28 USC § 1782 IN AID OF FOREIGN ARBITRATION: "A TRIBUNAL BY ANY OTHER NAME"

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I. PREAMBLE

Section 1782** of Title 28 of the United States Code is a tool of American Federal Civil Procedure that has recently gained increased interest.[1] It was built to assist foreign and international tribunals, and litigants before such tribunals, to get testimony or production of documents or things "for use in a proceeding in a foreign or international tribunal."[2] Federal district courts are competent to authorize such discovery giving the appropriate orders.[3]

The history of § 1782 dates back more than one and a half century. Established for the purpose of synchronizing the American civil procedure with the international practice of Letters Rogatory, its present provision is the result of preoccupation of Congress for the extensive increase of the international transactions and resultant litigation.[4]

Section 1782 is commonly described as "aid to foreign litigation," but recently it became apparent that the Statute may often be more of a problem than

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** The terms "Section 1782" and "§ 1782" are used interchangeably throughout this Article when referring to 28 U.S.C § 1782.

[1] *See generally* 28 U.S.C. § 1782 (2021).

> Assistance to foreign and international tribunals and to litigants before such tribunals *(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.*

§ 1782(a) (emphasis added).

[2] *Id.*

[3] *See* § 1782.

[4] For a history of § 1782 and its provisions, *see, e.g.*, Charles McClellan, *America, Land of (Extraterritorial) Discovery: Section 1782 Discovery for Foreign Litigants*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 809, 813, 815 (2008).

an "aid."[5] Conflicts arose among courts about the requirements for granting the aid, and the Supreme Court's seminal case *Intel Corporation v. Advanced Micro Devices*[6] seemed to have supplied an answer to all conflicts.

Unfortunately, this was not the case, and it is not surprising, given that outside the United States there is no system identical to the American one; instead, many systems may be grossly or totally incompatible.[7] For example, some European systems may reserve to the forum judge the power to interrogate witnesses, and the depositions "American style" are abhorred and forbidden.[8] In such cases, the recourse of foreign parties to § 1782 may amount to illegal circumvention of the mandatory rules of the forum.[9]

It so happened that many conflicts continued to exist, and some new ones started brewing in the recent years, such as the one that is the theme of this article: whether the parties to a foreign arbitration proceeding may avail themselves of the "aid" of § 1782.[10]

As of today, the courts are sharply divided on the answer to this question, a good number holding that arbitration panels do qualify as "tribunals" under § 1782,[11] and a good number holding that they do not.[12]

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[5] *See id*. at 832.

[6] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 269 (2004).

[7] *See id*. at 241, 260.

[8] *See, e.g.*, Simona Grossi, *A COMPARATIVE ANALYSIS BETWEEN ITALIAN CIVIL PROCEEDINGS AND AMERICAN CIVIL PROCEEDINGS BEFORE FEDERAL COURTS*, 20 IND. INT'L & COMP. L. REV. 213, 221 (2010).

[9] *See Intel Corp*., 542 U.S at 365.

[10] *See id*. at 244.

[11] *See, e.g., In re* Veiga, 746 F. Supp. 2d 8, 17 (D.D.C. 2010) (granting § 1782 discovery in aid of Bilateral Investment Treaty arbitration under the UNCITRAL Arbitration Rules, including before the tribunal had addressed whether it had jurisdiction); *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 303–04 (S.D.N.Y. 2010) (discussing that the arbitral tribunal appointed pursuant to international treaty and the UNCITRAL Arbitration Rules constituted a "foreign or international tribunal" within the meaning of § 1782); OJSC Ukrnafta v. Carpatsky Petroleum Corp., 2009 WL 2877156, at * 2 (D. Conn. Aug. 27, 2009) (discussing arbitral tribunal appointed pursuant to the UNCITRAL Rules and under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce constituted a "foreign or international tribunal" within the meaning of § 1782); *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 238–40 (D. Mass. 2008) (concluding that arbitral tribunal appointed under the International Chamber of Commerce Rules of Arbitration constituted a "tribunal" under § 1782); Comisión Ejecutiva Hidroeléctrica Del Río Lempa v. Nejapa Power Co., LLC, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) (holding private foreign arbitrations fall within the scope of § 1782); *In re* Application of Hallmark Cap. Corp., 534 F. Supp. 2d 951, 952 (D. Minn. 2007) (holding private foreign arbitrations fall within the scope of § 1782 and are, therefore, considered "tribunals").

[12] *See, e.g., In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1226–28 (N.D. Ga. 2006) (describing the findings of some courts that the term "foreign or international tribunals" is ambiguous). Other courts have concluded that private arbitrations do not fall within the statute to the extent that they do not provide for any form of review of the arbitral tribunal's decision. *See, e.g., In re* Operadora DB Mex., S.A., 2009 WL 2423138, at *1, 9–12 (M.D. Fla. Aug. 4, 2009) (finding ICC arbitral tribunal does not qualify as a foreign or international tribunal within the meaning of § 1782); *In re* an Arbitration in London, England between Norfolk Southern Corp., Norfolk Southern Ry. Co., and General Sec. Ins. Co. and Ace Bermuda Ltd., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) [hereinafter *In re* Arbitration in London, England between Norfolk Southern Corp.] (holding private arbitrations

Examining the references of these cases reveals an even deeper conflict. For example, the *In Re Babcock* court held that an International Chamber of Commerce ("ICC") arbitration qualified as a tribunal under § 1782 and the KeyCite of the decision shows only nine negative treatments out of sixty seven cases,[13] while in *In re an ARBITRATION in London, England between Norfolk Southern Corporation*, the court held that a private arbitration in London, England, did not qualify as "tribunal," because the *Intel* Court's reference to "arbitral tribunals" included state-sponsored arbitral bodies but excluded purely private arbitrations, got only two negative treatments out of twenty two.[14]

The disparate treatment may be due to the nature of the ICC as an "institutional" arbitration organization and the "private" nature of the London arbitration under review in that case, probably "ad hoc," but it is the visible symptom of the conflict. In other words, not all "arbitration panels" are created equal and there is no uniform treatment for all—the search for an answer still eludes the Court for want of uniformity.[15]

On this background developed the saga of *Servotronics*.[16]

II. THE *SERVOTRONICS* SAGA

An arbitration took place in London under the English CIArb[17] between Servotronics, Inc. of New York, the manufacturer of a valve for aircraft engines, and Rolls Royce, PLC, of London.[18] The dispute arose around the failure of a valve supplied by Servotronics to Rolls Royce during a test conducted in South Carolina on a Dreamliner aircraft of the Boeing Company.[19] The valve's failure caused damages to the aircraft.[20]

Boeing sued Rolls Royce who eventually settled and sought indemnity from Servotronics, with whom they had a long-term agreement that included a

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do not fall within the scope of § 1782); La Comision Ejecutiva, Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008), *aff'd* 341 F.App'x 31 (5th Cir. 2009) (holding private arbitrations do not fall within the scope of § 1782).

[13] *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d at 233.

[14] *See In re* Arbitration in London, England between Norfolk Southern Corp., 626 F. Supp. 2d at 886.

[15] *See id*. at 885.

[16] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021), and *cert. dismissed*, 142 S. Ct. 54 (2021) (holding that 28 U.S.C. § 1782(a) did not authorize the district court to compel discovery for use in a private foreign arbitration, and thus, the district court properly quashed the subpoena).

[17] *Servotronics*, 975 F.3d at 691. *See generally About Us,* CHARTERED INST. OF ARBITRATORS, https://www.ciarb.org/about-us/ (last visited Mar. 13, 2022) (describing the CIArb as "an international centre of excellence for the practice and profession of alternative dispute resolution (ADR)" which "offers a range of resources including guidance, support, advice, networking and promotional opportunities, as well as facilities for hearings, meetings and other events.").

[18] *Servotronics*, 975 F.3d at 691 ("Under a long-term agreement between Rolls-Royce and Servotronics, any dispute not resolved through negotiation or mediation must be submitted to binding arbitration in Birmingham, England, under the rules of the Chartered Institute of Arbiters (CIArb)."

[19] *Id*.

[20] *Id*.

CIArb Arbitration clause.[21] Upon initiation of arbitration, Servotronics filed an ex parte application in the U.S. District Court for the Northern District of Illinois asking for a subpoena compelling Boeing to produce documents for use in the London arbitration, under 28 U.S.C. § 1782(a).[22]

The judge initially granted the requested subpoena and Rolls-Royce moved to quash, arguing that § 1782(a) does not permit a district court to order discovery for use in a private foreign commercial arbitration.[23] Boeing intervened and joined the motion to quash.[24] The judge then reversed course and quashed the subpoena, agreeing with Rolls-Royce and Boeing that § 1782(a) does not authorize discovery assistance in private foreign arbitrations.[25]

Servotronics appealed, and the Seventh Circuit affirmed, holding that "*A 'foreign or international tribunal,' within the meaning of the statute authorizing a district court to provide discovery assistance to such a tribunal, is a state-sponsored, public, or quasi-governmental tribunal, and the term does not include private foreign arbitration*."[26]

Servotronics then filed a petition of certiorari with the Supreme Court, where the question at long debated in the Courts below was finally articulated in a precise text:

> Whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case below, the Seventh Circuit, have held.[27]

The event stirred great interest in both the business and legal communities, and a plethora of Amicus Briefs were filed: seven in support of Respondents,

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[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Servotronics*, 975 F.3d at 691.
[25] *Id*.
[26] *Id*. at 696.
[27] Petition for Certiorari, *Servotronics*, 141 S. Ct. 1684 (No. 20-794), 2020 WL 7343172, at *1.

Rolls-Royce PLC and The Boeing Company,[28] four in support of Petitioner, Servotronics,[29] and two, interestingly, in "support of neither."[30]

The case was set for argument in August 2021, but soon after the Petitioner filed a letter notifying the Clerk of intention to file a Rule 46 motion to dismiss, and on September 29, 2021, the Court ordered dismissal upon joint stipulation of the parties.[31]

Thus, the important question remains unanswered, and the deep conflict keeps reigning sovereign.

III. TWIN PETITIONS – THE SAGA GOES ON

Much ado about nothing? End of the story? Not so fast.

At the same time as *Servotronics*, two other cases were unfolding on precisely the same issue: whether a § 1782 discovery aid could be allowed to litigants in a foreign arbitration.

In *Luxshare, LTD. v. ZF Automotive US, Inc.*,[32] a business dispute involving hundreds of millions of dollars in potential damages, arose between Luxshare,

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[28] *See* Brief of Amicus Curiae of Dr. Xu Guojian, et. al. in Support of Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714235; *see also* Brief for Amicus Curiae Halliburton Company in Support of Respondent, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714194; *see also* Brief of the Gen. Aviation Mfrs. Ass'n, Inc. And the Aerospace Indus. Ass'n as Amici Curiae in Support of Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714678; *see also* Brief of Inst. of Int'l Bankers as Amicus Curiae in Support of Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714302; *see also* Brief of the Int'l Arb. Ctr. in Tokyo as Amicus Curiae in Support of Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2685702; *see also* Brief of the Chamber of Com. of the United States of America. and Bus. Roundtable as Amici Curiae in Support of the Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714157; *see also* Brief for the United States as Amicus Curiae Supporting Respondents, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 2714670 [hereinafter Brief for the United States].

[29] *See* Brief of the Int'l Inst. for Conflict Prevention & Resolution as Amicus Curiae in Support of Petitioner, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 103660; *see also* Brief of Fed. Arb., Inc. (Fedarb) as Amicus Curiae in Support of Petitioner, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 1966552; *see also* Brief of the Atlanta Int'l Arbitration Soc'y as Amicus Curiae in Support of Petitioner, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 146901; *see also* Brief Amicus Curiae of Professor George A. Bermann in Support of Petitioner, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 1988090 [hereinafter Brief Amicus Curiae of Professor George A. Bermann].

[30] *See* Brief Amicus Curiae of the Int'l Ct. of Arb. of the Int'l Chamber of Com. in Support of Neither Party, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 1986466; *see also* Brief of Professor Yanbai Andrea Wang as Amicus Curiae in Support of Neither Party, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) (No. 20-794), 2021 WL 1988070 [hereinafter Brief of Professor Yanbai Andrea Wang as Amicus Curiae].

[31] *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, *cert. dismissed*, 142 S. Ct. 54 (2021) (dismissing the petition for Writ of Certiorari on September 29, 2021).

[32] *See* Luxshare, LTD. v. ZF Auto. US, Inc., No. 20-MC-51245, 2021 WL 3629899 (E.D. Mich. Aug. 17, 2021).

LTD and ZF Automotive US, Inc ("ZF USA"). Intending to start an arbitration proceeding in Munich, Germany, Luxshare applied to the Eastern District of Michigan and requested discovery under § 1782 from ZF USA and two of its Officers.[33] The Court granted Luxshare discovery on July 1, 2021 and granted its motion to compel on August 17, 2021.[34]

In *Fund for Protection Of Investors Rights in Foreign States v. Alixpartners, LLP*,[35] a Russian corporation assignee of shareholder in a bankrupt nationalized private bank, challenged the expropriation of shareholder's bank interest by recourse to an arbitral panel established by a bilateral investment treaty between Lithuania and the Russian Federation.[36] The Fund for Protection sought assistance from the Southern District Court of New York, in order to obtain discovery from AlixPartners, LLP, a company with principal place of business in New York, for use in the arbitration proceeding.[37] The Court granted Fund for Protection recourse to § 1782 on July 15, 2021, a month before Luxshare obtained its motion to compel in its companion case.[38]

ZF Automotive, the intended Plaintiff in the planned arbitration and the Petitioner in the *Luxshare* case, was now aware of the pending certiorari in *Servotronics*, and being wary that *Servotronics* might soon become moot (thus remaining with the only alternative of an uncertain appeal against Luxshare), filed petition for certiorari on December 7, 2020.[39] In fact, *Servotronics* was dismissed, as we know, on September 29, 2021.[40]

> As a result of a business dispute involving hundreds of millions of dollars in potential damages, Luxshare, LTD intends to initiate, by the end of the year, an arbitration proceeding in Munich, Germany against ZF Automotive US, Inc. Luxshare came to this federal court in the Eastern District of Michigan pursuant to 28 U.S.C. § 1782 seeking discovery for the arbitration from ZF US and two of its senior officers who reside in the District.

Id.

[33] *See id.* (stating that arbitration proceeded in Munich).

[34] *See id.* at *6 (holding that "Luxshare is entitled to discovery under the Court's July 1 order and so the motion to compel that discovery will be granted.").

[35] *See In re* Fund for Prot. Of Inv'r Rights in Foreign States v. AlixPartners, LLP, 5 F. 4th 216 (2d Cir. 2021) (holding that an arbitration between an investor and a foreign country, such as Lithuania, pursuant to a bilateral investment treaty to which Lithuania was a party was a proceeding in a foreign or international tribunal under 28 U.S.C.S § 1782).

[36] *See id.* at 222 ("When the Fund initiated an arbitration pursuant to the Treaty, it elected to resolve the dispute through 'an ad hoc arbitration in accordance with Arbitration Rules of [UNCITRAL.]'").

[37] *See id.* ("In August 2019, the Fund filed an application pursuant to 28 U.S.C. § 17829 in the United States District Court for the Southern District of New York for an order granting the Fund leave to obtain discovery for use in its arbitration with Lithuania.").

[38] *See In re* Fund for Prot. Of Inv'r Rights in Foreign States, 5 F. 4th at 233 ("After considering the relevant Guo factors, this arbitration is between an investor and a foreign State party to a bilateral investment treaty taking place before an arbitral panel established by that Treaty, and therefore it is a 'proceeding in a foreign or international tribunal' under § 1782.").

[39] *See generally Docket for Servotronics, Inc., Petitioner v. Rolls-Royce PLC, et al.*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/docket/docketfiles/html/public/20-794.html (last visited Mar. 13, 2022) (highlighting the filing of Sevotronics petition for a Writ of Certiorari).

[40] *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, *cert. dismissed*, 142 S. Ct. 54 (2021)

In response to *Servotronics*' dismissal, Alixpartners took action and filed its own petition for certiorari, which was granted by the U.S. Supreme Court on December 19, 2021.[41] Both petitions emphasize that the ongoing circuit split and the uncertainty that it creates inflicts serious harm and that the uncertainty must be resolved by the Court, making sure that the vital question receives a conclusive answer.[42]

It was fair to foresee that the Supreme Court would oblige, having already granted certiorari in *Servotronics*, its petition dismissed not by the will of the Court.[43] Alixpartners also asked that its case be decided together with ZF Automotive,[44] both asking the identical question (regardless of the different type of arbitration panels) and again the Supreme Court obliged, distributing for Conference both cases at the same date of December 3, 2021, then rescheduled for Conference on December 10, 2021 and granting certiorari the same day.[45]

The stage is now set for a major pronouncement of the Supreme Court.

IV. § 1782 SERIES – SEASON 1 – *SERVOTRONICS*

Whether or not a new tide of Amicus Briefs will mount in the *Companion Cases*, the whole legal landscape has been widely traveled and explored in *Season One*, and one already has enough to dare to guess an answer to the question.

In fact, the material available helps one understand why there is a conflict in the first place. Nowhere in the § 1782 Statute is there an explicit indication that Arbitration Panels are not given the discovery help of § 1782 nor is it written that they are.[46] § 1782 in its present wording refers only to "*foreign or international tribunal*" and the word "*tribunal*" is the key to the whole conflict.[47] Most of the cases on the issue lament that "*tribunal"* is an ambiguous term, not

(dismissing Writ of Certiorari pursuant to Supreme Court Rule 46).

[41] *See* AlixPartners, LLP v. Fund for Prot. of Investors' Rights in Foreign States, 5 F.4th 216, *cert. dismissed*, 142 S. Ct. 638 (2021) (holding that "[p]etition for Writ of Certiorari before judgment to the United States Court of Appeals for the Sixth Circuit in No. 21–401 granted.").

[42] *See generally* Petition for Certiorari at 24, ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401 (6th Cir. Oct. 2021) (stating that "[i]f *Servotronics* is not ultimately the proper vehicle to do so, the Court should grant this petition to ensure that this vital question receives a conclusive answer.").

[43] *See Docket for Servotronics, Inc., Petitioner v. Rolls-Royce PLC, et al.*, *supra* note 39 (highlighting the Supreme Court's granting of certiorari in *Servotronics*).

[44] See generally ZF Automotive US, Inc. v. Luxshare, Ltd., Ballotpedia, https://ballotpedia.org/ZF_Automotive_US,_Inc._v._Luxshare,_Ltd. (last visited Mar. 13, 2022) (stating that "SCOTUS granted the petition on December 10, 2021. The court consolidated the case with ZF Automotive US, Inc. v. Luxshare, Ltd. to be argued together during the 2021-2022 term."). Actually, Alixpartners asked that, if not decided together, ZF Automotive should be held pending disposition of the Alixpartners case on the merits. Hereafter we will refer to both cases collectively as the Companion Cases.

[45] *See id*. (stating that, on December 10, 2021, the U.S. Supreme Court agreed to hear the cases together).

[46] *See* 28 U.S.C. § 1782 (2021) (noting that in reading the Code, there is no explicit indication for the Code to be used for discovery purposes by Arbitration Panels).

[47] *See id*. (explaining that the Code applies "for use in a proceeding in a foreign or international tribunal.").

necessarily attaching to an arbitration panel, and moved analysis steps ahead to functional tests and legislative history.[48]

The Amicus Brief for the United States as amicus curiae supporting respondents[49] is the best compendium of the tripartite approach. The United States Brief concluded that the term "*foreign or international tribunal*" does not extend to private commercial arbitration because of "*statutory context and history,*" "*whatever the meaning of the term in isolation*."[50]

It is then only reasonable to foresee that the series of propositions contrary to extend § 1782 to Arbitrations will continue in the same shape and form. We will check these propositions, as proffered in *Season One*, in inverse order: semantics first, then legislative history and, finally, functional context.

A. DICTIONARY DEFINITION FOR "TRIBUNAL"

The starting point of the United States Brief was the examination of the ordinary meaning and structure of the law. Because the term "tribunal" is not defined in the statute, the United States Brief asked what that term's "ordinary, contemporary, common meaning" was when Congress "enacted" § 1782's relevant language in 1964.[51] However, the United States Brief went on stating that the Supreme Court need not resolve the meaning of the word "tribunal" "in a vacuum" because its meaning in § 1782 is clarified by the "statutory context," including § 1782's "history" and "purpose."[52]

The case under review, *Servotronics*, likewise skipped the "dictionary" step, but with a more illuminating comment regarding the modern legal definition of "tribunal" as being broader: "*A court of justice or other adjudicatory body*,"[53] and that "[*i*]*n both common and legal parlance, the phrase 'foreign or international tribunal' can be understood to mean only state-sponsored tribunals, but it also can be understood to include private arbitration panels. Both interpretations are plausible*."[54]

[48] *See generally id*.
[49] Brief for the United States, *supra* note 28.
[50] *See id*. at 14 (analyzing the statutory context and history within the determination of what a tribunal is).
[51] *See id*. at 17, citing to Food Mtg. Inst. V. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (contemplating what the terms "'ordinary, contemporary, and common meaning' [meant] 'when Congress enacted' [§ 1782].").
[52] *See id*. at 18 (reasoning that the Supreme Court does not necessarily need to analyze or resolve the meaning of the word tribunal in a limited context since the Code itself provides some clarification regarding its intended purpose).
[53] *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 693 (2020) (emphasis added) (defining the word "tribunal" in accordance with the contemporary legal definition provided in Black's Law Dictionary (11th ed. 2019)).
[54] *See id*. at 694 (emphasis added) (noting that different dictionaries are inconclusive when canvassing definitions; instead both state-sponsored tribunals or private arbitration panels are plausible interpretations when defining "foreign or international tribunal").

In fact, today's authoritative Merriam-Webster Dictionary defines "tribunal" in a multitude of ways, such as: (1) "the seat of a judge or one acting as a judge[;]" (2) "a court or forum of justice [;]" and (3) "a person or body of persons having to hear and decide disputes so as to bind the parties."[55] This definition leaves no room for interpretation, but it is indeed proper to skip and proceed to a next step. However, the "dictionary analysis" deserves one more moment of attention.

The approach of the United States Brief and *Servotronics* is itself contradictory, being at one time *originalist* (original public meaning as perceived at time of enactment) and *textualist* (literal interpretation without considering their legislative history or underlying purpose), but soon after changing methods, switching to assess "*legislative history and underlying purpose,*" the exact opposite of *textualism* and *originalism*. In fact, to do a *textualist* and *originalist* analysis based only on dictionaries is arguably superficial, especially if a "legal" meaning is the target.

At the time of writing this Article, deeper research on online legal databases of the appearance of the term "*arbitral tribunal*" yields over 1,460 cases in the American justice system from 1898 until present times. Of these, 57 date from 1965 back to 1898, showing that the terminology was well established in the legal minds when the wording of § 1782 was changed to "tribunals" in 1964.[56] These 57 courts did not need a dictionary for calling arbitration panels "tribunals," and the use of the term was spread out on a wide range of courts, from Supreme Court of the United States,[57] to the Supreme Court of States, like New York,[58] Pennsylvania,[59] California,[60] Oregon,[61] and to U.S. District Courts of

[55] *See Tribunal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tribunal (listing a variety of definitions for the word "tribunal") (last visited Mar. 13, 2022).

[56] *See In re* Arbitration 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) (providing in dicta the Court's acknowledgment of the ways in which Congress has progressively broadened the scope of § 1782).

[57] Among these cases, which did not need a dictionary for labeling arbitration panels "tribunals" are: State of New Jersey v. State of Delaware, 291 U.S. 361 (1934); State of Louisiana v. State of Mississippi, 202 U.S. 1, 51 (1906); N. Am. Commercial Co. v. United States, 171 U.S. 110, 131 (1898); State of New Jersey v. State of Delaware, 55 S. Ct. 934, 961 (1935).

[58] Among these state cases, which did not need a dictionary for labeling arbitration panels "tribunals" are: Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 340, 174 N.E.2d 463 (1961); Lipman v. Haeuser Shellac Co., Inc, 289 N.Y. 76, 81, 43 N.E.2d 817 (1942); Milton L. Ehrlich, Inc. v. Unit Frame & Floor Corp., 5 N.Y.2d 275, 281, 157 N.E.2d 495 (1959); Potoker v. Brooklyn Eagle, Inc., 2 N.Y.2d 553, 558, 141 N.E.2d 841 (1957); Lipschutz v. Gutwirth, 304 N.Y. 58, 62, 106 N.E.2d 8 (1952).

[59] *See* Am. Eutectic Welding Alloys Sales Co. v. Flynn, 399 Pa. 617, 620, 161 A.2d 364, 366 (1960) (referencing an arbitral tribunal provision between contracting parties).

[60] *See generally* Loving & Evans v. Blick, 33 Cal. 2d 603 (1949) (providing an instance where the Supreme Court of California referred to arbititation as "tribunals.").

[61] *See generally* Rueda v. Union Pac. R. Co., 180 Or. 133 (1946) (demonstrating the Supreme Court of Oregon's synonymous usage of arbitration and tribunal).

New York,[62] Pennsylvania,[63] Florida,[64] Utah,[65] Maryland,[66] then to US Circuit Courts, Second,[67] Fourth,[68] Sixth,[69] Seventh,[70] and finally State courts.[71] If those instances were not enough, a special court, the United States Board of Tax Appeals, also used the same terminology once.[72]

Particularly interesting is *Banco Nacional de Cuba v. Sabbatino*, a seminal precedent very well-known and famous in the area of the "Act of State" doctrine.[73] The case dates to 1962, proof that the term "arbitral tribunal" was well understood and used at the time of the introduction of the word "tribunal" in the redrafting of § 1782 in 1964.

Among the 1,404 cases that used the term "arbitral tribunal" after 1965, a special mention is due to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[74] which uses the term seven times in J. Blackmun's opinion.[75]

Mitsubishi is central for the analysis that follows below and we will revert to it.

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[62] *See generally* Koreska v. Perry-Sherwood Corp., 253 F. Supp. 830 (S.D. N.Y. 1965) (utilizing the term "arbitral tribunal").
[63] *See* Canup v. Mississippi Val. Barge Line Co., 31 F.R.D. 282, 283 n.1 (W.D. Pa. 1962) (citing to the German-Polish Mixed Arbitral Tribunal).
[64] *See generally* Aerovias Interamericanas De Panama, S.A. v. Bd. Of County Com'rs of Dade County, Fla., 197 F. Supp. 230 (S.D. Fla. 1961), *rev'd*, 307 F.2d 802 (5th Cir. 1962) (referencing "arbitral tribunal" throughout the analysis and application).
[65] *See generally* Aboitiz & Co. v. Price, 99 F. Supp. 602 (D. Utah 1951) (providing an example of the court's usage of "tribunal" without the necessity of referencing a dictionary as it is a commonly well-known term among members of the judiciary).
[66] *See generally* Gen. Elec. Co. v. Robertson, 25 F.2d 146 (D. Md. 1928) (postulating the definition of the term "arbitral tribunal" as known by the judiciary).
[67] *See generally* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962) (referring to "arbitral tribunal" throughout the case).
[68] *See generally* Robertson v. Gen. Elec. Co., 32 F.2d 495 (4th Cir. 1962) (using the term "arbitral tribunal" within the case to emphasize how the term is well-known throughout judiciaries).
[69] *See generally* O'Brien v. Fackenthal, 5 F.2d 389 (6th Cir. 1925) (providing another instance where the terminology has been used as common practice and knowledge within the field).
[70] *See generally* Atchison, T. & S. F. Ry. Co. v. Bhd. of Locomotive Fireman & Enginemen, 26 F.2d 413 (7th Cir. 1928)(exhibiting the court's usage of the term "tribunal" and the court's repetitive use as an undisputed defined term).
[71] *See generally, e.g.*, New York Cent. R. Co. v. Erie R. Co., 213 N.Y.S. 2d 15 (Sup. Ct. 1961); Sonotone Corp. v. Hayes, 4 N.J. Super. 326 (App. Div. 1949).
[72] *See generally* Maltbie v. C.I.R., 31 B.T.A. 614 (1934) (demonstrating an additional illustration of a judiciary using the term in question.).
[73] *See generally* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 857, 863, 868 (2d Cir. 1962) (exemplifying the use of "arbitral tribunal" and demonstrating an evident understanding across the members of the judiciary).
[74] *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (providing an unequivocal illustration of the understanding of the definition for the term "tribunal" as it is repeatedly used throughout the court's decision.).
[75] *Id.* at 627–36, 651 n.18, 652 n.19.

B. LEGISLATIVE HISTORY

The common theme present in the briefs of *Servotronics* Respondents and their Amici is that Section 1782's legislative history provides support for the proposition that its use of the phrase "foreign" or "international tribunal" refers exclusively to a governmental or state-sponsored body that nothing in its history suggests that Congress intended to extend § 1782(a) to private, contract-based arbitrations. The United States Amicus Brief is the most representative of this interpretation of the legislative history–[76]spending nine pages to argue that the words and terms used in the successive changes of the Statute's text cannot be interpreted to refer to foreign private arbitrations.[77]

However, there is strong contrary, direct, and first-hand evidence. It is all wrapped up by Professor Brandon Hasbrouck in his article *If It Looks Like A Duck ...: Private International Arbitral Bodies Are Adjudicatory Tribunals Under 28 U.S.C. § 1782(A)*.[78] The article is structured in eight Sections.[79] After analyzing *Intel* in the context of the Circuits' conflict at Sections I to IV, Sections V and VI address the legislative history issue and in the last two Sections, Mr. Hasbrouck propounds a "proposal" for the solution of the problem that may stand good for today's certiorari.

The whole article revolves around the influence of Professor Hans Smit. In particular, "*Part V describes Han Smit's role in drafting the 1964 Congressional amendments and how Smit's scholarship influenced the Court's decision in Intel. Also, this Part argues that both the legislative history and Hans Smit's scholarship contemplate private international arbitral tribunals as being within the scope of § 1782*."[80] Also, the whole article, and Part V in particular, highlights four articles by Professor Smit.

The first article, published in 1965, is particularly interesting due to Professor Smit's explicit declaration that the preparatory works contemplated "arbitral tribunals" within the list of the adjudicatory bodies entitled to ask for § 1782 help. In his words: "*The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and <u>arbitral tribunals</u>, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts*."[81]

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[76] *See e.g.*, Brief for the United States, *supra* note 28 at 14 ("Whatever the meaning of that term in isolation, however, when properly construed as part of the broader phrase 'foreign or international tribunal,' in light of the statutory context and history, it does not extend to private commercial arbitration.").

[77] *Id*. at 17–26 (arguing that "Congress Did Not Intend 'A Proceeding In A Foreign Or International Tribunal' To Include A Private Commercial Arbitration").

[78] *See* Brandon Habrouck, *If It Looks Like a Duck…: Private International Arbitral Bodies are Adjudicatory Tribunals under 28 U.S.C. § 1782(A)*, 67 WASH. & LEE L. REV. 1659 (2010) (addressing the very issue that is now up for certiorari and arguing that "proper § 1782 analysis demands the recognition of private international arbitral tribunals as a 'tribunal.'").

[79] *See generally id*.

[80] *Id*. at 1665 (emphasis added).

[81] Hans Smit, *International Litigation under the United States Code* 65 COLUM. L. REV. 1015, 1026

The second article, published in 1994, describes the scope of the Project on International Procedure of the Columbia Law School and Professor Smit's role as Director of the Project and Reporter to the USA Commission and Advisory Committee.[82]

In the third article, published in 1997, Professor Smit affirms that the adoption by Congress of all the legislative proposals and the accompanying explanatory notes proves that the legislator intended to include arbitration in the § 1782 help.[83] In his words:

> [T]he text, and specifically the word "tribunal," clearly encompass private arbitral tribunals . . . the choice of that term was deliberate so as to depart from the text used in the legislation that was amended (which spoke of courts and tribunals created by international agreements to which the United states was a party), and . . . the purpose of Section 1782 was to make assistance available on the most liberal terms. Discriminating against private international tribunals not only does violence to the plain and clear text of Section 1782, it also fails to give consequence to the repeatedly re-affirmed public policy favoring arbitration. There simply is no good reason for withholding from private international tribunals who have been accorded by the body politic the power to adjudicate controversies and in fact to do so largely in a single instance, the assistance that they may need to obtain requisite information.[84]

Finally, in the fourth article published in 1998, Professor Smit reasserted that Congress intended to include Arbitration in the company of "bodies with

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n.71 (1965) (emphasis added).

[82] *See* Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215 (1994).

> Because of its preeminent standing in the fields of international and comparative legal studies, the Columbia Law School was asked to assume this responsibility. It accepted the mandate and, in turn, asked me to become the Director of the Project on International Procedure organized for this purpose. The Project had two principal purposes: (1) to assist the Commission in developing appropriate rules of international cooperation in litigation; and (2) to prepare studies of foreign procedure which would provide a basis for comparative studies of procedure generally. Within the structure so developed, the responsibility for preparing proposals for improving international cooperation in litigation was assumed by the Project, and particularly by me as its director. I also functioned as the reporter to the Commission and Advisory Committee.

Id. at 217–18.

[83] *See* Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 155 (1997) ("However, it would appear fair to say that Congress' wholesale adoption, without any change whatsoever, of the legislative proposals and the explanatory notes accompanying them lends considerable force to the argument that the intent of the dominant draftsman of these texts should be given appropriate weight.").

[84] *Id.* at 155–56.

adjudicatory functions" that § 1782 was intended to help.[85] Again, in Professor Smit's words:

> The substitution of the word "tribunal" for "court" was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions. Clearly, private arbitral tribunals come within the term the drafters used. This is also confirmed by the legislative history. New Section 1782 was expanded also to cover the assistance provided for in Sections 270-270C of Table 22 of the United States Code. This assistance was available to international tribunals established pursuant to an international agreement to which the United States was a party. Clearly those tribunals included international arbitral tribunals. Indeed, sections 270-270C of 22 United States Code were enacted especially for the purpose of providing for assistance to an international arbitral tribunal. New Section 1782 not only intended to continue the provision for this assistance but eliminated the requirement that the international tribunals be established by agreement to which the United States is a party. Indeed, the broad term "international tribunal" was intended to cover all international arbitral tribunals.[86]

Part V has two subsections: one for Professor Smit's "legislative influence" and one for his "scholarship influence" that produced the above described 1964 new wording of § 1782.[87]

i. Professor Smith's Influence

Congress began revision of § 1782 in 1958 by establishing a Commission on International Rules of Judicial Procedure ("International Rules Commission") without allocating funds; in order to bridge the gap, the Columbia Law School assisted by establishing a Project to "develop and draft legislative measures relating to judicial assistance in international litigation."[88] Leading the program was "Professor Smit[, who served as] the Columbia Project's

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[85] Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Tital 28 of the U.S.C. Revisited,* 25 SYRACUSE J. INT'L L. & COM. 1, 5 (1998) (explaining "the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.").

[86] *Id*.

[87] *See* Habrouck, *supra* note 78, at 1665 (breaking down Hans Smit's influence on the framing of § 1782 into two parts).

[88] *See id*. at 1686 (describing how the Commission on International Rules of Judicial Procedure ("International Rules Commission") requested Columbia Law School to take on legislative measures due to a deficiency of Congressional funding).

director . . . [as well] as Reporter to the International Rules Commission.[89] Professor Hasbrouck adds a most relevant observation:

> Also, Ruth Bader Ginsburg, who later wrote the Supreme Court's Intel decision, worked closely with Smit as an associate director of the Project. Hans Smit's role was to select the specific subjects that were to be addressed by legislation, analyze the deficiencies of existing law, and draft proposals to eliminate those deficiencies. Embracing his role, Smit drafted several legislative proposals and provided explanatory notes to the various legislative provisions proposed. Congress adopted, wholesale and without change, Smit's legislative proposals. In sum, Smit's legislative proposals are the 1964 amendments to § 1782.[90]

ii. Hans Smit: "The Dominant Drafter" of § 1782

Professor Hasbrouck continues:

> Circuit Judge Ginsburg, now Justice Ginsburg, described Hans Smit as "the dominant drafter of, and commentator on, the 1964 revision" to § 1782. Justice Ginsburg's description provides two important points that this Note adopts. First, Hans Smit is "the dominant drafter of" § 1782. This point underscores Hans Smit's legislative influence. Smit played a dominant role in drafting the phrase "a proceeding in a foreign or international tribunal," which is the textual source of the current split. Second, Smit is "the dominant ... commentator on" § 1782. This point underscores Hans Smit's scholarship influence. So, if there is confusion over what constitutes a "foreign or international tribunal," then courts should look to his subsequent scholarship. Thus, Smit's interpretation of what constitutes a "tribunal" is of particular importance.[91]

Beyond conjectures, we now have direct testimony by the "dominant drafter," that the Supreme Court has accepted explicitly, but the front for negation of § 1782 help to Arbitrations did not desist.

C. THE FUNCTIONAL TEST

This final line of negative arguments is summarized in a recent decision of the Southern District of Florida *IN RE Application of: Juan Maria RENDON*.[92]

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[89] *Id*.
[90] *Id*. at 1686–87.
[91] *Id*. at 1685 (emphasis omitted).
[92] *See In re* Application of Juan Maria Rendon and Roberto Maurice Ventura Crispino, No. 1:20-mc-21152-KMM, 2020 WL 8771274, at *6–10 (S.D. Fla. Nov. 5, 2020) [hereinafter *In Re Rendon*]

The case was about a § 1782 request in aid of discovery in arbitrations pending and contemplated with the International Chamber of Commerce ("ICC").[93] Taking the *Intel* decision as a starting point, the Court said that "Although the *Intel* Court did not detail the level of judicial review, this analysis of the functions of the proceedings, referred to as the 'functional analysis' test, has been used since *Intel* to determine whether a proceeding involves a foreign or international tribunal as required by the statute."[94]

The court agreed with "the overwhelming number of courts that have reviewed whether an ICC proceeding is a 'foreign or international tribunal' under § 1782 [and who] have concluded that ICC proceedings are not covered by the statute on the grounds that there is a lack of judicial review of ICC arbitral panel decisions."[95] The court then concluded that "although the decisions of the ICC Panel are final and binding on the parties, those decisions are not judicially reviewable, thus the ICC Rules do not satisfy the functional test, not providing for any review by a state-sponsored tribunal."[96]

This proposition is faulty in many ways. First, nowhere in *Intel* is a statement found that a "foreign tribunal" qualifies for § 1782 if its decisions are subject to "review by a state sponsored tribunal."[97] On the contrary, as previously mentioned, J. Ginsburg adopted the words of Reporter Smit: "'[t]he term tribunal'. . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[98]

Second, of all the international arbitration societies, to choose the ICC for negation of the functional judicial function is borderline slander. The ICC is one of the largest worldwide institutions of international commerce, not only conducting arbitrations but also drafting international rules, promoting international trade and investment, supporting global efforts to streamline customs and border procedures, and supporting multilateralism as the best way to address global challenges and reach global goals.[99]

(analyzing and critiquing the Functional Test provided by intel in consideration of Applicant's request).

[93] *See id*. at *1, *3 (summarizing the § 1782 request by the Applicants for aid in discovery).

[94] *Id*. at *6.

[95] *Id*. at *8 (citing *In re* Operadora DB Mexico, S.A. de C.V., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9–10 (M.D. Fla. Aug. 4, 2009)).

[96] *In re Rendon*, 2020 WL 8771274 at *8.

[97] *See* Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241, 247 (2004) (providing that the Supreme Court never ruled on § 1782 applying to "foreign tribunals" but rather this decision focused on the ability of United States District Court to enforce discovery requests made in connection with litigation in the international arena).

[98] *Id*. at 258.

[99] *See generally Our Mission*, INT'L CHAMBER OF COM., https://iccwbo.org/about-us/who-we-are/our-mission/ (last visited Mar. 13, 2022) (providing the mission behind the International Chamber of Commerce, and their intent to promote globalization).

Moreover, the ICC is an "institutional representative of more than 45 million companies in over 100 countries with a mission to make business work for everyone, every day, everywhere[,]" "represent[ing] business interests at the highest levels of intergovernmental decision-making, whether at the World Trade Organization, the United Nations. . . or the G20 – ensuring the voice of business is heard."[100] The Arbitration Rules of the ICC International Court of Arbitration are so complete, extensive and sophisticated to mirror any code of civil procedure.[101]

Third, the "functional" test is fundamentally faulty as applied to arbitration. In the United States, arbitration awards are reviewable by courts of law under the doctrine of "manifest disregard of the law."[102] In the United Kingdom arbitral awards have since long been subject to court review under the "special case" provisions, and now are appealable under Sections 67, 68 and 69 of the Arbitration Act.[103] Most of all, international arbitration is a creature of the New York Convention,[104] that provides its own ways of review of arbitral awards at Article V. That review is indeed more limited than the standard judicial review but is a review by a court of law anyway, and, as the *Rendon* court admitted, "*the Intel Court did not detail the level of judicial review*."[105]

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[100] *See Who We Are*, INT'L CHAMBER OF COM., https://iccwbo.org/about-us/who-we-are/ (last visited Mar. 13, 2022) (mentioning that the International Chamber of Commerce is interested in promoting international business in various sectors while responding to the demands of international commerce at all times).

[101] *See generally 2021 Arbitration Rules*, INT'L CHAMBER OF COM., https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last visited Mar. 13, 2022) (providing the Rules of Arbitration which are meant to be used with ease in international commerce).

[102] *See generally* Committee on International Commerical Disputes on the Association of the Bar of the City of New York, *The "Manifest Disregard of Law" Doctrine and International Arbitration in New York*, 24 AM. REV. INT'L ARB. 209 (2013) (stating the definition and test for the Manifest Disregard of Law Doctrine and how the New York Convention has used it in the international arena, drawing comparisons to other international actors).

[103] *See* Justin Williams et al., *Arbitration Procedures and Practice in the UK (England and Wales): Overview*, THOMSON REUTERS, https://uk.practicallaw.thomsonreuters.com/4-502-1378 (last visited Mar. 13, 2022) (mentioning that the appeals are reviewable only under the three situations, such as lack of substantive jurisdiction, serious irregularity, or on a point of law).

[104] *See generally Contracting States – List of Contracting States*, THE N.Y ARB. CONVENTION, https://www.newyorkconvention.org/list+of+contracting+states (last visited Mar. 13, 2022). At the time of this writing, the New York Convention on Arbitration has 169 state parties, including the majority of United Nations member states. *Id*. There are 195 countries in the world today. *See How Many Countries Are There in the World?*, WORLDATLAS, https://www.worldatlas.com/articles/how-many-countries-are-in-the-world.html (last visited Mar. 13, 2022). This total comprises 193 countries that are member states of the United Nations and 3 countries that are non-member observer states: the Cook Islands, the Holy See and the State of Palestine. *Id*. The regulation, including review, of arbitration awards therefore is a law of the world. Recognition of and enforcement of arbitral awards worldwide are, in a way, even stronger than they are for judgments of government courts.

[105] *See In re* Application of Juan Maria Rendon and Roberto Maurice Ventura Crispino, No. 1:20-mc-21152-KMM, 2020 WL 8771274, at *6 (S.D. Fla. Nov. 5, 2020) (emphasis added) (stating "the Intel Court did not detail the level of judicial review.").

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, however, the Supreme Court went way ahead, acknowledging the judicial role of international arbitration to the extent of entrusting to foreign arbitration the resolution of Anti-Trust disputes, and not too long before, did the same with issues of the Security and Exchange Commission ("SEC") in *Scherk v. Alberto Culver*.[106] No citation is needed for the level of public policy of Anti-Trust and SEC disputes, so extremely high that Congress allowed prosecution of violations committed abroad.

If it were not enough, both the *Mitsubishi* and the *Scherk* courts entrusted Anti-Trust and SEC disputes to arbitration, "which categorized '*[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of* <u>*forum-selection clause*</u> *that posits not only the situs of suit but also the procedure to be used in resolving the dispute*.'"[107]

Arbitration then is a "forum," a term used for judiciary functions. And if not enough, we have seen before that the *Mitsubishi* court calls arbitration "*arbitration tribunal*" at least seven times in the opinion.[108]

D. IN SUPPORT OF "NEITHER PARTY"

Out of 12 Amicus Briefs in *Servotronics*, two were filed "In Support of Neither Party," and one, filed by the International Chamber of Commerce ("ICC"),[109] may seem odd to some. As we have seen before, the ICC has been denied § 1782 help more than once in spite of being one of the largest arbitration institutions of the world and having procedural rules as complete as a code of procedure, thus one would have expected the ICC to file in support of Petitioner.

To understand why the ICC filed in support of neither party is the answer to the whole question. First of all, the bitter conflict among Circuits has reached a level of confrontation that may sound like a war of entitlements, but under

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[106] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 620 (1985) (holding that "the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims."); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 506 (1974) (remanding an action after finding that securities laws did not provide an alternative forum to supersede the mandatory arbitration clause in the parties' international contract).

[107] *See Mitsubushi*, 473 U.S. at 630 (citing *Scherk*, 417 U.S. at 519).

[108] *See generally id*. (showing that the term "arbitration tribunal" is used several times in the Court's opinion).

[109]

> Rather, *amici* aim to assist the Court on the following sub-issue: Assuming the Court finds that Section 1782 is available in connection with private commercial arbitration, what degree of deference should a U.S. court give to an arbitral tribunal's views on the discovery sought before it decides whether to grant or deny a Section 1782 application?

Brief of the Int'l Ct. of Arb. of the Int'l Chamber of Com. and the U.S. Council for Int'l Bus. as Amici Curiae in Support of Neither Party, ZF Automotive US, Inc., et al. v. Luxshare, LTD., No. 20-MC-51245, 2021 WL 3629899 (E.D. Mich. Aug. 17, 2021) (No. 21-401), 2022 WL 333377 [hereinafter Brief of the ICC Court & USCIB].

§1782 there is no enforceable right "to get" help, just a "right to ask." To grant § 1782 help is a discretionary job of the courts.[110]

Then comes a reality check. Arbitration is a system of dispute resolution based on confidentiality, speed, simplification of procedure and other distinctive traits that "American-style discovery" may severely endanger or destroy.[111] This well-known and undeniable reality has been candidly admitted even by the Petitioner and its Amici.[112]

Therefore, a denial of § 1782 help may be a benefit for the arbitration panel rather than a loss. Arbitrations go on by their own rules, made to suit the arbitration panels' nature, so that they can live (sometimes even better) without any external help.

Instead, the ICC, is correctly preoccupied with what happens when the § 1782 help is granted. In that case, what matters is that the fundamental traits of arbitration are not endangered or nullified, which can happen if rules of procedure that may be mandatory in the forum of the arbitration are violated, or the orders of the sitting Arbitrator are disregarded by the American court that is offering § 1782 help.

The ICC then concluded that since:

> the arbitral tribunal have primary authority and control over discovery, but from a practical standpoint, the arbitral tribunal is also best placed to assess any discovery request from the parties in an arbitration before it . . . assuming the Court holds that Section 1782 is available in aid of private commercial arbitrations, the ICC Court respectfully requests that the Court re-emphasize and make it explicit that the views of the constituted arbitral tribunal should be given a very high degree of deference under the *Intel* factors.[113]

V. § 1782 SERIES – SEASON 2

The scene is now set for the "companion petitions" in *Luxshare* and *Alixpartners*, both asking for a resolution to the same question: "[W]hether a private commercial arbitral panel qualifies as a 'foreign or international tribunal' under Section 1782, which authorizes district courts to compel testimony

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[110] *See* Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241, 247 (2004) (stating "we caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to 'interested person[s]' in proceedings abroad.").

[111] *Id*. at 262 n. 12 (discussing how the "'drafters[of § 1782] were quite aware of the circumstance that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence.'") (citation omitted).

[112] *See* Brief Amicus Curiae of Professor George A. Bermann, *supra* note 29, at 6 ("A major objection to making Section 1782 available to parties in international commercial arbitration appears to be an alleged risk of interfering with arbitral tribunals' prerogatives in organizing arbitral proceedings and injecting cost, delay, and formalism that arbitration is meant to avert.").

[113] *See* Brief of the ICC Court & USCIB, *supra* note 109, at *16–17.

or evidence 'for use in a proceeding in a foreign or international tribunal'"[114] and "Whether an ad hoc arbitration to resolve a commercial dispute between two parties is a 'foreign or international tribunal' under 28 U.S.C. § 1782(a) where the arbitral panel does not exercise any governmental or quasi-governmental authority."[115]

While this Article was being drafted, Amicus Briefs began to flow in, and it is reasonable to expect a repetition of those in *Servotronics*. Therefore, all the above conclusions would still apply: arbitral panels qualify as "foreign or international tribunals," although they do not exercise any governmental or quasi-governmental authority.

Is it going to be that simple? Did we not learn anything from the twelve Amicus Briefs in *Servotronics*? Is the question in the "companion cases" not leaving anything out? And would the answer to the new rephrased questions be enough to resolve the existing serious conflict among the Circuits?

Most of all, would anyone take care of noting, developing and applying the wise "support for neither" filed in *Servotronics*?

A. INFERENCES FROM SEASON ONE

One gleans a lesson from the material of Season One: the issue whether Arbitrators are Tribunals has a positive answer based on concrete proof and is *not* the real problem.

The aim of analysis must be moved to a different, wider target. Forensic examination reveals mounting evidence that the solution of the problem, not just of the question, may be found just in one case: *Intel Corp. v. Advanced Micro Devices, Inc.*

Intel established "four factors" that American courts must follow for deciding whether to grant a § 1782 request:

1. Whether the requested evidence is "unobtainable absent § 1782(a) aid," which is likely when the target from whom discovery is sought is a "nonparticipant[] in the foreign proceeding [and] may be outside the foreign tribunal's jurisdictional reach";

2. "[T]he nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

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[114] Petition for A Writ of Certiorari Before Judgment, ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S.Ct. 416 (2021) (No. 21-401), 2021 WL 4173622, at *2–3 (emphasis added) (highlighting the importance in determining whether § 1782 extends to private arbitration, entitling Luxshare to the discovery it seeks).

[115] Petition for a Writ of Certitorari, Alixpartners, LLP, et al., v. The Fund for Protection of Investor Rights in Foreign States, 142 S.Ct. 638 (2021) (No. 21-518), 2021 WL 4705742, at *I.

3. Whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

4. Whether the discovery requested is "unduly intrusive or burdensome," in which case the request may be rejected or trimmed.[116]

Factors 2 and 3 are the ones relevant to answering our question.

i. Nature of the Foreign Tribunal

This inquiry is due for governmental tribunals and arbitrations alike. In fact, not all tribunals and panels are made equal. Even assuming, without admitting, that government tribunals qualify for § 1782 aid and private arbitrators do not, it does not mean that all governmental tribunals get an automatic right to obtain a § 1782 help.

Under the second *Intel* factor, there are governmental tribunals in the world that would not pass the second factor test, and by the same token, there are arbitration panels that would not likewise qualify.[117]

Qualification for § 1782 help then is not a broad "all or nothing," not a "governmental" versus "private" decisionmaker, but a decision that the court must make one case at the time, examining the traits of the requesting entity under the requirements of the second *Intel* factor.

ii. An Attempt to Circumvent

As the ICC correctly pointed out, arbitrations unfold in many ways in the world—some are with and under the direction of state-of-the-art societies, like the ICC, and others may be a three-panel arbitration, or just an "ad hoc" single private arbitrator. In any case, the location where the panel is sitting almost always will have proprietary rules of arbitration procedure, or the parties may have agreed on their own rules, typically for protection of their confidentiality or logistics.

Furthermore, these rules are typically mandatory, and the discovery tools supplied by the American court under § 1782 may often conflict with the local rules. Also, the Arbitrator may have issued discovery orders that may be incompatible with the § 1782 tools. Again, these orders may not be violated by using a § 1782 discovery.

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[116] *Intel Corp.*, 542 U.S. at 264–65 (detailing the requirements of each factor created by the Court).

[117] *See id.* at 265 (illustrating that due to the second factor, there are courts that may not qualify, while other courts will qualify to obtain § 1782(a) assistance depending on "the nature of the court and the proceedings already underway abroad").

To reiterate, the third factor applies to governmental as well as to "private" tribunals.[118] The "prohibition of circumvention" is one of the most important factors for a § 1782 decision.

It seems to be all in *Intel*. All the rest is a red herring.

VI. CONCLUSION

The answer to the certified questions has been hiding in plain sight: *Intel* has it all.

Section 1782 has passed all tests: Textualist, Originalist, and Functional, as *Intel* has confirmed explicitly, if read correctly. What matters is the appropriate application of *Intel* across the board, where all "decision-makers" are treated alike.

There are governmental "tribunals" that do not qualify for § 1782 just as some "arbitral tribunals" may not likewise qualify. The clear voice of *Intel* is that the U.S. Courts must carefully appraise the "nature" of the "tribunal" before granting § 1782 help to anyone, including "arbitral tribunals," and, according to that nature, pay deference to the proprietary rules that require mandatory or equitable observance and respect in the forum that the USA Court is called to help.

This also includes deference to the orders of the sitting adjudicator—whether "governmental" or "arbitral," but especially arbitral—because of its unique procedure created and designed purposely to supply litigants with an instrument of dispute resolution based on confidentiality and simplifications that are the antithesis of the judiciary.

Section 1782 allows the judiciary to possibly interfere with the reason why arbitration came to exist. What the ICC correctly requests is that help is welcome with thanks if extended, but to be careful that the medicine is not more serious or deadly than the ailment.

The Amicus Brief of Professor Yanbai Andrea Wang, filed in Servotronics "In Support of Neither Party"[119] supplies the best rendering of this solution. Section III of her Brief is titled: "*Clarifying the Intel Factors Is Preferable To Adopting Illusory Distinctions That Would Exclude "Private" Commercial Arbitrations From Section 1782's Reach,*"[120] and her conclusion is:

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[118] *See, e.g.*, SIMONA GROSSI & MARIA CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE 19 (1st ed. 2010) (demonstrating that the *Codice di procedura civile* in Italy provides the Judge autonomy over discovery proceedings, including, "[d]uring [evidence] hearings, the judge hears testimony or accomplishes the other evidence requests–e.g., supervises experiments, etc.–which he previously granted by order . . . [additionally,] [t]he judge is always present during the proceeding and directs and supervises the parties and the whole development of the proceeding.").

[119] *See* Brief of Professor Yanbai Andrea Wang as Amicus Curiae, *supra* note 30, at 5 (arguing that "if the Court rules that Section 1782 applies to international commercial arbitrations, this case presents a perfect opportunity to refine and clarify the *Intel* factors' application in *all* contexts.").

[120] *Id.* at 22.

> The Court should resolve any concern with Section 1782's use within international commercial arbitrations by clarifying how lower courts should apply the Intel factors, rather than adopting a highly fraught and illusory distinction that would place "private" or "commercial" arbitration entirely outside of Section 1782's ambit. Indeed, as explained above, requiring notice and placing the burden of proof on Section 1782 applicants will restore the gatekeeping role that the Intel factors were established to play. And requiring courts to conduct a meaningful analysis of those factors will weed out the abusive and improper claims that seem to motivate lower court decisions that have categorically excluded international commercial arbitrations from Section 1782's reach.[121]

If the Supreme Court decides this way, it will render the American Procedural system a great service, enhancing the appearance of its good-will, its credibility, and its appeal worldwide, and will give the world a handy and manageable helping tool, just by simplifying guidance for the *Intel* factors, dissipating conflicts that have no reason to exist, and putting to sleep the rumination on the philosophical semantics of the word "tribunal."

After all, Arbitral panels "Quack like a duck, walk like a duck, and look like a duck, thus they must be (you know) "tribunals."[122]

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[121] *Id.* at 25 (delineating Professor Yanbai Andrea Wang's conclusion).
[122] And thank you once again for your "Duck," Professor Hasbrouck.