

Note

Debunking the Myths: International Commercial Arbitration and Section 1782(a)

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I. INTRODUCTION

International commercial arbitration continues to be the preferred dispute resolution mechanism for cross-border commercial disputes.¹ Its popularity

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1. See WHITE & CASE LLP & QUEEN MARY UNIV. OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 5 (2018), <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> (showing 92% of in-house counsel reported international arbitration as

resides not only in the allure of efficient and flexible proceedings, but in the prospect of having highly qualified and reputable experts decide cases without the danger of national biases.² Despite it being a private method of dispute resolution, international arbitration ultimately relies on an intergovernmental legal framework that allows enforcement of arbitral awards in over 150 countries in the world.³ Yet, arbitrators are constrained in their search for truth; they lack the coercive power to compel parties and non-parties to produce evidence that may be crucial to the outcome of the proceedings.⁴

At first glance, it would appear as if the United States Code provides a simple answer to this problem. Section 1782(a) of title 28 allows courts to compel production of testimony and documents “for use in a proceeding before a foreign or international tribunal.”⁵ Congress enacted the statute to provide evidence-gathering assistance in federal courts to participants in international adjudicative proceedings and to encourage foreign countries to provide similar aid to proceedings in the United States.⁶ But it has been an uphill battle for those who have sought judicial assistance in international commercial arbitrations under section 1782(a). For the last three decades, courts have grappled with the question of whether private arbitral bodies qualify as a “foreign or international tribunal” under the statute.⁷ The result has been an amorphous body of law and a circuit split that only promises to widen.

In 1999, the Second Circuit was the first court of appeals to tackle the issue in *National Broadcasting Co. v. Bear Stearns & Co. (NBC)*.⁸ In concluding that private arbitral authorities are not tribunals under section 1782(a),⁹ the court issued three key holdings. First, it held that the word “tribunal” is ambiguous, which in turn drove the court to examine the legislative history in search of Congress’s intent at the time of the statute’s enactment.¹⁰ Second, according to the court’s interpretation of the congressional reports, section 1782(a) only applies to State-sponsored or governmental entities.¹¹ Finally, the court concluded that evidence-gathering assistance in federal courts would hinder the efficiency of arbitration proceedings.¹² *NBC* was a precedent-setting opinion—in the past twenty years, most of the courts that excluded private arbitration from the scope of section 1782(a) have substantially replicated *NBC*’s reasoning,

preferred method of dispute resolution in 2018).

2. See *infra* Part III.

3. See 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 New York Convention]; *Contracting States*, N.Y. ARB. CONVENTION (last visited Dec. 18, 2020), <http://www.newyorkconvention.org/contracting-states>.

4. See Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT’L ARB. 153, 160 (1997) [hereinafter Smit, *American Judicial Assistance*].

5. 28 U.S.C. § 1782(a) (2018).

6. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004).

7. 28 U.S.C. § 1782(a). To the author’s knowledge, the first time a district court addressed this issue was in 1994. See *In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994).

8. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184 (2d Cir. 1999).

9. *Id.* at 191.

10. *Id.* at 188.

11. *Id.* at 189–90.

12. *Id.* at 190–91.

starting with the Fifth Circuit's 1999 decision in *Republic of Kazakhstan. v. Biedermann International*.¹³

Section 1782(a)'s landscape took an unexpected turn in 2004 with the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*¹⁴ The Court held that a European Union quasi-judicial administrative agency was a "tribunal" under the statute because it acted like a "first-instance decisionmaker."¹⁵ Following *Intel*, the Fifth Circuit reaffirmed its holding in *Biedermann* in 2009, reasoning that the Court's decision did not affect its prior analysis because *Intel* concerned a governmental entity rather than a private arbitral body.¹⁶ Other courts of appeals, however, reached a different conclusion. In 2012, the Eleventh Circuit was the first court of appeals to include international commercial arbitration within the scope of section 1782(a). Applying *Intel*'s functional approach, the Eleventh Circuit reasoned that an arbitral authority is the functional equivalent of a "tribunal" for the purposes of the statute.¹⁷ Unfortunately, the opinion was later vacated on other grounds,¹⁸ taking away the momentum needed for the Supreme Court to address the issue. Now the tide has turned and the split has officially reached the circuit courts. On the one hand, the Sixth Circuit in 2019 and the Fourth Circuit in 2020 held that section 1782(a) applies to private arbitrations.¹⁹ On the other hand, in 2020 the Seventh Circuit decided to exclude international commercial arbitration from the scope of the statute and the Second Circuit reaffirmed the *NBC* holding.²⁰ The issue continues to draw attention from other courts of appeals as of the date of this Note's publication, with cases pending in the Third and Ninth Circuits²¹ and a petition for certiorari pending before the Supreme Court.²²

Navigating the muddy waters of section 1782(a) has led practitioners and courts to spend tremendous amounts of time, energy, and resources—even in circuits where the matter appeared to be settled.²³ As long as globalized

13. *Republic of Kaz. v. Biedermann Int'l*, 168 F.3d 880, 881–83 (5th Cir. 1999).

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

15. *Id.* at 246, 257–58.

16. *El Paso Corp. v. La Comision Ejecutiva del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009).

17. *Consorcio Ecuatoriano de Telecomunicaciones S.A v. JAS Forwarding (USA), Inc. (Consorcio I)*, 685 F.3d 987, 993–98 (11th Cir. 2012) *vacated* *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc. (Consorcio II)*, 747 F.3d 1262 (11th Cir. 2014).

18. *See Consorcio II*, 747 F.3d at 1270 n.4 (expressly rejecting to consider the question because the record did not contain sufficient information on the nature of the arbitral tribunal in question).

19. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (ALJ)*, 939 F.3d 710, 723 (6th Cir. 2019).

20. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020); *Hanwei Guo v. Deutsche Bank Sec. Inc.*, 965 F.3d 96, 100 (2d Cir. 2020).

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

22. *Servotronics, Inc.*, 975 F.3d 689 *petition for cert. docketed*, No. 20-794 (U.S. Dec. 11, 2020).

23. Before the Second Circuit reaffirmed its holding in *NBC*, *Hanwei Guo*, 965 F.3d at 100, two courts in the Southern District of New York extended section 1728(a) to private arbitrations, reasoning that *Intel* had materially impacted *NBC*'s holding. *In re Children's Invest. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370–71 (S.D.N.Y. 2019); *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521–22 (S.D.N.Y. 2016).

commerce keeps expanding, section 1782(a) applications will continue to flood the courts, and the unnecessary expenditure of resources will persist. This confusing state of affairs increases the likelihood that the issue reaches the Supreme Court in upcoming terms. The stakes are high: given that American corporations dominate global commerce and often play an important role as parties and third parties to arbitration disputes, a Supreme Court decision on the matter has the potential to shape international commercial arbitration on a worldwide scale.

This Note will make the case for interpreting section 1782(a) as applicable to international commercial arbitration. In tracking the conflicting interpretations that have prevented section 1782(a)'s uniform application, this Note concludes that the root of the confusion lies in the Second Circuit's erroneous decision in *NBC*. The Note will highlight crucial flaws in the *NBC* opinion, which have gone under the radar for twenty-one years and have perpetuated myths that continue to be replicated today.

Part II of this Note focuses on the myth of State-sponsored tribunals; it argues that the idea that section 1782(a) only applies to State-sponsored bodies was a fictional limitation created by the Second Circuit due to its misinterpretation of the statute's legislative history. Part III addresses the myth of efficiency; it explains that some courts have overvalued the marginal impact of evidence-gathering assistance in federal courts on the efficiency of arbitration proceedings—in part because they have confused the policies underlying domestic arbitration with those underlying international commercial arbitration. Part IV confronts the myth of ambiguity; it criticizes *NBC*'s threshold finding that the word “tribunal” in section 1782(a) is ambiguous and places particular emphasis on *NBC*'s misinterpretation of the Supreme Court's decision in *Robinson v. Shell Oil Co.*²⁴ This Part will track the Sixth Circuit's detailed textual analysis, which concluded that the word “tribunal” unambiguously includes private arbitration. Finally, Part V addresses the Supreme Court's decision in *Intel* and its subsequent impact on lower courts; it attempts to bring order to the chaos by categorizing over thirty-five circuit and district court decisions according to their rationales, breaking down their interpretations of *Intel*.

II. THE MYTH OF STATE-SPONSORED TRIBUNALS

Much has been written about the 150 years of congressional efforts aimed at providing federal court assistance in international proceedings, which resulted in section 1782.²⁵ In 1999, the Second Circuit analyzed the statute's legislative history and concluded that Congress intended the provision to apply only to government or State-sponsored tribunals.²⁶ This Part will argue that the court erred in interpreting the 1964 amendments to the statute because Congress never intended to exclude private arbitrations from the scope of section 1782(a).

24. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

25. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

26. *Nat'l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 188–191 (2d Cir. 1999).

A. *A Brief History of Section 1782(a)*

In an attempt to address the “unmatched intensification of international intercourse” in the postwar era,²⁷ Congress created the Commission on International Rules of Judicial Procedure (“Commission”) in 1958.²⁸ The Commission solicited the aid of the Project on International Procedure of the Columbia University School of Law to carry out the international component of the statutory task²⁹—Professor Hans Smit was the Commission’s director and then-student Ruth Bader Ginsburg was the Commission’s associate director.³⁰

In 1964, Congress enacted the Commission’s proposed bill without amendment or objection³¹ and adopted the Commission’s “understanding of the intent behind the legislation”³²:

Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.³³

The Supreme Court in *Intel* referred to Congress’s intent behind the statute, noting section 1782’s “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.’”³⁴

The statute’s old version allowed for limited evidence-gathering assistance to a “judicial proceeding pending in any court in a foreign country.”³⁵ Instead, the new version eliminated the word “judicial,” replaced the word “court” with “tribunal,” and added the word “international.”³⁶ Additionally, the new version repealed and replaced sections 270 through 270(g) of title 22 of the United States

27. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 (1965) [hereinafter Smit, *International Litigation*].

28. Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (authorizing the Commission to “study existing practices of judicial assistance and cooperation between the United States and foreign countries” with a special focus on rendering “more readily ascertainable, efficient, economical, and expeditious” the “procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies . . .”).

29. Smit, *International Litigation*, *supra* note 27, at 1015.

30. Smit, *American Judicial Assistance*, *supra* note 4, at 154.

31. Smit, *International Litigation*, *supra* note 27, at 1015.

32. *Malev Hung. Airlines v. United Tech. Int’l Inc.*, Pratt & Whitney Commercial Engine Bus., 964 F.2d 97, 99 (2d Cir. 1992).

33. S. REP. NO. 88-1580, at 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3782–83; H.R. REP. NO. 88-1052, at 4 (1963).

34. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004) (quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002)).

35. 28 U.S.C. § 1782(a) (1958), *amended by* 28 U.S.C. § 1782(a) (1964) (emphasis added).

36. 28 U.S.C. § 1782(a) (1964), *amended by* 28 U.S.C. § 1782(a) (1996).

Code (collectively, “section 270”)³⁷—a discovery-enabling statute that, according to Congress, limited assistance to international tribunals in an “undesirable” way.³⁸ The relevant portion of the revised section 1782(a) now 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*, including criminal investigations conducted before formal accusation.³⁹

The most hotly debated portion of the congressional reports involves Congress’s explanation of its choice of the word “tribunal,” which lies at the root of the circuit split:

Subsection (a) of proposed revised section 1782 also describes the foreign proceedings in connection with which U.S. judicial assistance may be granted. A rather large number of requests for assistance emanate from investigating magistrates. The word “tribunal” is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals. The assistance thus made available replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g of title 22, United States Code which are proposed to be repealed.⁴⁰

B. *NBC’s Crucial Mistake*

The 1999 Second Circuit decision in *NBC* was the first to address the meaning of the word “tribunal” in section 1782(a) as applied to international commercial arbitration.⁴¹ This precedential opinion set the stage for a decades-long quest to understand how private arbitration fits within section 1782’s scheme.⁴² After concluding that the term “tribunal” is ambiguous,⁴³ the Second Circuit analyzed the statute’s legislative history.⁴⁴ *NBC*’s most consequential holding was that Congress intended to provide judicial assistance only to State-sponsored bodies, which excludes private arbitrations from the scope of the

37. Act of July 3, 1930, ch. 851, §§ 1–4, 46 Stat. 1005, 1005–06 (codified as 22 U.S.C. §§ 270–270(c) (1958)) as amended by Act of June 7, 1933, ch. 50, §§ 5–8, 48 Stat. 117, 117–18 (codified as 22 U.S.C. §§ 270(d)–(g) (1958)) repealed by Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995, 995.

38. S. REP. NO. 88-1580, at 3; H.R. REP. NO. 88-1052, at 6.

39. 28 U.S.C. § 1782(a) (2018) (emphasis added).

40. S. REP. NO. 88-1580, at 7–8; H.R. REP. NO. 88-1052, at 9. (citations omitted).

41. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184 (2d Cir. 1999).

42. See *infra* Section V.B.2.

43. *NBC*, 165 F.3d at 188. For a full discussion of the plain meaning of the term, see *infra* Part IV.

44. *NBC*, 165 F.3d at 188–90.

statute.⁴⁵ In support of its holding, the Second Circuit advanced two reasons: first, that the congressional reports discussed tribunals “acting as [S]tate instrumentalities or with the authority of the [S]tate” and failed to reference private arbitrations;⁴⁶ and second, that the phrase “foreign or international tribunal” in section 1782(a) was directly borrowed from repealed section 270⁴⁷—a statute applicable to tribunals “established pursuant to an agreement between the United States and any foreign government or governments”⁴⁸ Both arguments, however, fail to find support in section 1782(a)’s legislative history.

1. *Lack of Reference to Private Arbitration in Congressional Reports*

In explaining the choice of the word “tribunal” in section 1782(a), Congress stated that “[f]or example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.”⁴⁹ Congress also specified that “the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.”⁵⁰ The Second Circuit quoted these two portions of the reports as the basis for its conclusion 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.”⁵¹ But beyond its reliance on congressional silence, the court never explained *why* the State-sponsored or private nature of tribunals has any bearing on the purpose of section 1782(a). As will be explained below, Congress sought to extend judicial assistance to impartial adjudicative authorities that act like a “tribunal,” which means that *NBC*’s focus on the body’s source of authority rather than its functions was misplaced. The widespread confusion among courts on this issue calls for a detailed analysis of the distinction between the two.

A public grant of jurisdiction to national courts and first generation international tribunals is a “quintessentially sovereign act[]” through which States authorize entities to administer justice in their name.⁵² In contrast, a private grant of jurisdiction finds its source in consenting parties who authorize

45. *Id.* at 189–90 (“[I]t is apparent in context that the authors of [the congressional] reports had in mind only governmental entities, such as administrative or investigative courts, acting as [S]tate instrumentalities or with the authority of the [S]tate.”).

46. *Id.* at 189.

47. *Id.* at 189–90.

48. Act of July 3, 1930, ch. 851, § 1, 46 Stat. 1005, 1005 (codified as 22 U.S.C. § 270 (1958)) repealed by Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995, 995.

49. S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788; H.R. REP. NO. 88-1052, at 9 (1963).

50. S. REP. NO. 88-1580, at 8; H.R. REP. NO. 88-1052, at 9.

51. *NBC*, 165 F.3d at 189.

52. S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 324 (2013) [hereinafter Strong, *Distinguishing Commercial and Investment Arbitration*].

a third party to resolve a dispute.⁵³ Although arbitration originates from the consent of private parties, it is not an independent system of justice isolated from governmental oversight.⁵⁴ The goal of arbitration is to produce an award enforceable under the authority of the State. Without the backing of conventional courts, arbitration would not achieve its purpose of being an efficient dispute resolution mechanism.⁵⁵ Insofar as international commercial arbitration depends on State authority to enforce awards, it exists within a State-sponsored framework built on domestic laws and international treaties such as the New York Convention.⁵⁶

The most important difference between a public and a private grant of jurisdiction is that, in the case of public grants, “[the] judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force.”⁵⁷ This distinction, in turn, gives rise to functional and procedural differences between conventional litigation and arbitration. Examples of these differences include (a) arbitration parties’ right to choose an arbitrator as opposed to elected or appointed judges; (b) arbitration’s simpler procedural rules amenable to amendment by the parties as opposed to litigation’s complex set of pre-existing set of rules; (c) arbitration’s confidential proceedings as opposed to litigation’s publicly available records; or (d) arbitral awards’ limited judicial review as opposed to review of court judgments on the merits.⁵⁸ It is crucial, however, that the grant of jurisdiction to the adjudicative body is not confused with its functions or procedural characteristics. In other words, it is possible—albeit unlikely—for parties to structure an arbitration in a way that mimics regular litigation (e.g., by using the Federal Rules of Civil Procedure, allowing disclosure of the record, or providing for review of the award on the merits by a higher arbitral panel). But even in that case, the source of authority of an arbitral body will always be different from that of a court—in litigation, the power to impart justice lies with the State, while in arbitration it lies with a privately appointed third party.

Despite their differences, litigation and arbitration are functional equivalents; that is, they are both adjudicatory mechanisms conducted by a neutral decisionmaker, where parties with basic due process guarantees present

53. *Id.* at 338.

54. See Halil Rahman Basaran, *Is International Arbitration Universal?*, 21 ILSA J. INTL. & COMP. L. 497, 499 (2015) (“It is thanks to [S]tate consent that international commercial arbitration exists in the first place. This is the public law aspect of international commercial arbitration.”).

55. 31 AM. JUR. 3D *Proof of Facts* § 3 495 (1995) (“The most carefully drafted international arbitration agreement is worthless if an award stemming from that agreement cannot be enforced . . .”).

56. See *In re Hanwei Guo*, No. 18-MC-561 (JMF), 2019 WL 917076, at *2 (S.D.N.Y. Feb. 25, 2019), *aff’d sub nom.* *Hanwei Guo v. Deutsche Bank Sec. Inc.*, 965 F.3d 96 (2d Cir. 2020) (“After all, even the most ‘private’ of arbitrations are commonly backed up by the prospect of review, and enforcement, in governmental courts.”).

57. Strong, *Distinguishing Commercial and Investment Arbitration*, *supra* note 52, at 325 (quoting *TCL Air Conditioner Co. v. Fed. Court of Austl.*, HCA 51 ¶ 23 (2013)).

58. See S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 126 (2012) [hereinafter Strong, *Navigating the Borders*].

evidence in proceedings that result in a judgment or award enforceable in national courts. This functional equivalence is the reason why Congress enacted the Federal Arbitration Act (FAA) in 1929,⁵⁹ which elevated arbitration as a “favored alternative to litigation when the parties agree in writing to arbitration.”⁶⁰

NBC stands for the proposition that Congress did not intend private arbitration to be within the scope of section 1782(a) because the arbitrators’ source of jurisdiction is a private agreement.⁶¹ As explained above, the difference between a public and a private grant of jurisdiction boils down to the State’s power to compel parties into a judicial proceeding and to issue a judgment enforceable in and of itself—as opposed to consensual proceedings that result in awards that depend on external means of enforcement. For purposes of section 1782(a), this distinction bears weight only if Congress finds value in preserving the monopoly of foreign countries over their justice systems. In other words, if the source of authority of the tribunal—as opposed to its function—truly matters under the statute, then Congress would have withheld judicial assistance from international arbitrations because it did not trust the ability of private parties to resolve their own disputes (not only because arbitration functions differently from courts but because the decision-making power rests in the hands of private parties as opposed to the State). Nevertheless, the creation of State-sponsored international and domestic frameworks does away with the due process concerns that underlie the desire to impose governmental surveillance over arbitrations. Most importantly, the enactment of the FAA made it clear that Congress not only fully endorsed arbitration but, in many instances, considered it to be a “favored alternative to litigation”⁶² Thus, the Second Circuit’s crucial mistake lies in its misplaced emphasis on the tribunal’s grant of jurisdiction.

Contrary to the holding in *NBC*, the legislative history of section 1782(a) better supports the position that Congress was not concerned with a tribunal’s source of authority but with its *function*. The congressional reports acknowledge that the statute’s prior version was too narrow because it was limited to conventional courts.⁶³ In choosing to eliminate the word “court” and replace it with “tribunal,” Congress intended to liberalize judicial assistance in international proceedings.⁶⁴ Indeed, the drafter of the statute, Professor Hans

59. Congress enacted the FAA to “create[] a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate” *Moses H. Cone Mem’l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). “The FAA was one of the first modern arbitration statutes, and its enactment attested to the coming-of-age of arbitration in the United States.” Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 268 (1988).

60. *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 680 (4th Cir. 2018) (citing *Moses*, 460 U.S. at 24).

61. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 189–90 (2d Cir. 1999).

62. *McCormick*, 909 F.3d at 680; see also *supra* note 59.

63. “The word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts.” S. REP. NO. 88-1580, at 7 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788; H.R. REP. NO. 88-1052, at 9 (1963).

64. S. REP. NO. 88-1580, at 2; H.R. REP. NO. 88-1052, at 9 (“The proposed revision of section 1782, set forth in section 9(a) clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants” (emphasis added)).

Smit, staunchly advocated for an interpretation of section 1782(a) that would include private arbitration. He stated that he chose the word “tribunal” because it was a term broad enough “to make [s]ection 1782(a) assistance available on as liberal and flexible a basis as possible in any proceedings before a body exercising adjudicatory authority.”⁶⁵ Therefore, the purpose of the amendment was to provide courts with flexibility to adapt to the ever-changing and increasingly globalized commerce and to provide assistance to a broader range of international proceedings.

According to the Second Circuit, the fact that Congress listed only governmental entities in its reports (i.e., investigating magistrates, foreign administrative tribunals, and quasi-judicial agencies) serves as conclusive evidence that the statute only applies to State-sponsored bodies.⁶⁶ Nothing suggests, however, that Congress provided an exhaustive list of all “tribunal[s]” in the reports; instead, the use of the phrase “for example” implies an intent to avoid listing all possible adjudicatory bodies.⁶⁷ Most importantly, the congressional reports did not draw attention to how or why the source of the tribunal’s authority would impact the ultimate purpose of liberalizing judicial assistance. In contrast, Congress did emphasize that providing judicial assistance would resolve “the necessity [of foreign bodies] for obtaining evidence in the United States”⁶⁸ The phrase “obtaining evidence” suggests that Congress’s purpose was to assist adjudicatory tribunals with proof-gathering functions (i.e., bodies capable of acting like conventional courts).⁶⁹

65. 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, 301 (2003) [hereinafter Smit, *Supreme Court Rules*]; see also Arthur W. Rovine, *Section 1782 and International Arbitral Tribunals: Some Key Considerations in Key Cases*, 23 AM. REV. INT’L ARB. 461, 470 (2012) (“Hans said publicly that if anyone wanted to know the legislative history and underlying intent of [section] 1782 they had to come to him because he wrote [section] 1782, and it was his intention that the statute apply to foreign and international arbitration tribunals.” (emphasis omitted)). The Second Circuit disregarded Professor Smit’s views, reasoning that his perspective was “unpersuasive” because he first expressed it in an article written in 1998 and that post-amendment writings should not be determinative of congressional intent. *NBC*, 165 F.3d at 190 n.6 (2d Cir. 1999). Nevertheless, taking into account that “the post-amendment writings are by the Reporter for the responsible legislative committee and his understanding of the scope of the amendments is consistent with the general thrust of the Supreme Court’s expansive interpretation of those amendments,” Professor Smit’s comments should be considered persuasive. *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 956 n.2 (D. Minn. 2007). In fact, the Supreme Court in *Intel* relied on Professor Smit’s 1998 article—the same article that the Second Circuit disregarded—to support its interpretation of section 1782(a). See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 n.13, 265 n.17 (2004) (citing 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. & COMM. 1, 13, 19–20 (1998)) [hereinafter Smit, *American Assistance to Litigation*]. Regardless of whether Professor Smit’s post-amendment comments are attributable to Congress or not, his views are being cited here for the persuasiveness of their substance.

66. See *NBC*, 165 F.3d at 189–90.

67. See S. REP. NO. 88-1580, at 7; H.R. REP. NO. 88-1052, at 9 (“For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.”).

68. S. REP. NO. 88-1580, at 8; H.R. REP. NO. 88-1052, at 9. Although the reports mention the need of a “foreign administrative tribunal or quasi-judicial agency” to obtain evidence, the fact that this sentence only refers to State-sponsored bodies seems to be irrelevant. As explained above, it is likely that these were only examples to illustrate the breadth of the word “tribunal” rather than an attempt to limit the scope of the statute. See S. REP. NO. 88-1580, at 8; H.R. REP. NO. 88-1052, at 9.

69. See S. REP. NO. 88-1580, at 8; H.R. REP. NO. 88-1052, at 9.

The Supreme Court confirmed Congress’s functional understanding of section 1782(a). As explained in detail in Part V, the *Intel* Court held that a quasi-judicial administrative body was within the scope of the statute because it acted like a tribunal—an adjudicatory body capable of gathering evidence and entering a reviewable decision.⁷⁰ The Court further noted that “[i]n 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.’”⁷¹ The phrase “resistant to ready classification” is best interpreted to refer to the myriad of functionally different proceedings around the world, rather than to the tribunal’s source of authority.⁷²

Some lower courts have argued that *Intel*’s rationale does not apply to private arbitrations because the Supreme Court did not examine tribunals for which parties privately contracted.⁷³ Yet, the idea that the Court’s reasoning would have changed if the tribunal’s source of authority was a private grant of jurisdiction finds no support in the opinion.⁷⁴ The fact that the quasi-judicial administrative body in *Intel* was government-sponsored was irrelevant to its function as an impartial adjudicative entity.⁷⁵

Thus, the legislative history of section 1782(a) and the Supreme Court’s decision in *Intel* support the conclusion that Congress was concerned with the function of a tribunal rather than the source of its authority. The larger question must then be whether the tasks performed by arbitrators fail to align with those performed by the adjudicative bodies to which Congress intended to extend judicial assistance. The answer must be no. When Congress enacted section 1782(a), it attempted to extend assistance to the growing number of international proceedings in the post-war era.⁷⁶ In doing so, Congress sought to render the United States a pioneer of international cooperation to facilitate efficient evidence gathering around the world⁷⁷—not only in courts but in any other proceeding that resembled conventional litigation in a functional sense. As a favored alternative to litigation,⁷⁸ arbitration is exactly the type of proceeding that Congress envisioned should receive aid from federal courts. Just like the quasi-judicial administrative body in *Intel*, arbitrators adjudicate disputes, have an obligation to impartially apply the law to the facts, gather and weigh evidence,

70. The entity at issue in *Intel* was the Commission of the European Communities (“EU Commission”), the European body charged with conducting antitrust proceedings. 542 U.S. at 250. After noting that the EU Commission was a “proof-taking” body in which petitioner could “use” evidence, the Court held that it had “no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from [section] 1782(a)’s ambit.” *Id.* at 257–58.

71. *Id.* at 263 n.15.

72. *See id.*

73. *See infra* Section V.B.2.a.

74. *See Intel*, 542 U.S. at 257–58.

75. *See id.*

76. *See supra* note 27 and accompanying text.

77. *See supra* Section II.A.

78. *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 680 (4th Cir. 2018) (citing *Moses H. Cone Mem’l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

and are first-instance decisionmakers.⁷⁹

It is probably correct to assume that Congress did not have the “then-novel arena of international commercial arbitration” in mind when it enacted section 1782(a).⁸⁰ As the Second Circuit heavily emphasized, this is likely the reason why Congress failed to mention private dispute resolution proceedings in its reports.⁸¹ Nonetheless, Congress’s silence does not warrant the conclusion that it intended to exclude private arbitration from the scope of the statute. As the Supreme Court noted, “Legislative silence is a poor beacon to follow in discerning the proper statutory route”;⁸² this is so because “a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”⁸³ As such, congressional intent should be found in the statute’s overarching purpose: that is, the reports’ statement that “[t]he word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts.”⁸⁴ This is the critical portion of the congressional reports because it confirms that the only thing that is certain is that Congress intended to expand section 1782(a), which does not mean that the “expansion *stopped short* of private arbitration.”⁸⁵

2. The Phrase “International Tribunal” in Section 270

Repealed section 270 had an even more important role in the Second Circuit’s holding.⁸⁶ According to the court, Congress borrowed the phrase “international or foreign tribunal” in section 1782(a) from repealed section 270, which applied only to intergovernmental tribunals.⁸⁷ Just as with the congressional reports, the Second Circuit’s conclusion regarding section 270 stemmed from its misinterpretation of the statute’s legislative history.

Section 270 was a statute designed to allow domestic courts to compel the

79. See *Intel*, 542 U.S. at 257–58.

80. See *Republic of Kaz. v. Biedermann Int’l*, 168 F.3d 880, 882 (5th Cir. 1999); see also Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT’L ARB. 61, 70 (2008) (evaluating the state of international arbitration law in 1964 and concluding that private arbitration was not on the agenda of the drafters of section 1782).

81. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 189 (2d Cir. 1999).

82. *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

83. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980). The Supreme Court’s position comes in stark contrast to *NBC*, where the Second Circuit noted that “[t]he legislative history’s silence with respect to private tribunals is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention.” *NBC*, 165 F.3d at 190. *NBC*’s reasoning also conflicts with the arguments furthered by the Fifth Circuit—if international commercial arbitration was so novel and small in 1964 that Congress did not contemplate it when enacting the statute, *Biedermann*, 168 F.3d at 882, then extending section 1782(a) to cover it would not have been “a significant congressional expansion” that Congress could not have “lightly undertaken.” See *NBC*, 165 F.3d at 190.

84. S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788; H.R. REP. NO. 88-1052, at 9 (1963).

85. *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (ALJ)*, 939 F.3d 710, 728 (6th Cir. 2019).

86. See *NBC*, 165 F.3d at 189 (“The legislative history behind the replacement of [sections] 270-270g is even more compelling than that behind the revisions to the old [section] 1782.”).

87. See *infra* text accompanying notes 94–99.

testimony of witnesses in international proceedings.⁸⁸ While drafting section 1782, Professor Smit wrote an article in 1962 urging Congress to repeal section 270 due to its undesirable limitations, two of which have special relevance here.⁸⁹ First, section 270 only applied to proceedings involving the United States or its nationals.⁹⁰ Second, the proceedings were restricted to claims pending before “an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments”⁹¹ Professor Smit recommended that section 270 be made available to all proceedings before international tribunals.⁹² Congress followed the proposed recommendations and repealed section 270:

The main drawback of these provisions is that they improperly limit the availability of assistance to the U.S. agent before an international tribunal and require that the evidence relate to a matter in which the United States or any of its nationals is involved. Clearly, the interest of the United States in peaceful settlement of international disputes is not limited to controversies to which it is a formal party. Furthermore, it is only appropriate that the United States make the same assistance available to litigants before international tribunals that, in section 1782 of title 28, United States Code, it makes available to litigants before foreign tribunals.⁹³

Interpreting this section of the congressional report, the Second Circuit held that the term “international tribunal” in section 1782(a) “derives directly” from section 270.⁹⁴ According to the court, “[i]t is clear that the 1964 legislation was intended to broaden the scope of the repealed 22 U.S.C. §§ 270–270g by extending the reach of the surviving statute to intergovernmental tribunals not involving the United States.”⁹⁵ But if Congress understood section 270 to be too limited in scope and repealed it precisely to liberalize judicial assistance, it does not follow that it would have borrowed section 270’s narrow meaning of the word “tribunal” for the new and more expansive section 1782.⁹⁶ Furthermore, if the word “tribunal” in section 1782(a) were truly imported from section 270, the meaning should have been borrowed in its entirety, including the requirement that the tribunal be established pursuant to a treaty with the United States, unless

88. Act of July 3, 1930, ch. 851, §§ 1–4, 46 Stat. 1005, 1005–06 as amended by Act of June 7, 1933, ch. 50, §§ 5–8, 48 Stat. 117, 117–18, *repealed by* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995, 995. In 1930, Congress enacted sections 270 through 270(c) “in direct response to problems that arose in an arbitration proceeding between the United States and Canada.” *NBC*, 165 F.3d at 189 (citing Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1264 (1962) [hereinafter Smit, *Assistance Rendered*]). The statute authorized “international tribunals” to “administer oaths, to subpoena witnesses and records, and to punish for contempt.” Smit, *Assistance Rendered*, *supra*, at 1264. Three years later, in 1933, prompted by evidence-gathering limitations concerning the United States-German Mixed Claims Commission, Congress enacted sections 270(d) through 270(g), expanding access to federal courts for “the American agent.” *Id.*

89. Smit, *Assistance Rendered*, *supra* note 88, at 1274.

90. *Id.* at 1266 (citing 22 U.S.C. § 270 (1958)).

91. *Id.*

92. *Id.* at 1269, 1276.

93. S. REP. NO. 88-1580, at 4 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3785; H.R. REP. NO. 88-1052, at 6 (1963).

94. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 189 (2d Cir. 1999).

95. *Id.* at 190.

96. *See* 28 U.S.C. § 1782(a) (2018); 22 U.S.C. § 270 (1958).

otherwise noted.⁹⁷ The Second Circuit could not reach this conclusion because Congress made it clear that the requirement was an “undesirable” limitation.⁹⁸ The court instead chose the meaning that aligned with excluding private arbitration from the scope of the statute; it disregarded the requirement in the repealed section that the United States had to be a party to an agreement but somehow managed to keep the “intergovernmental” requirement for tribunals.⁹⁹

There is nothing in section 1782(a)’s legislative history that indicates that the term “international tribunal” was directly borrowed from section 270. In explaining the use of the word “tribunal” in section 1782(a), Congress never referred to the language in section 270;¹⁰⁰ instead, it made sure to repeal that statute so that section 1782(a) would be available to all participants before proceedings in international tribunals.¹⁰¹ Moreover, if the word “tribunal” in section 1782(a) had kept the “intergovernmental” feature, then conventional foreign courts would have been excluded from the scope of the statute because they do not derive their authority from an “intergovernmental” agreement, as required by section 270.¹⁰² This would be an untenable assertion because section 1782(a) “is not confined to proceedings before conventional courts,” which indicates that, at a minimum, it encompasses foreign courts.¹⁰³

In another effort to validate its holding, the Second Circuit noted that Congress cited Professor Smit’s 1962 article to explain the undesirable limitations of section 270.¹⁰⁴ In that article, Professor Smit asserted that “an international tribunal owes both its existence and its powers to an international agreement.”¹⁰⁵ The court concluded that, since the drafter of section 1782(a) was of the alleged view that international tribunals were only State-sponsored, and since Congress had adopted Professor Smit’s account, his words further supported the view that the term “tribunal” under section 1782 borrowed its meaning from repealed section 270.¹⁰⁶ This quotation, however, was taken out of context. The relevant portion of Professor Smit’s article reads as follows:

Section 270 is also subject to criticism because it purports unilaterally to bestow

97. See 28 U.S.C. § 1782(a) (2018); 22 U.S.C. § 270 (1958).

98. S. REP. NO. 88-1580, at 3; H.R. REP. NO. 88-1052, at 6.

99. See *NBC*, 165 F.3d at 190.

100. See S. REP. NO. 88-1580, at 3–4; H.R. REP. NO. 88-1052, at 5–6.

101. See S. REP. NO. 88-1580, at 3–4; H.R. REP. NO. 88-1052, at 5–6.

102. See 28 U.S.C. § 1782(a) (2018); 22 U.S.C. § 270 (1958).

103. See S. REP. NO. 88-1580, at 7; H.R. REP. NO. 88-1052, at 9.

104. *NBC*, 165 F.3d at 190 (quoting Smit, *Assistance Rendered*, *supra* note 88, at 1265).

105. Smit, *Assistance Rendered*, *supra* note 88, at 1267.

106. See *NBC*, 165 F.3d at 190 (“The Senate Report, in referring to the undesirable limitations of [sections] 270-270g, relied on a 1962 article by Professor Hans Smit, director of a project at the Columbia University School of Law that aided the Commission on International Rules of Judicial Procedure in drafting the bill that included the amended [section] 1782. In that article, Professor Smit asserted that ‘an international tribunal owes both its existence and its powers to an international agreement.’” (citations omitted.)) Note that the Second Circuit did not only cite Professor Smit to gloss the meaning of the word “tribunal” within the specific context of section 270. See *id.* There was no need for this because the text of section 270 already made it clear that the tribunals under that provision were limited to those established pursuant to an intergovernmental agreement. See 22 U.S.C. § 270 (1958). Instead, the Second Circuit cited Professor Smit’s article to support the proposition that Professor Smit himself thought that *all* tribunals—not only those to which section 270 referred to—owed their existence to an international agreement. See *NBC*, 165 F.3d at 190.

power to administer oaths upon international tribunals established by bilateral or multilateral agreement. There is little doubt that it can not effectively do so. Since an international tribunal owes both its existence and its powers to an international agreement, its powers can be extended only by such an agreement and not by a unilateral act. The correctness of this view was sustained by the United States-German Mixed Claims Commission when the American agent tried to invoke the 1930 act. Accordingly, section 270 is of avail only if the tribunal is willing to assert powers not granted by international agreement and if all parties fail to object or agree.¹⁰⁷

It is evident from the quotation that Professor Smit addressed the meaning of international tribunals in the exclusive context of section 270 because he was referring to one of the flaws of the statute. Given that section 270 limited the scope of the phrase “international tribunal” to those formed pursuant to bilateral and multilateral agreements,¹⁰⁸ a fairer reading of Professor Smit’s account would be that the “international tribunal[s] [to which section 270 refers] owe[] both [their] existence and [their] powers to an international agreement.”¹⁰⁹ Placing the quotation in its proper context, it is clear that Professor Smit did not make a general assertion that all international tribunals must be State-sponsored—only those referred to in section 270.

Section 1782(a)’s congressional reports do not warrant the claim that Congress excluded private arbitration from the scope of the statute or that the term “international tribunal” in section 1782(a) was borrowed from repealed section 270. When Congress sought to limit the breadth of the term in section 270 it did so in an express fashion by adding the requirement that the tribunals be established pursuant to an intergovernmental agreement.¹¹⁰ Instead, Congress chose not to limit the term in section 1782(a).¹¹¹ *NBC*’s distinction between State-sponsored and private tribunals does not find support in section 1782(a)’s legislative history, and notably, it hinders the statute’s purpose of extending judicial assistance to international adjudicatory proceedings.

III. THE MYTH OF EFFICIENCY

Courts and commentators have not shied away from exploring the policy implications of providing assistance in federal courts to international commercial arbitrations. The idea that wide-ranging discovery is at odds with arbitration has been pervasive among those who have read section 1782(a) narrowly.¹¹² Once

107. Smit, *Assistance Rendered*, *supra* note 88, at 1267.

108. 22 U.S.C. § 270.

109. Smit, *Assistance Rendered*, *supra* note 88, at 1267.

110. *See* 22 U.S.C. § 270.

111. *See In re Roz Trading Ltd.*, 496 F. Supp. 2d 1221, 1226 n.3 (N.D. Ga. 2006) (“Had Congress wanted to impose [a limitation on section 1782], it would have been a simple matter to add the word ‘governmental’ before the word ‘tribunal’ in the 1964 amendment.”).

112. *See, e.g.,* *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App’x 31, 34 (5th Cir. 2009); *Republic of Kaz. v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999); *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 190–91 (2d Cir. 1999); *In re Grupo Unidos Por El Canal S.A.*, No. 14–mc–80277–JST (DMR), 2015 WL 1815251, at *11 (N.D. Cal. Apr. 21, 2015); *In re Rhodanyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at *49 (D. Kan. Mar. 25, 2011).

again, the first court to champion this view was the Second Circuit in *NBC*.¹¹³ It reasoned that “[t]he popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness,” and that discovery would conflict with federal policy favoring arbitration by undermining these benefits.¹¹⁴ This argument rests on the assumption that all arbitration proceedings—domestic and international alike—are always cheaper, faster, and less burdensome from a procedural standpoint.¹¹⁵

Proponents of this view tend to overvalue efficiency. Although quicker and lower-cost proceedings are the main goal in *domestic* commercial arbitration, that is not necessarily the case in *international* commercial arbitration. Instead, there are important differences between both types of arbitration that render efficiency concerns less compelling in the context of section 1782(a). As explained by Professor S.I. Strong, international commercial arbitration involves

[s]ophisticated, specialized counsel for both parties (as opposed to consumer, employment, and securities arbitration, which may proceed without counsel for one or both of the parties);

...

Highly formal procedures, often dictated by detailed institutional rules of procedure and requiring extensive pre- and post-hearing written submissions, and involving days, if not weeks, of hearings (as opposed to consumer, labor, and employment arbitration, which use very little in the way of written submissions and evidence, and which emphasize short and informal hearings);

Complex legal claims involving large sums of money, often ranging in the millions or billions of dollars (as opposed to consumer, labor, and employment arbitration, which often involve simple legal issues and small amounts in dispute) . . .¹¹⁶

To clarify, this is not to say that efficiency is not a norm relevant to international arbitration proceedings. However, given that it can be slower, more expensive, and more complex than domestic arbitration, parties often pursue international arbitration for other reasons that, arguably, have equal or more weight than efficiency concerns. Examples of such reasons include (a) a lower likelihood of local prejudice from domestic courts;¹¹⁷ (b) a lower likelihood of entertaining cases before corrupt judiciaries, especially in emerging economies;¹¹⁸ (c) highly qualified arbitrators with extensive experience in international law and

113. *NBC*, 165 F.3d at 190–91.

114. *Id.*; see also Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 172 (2011) (“[D]iscovery has traditionally been viewed as an overly intrusive, time consuming, and expensive process that is susceptible to abuse by parties.”).

115. See, e.g., *Biedermann*, 168 F.3d at 883 (“Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.”).

116. Strong, *Navigating the Borders*, *supra* note 58, at 125–26.

117. *Id.* at 126 (“[A]s opposed to international litigation, which can subject parties to bias (or perceived bias) from national courts that favor their own citizens”).

118. See generally Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* (Berkeley Program in Law & Econ., Working Paper No. 28, 1999), <http://repositories.cdlib.org/blewp/28>.

commerce;¹¹⁹ (d) policies requiring arbitrators to disclose conflicts of interest;¹²⁰ (e) limited judicial review, which translates into a faster route to a final award and greater legal certainty;¹²¹ (f) effective and reliable means of enforcing awards; (g) confidential proceedings; and (h) a blend of common law and civil law procedures that renders disputes accessible to parties from all legal backgrounds.¹²²

The courts that have followed the *NBC* rationale have depicted efficiency as the be-all and end-all goal of international arbitration, which reveals their fundamental misunderstanding of its underlying policies. Indeed, it seems like these courts overvalued speed and savings to such an extent that they forgot that efficiency also rests on the need to achieve a just and factually accurate result. Thus, they disregarded the negative impact that their rulings would have on the ability of international arbitrators to gather the evidence they require to resolve disputes. Even though arbitrators have limited devices to induce parties to produce evidence—such as drawing negative inferences from the parties’ failure to cooperate—they are wholly reliant on federal courts when facing uncooperative non-parties in the United States.¹²³ Although the *NBC* court held that extending assistance to international arbitrators would cut against the federal policy in favor of arbitration,¹²⁴ nothing furthers this policy more than allowing arbitrators to gather evidence that would otherwise be unavailable to them.¹²⁵

The *NBC* decision portrays judicial assistance under section 1782(a) as an unmanageable beast that would inevitably lead to a full-scale, multijurisdictional dispute that would drag on arbitration proceedings indefinitely.¹²⁶ Yet, the most visible red flag in *NBC*’s efficiency argument is that the court never discussed the broad discretionary powers that judges have under section 1782(a).¹²⁷ In reality, judges can—and should—act as gatekeepers precisely to prevent the kind

119. Strong, *Navigating the Borders*, *supra* note 58, at 126.

120. *Id.* at 125 (“[A]s opposed to labor and employment arbitration, which can experience difficulties arising from perceptions regarding arbitrator bias concerning ‘repeat players’”).

121. *Id.* at 126.

122. *Id.* at 127.

123. Smit, *American Judicial Assistance*, *supra* note 4, at 160.

124. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 190–91 (2d Cir. 1999).

125. The Supreme Court has held that international commercial arbitration should be treated more favorably than domestic arbitration, even if there is a contrary result in the domestic context. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (“[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”). Some authors have argued that the strong policy in favor of international commercial arbitration should be enough in itself to read section 1782(a) broadly. *See* Martin Illmer & Ben Steinbrück, *U.S. Discovery and Foreign Private Arbitration: The Foreign Lawyer’s Perspective*, 25 J. INT’L ARB. 329, 333, 335 (2008); Smit, *Supreme Court Rules*, *supra* note 65, at 308 (“[The federal] policy alone is sufficient to justify reading [s]ection 1782 so as to provide what its plain and clear terms signify and to extend [s]ection 1782 assistance to private arbitral tribunals created under foreign or international law or agreements.”). *But see* Rothstein, *supra* note 80, at 61 (criticizing dynamic statutory interpretation that takes “into account post-enactment developments that reflect a ‘pro-arbitration policy’ . . .”).

126. *See NBC*, 165 F.3d at 190–91.

127. *See id.*

of concerns raised in *NBC*.¹²⁸ They must take several factors into account when deciding whether to grant assistance to international tribunals, such as (a) the nature of the foreign tribunal; (b) the character of the proceedings; (c) whether the request is an attempt to circumvent foreign evidence-gathering restrictions; and most importantly (d) whether the request is unduly intrusive or burdensome.¹²⁹ If a court decides to grant the application, it can limit the scope of the assistance in a manner that promotes both efficiency and the search for truth.¹³⁰ A court's power to shape its aid is so broad that it can deny an application if the parties submit it without the prior approval of the arbitrator.¹³¹ As one commentator argued, nothing would be more paternalistic than a court rejecting requests for evidence issued by private arbitrators themselves.¹³² If the Second Circuit's holding continues to stand, however, courts would not even have the opportunity to exercise their discretion because they would be categorically prohibited from considering arbitrators as a "tribunal" under section 1782(a).¹³³ Conversely, if courts exercise "scrupulous judicial discretion,"¹³⁴ extending assistance to international commercial arbitration would enhance the federal policy in favor of arbitration without hindering its efficiency. And even if there were marginal costs to efficiency, enabling interested parties to procure critical evidence weighs in favor of reading section 1782(a) broadly.

The Second Circuit, and most recently the Seventh Circuit, raised a final concern if federal courts were to provide evidence-gathering assistance in international commercial arbitrations.¹³⁵ Section 7 of the FAA allows arbitrators in the United States to request federal district courts to compel discovery in limited circumstances, which, according to the court, would potentially conflict with section 1782(a)'s more extensive assistance to international tribunals.¹³⁶

128. Section 1782(a) "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788; H.R. REP. NO. 88-1052, at 9 (1963).

129. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004). Note that a court may exercise its discretion only after having determined that it has the authority to do so. As such, the statutory requirement that the proceedings be before a foreign or international tribunal in the first step of the inquiry must be distinguished from an analysis of the nature of the tribunal in the second step of the inquiry. *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (ALJ)*, 939 F.3d 710, 725 (6th Cir. 2019).

130. *See ALJ*, 939 F.3d at 730 ("FedEx Corp.'s argument seems to assume that [section] 1782(a) discovery requests will inevitably become unduly burdensome, but the Supreme Court has made clear that district courts enjoy substantial discretion to shape discovery under [section] 1782(a)."); Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV. 649, 653 (2005) ("[Courts] can exercise this discretion in a way that promotes the goals of efficient and speedy conduct of arbitration proceedings.").

131. *See In re Technostroyexport*, 853 F. Supp. 695, 697–98 (S.D.N.Y. 1994) (denying section 1782(a) application because the arbitrator did not provide prior approval); *see also* Chukwumerije, *supra* note 130, at 679.

132. *See* Rothstein, *supra* note 80, at 61.

133. *Nat'l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 191 (2d Cir. 1999).

134. Chukwumerije, *supra* note 130, at 653.

135. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695–96 (7th Cir. 2020); *NBC*, 165 F.3d at 187–88, 191.

136. *See NBC*, 165 F.3d at 187–88, 191 (listing the differences between both statutes and finding that extending section 1782(a) to private arbitration "would create an entirely new category of disputes

The Supreme Court, however, has already rejected similar claims in the broader context of section 1782:

We also reject Intel’s suggestion that a [section] 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceedings. Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here.¹³⁷

As Professor Smit correctly argued, *NBC*’s reasoning “stands the very purpose of [s]ection 1782 on its head. It seeks to limit [s]ection 1782 because the domestic lawmaker has fallen short in introducing the same desirable rules into its domestic system. It frustrates, rather than effectuates, the legislative purpose.”¹³⁸ The Supreme Court has also indicated that the strong federal policy in favor of international commercial arbitration should be advanced “even assuming that a contrary result would be forthcoming in a domestic context.”¹³⁹ Commentators have further argued that section 1782(a)’s liberal provisions should induce the legislature to reform domestic law and emulate the amendments achieved on the international level—it should not be a “justification for a strained interpretation of the plain language of section 1782.”¹⁴⁰ Indeed, as will be addressed in Part IV, the plain language of the statute also supports the conclusion that international arbitrations are “tribunal[s]” under section 1782(a).

IV. THE MYTH OF AMBIGUITY

The relevant portion of section 1782(a) states:

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.¹⁴¹

In interpreting the provision, courts have attempted to find the ordinary and common meaning of the phrase “foreign or international tribunal.”¹⁴² Faithful to the pattern highlighted throughout this Note, the *NBC* decision was consequential in this regard and cleared the way for other circuit and district courts to exclude private arbitration from the scope of section 1782(a).¹⁴³ The Second Circuit held that the phrase is ambiguous and resorted to the legislative history to explore congressional intent.¹⁴⁴ Nevertheless, in reaching that conclusion, the court bypassed a crucial step of statutory interpretation by failing to analyze the specific and broader context of section 1782(a). This led the court

concerning the appointment of arbitrators and the characterization of arbitral panels as domestic, foreign, or international.”)

137. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 263 (2004) (citations omitted).

138. Smit, *Supreme Court Rules*, *supra* note 65, at 311.

139. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

140. Chukwumerije, *supra* note 130, at 678; *see also* Smit, *American Judicial Assistance*, *supra* note 4, at 160.

141. 28 U.S.C. § 1782(a) (2018) (emphasis added).

142. *See id.*

143. *See* cases that replicated *NBC*’s reasoning cited *infra* Section V.B.2.

144. *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 188 (2d Cir. 1999).

to explore extra-textual sources in a premature fashion. Instead, the inquiry should have ended with the text of the statute, which unambiguously includes private arbitral bodies. This Part explores some of the flaws in the Second Circuit's rationale in light of the recent decisions by the Sixth and Seventh Circuits¹⁴⁵—the only courts of appeals to engage in a meaningful textual analysis of section 1782(a).¹⁴⁶

Title 28 of the United States Code does not define the phrase “foreign or international tribunal.”¹⁴⁷ To determine the meaning of the phrase, settled precedent requires a three-step inquiry: first, courts must analyze the relevant language of the section itself; next, they must look at the specific context in which that language is used; and finally, they must evaluate the broader context and structure of the statute as a whole.¹⁴⁸ The unmistakable international nature of the arbitration proceedings in most cases has allowed the courts to dodge the otherwise thorny issue of defining the meaning of the words “foreign or international.”¹⁴⁹ Thus, the textual analysis has been focused exclusively on defining the term “tribunal.”¹⁵⁰

145. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (ALJ)*, 939 F.3d 710 (6th Cir. 2019).

146. The Fifth Circuit's decision will not be addressed here because it adopted the Second Circuit's holding that the word “tribunal” in section 1782(a) is ambiguous without further explanation. *Republic of Kaz. v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (“As the Second Circuit observed, however, the meaning of ‘foreign or international tribunal’ is ambiguous and must be construed in light of the background and purpose of the statute.”). Likewise, the Eleventh and Fourth Circuits' decisions will not be analyzed here because they did not run a textual analysis of section 1782(a). *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020); *Consortio Ecuatoriano de Telecomunicaciones S.A v. JAS Forwarding (USA), Inc. (Consortio I)*, 685 F.3d 987, 993–98 (11th Cir. 2012) *vacated* *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc. (Consortio II)*, 747 F.3d 1262 (11th Cir. 2014).

147. 28 U.S.C. § 1782(a) (2018).

148. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 496, 477 (1992) and *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)).

149. For example, *ALJ* and *NBC* concerned corporations based in different countries that were parties to commercial arbitrations held outside of the United States, and they never questioned the “foreign” or “international” nature of the dispute. *ALJ*, 939 F.3d at 722 (Saudi and United States corporations in arbitration proceedings in Saudi Arabia and United Arab Emirates); *NBC*, 165 F.3d at 187 (Mexican and United States corporations in arbitration dispute in Mexico). The meaning of the terms “foreign” and “international” in the context of section 1782(a) raises puzzling questions regarding what is it that makes an arbitral authority “foreign” or “international”: Is it the nationality of the parties or the nationality of the arbitrators? Is it the substantive law or the procedural law governing the dispute? Or is it the law of the seat of the panel? According to Professor Smit, the terms “foreign” and “international” should be given the broadest possible construction, and a tribunal should be considered international “when any of the parties before it, or any of the arbitrators, is not a citizen or resident of the United States.” Smit, *American Judicial Assistance*, *supra* note 4, at 485. *But see* Rothstein, *supra* note 80, at 78 (“[A]fter holding that a foreign private arbitration is a [section] 1782 ‘foreign tribunal,’ it would be difficult to explain why a private international arbitration in the United States is not a [section] 1782 ‘international tribunal.’”) To the author's knowledge, only three cases involving section 1782(a) have raised the question of whether an arbitration conducted in the United States can be considered “foreign of international.” All three courts rejected to address the issue. *See In re Grupo Unidos Por El Canal, S.A.*, No. 14–mc–80277–JST (DMR), 2015 WL 1815251, at *12 n.9 (N.D. Cal. Apr. 21, 2015) (Miami-based arbitration under the ICC rules involving non-US parties); *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) (same); *In re Dubey*, 949 F. Supp. 2d 990, 995–96 (C.D. Cal. 2013) (Los Angeles-based arbitration conducted under the American Arbitration Association involving U.S. parties). Although the meaning of the terms “international” or “foreign” in the context of section 1782(a) is far from settled, this Note will not address the issue.

150. *See* 28 U.S.C. § 1782(a).

For the first step of the inquiry—the ordinary meaning of the word “tribunal”—courts have sought answers in dictionaries and the common use of the word in the legal community. The Sixth Circuit acknowledged that dictionary definitions left “room for interpretation,” but found that American jurists, lawyers, and other courts—including the Supreme Court—have historically and continuously used “tribunal” to describe private arbitral bodies.¹⁵¹ The Second Circuit also held that the term “tribunal” does not unambiguously exclude private arbitration, referring to the parties’ “numerous references to private arbitration panels as ‘tribunals’ or ‘arbitral tribunals’ in court cases, international treaties, congressional statements, academic writings, and even the *Commentaries* of Blackstone and Story.”¹⁵² The Seventh Circuit relied exclusively on dictionary definitions in its analysis, finding that they are “inconclusive” and “do not unambiguously resolve” the matter.¹⁵³

Thus, these courts agreed that the term “tribunal” is broad enough to include private arbitral authorities. However, this is not enough to conclude that the term is unambiguous. The next step in the textual inquiry is to determine whether, in the context of section 1782, the longstanding references to private arbitrators as tribunals pass muster. Here is where things went wrong for the Second Circuit.¹⁵⁴ Without analyzing the context of the statute, the court held that the plain meaning of the term “tribunal” in section 1782(a) is ambiguous because it encompasses many types of arbitrations:

[T]he fact that the term ‘foreign or international tribunals’ is broad enough to include both [S]tate-sponsored and private tribunals fails to mandate a conclusion that the term, as used in [section] 1782, does include both. *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (although term ‘employees’ was broad enough to include former employees and Congress did not expressly specify ‘current employees’, use of term in statute was ambiguous). In our view, the term ‘foreign or international tribunal’ is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here.¹⁵⁵

The court’s only support for this conclusion was *Robinson v. Shell Oil Co.*,¹⁵⁶ a Supreme Court case that addressed whether the term “employees” in section 704(a) of title VII includes both former and current employees.¹⁵⁷ But the way in which the Second Circuit paraphrased the holding in *Robinson* was

151. *ALJ*, 939 F.3d at 719–20.

152. *NBC*, 165 F.3d at 188.

153. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 693–94 (7th Cir. 2020).

154. *See NBC*, 165 F.3d at 188.

155. *Id.*; *see also Republic of Kaz. v. Biedermann Int’l*, 168 F.3d 880, 888 (5th Cir. 1999) (holding that the term lacks precision).

156. *NBC*, 165 F.3d at 188 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

157. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat 253, 257 (codified at 42 USC § 2000e-3(a) (2018)) (“Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”).

misleading.¹⁵⁸ In that case, the Supreme Court’s reasoning directly contradicts *NBC*.

Unlike the Second Circuit, the *Robinson* Court ran a full textual analysis of section 704(a) of title VII.¹⁵⁹ The Court noted that “[a]t first blush, the term ‘employees’ in [section] 704(a) would seem to refer to those having an existing employment relationship with the employer in question. This initial impression, however, does not withstand scrutiny in the context of [section] 704(a).”¹⁶⁰ Next, the Court went beyond the language of the text itself and analyzed other uses of the word “employees” both within section 704(a) and throughout title VII.¹⁶¹ In the absence of temporal qualifiers that modify the word “employees” (such as “current” or “former”) the Court held that other sections in title VII covered current and/or former employees.¹⁶² The Court explained that “once it is established that the term ‘employees’ includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.”¹⁶³

The Court’s reasoning in *Robinson* applies here, albeit with a different result than the one reached in *NBC*. The *prima facie* meaning of “employees” in section 704(a) is current employees.¹⁶⁴ Similarly, the *prima facie* meaning of “tribunal” in section 1782(a) is an impartial adjudicative body that includes both private and State-sponsored arbitrations—as acknowledged by the Second, Sixth, and Seventh Circuits.¹⁶⁵ A crucial distinction, however, is that the ordinary meaning of the words in both statutes runs in opposite directions: “employees” in section 704(a) is restrictive (former employees would normally be excluded from the term), while “tribunal” in section 1782(a) is inclusive (encompassing all types of arbitral authorities).¹⁶⁶ This brings us to the ultimate question of whether the context of the statutes hints at an understanding different from the terms’ *prima facie* meaning. In *Robinson*, other provisions in title VII allowed for an alternative, more expansive interpretation of the word “employee” that included former employees.¹⁶⁷ Unlike the Second Circuit’s paraphrasing of the *Robinson* holding, the word “employee” is not ambiguous because “the term is broad and Congress did not expressly specify ‘current employees.’”¹⁶⁸ Rather,

158. *See supra* text accompanying note 155.

159. *Robinson*, 519 U.S. at 341–45.

160. *Id.* at 341. (citations omitted).

161. *Id.* at 341–45.

162. *Id.* at 343–44.

163. *Id.*; *see also* Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*ALJ*), 939 F.3d 710, 722 (6th Cir. 2019) (“[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.”).

164. *Robinson*, 519 U.S. at 341.

165. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 693–94 (7th Cir. 2020); *ALJ*, 939 F.3d at 719–20; *Nat’l Broad. Co. v. Bear Stearns & Co. (NBC)*, 165 F.3d 184, 188 (2d Cir. 1999).

166. *Compare Servotronics*, 975 F.3d at 693–94 (analyzing dictionary definitions of the word “tribunal”), and *ALJ*, 939 F.3d at 719–20 (analyzing dictionary definitions and other uses of the word “tribunal” in legal practice), and *NBC*, 165 F.3d at 188 (same), with *Robinson*, 519 U.S. at 341–45 (noting that the term “employees” seems to refer to a current employment relationship).

167. *Robinson*, 519 U.S. at 342–44.

168. *See NBC*, 165 F.3d at 188 (citing *Robinson*, 519 U.S. 337). The Second Circuit’s depiction

the ambiguity arises from the context of the statute, not from the meaning of the word itself.¹⁶⁹

But the context of section 1782(a) does not support an interpretation that restricts the wide-ranging meaning of the term “tribunal.”¹⁷⁰ Here, it is proper to refer to the Sixth Circuit’s decision in *ALJ* and the Seventh Circuit’s decision in *Servotronics*.¹⁷¹ Unlike the Second Circuit, these courts engaged in a detailed analysis of other uses of the word in the statute, even though they reached different conclusions.¹⁷² In their textual showdown, the Sixth Circuit’s holding that the word “tribunal” unambiguously includes private arbitration gained the upper hand.¹⁷³

In the specific context of section 1782(a), the word “tribunal” is used three times.¹⁷⁴ First, in the main sentence authorizing district courts to order a person to give testimony or provide evidence “for use in a proceeding in a foreign or international tribunal.”¹⁷⁵ The next sentence states that “[t]he order may be pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal”¹⁷⁶ Finally, two sentences later, the statute provides that the court’s 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”¹⁷⁷

According to the Seventh Circuit, the last phrase suggests that a “tribunal” is State-sponsored because it “operat[es] pursuant to the foreign country’s ‘practice and procedure.’”¹⁷⁸ Nevertheless, the court conveniently omitted the fact that the phrase “practice and procedure” also modifies “international tribunal.”¹⁷⁹ Indeed, the drafters’ use of the preposition “or” evinces their intent to place international tribunals in a different and separate category from

of the word “employees” as a “broad” word is inaccurate, *see id.*, given that the *Robinson* Court itself reasoned that the term “would seem to refer to those having an existing employment relationship with the employer in question.” *See Robinson*, 519 U.S. at 341. That is, the word’s ordinary meaning is not broad but restrictive. *See id.*

169. *See Robinson*, 519 U.S. at 341–45.

170. *See* 28 U.S.C. § 1782 (2018).

171. *See Servotronics*, 975 F.3d 689; *ALJ*, 939 F.3d 710.

172. *Compare NBC*, 165 F.3d at 188, with *Servotronics*, 975 F.3d at 694–95, and *ALJ*, 939 F.3d at 722–23.

173. *See ALJ*, 939 F.3d at 723.

174. Section 1782(a) states in relevant part: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a *foreign or international tribunal* or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of *the foreign country or the international tribunal*, for taking the testimony or statement or producing the document or other thing.” 28 U.S.C. § 1782(a) (emphasis added).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020).

179. *See* 28 U.S.C. § 1782(a).

governmental authorities of foreign countries.¹⁸⁰ That is, they understood that international tribunals can exist independently from domestic legal frameworks. And given that private arbitration bodies may prescribe evidence-gathering procedures,¹⁸¹ the use of the word “tribunal” in this context is not restrictive.

Similarly, the Sixth Circuit emphasized that the permissive wording of the sentence—“may be in whole or part”—indicates that it “is an optional borrowing provision.”¹⁸² The sentence only suggests that, if the international tribunal does not have procedures in place, the district court may still grant discovery pursuant to domestic procedures:

The most that could be said of the sentence is that it may be read to assume that a foreign country or international tribunal will have evidence-gathering procedures governing any given proceeding. But the statute’s terms do not require that such procedures exist or that a “foreign tribunal” be a governmental entity of a country that has prescribed such procedures.¹⁸³

With regards to the broader context of the provision, there are two other sections in title 28 that use the word “tribunal,” which were enacted in the same legislative act that included section 1782(a).¹⁸⁴ Section 1781 deals with the transmittal of “a letter rogatory issued, or request made, by a foreign or international tribunal” to a “tribunal, officer, or agency in the United States”¹⁸⁵ Section 1696(a) states that the district court “may order service upon [a person] of any document issued in connection with a proceeding in a foreign or international tribunal.”¹⁸⁶ The Seventh Circuit held that “[s]ervice-of-process assistance and letters rogatory—governed by [sections] 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 [S]tate-sponsored tribunals and does not include private arbitration panels.”¹⁸⁷ This conclusion is flawed. Regarding section 1781, the Seventh Circuit, once again, conveniently left out a crucial portion of the text of the statute in its analysis. The provision refers to “a letter rogatory issued *or request* made”¹⁸⁸ The inclusion of the word “request” in the statutory language suggests that the drafters were well aware that letters rogatory were not the only means available for international tribunals to require assistance from courts in the United States.¹⁸⁹ This is relevant because, as the Sixth Circuit held, private arbitral bodies “can make a request for

180. *See id.*

181. Strong, *Distinguishing Commercial and Investment Arbitration*, *supra* note 52, at 124 (“The types of procedures that can be used in international commercial arbitration are as diverse as the disputes themselves, and arbitral tribunals are encouraged to tailor the procedures to meet the needs of individual parties and the dispute at hand.”).

182. *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (ALJ)*, 939 F.3d 710, 723 (6th Cir. 2019) (quoting 28 U.S.C. § 1782(a)).

183. *Id.*

184. Act of Oct. 3, 1964, Pub. L. No. 88-619, sec. 9, §§ 4, 9, 78 Stat. 995, 995 (codified as 28 U.S.C. §§ 1696, 1781 (2018)).

185. 28 U.S.C. § 1781.

186. 28 U.S.C. § 1696.

187. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020).

188. 28 U.S.C. § 1781 (emphasis added).

189. *See id.*

evidence,” which means that section 1781 “does not indicate that the word ‘tribunal’ in the statute refers only to judicial or other public entities.”¹⁹⁰

As to section 1696, it would seem at first that it applies only in the context of governmental entities because arbitral bodies cannot issue service-of-process requests.¹⁹¹ Nevertheless, the Supreme Court in *Intel* rejected a similar argument.¹⁹² There, the petitioner argued that the class of private parties qualifying as “interested persons” under section 1696 had to be limited to litigants because “private parties—unlike officials designated under foreign law—cannot serve ‘process’ unless they have filed suit.”¹⁹³ The Court disregarded the petitioner’s claim and held that the provision “is not limited to service of *process*; it allows service of ‘any document’ issued in connection with a foreign proceeding.”¹⁹⁴ Given that private arbitrators can also issue requests to courts for service of any document to the parties, the meaning of the word “tribunal” in section 1696 is not limited to State-sponsored entities.¹⁹⁵ The Seventh Circuit’s textual analysis was thus erroneous.

It is still surprising that it took twenty-one years for courts of appeals to engage in a significant textual inquiry of the statute. As held by the Sixth Circuit, section 1782(a) provides a “clear answer” to the question presented: both the plain meaning and the context of the provision lead to the conclusion that the word “tribunal” unambiguously includes international commercial arbitration.¹⁹⁶

V. MAKING SENSE OF THE POST-*INTEL* CHAOS

The Supreme Court’s 2004 decision in *Intel* transformed section 1782(a)’s landscape.¹⁹⁷ Although the Court addressed the meaning of the word “tribunal” in reference to a State-sponsored rather than a private entity,¹⁹⁸ its analysis provided important guidelines to interpret the statute. After *Intel*, circuit and district courts have split on whether the Court’s decision warrants including international private arbitration within the scope of section 1782(a).

A. *The Supreme Court Decision in Intel*

In *Intel*, the respondent filed an antitrust complaint against the petitioner with the Directorate-General for Competition (“DG–Competition”) of the Commission of the European Communities (“EU Commission”).¹⁹⁹ The respondent later filed a section 1782(a) application in a federal district court to

190. Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*ALJ*), 939 F.3d 710, 723 (6th Cir. 2019) (quoting 28 U.S.C. § 1782(a) (2018)).

191. See 28 U.S.C. § 1696.

192. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 2478–79 n.10 (2004).

193. Brief for Petitioner at 27, *Intel*, 542 U.S. 241 (No. 02-572).

194. *Intel*, 542 U.S. at 2478–79 n.10.

195. See 28 U.S.C. 1696.

196. Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*ALJ*), 939 F.3d 710, 723 (6th Cir. 2019).

197. See *Intel*, 542 U.S. at 257–58.

198. See *id.*

199. *Id.* at 250.

compel document production related to the DG–Competition proceedings.²⁰⁰ The case reached the Supreme Court, which held that the EU Commission was a “tribunal” pursuant to section 1782(a).²⁰¹

Relevant to the Court’s analysis was the function of the DG–Competition and the EU Commission in the antitrust proceedings.²⁰² The EU Commission is the executive and administrative organ of the European Communities under the European Union treaty.²⁰³ The EU Commission enforces antitrust law through one of its investigative departments, the DG–Competition.²⁰⁴ The DG–Competition conducts a preliminary investigation *sua sponte* or upon receipt of a complaint.²⁰⁵ If the DG–Competition decides not to pursue the complaint, this decision is subject to judicial review by the General Court, and ultimately by the European Court of Justice.²⁰⁶ If, instead, the DG–Competition decides to pursue the complaint, the target of the investigation is entitled to a hearing before an independent officer, who later provides a report to the DG–Competition.²⁰⁷ Based on that report, the DG–Competition provides a recommendation to the EU Commission, which may either dismiss the complaint or impose penalties.²⁰⁸ The EU Commission’s final action is subject to review in the General Court and the European Court of Justice.²⁰⁹

The Supreme Court relied on the legislative history of section 1782²¹⁰ and on an analysis of the EU Commission’s functions²¹¹ to hold that the EU Commission is a “tribunal” under section 1782(a).²¹² The Court “reject[ed] the categorical limitations [the petitioner] would place on the statute’s reach.”²¹³ In doing so, it emphasized Congress’s instructions to the Commission in 1958 to recommend procedural revisions “for the rendering of assistance to foreign courts and quasi-judicial agencies.”²¹⁴ Similarly, the Court highlighted the fact that the 1964 amendments to section 1782(a) eliminated the phrase “judicial proceedings in any court” and replaced it with “a proceeding in a foreign or international tribunal.”²¹⁵ The Court quoted the congressional reports for the proposition that the word “tribunal” was used to extend assistance “in connection

200. *Id.* at 251.

201. *Id.* at 257–58.

202. *See id.*

203. *Id.* at 254.

204. *Id.*

205. *Id.*

206. *Id.* Prior to the enactment of the Treaty of Lisbon in 2009, the General Court was known as the “Court of First Instance” and the European Court of Justice was known as the “Court of Justice of European Union.” Given that *Intel* was decided in 2004, the decision references the European courts using their old denominations.

207. *Id.* at 254–55.

208. *Id.* at 255.

209. *Id.*

210. *Id.* at 241, 247–49, 257–58.

211. *Id.* at 257–58.

212. *Id.* at 258.

213. *Id.* at 255.

214. *Id.* at 257–58 (quoting Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743) (emphasis removed).

215. *Id.* at 258 (quoting Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 995).

with [administrative and quasi-judicial proceedings abroad].”²¹⁶ Immediately following this quote, the Court quoted a 1965 article by Professor Smit in parentheses, in which he listed adjudicative bodies he considered to be tribunals under the statute, including “arbitral tribunals”²¹⁷

The Court also addressed the issue of whether the DG–Competition and the EU Commission act as a “tribunal” for purposes of section 1782(a).²¹⁸ In evaluating the functions of the EU Commission, the Court noted that it acts as a first-instance adjudicative decisionmaker;²¹⁹ it permits the gathering and submission of evidence in the hearing before the DG–Competition;²²⁰ it has the authority to determine liability and impose penalties;²²¹ and its decisions are subject to judicial review by the General Court and the European Court of Justice.²²² Although several courts have categorized this as a functional test, other courts have been wary of this labeling, arguing that “[t]he [*Intel*] opinion does not purport to establish a test for future cases.”²²³

B. *Categorizing Post-Intel Decisions*

Far from clarifying whether section 1782(a) extends to private arbitration, *Intel* led to a deeper split among circuit and district courts. Many of the post-*Intel* decisions have misunderstood the nature of international law, have followed flawed precedent, and have confused similar but logically different arguments. As a result, courts and practitioners continue to cite to cases that, in reality, do not support their claims. This section will attempt to categorize over thirty-five circuit and district court decisions with the purpose of systematizing this confusing legal framework.

The courts’ holdings will be placed in two main categories: (1) section 1782(a) applies to international commercial arbitration; and (2) section 1782(a) does not apply to international commercial arbitration. Each category will be further divided into subcategories.

A few important caveats before proceeding. Some courts have based their rationales on various arguments, which has resulted in their decisions being placed in different subcategories simultaneously. Similarly, given that the courts’ reasonings touch on the textual, historical, and policy considerations previously discussed, Parts II–IV will be constantly referred to.

216. *Id.* (quoting S. REP. NO. 88-1580, at 7–8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).

217. *Id.* (quoting Smit, *International Litigation*, *supra* note 27, at 1026–27). This quotation prompted endless discussions among lower courts. *See infra* note 278 and accompanying text.

218. *Id.* at 257–58.

219. *Id.* at 246, 255, 258.

220. *Id.* at 257 (noting that the EU Commission is a “proof-taking” body).

221. *Id.* at 255 n.9.

222. *Id.* at 254, 257–58.

223. *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*ALJ*), 939 F.3d 710, 731 n.11 (6th Cir. 2019).

1. *Section 1782(a) Applies to International Commercial Arbitration*

Courts that extended section 1782(a) to private arbitration have based their decisions on the following rationales: (a) section 1782(a) categorically includes private arbitral bodies; and (b) private arbitral bodies act like a “tribunal.” Courts that extended section 1782(a) to private arbitration without providing any justification were not included in any of the two groups.²²⁴ Courts that did not elaborate on their reasoning but cited a prior court’s holding as support for their decision will be placed in that court’s category.

a. *Section 1782(a) Categorically Includes Private Arbitral Bodies*

Within this category, only a few courts held that the word “tribunal” unambiguously includes private arbitral panels.²²⁵ The Sixth Circuit was the only court to explore the text of the statute in depth, as explained in Part IV.²²⁶

Most courts belonging to this category focused instead on *Intel*’s broad reading of the statute’s legislative history.²²⁷ First, they tracked *Intel*’s emphasis on the twin aims of the provision and on how Congress eliminated the word “court” in section 1782(a) and replaced it with “tribunal.” Second, they highlighted *Intel*’s repeated refusal to place “categorical limitations” on section 1782(a).²²⁸ Finally, they emphasized *Intel*’s quotation of Professor Smit’s 1965 article, which included the phrase “arbitral tribunals.”²²⁹ According to these courts, the Supreme Court cited Professor Smit with approval, which “offers a meaningful insight”²³⁰ into the Court’s understanding of the statute. Many of the courts in this group also rebutted the policy concerns raised in *NBC*, which were discussed in Part III.

224. See e.g., *In re CA Inv. (Brazil) S.A.*, No. 19-mc-22 (MJD/SER), 2019 WL 1531268, at *3 (D. Minn. Apr. 9, 2019) (holding section 1782 applied to an ICC arbitration in Brazil but citing *Intel* only for its holding concerning the phrase “interested person” in the statute); *In re Technostroyexport*, 853 F. Supp. 695, 697–99 (S.D.N.Y. 1994) (holding that a private arbitral panel was a “tribunal” without elaborating on its reasoning but rejecting the application on discretionary grounds).

225. See *ALJ*, 939 F.3d at 725; *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1225–26 (N.D. Ga. 2006); see also *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238 (D. Mass. 2008) (noting that the term “tribunal” is commonly used to describe arbitral bodies, but stopping short of holding that the term is unambiguous); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 954 (D. Minn. 2007) (same).

226. *ALJ*, 939 F.3d at 717–23. Despite holding that there was no need to resort to the legislative history because the text provided a “clear answer,” *id.* at 723, the Sixth Circuit still addressed the policy considerations and the statute’s legislative history, as well as the Supreme Court’s decision in *Intel*. *Id.* at 723–31.

227. See *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 212–13 (4th Cir. 2020); *Consortio Ecuatoriano de Telecomunicaciones S.A v. JAS Forwarding (USA), Inc. (Consortio I)*, 685 F.3d 987, 993–98 (11th Cir. 2012) *vacated* *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc. (Consortio II)*, 747 F.3d 1262 (11th Cir. 2014).; *In re Babcock Borsig AG*, 538 F. Supp. 2d at 239–40; *In re Hallmark Capital*, 534 F. Supp. 2d at 955–56; *In re Roz Trading*, 469 F. Supp. 2d at 1224–26; see also *ALJ*, 939 F.3d at 727–28 (discussing *NBC*’s analysis of section 1782’s legislative history and concluding it was erroneous); *Comisión Ejecutiva Hidroeléctrica del Río Lempa v. Nejapa Power Co.*, No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) (relying on *Intel* without providing further reasoning).

228. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 250 (2004).

229. See *id.* at 258.

230. *In re Babcock Borsig AG*, 538 F. Supp. 2d at 239.

Although these courts acknowledged that *Intel* did not address private arbitration, they reasoned that *Intel*'s interpretation of section 1782(a)'s legislative history materially impacted *NBC*'s holding because it became evident that the Supreme Court favored a broad reading of the statute and rejected inflexible rules.²³¹

b. Private Arbitral Bodies Act like a "Tribunal"

In addition to *Intel*'s interpretation of the statute's legislative history, several courts have applied *Intel*'s functional approach. Two distinct subcategories can be found here:

Section 1782(a) applies to private arbitral bodies if, as a whole, they act like a "tribunal": The first subcategory of decisions interpreted *Intel* to require a holistic analysis of the functions of a "tribunal."²³² These courts held that private arbitral authorities are tribunals because they adjudicate disputes, have an obligation to impartially apply the law to the facts, have authority to enter awards eventually enforceable in domestic courts, have evidence-gathering capabilities, and are first-instance decisionmakers.²³³

Section 1782(a) applies to private arbitral bodies that issue awards subject to substantive review by national courts: The second subcategory of decisions also followed *Intel*'s functional approach. Nevertheless, instead of holistically analyzing whether arbitrators act like tribunals, they held that judicial review of the substance of the award was a *sine qua non* requirement without which the arbitration falls outside the scope of section 1782(a).²³⁴ This interpretation draws from the Supreme Court's holding that "the [EU] Commission is a [section] 1782(a) 'tribunal' when it acts as a first-instance decisionmaker."²³⁵ Under this view, the EU Commission in *Intel* was a "tribunal" primarily because its decisions were reviewable by the General Court and the European Court of

231. See e.g., *In re Roz Trading*, 469 F. Supp. 2d at 1228 ("The Supreme Court's interpretation and application of the legislative history contradicts the interpretations and applications of the Second and Fifth Circuits . . .").

232. See cases cited *supra* note 227. Most cases in this subcategory relied both on *Intel*'s interpretation of the statute's legislative history and on a functional analysis, with the exception of *Servotronics*, 954 F.3d 209 at 212–13, and *In re Hallmark Capital*, 534 F. Supp. 2d at 955–56, neither of which applied a functional analysis.

233. See cases cited *supra* note 227

234. *In re Children's Invest. Fund. Found.*, 363 F. Supp. 3d 361, 369–70 (S.D.N.Y. 2019); *In re Pola Mar. Ltd.*, No. CV416-333, 2018 WL 1787181, at *2 (S.D. Ga. Apr. 13, 2018); *Kleimar N.V. v. Benxi Iron & Steel Am. Ltd.*, No. 17-cv-01287, 2017 WL 3386115, at *5–6 (N.D. Ill. Aug. 7, 2017); *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521–22 (S.D.N.Y. 2016); *In re Owl Shipping, LLC*, No. 14–5655 (AET)(DEA), 2014 WL 5320192, at *2 (D.N.J. Oct. 17, 2014); *In re Winning (HK) Shipping Co.*, No. 09–22659–MC, 2010 WL 1796579, at *9–10 (S.D. Fla. Apr. 30, 2010); *OJSC Ukrnafta v. Carpatyky Petroleum Corp.*, No. 3:09–mc–265(JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009). The seminal case in this subgroup is *In re Winning*, 2010 WL 1796579 (all the other courts adopted the *In re Winning* rationale, with the exception of *OJSC Ukrnafta*, which was decided a year before). Concededly, this subgroup does not entirely fit within the broader umbrella of "Section 1782(a) applies to international commercial arbitration." Technically, these decisions stand for the proposition that section 1782(a) applies to *some* arbitrations—those that meet the specific requirement of issuing arbitral awards reviewable on the merits. However, given that they also apply *Intel*'s functional approach, they are placed within this subgroup for purposes of clarity.

235. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246 (2004).

Justice.²³⁶ The courts in this subgroup concluded that judicial review bears more weight in the functional analysis than any other court-like trait in arbitrations.

These decisions have a distinctive common feature that played a key role in the courts' reasoning: they all involved section 1782(a) applications for use in arbitrations in England.²³⁷ Pursuant to section 68 of the Arbitration Act of the United Kingdom (U.K.) parties may challenge an arbitration award in courts on the basis of a serious procedural irregularity.²³⁸ Similarly, section 69 of the Act states that “[u]nless otherwise agreed by the parties, a party to arbitral proceedings may . . . appeal to the court on a question of law arising out of an award made in the proceedings.”²³⁹ The courts in this subgroup read this provision to mean that all arbitration awards in England are subject to review “on both substantive and procedural grounds,”²⁴⁰ unless the parties waive their right to appeal.

The U.K.'s distinct legal framework allowed the courts to hold that *Intel* is not at odds with *NBC*. The argument goes as follows: *Intel*'s functional approach requires tribunals to be first-instance decisionmakers and *NBC* requires tribunals to be State-sponsored; thus, arbitrations in the U.K. fall within the purview of section 1782(a) only because their awards are subject to review on questions of law by U.K. courts.²⁴¹ The Fourth Circuit properly summarized this rationale when it noted that, since the U.K. Arbitration Act is a “product of ‘government-conferred authority,’” arbitrators in the U.K. are “acting with the authority of the State” because they issue appealable awards.²⁴² At this point, it becomes necessary to clarify some basic aspects about the enforceability of arbitral awards.

The seat of an arbitration or the country under whose laws the award is issued has primary jurisdiction over the arbitration, which translates into the authority to vacate the arbitral award.²⁴³ Courts that have secondary jurisdiction over the arbitration are limited to denying recognition and enforcement of the award, but cannot vacate it.²⁴⁴ Different standards and procedures apply depending on whether courts are setting aside an award or refusing to recognize and enforce it.²⁴⁵ Increasingly, countries have enacted legislation according to which the grounds for vacating domestic arbitration awards mirror the grounds

236. See *id.* at 246, 258.

237. See cases cited *supra* note 234.

238. Arbitration Act of 1993, c. 23, § 68 (Eng.).

239. *Id.* § 69.

240. *In re Winning (HK) Shipping Co.*, No. 09–22659–MC, 2010 WL 1796579, at *9 (S.D. Fla. Apr. 30, 2010).

241. See *e.g.*, *id.* at 7, 9 (“[t]he undersigned concurs that the holding in *Intel* does not necessarily extend the reach of section 1782 to purely private arbitrations . . . the holding in *Biedermann* and *NBC* are fully consistent with the *Intel* decision . . .”).

242. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020). The Fourth Circuit did not base its holding exclusively on the judicial review requirement. *Id.* The court, however, did reconcile *NBC* with *Intel* by holding that even if it were to apply the restrictive holding in *NBC*—“that the term refers only to ‘entities acting with the authority of the States’”—the U.K. arbitration would meet that definition. *Id.*

243. Strong, *Navigating the Borders*, *supra* note 58, at 187.

244. *Id.*

245. *Id.*

for non-enforcement of a foreign award under the New York Convention.²⁴⁶ Article V of the New York Convention allows member parties to refuse recognition and enforcement of an award based on two narrow grounds: jurisdictional and procedural challenges.²⁴⁷ A jurisdictional challenge concerns arbitral awards that go beyond the scope of the submission of the arbitration.²⁴⁸ A procedural challenge concerns serious irregularities that affect the decision-making process in the arbitration, such as incapacity of the parties, invalidity of the arbitration agreement, lack of notice, procedural unfairness, awards that are not yet binding on the parties, and awards that were set aside in the country it was issued.²⁴⁹ Notably, Article V of the New York Convention does not allow for substantive review of the award, which falls in line with the expectation of parties to international arbitrations—legal certainty and a rapid resolution of the dispute by way of limited judicial review.²⁵⁰

Although uncommon, some countries have additional or different grounds for vacatur of domestic arbitral awards other than jurisdictional or procedural grounds. This is the case of the U.K., which allows for substantive challenges to domestic arbitral awards on questions of law.²⁵¹ Note that this substantive review is technically not a review on the merits of the award because the arbitral authority's factual determinations are not subject to reconsideration.

The differing interpretations of *Intel's* functional approach turn on the meaning of the Court's phrase "first-instance decisionmaker."²⁵² On the one hand, the courts in the first subgroup, which read section 1782(a) broadly, held that first-instance decisionmakers are impartial adjudicative bodies that gather evidence, apply the law to the facts, and issue enforceable decisions reviewable by domestic courts.²⁵³ Of emphasis here, they understood *Intel's* language concerning judicial review as requiring only limited review—on grounds similar to those set forth in Article V of the New York Convention.²⁵⁴ These holdings are in harmony with the purpose of section 1782(a), which is to provide judicial assistance to tribunals that are functionally equivalent to conventional courts, as explained in Part II.

On the other hand, the courts in the second subgroup only granted judicial assistance under section 1782(a) because the arbitrations rendered awards reviewable by English courts on questions of law.²⁵⁵ In other words, according

246. *Id.*

247. New York Convention, *supra* note 3, art. V.

248. *Id.*, art. V(d).

249. *Id.*

250. Strong, *Navigating the Borders*, *supra* note 58, at 126.

251. It is important to highlight that the Arbitration Act of the U.K. does not apply to foreign awards, but only to those arbitrations taking place in the U.K. or in which U.K. law controls the underlying dispute. Arbitration Act of 1993, c. 23, § 2 (Eng.)

252. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255, 258 (2004).

253. *See cases cited supra* note 227.

254. *See e.g.*, *Consortio Ecuatoriano de Telecomunicaciones S.A v. JAS Forwarding (USA), Inc. (Consortio I)*, 685 F.3d 987, 993–98 (11th Cir. 2012) *vacated* *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc. (Consortio II)*, 747 F.3d 1262 (11th Cir. 2014).

255. *See cases cited supra* note 234; *see e.g.*, *In re Winning (HK) Shipping Co.*, No. 09–22659–MC, 2010 WL 1796579, at *9 (S.D. Fla. Apr. 30, 2010) (“[T]he undersigned is constrained by the

to these decisions, the statute does not apply to the vast majority of international commercial arbitrations. This rationale is deeply flawed and rests on an erroneous interpretation of the “first-instance decisionmaker” language in *Intel*.²⁵⁶

The fact that a tribunal acts in the first instance only compels the conclusion that there is a second instance of review; it does not qualify the extent to which the award must be reviewed. Stated differently, limited review does not mean no review at all.²⁵⁷ Thus, international commercial arbitrators are first-instance decisionmakers because they issue awards that are reviewable on procedural and jurisdictional grounds.²⁵⁸ The Eleventh Circuit emphatically rejected the notion that arbitral awards had to be subject to substantive review:

One could not seriously argue that, because domestic arbitration awards are only reviewable in court for limited reasons (notably excluding a second look at the substance of the arbitral determination), this amounts to no judicial review at all . . . we can discern no sound reason to depart from the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances.²⁵⁹

The courts in this subgroup did not provide arguments to explain why requiring substantive review of arbitral awards would enhance the purpose of section 1782(a). This reasoning raises the implicit claim that arbitral awards are unreliable and that their enforcement should not proceed without a “true judiciary power”²⁶⁰ reviewing the substance of the award—despite the fact that, in part, parties seek arbitration precisely to avoid judicial review on the merits. This goes back to the point discussed in Part II, according to which the only reason why Congress would have limited section 1782(a) exclusively to State-sponsored bodies—or to arbitrations that issue awards subject to review on the merits by a domestic court—is that it allegedly mistrusts arbitrators. But as explained throughout the Note, this stance runs contrary to the spirit of the FAA and the New York Convention, to the strong federal policy favoring arbitration, and to Congress’s intent to liberalize judicial assistance in international proceedings.

The logical gap in this approach becomes evident in the context of

Supreme Court’s ruling in *Intel* which does, in fact, place great emphasis on the availability of judicial review of the decision of the dispute forum . . . the undersigned has found no case which expressly addressed the issue of judicial reviewability and held that where a decision by a dispute resolution body was reviewable by a court on both *substantive* and procedural grounds, that body was not an international tribunal under section 1782.” (emphasis added)).

256. See *Intel*, 542 U.S. at 255, 258.

257. *Conсорcio I*, 685 F.3d at 996.

258. Even assuming that *Intel* required substantive review of arbitral awards, it is not even clear what type of substantive review would be appropriate. In *Intel*, the General Court and the European Court of Justice could review the record before the Commission and, presumably, reevaluate the Commission’s factual determinations. 542 U.S. at 254. Conversely, review under section 68 of the Arbitration Act of the U.K. is limited to questions of law, which could also be considered a limited judicial review similar to that of Article V of the New York Convention.

259. *Conсорcio I*, 685 F.3d at 997–98 (emphasis added).

260. *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008), *aff’d sub nom.* *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31 (5th Cir. 2009).

international investment arbitrations. In a uniform manner, district courts have held that section 1782(a) is applicable to investment arbitration disputes because the arbitrators' source of authority is a multilateral or bilateral treaty.²⁶¹ If *NBC's* rationale is followed to its core, however, investment arbitrations bring to life all the supposed reasons why section 1782(a) should exclude private arbitrations: an award not reviewable on the merits by an arbitral authority that is not part of a judiciary, in a process that is not overseen by a State. This approach finds no support in the language of section 1782(a) or in the statute's legislative history.

Interestingly, several courts that have refused to apply section 1782(a) to private arbitrations have relied on the opinions referred to above—i.e., on those that included investment arbitrations within the scope of the statute because the arbitrations were State-sponsored. One of the most often-cited decisions has been *In re Oxus Gold*, which addressed section 1782(a) in the context of an international investment arbitration.²⁶² The court held:

The international arbitration at issue is being conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member [S]tates. The arbitration is not the result of a contract or agreement between private parties as in *National Broadcasting*. The proceedings in issue has [sic] been authorized by the sovereign [S]tates of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the Bilateral Investment Treaty. Therefore, it appears to the Court as if the international arbitration proceeding in the present case is included as a "foreign or international tribunal" in [s]ection 1782.²⁶³

Although this decision has had a strong precedential value,²⁶⁴ it contains several legal and factual errors as pointed out in detail by Professor S.I. Strong: (a) the court's suggestion that the United Nations Commission on International Law ("UNCITRAL") is involved in the administration of investment arbitrations is flawed.²⁶⁵ Although UNCITRAL developed the UNCITRAL Arbitration Rules, which are used in investment arbitration, neither the United Nations nor UNCITRAL administer the proceedings,²⁶⁶ which means that the arbitrator that actually handles the proceedings is not State-sponsored;²⁶⁷ (b) the court assumed that only treaty-based arbitrations proceed under UNCITRAL Arbitration Rules.²⁶⁸ These rules, however, can be used in both public and private proceedings;²⁶⁹ and (c) some courts suggested that the UNCITRAL Arbitration Rules constitute a type of international law that can transform an arbitration

261. See Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 136 (2012) ("[F]ederal courts uniformly agree that an arbitral tribunal established pursuant to a bilateral investment treaty constitutes an 'international tribunal' within the meaning of the statute.")

262. *In re Oxus Gold PLC*, No. MISC. 06–82, 2006 WL 2927615, at *1 (D.N.J. Oct. 11, 2006).

263. *Id.* at *5. (citations omitted).

264. See e.g., *El Paso Corp.*, 341 F. App'x. at 32; *In re Dubey*, 949 F. Supp. 2d 990, 994 (C.D. Cal. 2013); *In re Winning (HK) Shipping Co.*, No. 09–22659–MC, 2010 WL 1796579, at *7 (S.D. Fla. Apr. 30, 2010); *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09–mc–265(JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009).

265. Strong, *Distinguishing Commercial and Investment Arbitration*, *supra* note 52, at 307–308.

266. *Id.* at 308.

267. *Id.*

268. *Id.*

269. *Id.*

panel into a tribunal for purposes of section 1782.²⁷⁰ This assertion does not hold up to scrutiny. The UNCITRAL Arbitration Rules “do not constitute ‘international law’ any more than the rules of a private arbitral institution” do.²⁷¹ Such an approach would likewise suggest that “the nature of the underlying substantive or procedural law should determine the nature of the tribunal.”²⁷²

These critiques demonstrate not only the confusion among courts between the function and the source of authority of a tribunal, but also their misunderstanding of fundamental aspects of international law, which has led them to perpetuate the myth of State sponsorship.

At first, it seems as if the decisions in this subgroup expanded the scope of section 1782(a) because they held that some private arbitral bodies can be considered tribunals under the statute, but a closer examination reveals that their reasoning is flawed. Following *NBC*, these courts erroneously limited the section 1782(a) to State-sponsored tribunals, while simultaneously misinterpreting *Intel* to impose a judicial reviewability requirement—exactly the kind of categorical limitation that the Supreme Court attempted to avoid.²⁷³

2. *Section 1782(a) Does Not Apply to International Commercial Arbitration*

Courts that have refused to extend section 1782(a) to private arbitration have based their decisions on the following rationales: (a) section 1782(a) categorically excludes private arbitration; and (b) private arbitral bodies do not act like a “tribunal.”

a. *Section 1782(a) Categorically Excludes Private Arbitration*

The courts in this group adopted the Second Circuit’s rationale to its full extent, holding that *Intel* did not overrule *NBC*.²⁷⁴ They held that the word

270. *Id.* at 308–09 (citing *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09–mc–265(JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009)) (“An arbitration panel governed by international law, namely, the UNCITRAL rules of arbitration, constitutes a ‘foreign tribunal’ for the purposes of [s]ection 1782.” (citations omitted)).

271. *Id.* at 309.

272. *Id.* at 307–309.

273. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 250 (2004).

274. *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 33–34 (5th Cir. 2009) (upholding *Republic of Kaz. v. Biedermann Int’l*, 168 F.3d 880, 882 (5th Cir. 1999), which in turn adopted the *NBC* rationale); *In re Stora Etzel GmbH*, No. 19-mc-209-CFC, 2020 WL 1849714, at *2–3 (D. Del. Apr. 13, 2020); *In re Golden Root Invs., PTE*, No. EDMC 19-11 JGB (KKx), 2019 WL 8011743 (C.D. Cal. Sep. 6, 2019); *In re Petrobras Sec. Litig.*, 393 F. Supp. 3d 376, 384–86 (S.D.N.Y. July 29, 2019); *Govt. of Lao People’s Democratic Republic v. Bridge Capital LLC*, No. 1:15-MC-00018, 2016 WL 1389764, at *4 (D.N. Mar. Is. Apr. 7, 2016); *In re Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277–JST (DMR), 2015 WL 1815251, at *11 (N.D. Cal. Apr. 21, 2015); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *6 (D. Colo. Apr. 17, 2015); *In re Dubey*, 949 F. Supp. 2d 990, 993–95 (C.D. Cal. 2013); *In re Rhodianyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at *39–49 (D. Kan. Mar. 25, 2011); *see also In re Oxus Gold PLC*, No. 06–82–GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (adopting *NBC*’s rationale without analyzing *Intel*). The Seventh Circuit’s decision in *Servotronics, Inc. v. Rolls-Royce PLC* also categorically excluded private arbitration from the scope of section 1782(a). 975 F.3d 689, 690 (7th Cir.

“tribunal” in section 1782(a) is ambiguous, that Congress’s intent was to cover only State-sponsored tribunals, and that a broader reading of the statute would adversely affect the efficiency of arbitrations and would lead to a conflict with domestic law.²⁷⁵

These decisions stress the fact that *Intel* did not address section 1782(a) in the context of private arbitration. The courts read *Intel*’s holding narrowly, interpreting it to apply exclusively to State-sponsored tribunals because the DG–Competition and the EU Commission were governmental bodies. Most of the courts in this subcategory rejected the need to apply *Intel*’s functional approach under the theory that it “define[d] the type of governmental arbitration subject to [section] 1782, rather than covering every type of international tribunal imaginable.”²⁷⁶ After the *Intel* decision, the Second and Fifth Circuit issued decisions reaffirming the holdings in *NBC* and *Biedermann* precisely under the argument that *Intel* left their rationales unchanged.²⁷⁷

The courts in this subgroup spent considerable energy condemning the decisions that extended section 1782(a) to private tribunals, criticizing their reliance on the *Intel* Court’s parenthetical quotation of Professor Smit’s article that included the phrase “arbitral tribunals.”²⁷⁸ The critiques are accurate—those decisions excessively relied on a quotation that was taken out of context. Nevertheless, this discussion shifts the focus away from the true issue at hand: none of the courts in this subcategory addressed *why* a distinction based on the State-sponsored nature of a tribunal would further section 1782(a)’s purpose. For the reasons detailed throughout this Note, these courts’ overly narrow reading of *Intel* and their reliance on *NBC* should be rejected.

*b. Private Arbitral Bodies Do Not Act like a
“Tribunal”*

Although many of the decisions in this group relied on *NBC*’s rationale, they also applied *Intel*’s functional approach.²⁷⁹ In doing so, the courts held that

2020). But it did not fully adopt the *NBC* holding. In particular, the Seventh Circuit was the only court in this group to hold that the text of section 1782(a) unambiguously excludes private arbitration because it only refers to State-sponsored entities. *Id.* at 695. It thus arrived at the same conclusion as the *NBC* court but without diving into the statute’s legislative history. *Id.* at 694–95. The Seventh Circuit also analyzed the potential conflict between a broad reading of section 1782(a) and section 7 of the FAA, *see id.* at 695–96—an issue first raised by the Second Circuit in *NBC*, as explained in Part III.

275. *See* cases cited *supra* note 274.

276. *See In re Govt. of Lao People’s Democratic Republic*, 2016 WL 1389764, at *4; *see also* cases cited *supra* note 274 with the exception of *In re Rhodianyl*, 2011 U.S. Dist. LEXIS 72918, and *In re Oxus Gold PLC*, 2007 WL 1037387.

277. *Hanwei Guo v. Deutsche Bank Sec. Inc.*, 965 F.3d 96, 100 (2d Cir. 2020); *El Paso*, 341 F. App’x 31, 33–34.

278. Four critiques were raised: (i) the context of the quote supports the proposition that section 1782 applies to administrative and quasi-judicial proceedings, not that it applies to private proceedings; (ii) Professor Smit’s phrase “arbitral tribunals” does not refer to private arbitral tribunals but to State-sponsored arbitral tribunals, which fall under the *NBC* holding; (iii) the Court omitted part of Professor Smit’s definition of “tribunal” that included “all bodies exercising adjudicatory powers,” which could be interpreted as supporting the Court’s exclusion of private arbitration; and (iv) the Court did not adopt Professor Smit’s statements as its own and it would not have expanded the scope of section 1782(a) to private arbitration without discussing doing so expressly. *See* cases cited *supra* note 274.

279. *See In re Finserve Grp. Ltd*, No. CA 4:11-mc-2044-RBH, 2011 WL 5024264, at *3 (D.S.C.

private arbitral bodies did not act like a “tribunal” under section 1782(a) because arbitral awards are not subject to judicial review on the merits by a State-sponsored court.²⁸⁰ As discussed at length in Section V.B.1.b, this reasoning is flawed.

VI. CONCLUSION

The circuit split has brought a great deal of uncertainty and inconvenience for practitioners seeking section 1782(a) applications for use in international commercial arbitrations. The Second Circuit’s decision at the turn of the last century paved the way for an unjustifiably narrow reading of the statute that excluded private arbitration bodies from the scope of section 1782(a). Other courts of appeals, such as the Fourth and Sixth Circuits, have recently picked up on *NBC*’s flaws. In holding that international commercial arbitrators are “tribunal[s]” under section 1782(a), these courts gave justice to the plain meaning of the text of the provision; redeemed Professor Smit’s choice to use a broad and neutral term capable of encompassing all adjudicative bodies; and promoted the policy goals intended by Congress when it enacted the statute in 1964. It will be in the hands of the Supreme Court to settle the question and to decide whether to uphold the goal of liberalized judicial assistance to *all* international tribunals as envisioned by the drafters of section 1782.

Oct. 20, 2011); *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 885–86 (N.D. Ill. 2009); *In re Operadora DB Mexico, S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *11 (M.D. Fla. Aug. 4, 2009); *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008), *aff’d sub nom. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 33–34 (5th Cir. 2009)

280. See cases listed *supra* note 279.