A DISTINCTION WITHOUT A DIFFERENCE: 28 U.S.C. § 1782 AND INTERNATIONAL ARBITRATION

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I. INTRODUCTION

In 1964, Congress amended 28 U.S.C. § 1782 to provide for judicial assistance in obtaining discovery "for use in a proceeding in a foreign or international tribunal."[1] Thirty years later, a district court addressed

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1. 28 U.S.C. § 1782(a).

whether private arbitration constituted a § 1782 tribunal.[2] Ever since, confusion abounds. Circuit courts have contributed to the confusion[3] and have created a circuit split.[4] This Note argues that the Supreme Court should find § 1782 extends judicial assistance to private arbitration in line with *Intel*'s broad interpretation and the congressional policy favoring arbitration.[5]

Part II addresses the development of § 1782 jurisprudence.[6] Initially, two district courts provided conflicting opinions.[7] The Second and Fifth Circuits then held that private arbitration does not constitute a § 1782 tribunal.[8] In 2004, the Supreme Court took a broad approach to § 1782.[9] Following *Intel*, the district courts have taken varied approaches and have not reached a consensus.[10] This culminated in the Fourth and Sixth Circuits splitting from the Second, Fifth, and Seventh Circuits.[11]

Part III analyzes the district court consensus that investor-state arbitrations constitute § 1782 tribunals.[12] Additionally, Part III argues that private arbitration constitutes a § 1782 tribunal because private arbitration does not meaningfully differ from investor-state arbitration,[13] arbitration performs the functions of ordinary courts,[14] and the federal policy in favor of arbitration counsels a broad interpretation of § 1782.[15] Finally, this Note provides guidance to district courts exercising their discretion.[16]

This Note uses "international arbitration" to refer to investor-state and private arbitrations collectively.

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2. *See In re* Application of Technostroyexport, 853 F. Supp. 695 (S.D.N.Y. 1994).

3. *See* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987 (11th Cir. 2012), *vacated*, 747 F.3d 1262 (11th Cir. 2014). The Eleventh Circuit initially held that arbitration qualifies as a "tribunal." Two years later, the Eleventh Circuit vacated that holding sua sponte.

4. *Compare* NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) (holding that private arbitration does not qualify as a § 1782 tribunal), *with* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019) (finding that private arbitration qualifies as a § 1782 tribunal).

5. *See infra* Part III.

6. *See infra* Part II.

7. *See infra* Section II.B.

8. *See infra* Section II.C.

9. *See infra* Section II.D. *Intel* did not address whether § 1782 applies to arbitrations. *See generally* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

10. *See infra* Section II.E.

11. *See infra* Section II.G.

12. *See infra* Section III.B.1.

13. *See infra* Section III.B.1.

14. *See infra* Section III.B.2.

15. *See infra* Section III.B.3.

16. *See infra* Section III.C.

II. BACKGROUND

A. The Statute

Section 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."[17] Congress amended § 1782 in 1964 to provide assistance to a "foreign or international tribunal" instead of a "judicial proceeding" in response to the growth of international commerce.[18] Since, courts have struggled when deciding whether international arbitrations satisfy § 1782's tribunal requirement.[19]

B. First Impressions

In 1994, the United States District Court for the Southern District of New York (SDNY) became the first to decide whether private arbitrations satisfied § 1782's foreign or international tribunal requirement.[20] The court found that private arbitrations constitute § 1782 tribunals without analysis.[21] However, the court ultimately rejected Technostroy's application of § 1782 because Technostroy had not sought a discovery ruling from the arbitrators.[22] The court noted that arbitrators have authority over their own proceedings.[23] As such, the court found that it would have been improper to allow Technostroy to circumvent their authority.[24]

Three years later, the SDNY revisited § 1782's application to private arbitration.[25] Medway Power sought discovery from General Electric Company (GE) pursuant to the arbitrator's letter stating that "GE's documents are relevant and necessary for the fair determination of the

17. 28 U.S.C. § 1782(a).

18. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248–49 (2004).

19. *Compare* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019) (finding that private arbitration qualified as a § 1782 tribunal), *with* NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) (finding that private arbitration did not qualify as a § 1782 tribunal).

20. *See In re* Application of Technostroyexport, 853 F. Supp. 695 (S.D.N.Y. 1994).

21. *Id.* at 697 ("The court is of the view than an arbitrator or arbitration panel is a 'tribunal' under § 1782.").

22. *Id.*

23. *Id.*

24. *Id.* at 699.

25. *See In re* Medway Power, 985 F. Supp. 402 (S.D.N.Y. 1997).

dispute."[26] The court, however, denied Medway's application on the grounds that private arbitrations do not qualify as § 1782 tribunals.[27] Instead, *Medway* found that Congress intended § 1782 to provide aid to "official, governmental bodies exercising an adjudicatory function."[28] Further, the *Medway* court found that the legislative history indicated that Congress intended § 1782 to extend only to public proceedings.[29] The court then suggested that the arbitrator should seek assistance from a British court, which could then seek U.S. assistance through a letter rogatory.[30] *Medway* also noted that British arbitrators did not have the authority to enforce discovery requests against third parties without requesting judicial assistance. As such, "[i]n a case dealing with the delicacies of international comity, [the court was] loath to approve a petition under [s]ection 1782 that would empower arbitrators with authority they would not have in the United States or . . . in the United Kingdom."[31]

C. The Second and Fifth Circuits Weigh In

The Second Circuit addressed whether private arbitration qualifies as a "foreign or international tribunal" in 1999.[32] The Second Circuit found that private arbitrations did not qualify as § 1782 tribunals.[33] As to the ordinary meaning, the court noted the statute "does not unambiguously *exclude* private arbitration panels."[34] While the statute could apply to private arbitration, the court found that nothing mandated this conclusion.[35] As a result, the court shifted its inquiry to the legislative history.[36]

NBC noted that Congress amended § 1782 to expand its scope beyond conventional courts.[37] However, the court found that Congress did not intend to broaden § 1782's scope beyond "governmental entities, such as administrative or investigative courts, acting as state instrumentalities or

26. *Id.* at 403 (internal quotation marks omitted).
27. *Id.*
28. *Id.*
29. *Id.* at 403–04. The *Medway* court also rejected *Technostroyexport*'s opposite conclusion as dictum. *Id.* at 404.
30. *Id.* at 405.
31. *Id.* at 404.
32. NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).
33. *Id.*
34. *Id.* at 188.
35. *Id.*
36. *Id.*
37. *Id.* at 189 (citing H.R. REP. NO. 88-1052, (1963); S. REP. NO. 88-1580, (1964)).

with the authority of the state."[38] Additionally, the legislative history did not mention private arbitration.[39] Furthermore, *NBC* noted that the § 1782 amendments also repealed 22 U.S.C. §§ 270–270g, from which § 1782 borrowed the phrase "international tribunal."[40] Sections 270–270g had granted international tribunals the authority to administer oaths and issue subpoenas where a U.S. treaty established the tribunal and where either the U.S. or a U.S. national had interest.[41] The court found that § 1782 broadened this definition of "international tribunal" by extending judicial assistance to tribunals created by international agreements to which the U.S. was not a party.[42] Additionally, *NBC* noted that allowing § 1782 discovery could inhibit the federal policy in favor of arbitration.[43] Parties choose arbitration, in part, for its efficiency and cost.[44] Allowing broad, American-style discovery would significantly undermine those advantages.[45] Therefore, *NBC* found Congress "intended [§ 1782] to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[46]

Shortly thereafter, the Fifth Circuit adopted the Second Circuit's reasoning to exclude private arbitration from § 1782.[47] Like *NBC*, *Biedermann* also feared that § 1782 could harm the efficiency of the arbitration process.[48] Furthermore, the Fifth Circuit expressed concern that parties would use § 1782 tactically.[49] However, the Fifth Circuit suggested

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38. *Id.* at 189 (analyzing the House and Senate Reports).

39. *Id.*

40. *Id.* at 190. The court also included the full text of 22 U.S.C. §§ 270–270g in an appendix to its opinion because historical statutes can prove hard to find. *Id.* at 191–93.

41. *Id.* at 189.

42. *Id.* at 190.

43. *Id.* at 191.

44. *Id.*

45. *Id.*

46. *Id.* at 190.

47. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999). While the court ruled that § 1782 does not apply to private arbitration and denied Kazakhstan's application, it did not state that the arbitration had arisen out of contract. Indeed, other sources suggest Biedermann had initiated arbitration against Kazakhstan pursuant to the U.S.-Kazakhstan Bilateral Investment Treaty. *See Biedermann v. Kazakhstan, Investment Dispute Settlement Navigator*, UNITED NATIONS CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/9/biedermann-v-kazakhstan [http://web.archive.org/web/20210125172421/https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/9/biedermann-v-kazakhstan] (last visited Apr. 17, 2021).

48. *Biedermann Int'l*, 168 F.3d at 883 ("The course of the litigation before us suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration").

49. *Id. See also* Peter B. Rutledge, *Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving U.S. Entities?*, 25 J. INT'L ARB. 171, 178 (2008)

that parties could contract for certain discovery procedures prior to the initiation of arbitration.[50]

D. The Supreme Court Provides Some Guidance

In *Intel*, the Supreme Court issued its first opinion on § 1782, outside the context of arbitration.[51] Advanced Micro Devices (AMD) had filed an antitrust complaint against Intel with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (European Commission).[52] AMD then filed a § 1782 request for discovery from Intel to aid in its pursuit of its complaint.[53] The Supreme Court granted certiorari to determine whether § 1782 contained a foreign-discoverability requirement and made discovery available to complainants, such as AMD, who "lack[ed] formal 'party' or 'litigant' status."[54] Additionally, the Supreme Court had to determine whether the foreign proceeding must be pending.[55]

The Supreme Court first recounted the legislative history of § 1782.[56] In 1855, Congress first provided for judicial assistance in response to letters rogatory from foreign courts where a foreign government had an interest in the claim.[57] In 1948, Congress expanded the statute by removing the requirement that a foreign government have an interest in the proceedings.[58] The new statute provided judicial assistance for depositions "to be used in *any civil action* pending in any court in a foreign country with which the United States is at peace."[59] In 1949, Congress replaced "civil action" with "judicial proceeding."[60] In 1958, in response to the growth of global trade, Congress formed the Commission on International Rules of Judicial Procedure (Rules Commission) to recommend changes to U.S. civil procedure.[61] In 1964, Congress unanimously adopted the

("[I]nterpreting section 1782 to encompass arbitration creates asymmetrical discovery rights that the foreign party can use as leverage . . . and then exploit that leverage for settlement purposes.").

50. *Biederman Int'l*, 168 F.3d at 883.
51. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
52. *Id.*
53. *Id.*
54. *Id.* at 255.
55. *Id.* at 253.
56. *Id*. at 247.
57. *Id.*
58. *Id.* at 247–48.
59. *Id.* at 248 (internal quotation marks omitted) (citation omitted).
60. *Id.*
61. *Id.*

Rules Commission's recommended changes to § 1782.[62] The 1964 amendment inserted "in a proceeding in a foreign or international tribunal" for the phrase "in any judicial proceeding *pending* in any court in a foreign country."[63] The Supreme Court explained 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.'"[64] Congress further expanded the scope of § 1782 in 1996 by adding "including criminal investigations conducted before formal accusation."[65]

The European Commission enforced European competition rules through the DG-Competition.[66] The DG-Competition conducted preliminary investigations after receiving a complaint or on its own initiative.[67] After its investigation, if the DG-Competition decided not to further pursue the complaint, that decision would be subject to review by the Court of First Instance and the Court of Justice for the European Communities (European Courts).[68] If the DG-Competition continued its investigation, it notified the target, who would then participate in a hearing before an independent official.[69] That official then reported to the DG-Competition, who made a recommendation to the European Commission. The Commission would then either dismiss the complaint or find liability.[70] The European Commission's decision was subject to judicial review by the European Courts.[71] Additionally, complainants had certain procedural rights before the European Commission.[72]

The Supreme Court noted the European Commission's decision "leads to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court," and, as such, the European Commission qualified as a tribunal under § 1782.[73] Further, *Intel* noted that the reviewing European Courts clearly qualified as § 1782 tribunals.[74] However, those courts did not accept evidence. So, AMD would have to present evidence to the European Commission to have that evidence

62. *Id.*
63. *Id.* at 248–49.
64. *Id.* at 249 (quoting S. REP. NO. 88-1580, at 7 (1964)).
65. *Id.* at 249 (quoting 28 U.S.C. § 1782(a)).
66. *Id.* at 254.
67. *Id.*
68. *Id.*
69. *Id.* at 254–55.
70. *Id.* at 255.
71. *Id.*
72. *Id.*
73. *Id.* (internal citation omitted).
74. *Id.* at 257.

available before the reviewing courts.[75] This supported the Court's finding that the European Commission constituted a § 1782 tribunal. Additionally, Congress intended § 1782 to "provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]."[76] Further, the Supreme Court, in a parenthetical, quoted an article by Hans Smit, saying the "term tribunal . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[77] Therefore, *Intel* found it had "no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit."[78]

The Supreme Court also rejected the contention that § 1782 applies only to pending proceedings, rather than imminent ones.[79] In doing so, the Supreme Court found that "§ 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European Courts, be within reasonable contemplation."[80]

Additionally, the Supreme Court rejected the argument that § 1782 allows discovery only of "materials that could be discovered in the foreign jurisdiction if the materials were located there."[81] The legislative history provided no support for a "blanket foreign-discoverability rule."[82] While concerns of international comity and parity among the parties could impact the district court's discretionary analysis, these concerns did not mandate a categorical foreign-discoverability rule.[83] For instance, a foreign-discoverability rule could "thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws."[84] Furthermore, courts could condition § 1782 discovery on the applicant's agreement to reciprocal discovery.[85] Additionally, *Intel* rejected a rule that would limit § 1782

75. *Id.*

76. *Id.* at 258 (quoting S. REP 88-1580, at 7–8 (1964) (internal quotation marks omitted) (alteration in the original)).

77. *Id.* (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965) (omission in original)).

78. *Id.* at 258.

79. *Id.* at 259.

80. *Id.* (internal citation omitted). The Supreme Court again quoted from Smit's article to bolster its reasoning.

81. *Id.* at 260.

82. *Id.*

83. *Id.* at 261.

84. *Id.* at 262.

85. *Id.*

discovery depending on whether U.S. law would allow discovery in analogous domestic proceedings.[86]

Intel also provided four factors for district courts to consider when exercising their discretion.[87] First, whether "the person from whom discovery is sought is a participant in the foreign proceeding."[88] Foreign tribunals can order parties before them to produce evidence, reducing the need for § 1782 aid.[89] However, if the party is not before the tribunal, § 1782 may provide the only method of obtaining the evidence.[90]

Second, district courts should consider the "nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity" of the foreign tribunal.[91] Notably, the Supreme Court discounted the European Commission's statement that it did not want U.S. judicial assistance.[92] Similarly, district courts may consider "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."[93] Finally, district courts may reject or modify unduly intrusive or burdensome requests.[94]

E. Private Commercial Arbitration After Intel.

Following *Intel*, district courts have split on whether § 1782 assistance extends to private commercial arbitrations.[95] Some courts have relied on the Supreme Court's quotation of Smit,[96] derived a functional test from

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86. *Id.* at 263.
87. *Id.* at 264.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 265–66. The Supreme Court noted:

> The European Commission has stated in amicus curiae briefs to this Court that it does not need or want the [d]istrict [c]ourt's assistance. It is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say "never" or "hardly ever" to judicial assistance from United States courts.

Id. (internal citations omitted).
93. *Id.* at 265 (internal citation omitted).
94. *Id.*
95. *Compare In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233 (D. Mass. 2008) (finding that private arbitration fell within § 1782's ambit but denying relief on discretionary grounds), *with* Norfolk S. Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882 (N.D. Ill. 2009) (finding that § 1782 assistance did not extend to private arbitration).
96. *In re Application of Hallmark Capital Corp.* noted that the Supreme Court approvingly cited Smit's article; further, the *Hallmark* court noted that "the [Supreme] Court cited Prof. Smit's 1965 article no less than six times, all apparently with approval." 534 F. Supp. 2d 951, 955 (D. Minn. 2007).

Intel,[97] and found that § 1782 unambiguously includes private arbitrations.[98] Other courts have dismissed the Supreme Court's reference to Smit's article as dictum,[99] found that private arbitration fails a functional test,[100] and rejected § 1782's application to private arbitration along the same reasoning as *NBC* and *Biedermann*.[101]

Roz Trading Ltd. found that private arbitrations constitute § 1782 tribunals.[102] After consulting the legislative history, the *Roz Trading* court found that "tribunal" in § 1782 unambiguously included private arbitration.[103] Additionally, *Roz Trading* found support in *Intel* because the Supreme Court rejected categorical limitations on § 1782.[104] Like the DG-Competition, the arbitral panel at issue qualified as a § 1782 tribunal when it "makes adjudicatory decisions responsive to a complaint and reviewable in court."[105] Furthermore, if Congress had intended to exclude private arbitration, "it would have been a simple matter to add the word 'governmental' before the word 'tribunal' in the 1964 amendment."[106] *Roz Trading* identified that §§ 270–270g had such a limitation, which "indicates that when Congress wants to limit a statute to apply only to governmental bodies, it is capable of doing so."[107] Finally, *Roz Trading*

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97. *In re Roz Trading Ltd.* applied a functional test where the court looked at whether the "body makes adjudicative decisions responsive to a complaint and reviewable in court . . . ." 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006).

98. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 723 (6th Cir. 2019) (finding that "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 . . . .").

99. *See Norfolk S. Corp.*, 626 F. Supp. 2d at 885 (acknowledging that the Supreme Court "favorably" quoted Smit but describing the quote as dictum).

100. *See, e.g.*, *In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *32 (M.D. Fla. Aug. 1, 2009) (finding that the private arbitration at issue failed a functional test because its decisions were not subject to judicial review).

101. *See, e.g.*, *In re* Dubey, 949 F. Supp. 2d 990, 995 (C.D. Cal. 2013) ("[T]he [c]ourt instead finds the reasoning in [*NBC*] and *Biedermann* directly on point and persuasive").

102. *See generally In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

103. *Id.* at 1226.

104. *Id.* at 1228.

105. *Id.* The *Roz Trading* court had earlier stated, "[The Coca-Cola Company] also does not dispute that the Centre's orders are enforceable in Austrian courts." *Id.* at 1225 (internal quotation marks omitted). *Roz Trading* does not comment on the extent that enforceability equates to reviewability. It is unclear whether the court distinguished the two, as other courts have. *See* TJAC Waterloo, LLC *ex. rel.* Univ. of Notre Dame (USA) in England, No. 3:16-mc-9-CAN, 2016 U.S. Dist. LEXIS 56381, at *1, *6 (N.D. Ind. Apr. 27, 2016) (distinguishing between enforceability and review of the merits to find the body at issue did not satisfy § 1782's tribunal requirement).

106. *Roz Trading,* 469 F. Supp. 2d at 1226 n.3.

107. *Id.* at 1227 n.5.

approved discovery within the scope of the Federal Rules of Civil Procedure.[108]

Courts have noted that "*Intel* . . . ruled expansively with respect to each of the three issues on which it had granted review[.]"[109] Accordingly, those courts rejected the reasoning of *NBC* and *Biedermann.*[110] *Babcock Borsig* began its analysis by noting that *Intel* did not directly address the issue.[111] However, "the Court's reasoning and dicta strongly indicate that these types of adjudicative bodies also fall within the statue."[112] The court noted that, like the European Commission, the arbitration at issue acted as a first-instance decisionmaker that took evidence and issued a binding decision on the merits.[113] Additionally, *Babcock Borsig* noted, "[T]he primary purpose of the statute is 'to assist foreign tribunals in obtaining relevant information that the tribunals may find useful . . .' In a situation where the foreign tribunal restricts discovery, granting the application could undermine the statute's objective."[114] Since the applicant had not provided evidence on the arbitrators' receptivity, the court denied the § 1782 application.[115]

Furthermore, multiple courts within the Second Circuit have rejected *NBC* following *Intel*.[116] Each court emphasized *Intel*'s quotation of Smit's article and found that this suggested the Supreme Court would consider private arbitration within § 1782's ambit.[117] Additionally, each court recognized that other courts had concluded that § 1782 assistance was

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108. *Id.* at 1230–31.

109. *In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 955 (D. Minn. 2007).

110. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 239 (D. Mass. 2008) ("[The court did] not find the reasoning in *National Broadcasting Co.* and *Republic of Kazakhstan* to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*.").

111. *Id.* at 238.

112. *Id.*

113. *Id.*

114. *Id.* at 241 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 262 (2004)).

115. *Id.*

116. *See In re* Kleimar N.V. (*Kleimar I*), 220 F. Supp. 3d 517 (S.D.N.Y. 2016) (holding that the London Maritime Arbitration Association qualified as a § 1782 tribunal); OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492, at *1 (D. Conn. Aug. 27, 2009) (holding that a SCC arbitration qualified as a § 1782 tribunal); *see also In re* Application of the Children's Inv. Fund Found. (UK), 363 F. Supp. 3d 361 (S.D.N.Y. 2019) (holding that arbitration before the London Court of International Arbitration constituted a § 1782 tribunal).

117. *See, e.g.*, *Kleimar I*, 220 F. Supp. 3d at 521.

available in the context of private arbitration.[118] However, each court also declined to provide substantial reasoning in reaching its decision.[119] While these cases do little to contribute to § 1782 jurisprudence, they demonstrate the general uncertainty regarding § 1782's application to private arbitration.[120] Additionally, they reflect a trend where more recent cases decide the issue without significant discussion.

F. The Eleventh Circuit Balks

In 2012, the Eleventh Circuit became the first court of appeals to address § 1782 in the context of private arbitration after *Intel,* but it chose to vacate its opinion two years later on its own initiative.[121] While *Consorcio* no longer remains binding authority, it provides insight as to how the Eleventh Circuit might decide the issue.

In determining whether private arbitration fell within § 1782, the Eleventh Circuit derived a functional test from *Intel*'s analysis of the DG-Competition.[122] The functional test considered "whether the arbitral panel acts as a first-instance adjudicative decisionmaker, whether it permits the gathering and submission of evidence, whether it has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review."[123] *Consorcio* found that the arbitral panel clearly met the first three requirements.[124] Accordingly, the court focused its analysis on whether the arbitral panel's decisions were subject to judicial review.[125]

The court noted that "judicial review of arbitration awards in Ecuador, much like a federal court's review of an arbitration award, is focused primarily on addressing defects in the arbitration proceeding."[126] The respondent argued that the functional test should require full review on the merits.[127] However, the Eleventh Circuit rejected this argument because it

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118. For example, *Kleimar I* stated, "The [c]ourt is persuaded by the reasoning of courts that have concluded that the LMAA is a 'foreign tribunal' within the domain of Section 1782" but did not discuss those cases. *Id.* at 522.

119. *Children's Investment* expressly followed the reasoning of *Kleimar I* after a similarly cursory description of prior case law. *Children's Investment*, 363 F. Supp. 3d at 369–70.

120. *See supra* Section II.E.

121. *See* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987 (11th Cir. 2012), *vacated*, 747 F.3d 1262 (11th Cir. 2014).

122. *Id.* at 995.

123. *Id.*

124. *Id.* at 996.

125. *Id.*

126. *Id.*

127. *Id.* at 997.

could "discern no sound reason to depart from the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances."[128] As such, *Consorcio* found that the arbitral tribunal satisfied the functional test, and, therefore, the arbitral panel qualified as a § 1782 tribunal.[129]

The Eleventh Circuit also found that *Intel* upset the reasoning of *NBC* and *Biedermann*.[130] *Consorcio* noted that *Intel* had rejected the kinds of categorical limitations that *NBC* and *Biedermann* had placed on the statute.[131] Further, *Consorcio* noted district courts could consider the policy concerns that informed *NBC* and *Biedermann* when weighing whether to exercise their discretion.[132]

G. The Sixth and Fourth Circuits Create a Split

The Sixth Circuit found that "tribunal" unambiguously included private arbitrations.[133] As such, the Sixth Circuit did not resort to the legislative history or policy arguments when interpreting § 1782.[134] The Sixth Circuit noted that contemporary legal and non-legal dictionaries provided varying definitions that could both exclude or include arbitral panels.[135] Next, the court turned to usages of "tribunal" in legal writing. The court noted that Joseph Story had described arbitrators as a tribunal in 1853.[136] Additionally, American courts have routinely used "tribunal" to describe private arbitrations, including the U.S. Supreme Court.[137] The court found these usages indicated "that American lawyers and judges have long understood . . . 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties."[138] Finally, the Sixth Circuit reasoned that the context in which "tribunal" appears in § 1782 did not recommend a narrower interpretation.[139] The court noted that "we have no reason to doubt that the phrase 'foreign or international' has a broad meaning that, at minimum, encompasses a proceeding like the

128. *Id.* at 996–97.
129. *Id.* at 996–98.
130. *Id.* at 997 n.7.
131. *Id.*
132. *Id.*
133. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 723 (6th Cir. 2019).
134. *Id.*
135. *Id.* at 719–20 (listing contemporary dictionary definitions).
136. *Id.* at 720–21.
137. *Id.* at 721 (listing cases in which courts use "tribunal" to refer to private arbitration).
138. *Id.* at 722.
139. *Id.*

DIFC-LCIA Arbitration[140] that is taking place abroad and is not subject to United States laws or rules."[141]

The Sixth Circuit also found that *Intel* did not exclude private arbitration from "tribunal."[142] The court noted that *Intel* "primarily focused on the decision-making power of the Commission."[143] In doing so, *Jameel Transportation* implicitly discounted *Intel*'s references to judicial review. Additionally, as *Intel* stated, "In light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"[144] Further, *Jameel Transportation* found *Intel*'s reference to "receptivity of the foreign government or the court or agency" did not limit "tribunal" to state-sponsored arbitrations because the Supreme Court did not intend to define "tribunal" in that section of its opinion.[145] As such, the Sixth Circuit found that its interpretation accorded with *Intel*.[146]

The Sixth Circuit also rejected *NBC* and *Biedermann*.[147] First, *Jameel Transportation* found that *NBC* and *Biedermann* turned too quickly to legislative history in their analyses.[148] Additionally, the legislative history supported a broad reading of "tribunal."[149] Just because the Senate Report did not explicitly include private arbitration does not mean that it excluded it.[150] The only reliable conclusion from the legislative history was that Congress intended to broaden the scope of § 1782, and "[f]urther inferences from the legislative history must rely on speculation."[151]

Furthermore, the Sixth Circuit rejected policy arguments.[152] First, the Sixth Circuit rejected the argument that expanded § 1782 discovery would thwart the limited discovery available under the Federal Arbitration Act

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140. "DIFC-LCIA" stands for Dubai International Financial Centre-London Court of International Arbitration. *Id.* at 714. In *Jameel Transportation*, arbitration commenced in Dubai before a panel constituted under the rules of DIFC-LCIA. *Id.*

141. *Id.* at 719 n.4 (noting dictionary definitions of "foreign" and "international"). Because the court did not have to answer whether the arbitration was "foreign," "international," or both, it declined to provide further discussion on the topic. *Id.*

142. *Id.* at 725.

143. *Id.*

144. *Id.* at 726 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 n.15 (2004)).

145. *Jameel Transp.*, 939 F.3d at 726.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 727.

150. *Id.* at 728.

151. *Id.* at 729.

152. *Id.* at 728–29.

(FAA).[153] The court noted that *Intel* rejected similar arguments when it rejected the proposed foreign-discoverability rule.[154] Additionally, *Intel* stated that these considerations belonged in the court's discretionary analysis.[155] Further, the Sixth Circuit found that including private arbitration within § 1782 did not defeat arbitration's efficiency.[156] *Intel* noted that district courts have discretion to consider the nature of the § 1782 tribunal as well as whether the discovery sought is unduly burdensome.[157] As such, *Jameel Transportation* reasoned that district courts could find § 1782 requests unduly burdensome in the context of private arbitration and that they might decide differently in the context of civil litigation.[158]

In *Boeing*, the Fourth Circuit determined that private arbitration in the United Kingdom qualified as an "entit[y] acting with the authority of the State" such that it constituted a § 1782 tribunal.[159] *Boeing* noted that the FAA created a system where "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes."[160] Therefore, domestic arbitrations acted with "government-conferred authority" that qualified them as § 1782 tribunals even under the narrow interpretations of *NBC* and *Biedermann*.[161] The United Kingdom's Arbitration Act provided for a similar system with increased government oversight.[162] Therefore, the U.K. arbitration constituted a "foreign or international tribunal."[163]

Boeing also rejected arguments that § 1782 would unacceptably expand the authority of foreign private arbitral panels.[164] While private arbitrations gained reach, § 1782 provided the same expansion of foreign courts' authority.[165] Additionally, *Intel* rejected comparisons to domestic discovery standards.[166]

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153. *Id.* at 728–29.
154. *Id.* at 729.
155. *Id.*
156. *Id.* at 729–30.
157. *Id.*
158. *Id.* at 730.
159. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 215.
165. *Id.*
166. *Id.* at 216 (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 (2004)).

While *Boeing* concluded Servotronics could avail itself of § 1782, the Fourth Circuit did not provide its own interpretation of "foreign or international tribunal."[167] Instead, it found the arbitration constituted a "product of 'government-conferred authority'" that satisfied "the more restrictive definition of 'foreign or international tribunal' adopted by [*NBC*] and *Biedermann* and now advanced by Boeing."[168]

H. District Courts Find That § 1782 Does Not Include Private Arbitration After Intel

Applying *Intel*, several district courts reasoned that § 1782 does not extend its assistance to private arbitrations.[169] Some of these courts relied on *NBC* and *Biedermann*,[170] while others emphasized the private nature of commercial arbitration.[171]

In 2008, *El Paso* found that *Intel* did not extend § 1782 assistance to private arbitration.[172] Initially, the court noted that the Fifth Circuit had previously denied § 1782 assistance to private arbitration and that some district courts had extended § 1782 aid following *Intel*.[173] *El Paso* found that *Intel* placed heavy focus on the judicial reviewability of the DG-Competition's decision.[174] As such, the ultimate reviewability of the DG-Competition distinguishes it "from an arbitral tribunal. An arbitral tribunal exists as a parallel source of decision-making to, and is entirely separate from, the judiciary, which was not the case with the [DG-Competition] as the Court was at pains to point out in *Intel*."[175] Furthermore, *Intel* authorized § 1782 assistance for use before the DG-Competition because the legislative history explicitly mentioned "administrative and quasi-judicial proceedings."[176] *El Paso* found that *Intel* included the quotation of

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167. *Id.* at 214.

168. *Id.*

169. *See, e.g.*, Norfolk S. Corp., v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882 (denying § 1782 assistance because private arbitrations do not constitute a § 1782 tribunal).

170. *See, e.g.*, *In re* Servotronics, Inc., No. 2:18-mc-00364-DCN, 2018 U.S. Dist. LEXIS 189423, at *1, *5–6 (D.S.C. Nov. 6, 2018) ("[T]he *Intel* decision did nothing to alter the Second and Fifth Circuits' holdings, and as such, § 1782 does not apply to private international arbitrations.").

171. *See, e.g.*, *In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *1, *38 (M.D. Fla. Aug. 1, 2009) (finding that § 1782 does not extend to private arbitration as opposed to "state-sponsored courts, administrative agencies, arbitral tribunals, and quasi-judicial bodies").

172. La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481 (S.D. Tex. 2008).

173. *Id.* at 485.

174. *Id.*

175. *Id.* at 485–86.

176. *Id.* at 486.

Smit's article as "support on this point, and only on this point."[177] Therefore, *Intel* provided no guidance on whether private arbitration falls within § 1782's ambit.[178] However, *Biedermann* provided guidance on that exact issue.[179] As such, *El Paso* followed *Biedermann* and found that private arbitrations do not constitute § 1782 tribunals. In an unpublished opinion, the Fifth Circuit affirmed, finding that *Intel* had not overruled *Biedermann*.[180]

Norfolk Southern also found that § 1782 does not apply to private arbitration.[181] There, the court began by noting that Congress amended the statute in 1964 in response to the growth of international trade.[182] Additionally, the court recognized that *Intel* took a broad approach to § 1782.[183] However, *Intel* "stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statute."[184] Indeed, *Norfolk Southern* pointed out that the Supreme Court had deleted the phrase "embraces all bodies exercising adjudicatory powers" from its quote of Smit's article.[185] Furthermore, "a reasoned distinction can be made between arbitrations such as those conducted by [the United Nations Commission on International Trade Law (UNCITRAL)], 'a body operating under the United Nations and established by its member states,' and purely private arbitrations established by private contract."[186] As such, *Norfolk Southern* found that

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177. *Id.*

178. *Id.* at 486 ("[T]he Supreme Court left this ambiguity for another day.").

179. *Id.*

180. El Paso Corp. v. La Comision Ejecutiva Hidroelecctrica Del Rio Lempa, 341 Fed. App'x 31 (5th Cir. 2009). While the Fifth Circuit found that *Intel* did not overturn *Biedermann*, it "determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in" the Fifth Circuit's Rules. *Id.* at 31, n. *.

181. Norfolk S. Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d. 882, 885 (N.D. Ill. 2009).

182. *Id.* at 884.

183. *Id.* at 885.

184. *Id.*

185. *Id.* Without the ellipsis, the full quote reads the "term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965).

186. *Id.* (quoting *In re* Oxus Gold PLC, No. MISC. 06–82, 2006 U.S. Dist. LEXIS 74118, at *1, *6 (D.N.J. Oct. 11, 2006)). Unfortunately, *Oxus Gold* failed to understand that UNCITRAL does not conduct arbitrations. *See* Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 69 n.119 (2011) ("The UNCITRAL Rules are a set of procedural rules that parties may use to govern the conduct of arbitral proceedings arising out of a purely commercial relationship. Arbitrations pursuant to these rules are not administered by any United Nations body and are often ad hoc proceedings between private

Intel intended to reference state-sponsored arbitrations and not private ones.[187]Additionally, if *Intel* meant to extend § 1782 to private arbitrations, the Supreme Court likely would have mentioned circuit court precedent.[188] *Norfolk Southern* also reasoned that *Intel* placed significant emphasis on the availability of judicial review of the DG-Competition's decision.[189] The court noted that the instant parties had agreed to waive any judicial review of the merits of their dispute.[190] Since *Intel* referenced only state-sponsored arbitral tribunals and no judicial review was available for the parties' arbitration, *Norfolk Southern* found that the private arbitration at hand did not constitute a § 1782 tribunal.[191]

Operadora also reasoned that § 1782 did not extend to private arbitration.[192] *Operadora* first noted *NBC* and *Biedermann*.[193] It highlighted that *NBC* had determined that § 1782 applied to "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" because the amended § 1782 replaced §§ 270–270g and the legislative history made no mention of private arbitration.[194] After considering *Intel* and subsequent district court decisions, *Operadora* found § 1782 ambiguous.[195] Accordingly, the court turned to the legislative history and purpose of § 1782.[196] *Operadora* concluded that § 1782 extended only to governmental entities and cited to *NBC*.[197] The legislative history indicated that "tribunal" meant to extend aid to investigative magistrates, administrative tribunals, and quasi-judicial agencies.[198] Additionally, Congress took "international tribunal" from §§ 270–270g, where it applied "only to governmental and state-sponsored" bodies.[199] Finally,

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parties"). It appears *Norfolk Southern* also failed to make this distinction. *See generally Norfolk S. Corp.*, 626 F. Supp. 2d at 882.

187. *Norfolk S. Corp.*, 626 F. Supp. 2d at 885.

188. *Id.* at 886 n.4.

189. *Id.* at 886.

190. *Id.*

191. *Id.*

192. *In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *1, *38 (M.D. Fla. Aug. 1, 2009).

193. *Id.* at *7.

194. *Id.* at *9–11 (quoting NBC v. Bear Sterns & Co., Inc., 165 F.3d 184, 189 (2d Cir. 1999) (internal quotation marks omitted)).

195. *Id.* at *26.

196. *Id.* at *26.

197. *Id.* at *28.

198. *Id.* at *29.

199. *Id.*

congressional silence toward private arbitration indicated that Congress did not consider private arbitration when drafting § 1782.[200]

Furthermore, *Operadora* found that the arbitral panel at issue also failed a functional analysis.[201] While the panel included an impartial decision-maker who issued dispositive rulings on the merits, its review process failed to meet *Intel*'s requirements.[202] *Operadora* noted that judicial review formed a "primary basis" for *Intel*'s decision to find the European Commission qualified as a § 1782 tribunal.[203] *Operadora* also found that a "functional analysis of the ICC Panel should also consider the origin of its decisionmaking [sic] authority and its purpose."[204] *Intel* based its criteria on the nature of the DG-Competition and European Commission.[205] Since these entities were clearly state-sponsored, the Supreme Court had no reason to consider the source of their authority.[206] Thus, *Operadora* found that if the Supreme Court analyzed the ICC Panel, then it "may consider these criteria because they are unique and salient features of private arbitral proceedings."[207] *Operadora* noted that the parties' private agreement gave rise to the arbitrators' authority.[208] Additionally, the parties selected arbitration "as an alternative to governmental or state-sponsored proceedings."[209] Therefore, the arbitration served a different purpose than state-sponsored proceedings.[210] *Operadora* found that neither Congress nor the Supreme Court would extend § 1782 to arbitrations without explicit mention.[211] Furthermore, the "Supreme Court would not have expanded § 1782 to permit discovery assistance in private arbitral proceedings and reversed *NBC* and *Biedermann*—without even acknowledging their existence—in a parenthetical quotation supporting an unrelated proposition."[212]

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200. *Id.* at *29–30 (citing NBC v. Bear Sterns & Co., Inc., 165 F.3d 184, 189 (2d Cir. 1999)).

201. *Id.* at *38.

202. *See id.* at *31–33.

203. *Id.* at *32.

204. *Id.* at *34. *See also* S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 323–46 (2013) (distinguishing between national courts, private arbitration, and investor-state arbitration on their grants of jurisdiction).

205. *Operadora*, 2009 U.S. Dist. LEXIS 60891, at *32–34.

206. *Id.* at *34–35.

207. *Id.* at *35.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at *36.

212. *Id.* at *37.

I. The Second Circuit Affirms NBC, and the Seventh Circuit Joins the Party

Guo found that *NBC*'s analysis survived *Intel*.[213] Initially, *Guo* noted "a longstanding rule of [the Second] Circuit that a three-judge panel is bound by a prior panel's decision until it is overruled either by this [c]ourt sitting *en banc* or by the Supreme Court."[214] Since *Intel* did not consider private arbitration, it did not directly overrule *NBC*.[215] Further, *NBC*'s analysis of the statute's text and history did not conflict with *Intel*'s.[216] Therefore, *NBC* controlled, and private arbitrations did not qualify as § 1782 tribunals.[217]

Guo also provided a test to determine whether arbitration qualified as private, outside § 1782's reach, or as a "governmental or intergovernmental arbitral tribunal, . . . conventional court, or . . . other state-sponsored adjudicatory body."[218] The Second Circuit adopted a function test, which analyzed "the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction. In short, the inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitration."[219]

The Chinese government had initially created the arbitral panel at issue in *Guo*.[220] However, the panel, at the time of the trial, functioned independently of the government.[221] Additionally, the grounds for Chinese court intervention reflected the narrow grounds in the FAA, and the panel had no authority outside of the parties' consent.[222] Therefore, *Guo* found that the panel constituted a private arbitration.[223]

The Seventh Circuit also held that private arbitrations fall outside § 1782's scope.[224] After finding that dictionary definitions conflicted,

213. *In re* Guo, 965 F.3d 96 (2d Cir. 2020).
214. *Id.* at 105 (citing Doscher v. Sea Port Grp. Sec., LLC, 832 F.3d 372, 378 (2d Cir. 2016)).
215. *Id.*
216. *Id.* at 106.
217. *Id.* at 106–07.
218. *Id.* at 107 (quoting NBC v. Bear Sterns & Co., Inc., 165 F.3d 184, 190 (2d Cir. 1999)).
219. *Id.* at 107.
220. *Id.*
221. *Id.*
222. *Id.* at 108.
223. *Id.*
224. Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, No. 20-794, 2021 U.S. LEXIS 1592, at *1 (Mar. 22, 2021). This involves the same parties and dispute as *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).

Rolls-Royce determined the statutory context indicated "foreign or international tribunal" excluded private arbitrations.[225] First, 28 U.S.C. § 1696, on service of process, and 28 U.S.C. § 1781, on letters rogatory, both use "foreign or international tribunal."[226] Both processes "are matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels."[227] Further, § 1782 provides that courts "may prescribe the practice and procedure [for taking discovery], which may be in whole or part the *practice and procedure of the foreign country or the international tribunal*."[228] *Rolls-Royce* found "foreign tribunal" indicated a governmental body operating under a foreign state's "practice and procedure."[229]

Rolls-Royce also determined a broad interpretation of § 1782 would conflict with the FAA.[230] Section 1782 allows for broader discovery than the FAA and would result in more expansive discovery in foreign than domestic, private arbitrations.[231] The Seventh Circuit found it "hard to conjure a rationale" for this disparity, and, therefore, a narrow interpretation of "tribunal" kept § 1782 and the FAA in accord.[232]

J. Investor-State Arbitration

District courts have seemingly unanimously extended § 1782 assistance to arbitrations arising under a bilateral investment treaty (BIT).[233] Notably, the Second and Fifth Circuits have found that § 1782 extends to "state-sponsored" tribunals.[234] District courts have found that

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225. *Id.* at 694.
226. *Id.* at 694–95.
227. *Id.* at 695.
228. *Id.* (quoting 28 U.S.C. § 1782).
229. *Id.* at 695–96.
230. *Id.* at 696.
231. *Id.* at 695.
232. *Id.* at 695–96.
233. District courts that have denied § 1782 aid in the context of investor-state arbitration have done so as a matter of discretion and did not hold that the arbitration failed to qualify as a § 1782 tribunal. *See, e.g.*, *In re* Chevron Corp., 762 F. Supp. 2d 242, 250, 252 (D. Mass. 2010) ("[T]he court assumes that the Treaty Arbitration meets the tribunal requirements for present purposes."). However, the court denied the § 1782 application on discretionary grounds. *Id. See also In re* Caratube Int'l Oil Co., LLP, 730 F. Supp. 2d 101, 105 (D.D.C. 2010) (exercising discretion to deny the § 1782 application without ruling on whether the BIT arbitration satisfied § 1782's tribunal requirement).
234. *See* NBC v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) (noting that Congress "intended [§ 1782] to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies"); Republic of

the presence of a BIT sufficiently distinguishes investor-state arbitration from private arbitration such that investor-state arbitration qualifies as a § 1782 tribunal.[235]

The majority of these decisions concerns a dispute between Chevron and the Republic of Ecuador.[236] Texaco, and later Chevron after a partial merger, had become embroiled in Ecuadorian litigation alleging environmental harm.[237] After a multi-billion-dollar judgment and a trial allegedly plagued by corruption, Chevron initiated arbitration pursuant to the U.S-Ecuador BIT.[238] Additionally, Chevron filed at least twenty-five § 1782 applications seeking discovery for use in the BIT arbitration.[239] Courts have authorized the parties' § 1782 applications without thorough analysis,[240] often relying on previous determinations.[241] It appears that the parties have stopped contesting whether § 1782 applies to their investor-state arbitration.[242]

Two cases outside of the Chevron-Ecuador dispute similarly concluded that § 1782 extends to investor-state arbitration without thorough analysis.[243] *Oxus Gold* distinguished an arbitration arising under the U.K.-Kyrgyzstan BIT from private arbitration.[244] In doing so, *Oxus Gold* noted that the "international arbitration at issue is being conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member states . . . The proceedings in issue has been authorized by the sovereign states of the

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Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999) ("[T]he new version of § 1782 was drafted to meld its predecessor with other statutes which facilitated discovery for international government-sanctioned tribunals.").

235. *See In re* Chevron Corp., 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) ("[T]he arbitration here at issue is not pending in an arbitral tribunal established by private parties. It is pending in a tribunal established by an international treaty.").

236. *In re* Chevron Corp., 633 F.3d 153, 156 (3d Cir. 2011).

237. *See id*. at 154–56.

238. *Id.* at 159.

239. *Id.*

240. *See In re Chevron Corp.*, 709 F. Supp. 2d at 291 (the court devoted two paragraphs to its analysis of whether the BIT arbitration satisfied § 1782's tribunal requirement).

241. *See* Chevron Corp. v. Shefftz, 754 F. Supp. 2d 254, 260 (D. Mass. 2010) (stating the "argument that the [BIT] Arbitration is not a 'foreign tribunal' because it is established by a private body and only governed by international rules is a view that has been eschewed by the majority of courts").

242. *See In re* Republic of Ecuador, 153 F. Supp. 3d 484, 487 (D. Mass. 2015) ("[N]either party disputes that the [a]rbitration is a 'foreign or international tribunal.'").

243. *See In re* Oxus Gold PLC, No. MISC. 06–82, 2006 U.S. Dist. LEXIS 74118, at *15, (D.N.J. Oct. 11, 2006). *See also In re* Mesa Power Grp., LLC, 878 F. Supp. 2d 1296 (S.D. Fla. 2012). The *Mesa* parties did not contest whether their NAFTA arbitration satisfied § 1782. *Id.* at 1302. Additionally, *Mesa* noted that the NAFTA arbitration passed the Eleventh Circuit's functional test without analysis. *Id.* at 1303.

244. *Oxus Gold*, 2006 U.S. Dist. LEXIS 74118, at *15–16.

United Kingdom and the Kyrgyzstan Republic. . . ."[245] Notably, the United Nations does not conduct arbitrations.[246] The extent to which this error undermines *Oxus Gold* is unclear, as this arguably constituted the entirety of *Oxus Gold*'s reasoning.[247]

III. ANALYSIS

The Supreme Court should declare that private and investor-state arbitrations satisfy § 1782's tribunal requirement when it decides *Servotronics v. Rolls-Royce*.[248] First, no meaningful difference exists to justify disparate treatment for private and investor-state arbitration.[249] Second, arbitration more closely resembles national courts than the European Commission.[250] Finally, federal policy suggests a broad interpretation of § 1782 that includes arbitration.[251]

A. Private Arbitration Qualifies as a § 1782 Tribunal

The Supreme Court should hold that § 1782 extends judicial assistance to private arbitration. First, courts have uniformly found that investor-state arbitration qualifies as a § 1782 tribunal.[252] Under § 1782, private arbitration does not meaningfully differ from investor-state arbitration to justify different treatment.[253] Second, arbitration performs the same functions as national courts.[254] Third, *Intel* broadly construed § 1782.[255] A broad construction includes private arbitration.[256] Finally,

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245. *Id.*

246. *See supra* note 175 and accompanying text.

247. *See Oxus Gold*, 2006 U.S. Dist. LEXIS 74118, at *15–16. After briefly recognizing *Intel* and *NBC*, *Oxus Gold* spent one paragraph concluding that the arbitration constituted a § 1782 tribunal.

248. *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020), *cert granted*, No. 20-794, 2021 U.S. LEXIS 1592, at *1 (Mar. 22, 2021).

249. *See infra* Section III.A.1.

250. *See infra* Section III.A.2.

251. *See infra* Section III.A.3.

252. *See supra* Section II.I.

253. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("There is no textual basis upon which to draw a distinction between public and private arbitral tribunals.").

254. *See infra* Section III.A.3.

255. *See In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 955 (D. Minn. 2007) ("*Intel* . . . ruled expansively with respect to each of the three issues on which it had granted review.").

256. *See infra* Section III.A.4.

Congress has indicated its support for international arbitration.[257] If parties cannot take important evidence from third parties, arbitration would lose its attractiveness.[258] Therefore, federal policy counsels a broad interpretation of § 1782 that encompasses private arbitration.

1. No Difference Between Investor-State and Private Arbitration

Courts have uniformly held that § 1782 extends judicial assistance to investor-state arbitrations.[259] The legislative history supports this conclusion.[260] Congress borrowed "international tribunal" from §§ 270–270g.[261] Congress enacted §§ 270–270g to provide assistance to arbitral proceedings involving the United States.[262] In doing so, Congress chose the phrase "international tribunal" to refer to the arbitration.[263] Furthermore, "an international tribunal owes both its existence and its powers to an international agreement."[264] Congress repealed §§ 270–270g because:

> The main drawback of these provisions is that they improperly limit the availability of assistance to the U.S. agent before an international tribunal . . . Clearly, the interest of the United States in peaceful settlement of international disputes is not limited to controversies to which it is a formal party. Furthermore, it is only appropriate that the United States make the same assistance available to litigants before international tribunals.[265]

Thus, § 1782 extends to investment-treaty arbitration because the arbitration derives its jurisdiction from the treaty.[266] Additionally, *Biedermann* noted that the amendments to § 1782 "[were] drafted to meld [§ 1782] with other statutes which facilitated discovery for international government-sanctioned tribunals."[267]

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257. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985) ("[T]he emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.").

258. *See infra* Section III.A.4.

259. *See supra* Section II.I.

260. *See* NBC v. Bear Sterns & Co., 165 F.3d 184, 190 (2d Cir. 1999).

261. *See id.*

262. *See* Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 60 COLUM. L. REV. 1264, 1276 (1962).

263. *See id*.

264. *Id.* at 1267.

265. S. REP. NO. 88-1580, at 4 (1964).

266. *See NBC*, 165 F.3d at 190.

267. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999).

In recognition of these facts, district courts have appropriately held that § 1782 extends judicial assistance to investor-state arbitrations.[268] While some courts claim a distinction between investor-state and private arbitration, they fail to identify why that distinction justifies differential treatment under § 1782.[269] However, "[t]here is no textual basis upon which to draw a distinction between public and private arbitral tribunals."[270] Furthermore, if "international tribunal" included only investor-state arbitration, Congress extended § 1782 to "foreign tribunals" as well.[271]

2. Separating "Foreign or International" from "Tribunal"

Congress recognized a distinction between "foreign tribunals" and "international tribunals."[272] Even if "international tribunal" includes only a tribunal that "owes both its existence and its powers to an international agreement,"[273] nothing suggests the same for "foreign tribunals." Indeed, to impose the same requirement on "foreign tribunal" would render that phrase superfluous. Furthermore, courts have identified that "foreign or international" and "tribunal" comprise separate elements.[274] Although *NBC* held that § 1782 does not extend to private arbitration, it also noted that "foreign or international" requires an analysis separate from "tribunal."[275] Recent decisions recognize the bifurcated analysis as they

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268. *See supra* Section II.I.

269. *See, e.g.*, Norfolk S. Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("[A] reasoned distinction can be made . . . Accordingly, [the court] interpret[ed] the *Intel* Court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations.").

270. *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008).

271. *See* 28 U.S.C. § 1782.

272. *See* S. REP. NO. 88-1580, at 4 (1964) ("Furthermore, it is only appropriate that the United States make the same assistance available to litigants before international tribunals that . . . it makes available to litigants before foreign tribunals.").

273. Smit, *supra* note 262, at 1267.

274. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 719 (6th Cir. 2019) ("We note also that there is no dispute that the DIFC-LCIA arbitration is 'foreign or international' in nature. Thus, we focus on the meaning of 'tribunal.'"). *See also In re* Grupo Unidos Por El Canal S.A., No. 14-mc-00226-MSK-KMT, 2015 U.S. Dist. LEXIS 50910, at *24 (D. Colo. Apr. 17, 2015) ("Because the court finds that this private arbitration is not a 'tribunal' under § 1782, it is not necessary to reach the question of whether the private arbitration here is 'international' within the meaning of § 1782.").

275. The Second Circuit reasoned that including private arbitration within § 1782's reach "would create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitral panels as domestic, foreign, or international." NBC v. Bear Stearns & Co., 165 F. 3d 184, 191 (2d Cir. 1999).

focus their analysis on "tribunal" and do not consider "foreign or international."[276]

Investor-state arbitration qualifies as an "international tribunal" because it traces its jurisdiction to an international agreement.[277] Furthermore, courts distinguish investor-state arbitration from private arbitration on the existence of an investment treaty.[278] However, this distinction does not justify different conclusions as to whether the arbitration satisfies § 1782's "tribunal" requirement. For instance, an English court clearly qualifies as a "foreign tribunal." However, an American court clearly cannot qualify as "foreign or international" but also serve as the quintessential example of a "tribunal." Similarly, removing the investment treaty removes the "international" characterization rather than the "tribunal" status. In the absence of an investment treaty, an investor can still contract with the host state for arbitral dispute resolution. The absence of a treaty causes the resulting arbitration to fail to qualify as an "international tribunal" because it does not owe "its existence and powers to an international agreement."[279] However, this arbitration is otherwise indistinguishable from a treaty-based one and should receive the same treatment under § 1782. The ICSID Convention recognizes this equivalency as ICSID's jurisdiction does not rely on an investment treaty.[280]

As courts have recognized the separation of "foreign or international" from "tribunal,"[281] the absence of a treaty should affect the "international" status rather than "tribunal." A domestic court does not qualify as "foreign or international" but clearly qualifies as a "tribunal."[282] Similarly, a Canadian court clearly qualifies as both "foreign or international" and a "tribunal."[283] Changing the location of the court does not affect its

276. *See, e.g.*, *Jameel Transp.*, 939 F.3d at 719. Similarly, *Rolls-Royce* seems to assume the arbitration qualifies as foreign as it refers to "private *foreign* arbitrations." Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020) (emphasis added).

277. *See* Smit, *supra* note 262, at 1267.

278. *See, e.g.*, *In re* Gov't of the Lao People's Democratic Republic, No. 1:15-MC-00018, 2016 U.S. Dist. LEXIS 47998, at *17 (D.N. Mar. I. 2016) ("A reasoned distinction can be made between purely private arbitral bodies and governmental arbitration pursuant to BITs.").

279. *See* Smit, *supra* note 262, at 1267.

280. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 25, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. The ICSID Convention created the International Center for the Settlement of Investment Disputes (ICSID). *Id.*

281. *See supra* Section III.B.1.

282. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257 (2004) ("Beyond question the reviewing authorities, both the Court of First Instance and the European Court of Justice, qualify as tribunals.").

283. *See id.* at 257 (noting the European Courts clearly qualified as § 1782 tribunals).

"tribunal" status. Similarly, whether the host state consents to arbitration in a contract or a treaty should not change that arbitration's status as a "tribunal."

Governing law represents the remaining difference between private, commercial arbitration and investor-state arbitration. As domestic and foreign courts qualify as tribunals while applying different laws, this difference also fails to justify disparate § 1782 treatment. No other difference between private and investor-state arbitration justifies different treatment under § 1782. Therefore, private arbitration qualifies as a § 1782 tribunal. If the arbitration takes place outside the United States, it qualifies as "foreign" and, therefore, satisfies § 1782's "foreign tribunal" requirement.

Additionally, the Sixth Circuit found no reason to distinguish between investor-state and private arbitration.[284] While *NBC* found the legislative silence toward private arbitration indicated a narrow interpretation,[285] the Sixth Circuit found "what the statements make clear is Congress's intent to *expand* § 1782(a)'s applicability . . . [T]he legislative history does not indicate that the expansion *stopped short* of private arbitration."[286]

3. Arbitration Performs the Same Functions as National Courts

Intel did not spawn a functional test. Instead, the Supreme Court looked to when the European Commission performed adjudicatory functions to determine when the Commission acted as a § 1782 tribunal because of its mixed investigative and adjudicatory functions.[287] *Intel* focused on the Commission's role in collecting evidence and rendering a decision on the merits as well as the availability of judicial review.[288] In doing so, *Intel* compared the Commission to national courts.[289] Additionally, *Intel* resolved all of its questions in favor of a broad

284. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp, 939 F.3d 710 (6th Cir. 2019).

285. NBC v. Bear Stearns & Co., 165 F.3d 184, 189–90 (2d Cir. 1999) ("The legislative history's silence with respect to private tribunals is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels . . . would not have been lightly undertaken by Congress without at least a mention of this legislative intention.").

286. *Jameel Transp.*, 939 F.3d at 728–29.

287. *See Intel*, 542 U.S. at 258 ("We have no warrant to exclude the European Commission, *to the extent* that it acts as a first-instance decisionmaker.") (emphasis added). *See also* Brief for Commission of European Communities as Amicus Curiae Supporting Petitioner at 8–9, *Intel*, 542 U.S. 241 (No. 02-572) ("By far the greatest part of the Commission's activities . . . is not in any sense adjudicative. . . . Only at the very end of the process . . . does the investigative function blur into decisionmaking [sic].").

288. *Intel*, 542 U.S. at 255.

289. *See id.* at 252.

interpretation of § 1782.[290] This approach suggests that courts should compare putative "tribunals" to ordinary courts to determine whether the putative "tribunal" satisfies § 1782. Additionally, those courts should take a broad view of "tribunal" in line with *Intel*'s broad interpretation.

Applying this test to arbitration, both private and investor-state arbitration clearly qualify as § 1782 tribunals. Arbitral panels perform the same functions as ordinary courts. Indeed, arbitration serves "as an alternative means of dispute resolution."[291] Arbitration bears greater resemblance to ordinary courts than the Commission in *Intel*. While some courts would deny § 1782 to arbitration on the absence of judicial review,[292] those courts misinterpret *Intel*'s focus on judicial review. "[T]he Commission's role includes proposing legislation, managing and implementing European Union policy and budgets, and representing the European Union on the international stage . . . ."[293] None of these functions warrant "tribunal" status. Therefore, the Supreme Court differentiated when the Commission acted as a "tribunal" from when it did not. For this reason, *Intel* focused on the DG-Competition's functions in connection with AMD's antitrust complaint to determine that the Commission acted as a "tribunal" "to the extent that it acts as a first-instance decisionmaker."[294] As the phrase "to the extent" demonstrates, *Intel* recognized that the Commission usually performed administrative functions that would not qualify it as a "tribunal."

Even if *Intel* created a functional test, district courts should limit its applicability to administrative agencies similar to the Commission. *Intel* distinguished when the Commission acted as a "tribunal" because the Commission normally performed administrative functions.[295] A functional test is unnecessary when the putative "tribunal" performs solely adjudicatory functions. For instance, if a party applied for § 1782 aid for use before a foreign court, a district court should not engage in a long, unguided analysis to determine whether the foreign court functions as a "tribunal." Instead, a district court should recognize that a foreign court represents the quintessential "foreign tribunal."[296]

Further, the district courts that have applied functional tests did so in a manner that directly conflicted with *Intel*. For example, *Operadora* considered the ability to gather evidence in its analysis but found the

290. *See id.* at 241.

291. NBC v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999).

292. *See supra* Section II.H.

293. Brief for Commission of European Communities as Amicus Curiae Supporting Petitioner at 1–2, *Intel*, 542 U.S. 241 (No. 02-572).

294. *Intel*, 542 U.S. at 258.

295. *See id.* at 257–60.

296. *See id.* at 257.

arbitration did not constitute a tribunal because of the limited judicial review available.[297] However, the European Court of Justice (ECJ) would have also failed this test while *Intel* stated the ECJ qualified as a tribunal "beyond question."[298] Unlike an arbitration, the ECJ has no mechanism to receive evidence.[299] Furthermore, as the court of last resort, the ECJ's rulings are not subject to further review. Therefore, the ECJ would fail *Operadora*'s test. This demonstrates that *Intel* did not derive a functional test. *Intel* did not provide a clear list of factors or guidance on how to weigh them. Instead, district courts should recognize that private arbitration qualifies as a "tribunal" due to its similarity to traditional courts.

4. Intel and the Federal Policy Favoring Arbitration Counsel a Broad Interpretation of "Tribunal" That Encompasses Arbitration

Intel decided all of its questions in favor of the broad application of § 1782.[300] Additionally, Congress has expressed a strong policy favoring international arbitration.[301] Together, these principles point toward a broad interpretation of "tribunal" that includes private and investor-state arbitrations.

While *Intel* did not directly address whether § 1782 assistance extends to arbitration, its treatment of the Commission provides guidance on how district courts should interpret "tribunal" regarding international arbitration.[302] International arbitration bears greater resemblance to traditional courts than the Commission does. The Commission argued it did not qualify as a "tribunal."[303] The Commission noted that it "[was] engaged in a preliminary investigation of Intel that was triggered by AMD's complaint alleging violations of European competition laws. But in that role, the Commission is not an adjudicative 'tribunal'—it is an investigative entity . . . ."[304] However, against the Commission's

297. *In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *32 (M.D. Fla. Aug. 1, 2009).

298. *Intel*, 542 U.S. at 257.

299. *See id.*

300. *Id.*

301. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985) ("[T]he emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.").

302. *See Intel*, 542 U.S. at 241. While *Intel* did not create any test for whether a putative "tribunal" qualifies for § 1782 assistance, its reasoning provides insight into how the Supreme Court might answer whether international arbitrations constitute "tribunals."

303. *See* Brief for Commission of European Communities as Amicus Curiae Supporting Petitioner at 4, *Intel*, 542 U.S. 241 (No. 02-572) ("[T]he Commission is not an adjudicative 'tribunal.'").

304. *Id.*

determination, the Supreme Court found the Commission qualified as a § 1782 tribunal.[305]

Neither private nor investor-state arbitrations perform investigative functions and, thus, differ from the Commission. They function as adjudicative bodies.[306] In this way, arbitration closely resembles traditional courts. Indeed, arbitration performs the same functions as courts: hearing disputes between adversarial parties, taking evidence, and deciding questions of law and fact on the merits.[307] If the Supreme Court found the Commission constituted a "tribunal,"[308] surely the Supreme Court would also find international arbitration satisfies § 1782's "tribunal" requirement. Under this analysis, no meaningful distinction exists between private and investor-state arbitration.[309] Both arbitral forms perform the same functions as courts. District courts should take guidance from *Intel*'s broad interpretation of "tribunal" to hold that § 1782 extends judicial assistance to private arbitrations.[310]

Additionally, Congress has expressed a policy favoring arbitration, which "applies with special force in the field of international commerce."[311] While some district courts find that § 1782 aid conflicts with that policy,[312] those courts misapply the policy. Denying § 1782 assistance to arbitration could completely prevent the parties from gathering vital evidence.[313] This would render arbitration unattractive as a means of dispute resolution. Given the importance of arbitration in

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305. *See Intel*, 542 U.S. at 265–66 ("The European Commission has stated . . . that it does not need or want the [d]istrict [c]ourt's assistance . . . It is not altogether clear, however, whether the Commission . . . means to say 'never' or 'hardly ever' to judicial assistance from United States courts.") (citations omitted).

306. *See, e.g.*, *In re* Winning (HK) Shipping Co., No. 09-22659-MC-UNGARO/SIMONTON, 2010 U.S. Dist. LEXIS 54290, at *22 (S.D. Fla. Apr. 30, 2010) ("[I]t is not disputed that the arbitrators in any anticipated arbitration will be able to collect evidence and issue a decision on the merits.").

307. *Id.*

308. *See Intel*, 542 U.S. at 241.

309. *But see* Norfolk S. Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("[A] reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL . . . and purely private arbitrations established by private contract.").

310. *See In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 955 (D. Minn. 2007).

311. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985). *See also* NBC v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999) (noting "the strong federal policy favoring arbitration as an alternative means of dispute resolution.").

312. *See supra* Section II.H.

313. *See Hallmark*, 534 F. Supp. 2d at 953. The arbitrator had indicated his receptivity to the requested discovery. He also acknowledged that obtaining the discovery required judicial assistance. *Id.*

international commerce,[314] this would disadvantage American companies. Foreign companies may decide to forego business with American companies rather than risk dispute resolution either in American courts or through an arbitral process lacking in material evidence.

The Second, Fifth, and Seventh Circuits all determined the policy favoring arbitration counseled against extending § 1782 aid to private arbitration. However, as the Fourth Circuit noted, the discretionary analysis under § 1782 avoids this "parade of horribles" and provides district courts a tool to reinforce the federal policy favoring arbitration.[315]

B. Guidance on the Application of the Intel Factors

Extending § 1782 to private arbitration would not deprive the parties of an efficient process[316] or disadvantage American companies.[317] Through the proper exercise of discretion, district courts can prevent the abuse of the discovery process, enforce the parties' expectations and the arbitrators' procedural authority, and maintain parity between American and foreign litigants.

The usual § 1782 dispute arises in this context: the applicant files the initial § 1782 petition, the district court grants the subpoena, then the opposing party in the arbitration intervenes to quash the subpoena. At the final stage, the district court conducts its discretionary analysis. If district court required the applicant to demonstrate the propriety of § 1782 aid, then the district court could screen out unmeritorious § 1782 requests without requiring the opposing party to expend time and resources fighting the subpoena. While the applicant would still incur the costs of the application, the opposing party would not bear any costs. Therefore, the opposing party would retain its bargained-for efficient process. Although the applicant's costs would increase, it would have no one to blame but itself. Additionally, this removes the potential for the tactical use of § 1782 by requiring no action on the part of the applicant's arbitral opponent.

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314. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

315. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214–16 (4th Cir. 2020) (rejecting policy concerns that § 1782 would inhibit arbitral efficiency).

316. *But see* NBC v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999). *NBC* found private arbitration outside of the scope of § 1782 so that "neither party is deprived of its bargained-for efficient process by the other party's tactical use of discovery devices." *Id.*

317. *But see* Rutledge, *supra* note 49, at 178 ("The upshot is that interpreting section 1782 to encompass arbitration creates asymmetrical discovery rights that the foreign party can use as leverage . . . and then exploit that leverage for settlement purposes.").

Furthermore, district courts should take guidance from the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules). The IBA Rules require parties to seek the arbitrators' consent before pursuing documents in the hands of third parties.[318] District courts can appropriately consider these rules under *Intel*. While *Intel* rejected a categorical foreign-discoverability requirement, the Supreme Court counseled district courts to "take into account the nature of the foreign tribunal."[319] Therefore, district courts can consider the IBA Rules, as a codification of best practices, in their discretionary analyses. Furthermore, this allows district courts to screen out unmeritorious requests, which "attempt to circumvent foreign proof-gathering restrictions."[320] Additionally, this rule provides a simple, bright-line test for district courts to apply. Ease of application lends itself to judicial efficiency. Also, given the confusion surrounding § 1782 and arbitration,[321] this approach avoids the possibility of full-fledged, American-style discovery, which some courts have authorized.[322] Authorizing American-style discovery for use in international arbitration would defeat the parties' expectations and harm the efficiency of arbitration.

District courts can also prevent parties from inappropriately weaponizing § 1782 to increase settlement pressure on American parties.[323] First, when the foreign party seeks discovery from its American adversary, the district court should reject the application because "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."[324] Additionally, if the district court rejects the application at the initial stage, it prevents the foreign party from dragging the American party into costly parallel litigation. Furthermore, if the district court requires evidence of

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318. *See* INT'L BAR ASS'N, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 3.9 (2010). The Rules state:

> If a Party wishes to obtain the production of Documents from a [non-Party] . . . the party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available . . . or seek leave from the Arbitral Tribunal to take such steps itself.

Id.

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

320. *Id.* at 265.

321. *See supra* Part II.

322. *See, e.g.*, *In re* Roz Trading, 469 F. Supp. 2d 1221, 1230 (N.D. Ga. 2006) ("This [c]ourt will aid Petitioner to obtain discovery consistent with the scope imposed by Federal Rule of Civil Procedure 26(b)(1).").

323. *See* Rutledge, *supra* note 49, at 178. Rutledge expressed concerns that foreign parties could file numerous § 1782 requests against American opponents or related third parties, such as subsidiaries, to increase settlement pressure. *Id.*

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

the arbitrators' consent, it diminishes the possibility of weaponized § 1782 requests. While the American company could move to quash the subpoena, the arbitrators' approval signals the evidence is likely material to the dispute. Seeking material evidence does not represent an inappropriate use of discovery devices. Finally, the district court can appropriately condition relief, or reject the application outright, if it suspects a nefarious motive.

IV. CONCLUSION

The Supreme Court should hold that private arbitration qualifies as a § 1782 tribunal in line with its broad interpretation in *Intel*.[325] Additionally, arbitration performs the same functions as ordinary courts, and the federal policy in favor of arbitration counsels a broad interpretation of § 1782.[326] Finally, district courts should require the approval of the arbitrators before granting § 1782 applications to reinforce the parties' expectations and the arbitrators' authority.[327]

325. *See supra* Section III.A.
326. *See supra* Section III.A.
327. *See supra* Section III.B.