COMMENTS

Servotronics and Certiorari: The Imminent Supreme Court Decision and Why Private International Arbitrations are "Foreign or International Tribunals" Under 28 U.S.C § 1782

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I. INTRODUCTION

Section 1782 of Title 28 of the United States Code provides that a "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."[1] The scope of the latter few words, foreign or international tribunals, has driven a rift between Federal Circuit Courts over the last two decades, namely over whether or not the phrase encompasses private international arbitrations.[2] Just last year alone, three circuits handed down a decision addressing the question directly,[3] with decisions on the issue currently on appeal in the United States Courts of Appeal for the Third and Ninth Circuits.[4] On March 22, 2021, this momentum reached a crescendo as the United States Supreme Court granted certiorari to review the decision of

1. 28 U.S.C. § 1782(a) (1996).

2. *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) (holding that 1782 does not apply to private international arbitrations); Republic of Kaz. v. Biedermann Int'l,168 F.3d 880, 881-83 (5th Cir. 1999); *see also In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020) (holding that discovery assistance under 1782 does extend to commercial arbitration).

3. Hanwei Guo v. Deutsche Bank Sec., 965 F.3d 96 (2d Cir. 2020); Boeing, 954 F.3d at 209; Servotronics v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020).

4. HRC-Hainan Holding Co. v. Yihan Hu, No. 20-15371 (9th Cir. Sep. 14, 2020); *In re* EWG Gasspeicher GmbH, No. 19-mc-109-RGA, 2020 WL 1272612, at *1 (D. Del. Mar. 17, 2020) *appeal docketed*, No. 20-1830 (3d Cir. Apr. 24, 2020).

the United States Court of Appeal for the Seventh Circuit in *Servotronics v. Rolls-Royce,* the most recently published circuit court decision regarding the scope of section 1782.[5] The Supreme Court had addressed the reach of section 1782's applicability once before in 2004 in its opinion in *Intel Corp. v. Advanced Micro Devices*.[6] Though the Court did not directly address whether or not the statute applies to private arbitrations, it did lay the groundwork for the assertion that section 1782 casts a wide net, rejecting categorical limitations on the statute's reach.[7]

Oral argument was set for October 5, 2021.[8] The imminent Supreme Court decision seeks to resolve a widening circuit split and a shapeless body of case law; a result that produces consistency is imperative.[9] This Comment provides a timeline of federal jurisprudence on the issue to frame the surrounding legal and policy context.[10] It then provides a background on international commercial arbitration to provide an understanding of why this area in particular has been one of controversy and inconsistency in relation to the application of 28 U.S.C. 1782.[11] Then, this Comment makes the argument for a Supreme Court decision allowing for discovery assistance in aid of private international arbitration by analyzing the latter within the framework of the former.[12]

II. COMMERCIAL ARBITRATION AND § 1782: A CHRONOLOGY OF FEDERAL JURISPRUDENCE

A. National Broadcasting and Biedermann: The Second and Fifth Circuits Find Private Arbitrations and § 1782 Are on Different Channels

The United States Court of Appeal for the Second Circuit was the first federal appellate circuit to specifically address whether section 1782 applies to private foreign arbitrations in its 1999 decision, *National*

5. *Rolls-Royce*, 975 F.3d at 689, *cert. granted*, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021). Docket No. 20-794, https://www.supremecourt.gov/docket/docketfiles/html/public/20-794.html. On September 24, 2021, the parties filed a joint stipulation to dismiss. Five days later, the case was dismissed from the Supreme Court's docket.

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

7. *Id.* at 256.

8. *Rolls-Royce*, 975 F.3d at 689, *cert. granted*, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).

9. *See* Alejandro A. Nava Cuenca, *Debunking the Myths: International Commercial Arbitration and Section 1782(a)*, 46 YALE J. INT'L L. 155, 156 (2021).

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

Broadcasting Co. v. Bear Stearns.[13] The *Bear Stearns* opinion addressed a request for assistance made by a party to an International Chamber of Commerce (ICC) arbitration based in Mexico.[14] The Second Circuit addressed an appeal from a decision by the United States District Court for the Southern District of New York, which concluded that 28 U.S.C. § 1782 did not apply to "private commercial arbitration under the auspices of non-governmental organizations."[15] The dispute in question arose from a contract for programming and services between the National Broadcasting Company (NBC) and Azteca, a privately-owned Mexican broadcasting company, which contained an agreement providing that all disputes would be resolved through arbitration administrated by the ICC under Mexican law.[16] In anticipation of this arbitration, but prior to the appointment of the arbitrators, NBC made an *ex parte* request under § 1782 to compel the production of discovery materials by serving subpoenas on six third-party financial institutions.[17] The subpoenas were initially authorized but subsequently quashed by Judge Sweet of the Southern District, a decision which the Second Circuit affirmed.[18]

In its *de novo* review of the district court's interpretation of section 1782, the Second Circuit first looked to the plain language of the statute itself, specifically the phrase "foreign or international tribunal."[19] The circuit court concluded that the phrase was "sufficiently ambiguous" and did not "necessarily include or exclude" the private arbitral panel, and accordingly focused its gaze on the statute's legislative intent and history to further divine its meaning.[20] The court looked to the 1964 amendments to the statute, which introduced the phrase tribunal to "make it clear that assistance is not confined to proceedings before conventional courts."[21] Despite this, the Second Circuit concluded that section 1782 assistance did not extend to arbitral panels formed pursuant to a private agreement, finding it was "clear" that the authors only had in mind governmental bodies "acting as state instrumentalities or with the authority of the

13. Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration,* 47 STAN. J. INT'L L. 51, 61 (2011).

14. Nat'l Broadcasting Co. v. Bear Stearns, 165 F.3d 184, 185 (2d Cir. 199).

15. *Id.* at 185-86; *see also In re* The Application of National Broadcasting Co., No. M–77, 1998 WL 19994 (S.D.N.Y. Jan. 21, 1998).

16. *Bear Stearns*, 165 F.3d at 186.

17. *Id.*

18. *Id.*

19. *Id.* at 188.

20. *Id.*

21. *Id.* at 188-89.

state."[22] Because the Second Circuit held that section 1782 did not apply to private arbitrations, it did not address the possible conflict between assistance available under section 1782 and the judicial assistance already provided to arbitrations under the Federal Arbitration Act (FAA), specifically 9 U.S.C. § 7.[23]

The United States Court of Appeal for the Fifth Circuit quickly aligned with the Second Circuit, holding less than two months later in *Republic of Kazakhstan v. Biedermann International* that section 1782 did not apply to private arbitrations.[24] *In Biedermann,* the Fifth Circuit addressed an appeal from an order of the United States District Court for the Southern District of Texas compelling deposition testimony and the production of documents from a third party to be used in an arbitral proceeding convened before the Arbitration Institute of the Stockholm Chamber of Commerce.[25] In its analysis, the Fifth Circuit closely followed the Second Circuit's reasoning in *National Broadcasting*, echoing the Second Circuit's observation that the phrase "foreign or international tribunal," as used in section 1782(a), was ambiguous and that the phrase must be analyzed within the context of the statute's history and purpose.[26]

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22. *Id.* at 189-91. The Second Circuit found it significant that the phrase "international tribunal" was derived from the statutory predecessor of § 1782, the now-repealed 22 U.S.C. § 270, which "applied only to intergovernmental tribunals" formed pursuant to treaties between the United States and other Countries; this "made it clear" that one aim of the new legislation was to expand assistance to international agreements in which the United States was not a formal party. *Id.* at 189-90. The Second Circuit summated that this assessment of legislative history, paired with the Congressional silence as to the statute's applicability to private tribunals, warranted the conclusion that the modern version of § 1782 "intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies," *Id.* at 190.

23. *Id.* at 187-88 (The Second Circuit notes that the "The FAA applies to private commercial arbitration conducted in this country; and it applies also to arbitrations in certain foreign countries by virtue of legislation implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . and the Inter-American Convention on International Commercial Arbitration"). *See also* 9 U.S.C. § 7 (provides that "the arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt").

24. Beale, *supra* note 13, at 63; Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999).

25. *Biedermann Int'l*, 168 F.3d at 881.

26. *Id.* at 881-82 (Much like the Second, the Fifth Circuit looked to the introduction of the phrase "tribunal" to replace the word "court" in the 1964 amendments, finding this to be evidence of "Congress's intention to expand the discovery provision beyond conventional courts to include "foreign administrative and quasi-judicial agencies," but that this did not extend to cover privately-formed entities).

The Fifth Circuit then concluded that the policy aims behind section 1782 and the policies favoring arbitration warranted a finding that section 1782 did not extend to private international arbitrations.[27]

B. Intel Corp. v. Advanced Micro Devices: The Supreme Court Reconfigures the Processing of § 1782 Requests

Five years after the decisions of the Second and Fifth Circuits, the Supreme Court provided a decision much in contrast with their narrow interpretations, setting forth an expansive, functional approach to determining what is and what is not a "foreign or international tribunal" in Justice Ginsburg's opinion in *Intel Corp. v. Advanced Micro Devices*.[28] The underlying controversy in *Intel* dealt with a discovery request made by the respondent, Advanced Micro Devices (AMD), following their filing of an anti-trust complaint against the petitioner, Intel, before the Directorate-General (DG) of the Competition Commission of the European Communities.[29] AMD sought assistance from the United States District Court for the Northern District of California to require Intel to produce documents potentially relevant to the complaint.[30] The Northern District of California denied the requested discovery, concluding that it was not authorized by section 1782, a decision that the Ninth Circuit subsequently reversed, remanding the application to be considered on its merits.[31] The Supreme Court agreed with the Ninth Circuit, holding that the district court did have the authority to hear the request, finding the DG to be a "tribunal" to the extent that it acts as a "first-instance decisionmaker."[32]

The Supreme Court first outlined the history of section 1782, summating that it was a "product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals."[33] Turning to an analysis of the

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27. *Id.* at 882-83 (The Fifth Circuit noted that § 1782 was "enlarged to further comity among nations" and stated that making the broad discovery assistance of § 1782 available to private foreign arbitrations would undermine private arbitration's benefits as a speedy, cost-efficient, and effective means of dispute resolution).

28. *See* Intel Corp. v. Advanced Micro Devices, 542 U.S. 241 (2004); Laura Emmy Malament, *Making or Breaking Your Billion Dollar Case: U.S. Judicial Assistance to Private International Arbitration under 28 U.S.C. § 1782(a)*, 67 VAND. L. REV. 1213, 1219 (2014).

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

30. *Id.*

31. *Id.*

32. *Id.* at 247.

33. *Id.* at 247-49. Congress first allowed for Foreign tribunals to request the aid of federal courts in 1855, which originally came in the form of Letters Rogatory, *Id.* at 247. *See also* Act of

language of the statute, the Court determined that the requested assistance met the requirement that it be "for use in a foreign or international tribunal," finding that section 1782 permitted assistance to proceedings where the DG of the Commission exercised "quasi-judicial powers."[34] In making this determination, the Court emphasized the DG's capacity to act as a first-instance decision-maker, specifically in its ability to receive complaints, weigh evidence, and issue a final decision reviewable by European Courts.[35] The Court laid a substantial base supporting the view that section 1782 should be interpreted broadly, rejecting categorical limitations on the statute's reach.[36]

The Supreme Court subsequently outlined four factors that a district court may consider when exercising its discretion to grant, modify, or deny a discovery request made pursuant to section 1782.[37] First, the need for discovery aid is ordinarily not as apparent when a person from whom discovery is sought is a participant in the foreign proceeding.[38] Second, a court may take into account the nature and character of the foreign tribunal and its proceedings, as well as the receptivity of the entity to U.S. judicial assistance.[39] Third, the district court may assess whether the request conceals an attempt to circumvent proof-gathering restrictions or other policies of foreign countries or the United States.[40] Last, unduly burdensome requests may be rejected or trimmed.[41] Though the Court did not address a private entity specifically, it cemented a liberal interpretation of section 1782, providing guidelines for a district court to consider when exercising its discretion within this broad framework.[42]

Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630. In 1958, Congress created a commission to revise and improve the existing practices of judicial assistance to foreign countries, which produced the revisions enacted by the 1964 amendments. *See Intel*, 542 U.S. at 248-49; *see also* Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015-16 (1965).

34. *Intel*, 542 U.S. at 257-58.

35. *Id.* at 254-55, 258. In its discussion of the phrase "foreign or International tribunal" the Court quoted a law review article by Hans Smit, one of the principle drafters of the 1964 amendments, which stated that "the term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts," *Id.* at 258; *see* Smit, *supra* note 33, at 1026-27.

36. *Intel*, 542 U.S. at 255, 259, 265; Malament, *supra* note 28, at 1227.

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

38. *Id.* at 264.

39. *Id.*

40. *Id.* at 265.

41. *Id.*

42. *See* Beale, *supra* note 13, at 65-66; Malament, *supra* note 28, at 1227.

C. Confusion and Inconsistency in the District Courts following Intel: Questions Over the Decision's Impact on the Statute's Reach

In the three years following *Intel*, commentators identified a trend of interpreting section 1782 broadly so as to encompass private foreign arbitrations emerging in the district courts.[43] This trend then began to reverse as quickly as it had developed, with many district courts finding that discovery assistance under section 1782 is unavailable to international private arbitrations.[44] The resulting body of case law bore differing analytical approaches resulting in divided outcomes.[45] However, a pattern of consistency had emerged in district courts that applied a functional analysis, consistent with the Supreme Court's discretionary framework laid out in *Intel*.[46] One such court was the United States District Court for the Northern District of Georgia, which granted a discovery request made by a party to an international private arbitration in *In re Roz Trading*.[47]

In *Roz Trading*, the Northern District of Georgia addressed a discovery request made for the production of documents for use in a proceeding before an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber ("the Centre") in Vienna, Austria.[48] The district court found that the Centre was a "foreign or international tribunal" when "examined under the same functional lens" as used by the Supreme Court in *Intel,* emphasizing that the Centre's arbitral panels conduct proceedings, which lead to a dispositive ruling that is responsive to the complaint and reviewable in court.[49]

Three years following *Roz Trading*, the United States District Court for the Middle District of Florida applied the *Intel* functional analysis with a pre-*Intel* mindset to find that assistance under section 1782 was

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43. Beale, *supra* note 13, at 67-68.

44. Beale, *supra* note 13, at 68.

45. Gustavo J. Lamelas, *The Evolving Standards for Extending U.S. Discovery Assistance to International Arbitrations*, 16 IBA ARB. NEWS 154, 155 (Mar. 2011). *See* Norfolk S. Corp. v. Gen. Sec. Ins. Co., 626 F. Supp. 2d. 882, 885 (N.D. Ill. 2009); *see also In re* Hallmark Capital Corp., 534 F. Supp. 2d. 951, 954-57 (D. Minn. 2007).

46. *Lamelas, supra* note 45, at 156; *see also In re* Winning (HK) Shipping Co., Case No. 09-22659-MC, 2010 U.S. Dist. LEXIS 54290 (S.D. Fla. Apr. 30, 2010) (finding that a private arbitration functioned as a "tribunal" and discovery assistance was thus available); OJSC Ukrnafta v. Carpatsky Petroleum Corp., Case No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009) (holding the District Court found it had authority to hear the request, concluded that the arbitral panel at issue, governed by the rules of the UNCITRAL Model Law and subject to judicial review, was a "foreign or international tribunal," and used its discretion to grant discovery assistance).

47. *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1231 (N.D. Ga. 2006).

48. *Id.* at 1222.

49. *Id.* at 1224-25.

unavailable to private arbitrations in its 2009 decision, *In re Operadora.*[50] In *Operadora*, the district court held that an arbitral panel of the ICC was not a "tribunal" within the meaning of section 1782.[51] In its reasoning, that court agreed that the private arbitral panel issued responsive decisions that bind the involved parties.[52] However, the district court noted that the ICC rules provided for review of the decisions by only an ICC court, which it found insufficient to constitute the function of "judicial review" as the ICC rules did not provide for review by a "state-sponsored tribunal."[53] The court reasoned discovery assistance was only available to tribunals with "state-sponsored" authority, noting that the panel derived its decision-making authority from a private contract to justify the conclusion that it was not a product of "state-sponsored" means.[54]

In summation, the body of jurisprudence produced in district courts following *Intel* yielded inconsistent, divided outcomes, as noted by several commentators on the subject.[55] The core of the dispute seems to be more over the origins of a private arbitral tribunal's authority, rather than over what kind of function it serves.[56] This strident dispute subsequently permeated into the Circuit Courts of Appeals.[57] Thus, the Supreme Court should be sure to address the questions it left open in *Intel*, namely whether discovery is assistance available to only "state-sponsored" tribunals, and if so, where should the line for this distinction be drawn?[58]

D. Divide in the Federal Circuits: Is Assistance Under 28 U.S.C. § 1782 Available to Only "State-Sponsored" Entities?

In the midst of the surmounting divide in district court interpretations of section 1782, the Fifth Circuit quickly doubled down on its decision in *Biedermann*, finding it was not directly overruled by *Intel* in its 2009

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

51. *Id.* at *39.

52. *Id.* at *33.

53. *Id.* at *33-34.

54. *Id.* at *36-38.

55. *See* Beale, *supra* note 13, at 89; Malament, *supra* note 28, at 1220; *see also* Lamelas, *supra* note 45, at 155.

56. *See In re* Operadora, 2009 U.S. Dist. LEXIS 68091 at *33-38; *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1231 (N.D. Ga. 2006).

57. *See* El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31 (5th Cir. 1999); *In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710 (6th Cir. 2019); *In re* Hanwei Guo, 965 F.3d 96 (2d Cir. 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

58. Intel Corp. v. Advanced Micro Devices, 542 U.S. 241, 265 (2004); Beale, *supra* note 13.

opinion, *El Paso Corporation v. La Comision Ejecutiva Hidreoelectrica Del Rio Lempa.*[59] The Fifth Circuit first noted that its own precedent established that a "tribunal" within the meaning of section 1782 did not include private international arbitrations.[60] The circuit court then pointed to the *Intel* decision, emphasizing that the precise question of "whether a private international arbitration tribunal also qualifies as a 'tribunal' under § 1782 was not before the court."[61] Since this question and the associated policy questions were not directly addressed by the court in *Intel,* the Fifth Circuit concluded that it remained bound by its decision in *Biedermann*.[62]

Nearly a decade later, the United States Court of Appeal for the Sixth Circuit became the first circuit court to take the opposite side, interpreting section 1782 broadly so as to encompass private international arbitrations in *In re Application to Obtain Discovery for Use in Foreign Proceedings*.[63] The discovery request at issue in *Application to Obtain Discovery* was made by one party to a private arbitral proceeding in Saudi Arabia, which sought to compel the other party to the arbitration to produce certain discovery materials.[64] In its analysis of the language of section 1782, the circuit court focused specifically on the meaning of the word "tribunal."[65] The Sixth Circuit found that text and context of section 1782 provided "no reason to doubt" that the word "tribunal" includes privately-formed arbitral panels.[66] Furthermore, the court rejected the purported limitation that a "foreign or international tribunal" only encompass state-sponsored entities, finding no such limiting principle to be warranted either by policy implications or by *Intel.*[67]

Soon thereafter, the United States Court of Appeal for the Fourth Circuit took the side of the Sixth Circuit, interpreting the statute's language broadly, while also interpreting what it means to possess "state-sponsored" authority quite broadly as well.[68] In *Servotronics v. Boeing*, the Fourth Circuit addressed a discovery request made by Servotronics, seeking to

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59. *El Paso Corp.*, 341 F. App'x at 33-34.
60. *Id.* at 33.
61. *Id.* at 34.
62. *Id.*
63. *In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 728 (6th Cir. 2019).
64. *Id.* at 714.
65. *Id.* at 719.
66. *Id.* at 723. In reaching this conclusion, the Sixth Circuit looked to dictionary definitions at the time the language was introduced, the usage of the phrase in legal writing, and the other uses of the word in the statute. *Id.* at 719-22.
67. *Id.* at 725-26, 729.
68. Servotronics Inc. v. Boeing Co., 954 F.3d 209, 214-15 (4th Cir. 2020).

compel the testimony of several current and former Boeing employees, for use in a private arbitration in London.[69] The Fourth Circuit held that even arbitral panels formed by private agreement are an "exercise of government-conferred authority," and are accordingly "tribunals" under 28 U.S.C. § 1782.[70] In its reasoning, the Fourth Circuit highlighted the fact that arbitration in the United States is a "congressionally endorsed and regulated" process that is judicially supervised.[71] The circuit court subsequently noted that English arbitrations are comparatively more of a product of government-conferred authority, stating "even to a greater degree than . . . in the United States, UK arbitrations are sanctioned, regulated, and overseen by the government."[72] Thus, the Fourth Circuit concluded that even if "tribunal" in section 1782 only refers to "state-sponsored" entities, private international arbitrations are still squarely within that contemplation.[73]

In July 2020, the Second Circuit reviewed its own precedent in a post-*Intel* light, re-establishing the circuit divide over section 1782's applicability to private foreign arbitrations in the opinion, authored by Chief Judge Livingston, *In re Hanwei Guo*.[74] The circuit court in *Hanwei Guo* dealt with a request to compel the production of discovery materials from four non-party financial institutions, in connection with a privately-operated Chinese arbitration, convened in accordance with the rules of a government-established arbitration center.[75] Though the Southern District of New York in the proceedings below found that section 1782 did not apply to private arbitrations, the Second Circuit acknowledged that district courts within its own circuit had become divided over whether it's now decades-old opinion in *National Broadcasting* "remains intact post-

69. *Id.* at 210. The arbitration was convened under the rules of the Chartered Institute of Arbitrators, *see CIArb Arbitration Rules*, CHARTERED INST. ARBITRATORS (Dec. 2015), https://www.ciarb.org/media/2729/ciarb-arbitration-rules.pdf.

70. *Boeing*, 954 F.3d at 214, 216.

71. *Id.* at 213. The Fourth Circuit noted that Congress "elevate[d] the arbitration of claims as a favored alternative to litigation when the parties agree in writing to arbitration" with the enactment of the Federal Arbitration act. *Id.* (quoting McCormick v. America Online, Inc., 909 F.3d 677, 680 (4th Cir. 2018)).

72. *Id.* at 214.

73. *Id.* at 213-14.

74. *In re* Hanwei Guo, 965 F.3d 96, 100 (2d Cir. 2020).

75. *Id.* at 100-01. Guo initiated arbitration against several parties before the China International Economic and Trade Arbitration Commission (CIETAC). *Id.* at 100. CIETAC was created by the government of the People's Republic of China in 1954, and still receives funding from the Chinese government. *Id.* at 100-01. Arbitrators in CIETAC proceedings are selected by the parties and are not required to have any ties or undergo screening with any agency other than CIETAC. *Id.* at 100.

Intel."[76] The circuit court concluded that its holding in *Bear Stearns* still remained good law, as the Supreme Court's decision in *Intel* did not "cast sufficient doubt on the reasoning or holding" of *Bear Stearns*.[77] Accordingly, the Second Circuit reaffirmed that discovery assistance under section 1782 was only available to "state-sponsored" tribunals, and denied the assistance requested in aid of the China International Economic and Trade Arbitration Commission (CIETAC) proceeding, finding that the CIETAC arbitral panel functioned "in a manner nearly identical to" private arbitrations in the United States.[78]

In summation, the divide over the interpretation of section 1782 at the federal appellate level solidified immediately preceding the Seventh Circuit decision now facing certiorari, *Servotronics v. Rolls Royce*.[79] As it was at the district court level, the most contentious debate seems to focus on whether there is a requirement that a tribunal possess "state-sponsored" authority. Moreover, the debate also encompassed the question of precisely how to define when a body acting as a tribunal does or does not possess "state-sponsored" or "government conferred" authority.[80]

E. Servotronics v. Rolls-Royce: Seventh Circuit Finishes the Engine Needed to Speed Supreme Court Review

Rolls Royce sits as the most recent addition to an increasingly conflicted body of circuit-court jurisprudence on the applicability of 28 U.S.C. § 1782 to private arbitrations.[81] The Seventh Circuit in *Rolls Royce* addressed a discovery request made in conjunction with the very same

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76. *Id.* at 101, 104. *See also In re* Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, No. 18-MC-561, 2019 WL 917076, at *1 (S.D.N.Y. Feb. 25, 2019). Some district courts within the Second Circuit found that National Broadcasting no longer applied following Intel, and that private arbitrations were allowed assistance under § 1782. *See In re* Children's Investment Fund Found. (UK), 363 F. Supp. 3d 361, 369-71 (S.D.N.Y. 2019). Others concluded that *Bear Stearns* remained good law. *See In re* Petrobras Sec. Litig., 393 F. Supp. 3d 376, 380, 384-86 (S.D.N.Y. 2019).

77. *In re Hanwei Guo*, 965 F.3d at 105.

78. *Id.* at 107-09. Specific factors the Second Circuit found indicative of the panel's private function were the nature of the arbitral panel's jurisdiction and method of appointment, which were both derived "exclusively from the agreement of the parties." *Id.* at 108.

79. *See* Servotronics v. Rolls Royce, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, Docket No. 20-794 (Mar. 22, 2021); *see also In re Hanwei Guo*, 965 F.3d at 109; Servotronics Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020).

80. *See In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *38 (M.D. Fla. Aug. 1, 2009); *In re* Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, No. 18-MC-561, 2019 WL 917076, at *1 (S.D.N.Y. Feb. 25, 2019).

81. *See Rolls Royce*, 975. F3d at 690.

arbitral proceeding at issue in the Fourth Circuit's decision in *Boeing,* though it made the opposite conclusion, finding that private arbitrations were not "foreign or international tribunals" under section 1782.[82] The Seventh Circuit sided with the Second and Fifth Circuits for several reasons, namely their finding of the language of the statute to be ambiguous, and finding that the statutory context and legislative history supported an interpretation tailored to only state-sponsored or intergovernmental entities.[83]

This conclusion indicates that the relevance and depth of the origins of a tribunal's authority will likely be a point of emphasis for the Supreme Court in their upcoming decision.[84] In the next section, this Comment will provide a background on international commercial arbitration, introducing several of the core forces driving the development of arbitration as the preferred method of dispute resolution in modern international commerce.[85] This will ultimately show that, as a collective whole, private international arbitrations fit squarely within, and could greatly benefit from, an expansive interpretation of 28 U.S.C. § 1782.[86]

III. INTERNATIONAL COMMERCIAL ARBITRATIONS STATUTES, POLICIES, AND INSTITUTIONS

A. Private Arbitration in Global Commerce: Why Parties Choose to Arbitrate

International commercial contracts have become increasingly complex as a result of the technological advances and socio-economic developments of the last century.[87] Consequently, these contracts are typically associated with "special problems for which traditional law does not provide appropriate answers."[88] Thus, the vast majority of international agreements contain arbitration clauses, agreements negotiated and tailored to meet the mutual needs of the parties involved.[89]

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82. *Id.* at 693.

83. *Id.* at 696.

84. *Id.* In fact, the petition for certiorari submitted to the Supreme Court presents this question directly. *See* Petition for Writ of Certiorari at *13, Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Co., (No. 20-794), 2020 WL 7343172.

85. Malament, *supra* note 28, at 1214.

86. *See* Nava Cuenca *supra* note 9, at 190.

87. JOACHIM G. FRICK, ARBITRATION AND COMPLEX INTERNATIONAL CONTRACTS 3 (Dr. Julian Lew ed., Kluwer Law Int'l 2001).

88. *Id.* at 15.

89. *Id.* at 7.

Arbitration is widely known as a popular form of alternative dispute resolution (ADR), meaning it is an alternative to resolution through litigation in traditional courts.[90] In the context of the complex area of international commerce, one of the main reasons parties seek an alternative to transnational litigation is to achieve simplicity and neutrality in disputes whose resolution would otherwise become potentially tendentious and unruly.[91] Parties achieve this in arbitration through a higher degree of informality and confidentiality in the proceedings, tailoring the procedural rules to meet the specific needs of the parties and the potential dispute.[92]

Another advantage of arbitration favored by participants in the growing international economy is the relative ease at which arbitral awards can be enforced around the globe.[93] This has been achieved in large part by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), a treaty adopted in some way by over 160 countries.[94] Considering the lack of any similar multi-lateral agreement for enforcing the judgements of traditional judiciaries, arbitration provides a more efficient and resolute method of achieving finality in a dispute.[95]

Nonetheless, choosing to resolve disputes through a private arbitration agreement has some inherent drawbacks, though they arise more often in "poorly drafted" arbitration agreements.[96] One more generally pervasive drawback can be seen in arbitrators' authority over

90. Richard H. Kreindler, *Arbitration or Litigation? ADR Issues in Transnational Disputes*, *in* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 1, 1 (Thomas E. Carbonneau & Jeanette A. Jaeggi, eds., 2006).

91. *Id.* at 1-2. By forming an arbitration agreement at the outset of a contractual relationship parties can create an "equitable playing field," offering the potential for a neutral venue and substantive law, as well as "consensually agreed-upon rules and input into the selection of a tribunal with a particular background." *Id.* at 2-3.

92. *Id.* at 1-3.

93. Jennifer Sandlin, *Practicalities and Commercial Realities: § 1782 and Its Application to Private Commercial Arbitration*, 44 J. LEGAL PRO. 223, 236 (2020).

94. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. Contracting countries agree to provide the assistance of their respective court systems in enforcing the final awards rendered by foreign arbitral panels. *See* United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards arts.1-5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S 3. *See also Contracting States*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/countries (last visited Nov. 5, 2021).

95. Sandlin, *supra* note 93, at 236.

96. Kreindler, *supra* note 90, at 2.

their proceedings.[97] Arbitrators themselves have the power to regulate the conduct of the proceedings before them, including the ability to order parties to produce documents in their possession for use in the arbitral proceeding.[98] However, the arbitrators derive these powers only from the agreement of the parties.[99] Thus, arbitrators lack the coercive subpoena power of the courts, rendering them unable to enforce an order requiring a party to produce discovery materials, especially to non-parties.[100]

B. International Commercial Arbitration and the U.S. Courts

Originally the U.S. legal community was skeptical of international arbitration, generally regarding it as a "blunt and imprecise" method of dispute resolution.[101] Although judicial assistance to private arbitration was codified into U.S. law with the passing of the Federal Arbitration Act in 1925,[102] it was not until the latter half of the twentieth century that arbitration agreements were placed on an equal level with judicial proceedings.[103] This was achieved in "small conceptual increments,"[104] over the course of several decisions of the Supreme Court, culminating in 1985 with the opinion of Justice Blackmun in *Mitsubishi Motors v. Soler Chrysler-Plymouth*.[105] Thereafter, U.S. courts began to shift course, bolstering the legitimacy of arbitration as a method of dispute resolution in response to the growing involvement of the United States in international commerce.[106] In the past few decades, there has been a trend in U.S. courts toward expanding the scope of discovery in the area of international arbitration.[107] In response to the legal developments in the

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97. *See* Martin Davies, *Discovery in the USA for Arbitration Elsewhere*, 2020 LLOYD'S MAR. & COM. L. Q. 535, 535 (2020).

98. *Id.*

99. *Id.*

100. *Id.*

101. PEDRO J. MARTÍNEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION 1-2, 8 (Cambridge Univ. Press, 2009).

102. Benjamin J. Tievsky, *The Federal Arbitration Act After* Alafabco*, A Case Analysis*, 11 CARDOZO J. CONFLICT RESOL. 675, 677 (2010).

103. MARTÍNEZ-FRAGA, *supra* note 101, at 15, 20-21.

104. *Id.* at 20.

105. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 616 (1985). The Supreme Court considered whether "an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction." *Id.* at 624. The Court upheld the arbitration agreement, *id.* at 640, casting aside old domestic notions of arbitration and embracing a modern "international policy, favoring arbitration," *id.* at 636-39. *See also* MARTÍNEZ-FRAGA, *supra* note 101, at 15-33 (discussing the series of Supreme Court opinions and their implications).

106. Malament, *supra* note 28, at 1214; MARTÍNEZ-FRAGA, *supra* note 101, at 14.

107. *See* Kreindler, *supra* note 90, at 16.

United States, arbitration and its advantages "must be looked at in a new light."[108] U.S. courts play a limited but pivotal role in the process of international commercial arbitration, a role especially consequential to arbitrators whom otherwise lack the ability to compel discovery.[109]

C. Relevant International Arbitral Institutions: Europe, the United Kingdom, and the United Nations

An assessment of the prominent institutions and covenants of commercial arbitration can provide further context on what influences the international arbitral process as a whole.[110] This Comment looks at three such institutions that have specifically been addressed by federal courts in relation to section 1782, starting with the ICC, then the Chartered Institute of Arbitrators ("Ciarb"), as well as the United Nations Commission on International Trade Law (UNCITRAL) and its model law for commercial arbitration.[111]

Collectively, the various arbitral institutions of Europe handle the bulk of global arbitration cases, with the ICC providing the lion's share of that caseload.[112] The ICC was established in 1919 in Paris by an association of French businessmen following the end of the First World War.[113] Although it is a private non-governmental organization, it furthers the interests of the "international business community" through its vast network of national committees comprised of economic and industrial leaders.[114] The ICC's role in modern international commerce cannot be understated, as it now serves as the "institutional representative of over 45

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108. *Id.* at 2.

109. Sandlin, *supra* note 93, at 234.

110. *See* Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, 308-10 (2004). Hans Smit, one of the principal drafters of the 1964 amendments to § 1782, argues that private arbitrations should be considered "foreign or international tribunals." *Id.* at 306-08; *see also* Smit, *supra* notes 33; Kreindler, *supra* text accommodating note 90.

111. *See* Lamelas, *supra* note 45; Nat'l Broadcasting Co. v. Bear Stearns, 165 F.3d 184, 186 (2d Cir. 1999); Servotronics Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020); Servotronics v. Rolls Royce, 975 F.3d 689, 690 (7th Cir. 2020); *see also In re* Operadora, No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *33-38 (M.D. Fla. Aug. 1, 2009).

112. *See* Dr. Markus Altenkirch & Brigitta John, *Arbitration Statistics 2019*, GLOBAL ARB. NEWS (July 15, 2020), https://globalarbitrationnews.com/how-did-arbitration-institutions-fare-in-2019/#_ftn3. From 2012-2019, the ICC oversaw the lion's share of cases amongst European Institutions, with that caseload increasing year-over-year. *Id.*

113. ERIK SCHÄFER ET AL., ICC ARBITRATION IN PRACTICE, 13 (2005). The ICC court of Arbitration was formed soon thereafter in 1923. *Id.* The Court of Arbitration functions independently, proscribing guidelines for participants in its arbitral proceedings int order to "assist parties" in making rational use of resources in arbitral proceedings. *See id.* at 13-14.

114. *Id.* at 13.

million companies in over 100 countries."[115] Thus, the ICC achieves an inter-governmental function, despite being a private organization, through its unification of global legal and business leaders to "meet the diverse needs and interests" of parties spanning the breadth of the global economy.[116] An example of this unified, though flexible, approach is seen in the ICC's rules governing the arbitral proceedings themselves, which acknowledge their own inherent limitations, made necessary to make them "capable of being applied in as many jurisdictions as possible," and applicable to "parties from different legal backgrounds."[117]

The United Kingdom is one country in particular that has been at the forefront of legal development concerning arbitration, which is embodied by the "contemporary and integrated" legislative framework of the 1996 United Kingdom Arbitration Act.[118] Through the Act, the United Kingdom encourages its courts to take an active role in providing aid to international arbitrations, granting them broad authority in determining whether to provide assistance.[119] Recently, an English Court of Appeals held that this authority includes the ability to compel the production of deposition testimony from a non-party in aid of a New York arbitration proceeding.[120]

Ciarb exists within this framework as an organizational manifestation of forward-thinking arbitration policy of the United Kingdom, established in order to "facilitate and promote the worldwide determination of disputes by arbitration."[121] Ciarb is a registered not-for-profit organization that was originally founded in 1915, and was officially granted a Royal

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115. *About Us,* INT'L CHAMBER COM., https://iccwbo.org/about-us/ (last visited Nov. 5, 2021). The ICC represents "business interests at the highest levels of intergovernmental decision-making," which sets it apart as a "unique institution" with its "capacity to bridge the public and private sectors." *Id.*

116. *Dispute Resolution,* INT'L CHAMBER COM., https://iccwbo.org/about-us/who-we-are/dispute-resolution/ (last visited Nov. 5, 2021).

117. *See*, *e.g.*, SCHÄFER, *supra* note 113, at 75.

118. Thomas Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 TUL. MAR. L.J. 131, 132, 154 (1997).

119. ARBITRATION ACT, 1996 (UK), c.23, § 44, https://www.legislation.gov.uk/ukpga/1996/23/section/44 (The statute reads in relevant part: "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are (a) the taking of the evidence of witnesses; (b) the preservation of evidence"); *see also* ARBITRATION ACT, 1996 (UK), c.23, § 2(3) (powers conferred in § 44 apply even if the seat of the arbitration is outside of the United Kingdom).

120. *See* A and Another v. C and Others, [2020] EWCA, 1 LLOYD'S REP. 341, 341-48 (Eng.).

121. *Royal Charter Bye-Laws and Schedule to the Bye-Laws*, CHARTERED INST. ARBS. (Aug. 2013 ver.), https://www.ciarb.org/media/1558/ciarb_bye-laws_a-pdf-jan14.pdf.

Charter by Queen Elizabeth II in 1979.[122] Its network of 16,000 member practitioners across over 140 countries is linked together by the common goal of promoting the "constructive resolution of disputes" worldwide as a "global, inclusive thought leader" in the international community.[123] Thus, Ciarb as an institution is an amalgam of private and governmental authorities, functioning in a manner that actively accomplishes the policy objectives of the nation in which it operates.[124]

On a broader scale, inter-governmental organizations work to create global uniformity and cooperation in the resolution of commercial disputes, with one of the more globally influential organizations being UNCITRAL.[125] UNCITRAL was established in 1966 through a resolution passed by the United Nations General Assembly, and has since played an important role in furthering the "progressive harmonization and modernization of the law of international trade."[126] For dispute resolution in particular, it accomplished this goal through drafting the UNCITRAL Model Law on International Commercial Arbitration in 1985.[127] By drafting and adopting the Model Law, UNCITRAL significantly contributed to the "establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations."[128] In doing so, UNCITRAL received the general credence of its member states, whom recognized the Model Law's value as a mechanism

122. *Id.*; s*ee also* Julio César Betancourt, *The Chartered Institute of Arbitrators (1915-2015): The First 100 Years (October 1, 2015)*, 81 INT'L J. ARB., MEDIATION & DISP. MGMT. 4, 1-3 (2015).

123. *See* CIArb Strategy 2021 to 2023, CHARTERED INST. ARBS., https://www.ciarb.org/media/12856/ciarb-strategy-summary.pdf (last visited Nov. 5, 2021).

124. *Compare* Carbonneau, *supra* note 118, at 132 (praising the United Kingdom Arbitration Act as an innovative regulatory philosophy built upon "a wealth of knowledge and expertise of arbitration law and practice"), *with* CIArb Strategy, *supra* note 123, at 1 (outlining the organization's mission to be an "inclusive global thought leader on all forms of dispute resolution, promoting and facilitating the creative and effective resolution of disputes").

125. *See About Us*, UNITED NATIONS, https://www.un.org/en/about-us/. The United Nations is currently comprised of 193 member states. *Id. See also A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law*, U.N. COMM'N INT'L TRADE L. (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf [hereinafter A Guide to UNCITRAL].

126. *See* A Guide to UNCITRAL, *supra* note 125, at 1.

127. U.N. COMM'N INT'L TRADE L., *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006*, at 1, U.N. Sales No. E.08.V.4 (2008), *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

128. *Id.*

for attaining unification in the rules on international commercial arbitration.[129]

In conclusion, states around the world have developed a vested interest in improving the legal procedures and policies surrounding international arbitration.[130] These states endeavor in advancing this interest through a spectrum of institutions, laws, and treaties, each possessing its own particularized form of state-affiliation.[131]

IV. MAKING THE CASE: PRIVATE INTERNATIONAL ARBITRATIONS ARE "FOREIGN OR INTERNATIONAL TRIBUNALS" UNDER § 1782

A. "State- Sponsored" Authority and Arbitration: A Needless Distinction in Light of Modern Policy

To resolve the question of whether section 1782 applies to private international arbitrations, the Supreme Court should first resolve the dispute over the relevance of, and extent to which, a tribunal possesses "state-sponsored" authority.[132] Viewing the vast landscape of international commercial arbitration through the wide lens cast by circuit-court jurisprudence, the "state-sponsored" distinction is rendered inoperative in several ways.[133] First, the majority of international arbitral tribunals are created in accordance with the New York Convention, an international agreement to which the United States is a party.[134] To exclude such tribunals from the reach of section 1782 would produce a result "exactly the opposite" of the reformers' intention to make this assistance be available to "all tribunals" created under foreign law or pursuant to an international agreement.[135] Second, various international arbitral institutions come with varying levels of government association, thus making it oftentimes difficult to characterize a particular tribunal's affiliation with a particular government.[136] Third, federal courts have reached sharply differing conclusions on what constitutes sufficient "state-sponsored" authority so as to be deemed "a foreign or international

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129. *Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General*, [1985] 16 U.N. COMM'N ON INT'L TRADE L. Y.B. 53-55, U.N. Doc. A/CN.9/263.

130. *Id.*

131. *See* SCHÄFER, *supra* note 113; *A and Another v. C and Others*, [2020] EWCA, 1 LLOYD'S REP. 341, 341-48 (Eng.); A Guide to UNCITRAL, *supra* note 125.

132. *See* discussion *supra* Part II. D.

133. *See* discussion *supra* Part II. E.

134. *See* Smit, *supra* note 110, at 306.

135. *Id.*

136. *See* discussion *supra* Part III. C.

tribunal."[137] Thus, a determination by the Supreme Court that section 1782 applies to only "state-sponsored" tribunals bears the potential for further dispute amongst federal courts.[138] Moreover, the needs and interests of state governments around the world are contented by the various institutions and organizations in international commercial arbitration, regardless of whether they are private or governmental.[139] As a result, the Court ought to eliminate the distinction altogether, and absolve itself of the chore of drafting an inessential qualification.[140]

B. Reviewing Rolls Royce: Resolving the Driving Concerns of the Seventh Circuit Through an Interpretation of § 1782 Encompassing Private Arbitral Tribunals

The structure of the Seventh Circuit's legal analysis in *Servotronics v. Rolls Royce* provides a proper crucible for inducting private international arbitrations into the domain of section 1782 as "foreign or international tribunals."[141] First, the circuit court assessed the plain meaning of the phrase "foreign or international tribunal," canvassing both legal and non-legal dictionaries to avail, and ultimately finding the phrase to be ambiguous.[142] However, had the court evaluated the ordinary meaning of "tribunal" based on the function tribunals serve, it would have reached the opposite conclusion.[143] Private arbitrations function as tribunals in their capacity to impartially adjudicate commercial disputes, through receiving complaints, gathering, and weighing of evidence and issue final decisions enforceable in domestic court.[144] Moreover, the disputes that arbitrations resolve are the precise cases that are unworkable in traditional courts, which are undoubtedly tribunals.[145] In applying a functional approach to this question, courts can achieve consistency in their decision-making when receiving requests made pursuant to section 1782.[146]

Second, the Seventh Circuit looked to the context of section 1782, reading it as a coherent whole alongside its predecessors to find that "a

137. *See* sources cited *supra* notes 65-76.
138. *See* Nava Cuenca, *supra* note 9, at 173.
139. *See supra* text accompanying notes 113, 120, 125.
140. *See* Nava Cuenca, *supra* note 9, at 165.
141. *See* discussion *supra* Part II. E.
142. Servotronics v. Rolls Royce, 975 F.3d 689, 693-94 (7th Cir. 2020).
143. Intel Corp. v. Advanced Micro Devices, 542 U.S. 241, 257-58 (2004).
144. *See* Nava Cuenca, *supra* note 9, at 183.
145. *See* Sandlin, *supra* note 93.
146. *See* Beale, *supra* text accompanying notes 43, 44.

'foreign tribunal' in this context mean[t] a governmental, administrative, or quasi-governmental tribunal."[147] At this point the circuit court should have considered the policies, laws, and institutions that comprise international commercial arbitration as a collective whole.[148] By doing so, it would have readily seen that the international arbitral process itself is a "quasi-governmental" creation, and that it was unnecessary to strain so hard to impose such a limitation.[149]

Third, the Seventh Circuit addressed the potential conflict with the Federal Arbitration Act, opting for a narrow interpretation of section 1782 to avoid the possible scenario where judicial discovery assistance would be available to some foreign arbitral panels under both statutes.[150] This hypothetical fear is rectified by the broad discretion afforded to district courts when hearing section 1782 requests.[151] As outlined by the Court in *Intel*, district courts may balance a number of factors in order to determine whether the need for discovery assistance truly outweighs the burden that the request would impose.[152] Arbitration agreements are the product of contractual negotiations between highly sophisticated parties who seek out specific arbitral rules and procedures that apply practically to the intricacies of their specific arrangement.[153] Consequently, "practical parties will be practical about requesting assistance," and section 1782 requests made in connection with private arbitrations will be granted in limited, but crucial circumstances.[154] Such circumstances may arise when potentially dispositive materials are in the possession of a non-compliant party or third party, where the arbitrators would otherwise lack any means to compel their production.[155] Thus, an interpretation of section 1782 that encompasses private arbitrations stands to benefit both the courts of the United States, and the international community surrounding commercial arbitration.[156] In doing so, the Supreme Court will remain lockstep with its

147. *Rolls Royce*, 975 F.3d at 693-94.
148. *See supra* text accompanying note 127.
149. *See supra* text accompanying notes 135, 136.
150. *Rolls Royce*, 975 F.3d at 693-94.
151. *See supra* text accompanying note 40.
152. Intel Corp. v. Advanced Micro Devices, 542 U.S. 241, 268-69 (2004). Justice Ginsburg specifically addresses the concern of the dissent that an expansive interpretation of § 1782 would cause a clogging of district court dockets with discovery requests, stating "There is no evidence whatsoever, in the 40 years since § 1782(a)'s adoption, of the costs, delays, and forced settlements the dissent hypothesizes." *Id.* at 265 n.17.
153. *See* Sandlin, *supra* note 93, at 238-41.
154. *See* Sandlin, *supra* note 93, at 238; Beale, *supra* note 13, at 54.
155. *See* Davies, *supra* note 97, at 535-39.
156. *See supra* text accompanying notes 135, 141.

own views in *Mitsubishi v. Chrysler Soler-Plymouth* and *Intel*, adapting its international policy strongly favoring arbitration to a discretionary statute unbound by categorical limitations.[157]

V. CONCLUSION

The parties have jointly dismissed the case, and thus the Supreme Court will have to wait for another day to seal the fissure between the federal circuits caused by section 1782.[158] Should this question again fall within the purview of certiorari, the Supreme Court should provide an answer that is incontrovertible in its future application as well. This decision must thus produce a framework that district courts can apply consistently and effectively. The Court can reach such a decision while remaining in line with *Intel* by guiding its analysis in three main aspects.[159] First, explicitly eliminating any need for tribunal to demonstrate "state-sponsored" authority will dissolve a main point of contention and confusion amongst the federal courts. Second, taking a functional approach to the question of tribunal will provide consistency in the framework for analyzing whether the district court has the authority to rule on the discovery request. Third, allowing district courts to utilize their discretion, balancing the need for assistance against the burden imposed by the request, will enable district courts to provide aid efficiently, tailoring assistance to the limitations dictated by each particular situation. In each facet of this analysis, private arbitration shines through. As a collective whole, international arbitration demonstrates the problems surrounding the hypothetical requirement of state authority. Arbitrations save traditional judicial tribunals countless time and taxpayer dollars by efficiently resolving otherwise complex, burdensome disputes outside the court system.[160] Consequently, it is arbitrators themselves who could benefit greatly from discretionary access to the subpoena power of district courts when procuring discovery materials that may be dispositive to the outcome of the dispute. Thus, the Supreme Court should take an expansive approach to interpreting 28 U.S.C. § 1782 and determine that international private arbitrations are "foreign or international tribunals." Doing so will allow the Court to further develop its own pro-arbitration stance, while

157. *See supra* text accompanying notes 34, 103.

158. *Rolls-Royce*, 975 F.3d at 689, *cert. granted*, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021), Docket No. 20-794, https://www.supremecourt.gov/docket/docketfiles/html/public/20-794.html.

159. *See supra* note 158.

160. *See supra* Part III.

also cementing the United States in the center of the fight for global uniformity and innovation in international commercial arbitration.