Discovering the Widening U.S. Circuit Split on Discovery Orders from "Foreign and International Tribunals" under U.S.C. § 1782

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IN THE world of international arbitration, there are two tracks: Investment Treaty Arbitration (ITA) and private International Commercial Arbitration (ICA). Investment Treaty Arbitration refers to the dispute resolution mechanism generally embodied in foreign direct investment treaties between countries that assist investors in recovery on breaches identified in the treaty. These bilateral (or multilateral) investment treaties use some form of investor-state dispute settlement, such as international arbitration or mediation to resolve the disputes.

Parties in cross-border transactions who are not necessarily involved in foreign investment through a trade treaty, but who want the right to resolve disputes in an enforceable manner, rely on international commercial arbitration to resolve their disputes. In many ways, the two tracks are very similar, but the ICA track is much more flexible and allows a higher degree of party autonomy, because the parties are subject only to the constraints of their consent to their own private agreements.

Under both tracks, once an arbitral panel is constituted, it is referred to as an arbitral tribunal, and the tribunal serves as the "court" for the administration and adjudication of the parties' dispute. In the arbitral process, the tribunal may allow some discovery, depending on the applicable rules, the parties' requests, and the nature of the dispute. Parties may need to request or subpoena document production, depositions, or other discovery from each other or from third parties to the arbitration. The tribunal can generally issue an order compelling discovery, and once issued, the question becomes how to enforce the order.

In the United States, the enforcement of such orders generally has been enforced through 28 U.S.C. § 1782 ("Section 1782"), which states:

> (a) The 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**, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.[1]

United States district courts have interpreted the requirements of Section 1782 in different ways. There is a widening split among the U.S. courts as to the definition and meaning of "foreign or international tribunal." Some courts have interpreted this phrase to include only tribunals presiding over Investment Treaty Arbitration or governmental proceedings, and not International Commercial Arbitration. The interpretation of

[1] 28 U.S.C. § 1782 (emphasis added).

this phrase "foreign or international tribunal" is thus determinative as to whether discovery orders will be enforced in these jurisdictions.

This article will provide background information on cases that have addressed Section 1782 and analyze the current status of the *Servotronics* cases that have highlighted the circuit court split on this issue.

I. Discovery in International Arbitration in the United States

One of the main goals of arbitration, and alternative dispute resolution in general, is to control the costs of the dispute resolution process as compared to traditional litigation. Often that means limiting the discovery process. Nevertheless, the parties to arbitration must have a way to obtain evidence to support their positions. In United States based arbitrations, arbitral institutions have established various degrees of discovery, but the parties are free to expand or limit discovery based on their arbitration clause. Generally, in the U.S., discovery is a strong tool used in arbitration, even if somewhat limited compared to litigation.

The Federal Arbitration Act ("FAA") underlies all U.S. based arbitrations, rendering contractual arbitration clauses binding and enforceable. The FAA does not dictate the parties' use of discovery in arbitration. With regard to witnesses, the FAA allows arbitrators in a proceeding to summon witnesses and corresponding documents that "may be deemed material as evidence in the case."[2] Each state also has procedures in place for obtaining evidence and/or discovery in arbitration.

The availability of discovery in international arbitrations *seated* in the United States is also governed by several factors: the arbitration clause in the applicable agreement, the arbitration rules adopted by parties, an arbitrator's discretion, statutes, and case law where the seat of the arbitration is located.

If the arbitration is seated in North Carolina, for example, then the N.C. International Arbitration and Conciliation Act ("NC IACA") controls.[3] NC IACA provides that the arbitral tribunal is endowed with the power "to order such discovery as it deems necessary and to determine the admissibility, relevance, materiality, and weight of any evidence."[4]

Furthermore, the arbitral tribunal or a party, with the approval of the arbitral tribunal, may request from a North Carolina

[2] 9 U.S.C. § 7 (2018).
[3] N.C. GEN. STAT. § 1-567.31.
[4] N.C. GEN. STAT. § 1-567.49.

court assistance in obtaining discovery and taking evidence.[5] The courts in North Carolina may execute the request within its competence and according to its rules on discovery and taking evidence, and may impose sanctions for failure to comply with its orders. Further, "[a] subpoena may be issued as provided by General Statutes Section 8-59, in which case the witness compensation provisions of General Statutes Sections 6-51, 6-53, and 7A-314 shall apply."[6]

In other states, the law may not allow for court assistance of discovery from international arbitrations. For international arbitrations seated *outside* of the U.S., 28 U.S.C. § 1782 offers the only option to seek court assistance in enforcement of discovery orders from arbitral tribunals. If a party engaged in ITA or ICA seeks discovery of witnesses or records (or other evidence) located in the U.S., the parties will file a Section 1782 application in federal court. Depending on which circuit the federal district court belongs, a party's ability to enforce discovery orders may fall on the phrase "[a]ssistance to foreign and international tribunals and to litigants before such tribunals."[7]

A. History of the phrase "Assistance to foreign and international tribunals and to litigants before such tribunals"

Section 1782 was not always used in the arbitration context. In fact, U.S. courts actively and uniformly opposed such use for many years.[8] This philosophy was in line with the overall approach of all branches of the U.S. government until the 1960s. Indeed, the New York Convention was not ratified by the United States until 1970, and the Panama Convention was not ratified until 1975. In 1964, Congress had changed the wording of Section 1782 from "court" to "tribunal," but the Fifth Circuit and others ruled "[t]here [was] no contemporaneous evidence" of a congressional intent to extend Sec. 1782's reach to "the then-novel arena of international commercial arbitration."[9]

This philosophy continued to change in the 1990s. In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Supreme Court determined that a district court had discretion to

[5] *Id.*
[6] N.C. GEN. STAT. § 1-567.57.
[7] 28 U.S.C § 1782.
[8] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 185 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999).
[9] *Biedermann*, 168 F.3d at 881-882.

grant or deny an application under Section 1782 after considering the following factors:

- whether discovery sought is within the foreign tribunal's jurisdictional reach and, thus, accessible without Section § 1782;
- the nature of the foreign tribunal, the character of the proceedings abroad, and the reciprocity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance;
- whether the applicant's request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and
- whether the request is unduly intrusive or burdensome.[10]

The *Intel* court made clear that a court's discretion to order testimony, documents, or other evidence under Section 1782(a) was not to be limited by categorical restrictions set out above.[11] Even if the foreign tribunal or interested person making the Section 1782 application would not be able to obtain that same information in the jurisdiction where the tribunal is operating,[12] the district court has the discretion to determine the scope and terms of its order providing such foreign assistance.[13]

The underlying dispute in *Intel* was not an arbitration, but a complaint before the Directorate-General for Competition of the Commission of the European Communities.[14] Justice Ginsburg clarified that "tribunal", as used in the statute, included "administrative and quasi-judicial proceedings" in addition to judicial proceedings. Justice Ginsburg based her belief on the change to the statute from "judicial proceeding," to "tribunal" in 1964.[15] The Court held that while the Directorate-General is not an adjudicatory body, the Commission acted as a "first-instance decisionmaker" and, thus, fell within the reach of Section 1782.

Post-*Intel* decisions, beginning with *In re Oxus Gold PLC*, have concluded that investor-state arbitrations constitute "tribunals" as contemplated in 28 U.S.C. § 1782.[16] In *In re Oxus Gold PLC*, the

[10] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241; 124 S. Ct 2466; 159 L. Ed. 2d 355 (2004).
[11] *Intel*, 542 U.S. at 262–266.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *In re* Matter of Application of Oxus Gold PLC, No. MISC.06-82, 2006 WL 2927615, at *6 (D. N.J. Oct. 10, 2006); *see also In re* Arb.

district court determined a bilateral investment treaty governed by the United Nations Commission On International Trade Law ("UNCITRAL") Arbitration Rules constituted a foreign tribunal, but noted that international arbitration panels created exclusively by private parties were not included in the statute's meaning.[17] The respondents in *Oxus* argued that the arbitration panel consisted of private individuals chosen by the parties, was not a governmental or inter-governmental arbitration tribunal, was not conducted by a United Nations committee, did not involve claims between nations, and could not be "deemed for use in a foreign tribunal."[18] The court did not agree since "Article 8 of the BIT Agreement between the United Kingdom and Kazakhstan specifically mandate[d] that disputes between nationals of the two countries would be resolved by arbitration governed by international law."[19]

There has been some criticism of this line of cases. Neither the United Nations nor UNCITRAL itself administers arbitrations. Instead, the UNCITRAL Rules are commonly used in *ad hoc* arbitrations.[20] Another BIT arbitration case, *In re Chevron* did not offer an explicit ruling on whether investor-state arbitration constitutes a "tribunal" under Section 1782.[21] The *Chevron* case has also been criticized as containing insufficient reasoning to be precedent-setting.[22]

B. Post-*Intel* Extraterritorial Discovery Under Section 1782

Post-*Intel,* one of the first circuits to comment on Section 1782 in the context of extraterritorial discovery was the Eleventh Circuit. In 2016, the court held in *Sergeeva v. Tripleton Int'l Ltd*. [23] that the (extraterritorial) location of documents and electronically stored information does not create a barrier to

between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd., 626 F. Supp.2d 882, 885 (N.D. Ill. 2009).

[17] *In re* Matter of Application of Oxus Gold PLC, No. MISC.06-82, 2007 WL 1037387, at *5 (D. N.J. Apr. 7, 2007).

[18] *Id.* at *4.

[19] *Id.* at *5.

[20] United Nations Commission on International Trade Law (UNCITRAL), *Arbitration Rules*, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited Mar. 27, 2021).

[21] *In re* Chevron Corp., 633 F.3d 153, 161 (3d Cir. 2011).

[22] *Id.* (stating without citing authority, "use of the evidence uncovered in a section 1782 application in the BIT arbitration to 'attack' the Lago Agrio Court unquestionably would be 'for use in a proceeding in a foreign or international tribunal'").

[23] Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194 (11th Cir. 2016).

discovery under Section 1782.[24] The court reasoned that the *Intel* factors, coupled with congressional direction, allowed federal courts to permit discovery in the digital age.[25] The court specifically noted that Section 1782 incorporated the Federal Rules of Civil Procedure, which allow for extraterritorial discovery.[26] Instead, the central inquiry was whether the requested documents were "within the subpoenaed party's possession, custody or control," regardless of their physical location.[27]

Shortly after the Eleventh Circuit decision, the Second Circuit decided *In re Application of Antonio del Valle Ruiz,* which granted, in part, an application seeking discovery from Banco Santander and its New York-based affiliate, Santander Investment Securities, which included documents located overseas.[28] Santander urged the court to determine that the word "found" in Section 1782 was limited to individuals and entities over which a district court had personal jurisdiction and argued that the district court erred by not asserting a *per se* bar against extraterritorial discovery under Section 1782.[29] The Second Circuit joined the Eleventh Circuit in holding that there is no *per se* bar under Section 1782 preventing discovery of documents located abroad.[30]

The D.C. District Court took a different approach. In *Norex Petroleum v. Chubb Insurance Co. of Canada*, a subsidiary provided records held in the United States and maintained that Section 1782 did not permit the petroleum company to seek production of documents held outside the United States by its parent corporation. The court held the request by the petroleum company for document production was outside of the scope of discovery provided by Section 1782. *Norex Petroleum* suggested that extraterritorial application of Section 1782 would not be within the aims of the statute and that documents held outside the United States were beyond the statute's intended reach. Nothing in the Supreme Court's *Intel* decision directly addressed this issue or suggested otherwise.

These cases provide the background for the increased scrutiny in the widening circuit split on the interpretation of the

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[24] *Id.* at 1200.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *In re* del Valle Ruiz, 939 F.3d 520, 527–532 (2d Cir. 2019).
[29] *Id.*
[30] In doing so, the Second Circuit abrogated Purolite Corporation v. Hitachi America, Ltd., 2017 WL 1906905 (S.D.N.Y. May 9, 2017); *In re* Application of Kreke Immobilien KG, 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013); *In re* Godfrey, 526 F. Supp.2d 417 (S.D.N.Y. 2007); and *In re* Microsoft Corporation, 428 F. Supp.2d 188 (S.D.N.Y. 2006).

phrase "foreign or international tribunal" found in Section 1782.

II. The Widening Split – Whether Private International Commercial Arbitration Constitutes a Foreign Tribunal Under Section 1782

A. The *Servotronics* cases

There is no better representation of the circuit court split in the United States than the *Servotronics* cases, one appealed in the Fourth Circuit and the other filed in the Seventh Circuit. Both cases arose from the exact same arbitration and involve the same parties, but U.S. district courts came to differing interpretations of the definition of "foreign tribunal" under 28 U.S.C. § 1782 and, thus, provided two different applications on the enforcement of the discovery requests.

1. The Fourth Circuit held that a private international commercial arbitration <u>is</u> a foreign tribunal under 28 U.S.C. § 1782

In the Fourth Circuit case, an OEM supplier, Servotronics, supplied a valve to Rolls-Royce PLC ("Rolls-Royce") in May 2015 that Rolls-Royce then installed in an aircraft engine it manufactured for The Boeing Company ("Boeing"). In January 2016, while testing the engine at Boeing's plant in South Carolina, the engine caught fire, causing significant damage to Boeing's aircraft. After Rolls-Royce settled Boeing's claim for damages, it sought indemnification in the amount of $12.8 million from Servotronics, contending that a malfunction of Servotronics' valve caused the fire. On Servotronics' rejection of the claim, Rolls-Royce commenced an arbitration proceeding in the United Kingdom, as required by the contract between the parties ("the Agreement").[31]

The Agreement called for arbitration in Birmingham, England, under the rules of the Chartered Institute of Arbitrators, and these Rules were deemed to be incorporated by reference into the Agreement.

In an effort to procure evidence to support its defense in the UK arbitration, Servotronics filed an *ex parte* application in the district court under Section 1782 to obtain a court order authorizing the service of subpoenas on three South Carolina residents, all current or former Boeing employees, to give testimony. Two of the employees participated in troubleshooting the aircraft engine that caught fire, and

[31] Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020) ("*Servotronics I*").

the third employee was the chairperson of the Boeing Incident Review Board that investigated the fire.[32]

Boeing objected to the discovery order's enforcement on the basis that the UK arbitration panel was not a "foreign tribunal" as contemplated under Section 1782. Boeing argued that Congress was referring only to "an entity that exercise[s] government-conferred authority." In this case, because the arbitration was a "private proceeding deriving its authority not from the government, but from the parties' agreement," the arbitral panel was not a "tribunal" for purposes of Section 1782.[33]

The Fourth Circuit disagreed and specifically held that private International Commercial Arbitration panels meet the definition of Foreign Tribunal under Section 1782. The court identified that the private arbitration panel in the United Kingdom was empowered and regulated by the U.K. Arbitration Act of 1996 and held that this arbitral tribunal is a tribunal within the definition of Section 1782(a). The court further noted, "[e]ven to a greater degree than arbitration in the United States, UK arbitrations are sanctioned, regulated and overseen by the government and its courts…"; therefore, an arbitration panel is "a product of "government-conferred authority…."[34]

The Fourth Circuit identified the circuit court split on this issue. It also explained the policy of Congress with a 150-year history of facilitating cooperation with foreign countries by providing federal-court assistance in gathering evidence for use in foreign tribunals. The court acknowledged the growth of international commerce over the last fifty years and Congress's intent to improve the assistance it had previously afforded. It established the Commission on International Rules of Judicial Procedure with instructions to recommend changes designed to improve international cooperation. The Rules Commission had recommended changes to Section 1782, which Congress adopted in 1964. With the changes, Congress deleted from the former version of the statute the words "in any judicial proceeding pending in any court in a foreign country" (emphasis added) and replaced them with the phrase "in a proceeding in a foreign or international tribunal."[35]

The Fourth Circuit further identified that Congress understood its change would authorize U.S. assistance not only in connection with court proceedings, but also in connection with "administrative and quasi-judicial

[32] *Servotronics I*, 954 F.3d at 211.
[33] *Id.* at 213.
[34] *Id.* at 214.
[35] *Id.* at 212–213.

proceedings" abroad.[36] The court emphasized the Federal Arbitration Act's clear policy of considering arbitration contracts "valid, irrevocable, and enforceable," furthering the basic purpose of eliminating judicial resistance to arbitration agreements.[37]

Interestingly, the court also addressed the speculation of the risk of expanded discovery in arbitrations. The Fourth Circuit argued that Section 1782(a) was not designed to authorize full discovery in connection with a foreign arbitration proceeding, or any other proceeding of a foreign tribunal. The court stated, "the provision does not even use the term 'discovery.' It is much more limited. The statute authorizes a U.S. district court to function in the stead of a foreign tribunal and, on behalf of that tribunal, to take statements and receive testimony and documents or other materials intended 'for use' in the proceeding before the tribunal."[38]

The Fourth Circuit reiterated that the district court has the discretion to assist in the limited role of receiving evidence for use in the foreign tribunal proceeding, following the precedent in *Intel* which held that Section 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to interested persons in proceedings abroad. In contrast, the Federal Rules of Civil Procedure actually authorizes *the parties*, without approval of the court, to initiate and conduct discovery.[39] Under the FAA, American arbitrators have the benefit of subpoenaed testimony and documents through the enforcement of the courts.[40] Accordingly, the likelihood of somehow *expanding* the scope of the discovery allowed by the Federal Rules of Civil Procedure already is very low.

2. The Seventh Circuit held that a private international commercial arbitration is <u>not</u> a foreign tribunal under Section 1782

At roughly the same time it sought to authorize the service of subpoenas in the Fourth Circuit, Servotronics filed an *ex parte* application in the U.S. District Court

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[36] *Intel*, 542 U.S. at 258 (quoting S. Rep. No. 88-1580, at 7–8); *see also* Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71, 1027 n.73 (1965) (written by a reporter to the Rules Commission and indicating that the term "tribunal" was meant to include "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts" (cited approvingly in *Intel*).

[37] 9 U.S.C. § 2; *Servotronics I*, 954 F.3d at 213.

[38] *Servotronics I,* 954 F.3d at 214-215.

[39] *Id.* at 214–215.

[40] *Id.* at 215.

for the Northern District of Illinois asking the court to issue a subpoena compelling Boeing to produce documents.[41] The application also invoked Section 1782(a), and the judge initially granted it and issued the requested subpoena.[42] Then, Rolls-Royce and Boeing intervened and moved to quash the subpoena, arguing that Section 1782(a) did not permit a district court to order discovery for use in a private foreign commercial arbitration. The judge reversed the initial ruling and quashed the subpoena. Servotronics appealed.

The Seventh Circuit emphasized that this case involves a Section 1782(a) application filed by a party to a private commercial arbitration in the UK. Thus, there is no "letter rogatory" or request from a foreign or international tribunal.[43] Rather, Servotronics invoked the statute by virtue of its status as an "interested person" in the UK arbitration.[44] Letters rogatory are transmitted through diplomatic agencies; the statute provides that the State Department may, either "directly, or through suitable channels, ... receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed," and "receive and return it after execution."[45] This assistance is reciprocal, and the court reasoned that Sections 1781 and 1782 work in tandem.

Acknowledging the United States circuit court split on the interpretation of Section 1782, the Seventh Circuit analyzed statutory interpretation as to Congress' intent, but leaned more heavily on the fact that identical words or phrases were used in different parts of the same statute (or related statutes) and thus are presumed to have the same meaning. The court looked to other uses of the phrase "foreign or international tribunal" as used in Sections 1696 and 1781. In both instances, the court found the phrase addresses matters of comity between governments, suggesting state-sponsored tribunals are included, but private arbitration panels "are far less plausible."[46]

Following the Second and Fifth Circuits, the court further emphasized the discovery assistance authorized by Section 1782(a) as "notably broader than that authorized by the FAA."[47] The

[41] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 690 (7th Cir. 2020) ("*Servotronics II*").
[42] *Id.*
[43] *See* 28 U.S.C. § 1781(a)(1). *See also Servotronics II*, 975 F.3d at 694.
[44] *Id.*
[45] *Id.* at 691.
[46] *Id.* at 694.
[47] *Id.* at 695.

FAA permits the arbitration panel—but not the parties—to summon witnesses to testify and produce documents and then to petition the district court to enforce the summons.[48] In contrast, Section 1782(a), permits both foreign tribunals and litigants (as well as other "interested persons") to obtain discovery orders from district courts. The court concluded that reading the statute broadly to apply to all private foreign arbitrations would create a direct conflict with the Federal Arbitration Act for some foreign arbitrations—parties in foreign arbitrations would have more access to discovery than those in arbitration in the United States.[49]

The court determined a more limited reading of Section 1782(a) was "probably the correct one: a 'foreign tribunal' in this context means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.' Private foreign arbitrations, in other words, are not included."[50] Thus, the court affirmed the lower court's decision to quash the subpoena.

3. The Sixth Circuit held that a private international commercial arbitration <u>is</u> a foreign tribunal under 28 U.S.C. § 1782, and Ninth Circuit might agree

The Fourth Circuit followed the Sixth Circuit's reasoning in *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp*,[51] which was the first circuit decision to consider this issue after *Intel*. In *Abdul Latif Jameel Transp. Co.* ("ALJ"), the court analyzed whether the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) qualified as a "foreign or international tribunal," by looking to the dictionary definitions at the time of Congress's enactment of the statutory language and use of the words in legal writing.[52]

Through this analysis, the court found "American lawyers and judges have long understood, and still use, the word 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties."[53] Ultimately, the court rested its decision on the text, context, and structure of Section 1782 itself, because it provides "no reason to doubt that the word 'tribunal'

[48] 9 U.S.C. § 7.
[49] *Servotronics II*, 975 F.3d at 696.
[50] *Id.* at 695.
[51] *In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 720 (6th Cir. 2019).
[52] *In re Application*, 939 F.3d at 720.
[53] *Id.* at 721.

includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties."[54] The decision in *Intel* "contain[ed] no limiting principle suggesting the ordinary meaning of 'tribunal' does not apply."[55] The court further brushed aside the arguments by the Second and Fifth Circuits[56] by emphasizing the statutory requirements are a bare minimum threshold, and if a discovery request is likely to become unduly burdensome, "district courts enjoy substantial discretion to shape [i.e. limit] discovery under § 1782(a)."[57]

Likewise, the Ninth Circuit is currently analyzing the decision of one of its lower courts in *HRC-Hainan Holding Co., LLC v. Yihan Hu*.[58] There, the United States District Court for the Northern District of California held that the Sixth Circuit's conclusion was the correct one on this issue—there should be no distinction between public and private arbitration.

In the *HRC* case, a group of Delaware and Chinese companies ("Applicants") entered into a Collaboration Agreement with a Chinese hospital for the Applicants to invest $10 million in the hospital to build and equip an in vitro fertilization ("IVF") center in Hainan, China and to obtain a highly valuable government license to provide for IVF services. Applicants allege that after obtaining the license, the hospital took possession of the IVF center and license and unilaterally terminated the agreement. Based on the hospital's alleged breach of contract, Applicants initiated arbitration against the hospital administered by the China International Economic and Trade Arbitration Commission ("CIETAC"). This is a private commercial arbitration based on the parties' contractual obligations.

The Applicants also alleged Yihan Hu, who resided in the Northern District of California, signed the agreement on the hospital's behalf. The Applicants then initiated *ex parte* Section 1782 application requests in the district court seeking leave to serve document and deposition subpoenas on non-parties to the arbitration. The non-parties included Ms. Hu and her parents, and three entities Ms. Hu managed in California ("respondents"). The district court granted the applications, and respondents then moved to quash the subpoenas.[59]

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[54] *Id.* at 723.
[55] *Id.*
[56] Discussed *infra* at Section II(b)(4).
[57] *In re Application*, 939 F.3d at 730.
[58] HRC-Hainan Holding Co., LLC v. Yihan Hu, No. 19-MC-80277-TSH, 2020 WL 906719, at *1 (N.D. Cal. Feb. 25, 2020).
[59] J. Alexander Lawrence, et al., *California Federal District Court for the First Time*

The district court held the Section 1782 application was properly granted. It noted the Sixth Circuit had demonstrated, "the ordinary meaning of 'tribunal' has long encompassed 'privately contracted-for arbitral bodies with the power to bind the contracting parties,' including at the time the current version of § 1782(a) was adopted." It also noted that other uses of "tribunal" in the same statute and chapter of the code are "not inconsistent with a definition of the word that includes private arbitrations."[60]

In addressing concerns of the expansion of the scope of discovery, the district court stated *Intel* clearly rejected the "suggestion that [a] § 1782(a) applicant must show United States law would allow discovery in domestic litigation analogous to the foreign proceeding." It reasoned *Intel* actually "cautions against" giving weight to that concern, and there was nothing to suggest Congress intended to restrict or "shape the contours of § 1782(a) based only on a statute passed 30 years earlier."[61]

The *HRC* court also analyzed the difference in certain proceedings in the case, as there was a separate litigation in Huinan's court system. The district court asked the parties to provide supplemental briefing on how each document request related to the CIETAC arbitration and Hainan court proceeding. Based upon relevance and discovery considerations, the district court granted in part and denied in part the Respondents' Motion to Quash and Applicants' Motion to Compel.[62]

The *HRC* case is now on appeal before the Ninth Circuit Court of Appeals, and the proceedings have been held in abeyance pending the Supreme Court's disposition in *Servotronics*.[63]

4. The Second, Fifth (and now Seventh) Circuits have held that a private international commercial arbitration is <u>not</u> a foreign tribunal under 28 U.S.C. § 1782

Prior to *Intel*, both the Second and Fifth Circuits decided private commercial arbitration did not constitute a foreign tribunal for purposes of Section 1782.[64] The question presented to the Second

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Approves of U.S. Discovery in Aid of Foreign-Seated Private Commercial Arbitration (Mar. 9, 2020), https://www.mofo.com/resources/insights/200309-ca-district-court-discovery-foreign-arbitration.html#_ftn11 (last visited June 10, 2021).

[60] *HRC-Hainan Holding,* 2020 WL 906719, at *7.

[61] *Id.* at *8.

[62] *Id.* at *9.

[63] HRC-Hainan Holding Co., LLC et al. v. Yihan Hu, et al., 20-15371, DE 46 (9th Cir. Mar. 22, 2021).

[64] *NBC*, 165 F.3d 184; *Biedermann*, 168 F.3d at 882.

Circuit in *NBC v. Bear Stearns*, was whether a commercial arbitration conducted in Mexico under the International Chamber of Commerce (a private organization), constituted a "proceeding in a foreign or international tribunal" under Section 1782. Bear Stearns argued that regardless of the statute's meaning, it is not available for NBC's proposed purpose because of the FAA. The court stated "[i]f the broader evidence-gathering mechanisms provided for in § 1782 were applicable to… private arbitral panels, we would need to decide whether 9 U.S.C. § 7 [§ 7 of the FAA] is exclusive, in which case the two statutes would conflict. Because we conclude instead that § 1782 does not apply to proceedings before private arbitral panels, we need not reach this issue."[65]

To reach this decision, the Second Circuit found the term "foreign or international tribunal" ambiguous and turned to legislative history and purpose to determine the meaning.[66] Looking at the contemporaneous context of Section 1782 and 22 U.S.C. §§ 270–270g, the court found the legislative history of 270-270g clearly applied only to intergovernmental tribunals.[67] In conjunction with Section 1782's absence of legislative history regarding private tribunals, the court concluded the legislature would not have undertaken this expansion of assistance without expressly stating this intention.[68] The court ultimately concluded allowing the discovery would undermine one of the key advantages of arbitration—its efficiency and cost-effectiveness—trending towards shorter time towards resolution as compared to litigation.

Additionally, the court noted that when parties to a private international arbitration make no provision for some degree of consensual discovery in their agreement to arbitrate, then "the arbitrators control discovery." Thus, "neither party is deprived of its bargained-for efficient process by the other party's tactical use of discovery devices." However, the court the reasoned that by "expanding" the discovery assistance in Section 1782 to private tribunals, this efficient process would be "overridden."[69]

The Fifth Circuit relied on similar reasoning in *Republic of Kazakhstan v. Biedermann International*.[70] In analyzing whether a private international arbitration panel meets the definition of tribunal, the court noted the limits on the definition since it "has been held not to include even certain types of fact-

[65] *NBC,* 165 F.3d at 188.
[66] *Id.*
[67] *Id.* at 189.
[68] *Id.* at 191.
[69] *Id.* at 191.
[70] *Biedermann,* 168 F.3d at 882.

finding proceedings, like those enforcing tax assessment and currency exchange regulations, conducted under the auspices of foreign governments."[71] Like the Second Circuit, the court continued its skepticism by pointing to the possible conflict between a broad interpretation of tribunal and the provisions of the FAA[72] and the lack of contemporaneous legislative history expressly contemplating international commercial arbitration.[73]

Both the Second and Fifth Circuits reaffirmed these rulings after *Intel*.[74] Interestingly, one district court in the Second Circuit rejected this notion when it ruled the London Maritime Arbitration Association was a foreign tribunal under Section 1782 and declined to follow the Circuit's pre-*Intel* decision in view of the dictum in *Intel* that "suggests the Supreme Court may consider private foreign arbitrations…within the scope of Section 1782."[75] However, the Second Circuit reversed and reaffirmed its position on appeal that private foreign arbitrations are not within the scope.[76]

Almost ten years after *Biedermann* and post-*Intel*, the Fifth Circuit found Justice Ginsburg's reference to Hans Smit's definition of "tribunal" was only for the proposition that Section 1782 applies to quasi-judicial agencies and administrative courts.[77] The Fifth Circuit was not persuaded by the argument that the *Intel* ruling appeared to change the analysis.

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[71] *Biedermann*, 168 F.3d at 882 (citing Fonseca v. Blumenthal, 620 F.2d 322, 323 (2d Cir. 1980) (finding the Superintendent of Exchange Control of Colombia not a "tribunal"); *In re* Letters Rogatory Issued by Dir. of Inspection of Gov't of India, 385 F.2d 1017, 1020–1022 (2d Cir. 1967) (finding an Indian income tax officer not a "tribunal")); *see also In re* Letters Rogatory from Tokyo Dist. Prosecutor's Off., Tokyo, Japan, 16 F.3d 1016, 1018–1019 (9th Cir. 1994) (finding Tokyo District Prosecutor's Office not a "tribunal").

[72] *Biedermann*, 168 F.3d at 883 ("the differences in available discovery could create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitration disputes as domestic, foreign, or international") (citing *NBC*, 165 F.3d at 188–190).

[73] *Id.* at 883 ("It is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart.").

[74] *In re* Guo, 965 F.3d 96, 100 (2d Cir. 2020) (as amended July 9, 2020); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed. Appx. 31 (5th Cir. 2009) ("Because we cannot overrule the decision of a prior panel unless such overruling is unequivocally directed by controlling Supreme Court precedent, we remain bound by our holding in *Biedermann*.").

[75] *In re* Ex Parte Application of Kleimar, 220 F. Supp.3d 517 (S.D.N.Y. 2016) ("it would have been a simple matter to add the word 'governmental' before the word 'tribunal,' had Congress wanted to limit 1782 to governmental tribunals").

[76] *In re Guo*, 965 F.3d at 100.

[77] *El Paso Corp.*, 617 F. Supp.2d at 486–487.

Other district courts have discussed and affirmed the position that private arbitral tribunals were not contemplated by Section 1782,[78] and are joined by district courts in the Seventh, Ninth, Tenth, and Eleventh Circuits.[79] However, some district courts in the Ninth and Eleventh Circuits have also come to the opposite conclusion[80] and are joined by district courts in the Eighth Circuit and the D.C. Circuit.[81]

Indeed, several courts have analyzed Section 1782 as applicable in foreign "litigation,"[82] which may indicate the interpretation of this section requires more than a private party's contractual obligation of arbitration.

In April 2020, a district court in Delaware, which is in the Third Circuit, held the term "tribunal" in Section 1782 did not mean private arbitral body in *In re Application of Storag Etzel GMBH*.[83] The district court plainly stated the term "tribunal" in Section 1782 meant a "foreign government, court, or agency," and not a private arbitral body. The petitioner could not obtain discovery from the company located in the U.S. for use in a private arbitration in Germany under Section 1782.[84] The Delaware court noted the term "tribunal" was ambiguous, but held it appeared that Congress understood when it adopted the Rules Commission's revisions to

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[78] *In re* Axion Holding Cyprus Ltd. Pursuant to 28 U.S.C. § 1782 for Leave to Take Discovery for use in Foreign Proceedings, No. 20-00290 (MN), 2020 U.S. Dist. LEXIS 171293 (D. Del. Sep. 18, 2020) ("If Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign jurisdiction, it would have done so explicitly."); *In re* EWE Gasspeicher GmbH, No. CV 19-MC-109-RGA, 2020 WL 1272612, at *2 (D. Del. Mar. 17, 2020), on appeal ("While there are reasonable arguments on both sides of the debate, [we] hold that a private commercial arbitration is not a "tribunal" within the meaning of § 1782."); *El Paso Corp*., 617 F. Supp.2d at 483, 485.

[79] *In re* Grupo Unidos por el Canal, S.A., 2015 WL 1815251, at *7 (N.D. Cal. Apr. 21, 2015); In re Grupo Unidos Por El Canal, S.A., 2015 WL 1810135, at *5-6 (D. Colo. Apr. 17, 2015) (finding that *Intel* did not consider whether Section 1782 could be invoked if the tribunal was private arbitration agreed to contractually by private parties)*; In re Norfolk S. Corp.,* 626 F. Supp.2d at 885 (interpreting *Intel's* reference to "arbitral tribunals" as including state-sponsored arbitration bodies, but excluding purely private arbitrations); *In re* Operadora DB Mexico, S.A. DE C.V.*,* 2009 WL 2423138, at *10-12 (M.D. Fla. Aug. 4, 2009) (applying a functional analysis, holding that Section 1782 did not apply to a private arbitration tribunal constituted under the ICC International Court of Arbitration).

[80] *In re* Application of Roz Trading Limited, 469. F. Supp.2d 1221 (N.D. Ga. 2006).

[81] *In re* Application of Hallmark Capital Corp.*,* 534 F. Supp.2d 951, 954–957 (D. Minn. 2007) ("the 'common usage' and the 'widely accepted definition' of 'tribunal' includes arbitral bodies.").

[82] Gov't of Ghana v. ProEnergy Servs., LLC, 677 F.3d 340 (8th Cir. 2012).

[83] *In re* Storag Etzel GmbH, No. CV 19-MC-209-CFC, 2020 WL 1849714 (D. Del. Apr. 13, 2020).

[84] *In re Storag Etzel*, 2020 WL 1849714 at *3.

Section 1782(a), that the revisions extended only to courts and government agencies, not to private arbitral bodies.[85]

5. Not every circuit court has ruled on the issue, but some have had relevant discussions on it

The Eleventh Circuit is trending towards interpreting Section 1782 to include private commercial arbitration. It did not specifically address the issue in the *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*,[86] but the court did observe that it reviewed the case law and found the private arbitral tribunal in this action was "likely within the purview" of Section 1782.[87] The court held the application satisfied the *prima facie* requirements of Section 1782(a), in that the applicant "established that the civil and criminal actions are within reasonable contemplation." However, the district court did not actually have to reach the issue of whether the pending arbitration was a foreign tribunal proceeding under the statute.

The Eleventh Circuit found it persuasive that Congress deleted the words "in any judicial proceeding pending in any court in a foreign country" and replaced them with the words "in a proceeding in a foreign or international tribunal" in order to ensure assistance was not confined to proceedings just before conventional courts, but rather extended to administrative and quasi-judicial proceedings. Further, in 1996, Congress broadened the statute, adding proceedings in a foreign or international tribunal included "criminal investigations conducted before formal accusation." The Eleventh Circuit observed that even before the 1996 amendment, "[t]he history of Section 1782 reveal[ed] Congress' wish to strengthen the power of district courts to respond to requests for international assistance."[88]

However, the Eleventh Circuit also noted "the law is clear that a district court is not required to grant a Section 1782(a) discovery application simply because it has the authority to do so." The court spelled out the same *Intel* factors to

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[85] *Id.*

[86] Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987 (11th Cir. 2012), vacated and superseded by Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014).

[87] *Application of Consorcio Ecuatoriano,* 747 F.3d at 1268.

[88] *Id.* at 1269; Lo Ka Chun v. Lo To, 858 F.2d 1564, 1565 (11th Cir. 1988).

be considered in exercising the court's discretion.[89]

By comparison, the D.C. Circuit has not definitively spoken on whether private international commercial arbitration constitutes a tribunal, but the D.C. court gave weight to the *Intel* factors, which demonstrates a trend toward not to make a distinction between public and private international commercial arbitration. In *Hulley Enters. v. Baker Botts LLP*, the D.C. district court agreed the application satisfied all three statutory requirements, and the court had the authority to grant the application. It then relied on the *Intel* factors for its discretion in applying Section 1782 to the public Investment Treaty Arbitration proceedings. However, the court did not have to address whether its same analysis would apply to private commercial arbitration.[90]

B. Implications of *Servotronics*

1. The U.S. Supreme Court has granted *writ of certiorari*

The implications for parties in international arbitration are current and real, because Section 1782 applications are a powerful discovery tool. Given a split in the circuit courts as to whether that tool should be used only in public foreign proceedings as opposed to private commercial arbitration, this issue is now ripe for the United States Supreme Court to weigh in. The parties in *Servotronics* appealed the decision from the Seventh Circuit, seeking a *writ of certiorari* for the U.S. Supreme Court to hear the case, and on March 22, 2021, the Supreme Court granted the *writ.*

The Petitioner argued the conflicting circuit court decisions offered a compelling reason for the Supreme Court to decide the matter at hand. Courts prefer consistency among the circuits, and the Petitioner sought to settle the Congressional intent question once and for all. Another important issue is that this discovery enforcement rule affects the rights of U.S. citizens to be "hauled in" to provide evidence in foreign proceedings. Thus, this discovery tool has national significance as to how U.S. citizens are treated as witnesses. Moreover, this decision would set precedential value, as the Supreme Court has the power to bind all lower courts. This issue has not been previously decided in any other capacity by the Supreme Court.

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[89] *Application of Consorcio Ecuatoriano,* 747 F.3d at 1272.

[90] *In re* Application for an Ord. Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for use in a Foreign Proceeding, 286 F. Supp.3d 1, 4 (D.D.C. 2017).

Petitioner also noted the interpretation of "tribunal" from the lower court was consistent with recent statutory interpretations. The Petitioner focused its arguments on the plain language meaning of the term, the legislative intent, the functional analysis, and discretionary factors utilized by the district courts, to argue Section 1782 should apply to private commercial arbitrations.

Respondents Boeing Company and Rolls-Royce asserted in their brief that during the arbitral process, they had already produced all documents the arbitral panel determined were necessary for the fair resolution of the arbitration. The Respondents contended the basis for the Section 1782 application was "excessively broad" and "insufficiently focused." In addressing the contrary holding in the Fourth Circuit, the Respondents also noted that the Fourth Circuit did not specifically hold that private ICAs were "foreign tribunals;" rather, the court held that the specific UK arbitration in this case was "a product of a government-conferred authority."

Respondents also characterized this circuit court split as "minor" and not significant enough for the Supreme Court to weigh in. In fact, as noted in this Article, not all circuits have even addressed this issue one way or the other. By the time the Supreme Court would be able to hear this case, the issue will likely be moot given the timing of the adjudication of the arbitration in May 2021. Thus, there would be no "case or controversy" to resolve. The Respondents further argued the 7th Circuit, adopting the 2nd and 5th Circuits' reasoning, was the correct analysis and urged The Supreme Court to likewise adopt the same approach.

2. Common law vs. civil law implications

On the issue of discovery, there is a philosophical difference between common law and civil law countries. In common law countries, the parties believe the discovery process is a primary driver towards finding the "truth" in adversarial proceedings. Civil law countries generally assume the judge (or arbitrator) will take a more active role in the fact-finding, and the goal of discovery is to instruct the judge.[91] In most civil law countries, discovery is fairly limited and essentially, if the parties do not already have the evidence when they come to trial or arbitration, then they are not likely to proceed very far.

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[91] Hugo Arias Salgado, *Ecuador: How Civil and Common Law Countries Treat Fact-Finding*, MONDAQ (Sept. 26, 2016) https://www.mondaq.com/civil-law/526638/how-civil-and-common-law-countries-treat-factfinding (last visited June 10, 2021).

International arbitration is more akin to civil adjudication and generally limits discovery compared to what U.S. attorneys would otherwise be accustomed. Critics have argued that the more U.S. parties are engaging counsel for their international disputes in arbitration, the more like "common law style litigation" it is becoming.

Importantly, those concerned with potential risks that compelled discovery may present in the private commercial arbitration context can prevent these issues through careful drafting of arbitration clauses. The parties can agree to limit discovery and set ground rules for the conduct of the arbitration before the dispute arises or they can select an arbitral institution and/or arbitrator known for limitations on discovery. The *Intel* factors also offer a safeguard in circumstances where discovery is compelled, so that courts consider these factors and prevent "fishing expeditions" and abuses of the discovery process.

Another implication is the fact that all "interested parties" gain access to the discovery process under Section 1782; whereas, discovery in U.S. litigation is limited to the parties themselves. What if a discovery request originates from the panel itself, and not the parties? Or what if the "interested party" is not involved in the arbitration at all?

The FAA permits only the arbitral tribunal to summon witnesses to testify or produce documents while Section 1782(a) permits both foreign tribunals and parties to seek a summons to obtain discovery. The common law perspective may be more in favor of the expansion of the discovery tools for the purpose of fact-finding, but the civil law perspective may find this expansion to be an abuse of discovery and contrary to the confidential nature of private arbitration.

From a common law perspective, the inability to enforce discovery orders may seem wholly inapposite to the fact-finding mission of adversary proceedings. However, from a civil law perspective, the use of discovery as a litigation tool (or arbitration tool) is not viewed as significant. However, in any case, parties in a private commercial arbitration expect to be able to present their case to their fullest ability before the arbitral tribunal and do not want to accept any disadvantage that might result in an adverse decision.

3. Uncertainty for parties in arbitration

The primary implication of the current circuit court split is that there is uncertainty as to how the statute will be applied in the United States. This uncertainty will result in additional litigation of the issue, increased costs for the parties, and

inefficiencies in the arbitral process. The *amicus brief* filed by the International Institute For Conflict Prevention & Resolution ("CPR") focused its arguments on this issue. The CPR is a well-established non-profit organization that assists parties in finding alternative dispute resolution ("ADR") mechanisms. The CPR is comprised of both a think-tank and an organization that provides neutrals for ADR proceedings.

The CPR also pointed out that often the ADR procedure commences before the completion of the Section 1782 application and its litigation process, and thus, the Section 1782 application becomes moot. The arbitration hearing on the merits in the *Servotronics* arbitration is set for May 2021, and it is unlikely that the Supreme Court will have ruled on this action before such time. The CPR urged the Court to set the appeal case for hearing this term to avoid the issue becoming moot before it could be addressed by the Court. The CPR noted that this protracted "journey of jurisprudence" through the circuit courts reflects the need for the Supreme Court to review and rule on this issue specifically.

The Atlanta International Arbitration Society ("AtlAS") noted in its *amicus brief* that the mere uncertainty of how Section 1782 is interpreted in the United States may essentially "chill" the parties' desire for arbitration in the private commercial context. The Charlotte International Arbitration Society ("CIAS") agrees with the proposition that the resolution of this issue will bring more certainty to parties, which would increase parties' confidence in the use of international arbitration in the business context. At the time of contracting, no one can be sure where potential witnesses, documents, or evidence may be located when needed in arbitration. Leaving the enforceability of Section 1782 orders to "happenstance" of the location of the witness or custodian seems undesirable. The primary arguments cited in favor of applying Section 1782 to private ICAs include: (a) reciprocity- one policy reason Congress enacted Section 1782 was to receive reciprocity from foreign countries so that United States litigants could seek discovery in other countries; (b) modern usage of the word "tribunal"- practitioners and U.S. courts[92] use "tribunal" in the industry vernacular to mean arbitration panels in international

private commercial settings and do not consider the word restricted to a "court" or quasi-judicial body; (c) Section 1782 serves as a "liberalizing" statute by which the drafter intended to broaden the enforcement of discovery orders;[93] (d) the interpretation is not inconsistent with the FAA and the phrase "for use" in the tribunal proceedings is actually more limiting than discovery allowable under U.S. law currently; and (e) Section 1782 applies to ITA and the drafters of the statute did not include any distinction between ICA and ITAs.

The primary arguments against applying Section 1782 to private ICAs, but rather to governmental and quasi-judicial bodies only, include: (a) plain language at the time of drafting- when Congress drafted the language, "tribunal" generally only meant "court" or similar quasi-judicial setting; (b) statutory construction indicates that similar statutes when read together should have the same meaning and, as such, where other federal statutes refer to tribunal they typically only refer to a governmental body, an investigating magistrate, a quasi-governmental agency, or conventional civil and commercial courts; (c) applying Section 1782 to foreign arbitrations makes venue and seat selection more predictive of greater discovery rights than any other factor; and (d) if Congress meant to include "private commercial arbitration," it would have specifically stated so in the statute (or can amend the statute to do so).

Needless to say, the international arbitration community is very eager for the resolution of this important issue.

III. Conclusion

The table is set for the Supreme Court to address this issue and set precedent that all United States circuit courts must follow. The question will be whether the long-

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[92] *See, for example*, Application of the Rosenthal-Block China Corp., 278 F.2d 713 (2d Cir. 1960) (recognizing the "Arbitration Tribunal of the American Arbitration Association" as private commercial arbitration); The reply memorandum of law from *Servotronics* lists several other similar citations.

[93] One of the drafters of Section 1782, Professor Hans Smit, has commented that it is "clearly incorrect" to conclude "that Section 1782 does not extend its reach to private international arbitral tribunals." 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, 298 (2003) https://1.nextwestlaw.com/link/document/fulltext?findtype=y&sernum=0302918254&pubnum=0106902&originatingdoc=i138f5c64ba9b11e98c309ebae4bf8962&reftype=Ir&fi=co_pp_sp_106902_298&orginationcontext=document&transitiontype=documentitem&contextdata=(sc.relatedinfo)#co_pp_sp106902_298. Arguments that the drafters indeed intended Section 1782 to apply to ICAs reference Professor Smit.

standing history in favor of arbitration and cooperation with foreign proceedings (not just litigation) is going to push the trend towards one interpretation over the other. Currently, the districts that have allowed discovery for private commercial arbitral proceedings are arguably more "pro-arbitration" than those jurisdictions that have ruled the opposite, in that they give assistance to more arbitration proceedings. So, if discovery is likely to be a necessity to proving one's case or if it could be used as a strategy in the dispute resolution process, counsel for parties need to carefully consider where to file their 28 U.S.C. § 1782 applications.