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# INTERNATIONAL ARBITRATION: SUPREME COURT HOLDS DISTRICT COURTS MAY NOT ORDER DISCOVERY FOR USE IN PRIVATE INTERNATIONAL ARBITRATION

## I. INTRODUCTION

Section 1782(a) of the United States Code is a federal statute that gives district courts the power to assist evidence-gathering by “foreign or international tribunals.”<sup>1</sup> For most of its history, federal courts interpreted the phrase “foreign or international tribunals” in § 1782 as applying only to governmental bodies such as courts and administrative agencies.<sup>2</sup> Beginning in 2004, however, parties in a range of cases asserted that private international arbitration proceedings also qualified as “foreign or international tribunals” under the statute.<sup>3</sup> Private international arbitration in this context means arbitral proceedings initiated by contractual agreement between private parties to trans-national commercial transactions.<sup>4</sup> As a result of these cases, federal circuit courts diverged on the question of whether § 1782 permits district courts to assist evidence-gathering by parties to private

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<sup>1</sup> See 28 U.S.C. § 1782(a) (providing 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.”)

<sup>2</sup> See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) [hereinafter *NBC*] (concluding “when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 882 (5th Cir. 1999) (stating 1964 version of § 1782 aimed to facilitate discovery for international government-sanctioned tribunals).

<sup>3</sup> See, e.g., *In re Guo*, 965 F.3d 96, 107 (2d Cir. 2020) (holding private international arbitration in China was not “foreign or international tribunal” under § 1782); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 34 (5th Cir. 2009) (reaching same conclusion on private arbitration in Switzerland); *In re EWE Gasspeicher GmbH*, No. CV 19-MC-109-RGA, 2020 WL 1272612, at \*3 (D. Del. Mar. 17, 2020) (reaching same conclusion on private arbitration in Germany); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 730-31 (6th Cir. 2019) (holding private arbitration in Dubai was “foreign or international tribunal” under § 1782); *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-MC-80277-TSH, 2020 WL 906719, at \*8 (N.D. Cal. Feb. 25, 2020) (reaching same conclusion on private arbitration panel in China).

<sup>4</sup> See S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 300 (2013) (defining different types of international arbitration). Strong distinguishes international commercial arbitration, which occurs between private parties, from investment arbitration, which arises from investment treaties or interstate agreements. *Id.*

international arbitrations.<sup>5</sup> In June 2022, the Supreme Court resolved the split in *ZF Automotive US, Inc. v. Luxshare, Ltd.*<sup>6</sup> In a unanimous decision, the Court held that a “foreign or international tribunal” is one that exercises governmental authority conferred by a single nation or multiple nations.<sup>7</sup>

The resolution of the § 1782 split is significant because applying the statute to private international arbitrations would have opened the door to expansive, American-style discovery in those processes.<sup>8</sup> Parties to international arbitrations already support their claims and defenses with extensive documentary evidence.<sup>9</sup> Subject to the parties’ prior agreement, arbitrators generally have the power and discretion to order the parties to produce documents or testify.<sup>10</sup> But parties generally cannot seek discovery against the wishes of the opposing party and the arbitral tribunal, particularly discovery from third parties.<sup>11</sup> This reflects the view that the wishes of the parties should guide the arbitration process, and that it should remain a faster and more efficient alternative to litigation.<sup>12</sup> In recent years, the International Bar Association’s Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) have become the dominant choice for evidentiary rules

<sup>5</sup> See Ted Folkman, *Case of the Day: Servotronics v. Rolls-Royce*, FOLKMAN LLC (Oct. 10, 2020), <https://lettersblogatory.com/2020/10/06/case-of-the-day-servotronics-v-rolls-royce/> (describing circuit split).

<sup>6</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*8 (U.S. June 13, 2022) (summarizing holding).

<sup>7</sup> See *id.* (“In sum, we hold that § 1782 requires a “foreign or international tribunal” to be governmental or intergovernmental.”). *ZF Automotive* was consolidated with another case, *AlixPartners, LLP v. The Fund for Protection of Investors’ Rights in Foreign States*, earlier in the Court’s 2021-2022 term. *Id.* at \*3 (describing factual and procedural background).

<sup>8</sup> See Hailey Barnett & R. Zachary Torres-Fowler, *Servotronics, Inc. v. Rolls-Royce PLC: What the U.S. Supreme Court’s Upcoming Decision on 28 U.S.C. § 1782 Means for International Construction Arbitration*, JD SUPRA (Apr. 2, 2021), <https://www.jdsupra.com/legalnews/servotronics-inc-v-rolls-royce-plc-what-4025904/> (describing implications of Supreme Court’s decision). The term “discovery” refers to the court-mandated production of evidence, including from third parties, as the Federal Rules of Civil Procedure permit in United States courts. *Id.*

<sup>9</sup> See RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION art. 3-6 (INT’L BAR ASS’N 2010) [hereinafter *IBA Rules*] (outlining detailed model rules for exchange of documents, witness statements, and expert reports); Conna Weiner, *Top 10 Things Practitioners Should Know About International Arbitration* (Boston Bar Ass’n webinar Jan. 21, 2021).

<sup>10</sup> See Laurent Vercauteren, *The Taking of Documentary Evidence in International Arbitration*, 23 AM. REV. INT’L ARB. 341, 346 (2012) (noting arbitrators’ disclosure powers).

<sup>11</sup> See *id.* at 350 (noting private arbitral tribunals usually lack authority to order discovery from third parties).

<sup>12</sup> See GEORGE M. VON MEHREN, BEST PRACTICES FOR INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION, A BRIEF OVERVIEW OF INTERNATIONAL ARBITRATION (2007), 2007 WL 6082203, at \*1, \*2 (describing cost-effectiveness of arbitration). Parties view arbitration as efficient because they can set a time limit on the proceedings and allow only limited discovery and motion practice. *Id.* Parties can therefore sometimes resolve even complex matters within a year. *Id.*

in international arbitration.<sup>13</sup> However, these rules are not universally accepted, particularly by arbitrators from civil law systems who consider them to be overly influenced by the common-law discovery approach.<sup>14</sup> Furthermore, parties and practitioners are increasingly unhappy with the rising cost of international arbitration.<sup>15</sup>

This Note offers a critique the *ZF Automotive* decision from several perspectives.<sup>16</sup> The decision was not a foregone conclusion, given the compelling arguments that existed in favor of a broader interpretation.<sup>17</sup> Moreover, the Court's earlier § 1782 decision, *Intel Corp. v. Advanced Micro Devices, Inc.*, already provided district courts with a four-factor analytical framework to assess § 1782 requests from any tribunal.<sup>18</sup> If the Court adopted the broader interpretation, district courts could still screen requests from private tribunals using the *Intel* factors, notably whether the tribunal was receptive to U.S. assistance and whether the discovery request was unduly burdensome.<sup>19</sup> But although the *ZF Automotive* holding was not inevitable, both the statute's language and legislative history support the Court's interpretation of § 1782.<sup>20</sup> The decision also avoids creating more discovery rights for parties to international arbitrations than are available to domestic parties under the Federal Arbitration Act ("FAA").<sup>21</sup> Notably, the *ZF Automotive* decision did not weigh in on the argument that § 1782 discovery would frustrate the efficiency of international arbitration.<sup>22</sup> The Court had

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<sup>13</sup> See Vercauteren, *supra* note 10, at 346 (noting "a more 'international' approach has evolved over the past few decades through the use of the IBA Rules on the Taking of Evidence.")

<sup>14</sup> See *id.* at 351 (noting rulings on disclosure procedure influenced by arbitrators' experience and legal background). On the subject of English- or American-style discovery practices, one civil law authority stated, "we react to the notion of discovery, be it English, or, worse, American style, as an invasion of privacy by the court which is only acceptable in criminal cases." *Id.*

<sup>15</sup> See WHITE & CASE LLP & QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARB., 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 7 (2018) [hereinafter *White & Case & Queen Mary Univ.*] (finding survey respondents most commonly cited cost as main drawback of international arbitration).

<sup>16</sup> See discussion *infra* pp. 62-90 (analyzing question at issue in *ZF Automotive*).

<sup>17</sup> See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 723 (6th Cir. 2019) (determining text, context, and structure of § 1782(a) clearly indicate "tribunal" includes private international arbitration); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1021 (1965) (laying out rationale underlying 1964 amendments to § 1782).

<sup>18</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) (outlining factors for district courts to consider in evaluating § 1782 requests).

<sup>19</sup> See discussion *infra* pp. 87-91 (analyzing applicability of *Intel* factors to private tribunals).

<sup>20</sup> See discussion *infra* pp. 65-79 (analyzing question at issue in *ZF Automotive*).

<sup>21</sup> See *In re Application*, 939 F.3d at 728-30 (discussing potential implications for FAA and efficiency of international arbitration).

<sup>22</sup> See *Intel*, 542 U.S. at 268 (Breyer J., dissenting) (reasoning discovery takes time, adds cost, and may force parties to settle disputes).

no need to do so since it resolved the issue based on the statute's language, legislative history, and comparison with the FAA.<sup>23</sup> Even without addressing this policy concern explicitly, however, the decision responds to practitioners' and parties' concerns about the rising cost of international arbitration and will provide a welcome check on the trend toward overly-expansive discovery.<sup>24</sup>

This Note proceeds in three parts, beginning with a summary of the growth in international arbitration in recent decades.<sup>25</sup> Next, the paper traces the history of § 1782 as a statute intended to facilitate international judicial cooperation.<sup>26</sup> This section reviews early circuit court decisions rejecting the idea that district courts could assist with discovery for private international arbitrations, and the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, which addressed the scope of § 1782 but not whether it applied to private arbitration.<sup>27</sup> The paper then presents the more recent post-*Intel* decisions on the statute, including the circuit split leading to the *ZF Automotive* decision.<sup>28</sup>

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<sup>23</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*6-7 (U.S. June 13, 2022) (analyzing statute's language, context, and comparison with FAA).

<sup>24</sup> See Benjamin M. Daniels and Jenna M. Scoville, *Supreme Court Limits Section 1782 Discovery*, NAT'L LAW REVIEW, <https://www.natlawreview.com/article/supreme-court-limits-section-1782-discovery-international-arbitrations> (last visited Jun 21, 2022) (noting "[i]nternational arbitration just got cheaper for U.S. companies."). See also Brief of the Int'l Inst. for Conflict Prevention & Resol. as Amicus Curiae in Support of Petitioner, *Servotronics, Inc. v. Rolls-Royce PLC*, (No. 20-794), 2021 WL 39559 (U.S.), at \*7 (noting average length from filing of § 1782 application until decision was almost seventeen months); RULES ON THE EFFICIENT CONDUCT OF PROCEEDINGS IN INT'L ARB. (PRAGUE RULES) (2018) (offering more efficient alternative to IBA Rules); Fabian Bonke, *Do the Prague Rules Provide for an Efficient Resolution of Construction Arbitration Disputes?*, KLUWER ARBITRATION BLOG (Jul. 20, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/07/20/do-the-prague-rules-provide-for-an-efficient-resolution-of-construction-arbitration-disputes/> (discussing Prague Rules as potential solution to discovery-related cost and time concerns).

<sup>25</sup> See discussion *infra* pp. 16-19 (providing overview of recent growth in international arbitration).

<sup>26</sup> See Mousa Zalta, Note, *Recent Interpretation of 28 U.S.C. § 1782(a) by the Supreme Court in Intel Corp. v. Advanced Micro Devices, Inc.: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants*, 17 PACE INT'L L. REV. 413, 413-14 (2005) (noting original purpose of statute was to strengthen legal and diplomatic relations).

<sup>27</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246-47 (2004) (outlining questions before the Court); *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (stating holding); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (stating holding).

<sup>28</sup> See, e.g., *In re Guo*, 965 F.3d 96, 107 (2d Cir. 2020) (holding private international arbitration in China not "foreign or international tribunal" under § 1782); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 730-31 (6th Cir. 2019) (holding private arbitration in Dubai "foreign or international tribunal" under § 1782); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 212 (4th Cir. 2020) (holding private arbitration in United Kingdom "foreign or international tribunal" under § 1782); *Servotronics, Inc. v.*

## II. FACTS

### A. *Growth in Private International Commercial Arbitration*

The upsurge in global business transactions in recent decades has brought with it an increase in international disputes between contracting parties.<sup>29</sup> Research suggests that, for both legal practitioners and corporate counsel, private arbitration is the preferred method of resolving transnational disputes.<sup>30</sup> Arbitration is, by definition, a form of dispute resolution based on a private agreement between contracting parties.<sup>31</sup> The parties grant power to one or more individuals to determine the outcome of a dispute, and the outcome is then binding on the parties.<sup>32</sup> Private international arbitration is an arbitral proceeding between parties to trans-national commercial transactions.<sup>33</sup> One often-cited, decades-old estimate puts the frequency of arbitration clauses in international contracts at ninety percent.<sup>34</sup> More recent scholarship notes a lower prevalence, with arbitration clauses present in only twenty-five percent of international contracts involving companies with close ties to the United States.<sup>35</sup> Regardless of the exact prevalence of such clauses, the growth in the volume of international business has certainly driven growth in the use of private international commercial arbitration.<sup>36</sup>

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Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020) (holding same private arbitral body in United Kingdom not within meaning of § 1782).

<sup>29</sup> See Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 94 (2000) (noting that international commercial arbitration has become "the accepted way of resolving international business disputes.")

<sup>30</sup> See White & Case & Queen Mary Univ., *supra* note 15 at 5 (providing results of survey and interviews). The survey found that ninety percent of respondents preferred either arbitration alone or arbitration in combination with other forms of alternative dispute resolution for cross-border disputes. *Id.* Survey respondents included more than one thousand private practitioners, full-time arbitrators, in-house counsel, and others. *Id.* at 35.

<sup>31</sup> See JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 1.1 (2nd ed. 2007) (reviewing multiple scholarly definitions of arbitration).

<sup>32</sup> See *id.* (defining arbitration).

<sup>33</sup> See Strong, *supra* note 4, at 300 (distinguishing international commercial arbitration from investment arbitration).

<sup>34</sup> See KLAUS PETER BERGER, *INTERNATIONAL ECONOMIC ARBITRATION* 8 n.62 (Kluwer Law and Tax'n Publishers ed., 1993) (citing statistic). The estimate seems to originate in a 1988 book by international arbitration lawyer and scholar Albert Jan Van den Berg. *Id.*

<sup>35</sup> See Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 9, 10 (2019) (presenting empirical analysis of over half a million international contracts between 2000 and 2016). The study found publicly held companies in the United States were more likely to opt for domestic courts than arbitration. *Id.*

<sup>36</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487, Reporter's Note 1 (AM. L. INST. 1987) ("[a]s the volume and extent of international transactions have grown, resort to

### B. *Advantages of Arbitration for International Transactions*

Parties choose arbitration over litigation or another form of dispute resolution in their international contracts for several reasons.<sup>37</sup> Many companies and attorneys consider the enforceability of awards to be the primary advantage of international commercial arbitration.<sup>38</sup> Most states enforce international arbitration awards pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>39</sup> Under the New York Convention, states agree to recognize parties’ agreements to arbitrate and to enforce arbitral awards.<sup>40</sup> Observers praise the New York Convention for contributing to the growth of international arbitration because it ensures that states enforce arbitral awards.<sup>41</sup>

Parties also opt for private arbitration in international contracts because they can select a neutral venue, avoiding the “hometown justice” that could result from submitting the dispute to one party’s national courts.<sup>42</sup>

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arbitration as the agreed means of dispute settlement has become widespread.”); Drahozal, *supra* note 29, at 94 (noting increased use of international arbitration); White & Case & Queen Mary Univ., *supra* note 15, at 5 (finding arbitration preferred method of international dispute resolution).

<sup>37</sup> See John R. Trentacosta & Leah R. Imbrogno, *Contracting for International Arbitration in the Global Supply Chain*, MICH. B.J., September 2018, at 30-31 (listing considerations parties should consider when deciding whether to include contractual arbitration clause); White & Case & Queen Mary Univ., *supra* note 15, at 5 (finding arbitration frequently pursued in combination with other forms of alternative dispute resolution).

<sup>38</sup> See White & Case & Queen Mary Univ., *supra* note 15, at 7 (setting out survey respondents’ top four advantages of arbitration).

<sup>39</sup> See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention] (creating guidelines on recognition and enforcement of arbitral awards between States).

<sup>40</sup> See New York Convention, *supra* note 39, at 38-40 (providing “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration . . . [disputes] between them in respect of a defined legal relationship” and “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them . . . .”) Congress implemented the New York Convention as part of the Federal Arbitration Act. 9 U.S.C. §§ 201-208.

<sup>41</sup> See von Mehren, *supra* note 12, at \*2 (praising New York Convention for providing “a simpler and more effective method for obtaining recognition and enforcement of foreign arbitral awards than is typically available for foreign court judgments.”); Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT’L L. 115, 126 (2018) (“Consistent with the Convention’s objectives, national courts have held that [its] provisions mandate a uniform, ‘pro-enforcement’ regime that allows effective, efficient recognition and enforcement of both international arbitration agreements and awards.”)

<sup>42</sup> See, e.g., Drahozal, *supra* note 29, at 95 (explaining preference for arbitration); Nyarko, *supra* note 35, at 6-7 (attributing preference for arbitration to concerns about home biases and finding that “[i]f the quality of the foreign judicial institutions is not in doubt, parties are much more likely to refer disputes to the U.S. judiciary than to arbitration.”); von Mehren, *supra* note 12, at \*1 (ascribing preference for arbitration to avoidance of “home court advantage”). Parties may be more

Flexibility is another key advantage, including the parties' ability to select the members of the arbitral tribunal, to control the timetable, and to establish the procedural rules the tribunal will apply.<sup>43</sup> Contracting parties also tend to see arbitration as more confidential than litigation, particularly where a dispute implicates trade secrets or non-public business practices, since arbitral submissions and proceedings are generally not public.<sup>44</sup>

### C. *The Exchange of Evidence in International Arbitration Proceedings*

Most international arbitrations follow a similar overall progression, with some variation depending on the parties' preferences and the rules of the administering institution.<sup>45</sup> They take place at a location, or arbitral seat, agreed-to by the parties and often in a neutral location.<sup>46</sup> Although there are many steps along the way, the process generally involves the following: the claimant serves a notice of arbitration on the respondent, an arbitral tribunal is formed, the claimant submits a statement of claim and the respondent submits a statement of defense, the parties exchange evidence, they present arguments at a hearing before the arbitral tribunal, and finally, the tribunal renders a decision and award.<sup>47</sup>

International arbitrations also involve extensive submissions of documentary evidence; parties support their statements of claim and defense

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likely to hold this preference when they have reason to question the independence or reliability of the other side's national courts. Von Mehren, *supra* note 12, at \*1.

<sup>43</sup> See White & Case & Queen Mary Univ., *supra* note 15, at 7 (finding "flexibility" was third most valuable characteristic of arbitration); Trentacosta & Imbrogno, *supra* note 37, at 31-32 (observing parties can establish timetable and procedures).

<sup>44</sup> See Trentacosta & Imbrogno, *supra* note 37, at 31 (suggesting parties include confidentiality provisions to avoid information becoming public in potential court proceedings). The lack of standard procedures and the closed nature of international arbitral proceedings has also led some to question their transparency and ethical grounding. Megan K. Niedermeyer, *Ethics for Arbitrators at the International Level: Who Writes the Rules of the Game?*, 25 AM. REV. INT'L ARB. 481, 482 (2014) (describing international arbitration as "ethical no-man's land").

<sup>45</sup> See White & Case & Queen Mary Univ., *supra* note 15, at 13-15 (discussing respondents' preferred arbitral institutions). The top five institutions in 2018 were the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC), and the Stockholm Chamber of Commerce (SCC). *Id.*

<sup>46</sup> See von Mehren, *supra* note 12, at \*3 (noting concerns regarding designated place of arbitration). London, Paris, Geneva, Zurich, and New York were traditionally the preferred seat for international arbitration, with Singapore and Hong Kong joining the top five in 2018. See also White & Case & Queen Mary Univ., *supra* note 15, at 7 (listing survey respondents' preferred seats).

<sup>47</sup> See The Arbitration Institute of the Stockholm Chamber of Commerce, *Step by step guide to arbitration – The Arbitration Institute of the Stockholm Chamber of Commerce*, <https://sccinstitute.com/our-services/arbitration/step-by-step-guide-to-arbitration/> (last visited Aug. 8, 2021) (providing schematic illustration of arbitration process).



with documentary materials, written witness statements, and expert reports.<sup>48</sup> Parties to an arbitration may request documents from the opposing party.<sup>49</sup> However, wide-ranging discovery is rare in international arbitration because mandatory disclosure of evidence is limited to whatever the parties agree in advance.<sup>50</sup> An arbitral tribunal may have discretion to order the parties to disclose information, but under most arbitral statutes and rules, they may not order discovery from third parties.<sup>51</sup>

Although many international arbitration practitioners frown upon extensive discovery, more expansive evidence-gathering is becoming the norm.<sup>52</sup> The IBA Rules have become the most commonly-adopted rules of evidence in international arbitration, and even though the rules stop short of allowing full American-style discovery, practitioners view them as being more influenced by the common law than the civil law tradition.<sup>53</sup> This has prompted backlash, particularly by civil law practitioners advocating for more efficient evidentiary procedures.<sup>54</sup>

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<sup>48</sup> See IBA Rules, *supra* note 9, art. 3-6 (outlining model rules for exchange of documents, witness statements, and expert reports).

<sup>49</sup> See *id.* at art. 3 (detailing model procedure for "Request to Produce").

<sup>50</sup> See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (noting limited discovery in international arbitration).

Few, if any, non-American tribunals of any kind, including arbitration panels created by private parties, provide for the kind of discovery that is commonplace in our federal courts and in most, if not all, state courts. If the parties to a private international arbitration make no provision for some degree of consensual discovery *inter se* in their agreement to arbitrate, the arbitrators control discovery, and neither party is deprived of its bargained-for efficient process by the other party's tactical use of discovery devices.

*Id.*; see also Vercauteren, *supra* note 10, at 346 (describing "[t]he nature and the extent of disclosure between the parties will be influenced by the principle of party autonomy: it will be subject to the agreement the parties have reached and to the arbitrator's discretion.")

<sup>51</sup> See Vercauteren, *supra* note 10, at 350 (discussing limits on arbitrators' power to order discovery). The FAA and the English and Swiss arbitration statutes are notable exceptions, permitting arbitrators to require third parties to produce evidence. *Id.*

<sup>52</sup> See von Mehren, *supra* note 12, at \*3 (observing "international arbitration is not well suited to cases that require significant discovery from the other side" and that "if you need extensive discovery to make your case, you are much better off in a U.S. court."); see also Weiner, *supra* note 9 (discussing arbitral tribunals' frequent use of IBA rules to guide disclosure).

<sup>53</sup> See Vercauteren, *supra* note 10, at 356 (noting perception of common-law influence in IBA Rules). The IBA Rules' commitment to respect of other legal traditions should be "taken with a grain of salt." *Id.*

<sup>54</sup> See Prague Rules, *supra* note 24, Note from the Working Group (advocating greater efficiency through adoption of civil law practices). "One of the ways to increase the efficiency of arbitral proceedings is to encourage tribunals to take a more active role in managing the proceedings (as is traditionally done in many civil law countries)." *Id.*; see also Bonke, *supra* note 24 (discussing Prague Rules as potential solution to discovery-related cost and time concerns).

The extent of discovery is also a major driver of the cost of an international arbitration process.<sup>55</sup> Although traditionally considered a more efficient alternative to litigation, parties today see high costs as the main drawback of arbitral proceedings.<sup>56</sup> High costs typically derive from fees for arbitrator(s), venues, and translation; others relate more closely to the production of evidence, such as parties and their legal representatives engaging in “dilatatory tactics” and arbitrators being unwilling or unable to impose sanctions.<sup>57</sup>

With this factual background in mind, the following section traces the history of § 1782 as a statute intended to assist litigants in “foreign or international tribunals” in obtaining evidence in the United States.<sup>58</sup>

### III. HISTORY

#### A. Section 1782

The legal controversy surrounding § 1782 today focuses on international arbitration, but the statute itself originated in 1855 as Congress’ attempt to allow U.S. courts to provide assistance to foreign litigants.<sup>59</sup> After World War II, commercial transactions between the U.S. and foreign parties increased significantly.<sup>60</sup> At the same time, it became clear that U.S. courts had a problematic record when it came to international judicial cooperation.<sup>61</sup>

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<sup>55</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (Breyer J., dissenting) (reasoning that discovery takes time, adds cost, and may force parties to settle disputes).

<sup>56</sup> See *White & Case & Queen Mary Univ.*, *supra* note 15, at 7 (finding that respondents most commonly cited cost as main drawback of international arbitration); *Trentacosta & Imbrogno*, *supra* note 37, at 32 (“Despite popular belief, arbitration is not always cheaper than litigating a case in the court system. This is especially true in the event of a highly complex, multinational dispute. In addition to arbitration fees, the parties also may be responsible for Tribunal fees, venue fees, attorneys’ fees, travel expenses, and translation services, among other things.”)

<sup>57</sup> See *White & Case & Queen Mary Univ.*, *supra* note 15, at 7-8 (explaining costs and consequences of lack of sanctions); *Trentacosta & Imbrogno*, *supra* note 37, at 31 (noting flexible procedural rules can lead to squabbling among parties).

<sup>58</sup> See 28 U.S.C. § 1782(a) (granting district courts discretionary power to order discovery in foreign proceedings).

<sup>59</sup> See The Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855) (tasking circuit courts with assisting foreign litigants); see also *Intel*, 542 U.S. at 247 (noting 1855 statute permitted requests for aid using letters rogatory through diplomatic channels). In a second, revised version of the statute, Congress placed more limitations on the use of letters rogatory to seek judicial assistance. The Act of March 3, 1863, § 1, 12 Stat. 769-70 (1863).

<sup>60</sup> See Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and A Program for Reform*, 62 YALE L.J. 515, 557-58 (1953) (describing history of attitudes toward judicial cooperation with foreign courts).

<sup>61</sup> See *id.* (noting U.S. took isolationist stance prior to World War II, refusing to enter mutual judicial assistance treaties). After World War II, “dislocation of persons and property and

In 1958, Congress appointed the Commission on International Rules of Judicial Procedure ("the Commission") to "investigate and study present practices in judicial assistance and judicial cooperation between the United States and Foreign Countries, and to make recommendations for the improvement of international legal practice and methods of procedure."<sup>62</sup> The Commission recommended that Congress substantially revise § 1782.<sup>63</sup> Accordingly, the 1964 revision of § 1782 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 . . . ."<sup>64</sup> The phrase at issue in the recent circuit split, "foreign or international tribunal," is not defined in the statute.<sup>65</sup> In 1965, the rapporteur of the Commission argued that the revised statute aimed to improve cooperation between the United States and "tribunals" operating either internationally or in individual countries.<sup>66</sup> The term "tribunal," the rapporteur maintained, encompassed "all bodies that have adjudicatory power, and [wa]s intended to include not only civil, criminal, and administrative courts . . . but also arbitral tribunals or single arbitrators."<sup>67</sup> Later, the Supreme Court in *Intel* cited the rapporteur's article approvingly,

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America's post-war position as the leading industrial and creditor nation of the world combine[d] to confront the bar with unexpected and sometimes insoluble problems of international practice." *Id.* at 516. The U.S. had some success in seeking judicial cooperation from other common law countries, but civil law and Islamic law countries routinely rebuffed such requests. *Id.* at 522. When other countries sought assistance from the U.S., both executive and judicial branch responses tended to be delayed and unclear on key procedural points. *Id.* at 542.

<sup>62</sup> See 1964 U.S.C.C.A.N. 3782, 3793 (describing purpose of Commission).

<sup>63</sup> See *id.* at 3788 (describing liberalizing purpose of proposed statutory amendments). The Commission believed the revision "clarific[d] and liberalize[d] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States . . . ." *Id.*

<sup>64</sup> See 28 U.S.C. § 1782(a) (granting district courts discretionary power to order discovery for use in foreign proceedings). The statute goes on to provide that the order may be issued in response to a letter rogatory, a request from a "foreign or international tribunal," or an application from any interested person. *Id.* The court may appoint a person to gather the requested evidence and may set the discovery procedures based on either the procedures of the requesting tribunal or the Federal Rules of Civil Procedure. *Id.*; see also Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 229 (1994) (describing history of amendments to § 1782). Smit observed that federal courts were reluctant to follow through on Congress' shift in policy toward a more liberal judicial cooperation regime, being already overburdened and reluctant to take on additional duties. Smit, *supra* at 229 n.69.

<sup>65</sup> See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999) (noting § 1782 does not define phrase "foreign or international tribunal.")

<sup>66</sup> See Smit, *supra* note 17, at 1021 (laying out Commission's rationale underlying proposed 1964 amendments). In a footnote, Smit notes that "[t]he term 'tribunal' was chosen deliberately as being both neutral and encompassing. Any person or body exercising adjudicatory power is included." *Id.* at 1021 n.36.

<sup>67</sup> See Smit, *supra* note 17, at 1021 (presenting Commission's understanding of what "tribunal" includes).

for the proposition that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts.”<sup>68</sup>

*B. The Statute’s Applicability to Private Arbitrations: Early Decisions*

The issue of whether § 1782 applied to private arbitral proceedings did not come before federal circuit courts until more than three decades after the 1964 revisions.<sup>69</sup> In 1999, both the Second and Fifth Circuits held that the statute did not apply to private arbitration.<sup>70</sup> Both reasoned that the phrase “foreign or international tribunal” is ambiguous and that Congress intended the district courts to assist governmental bodies in obtaining discovery in the United States, not private arbitral panels.<sup>71</sup> In addition, in *National Broadcasting Co. v. Bear Stearns & Co.* (“NBC”), the Second Circuit compared § 1782 with the district courts’ power to compel discovery in private domestic arbitration under Section 7 of the Federal Arbitration Act (“FAA”).<sup>72</sup> The Second Circuit noted that § 7 of the FAA offers more limited discovery to parties in domestic arbitrations than § 1782 would grant to

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<sup>68</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (discussing meaning of “tribunal”); see also Zalta, *supra* note 26, at 436 (noting congressional amendments have continuously liberalized the scope of the statute).

<sup>69</sup> See *Nat’l Broad. Co.*, 165 F.3d at 191 (holding § 1782 does not apply to arbitral bodies established by private parties); *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, 883 (5th Cir. 1999) (holding arbitral bodies established by private parties exempt from § 1782).

<sup>70</sup> See *Nat’l Broad. Co.*, 165 F.3d at 191 (stating holding); *Biedermann*, 168 F.3d at 883 (stating holding).

<sup>71</sup> See *Nat’l Broad. Co.*, 165 F.3d at 190 (outlining reasoning); *Biedermann*, 168 F.3d at 883 (outlining reasoning). In *NBC*, the Second Circuit reasoned that the word “tribunal” is ambiguous and that nothing in the legislative history or contemporary accounts of the 1964 revision suggested Congress intended the statute to apply to private arbitration. *Nat’l Broad. Co.*, 165 F.3d at 190. In *Biedermann*, the Fifth Circuit similarly grounded its decision on the ambiguity of the phrase “foreign or international tribunal,” and interpreted the legislative history to reveal that “when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.” *Biedermann*, 168 F.3d at 883.

<sup>72</sup> See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 1887 (2d Cir. 1999) (describing more limited discovery for domestic arbitrations under FAA than international arbitrations under § 1782). Section 7 of the FAA governs discovery procedure and is more limited than § 1782 in terms of who can subpoena or request evidence, which district court can enforce a subpoena or request, and what kind of evidence can be requested. *Id.*; see also Ted Folkman, *Pre-Hearing Discovery in Arbitration: Beck’s Superior Revisited*, FOLKMAN LLC: LETTERS BLOGATORY (Jan. 19, 2011), <https://lettersblogatory.com/2011/01/19/pre-hearing-discovery-in-arbitration-becks-superior-revisited/> (comparing FAA § 7 with § 1782).

parties in international arbitration.<sup>73</sup> As a result, if § 1782 applied to private international arbitrations, it would conflict with the FAA.<sup>74</sup> The Fifth Circuit largely shared this view.<sup>75</sup> The Fifth Circuit also addressed the effects of a broad construction of § 1782 on the speed and efficiency of international arbitration, noting increased discovery would “thwart private international arbitration’s greatest benefits.”<sup>76</sup>

### C. *The Supreme Court’s Intel Decision*

By 2004, § 1782 had created numerous open questions among the lower courts, some of which the Supreme Court took up in *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>77</sup> Here, the Court assessed whether the institution at issue in the case, the European Directorate General–Competition, was a “tribunal” within the statute’s meaning.<sup>78</sup> *Intel* did not address the question of whether the statute applies to private arbitration, but the decision did offer clarity on the meaning of a “tribunal” in “foreign or international tribunal.”<sup>79</sup> The Court concluded that the European Directorate General–Competition was a tribunal, because Directorate General–Competition acted as a first-instance decision maker; it had an investigative, evidence-gathering function, and it issued decisions reviewable by the Court of First Instance and the European Court of Justice.<sup>80</sup> The Court listed several types of proceedings that could fall under the term “tribunal,” including “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial

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<sup>73</sup> See *NBC*, 165 F.3d at 187 (describing more limited discovery for domestic arbitrations under FAA than international arbitrations under § 1782); see also Folkman, *supra* note 72 (comparing FAA § 7 with § 1782).

<sup>74</sup> See *NBC*, 165 F.3d at 187 (discussing potential conflict with FAA).

<sup>75</sup> See *Biedermann*, 168 F.3d at 883 (stating “[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart.”)

<sup>76</sup> *Id.* (discussing efficiency concerns).

<sup>77</sup> 542 U.S. 241, 246–47 (2004) (outlining questions before Court). The Court addressed four main questions in *Intel*: (1) who qualifies as an “interested person;” (2) does a European administrative agency qualify as a “tribunal;” (3) must a proceeding be pending or imminent; and (4) is there a “foreign discoverability” requirement, meaning the evidence sought must be discoverable under the law governing the foreign proceeding. *Id.* The European Directorate General–Competition is the administrative agency with primary responsibility for enforcing the European Union’s antitrust laws, including by adjudicating antitrust complaints. *Id.* at 250.

<sup>78</sup> See *id.* at 258 (holding European Commission, to which Directorate General–Competition belonged, was first-instance decision maker).

<sup>79</sup> See *id.* at 249 (discussing scope of word “tribunal” in statute).

<sup>80</sup> See *id.* at 257 (noting European regional courts undoubtedly qualify as tribunals); see also Strong, *supra* note 4, at 303 (“[T]he Supreme Court interpreted the term ‘foreign or international tribunal’ in section 1782 as including ‘first-instance decision-makers’ that render ‘dispositive rulings’ that are subject to some form of judicial review.”)

agencies, as well as conventional civil, commercial, criminal, and administrative courts.”<sup>81</sup> The Court reasoned that the purpose of the 1964 amendments to § 1782 was to expand procedures for judicial assistance to include a broader range of decision-making bodies than conventional courts.<sup>82</sup>

The *Intel* Court emphasized that district courts’ authority to entertain discovery requests under § 1782 is entirely discretionary.<sup>83</sup> The Court outlined four factors for district courts to consider when deciding whether to grant a § 1782 discovery request: first, whether the request comes from a non-participant to a proceeding who otherwise cannot access the information; second, whether the foreign tribunal is receptive to the assistance; third, whether the request conceals an effort to circumvent evidence-gathering by a foreign tribunal; and fourth, whether the request is unduly intrusive or burdensome.<sup>84</sup>

#### D. Recent Circuit Court Decisions

The recently-resolved split among circuit courts over the use of § 1782 for private international arbitration stemmed from the *Intel* decision.<sup>85</sup> In multiple cases, parties to private international arbitrations argued they could seek discovery under § 1782 because the *Intel* Court reasoned the statute applied to “administrative and arbitral tribunals.”<sup>86</sup> In *El Paso Corp. v.*

<sup>81</sup> *Id.* at 258 (discussing congressional intent in amending statutory language from “court” to “tribunal”). This aspect of the Court’s reasoning relied in part on the writings of Hans Smit, one of the rapporteurs of the Commission on International Rules of Judicial Procedure. *Id.*

<sup>82</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257-58 (2004) (“[W]hen Congress established the Commission on International Rules of Judicial Procedure in 1958 . . . it instructed the Rules Commission to recommend procedural revisions ‘for the rendering of assistance to foreign courts and quasi-judicial agencies.’”) (quoting § 2, 72 Stat. 1743) (emphasis in original).

<sup>83</sup> See *id.* at 264 (confirming district courts’ discretion to grant or deny requests). Unrelated to the meaning of “tribunal,” the Court also held that proceedings before a foreign or international tribunal did not have to be pending or imminent, and that foreign discoverability was not a § 1782 requirement. *Id.* at 246-47.

<sup>84</sup> See *id.* at 264-65 (providing four factors to guide district courts). Justice Breyer dissented, proposing a more limited role for U.S. courts in facilitating foreign discovery requests. *Id.* at 268-69 (Breyer J., dissenting). In Justice Breyer’s view, “discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes.” *Id.* Breyer proposed two limitations on § 1782: (1) if an entity does not view itself as a tribunal, its view should be given great deference; and (2) foreign discoverability should be required, as should compatibility with the FAA. *Id.* at 269-70; see also Zalta, *supra* note 26, at 442 (noting failure to consider foreign entity’s categorization of itself could offend courts of other countries).

<sup>85</sup> See *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020) (seeking to interpret § 1782 in line with *Intel*).

<sup>86</sup> See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 723 (6th Cir. 2019) (“*Intel* determined that § 1782(a)

*La Comision Ejecutiva Hidroelectrica Del Rio Lempa* (“CEL”), one of the first post-*Intel* cases, a Salvadoran utility company argued that the Fifth Circuit should overturn *Republic of Kazakhstan v. Biedermann Int’l* and allow the company’s § 1782 discovery request.<sup>87</sup> The Fifth Circuit declined to do so.<sup>88</sup> The court reasoned that the question of whether a private arbitration is a “tribunal” was not before the Court in *Intel*, and that *Intel*’s only specific mention of arbitration was in a parenthetical referencing the writings of the rapporteur of the Commission on International Rules of Judicial Procedure.<sup>89</sup> Furthermore, *Intel* did not address the concerns that caused the court in *Biedermann* to reject § 1782’s application to private international arbitrations.<sup>90</sup> These concerns included the potential for conflict between § 1782 and § 7 of the FAA, the potential for disputes about the domestic or international nature of an arbitration, and the likelihood that allowing parties in international arbitrations to seek discovery in the United States would lead to delays and drive up the cost of international arbitration.<sup>91</sup> In the end, the Fifth Circuit did not find that *Intel* required it to overturn *Biedermann*.<sup>92</sup>

In 2019, the Sixth Circuit set the stage for the circuit split when it held, in direct contradiction to the Fifth Circuit, that an arbitration panel in both Dubai and London was a “foreign or international tribunal.”<sup>93</sup> In *In re Application to Obtain Discovery for Use in Foreign Proceedings* (“*In re Application*”), the court conducted a detailed textual analysis of the phrase “foreign or international tribunal” and concluded that it could apply to private arbitration.<sup>94</sup> The court also concluded that nothing in *Intel* limited the

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provides for discovery assistance in non-judicial proceedings.”); *In re Guo*, 965 F.3d 96, 105 (2d Cir. 2020), as amended (July 9, 2020) (reasoning *Intel* did not mandate § 1782 discovery for private international arbitration).

<sup>87</sup> See 341 F. App’x 31, 33 (5th Cir. 2009) (summarizing plaintiff utility company’s argument). The utility company sought discovery in Texas for use in a Swiss arbitration arising from a dispute with another utility company. *Id.* at 32.

<sup>88</sup> See *id.* at 32 (disagreeing that *Biedermann* was no longer controlling law).

<sup>89</sup> See *id.* at 34 (“The only mention of arbitration in the *Intel* opinion is in a quote in a parenthetical from a law review article by Hans Smit.”)

<sup>90</sup> See *id.* (noting *Intel* did not address concerns outlined in *Biedermann*).

<sup>91</sup> See *id.* (recapping concerns).

<sup>92</sup> See *CEL*, 341 F. App’x at 34 (holding court could not “overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent . . . .”)

<sup>93</sup> See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 723 (6th Cir. 2019) (announcing holding).

<sup>94</sup> See *id.* at 726 (describing court’s text-based approach to analysis); see also Case Comment, *Statutory Interpretation—Textualism—Sixth Circuit Holds That Private Commercial Arbitration Is A Foreign or International Tribunal.—In Re: Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), 133 HARV. L. REV. 2627, 2629-33 (2020) (discussing usage of expressions “international tribunal” and “foreign tribunal” in legal writing). This comment argues that the Sixth Circuit was wrong to analyze “tribunal” alone instead of the full phrase “foreign or international tribunal.” Harvard Law Review, *supra* at 2634.

statute's applicability to private arbitration.<sup>95</sup> Rather, *Intel* laid out four factors that district courts should consider when deciding whether to grant a § 1782 request, obviating the need for an initial assessment of the type of foreign proceeding.<sup>96</sup>

Yet other circuits continued to uphold the traditional view that § 1782 permitted discovery only to governmental bodies.<sup>97</sup> In the early part of 2020, the Second Circuit again held that private arbitral proceedings are not within the statute's scope, this time determining that a Chinese arbitral body was excluded.<sup>98</sup> Like the Fifth Circuit's 2009 decision in *CEL*, the Court reasoned that nothing in *Intel* overruled its prior decision in *NBC*.<sup>99</sup> Therefore, *NBC*'s holding that § 1782 did not apply to private arbitration was still good law.<sup>100</sup>

### E. *The Servotronics Decisions*

Also during 2020, two circuit courts reached opposing decisions on § 1782 in cases arising from the same facts, beginning with the Fourth Circuit's holding in *Servotronics, Inc. v. Boeing Co.* ("Servotronics I").<sup>101</sup> The cases arose from an engine fire caused by a valve malfunction during testing of a new aircraft, leading to a dispute between Servotronics, the maker of the valve; Rolls Royce, the maker of the engine; and Boeing, the maker of the plane.<sup>102</sup> In *Servotronics I*, the Fourth Circuit held that a private arbitral panel in the United Kingdom was a "foreign or international tribunal" and could obtain discovery under § 1782.<sup>103</sup> The court reasoned that although

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<sup>95</sup> See *In re Application*, 939 F.3d at 723 (determining *Intel* decision does not contradict conclusion of textual analysis).

<sup>96</sup> *Id.* at 726 (outlining reasoning).

<sup>97</sup> See *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 692-94 (7th Cir. 2020) (holding § 1782 inapplicable to United Kingdom arbitral panel); *Guo v. Deutsche Bank Sec. Inc.*, 965 F.3d 96 (2d Cir. 2020), *aff'g by an equally divided court In re Hanwei Guo* 2019 WL 917076 (2019) (refusing to allow discovery under statute for use in private arbitration in China).

<sup>98</sup> See *Guo*, 965 F.3d at 109 (stating holding). In reaching this conclusion, the court relied on its longstanding rule that "a three-judge panel is bound by a prior panel's decision until it is overruled either by this Court sitting en banc or by the Supreme Court." *Id.* at 105.

<sup>99</sup> *Id.* at 105 (stating *Intel* did not cast doubt on reasoning or holding of *NBC*).

<sup>100</sup> *Id.* (stating holding). The court reasoned that the Chinese arbitration was a private proceeding because the arbitral institution operated largely independently of the Chinese state, with its jurisdiction arising solely from the parties' contractual undertakings. *Id.* at 108.

<sup>101</sup> See 954 F.3d 209, 213 (4th Cir. 2020) (stating holding); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 690 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021) (same).

<sup>102</sup> See *Servotronics*, 954 F.3d at 210 (describing facts of case). Servotronics sought to use § 1782 to depose three Boeing employees in support of its defense that the valve did not cause the fire. *Id.*

<sup>103</sup> See *id.* (stating holding).



arbitration is a private process, it occurs under state authority and with judicial oversight.<sup>104</sup> With the enactment of the FAA, Congress elevated arbitration as a favored alternative to litigation.<sup>105</sup> And since the United Kingdom's arbitration statute similarly ensured court oversight of arbitrations, the court held that the London-based arbitral panel at issue was a tribunal for § 1782 purposes.<sup>106</sup>

Later the same year, the Seventh Circuit held in *Servotronics, Inc. v. Rolls-Royce PLC* ("Servotronics II") that § 1782 does not apply to private arbitration because, in the overall context of the statute, the phrase "foreign tribunal" means "a governmental, administrative, or quasi-governmental tribunal."<sup>107</sup> According to the Seventh Circuit, even if interpreted in light of the liberalizing trend observed in *Intel*, the language of § 1782 does not suggest Congress intended to cover private arbitral tribunals.<sup>108</sup> Here, too, the court expressed concern that a broad reading of § 1782 would directly conflict with the FAA, where discovery is more limited.<sup>109</sup> *Servotronics*, the party seeking discovery under § 1782 in both cases, successfully petitioned for certiorari, which the Supreme Court granted in March 2021.<sup>110</sup> The U.K.-

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<sup>104</sup> See *id.* at 214 ("[C]ontrary to Boeing's general assertion that arbitration is not a product of 'government-conferred authority,' under U.S. law, it clearly is.") The court relied on *Intel*'s interpretation of congressional intent at the time of the 1964 amendments to § 1782, as aiming to authorize U.S. assistance to "administrative and quasi-judicial proceedings abroad." *Id.*

<sup>105</sup> See *id.* (reasoning United Kingdom arbitral panel was "acting with the authority of the State" even under narrower reading of § 1782); see also Brandon Hasbrouck, Note, *If It Looks Like A Duck . . . : Private International Arbitral Bodies Are Adjudicatory Tribunals Under 28 U.S.C. § 1782(a)*, 67 WASH. & LEE L. REV. 1659, 1708 (2010) (arguing Congress intended to expand § 1782 with 1964 amendments). Hasbrouck argues that when courts refuse to apply the statute to arbitral proceedings, they allow policy concerns to act as the dispositive factor. Hasbrouck, *supra* at 1708; see also Charles E. Sheehan, Case Comment, *INTERNATIONAL ARBITRATION, Eleventh Circuit Holds Private Commercial Arbitration Panel Is a "Tribunal" for Purposes of 28 U.S.C. § 1782 – Consorcio Ecuatoriano De Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), 36 SUFFOLK TRANSNAT'L L. REV. 489, 497 (2013) (arguing broader reading of § 1782 is preferable).

<sup>106</sup> See *Servotronics*, 954 F.3d at 213 (reasoning arbitral panel acted with state oversight).

<sup>107</sup> See *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020) (stating holding); see also Jenna M. Godfrey, Comment, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(a)'s Application in Private International Arbitration Proceedings*, 60 AM. U. L. REV. 475, 518 (2010) (concluding plain language, legislative history, and statutory scheme all exclude private international arbitration). Further, placing private arbitration within the statute's scope would defeat its purpose as a lower-cost, quicker, and more confidential alternative to litigation. Godfrey, *supra* at 518.

<sup>108</sup> See *Servotronics*, 975 F.3d 689, 696 (outlining court's reasoning).

<sup>109</sup> See *id.* (describing clash with FAA).

<sup>110</sup> See *Servotronics, Inc. v. Rolls-Royce PLC*, 141 S. Ct. 1684 (Mem.), *aff'd*, 979 F.3d 689 (U.S. Mar. 22, 2021) (granting certiorari).

based arbitral panel went ahead with its hearing as planned in May 2021, and not long afterward, the Supreme Court dismissed the case as moot.<sup>111</sup>

#### F. *The ZF Automotive Decision*

In December 2021, the Supreme Court granted certiorari in two consolidated § 1782 cases: *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States* (“AlixPartners”) and *ZF Automotive US, Inc. v. Luxshare, Ltd.* (“ZF Automotive”).<sup>112</sup> *AlixPartners* is an appeal from a Second Circuit ruling that addressed whether § 1782 permits discovery assistance to a party in investor-state arbitration.<sup>113</sup> There, a Russian corporation, the Fund for Protection of Investor Rights in Foreign States (“the Fund”), sought discovery assistance for use in proceedings before an arbitral panel established under the bilateral investment treaty between Lithuania and Russia.<sup>114</sup> The court declined to extend its holding in *NBC* to this type of panel, holding instead that the panel was a “foreign or international tribunal.”<sup>115</sup> Even though the panel in *AlixPartners* had some characteristics of private commercial arbitration, it was established by an investor and a foreign state pursuant to a treaty between two States.<sup>116</sup> Therefore, it fits the Second Circuit’s requirement that § 1782 assistance go only to governmental

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<sup>111</sup> See Ted Folkman, *Anticlimax of the Day: Servotronics Case Settles*, FOLKMAN LLC: THE LETTERS BLOGATORY (Sep. 9, 2021), <https://folkman.law/2021/09/09/anticlimax-of-the-day-servotronics-case-settles/> (reporting on status of case); see also Alison Frankel, *DOJ will argue at SCOTUS against U.S. discovery in private foreign arbitration*, REUTERS (Aug. 3, 2021), <https://www.reuters.com/legal/government/doj-will-argue-scotus-against-us-discovery-private-foreign-arbitration-2021-08-03/> (describing timeline of underlying arbitration).

<sup>112</sup> See *AlixPartners, LLP v. Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638 (Mem) (2021) (consolidating cases and granting certiorari); *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2021 WL 5858630 (U.S. Dec. 10, 2021) (same); Timothy Blakely et al., *International Arbitration Update: Supreme Court Takes Opportunity to Revisit Circuit Split over Discovery in Aid of International Arbitration*, JD SUPRA (Dec. 17, 2021), <https://www.jdsupra.com/legal-news/scotus-to-resolve-circuit-split-after-7429313/> (last visited Jan 9, 2022) (discussing case consolidation and scheduling).

<sup>113</sup> See *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proc.*, 5 F.4d 216, at 220 (presenting questions for consideration).

<sup>114</sup> See *id.* at 221-22 (describing factual background).

<sup>115</sup> See *id.* at 233 (stating holding).

<sup>116</sup> See *id.* at 225-26 (reiterating factors laid out in *Guo* to consider nature of arbitral body). The Second Circuit summarized four factors it identified in *Guo*:

- (1) the ‘degree of state affiliation and functional independence possessed by the entity’;
- (2) the ‘degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision’; (3) the ‘nature of the jurisdiction possessed by the panel’; and (4) the ‘ability of the parties to select their own arbitrators.’

tribunals.<sup>117</sup> Earlier, in *Servotronics II*, a Department of Justice amicus brief had expressed concerns about applying § 1782 to investor-state arbitrations because U.S. assistance could destabilize or politicize those processes.<sup>118</sup> The government argued Congress could not possibly have intended the statute to apply to investor-state arbitration when such dispute settlement did not exist in 1964.<sup>119</sup> Moreover, allowing broad discovery would “upset settled expectations” of efficiency, cost-effectiveness, and the traditional rules of evidence in investor-state dispute settlement.<sup>120</sup>

In *ZF Automotive*, a Hong Kong-based electronics manufacturer, Luxshare, began arbitration in Germany against ZF, a Michigan-based automotive parts manufacturer.<sup>121</sup> The District Court for the Eastern District of Michigan granted Luxshare’s request for discovery from ZF and two of its senior officers.<sup>122</sup> ZF argued the district court should stay discovery until the Supreme Court decided *Servotronics*, since that decision would control the outcome of ZF’s case.<sup>123</sup> The court disagreed, because “the current law in the Sixth Circuit [was] that § 1782 discovery may be used for private commercial arbitrations.”<sup>124</sup> ZF petitioned for certiorari even before the Sixth

<sup>117</sup> See *id.* (stating holding).

<sup>118</sup> See Brief for the United States as Amicus Curiae Supporting Respondents at 32, *Servotronics, Inc. v. Rolls-Royce PLC*, 141 S. Ct. 1684 (2021) (Mem.) (No. 975 F.3d 689 (7th Cir. 2020) (No. 20-794) 2021 WL 2714670 (stating “the first international agreements containing provisions for investor-state arbitration were not adopted until several years later.”); see also Frankel, *supra* note 111 (describing Department of Justice policy concerns).

<sup>119</sup> See Brief for the United States, *supra* note 118, at 32 (arguing “investor-state arbitration is not properly understood as a ‘proceeding in a foreign or international tribunal’”).

<sup>120</sup> See *id.* (outlining concerns about impact on investor-state arbitration).

[I]njecting broad discovery, aided by the assistance of U.S. courts, into streamlined investor-state arbitrations could undermine the efficiency and cost-effectiveness of those mechanisms. Doing so could upset settled expectations of investors and foreign states that select a particular arbitral regime, including rules applying to discovery, by allowing one party, or potentially both, to circumvent those settled rules. And to the extent that the availability of broad, court-aided discovery would dissuade investors and foreign states from selecting that model, it could hinder certain benefits that stem from the availability of investor-state arbitration.

*Id.*

<sup>121</sup> See Matthew Adler et al., *SCOTUS to Resolve Circuit Split After All—Can Federal Courts Order Discovery for Use in Private, Commercial International Arbitrations?*, JD SUPRA (Dec. 21, 2021), <https://www.jdsupra.com/legalnews/scotus-to-resolve-circuit-split-after-7429313/> (outlining background and significance of *ZF Automotive* within context of circuit split).

<sup>122</sup> See *Luxshare, LTD. v. ZF Auto. US, Inc.*, 555 F. Supp. 3d 510, 513 (E.D. Mich.), *cert. granted before judgment*, 142 S. Ct. 637 (2021), and *rev’d*, No. 21-401, 2022 WL 2111355 (U.S. June 13, 2022) (denying ZF’s motion to stay and granting Luxshare’s motion to compel discovery).

<sup>123</sup> See *id.* at \*2 (summarizing ZF’s argument that it would likely succeed on merits of appeal).

<sup>124</sup> See *id.* (citing *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 723 (6th Cir. 2019) (noting grant of certiorari

Circuit ruled on its appeal, pitching its case as the ideal vehicle for the Court to finally resolve the § 1782 question given the withdrawal of the *Servotronics* case.<sup>125</sup>

#### IV. ANALYSIS

In *ZF Automotive*, the Supreme Court firmly rejected the interpretation of the phrase “foreign or international tribunal” in § 1782 as encompassing private international arbitral proceedings.<sup>126</sup> The Court reached this conclusion based on the plain language of the phrase and its context within the overall statute, reasoning that the background, congressional intent, and legislative history also supported its conclusion.<sup>127</sup> The Court compared § 1782 to the FAA as part of its discussion of congressional intent, but did not address other policy concerns, notably the implications of the decision for the efficiency of international arbitrations.<sup>128</sup> This Note’s analysis therefore considers two main questions.<sup>129</sup> First, is the Court’s interpretation of the phrase “foreign or international tribunal” supported by the plain meaning, statutory context, and legislative history?<sup>130</sup> And second, what policy implications follow from the ruling, particularly for the efficiency of international arbitration?<sup>131</sup>

##### A. *The Ordinary Meaning, Statutory Context, and Legislative History of*

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does not itself change binding precedent). *ZF* appealed to the Sixth Circuit but to no avail; the Sixth Circuit agreed *ZF* could not establish a likelihood of success on the merits based only on a grant of certiorari, and in any event, the Supreme Court had by then dismissed the *Servotronics* case. See *Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021).

<sup>125</sup> See Petition for A Writ of Certiorari Before Judgment at 5, *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 637 (2021) (Mcm.) (No. 21-401) 2021 WL 4173622 (noting “if *Servotronics* is dismissed, the existing circuit-split and the disuniformity and uncertainty it engenders will persist.”)

<sup>126</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*3 (U.S. June 13, 2022) (stating holding).

<sup>127</sup> See *id.* at 5-8 (analyzing text of statute, statutory context, and legislative history).

<sup>128</sup> See *id.* at 7 (comparing § 1782 to FAA). *Contra Intel*, 542 U.S. at 264-65 (addressing policy implications by outlining § 1782 factors for district courts to consider).

<sup>129</sup> See discussion *infra* pp. 69-92 (discussing three main questions for interpretation of § 1782).

<sup>130</sup> See discussion *infra* pp. 69-82 (discussing legislative history).

<sup>131</sup> See discussion *infra* pp. 82-92 (discussing policy concerns).

*"Foreign or International Tribunal"*

The meaning of the phrase "foreign or international tribunal" in § 1782 was the sole issue before the Court in *ZF Automotive*.<sup>132</sup> The full provision reads "[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 . . . ."<sup>133</sup> The Second, Fifth, and Seventh Circuits considered the phrase "foreign or international tribunal" could either include or exclude private arbitrations, and was therefore ambiguous.<sup>134</sup> The Sixth Circuit disagreed, reasoning that other courts and jurists regularly used the word "tribunal" to refer to private commercial arbitral panels.<sup>135</sup> Moreover, the court reasoned that where the word was used elsewhere in the statute, its meaning did not preclude its application to an arbitral proceeding.<sup>136</sup> The Supreme Court in *ZF Automotive* also found ambiguity in the word "tribunal" standing alone.<sup>137</sup> The Court therefore focused on the use of the word within a phrase, reasoning that both "foreign tribunal" and "international tribunal" are phrases that connote sovereign authority.<sup>138</sup> The Court noted that the later provisions § 1782 support this reading by giving the district courts the option

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<sup>132</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*3 (U.S. June 13, 2022) (stating question at issue).

<sup>133</sup> See 28 U.S.C. § 1782(a) (granting district courts discretionary power to order discovery for use in foreign proceedings).

<sup>134</sup> See *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021) ("In both common and legal parlance, the phrase 'foreign or international tribunal' can be understood to mean only state-sponsored tribunals [or] . . . to include private arbitration panels. Both interpretations are plausible."); see also *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999) ("In our view, the term 'foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here."); *Rep. of Kazakhstan v Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (following Second Circuit's observation that "foreign or international tribunal" meaning was ambiguous).

<sup>135</sup> See *In re Application*, 939 F.3d at 723 ("[T]he text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels . . . .") The court also provided examples of court decisions and jurists using "tribunal" to describe arbitration. *Id.* at 720-21.

<sup>136</sup> See *id.* at 722-23 (analyzing meaning of "tribunal" throughout § 1782). The Sixth Circuit identified the primary feature of a "tribunal" based on the statute to be evidence-gathering, not being a government body. *Id.* Commentary on *In re Application* argues the Sixth Circuit was wrong to direct its analysis only to the word "tribunal," because the phrases "international tribunal" or "foreign tribunal" are much more likely to refer to a governmental body. See Harvard Law Review, *supra* note 94, at 2634 (analyzing use of phrases).

<sup>137</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*5 (U.S. June 13, 2022) (reasoning "tribunal" standing alone "shed little light" and did not exclude private adjudicatory bodies).

<sup>138</sup> See *ZF Auto.*, 2022 WL 2111355, at \*6 (observing that phrase "foreign leader" brings to mind "an official of a foreign state, not a team captain of a European football club.")

to adopt the procedures of “the foreign country or the international tribunal” when ordering discovery under the statute.<sup>139</sup>

The Court then addressed the legislative history and purpose of the statute.<sup>140</sup> Here, the Court reasoned that with the 1964 amendments to § 1782, Congress intended to expand the range of foreign and international bodies U.S. courts could assist, but did not intend to expand assistance to private bodies.<sup>141</sup> Congress’ intent in appointing the Commission on International Rules of Judicial Procedure was to improve cooperation between the U.S. and foreign countries.<sup>142</sup>

This reading departs from some previous interpretations of the Congressional intent behind the revision of § 1782 in 1964.<sup>143</sup> There is broad agreement that the Commission on International Rules of Judicial Procedure aimed to liberalize procedures for international judicial cooperation.<sup>144</sup> In *Intel*, the Court reasoned that Congress amended § 1782 in 1964 as a means to improve procedures for judicial assistance, which included “administrative and quasi-judicial proceedings abroad.”<sup>145</sup> In describing quasi-judicial proceedings, the Court mentioned “arbitral tribunals” as an example.<sup>146</sup> The Rapporteur of the Commission, whose writings the *Intel* Court cited, believed a “tribunal” included “arbitral tribunals or single arbitrators.”<sup>147</sup> The *ZF Automotive* decision clarifies that any such “quasi-judicial agencies” or

<sup>139</sup> See *id.* (discussing congruity of holding with other statutory provisions).

<sup>140</sup> See *id.* at \*7 (analyzing statute’s history and purpose).

<sup>141</sup> See *id.* (“From the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create.”) The Court also noted the statute’s primary purpose is to foster comity and encourage reciprocal assistance with foreign governments. See *id.*

<sup>142</sup> See *id.* (describing Commission’s mandate)

<sup>143</sup> See *In re Application*, 939 F.3d at 723 (“[T]he text, context, and structure of § 1782(a) provide no reason to doubt that the word ‘tribunal’ includes private commercial arbitral panels . . . .”) *Contra* Nat’l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) (“[L]egislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”); Harvard Law Review, *supra* note 94, at 2634 (arguing “foreign tribunal” or “international tribunal” usage meant sovereign bodies when amendment passed).

<sup>144</sup> See S. REP. Act of Sept. 15, 1964, Pub. L. No. 88-1580, at 3793 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3793 (describing commission’s purpose to “investigate and study present practices in judicial assistance and judicial cooperation between the United States and Foreign Countries, and to make recommendations for the improvement of international legal practice and methods of procedure”); see also Jones, *supra* note 60, at 516, 522, 557-58 (describing U.S. judicial assistance regime problems before 1964 amendment to § 1782); Smit, *supra* note 64, at 229 (discussing amendment’s shift toward more liberal judicial cooperation regime).

<sup>145</sup> See *id.* at 258 (discussing congressional intent in amending statutory language from “court” to “tribunal”).

<sup>146</sup> See *id.* (quoting Smit, *supra* note 17, at 1026–27 nn.71, 73) (explaining body Commission believed “tribunal” included).

<sup>147</sup> See Smit, *supra* note 17, at 1021 (presenting Commission’s understanding of what “tribunal” includes).

“arbitral tribunals” must be governmental in nature, and does not include privately-constituted panels.<sup>148</sup>

This reading makes sense in light of the history of private, international, commercial arbitration, which essentially did not exist at the time of the 1964 amendments to § 1782.<sup>149</sup> It is therefore probable that Congress simply did not have a specific intent regarding application of the statute to private arbitration.<sup>150</sup> Although international commerce certainly expanded during the post-World War II period, growth in cross-border trade and investment in recent decades far outstrips any previous era.<sup>151</sup> As noted, *Intel* mentions “arbitral tribunals” only once as an example of the kinds of non-conventional courts the Commission believed could potentially fall within the amended statute.<sup>152</sup> While the interpretation of a statute can evolve over time to meet changes in society, it seems unlikely that Congress considered permitting parties of private arbitrations to seek discovery under § 1782.<sup>153</sup>

The Court in *ZF Automotive* also firmly rejected Luxshare’s argument that private arbitral tribunals are governmental because national courts play a role in enforcing their decisions.<sup>154</sup> The Fourth Circuit had relied on this reasoning in the first *Servotronics* decision, where it concluded that the extent of judicial oversight provided in both the FAA and in the United Kingdom’s arbitration statute was sufficient to put private arbitrations under the aegis of state authority.<sup>155</sup> According to *ZF Automotive*, this view of arbitration improperly “erase[s] any distinction between private and governmental

<sup>148</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257-58 (2004) (noting Congress amended § 1782 to improve assistance to quasi-judicial agencies as well as courts).

<sup>149</sup> See *Harvard Law Review*, *supra* note 94, at 2634 (noting private commercial arbitration uncommon during § 1782’s enactment).

<sup>150</sup> See *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020) *cert. granted*, 141 S. Ct. 1684 (2021) (“*Servotronics* relies heavily on the professor’s inclusion of ‘arbitral tribunals’ in this footnoted list, but this reliance is misplaced. The quotation from the professor’s article appears in the Court’s opinion as part of an explanatory parenthetical. There is no indication that the phrase ‘arbitral tribunals’ includes private arbitral tribunals.”)

<sup>151</sup> See *Nyarko*, *supra* note 35, at 7 (discussing recent growth in movement of goods and services internationally); see also *Drahozal*, *supra* note 29, at 94 (discussing recent increase in international commercial transactions and preference for arbitration).

<sup>152</sup> See *Intel*, 542 U.S. at 259 (quoting writings of rapporteur of Commission);

<sup>153</sup> See *Harvard Law Review*, *supra* note 94, at 2634 (“[T]he word [tribunal] seems to carry a narrower meaning in the statute that would probably not embrace private commercial arbitration, even if that type of dispute resolution were as important at the time of enactment as it is now.”)

<sup>154</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*8 (U.S. June 13, 2022) (dismissing argument as “implausibly broad definition of a governmental adjudicative body”).

<sup>155</sup> See *id.* at 214 (“[C]ontrary to Boeing’s general assertion that arbitration is not a product of ‘government-conferred authority,’ under U.S. law, it clearly is.”)

adjudicative bodies.”<sup>156</sup> In *Intel*, the Supreme Court took a functional approach in assessing whether the European Directorate-General Competition was a “foreign or international tribunal,” raising the issue of whether a similarly functional appraisal of private arbitrations would put them inside or outside the statute’s scope.<sup>157</sup> The characteristics the Court found persuasive were the European Directorate-General Competition’s status as a first-instance decision-maker, its evidence-gathering function, and the European courts’ role in reviewing its decisions.<sup>158</sup> Arbitral tribunals are decision-makers because they determine the outcome of disputes in a manner that is binding on the parties.<sup>159</sup> They gather evidence through document exchange between the parties, in accordance with their prior agreements.<sup>160</sup> In the United States, arbitral decisions are also subject to limited judicial review whereby federal courts can confirm awards or vacate them if they were reached through corruption, fraud, misconduct, or the arbitrators’ bias.<sup>161</sup> Parties to private arbitrations therefore have no opportunity for appellate review of the merits of their case, only the existence of misconduct.<sup>162</sup> The holding in *ZF Automotive*, that arbitral tribunals do not possess state

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<sup>156</sup> See *ZF Automotive*, 2022 WL 2111355, at \*8 (distinguishing private arbitrations from governmental adjudicative bodies).

<sup>157</sup> See *Intel*, 542 U.S. at 257-58 (2004) (noting DG-Competition characteristics); see also Strong, *supra* note 4, at 303 (“In reaching this conclusion, the Supreme Court interpreted the term ‘foreign or international tribunal’ in section 1782 as including ‘first-instance decision-makers’ that render ‘dispositive rulings’ that are subject to some form of judicial review.”)

<sup>158</sup> See *Intel*, 542 U.S. at 258 (explaining how “tribunal” fit within statute); see also *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 725 (6th Cir. 2019) (noting Supreme Court’s assessment “primarily focused on the decision-making power of the Commission . . .”)

<sup>159</sup> See Federal Arbitration Act, 9 U.S.C. § 2 (declaring arbitration contracts to be “valid, irrevocable, and enforceable”).

<sup>160</sup> See IBA Rules, *supra* note 9, art. 3-6 (providing detailed model rules for exchange of documents, witness statements, and expert reports); see also Vercauteren, *supra* note 10, at 346 (“The nature and the extent of disclosure between the parties will be influenced by the principle of party autonomy: it will be subject to the agreement the parties have reached and to the arbitrator’s discretion.”)

<sup>161</sup> See 9 U.S.C. § 10 (granting federal courts jurisdiction to confirm or vacate awards).

<sup>162</sup> See *In re Guo*, 965 F.3d 96, 107 (2d Cir. 2020), *as amended* (July 9, 2020) (“[T]he limited review provided to parties to CIETAC arbitrations in Chinese courts and the role of the Chinese government in enforcing awards are not enough to render CIETAC a ‘foreign or international tribunal.’”) The grounds for setting aside an arbitration award under Chinese law were just as limited as the grounds in U.S. courts: lack of agreement to arbitrate, improper appointment of arbitrators, or corruption. *Id.*; see also Strong, *supra* note 4, at 303 (“[T]he Directorate-General was in this instance acting as what was effectively the taker of proof for the Court of First Instance and the European Court of Justice (ECJ).”)



authority simply because their decisions receive some court oversight, aligns with *Intel*, where judicial review of decisions was one key trait of a “tribunal.”<sup>163</sup>

### B. Conflict with the FAA

The Court in *ZF Automotive* further reasoned that “[e]xtending § 1782 to include private bodies would also be in significant tension with the FAA . . . because § 1782 permits much broader discovery than the FAA allows.”<sup>164</sup> Under the FAA, only arbitrators, not parties, can subpoena evidence; only the district court where the arbitration is seated can enforce the subpoena; and only mandatorily-produced evidence may be brought before the arbitrator, not other forms of pre-hearing discovery.<sup>165</sup> In contrast, § 1782 permits parties and other interested persons to file a request, and permits them to seek discovery in any district where a person or item is located.<sup>166</sup> The Fourth Circuit reconciled these concerns in *Servotronics I* by noting that § 1782 is designed to assist foreign tribunals in accessing information located in the United States, therefore its purpose is entirely different from that of the FAA.<sup>167</sup> This reasoning means that instead of clashing with the FAA, applying § 1782 to private international arbitration creates a level playing field with domestic arbitration in terms of the ability to obtain discovery through the courts.<sup>168</sup> The Fourth Circuit acknowledged, however, that § 1782 would still allow a foreign arbitral panel to have broader geographical scope than an American panel.<sup>169</sup> The court’s only rationale for this discrepancy was that it was the inevitable result of Congress’ public

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<sup>163</sup> See *ZF Automotive*, 2022 WL 2111355, at \*7 (discussing need to avoid mismatch between domestic and international arbitration).

<sup>164</sup> See *ZF Automotive*, 2022 WL 2111355, at \*7 (dismissing argument that private arbitrations are governmental because courts enforce their decisions); *Intel*, 542 U.S. at 257-58 (2004) (noting availability of judicial review as key feature of “tribunal”).

<sup>165</sup> See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (describing more limited discovery for domestic arbitrations under FAA than international arbitrations under § 1782); see also *Folkman*, *supra* note 72 (comparing FAA § 7 with § 1782).

<sup>166</sup> See *NBC*, 165 F.3d at 187; *Folkman*, *supra* note 72 (comparing FAA § 7 with § 1782).

<sup>167</sup> See *Servotronics*, 954 F.3d at 215-16 (reasoning that under § 1782 district court effectively functions as “a surrogate for a foreign tribunal by taking testimony and statements for use in the foreign proceeding”).

<sup>168</sup> See *id.* (“When viewed in this light, the district court functions no differently than does the foreign arbitral panel or, indeed, an American arbitral panel.”)

<sup>169</sup> See *id.* (“If such a geographical extension were inappropriate, then Congress would not have enacted § 1782 at all. But it did—and for good reason—and the parties are bound by it. Moreover, any undue burdens that might result in this regard can and should be managed by the district court with the discretion conferred on it by § 1782(a).”)

policy decision, an interpretation the Supreme Court declined to follow in *ZF Automotive*.<sup>170</sup>

### C. Efficiency Implications

Perhaps the most commonly-advanced policy argument against broadening § 1782 to encompass private international arbitration was that allowing discovery in the United States would add undue costs and lengthen the time required for private arbitration.<sup>171</sup> This argument is often expressed in terms of international arbitration being a more efficient option than cross-border litigation.<sup>172</sup> The Department of Justice has argued that allowing parties to investor-state arbitrations to use § 1782 would “undermine the efficiency and cost-effectiveness of those mechanisms” and “could upset settled expectations of investors and foreign states that select a particular arbitral regime[.]”<sup>173</sup> Practitioners similarly cite high costs as the biggest drawback of international arbitration.<sup>174</sup> Some of those high costs relate to the gathering and exchange of evidence, which can be extensive even without access

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<sup>170</sup> See *ZF Automotive*, 2022 WL 2111355, at \*7 (following Seventh Circuit in observing that “[i]t’s hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations.”) (quoting *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021)).

<sup>171</sup> See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer J., dissenting) (opining that expansive discovery would contradict core purpose of arbitration as efficient alternative to litigation); see also *Servotronics*, 954 F.3d at 214 (summarizing efficiency concerns).

Boeing advances a parade of horrors that it asserts would follow from applying § 1782(a) to arbitration proceedings . . . [arguing that] application of § 1782(a) would broaden the procedural scope of arbitration and make available in foreign arbitrations the full discovery process available under the Federal Rules of Civil Procedure. This would, Boeing contends, inject extraordinary delay and costs into arbitrations, thereby defeating their purpose and undermining parties’ bargained-for method of dispute resolution.

*Id.*; *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 730 (6th Cir. 2019) (rejecting argument that authorizing discovery would defeat main purpose of arbitration as efficient alternative).

<sup>172</sup> See *In re Application*, 939 F.3d at 730 (citing efficiency as main purpose of arbitration).

<sup>173</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners at 32, *ZF Automotive U.S., Inc. v. Luxshare, Ltd.*, 2022 WL 333383 (U.S.) (arguing broader discovery could destabilize investor-state arbitration regime); Brief for the United States, *supra* note 118, at 32 (same).

<sup>174</sup> See *White & Case & Queen Mary Univ.*, *supra* note 15, at 7 (finding that respondents most commonly cited cost as main drawback of international arbitration); *Trentacosta & Imbrogno*, *supra* note 37, at 32 (“Despite popular belief, arbitration is not always cheaper than litigating a case in the court system. This is especially true in the event of a highly complex, multinational dispute.”); *von Mehren*, *supra* note 12, at \*2 (describing cost-effectiveness and potential short timeline for arbitration).

to discovery in the United States.<sup>175</sup> Other costs are driven by parties and their legal representatives engaging in “dilatory tactics,” and arbitrators being unwilling or unable to impose sanctions which might prevent delays.<sup>176</sup> Seeking discovery in the United States under § 1782 also requires sufficient time for the party’s application to make its way through the docket of the relevant district court.<sup>177</sup> This risks adding to the cost of already-costly proceedings.<sup>178</sup> Therefore, although the Court did not address efficiency concerns in *ZF Automotive*, the decision will allay concerns about allowing American-style discovery into international arbitration, where it has never been part of the traditional practice.<sup>179</sup> This is particularly true of cases where expansive discovery was not part of the parties’ prior agreements.<sup>180</sup>

Yet while the *ZF Automotive* decision will promote efficiency, it was arguably not the only way to do so.<sup>181</sup> The Court in *Intel* addressed efficiency concerns by emphasizing that § 1782 grants the district courts *discretion* to decide whether to grant a discovery request and by providing factors to guide those decisions.<sup>182</sup> The four factors outlined in *Intel* were: whether the requestor cannot otherwise access the information; whether the nature and character of the foreign tribunal makes it receptive to the assistance; whether the request conceals an effort to circumvent the tribunal’s own evidence-

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<sup>175</sup> See IBA Rules, *supra* note 9, art. 3-6 (outlining detailed rules for exchange of documents, witness statements, and expert reports).

<sup>176</sup> See *White & Case & Queen Mary Univ.*, *supra* note 15, at 7 (explaining costs and consequences of lack of sanctions); *Trentacosta & Imbrogno*, *supra* note 37, at 31 (noting flexibility can cause squabbling among parties).

<sup>177</sup> See *Folkman*, *supra* note 72 (discussing potential mootness if arbitration outpaced § 1782 application decision).

<sup>178</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268-69 (2004) (Breyer, J. dissenting) (arguing proliferation of discovery into international arbitration defeats judicial cooperation goals of § 1782).

To the extent that expensive, time-consuming battles about discovery proliferate, they deflect the attention of foreign authorities from other matters those authorities consider more important; they can lead to results contrary to those that foreign authorities desire; and they can promote disharmony among national and international authorities, rather than the harmony that § 1782 seeks to achieve. They also use up domestic judicial resources and crowd our dockets.

*Id.*

<sup>179</sup> See *Prague Rules*, *supra* note 24 (advocating greater efficiency through adoption of civil law practices); *Bonke*, *supra* note 24 (discussing Prague Rules as potential solution to discovery-related cost and time concerns).

<sup>180</sup> See *Vercauteren*, *supra* note 10, at 346 (describing how principle of party autonomy limits discovery in arbitration to only disclosures parties agree to).

<sup>181</sup> See discussion *infra* pp. 87-90.

<sup>182</sup> See *Intel*, 542 U.S. at 265 (outlining four factors for district court consideration when deciding § 1782 applications).

gathering; and whether the request is unduly intrusive or burdensome.<sup>183</sup> The Court in *ZF Automotive* could have authorized the district courts to apply these factors to private arbitrations, potentially giving some factors more weight.<sup>184</sup> For example, the district courts could have simply refused requests if the “nature” of the foreign tribunal was a private arbitral panel, particularly where the parties had not agreed among themselves to use § 1782 requests, or if the arbitrators themselves opposed the discovery request.<sup>185</sup> The district court could also give additional weight to the “unduly intrusive or burdensome” factor if the request caused unreasonable delays and costs.<sup>186</sup> As the Fourth Circuit also noted, the process envisaged in § 1782 does not grant parties the full scope of discovery open to litigants under the Federal Rules of Civil Procedure.<sup>187</sup> The process sees the district court serving a limiting role in procuring certain evidence that the party specifies, not granting the party themselves the ability to seek unlimited discovery.<sup>188</sup> Seen in this light, the *Intel* decision already gave the district courts an analytical framework to accept or reject § 1782 requests for use in private international arbitrations.<sup>189</sup> By finding that the statute’s language and purpose simply do not encompass private arbitration, the *ZF Automotive* decision relieves them of the need to conduct this assessment in the first place.<sup>190</sup>

#### D. Remaining Questions

*ZF Automotive* provided a clear answer to the question driving the § 1782 circuit split, and impliedly addressed practitioners’ concerns about the expansion of discovery in international arbitration.<sup>191</sup> It leaves some § 1782 questions unresolved, however, and raises new ones.<sup>192</sup> Perhaps most obviously, the decision will hinder parties’ ability to obtain evidence that

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<sup>183</sup> See *id.* at 265 (providing four factors to guide district courts).

<sup>184</sup> See *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proc.)*, 939 F.3d 710, 730 (6th Cir. 2019) (discussing potential use of factors to counteract efficiency concerns).

<sup>185</sup> See *id.* (discussing application of factors).

<sup>186</sup> See *Intel*, 542 U.S. at 268-69 (Breyer, J. dissenting) (expressing concern about potential “fishing expeditions” by private arbitration parties).

<sup>187</sup> See *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 215 (4th Cir. 2020) (addressing efficiency concerns).

<sup>188</sup> See *id.* (addressing limited role of district courts).

<sup>189</sup> See *Intel*, 542 U.S. at 265 (outlining four factors for district court consideration when deciding § 1782 applications).

<sup>190</sup> See discussion *supra* pp. 64-77 (presenting Court’s conclusion based on statutory language and purpose).

<sup>191</sup> See Daniels and Scoville, *supra* note 24 (discussing impact of decision).

<sup>192</sup> See Daniels and Scoville, *supra* note 24 (outlining questions arising from decision).

supports their claims or defenses but happens to be located in the United States.<sup>193</sup> Parties may still request evidence from other parties, and they can empower arbitrators to compel disclosure.<sup>194</sup> But because of the geographic limitations of the FAA, they cannot ask a United States court to enforce a subpoena if they are seated outside the United States.<sup>195</sup> The decision might also cause even more litigation to clarify whether a particular arbitral tribunal has sufficient governmental authority.<sup>196</sup> The Court itself recognized that it left open the possibility that an investor-state arbitral tribunal might, in different circumstances, exercise governmental authority.<sup>197</sup> Although one party to the dispute in *Alix Partners* was the state of Lithuania, the arbitration itself was an ad hoc panel constituted solely for that dispute.<sup>198</sup> Investor-state arbitrations that take place at permanent institutions or courts potentially have sufficient governmental authority, but this will only be decided in future cases.<sup>199</sup>

## V. CONCLUSION

Prior to the *ZF Automotive* decision, most courts held that the plain meaning of the word “tribunal” in 28 U.S.C. § 1782 was ambiguous: it could plausibly either include or exclude private international arbitration. Legislative history, contemporary writings, and the *Intel* decision also suggested that Congress intended to liberalize the statute, including applying it to a

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<sup>193</sup> See *Luxshare, LTD. v. ZF Auto. US, Inc.*, No. 20-MC-51245, 2021 WL 3629899, at \*5 (E.D. Mich. Aug. 17, 2021), *cert. granted*, 142 S. Ct. 637 (2021) (No. 21-401) (reasoning § 1782 discovery serves public interest by supporting truth in foreign proceedings); Daniels and Scoville, *supra* note 24 (noting parties have less ability to obtain information outside arbitration rules or applicable laws).

<sup>194</sup> See Vercauteren, *supra* note 10 at 346 (2012) (noting parties’ disclosure agreements and arbitrators’ powers).

<sup>195</sup> See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (describing more limited discovery for domestic arbitrations under FAA than international arbitrations under § 1782); see also discussion, *supra* p. 78 (outlining limitations in FAA § 7).

<sup>196</sup> See Ted Folkman, *Case of the Day: ZF Automotive v. Luxshare*, FOLKMAN LLC (2022), <https://folkman.law/2022/06/14/case-of-the-day-zf-automotive-v-luxshare/> (last visited Jun 22, 2022) (outlining reasons why investment treaty arbitration might well be governmental in nature); Daniels and Scoville, *supra* note 24 (noting likelihood of future litigation on this point).

<sup>197</sup> See *ZF Auto. US, Inc. v. Luxshare, Ltd.*, No. 21-401, 2022 WL 2111355, at \*9-10 (U.S. June 13, 2022) (“None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority.”)

<sup>198</sup> See *id.* (reasoning ad hoc nature of panel took it out of the scope of governmental authority)

<sup>199</sup> See Folkman, *supra* note 196 (noting need for further clarity on statute’s application to investor-state disputes); *Supreme Court Sharply Limits Federal District Courts’ Authority to Order Discovery in International Arbitration Proceedings*, NAT’L L’ REV., <https://www.natlawreview.com/article/supreme-court-sharply-limits-federal-district-courts-authority-to-order-discovery> (last visited Jun 22, 2022) (same).

broader range of institutions than conventional courts and governmental agencies. *ZF Automotive* has clarified that a “tribunal” must have governmental authority, and that the liberalizing trend does not extend to private arbitrations. The decision aligns with the history of private international commercial arbitration. This was an uncommon form of dispute settlement in 1964, meaning Congress likely did not have a specific intent toward it. The decision also avoids conflict with the FAA.

The Supreme Court did not explicitly address efficiency in *ZF Automotive*, but the decision does respond to genuine concerns about delays and costs arising from additional discovery in international arbitration. The holding should allay some criticism of the increasing trend toward American-style discovery. The Court could have reiterated the *Intel* decision’s guidance for district courts to exercise their discretion on § 1782 requests. This discretion includes the ability to refuse requests in cases where the parties or the tribunal do not want the assistance. However, leaving each assessment wholly in the district courts’ discretion would have increased the burden of § 1782 requests; under *ZF Automotive*, district courts need only determine whether a tribunal is governmental, and may dismiss those that are not. Questions still remain regarding how *ZF Automotive* will play out in practice, but for now, it is at least clear that the district courts may not provide discovery assistance for use in private international arbitration.

*Niamh Gibbons*

