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NOTES

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28 U.S.C. § 1782 authorizes federal judges to grant assistance to a "foreign or international tribunal" for discovery proceedings. The meaning of the term "foreign or international tribunal" has been the subject of much dispute. In 2019 the Sixth Circuit became the first court of appeals to extend the purview of the statute to private commercial arbitration, creating a circuit split. However, the use of 28 U.S.C. § 1782 in arbitral proceedings raises a number of questions about whether U.S. style discovery would impede the efficiency of arbitration and whether the practice could be extended to international tribunals located within the United States. This Note explores the contours of the statute and the implications of the Sixth Circuit's decision.

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INTRODUCTION

"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion."[1] Writing for a unanimous Sixth Circuit, Judge John K. Bush opened his opinion for *Abdul Lateef Jamil Transportation Co. v. FedEx Corp.* ("*FedEx*") with this excerpt from a letter written by Thomas Jefferson to his nephew.[2] Jefferson's words personify reason and offer imagery of her tribunal as a truth-seeking decisionmaker.[3] This literary epigraph quoted in the *FedEx* opinion foreshadowed the court's expansive application of 28 U.S.C. § 1782 ("§ 1782").[4] It stood as an erudite gateway to an opinion that dramatically departed from the decisions of two other Courts of Appeals,[5] creating a circuit split based on the meaning of two words: arbitral tribunal.[6]

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[1] *Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787)*, *in* 12 THE PAPERS OF THOMAS JEFFERSON 14, 15 (Julian P. Boyd ed., 1955), *quoted in In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 713 (6th Cir. 2019).

[2] *FedEx*, 939 F.3d at 713.

[3] *See id.*

[4] *See id.* at 713–14.

[5] *See id.* at 726.

[6] *See id.* at 724; *In re* Grupo Unidos Por El Canal S.A., No. 14-mc-80277-JST (DMR), 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015). In *Grupo Unidos*, the court poignantly expressed the issue that continues to divide courts: "Two words from a law review article quoted by the Supreme Court . . . have spawned disharmony in the courts regarding whether [§ 1782] applies to private arbitrations established by contract." *Id.* The "two words" referred to by the court were "arbitral tribunals." *Id.* (discussing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004)).

The statute at issue in *FedEx* was § 1782,[7] which authorizes federal judges to grant assistance in discovery to foreign and international tribunals.[8] In relevant part, the statute reads,

> 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* . . . . The order may be 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.[9]

This statute, which represents a powerful discovery tool in foreign and international litigation, has been the subject of much dispute.[10] One of the most contentious issues is the interpretation of the phrase "a proceeding in a foreign or international tribunal," leading to speculation about whether such judicial assistance is available in private commercial arbitration.[11]

The Sixth Circuit's recent decision in *FedEx* signified the first time that a Court of Appeals held that private arbitral tribunals are "foreign or international tribunals" within the meaning § 1782 and, therefore, may qualify for judicial assistance.[12] The *FedEx* decision split from prior opinions issued by the Fifth and Second Circuits

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[7] *FedEx*, 939 F.3d at 713.

[8] *See* 28 U.S.C. § 1782(a).

[9] *Id.* (emphasis added).

[10] *See* LUCAS V.M. BENTO, THE GLOBALIZATION OF DISCOVERY 46–47 (2020) ("These couple hundred words [that constitute § 1782] have been the source of over 1,000 reported federal district court decisions, over 150 federal appellate decisions, and one major U.S. Supreme Court decision.").

[11] *See id.* at 108–10.

[12] *See* Gilbert A. Samberg & Todd Rosenbaum, *Calling SCOTUS: Sixth Circuit Re-Establishes Circuit Split Re U.S. Discovery in Aid of Foreign Commercial Arbitration (28 U.S.C. § 1782)*, NAT'L L. REV. (Oct. 4, 2019), https://www.natlawreview.com/article/calling-scotus-sixth-circuit-re-establishes-circuit-split-re-us-discovery-aid.

which reached the opposite conclusion.[13] Since the split, the topic has been hotly debated, requiring other courts to weigh in on the issue.[14] But crucial questions remain: Was *FedEx* correctly decided? How far should the scope of § 1782 extend? What impact will the decision have on private arbitral proceedings? This Note endeavors to comprehensively address each of these questions.

This Note has three principal parts. The first Part of this Note will describe the origin of § 1782 and Congress' expansion of the statute's scope in light of globalization. It will also discuss how appellate courts have interpreted the phrase "foreign or international tribunal" narrowly and why the Supreme Court conversely suggested that the language was meant to encompass a broad range of dispute resolution procedures. The second Part offers a detailed account of the Sixth Circuit's reasoning in *FedEx* and explains how the court reached its conclusion that private arbitral tribunals fall within the ambit of § 1782. Lastly, the third Part explores the conclusions reached by other circuit courts since the circuit split and discusses whether the *FedEx* decision would be confirmed by the Supreme Court. It also examines questions that remain unanswered about the impact of § 1782 on private arbitration.

I. THE HISTORY AND BACKGROUND OF § 1782

A. *The Evolution of 1782*

International judicial assistance has existed in the United States since the founding of the country.[15] The first recognized means for foreign litigants to obtain evidence in the United States was through letters rogatory and commissions: In general, a foreign court could make a request to a U.S. court for assistance in the dis-

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[13] *Id.*; *In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 726 (6th Cir. 2019).

[14] *See* John B. Pinney, *Update: The Section 1782 Conflict Intensifies as the International Arbitration Issue Goes to the Supreme Court*, 38 ALTS. HIGH COST LITIG. 125, 125 (2020).

[15] *See* Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 600 (1990); Michael Campion Miller et al., *28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts*, FED. LAW., May 2012, at 44, 44.

covery process and, if accepted, the U.S. court would appoint a commissioner to gather the evidence sought.[16] The purpose of the process was to "aid[ ] in the administration of justice."[17] The discovery tool, however, was rarely used due to challenges in executing letters rogatory at that time and because federal courts were resistant to providing assistance to foreign courts.[18]

In the aftermath of the second world war, the United States made a concerted effort to facilitate and strengthen relationships among nations.[19] Growing incentives for cross-border cooperation inspired Congress to revitalize prior legislation regarding judicial assistance by passing 28 U.S.C. § 1782 in 1948.[20] Just a year later, the statute was amended for broader application in 1949.[21] The revived and modernized statute authorized the district court where a "witness resides or may be found" to compel "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace."[22]

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[16] Stahr, *supra* note 15, at 600 nn.12–13; *see also* EDWARD P. WEEKS, A TREATISE ON THE LAW OF DEPOSITIONS § 128 at 151 (1880) ("There is a broad distinction between the execution of a commission and the procurement of testimony by the instrumentality of letters rogatory or requisitory. In the former case, the rules of procedure are established by the court issuing the commission, and are entirely under its control. In the latter, the methods of procedure must, from the nature of the case, be altogether under the control of the foreign tribunal which is appealed to for assistance in the administration of justice.").

[17] Stahr, *supra* note 15, at 600–01.

[18] *See* Miller et al., *supra* note 15, at 44. For a more complete history of international judicial assistance between 1780 and 1948, see Stahr, *supra* note 15, at 600–04.

[19] Miller et al., *supra* note 15, at 44–45; *see, e.g.*, *History of the United Nations*, UNITED NATIONS, https://www.un.org/en/model-united-nations/history-united-nations (last visited May 15, 2021) (explaining that after World War II there existed a strong sentiment that international cooperation would lead to lasting peace between countries and that this was motivation behind establishing the United Nations).

[20] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247–48 (2004); Stahr, *supra* note 15, at 602–03; Miller et al., *supra* note 15, at 44–45; Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949.

[21] *See Intel Corp.*, 542 U.S. at 248; Miller et al., *supra* note 15, at 44; Act of May 24, 1949, Pub. L. No. 81-72, § 93, 63 Stat. 89, 103.

[22] *See* Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949; Act of May 24, 1949, Pub. L. No. 81-72, § 93, 63 Stat. 89, 103.

Over the next decade, however, international trade expanded rapidly, and Congress determined that the statute required considerable revision to meet the needs of increased commercial disputes.[23] In 1964, § 1782 was expanded in four major respects: (1) assistance was available for the retrieval of documents and other evidence, not just for the taking of depositions; (2) the word "court" was replaced with "foreign or international tribunal"; (3) discovery could be sought by "any interested person"; and (4) there was no longer a requirement that litigation be pending, but the evidence sought must eventually be used in a proceeding.[24] The goal was to aid in foreign and international proceedings and to encourage other countries to reciprocate such assistance.[25]

These additions to the traditional notion of judicial assistance left much to interpretation by the courts, particularly the phrase "foreign or international tribunal"—a term that was left undefined by the drafters of the statute.[26] Since the rise of private international arbitration over the last thirty years, one of the most hotly debated issues with regards to § 1782 discovery has been whether private commercial arbitration falls within the definition of "foreign or international tribunal."[27]

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[23] *See* Nicolò Trocker, *U.S.-Style Discovery for Non-U.S. Proceedings: Judicial Assistance or Judicial Interference?*, 1 INT'L J. PROC. L. 299, 307 (2011). *See generally* Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J., 515, 516–18 (1953) (discussing the ways in which judicial assistance fell short in 1953 and addressing the need for legislative improvements).

[24] Trocker, *supra* note 23, at 307–08; Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997 (§ 1782 as enacted by Congress).

[25] Trocker, *supra* note 23, at 308. These goals are often referred to as the "twin-aims" of the statute. *Id.*; *see also Intel Corp.*, 542 U.S. at 252 (citing Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002).

[26] *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2d Cir. 1999) (explaining that "foreign or international tribunal" was left undefined in § 1782); *Intel Corp.*, 542 U.S. at 263 n.15 ("In light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"); Trocker, *supra* note 23, at 309.

[27] *See* BENTO, *supra* note 10, at 106–08 (explaining that the issue of defining "foreign or international tribunal" has been most contentious in the context of private arbitrations). *See generally id.* at 106–28 (illustrating a comprehensive history of how courts have construed "foreign or international tribunal" in context of private arbitration).

B. *Circuit Courts Exclude Arbitral Tribunals from § 1782 Discovery*

In 1999, the Second Circuit became the first court of appeals to address the issue of whether a private arbitration qualifies for § 1782 aid in *National Broadcasting Co. v. Bear Stearns & Co.* ("*National Broadcasting*").[28] The case concerned a commercial arbitration proceeding between National Broadcasting Company ("NBC") and Azteca, a Mexican broadcasting company, administered by the International Chamber of Commerce in Mexico.[29] In anticipation of arbitration, NBC submitted a § 1782 discovery request in the Southern District of New York to serve third-party financial institutions with document subpoenas.[30] The request was initially granted but later quashed because the district court found that "the term 'foreign or international tribunal' in [§ 1782] . . . does not encompass private international commercial arbitration."[31]

On appeal, the Second Circuit affirmed this ruling.[32] In its analysis, the court explained that the word "tribunal" was ambiguous and, therefore, private arbitral panels could not necessarily be included or excluded.[33] It then examined the legislative history of the statute to discern the meaning of "tribunal" and determined that "the word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts . . . ."[34] Nevertheless, the court concluded that "tribunal" was reserved for "governmental entities . . . acting as state instrumentalities or with the authority of the state."[35]

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[28] *See Nat'l Broad. Co.*, 165 F.3d at 185; *see also* Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. §1782*, 17 AM. REV. INT'L ARB. 45, 50 (2006) (explaining that Second Circuit was first court of appeals to consider this matter).

[29] *Nat'l Broad. Co.*, 165 F.3d at 186.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 191.

[33] *Id.* at 188.

[34] *Id.* at 188–89 (quoting H.R. REP. NO. 88–1052, at 9 (1963); S. REP. NO. 88–1580, at 7 (1964)).

[35] *Id.* at 189.

In reaching this conclusion, the court relied on House and Senate Reports, which mention "state instrumentalities," such as foreign administrative tribunals, quasi-judicial agencies, and investigative magistrates.[36] These supplementary materials, however, failed to mention private dispute resolution proceedings and, therefore, the court found that "[t]he absence of any reference to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute."[37]

Moreover, the court noted that prior legislation used the term "international tribunal" to refer to intergovernmental tribunals pursuant to a treaty.[38] The court reasoned that although the 1964 revisions were meant to broaden the scope of the statute, the inclusion of private arbitration would have been an extreme deviation from the original intent of the statute and would have warranted acknowledgement.[39] The court found that "[t]he legislative history's silence with respect to private tribunals" proves that extending § 1782 to private arbitration was not the intent of Congress.[40]

The Second Circuit also reasoned that this type of discovery would conflict with the Federal Arbitration Act (the "FAA"), the body of law in the United States that controls judicial treatment of arbitration agreements.[41] It explained that § 1782 would provide for broader discovery in private arbitration than that permitted under § 7 of the FAA.[42] For example, § 7 of the FAA permits only arbitrators to seek judicial assistance and the evidence is limited to testimony and material physical evidence.[43] By contrast, § 1782 allows "any interested party" to apply for judicial assistance, and the district court has the power to compel a person to give testimony, give a statement, or to produce "a document or other thing for use in a proceeding in a foreign or international tribunal."[44] The court determined that allowing such broad evidence-gathering mechanisms as provided for by § 1782 would overburden the al-

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36 *Id.*
37 *Id.*
38 *Id.* at 189–90.
39 *Id.*
40 *Id.* at 190.
41 *Id.* at 187–88.
42 *Id.*
43 *Id.*; 9 U.S.C. § 7.
44 28 U.S.C. § 1782.

ternative dispute resolution process—a mechanism that is valued for its time and cost efficiency.[45]

That same year, the Fifth Circuit in *Republic of Kazakhstan v. Biedermann International* ("*Biedermann*") also found that "§ 1782 does not apply to private international arbitrations."[46] The court closely followed the reasoning of the Second Circuit but made a note that international commercial arbitration would have been considered a novel concept in 1964 and, therefore, would not have been contemplated by the drafters.[47]

C. *The Supreme Court Unlocks the Door to a Broader Interpretation of § 1782*

Intel Corp. v. Advanced Micro Devices, Inc. ("*Intel*") marked the first time in history that a § 1782 decision was reviewed by the Supreme Court.[48] In that case, Advanced Micro Devices filed an antitrust complaint against Intel Corporation with the Directorate-General for Competition of the European Commission ("European Commission") and petitioned the Northern District of California for the production of documents under § 1782.[49] One of the issues before the Court was whether a proceeding before the European Commission constituted a "foreign or international tribunal" under § 1782.[50] While the question of whether § 1782 is available to *private arbitrations* was not before the Supreme Court, Justice Gins-

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[45] *See Nat'l Broad. Co.*, 165 F.3d at 190–91 ("The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness . . . .").

[46] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999).

[47] *Id.* at 882; Conley, *supra* note 28, at 52.

[48] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246 (2004); Daniel A. Losk, *Section 1782(a) After* Intel*: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035, 1046 (2005) ("Ruling on § 1782(a) for the first time in the statute's 150 years of existence, the Supreme Court in *Intel* delivered a broad, liberal interpretation of the availability of judicial assistance.").

[49] *Intel Corp.*, 542 U.S. at 246.

[50] *See id.* at 246–47; *see also European Commission*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited May 15, 2021) (explaining that the European Commission is the executive branch of the European Union).

berg, writing for the majority, constructed an expansive interpretation of "tribunal."[51]

In its analysis the Court noted that the 1964 version of the statute deliberately replaced "any judicial proceeding" with "a proceeding in a foreign or international tribunal."[52] The Court reasoned that the change permitted aid to administrative and quasi-judicial proceedings—in other words, the 1964 version expressly provided for non-judicial proceedings.[53] Additionally, the Court chose to read the language of the statute liberally, stating that "Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"[54]

Most significantly, the Court cited with approval an article written by Hans Smit, one of the chief architects of the 1964 revisions, which states, "[t]he term 'tribunal'. . . includes investigating magistrates, administrative and *arbitral tribunals* . . . ."[55] Another portion of Professor Smit's article briefly noted by the Court explains, "[t]he increasing number and importance of international tribunals make this *liberal provision* of assistance in aid of litigation in international tribunals of great significance. . . . The new legislation [] authorizes assistance in aid of *international arbitral tribunals*."[56]

Intel was significant for judicial assistance. The Court concluded that the European Commission was a "tribunal" within the ambit of § 1782 on the basis that it operated as a "first-instance decisionmaker" that was subject to judicial review.[57] It also established a four-factor test intended to guide judges when deciding whether

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[51] *Intel Corp.*, 542 U.S. at 257–58, 263 n.15.

[52] *Id.* at 258.

[53] *See id*.

[54] *Id.* at 263 n.15.

[55] *Id*. at 258 (alterations in original) (emphasis added) (citing Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71, 1027 n.73 (1965)); Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 994 n.4 (11th Cir. 2012) (explaining that Professor Smit was "dominant drafter" of 1964 revisions to § 1782).

[56] *Intel Corp.*, 542 U.S. at 258; Smit, *supra* note 55, at 1027 n.73 (emphasis added).

[57] *Intel Corp.*, 542 U.S. at 258.

to grant § 1782 discovery aid to a party.[58] But most notably, the opinion disrupted the trend toward excluding commercial arbitration from § 1782, causing many to speculate whether *National Broadcasting* and *Biedermann* were correctly decided.[59]

It was two words—"arbitral tribunals"—quoted by the Supreme Court from Professor Smit's article that "spawned disharmony in the courts regarding whether [§ 1782] applies to private arbitrations established by contract."[60] After *Intel*, a flurry of district court opinions were published addressing the definition of "foreign or international tribunal" under § 1782, and across district courts no consensus was reached on the matter.[61]

The first court of appeals to address the issue following *Intel* was the Eleventh Circuit.[62] Relying on *Intel*, the court concluded that a commercial arbitration was a "tribunal" for the purposes of § 1782 discovery because the arbitral panel was a "first-instance decisionmaker" that was subject to judicial review.[63] The court, however, mysteriously revised its opinion two years later and sua sponte withdrew its judgement on whether an arbitral tribunal constitutes a § 1782 tribunal.[64] This application of *Intel* remained un-

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[58] *See Intel Corp.*, 542 U.S. at 264–65.

[59] *See, e.g.*, Losk, *supra* note 48, at 1048–50.

[60] *In re* Grupo Unidos Por El Canal S.A., No. 14-mc-80277-JST (DMR), 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015).

[61] *See, e.g.*, *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1226 (N.D. Ga. 2006) ("The Court holds that the [arbitral panel] is a 'foreign or international tribunal' within the meaning of § 1782(a)."); *In re* Oxus Gold PLC, MISC No. 06-822007-GEB, WL 1037387, at *5 (D.N.J. Apr. 2, 2007); *In re* Grupo Unidos Por El Canal, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015); Helen Trading S.A. v. McQuilling Partners Inc., No. 4:18-MC-154, 2018 WL 7252925, at *3 (S.D. Tex. Feb. 9, 2018); *see also In re* Storag Etzel GmbH, No. 19-mc-209-CFC, 2020 WL 1849714, at *1 n.1 (D. Del. Apr. 13, 2020) (listing all cases to date that have addressed the issue of whether "tribunal" in § 1782 includes arbitral bodies).

[62] Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 989–90 (11th Cir. 2012), *superseded by* 747 F.3d 1262, 1265 (11th Cir. 2014).

[63] *See id.* at 994–97.

[64] *See Consorcio*, 747 F.3d at 1265, 1270 n.4.

explored by appellate courts until 2019 when the issue came before the Sixth Circuit.[65]

II. *ABDUL LATIF JAMEEL TRANSPORTATION CO. V. FEDEX CORP.*

Fifteen years after *Intel*, the Sixth Circuit concluded that private arbitration is a "foreign or international tribunal" within the purview of § 1782 in *FedEx*.[66] The principal issue before the court was whether a commercial arbitration taking place in a foreign country between a Saudi corporation and a U.S. corporation could gain access to § 1782 assistance.[67] Judge Bush, writing a unanimous decision, found inspiration in the words of Thomas Jefferson: "Thomas Jefferson once counseled his nephew Peter Carr on how to think: 'Fix reason firmly in her seat, and call to her tribunal every fact, every opinion.' This case calls upon us to do just that."[68]

A. *Background: Facts and Procedural History*

In 2014, FedEx International, a division of FedEx Corporation ("FedEx Corp."), entered into a General Service Provider ("GSP") contract with Abdul Latif Jameel Transportation ("ALJ"), a Saudi company.[69] The GSP provided that ALJ would provide delivery services for FedEx International within Saudi Arabia.[70] The contract contained an arbitration clause that required all disputes arising from the GSP to be settled through arbitration in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration (the "DIFC-LCIA").[71]

The relationship between the parties began to sour with both parties claiming breach of contract, and by 2018, all attempts at

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[65] *See In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 714 (6th Cir. 2019).

[66] *Id.*

[67] *Id.* at 713.

[68] *Id.* (quoting *Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787)*, *in* 12 THE PAPERS OF THOMAS JEFFERSON 14, 15 (Julian P. Boyd ed., 1955).

[69] *Id.* at 714; Corrected Brief for Respondent-Appellee FedEx Corp. at 4, *FedEx*, 939 F.3d 710 (2019) (No. 19-5315) [hereinafter FedEx Brief].

[70] *FedEx*, 939 F.3d at 714.

[71] *Id.*

reconciliation had been completely frustrated.[72] As a result, FedEx International initiated the DIFC-LCIA Arbitration, in accordance with the GSP.[73] On May 14, 2018, ALJ applied to the Western District of Tennessee for an ex parte order, pursuant to 28 U.S.C. § 1782, to obtain discovery from FedEx Corp. for use in the arbitration proceedings located in Dubai.[74] The district court denied ALJ's application, concluding that the phrase "foreign or international tribunal" in § 1782 did not include private arbitral proceedings, such as DIFC-LCIA; therefore, ALJ was not eligible for assistance under § 1782 for those proceedings.[75] On April 12, 2019, ALJ appealed to the Sixth Circuit.[76]

B. *Relying on the Language of the Statute, the Sixth Circuit Found that "Tribunal" Encompasses Private Arbitration*

In determining "whether the DIFC-LCIA Arbitration panel qualified as a § 1782(a) 'foreign or international tribunal,'" [77] the court relied heavily on an analysis of the language of the statute. In searching for the definition of "tribunal," the court examined the plain meaning of the word, the historical legal uses of the word, and finally, the statutory definition of "tribunal."[78] The answers found in this textual exploration determined the outcome of the case: According to the Sixth Circuit, the DIFC-LCIA Arbitration panel qualified as a "foreign or international tribunal" within the purview of § 1782.[79]

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[72] *See id.* at 714–15.

[73] *Id.* at 715.

[74] *Id.* at 715–16. In addition to the GSP, FedEx International and ALJ had entered into a Domestic Service Agreement ("DSA") that contained an arbitration clause requiring the parties to settle any dispute in Saudi Arabia under Saudi law. *Id.* at 714. Before FedEx International commenced the DIFC-LCIA Arbitration, ALJ had submitted to a dispute in connection with the DSA to a Saudi arbitration panel. *Id.* at 715. ALJ sought § 1782 assistance for discovery in both the DIFC-LCIA Arbitration and the Saudi arbitration; however, the Saudi arbitration was dismissed, so the Sixth Circuit declined to decide the issue with respect to that arbitration. *Id.* at 716–17.

[75] *Id.* at 716.

[76] *Id.*

[77] *Id.* at 717.

[78] *See id.* at 717–18.

[79] *Id.* at 723.

Because the drafters of the statute left the term "foreign or international tribunal" undefined, the court began its analysis with an examination of the plain meaning of "tribunal."[80] It noted that there was no evidence to indicate that either "international tribunal" or "foreign tribunal" was a term of art with a specialized meaning.[81] As a result, the court decided to focus exclusively on the definition of "tribunal."[82]

To start, the court considered it important to examine the use of the word at the time the statute was drafted,[83] and looked to both legal and non-legal dictionary definitions of "tribunal" to discern its meaning.[84] It found that legal dictionaries from the time did not consistently define the scope of the word "tribunal": In some cases, the definition was broad enough to include private arbitration, and in other cases, it was not.[85] The court could not rely on these inconsistent definitions.[86]

Instead, the court turned its attention to the use of the word "tribunal" in legal writing.[87] It observed that "American jurists and lawyers have long used the word 'tribunal' in . . . a sense that includes private, contracted-for, commercial arbitral panels,"[88] citing several examples of this use of the word as far back as the 1850s.[89] It noted that even private arbitrations at issue before the Supreme Court have been referred to as "tribunals," both before and after the drafting of § 1782.[90]

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[80] *Id.* at 717.

[81] *Id.* at 718–19.

[82] *Id.* at 719 ("[T]here is no dispute that the DIFC-LCIA arbitration is 'foreign or international' in nature. Thus, we focus on the meaning of 'tribunal,' which is hotly disputed." (footnotes omitted)).

[83] *Id.* at 717.

[84] *Id.* at 719–720.

[85] *Id.*

[86] *See id.* at 720.

[87] *Id.*

[88] *Id.*

[89] *See id.* at 720–21 ("Justice Joseph Story's *Commentaries on Equity Jurisprudence* used the word "tribunal" to describe private, contracted-for arbitrations . . . ." (citing 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1457 at 955 (6th ed. 1853))).

[90] *See id.* at 721–22 (first citing Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 203 (1956); then citing Balt. Contractors, Inc. v. Bodinger, 348 U.S. 176, 185 (1955) (Black, J., dissenting); then citing Red Cross Line v.

Finally, because an inquiry into the context in which the word is used within legislation is an essential facet of statutory interpretation, the court looked to the congressional meaning of the word.[91] It found that "evidence of congressional usage does not compel a narrower understanding of ["tribunal"] than its linguistic meaning."[92] For example, § 1782 reads, "[t]he [§ 1782 discovery] 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."[93] FedEx Corp. took the position that the term "foreign or international tribunal" applies exclusively to governmental entities because only governmental entities will have established procedures for the taking of evidence.[94] The Sixth Circuit quickly dismissed this assertion, explaining that the inclusion of the phrase "may be in whole or in part" is permissive—there is no requirement that such procedures be applied or that it be shown that they even exist, but *if* the adjudicatory body uses particular procedures in the collection of evidence, "then the district court *may* order that evidence be collected pursuant to those procedures."[95] The court explained that no other uses of the word "tribunal" within the statute indicate a more limited definition of the word.[96]

The court relied heavily on the statutory language, explaining that its "analysis begins with the language of the statute[,] [a]nd where the statutory language provides a clear answer, it ends there as well."[97] The court concluded: "[T]he text, context, and structure of [§ 1782] provide no reason to doubt that the word 'tribunal' in-

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Atlantic Fruit Co., 264 U.S. 109, 121 n.1 (1924); and then citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985)).

[91] *FedEx*, 939 F.3d at 722 ("[I]f the overall context and structure of the statute indicate that Congress used the word in a different sense than its linguistic meaning, the congressional meaning controls.").

[92] *Id.*

[93] 28 U.S.C. § 1782(a); *FedEx*, 939 F.3d at 722.

[94] *Id.* at 722–23.

[95] *Id.* at 723 (emphasis added).

[96] *Id.* (describing only one other appearance of the word "tribunal" and explaining that its use was "not inconsistent with a definition of the word that includes private arbitrations").

[97] *Id.* (quoting Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999)).

cludes private commercial arbitral panels . . . . Therefore, we need look no further to hold that the DIFC-LCIA Arbitration panel is a 'foreign or international tribunal.'"[98] With that, the Sixth Circuit reversed the decision of the lower court.[99]

C. *The Sixth Circuit Addressed Remaining Arguments*

Although the Sixth Circuit arrived at its decision at the end of its analysis of statutory language, it nevertheless went on to identify and examine all remaining arguments that could implant doubt in the court's findings. It addressed its disagreement with the statutory interpretation in *Biedermann* and *National Broadcasting*.[100] It also bolstered its own conclusion with the Supreme Court's opinion in *Intel*.[101] Lastly, the court dispensed with all public policy concerns that had been raised.[102] The Sixth Circuit's thorough investigation into all contrary arguments helped to reinforce its final conclusion and justify its split from the other Courts of Appeals.

1. "FOREIGN OR INTERNATIONAL TRIBUNAL" IS NOT LIMITED TO GOVERNMENTAL ENTITIES

The Second and Fifth Circuit court decisions relied heavily on legislative history in finding that under § 1782 a "foreign or international tribunal" could not be a private arbitral proceeding.[103] According to these courts, the legislative history indicated that the statute was intended to apply exclusively to government entities.[104] The *FedEx* court found these conclusions to be unpersuasive.[105]

First, the *FedEx* court found that legislative history is not controlling in statutory interpretations.[106] It explained that the reliability of legislative history has been questioned because it consists of

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98 *Id.*

99 *Id.* at 723, 732.

100 *Id.* at 726.

101 *Id.*

102 *Id.* at 728.

103 *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188–90 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881–82 (5th Cir. 1999).

104 *See Nat'l Broad. Co.*, 165 F.3d at 188–90; *Biedermann*, 168 F.3d at 881–82.

105 *FedEx*, 939 F.3d at 726–28.

106 *See id.* at 726.

rough drafts and preliminary writings that may not reflect the ultimate intentions of the majority.[107] Second, in this case, neither the legislative history nor the text of § 1782 contain limiting language and, therefore, if the court were to rely on such sources it would still reach the same conclusion.[108] The court emphasized that both legislative history and the statutory language provide evidence of Congress' intent to *expand* the reach of § 1782, and "the legislative history does not indicate that the expansion *stopped short* of private arbitration."[109]

The Sixth Circuit also dispensed with the notion that, under *Intel*, a § 1782 "tribunal" must be limited to a judicial or state-sponsored entity.[110] It rejected the idea that the second *Intel* factor ("a court . . . may consider the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance"[111]) intended to limit or define tribunal.[112] In support, the court quoted Justice Ginsburg's explanation that Congress "left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"[113] All in all, the Sixth Circuit made a strong assertion that § 1782 was intended to be construed broadly and, therefore, private arbitration is under the umbrella of "foreign or international tribunals."

2. POLICY CONSIDERATIONS DID NOT IMPACT THE SIXTH CIRCUIT'S CONCLUSION

The Sixth Circuit turned to policy considerations last, explaining that policy arguments carry very little weight in its decision

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107 *See id.* at 727.

108 *See id.* at 727–28.

109 *Id.* ("The facts on which the legislative history is most clear are that the substitution of 'tribunal' for 'judicial proceeding' broadened the scope of the statute, and . . . removed the requirement that the United States be a party to an international agreement under which a proceeding takes place.").

110 *See id.* at 723–26.

111 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 244 (2004).

112 *FedEx*, 939 F.3d at 725–26 ("Indeed, that the Court made 'the nature of the foreign tribunal' a factor for the district court to consider suggests that the Court was not attempting to contemplate any and all possible types of 'tribunal' in which § 1782(a) discovery might be granted.").

113 *Id.* at 726 (quoting *Intel Corp.*, 542 U.S. at 263 n.15).

because "achieving a better policy outcome . . . is a task for Congress, not the courts."[114] The court, however, went on to address these concerns because even if it "were inclined to countenance policy arguments," such arguments do not mandate that the court reach a different conclusion.[115]

One policy argument asserted by FedEx Corp. was that § 1782 unfairly grants broader discovery than what is typically available in domestic arbitration disputes.[116] Chapter 1 § 7 of the FAA, which governs domestic arbitration in the United States, empowers only arbitrators to request judicial assistance in the discovery process.[117] By contrast, § 1782 provides that "any interested person," including parties and even third parties, may petition federal courts for evidentiary aid.[118] Thus, foreign parties engaged in arbitration would have access to a discovery tool that is not available to parties in domestic arbitration.[119]

The Sixth Circuit was unpersuaded by this argument.[120] It pointed out that the *Intel* court dispensed with such concerns due to the fact that under § 1782, there is no requirement that a foreign party provide equivalent information or grant U.S. citizens similar access to judicial assistance.[121] Indeed, "Section 1782 . . . does not direct United States courts to engage in comparative analysis to

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[114] *Id.* at 728 (citations omitted) (alterations included) (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 13–14 (2000)).

[115] *Id.*

[116] *Id.*

[117] 9 U.S.C. § 7 ("The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.").

[118] 28 U.S.C. § 1782(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 . . . . 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.").

[119] *FedEx*, 939 F.3d at 728.

[120] *Id.* at 729.

[121] *Id.*; Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 (2004).

determine whether analogous proceedings exist [domestically]."[122] Furthermore, the Sixth Circuit explained that if there is a concern for equality between parties in foreign or international arbitration proceedings, the district court has discretion to deny a § 1782 application or condition acquiescence on a reciprocal exchange of information.[123]

Another policy consideration raised by FedEx Corp. was the concern that qualifying private arbitration for § 1782 assistance could have the effect of encumbering the arbitration process, which is valued for its cost and time efficiencies.[124] The Sixth Circuit was not persuaded by this point because *Intel* grants district judges the discretion to deny a request if it is "unduly intrusive or burdensome."[125]

Lastly, FedEx Corp. argued that extending § 1782 discovery to private arbitration would be incongruous to the "twin aims" of § 1782, which are to "provid[e] efficient assistance to participants in international litigation and encourag[e] foreign countries by example to provide similar assistance to our courts."[126] FedEx Corp. argued that such a decision would "actually disserve[] United States interests because it 'encourage[s] foreign countries to undermine U.S. policy in favor of enforcing private arbitration agreements by granting discovery inconsistent with those agreements.'"[127] The Sixth Circuit countered this assertion by again reminding FedEx Corp. that the district court has discretion to refuse any § 1782 request and may do so if it perceives the discovery request to be contrary to the agreement of the parties.[128]

Overall, the Sixth Circuit relied primarily on the meaning of the word "tribunal" in concluding that the DIFC-LCIA arbitration qualifies as a § 1782 "foreign or international tribunal"—neither legislative nor policy arguments dissuaded the court from reaching this conclusion. The court reversed the district court's decision and

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122 *FedEx*, 939 F.3d at 729 (quoting *Intel Corp.*, 542 U.S. at 263).

123 *See id.*

124 *Id.* at 729–30.

125 *See id.* at 730 (citing *Intel Corp.*, 542 U.S. at 265).

126 *Id.* (citing FedEx Brief, *supra* note 69, at 20).

127 *Id.* (second alteration in original) (quoting FedEx Brief, *supra* note 69, at 20).

128 *Id.*

remanded it for further consideration, instructing the lower court to apply the *Intel* factors to determine whether the § 1782 request should be granted.[129]

III. THE SUPREME COURT MUST ADDRESS THE CIRCUIT SPLIT CREATED BY *FEDEX*

The Sixth Circuit created a split among Courts of Appeals that will not easily be neglected by the Supreme Court[130]—especially given the significance of private arbitration in modern cross-border transactions.[131] Unsurprisingly, a number of courts have already been confronted with the question of how to define "tribunal" in the context of § 1782 discovery since the *FedEx* decision in 2019.[132] But, these subsequent decisions have not brought greater clarity to the issue: Inevitably, the Supreme Court will need to clarify the statutory meaning of "tribunal." This Note posits that the Supreme Court would likely support the *FedEx* court's comprehensive analysis on the issue and would approve of its interpretation of § 1782.

A. *The Application of § 1782 to Arbitral Tribunals Continues to be Disputed*

With the ever-growing prevalence of international commerce, arbitration has become the preferred dispute resolution process in cross-border commercial transactions.[133] As a result, several courts

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[129] *Id.* at 732.

[130] *See* Pinney, *supra* note 14, at 125.

[131] *See* Matthew J. Soroky, *Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications*, 39 FRANCHISE L.J. 185, 185 (2019); Laura Emmy Malament, Note, *Making or Breaking Your Billion Dollar Case: U.S. Judicial Assistance to Private International Arbitration Under 28 U.S.C. § 1782(a)*, 67 VAND. L. REV. 1213, 1214 (2014).

[132] *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 690 (7th Cir. 2020); *In re* Guo, 965 F.3d 96, 100 (2d Cir. 2020); *In re* Storag Etzel GmbH, No. 19-mc-209-CFC, 2020 WL 1849714, at *1 (D. Del. Apr. 13, 2020); *In re* EWE Gasspeicher GmbH, No. 19-mc-109-RGA, 2020 WL 1272612, at *1 (D. Del. Mar. 17, 2020); HRC-Hainan Holding Co. v. Yihan Hu, No. 19-mc-80277-TSH, 2020 WL 906719, at *1 (N.D. Cal. Feb. 25, 2020).

[133] *See* Soroky, *supra* note 131, at 185; Malament, *supra* note 131, at 1214.

have already been asked to weigh in on the recent circuit split.[134] Among Courts of Appeals, the Fourth Circuit has chosen to align with the Sixth Circuit's interpretation of the statute,[135] while the Second and Seventh Circuits have reached opposite conclusions.[136]

After *FedEx*, the Fourth Circuit was the next Court of Appeals to examine the issue.[137] Like the Sixth Circuit, the Fourth Circuit found that Congress intended to expand the reach of § 1782 "to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*."[138] Also congruent with the Sixth Circuit's analysis, the Fourth Circuit rejected the idea that allowing § 1782 discovery in arbitral proceedings would "inject extraordinary delay and costs into arbitrations, thereby defeating their purpose and undermining parties' bargained-for method of dispute resolution" because any undue burden "can and should be managed by the district court with the discretion conferred on it by [§ 1782]."[139]

Interestingly, in addressing the argument that § 1782 was meant to apply only to government-controlled tribunals and not private commercial arbitrations, the Fourth Circuit pointed to the FAA as evidence that arbitration is in fact regulated by the government and would therefore be a product of "government-conferred authority."[140] It explained that the FAA "provides particular procedural mechanisms for conducting arbitrations, as well as for court supervision and enforcement of arbitral awards[,]" which confirms that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised."[141]

By contrast, in *In re Guo*, the Second Circuit upheld it's ruling in *National Broadcasting* "that the phrase 'foreign or international tribunal' does *not* encompass 'arbitral bod[ies] established by pri-

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134 *See supra* note 132 (listing cases).
135 *See Boeing*, 954 F.3d at 210.
136 *See In re Guo*, 965 F.3d at 100; *Rolls-Royce*, 975 F.3d at 690.
137 *See Boeing*, 954 F.3d at 210.
138 *See id.* at 213.
139 *Id.* at 214–15.
140 *Id.* at 213–14.
141 *Id.*

vate parties.'"[142] The *Guo* court essentially found that *Intel* did not overrule *National Broadcasting* because *Intel* never directly addressed the question of "whether a private international arbitration tribunal qualifies as a 'tribunal' under § 1782."[143] It regarded Professor Smit's definition of "tribunal" quoted in the *Intel* opinion as mere dicta and overall, found *Intel* to be both unpersuasive and non-binding.[144]

Similarly, in *Servotronics, Inc. v. Rolls-Royce PLC*, the Seventh Circuit chose to align with *National Broadcasting* and *Biedermann*.[145] In reaching this decision the court conducted a statutory interpretation of "foreign or international tribunal," finding that it could only apply to "governmental, administrative, or quasi-governmental" entities and not private arbitrations.[146] It also relied heavily on the fact that if § 1782 were available in private international arbitrations, it would make available broader discovery than that which is available to domestic arbitrations, which it found to be "a serious conflict with the [FAA]."[147] Like the *Guo* court, the *Rolls-Royce* court found the Supreme Court's mention of Professor Smit's law review article to be insignificant.[148]

As the Courts of Appeals dispute the application of this discovery tool, parties to international arbitration agreements eagerly anticipate clarity.[149] A resolution of this matter could affect the way

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[142] *In re* Guo, 965 F.3d 96, 100 (2d Cir. 2020) (alterations in original) (emphasis added) (quoting Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 191 (2d Cir. 1999)).

[143] *Id.* at 103.

[144] *Id.* at 105.

[145] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 690 (7th Cir. 2020).

[146] *Id.* at 694–95 ("Service-of-process assistance and letters rogatory—governed by §§ 1696 and 1781—are matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels.").

[147] *Id.* at 695–96.

[148] *Id.* at 696 (asserting that this portion of *Intel* opinion "has taken on outsized significance").

[149] Two other § 1782 cases recently appealed to the Third and Ninth Circuits. *In re* EWE Gasspeicher GmbH, No. 19-mc-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17), *appeal filed*, No. 20-1830 (3d Cir. Apr. 16, 2020); HRC-Hainan

arbitration agreements are drafted and will certainly influence how parties approach pending disputes. The Supreme Court will need to make a determination regarding the circuit split created by *FedEx* in the near future.[150]

B. *The Supreme Court Would Likely Approve of the Analysis in FedEx*

In the event that *FedEx* or a similar case is granted certiorari, it is reasonable to assume that the Supreme Court would uphold the Sixth Circuit's decision because the opinion presents a sound and comprehensive statutory construction.

1. THE *FEDEX* EMPLOYED A STATUTORY INTERPRETATION CONGRUENT WITH THE METHODS OF THE SUPREME COURT

The Supreme Court commonly begins statutory interpretation with the words of the statute at issue,[151] and the *FedEx* court did just that: It conducted a thorough textual analysis of "foreign or international tribunal."[152] Because the definition of the term "foreign or international tribunal" was absent from the statute, the *FedEx* court examined the plain meaning of the language of the text,[153] a practice that is consistently followed by the Supreme Court.[154] To determine the ordinary meaning of the word, the Sixth Circuit employed the common Supreme Court practice of consult-

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Holding Co. v. Yihan Hu, No. 19-mc-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25), *appeal filed*, No. 20-15371 (9th Cir. Feb. 28, 2020).

150 *See* Samberg & Rosenbaum, *supra* note 12.

151 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) ("One naturally must begin with the words of the statute when the very subject of the litigation is what the statute requires.").

152 *See In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 717–23 (6th Cir. 2019).

153 *See id.* at 717.

154 *See, e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Moskal v. United States, 498 U.S. 103, 108 (1990) ("'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'" (citations omitted) (first quoting United States v. Turkette, 452 U.S. 576, 580 (1981); and then quoting Richards v. United States, 369 U.S. 1, 9 (1962))).

ing dictionaries.[155] They found that contemporary dictionaries supported an interpretation of "tribunal" that is "broad enough to include private arbitration."[156] The Sixth Circuit further analyzed the congressional meaning and legal use—including the Supreme Court's own use—of "tribunal" to support a broad interpretation of the word.[157]

In fact, the Sixth Circuit specifically addressed the Supreme Court's use of the word "tribunal" in *Intel* to support its statutory interpretation.[158] It pointed out the Court's own conclusion that "the word 'tribunal' applies to non-judicial proceedings[,]" and noted the Court's tacit approval of Professor Smit's definition of "tribunal," which explicitly included "arbitral tribunals."[159]

By contrast, the Second, Fifth, and Seventh Circuit courts conducted only a cursory analysis of the plain meaning of "tribunal," finding the term to be broad enough to encompass private arbitration, but concluding that it was simply ambiguous.[160] The Sixth Circuit rightly noted that "the Second and Fifth Circuits turned to legislative history too early in the interpretation process."[161] By neglecting to examine the congressional meaning and legal uses of the word, these courts simply glossed over an essential step in statutory construction.[162] Given the exhaustive textual examination conducted by the Sixth Circuit, which included the ordinary definition, congressional meaning, and judicial uses of the word "tribu-

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[155] *See, e.g.*, Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362–63 (2019) (using dictionaries from time that Congress enacted Freedom of Information Act to determine the meaning of the word "confidential").

[156] *FedEx*, 939 F.3d at 719–20.

[157] *See id.* at 718, 720–23 ("Words 'must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 809 (1989)).

[158] *Id.* at 723.

[159] *Id.* at 724.

[160] *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 693–94 (7th Cir. 2020).

[161] *FedEx*, 939 F.3d at 726.

[162] The Seventh Circuit conducted a brief analysis of both the dictionary definitions and congressional meaning of the term but failed to consider the common legal uses. *See Rolls-Royce PLC*, 975 F.3d at 693–95.

nal," the Supreme Court would likely agree with the conclusion reached by the Sixth Circuit.

2. THE *FEDEX* COURT ALIGNED ITS ANALYSIS OF LEGISLATIVE HISTORY WITH *INTEL*

Although the *FedEx* court relied almost exclusively on a strict textual analysis of § 1782 to reach its conclusion, it did go on to support its finding by addressing the legislative history of the statute.[163] The Sixth Circuit made similar findings about the legislative history of § 1782 as those presented by the Supreme Court in *Intel*. It also used the analyses conducted by the Second and Fifth Circuits to support its own contrary conclusion.[164]

In *Intel*, the Supreme Court described the evolution of § 1782 where "any judicial proceeding" was replaced with "a proceeding in a foreign or international tribunal."[165] This was significant because it extended the availability of the § 1782 discovery tool to a variety of proceedings.[166] The Court placed great emphasis on the congressional intent to apply the statute broadly and emphasized the lack of limits placed on the scope of the statute by Congress.[167] The Supreme Court then underscored its legislative analysis with Professor Smit's quote defining "tribunal."[168] As a leading drafter of the 1964 revisions to the statute, Professor Smit was cited repeatedly throughout *Intel* as persuasive authority on the meaning and application of § 1782.[169] Thus, the Supreme Court would like-

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163 *Fedex*, 939 F.3d at 727–28.

164 *Id.*

165 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257–58 (2004).

166 *See id.* at 249.

167 *See, e.g.*, *id.* at 263 n.15 ("Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'").

168 *Id.* at 258.

169 *See id.* at 247 n.1, 248, 249 n.8, 256–59, 261 n.12, 262 n.13, 265 n.17. Indeed, Professor Smit has written much about the intended definition of tribunal, and his construction of the word clearly includes arbitral tribunals: For example, in another article, he wrote "the term 'tribunal' in Section 1782 includes an arbitral tribunal created by private agreement." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 6 (1998) [hereinafter *American Assistance*].

ly continue to follow Professor Smit's broad definition of the term "tribunal" within § 1782.

Like the Supreme Court in *Intel*, the *FedEx* court found the legislative history to command liberal interpretation of the statute.[170] In fact, the Sixth Circuit used the exact legislative sources cited in *National Broadcasting* to reach an opposite conclusion.[171] In *National Broadcasting*, the Second Circuit conceded that legislative history indicates an intent to expand the statute but leaped to an assumption that because private arbitration was not specifically mentioned, it was not within the consideration of Congress at the time the statute was drafted.[172] This reasoning advanced by the Second Circuit lacked concrete support.

The Sixth Circuit correctly pointed out that there is no evidence that Congress intended to exclude private arbitration from the statute's expansion.[173] By contrast, "[t]he facts on which the legislative history is most clear are the substitution of 'tribunal' for 'judicial proceeding' broadened the scope of the statute," indicating "Congress's intent to *expand* § 1782(a)'s applicability."[174] Like the Supreme Court in *Intel*, the *FedEx* court found that the legislative history points to a purposeful expansion of the statute without any indication of limitations.

The reasoning in *Intel* indicates that the Supreme Court would approach statutory construction of § 1782 using textual analysis and legislative history, much like the Sixth Circuit did in *FedEx*. Given the *Intel* court's use of the word tribunal, its explanation of the broadening of the statute in the 1960s, and its approval of Professor Smit's definition of the word "tribunal," the Supreme Court would likely agree with the conclusion reached in *FedEx*.

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170 *See In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 728 (6th Cir. 2019).

171 *Id.* at 727–28.

172 Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999) ("The absence of any reference to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute.").

173 *FedEx*, 939 F.3d at 728.

174 *Id.*

IV. THE FUTURE OF PRIVATE ARBITRATION IN LIGHT OF *FEDEX*

Although the *FedEx* opinion provided a thorough and comprehensive analysis of the issues surrounding the application of § 1782 to private arbitration, the decision left many questions unanswered. Primary among them is whether the statute will impermissibly burden the arbitration process and create asymmetry among parties.[175] Although the *FedEx* court addressed this argument in its opinion, the effect of its decision remains to be seen in real-world application. Additionally, if international arbitral tribunals qualify for aid under § 1782, it is possible that the discovery tool would be utilized by arbitral tribunals considered to be "international" but are, in fact, located domestically.[176]

A. *Remaining Public Policy Considerations*

The most common concern about extending § 1782 to private arbitral proceedings is that it will impermissibly burden the arbitration process.[177] Private arbitration has overwhelmingly become the leading choice of dispute resolution in international commercial contracts and plays an essential role in the increasingly globalized economy.[178] Parties to cross-border transactions value arbitration as a process that is cost-effective and efficient.[179] There is a widespread fear that these benefits will vanish if § 1782 is made available in private arbitration because it will encumber the alternative

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[175] *See, e.g.*, Malament, *supra* note 131, at 1231–32 (discussing concerns expressed by Second Circuit in *National Broadcasting*).

[176] *See, e.g.*, COMM. ON INT'L COM. DISPS., N.Y.C. BAR, 28 U.S.C. § 1782 AS A MEANS OF OBTAINING DISCOVERY IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION—APPLICABILITY AND BEST PRACTICES 32–35 (2008) [hereinafter NEW YORK CITY BAR COMMITTEE], https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports////57461369f8f0a1240059dd9f/01-01-2008/12-31-2008/1/10 (discussing whether § 1782 should apply to "foreign or international tribunals" seated in the United States).

[177] *See* Malament, *supra* note 131, at 1231–32; Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 91–92 (2011); Conley, *supra* note 28, at 67–68.

[178] *See* Malament, *supra* note 131, at 1214; Soroky, *supra* note 131, at 185.

[179] Malament, *supra* note 131, at 1231.

dispute resolution mechanism with broad U.S.-style discovery and greater judicial involvement.[180]

The concern that § 1782 discovery would be cumbersome and inequitable was expressed by both the Second and Fifth Circuits.[181] The Sixth Circuit, however, found these concerns to be overblown because "§ 1782(a) is permissive: the district court 'may' order discovery, and the Supreme Court has made clear that the district court has wide discretion in determining whether and how to do so."[182] Not only did *Intel* create a list of four factors for judges to consider before granting a § 1782 request, but it also empowered judges to reject any request deemed unreasonable or inconsistent with the goals of the parties.[183] In other words, a request must withstand the scrutiny of a court—it is by no means automatically granted.[184]

Additionally, in addressing inequitable access to discovery, the Supreme Court rejected the idea that an applicant must provide equivalent discovery.[185] It noted that if fairness was a concern, "a district court could condition relief upon that person's reciprocal exchange of information."[186] The arbitrators also have the power to exclude any evidence they deem to be improper and "can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate."[187]

Arbitration is a mechanism that is contracted for by the parties.[188] Some have expressed concern that allowing § 1782 discovery in private arbitrations would be contrary to the provisions

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[180] Beale et al., *supra* note 177, at 91–92.

[181] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190–91 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).

[182] *In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 730 (6th Cir. 2019) (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261–62, 265–66 (2004)).

[183] *Intel Corp.*, 542 U.S. at 264–66.

[184] *See id.* at 266 ("Having held that § 1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to ensure an airing adequate to determine what, if any, assistance is appropriate.").

[185] *Id.* at 262–63.

[186] *Id.*

[187] *Id.*

[188] *See* Conley, *supra* note 28, at 67–69.

agreed upon by the parties, which often prescribe very limited discovery.[189] The second *Intel* factor, however, asks district courts to consider "the 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."[190] Accordingly, the rules and proceedings of a party-selected arbitral tribunal, the receptivity of that tribunal to discovery assistance, and the intentions of the contracting parties would weigh in a court's decision to grant the § 1782 request.[191] There is ample opportunity for parties, judges, and arbitrators to ensure the discovery process is reasonable, fair, and harmonious with the goals of the arbitration.

Further, the *Biedermann* and *National Broadcasting* courts voiced concern that § 1782 discovery conflicts with the FAA because it grants broader discovery than is permitted in domestic arbitration.[192] The *FedEx* court dispels this concern by pointing out that nothing requires domestic arbitration and international arbitration to provide equivalent discovery.[193] Professor Smit has commented that

> [t]he fact that [§] 1782 . . . does not deal with the domestic arena cannot be seriously considered as an argument for limiting its intended purpose in the international arena. On the contrary, if anything, it should move the legislature dealing with domestic adjudication to emulate the reform achieved on the international level. . . . In fact, the aim of the drafters of [§] 1782 was that domestic legislatures adopt

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189 *Id.* at 68–69.

190 *Intel Corp.*, 542 U.S. at 264.

191 *See In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 730 (6th Cir. 2019); Malament, *supra* note 131, at 1241 (proposing a four-step framework for district courts when deciding whether to grant a § 1782 request).

192 Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 187–88 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882–83 (5th Cir. 1999).

193 *FedEx*, 939 F.3d at 728–29 (citing *Intel Corp.*, 542 U.S. at 260–61).

> the liberalized rules they provided for the international situation.[194]

Thus, in light of *Intel* and *FedEx*, the public policy arguments present unpersuasive points. These cases prove that § 1782 is only available in limited circumstances, alleviating the concern that such judicial assistance in private arbitration would over-burden arbitration proceedings, unfairly benefit foreign parties, or infringe upon the intentions of the contracting parties.

B. *The Applicability of § 1782 to International Arbitral Proceedings Seated Domestically*

Should the Supreme Court agree to extend § 1782 assistance to private arbitration proceedings, another issue is whether an arbitral tribunal that is seated in the United States and considered to be "international" falls within the § 1782 definition of "foreign or international tribunals." International arbitral tribunals located within the United States could reasonably be included within the § 1782 definition of "foreign or international tribunal."

1. "FOREIGN TRIBUNAL" AND "INTERNATIONAL TRIBUNAL" HAVE DIFFERENT MEANINGS

The text of § 1782 implies a distinction between what is considered to be a "foreign tribunal" versus an "international tribunal."[195] Indeed, the statute reads, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign *or* international tribunal."[196] This indicates that these terms are distinct.

The *FedEx* court found no evidence that the terms "foreign tribunal" and "international tribunal" are terms of art.[197] "Foreign" and "international" have, however, been used and defined in dis-

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[194] 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, 311 (2003).

[195] *See* 28 U.S.C. § 1782.

[196] *Id.* (emphasis added).

[197] *See FedEx*, 939 F.3d at 718–19.

tinctly different ways within the context of arbitration.[198] For example, "foreign arbitration" has been used in a much narrower capacity to describe arbitration proceedings taking place in another country.[199] Accordingly, it seems that the definition of "foreign arbitration" primarily focuses on the geographical location of the tribunal.[200] By contrast, "international arbitration" has a broad meaning that does not depend on the location of the proceedings.[201]

2. INTERNATIONAL ARBITRATION ENCOMPASSES NON-DOMESTIC ARBITRATION AND FOREIGN ARBITRATION

Chapter 2 of the FAA enforces the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), which was created to "encourage the recognition and enforcement of international arbitral awards."[202] Accordingly, the term "international arbitral awards" includes both "awards made in a [state] other than that in which enforcement of the award is sought" as well as those awards "not considered as domestic" in the state of enforcement.[203] Those awards have been referred to as

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[198] *See, e.g.*, Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 629–30 (1989) [hereinafter *A-National Arbitration*].

[199] *See, e.g.*, Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931 (2d Cir. 1983). Article I of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards states: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . . ." United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter The New York Convention]. The Second Circuit refers to this as the "territorial criterion," explaining that a foreign arbitral award—one rendered in another country—meets the "territorial criterion." *Bergesen*, 710 F.2d at 931–32.

[200] *See Bergesen*, 710 F.2d at 931–32; Stahr, *supra* note 15, at 619.

[201] *See* Stahr, *supra* note 15, at 619; *A-National Arbitration*, *supra* note 198, at 629–30.

[202] Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte Gmbh, 141 F.3d 1434, 1440 (11th Cir. 1998) (quoting *Bergesen*, 710 F.2d at 932); 9 U.S.C. § 201.

[203] *See Indus. Risk*, 141 F.3d at 1440; *Bergesen*, 710 F.2d at 931; *see also* Paolo Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283, 293–94 (1959) ("Article I [of the Convention] seems to permit

"foreign awards" and "non-domestic awards," respectively.[204] Thus, it follows that because Chapter 2 governs "international arbitral awards," then "foreign awards" and "non-domestic awards" both fall within the purview of "international arbitral awards."

Unfortunately, the Convention does not define a "non-domestic" award.[205] Courts, however, have relied on § 202 of the FAA in interpreting the term.[206] The section provides as follows:

> An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[207]

In other words, an award is "non-domestic" if the arbitration involves property located abroad or the dispute is not "entirely between citizens of the United States."[208] Courts have found that an

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only one construction . . . . [T]he Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not any of such awards may be regarded as domestic in that state; it also applies to all awards not considered as domestic in the state of enforcement, whether or not any of such awards may have been rendered in the territory of that state.").

[204] *See, e.g.*, *Bergesen*, 710 F.2d at 932. The court explains that awards "not considered as domestic" or "nondomestic awards" are "made within the legal framework of another country . . . or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. *Id.* It also points out that for an award to be considered a "foreign award" it must meet the "territorial criterion" of being made outside the jurisdiction where enforcement is sought. *Id.*

[205] *Id.*

[206] *See, e.g.*, *Indus. Risk*, 141 F.3d at 1440–41.

[207] 9 U.S.C. § 202.

[208] *See Indus. Risk*, 141 F.3d at 1441 ("We read [Section 202 of the Convention] to define all arbitral awards not 'entirely between citizens of the United States' as 'non-domestic' for purposes of Article I of the Convention. We join the First, Second, Seventh, and Ninth Circuits in holding that arbitration agreements and awards 'not considered as domestic' in the United States are those agreements and awards 'which are subject to the Convention . . . because [they were' . . . involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.'" (alterations in original) (emphasis removed) (quoting *Bergesen*, 710 F.2d at 932)).

arbitral agreement or award between parties, whereby one of the parties is domiciled or has a principle place of business outside of the United States, is considered to be "non-domestic"—even if the seat of arbitration is located in the United States.[209] Thus, according to U.S. precedent, an award is "non-domestic" if the dispute involves an international element.

Based on the above interpretation of the Convention, international arbitration proceedings are both "foreign arbitrations" (which relates to the location of the tribunal) and "non-domestic arbitrations" (which relates to the nationalities of the parties, the place where the contract is intended to be executed, and the location of any property at issue). Thus, because an international arbitration proceeding can take place within U.S. borders, an arbitration seated in the United States may be considered an "international tribunal" if the parties have different nationalities or the nature of the contract is international.

Moreover, at the time § 1782 was constructed, the word "international arbitration" was used in reference to private commercial arbitration between parties of different nationalities.[210] For example, in 1923, forty years before the current form of § 1782 was introduced, the International Chamber of Commerce (the "ICC"), the leading private commercial arbitral institute, established the Court of International Arbitration for commercial disputes between parties from different countries.[211] This indicates that the ICC defined "international arbitration" based on the nationality of the parties rather than the seat of arbitration and that the term "international arbitration" encompassed private disputes at the time the statute was drafted.

3. INTERNATIONAL ARBITRATION COVERS A WIDE SPECTRUM OF ARBITRAL DISPUTES

"International arbitration" is a term that has been used to describe a wide range of arbitral disputes; it cannot be narrowly construed to apply, for example, exclusively to governmental entities. Indeed, Professor Smit defined international arbitration broadly:

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[209] *Id.*

[210] *See* JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 19 (2003).

[211] *Id.*

"International arbitration deals with matters that have elements connecting them to more than one state . . . ."[212]

U.S. courts have used the term "international arbitral proceedings" to describe a variety of private disputes. For example, it has been used to describe treaty-based arbitrations, such as ICSID proceedings pursuant to a bilateral investment treaty or the U.S.-Iranian Claims Tribunal.[213] The term has also been used to refer to foreign private commercial arbitrations seated in another country,[214] and it has been used to characterize "non-domestic" arbitrations located within the United States between citizens of different countries.[215]

Indeed, Professor Smit has noted that an arbitration proceeding within the United States with parties of different nationalities may be a "prime example of a truely [sic] international arbitration."[216] In explaining how § 1782 was intended to be construed, Professor Smit confirms that "the broad term 'international tribunal' was intended to cover *all* international arbitral tribunals."[217] He explained that "the term 'international' should be given the broadest possible construction. Accordingly, a tribunal is international in the sense of [§ 1782] when any of the parties before it, or any of the arbitrators, is not a citizen or resident of the United States."[218] Thus, if the term "international tribunal" was meant to be defined broadly and to include *all* international tribunals, then arbitrations pursuant to a treaty, "foreign arbitrations," and "non-domestic arbitrations" that are seated within the United States, are all within the definition "international tribunal" under § 1782.

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[212] *A-National Arbitration*, *supra* note 198, at 629–30.

[213] *See, e.g.*, Itek Corp. v. First Nat'l Bank of Bos., 566 F. Supp. 1210, 1214 (1st Cir. 1983); *In re* Chevron Corp., 709 F. Supp. 2d 283, 288 (S.D.N.Y. 2010).

[214] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985); Bahrain Telecomms. Co. v. Discoverytel, Inc., 476 F. Supp. 2d 176, 177–78 (D. Conn. 2007).

[215] *See, e.g.*, Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte Gmbh, 141 F.3d 1434, 1440–41 (11th Cir. 1998).

[216] *A-National Arbitration*, *supra* note 198, at 630.

[217] *American Assistance*, *supra* note 169, at 5 (emphasis added).

[218] *Id.* at 6–8.

4. AN "INTERNATIONAL TRIBUNAL" NEED NOT BE SEATED ABROAD UNDER § 1782

Another point of contention is whether § 1782 is intended solely for proceedings abroad, thereby barring application of the statute to international tribunals located within the United States. This argument may be supported by *Intel*, which does not directly address the issue but does place some emphasis on the tribunals located abroad. For example, *Intel* states, "a court presented with a § 1782(a) request may take into account the 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."[219] Additionally, the *Intel* court states, "Section 1782 is a provision for assistance to tribunals abroad."[220] There is, however, no statutory language limiting the term "foreign or international tribunal" to proceedings abroad and, as the *FedEx* court noted, there is nothing to indicate that these quoted sections intended to define "tribunal."[221]

Additionally, the Committee on International Commercial Disputes ("the Committee") addressed this issue in a report that describes best practices for the use of § 1782 in international arbitration.[222] The report explained that there is persuasive reasoning on both sides: There are good arguments that § 1782 applies exclusively to tribunals located in another country, but there are also convincing interpretations allowing for an "international tribunal" to be seated in the United States.[223] To settle the conflict, the Committee proposes a "bright line rule" excluding any arbitral proceedings seated within the United States from § 1782 discovery.[224]

This rule places arbitrary restrictions on § 1782, which was meant to be construed broadly.[225] Consider an example of a com-

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[219] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004) (emphasis added).

[220] *Id.* at 263.

[221] *See In re* Application to Obtain Discovery for Use in Foreign Proceedings (Abdul Latif Jameel Transp. Co. v. FedEx Corp.) (*FedEx*), 939 F.3d 710, 725 (6th Cir. 2019).

[222] NEW YORK CITY BAR COMMITTEE, *supra* note 176, at 33–35.

[223] *Id.*

[224] *Id.* at 35.

[225] *See American Assistance*, *supra* note 169, at 5.

mercial arbitration located in Switzerland under German law between Australian and American parties according to ICDR Arbitration rules. In this example, the chosen arbitrators are citizens of Canada, France, and the United Kingdom. Under the Sixth Circuit's ruling, this arbitration qualifies as a "foreign or international tribunal" for § 1782 purposes. The arbitrators and "any interested party" are free to apply to a district court of the United States for assistance under § 1782. Now, if everything remains the same, but the seat of arbitration is moved from Switzerland to Miami, under the bright line rule proposed by the Committee, the parties in this arbitration would be stripped of the privilege of judicial assistance. The only difference in these proceedings is the seat of arbitration. Nevertheless, both tribunals are international in nature and may encounter the same difficulties in obtaining discovery.

There is little difference between the decision to supply aid to private international arbitral proceedings seated abroad versus those located domestically. The fact that the seat of arbitration is located within U.S. borders may have minimal bearing on the outcome of the arbitration.[226] The parties are empowered to contract for any location, nationality of arbitrator, arbitration rules, and even applicable law.[227] Thus, it may ultimately matter very little where the arbitration actually occurs.[228] In the end, it may lead to forum shopping where parties choose the seat of arbitration outside of the United States simply so that they can have access to a more advantageous discovery tool.

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[226] *See generally* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS 115–23 (1999) [hereinafter ARBITRATION AND FORUM SELECTION] (explaining that one attraction of international arbitration is that parties are free to choose what laws apply to their contract, where their disputes will be resolved, and their arbitrators); JAN PAULSSON, THE IDEA OF ARBITRATION 29 (2013) ("The law applicable *to arbitration* is not the law applicable *in arbitration*. . . . [A] plurality of legal orders may serve as foundations of the same arbitral process.").

[227] *See* ARBITRATION AND FORUM SELECTION, *supra* note 226, at 115–23.

[228] *See generally* PAULSSON, *supra* note 226, at 29–39 (explaining that modern arbitration is "subject to a multiplicity of systems" and the award may be enforced in in a variety of jurisdictions whether or not an award's country of origin has accepted the award).

5. § 1782 COULD BE EXTENDED TO INCLUDE INTERNATIONAL ARBITRAL PROCEEDINGS LOCATED IN THE UNITED STATES

An examination of the history of § 1782 demonstrates that it is continuously being interpreted more liberally. According to judicial interpretations of the Convention, a tribunal seated within the United States constitutes an international arbitral tribunal if the nature of the dispute is international.[229] Thus, it is possible that § 1782 could be extended to include international arbitral proceedings within the United States.

CONCLUSION

The *FedEx* court accomplished what Thomas Jefferson advised his nephew to do—in its comprehensive opinion, it called upon every fact and every opinion to structure its reasoning. Given its broad application of § 1782 in *Intel*, the Supreme Court would be likely to uphold the Sixth Circuit's conclusion that the term "foreign or international tribunal" within § 1782 encompasses private arbitration. However, even if this facet of the § 1782 debate is finally settled, more questions regarding the scope of § 1782 in private arbitration wait below the surface, not least of which is whether it can be extended to international arbitral proceedings conducted within the United States.

This once forgotten and esoteric statute now rises to the forefront of the most important international commercial disputes, and it will be imperative for the Supreme Court to address these emerging concerns that have an immense impact on global commercial relations. Indeed, the Supreme Court will be required to bring clarity to those two words that incited the recent circuit split—"arbitral tribunals."

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[229] *See, e.g.*, Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte Gmbh, 141 F.3d 1434, 1441 (11th Cir. 1998) (concluding that an arbitration located in Florida between a German Corporation and a Florida Corporation is "non-domestic" under the Convention); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (concluding that an arbitration located in the United States between two foreign parties is "non-domestic" under the Convention).