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* Candidate for J.D., Washington and Lee University School of Law, May 2011. I would like to thank Michael Gardner, without whom this Note would have never taken shape; Joshua Cannon and Brett Shockley for their countless helpful comments and suggestions during this Note's composition; and my loving and lovely fianceé Jilliann for blessing me with a limitless reserve of support and inspiration—you make me want to be great.

I. Introduction

"As the oft-used and oft-quoted maxim for assessing the obvious goes: 'If it looks like a duck, walks like a duck, and quacks like a duck, it just may be a duck.' The notion behind this quote is an irrefutable adage,"[1] but one that is seemingly lost on many district courts today who struggle to either discern or acknowledge the obvious: Private international arbitral bodies are "tribunals" within the meaning of 28 U.S.C. § 1782(a)[2] because they are "first-instance decisionmaker[s]" that conduct adjudicatory proceedings which lead to a dispositive ruling.[3]

International commercial arbitration is the "accepted way of resolving international business disputes [between private parties]." As stated by one international lawyer, "'[i]n today's world the dispute resolution mechanism will invariably be arbitration.'"[4] Although there are no empirical studies compiling statistics on the frequency of arbitration provisions in

1. *See* Nathan W. Kellum, *If It Looks Like a Duck . . . . Traditional Public Forum Status of Open Areas on Public University Campuses*, 33 HASTINGS CONST. L.Q. 1, 1 (2006) (applying the *Duck Test* to traditional public forum status of open areas on campus).

2. *See* 28 U.S.C. § 1782(a) (2006) ("Assistance to foreign and international tribunals and to litigants before such tribunals.").

3. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (providing the analytical structure to determine whether an international arbitral body constitutes a tribunal within the meaning of § 1782(a)).

4. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 94 (2000) (discussing the practice of international commercial arbitration and how it relates to private parties).

international commercial contracts, "[o]ne estimate is that ninety percent of all international contracts contain arbitration clauses."[5]

Section 1782 of Title 28 of the United States Code grants U.S. district courts the authority to provide discovery assistance to international and foreign tribunals.[6] One scholar provided a succinct overview of § 1782's powerful scope: "This statute boldly authorizes the use of the Federal Rules of Civil Procedure—specifically, the rules governing the discovery of documents and information in U.S. federal courts—to assist a 'foreign tribunal' . . . with securing documents or deposition testimony from persons or entities present . . . in the United States."[7]

Congress first provided judicial assistance to foreign tribunals in 1855 through the use of letters rogatory via diplomatic channels.[8] Over the next 100 years, congressional amendments broadened the ability of U.S. courts to provide judicial assistance by eliminating previous statutory requirements.[9] "In the late 1950s, Congress acknowledged that an increase in international commercial and financial transactions required a 'comprehensive study' of the optimal level of judicial assistance."[10] Congress created the Commission on International Rules of Judicial Procedure (International Rules Commission) to investigate and recommend improvements to U.S. and foreign judicial assistance practices.[11]

In 1964, Congress adopted the International Rules Commission's suggested legislation, which resulted in a complete revision of § 1782. "One of the most notable amendments was that federal district courts could order the production of documents or testimony 'for use in a proceeding in

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5. *Id.*

6. *See* 28 U.S.C. § 1782(a) ("Assistance to foreign and international tribunals and to litigants before such tribunals.").

7. *See* Pedro J. Martinez-Fraga, *The Future of 28 U.S.C. § 1782: The Continued Advance Of American-Style Discovery in International Commercial Arbitration*, 64 U. MIAMI L. REV. 89, 89 (2009) (noting "the most salient, significant, and uniquely American contribution to private procedural international law is embodied in 28 U.S.C. § 1782(a)"); 28 U.S.C. § 1782(a) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . .").

8. *See Intel Corp.*, 542 U.S. at 247 (providing the historical and political context of the 1964 Amendments to § 1782).

9. *See* Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*, 17 AM. REV. INT'L ARB. 45, 47 (2006) (providing the historical and political developments leading up to the 1964 Amendments to § 1782).

10. *Id.*

11. *Id.* (citations omitted).

a foreign or international *tribunal*.'"[12] This quoted language replaced judicial proceedings "pending in any *court* in a foreign country with which the United States is at peace."[13] In its current form, § 1782(a) reads as follows: "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. . . ."[14]

Currently, the district courts are split on the statutory meaning of "tribunal." Specifically, the district courts are split on the issue of whether private international arbitral bodies constitute a tribunal under § 1782.[15] This Note attempts to answer the question of whether private international arbitral bodies constitute an "international tribunal" within the meaning of § 1782. Hans Smit, the "dominant drafter"[16] of the 1964 amendments, takes a clear position, which this Note adopts: "[T]he word 'tribunal,' clearly encompass[es] private arbitral tribunals . . . [T]he choice of that term was deliberate so as to depart from the text used in the legislation that was amended . . . ."[17]

When district courts fail to recognize private international arbitral tribunals as § 1782 "tribunals," it deprives would-be § 1782 petitioners from potential documents that can, at times, be dispositive to the adjudication outcome.[18] This Note argues that depriving parties from

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12. *Id.* (emphasis in original).

13. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 (noting the political efforts made by Congress to expand § 1782 (emphasis added)).

14. 28 U.S.C. § 1782(a) (2006) (emphasis added).

15. *Compare* Norfolk S. Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) (holding that private arbitral tribunals do not fall within the definition the Supreme Court embraced in its *Intel* dictum), *with In re* Application of Roz Trading Ltd., 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006) (holding that when applying *Intel*'s analysis, private international arbitral bodies constitute a tribunal within the statutory construction of § 1782).

16. *In re* Letter of Request from Crown Prosecution Service of United Kingdom, 870 F.2d 686, 689 (D.C. Cir. 1989).

17. *See* Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 155 (1997) (noting that he drafted the 1964 Amendments to § 1782 and that Congress adopted those amendments wholesale and without change).

18. *See* Posting of Lucy Reed, KLUWER ARBITRATION BLOG (Feb. 3, 2009), http://kluwerarbitrationblog.com/blog/2009/02/03/us-discovery-in-aid-of-international-arbitration-recent-developments/ (last visited Nov. 15, 2010) ("Parties involved in foreign litigation have a powerful U.S. discovery tool at their disposal in 28 U.S.C. § 1782(a).") (on file with the Washington and Lee Law Review). It is hard to determine what impact the discovered documents have in an arbitral proceeding because most of these proceedings are not of public record. However, some District Courts have alluded to the dispositive effect

discoverable material is precisely what Congress intended to prevent.[19] Specifically, when Congress amended § 1782 it did so to "improve judicial assistance between the United States and foreign countries."[20] In other words, if there are discoverable materials in the United States that can help a foreign tribunal, then the district court *should* allow discovery.[21]

Admittedly, this discovery device could prove too powerful and cumbersome, diminishing its value to the system.[22] Section 1782 discovery could be used to delay proceedings and increase litigation costs.[23] Such inefficiency, many courts and scholars argue, will force parties to settle.[24] Meaning, if courts interpret § 1782 to include international arbitral bodies, then all of the fundamental policies behind international arbitration agreements would be undermined.[25] These policy concerns are legitimate. But, as this Note argues in Part VIII, the Supreme Court has already provided a sound analytical framework to address these concerns in *Intel Corp. v. Advanced Micro Devices, Inc.*[26]

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§ 1782 has on the preliminary issue whether or not to compel arbitration in the first place. *See, e.g.*, *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 235 (D. Mass. 2008) (discussing the factual background and the petitioner's use of § 1782); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 687 n.135 (noting "[o]ne little-known procedural device that could be especially useful for obtaining *exculpatory* evidence is 28 U.S.C. § 1782, a statute commonly used in international commercial litigation. Detainees could try to invoke Section 1782 to subpoena documents from U.S. personnel who would be otherwise immune." (emphasis added)).

19. *See infra* Part V (discussing the intention and meaning of the 1964 Amendments to § 1782).

20. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) ("Section 1782 had previously referred to 'any judicial proceeding.' The Rules Commission's draft, which Congress adopted, replaced that term with 'a proceeding in a foreign or international tribunal.' Congress understood that change to 'provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'" (citations omitted)).

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

22. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) ("Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process.").

23. *See id.* ("Arbitration is intended as a speedy, economical, and effective means of dispute resolution.").

24. *See id.* ("Resort to § 1782 in the teeth of such agreements suggests a party's attempt to manipulate United States court processes for tactical advantage.").

25. *See id.* ("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.").

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

Additionally, many scholars and courts argue that although private international arbitral bodies have all the distinctive characteristics of an adjudicatory tribunal, they are still not a "tribunal" within the meaning of § 1782.[27] Despite the Supreme Court's recognition that § 1782 is to be interpreted expansively, some district courts have taken a restrictive approach and conclude that Congress's 1964 amendments to § 1782 were meant to include only public international tribunals.[28] In reaching this conclusion, district courts, and supporting scholars, base their arguments on the policy rationales discussed above (litigation expenses, costs, delay, and settlement).[29] In other words, their arguments are contingent *primarily* on the policy rationales behind international arbitration agreements.[30]

This Note argues that the district courts' reliance on policy as *the* decisive factor in determining whether a private international arbitral body constitutes a § 1782 "tribunal" is misguided and misplaced.[31] Relevant policy concerns should be considered when the district court is determining whether or not to exercise *its discretion*, but not in determining what constitutes a tribunal.[32] Additionally, reliance on policy concerns in determining what constitutes a tribunal makes very little sense in light of the analytical framework provided by the Court in *Intel*,[33] the legislative

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(holding that the DG-Competition is a tribunal under § 1782 because the tribunal is a "first-instance decisionmaker[]" that conducts proceedings which lead to a dispositive ruling). The *Intel* Court also provided a discretionary guidance test, which provides several factors a district court should consider when exercising its discretion. *Id.* at 264.

27. *See* Norfolk S. Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (concluding that "[w]hile the private arbitral tribunal at issue here likely falls within the scope of 'all bodies exercising adjudicatory powers'" it still is not a tribunal under § 1782 because of the purpose of international arbitration agreements).

28. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 239–40 (D. Mass. 2008) ("[T]he Court in *Intel* emphasized Congress's intent to expand the applicable scope of § 1782(a). The Court noted Congress's use of the broad term 'tribunal,' and it favorably quoted Professor Smit's definition of the term, which expressly included 'arbitral tribunals.'").

29. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) ("Arbitration is intended as a speedy, economical, and effective means of dispute resolution.").

30. *See infra* Part IV (noting that the courts who have held private international arbitral bodies do not constitute a 'tribunal' under § 1782 give dispositive weight to policy although loosely referencing the statutory history of § 1782 and the *Intel* opinion).

31. *See infra* Part VII (providing a succinct overview of the policy rationales and noting that these rationales should be considered when the court exercises their discretion).

32. *See infra* Part VIII (proposing a comprehensive solution that will provide a sound judicial analytical framework when dealing with § 1782 petitions).

33. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (holding that the DG-Competition is a tribunal under § 1782 because the tribunal is a "first-

history of the 1964 amendments to § 1782,[34] and the "dominant drafter" Hans Smit's interpretation of § 1782.[35] All three sources include private international arbitral bodies within the scope of § 1782.[36]

The discussion below proceeds as follows: Part II of this Note provides the interpretive framework for § 1782 petitions before *Intel* was decided. Specifically, this Part discusses two Federal Court of Appeals Circuit Court decisions which held that private international tribunals did not constitute a "tribunal" under § 1782.[37] Part III provides a succinct overview of the Supreme Court's decision in *Intel*. Particular attention is given to the Court's conclusion on why the disputed arbitral body constituted a tribunal, and the discretionary guidance test the Court established.[38] Part IV provides the jurisprudential split that has arisen among district courts in navigating § 1782 post-*Intel*. Part V describes Han Smit's role in drafting the 1964 Congressional amendments and how Smit's scholarship influenced the Court's decision in *Intel*. Also, this Part argues that both the legislative history and Hans Smit's scholarship contemplate private international arbitral tribunals as being within the scope of § 1782.[39] Part VI provides the legislative history behind the 1964 amendments, emphasizing the wholesale adoption of Hans Smit's work by Congress. Part VII provides a concise overview of the policies behind international

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instance decisionmaker" that conducts proceedings which lead to a dispositive ruling).

34. *See infra* Part VI (noting that the 1964 Amendments are meant to be interpreted expansively and inclusively).

35. *See* Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965) ("The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."); *see also infra* Part VIII (proposing a workable definition of what constitutes a tribunal under § 1782).

36. *See infra* Part VI (discussing the legislative history and Professor Hans Smit's law review article).

37. *See* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 190 (2d Cir. 1999) (holding § 1782(a) only "cover[s] governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" and not private arbitral tribunals); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (holding "the term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations").

38. *See Intel Corp.*, 542 U.S. at 258 (holding that the DG-Competition is a tribunal under § 1782 because the tribunal is a "first-instance decisionmaker" that conducts proceedings which lead to a dispositive ruling).

39. *See* Smit, *supra* note 35, at 1026 (discussing the interpretive framework of § 1782 and his understanding of what constitutes a tribunal).

arbitration provisions and argues that district courts' reliance on policy is misguided and misplaced when concluding private international arbitral tribunals are not within the scope of § 1782.

Finally, to resolve the district court split, Part VIII proposes a comprehensive solution that provides a sound judicial framework for analyzing § 1782 petitions. The starting point to this solution is to provide a workable definition of what constitutes a "tribunal." This Note argues that the analytical framework in *Intel* provides a two-prong test to determine what constitutes a tribunal: (1) whether the international arbitral bodies are "first-instance decisionmaker[s];" and (2) whether the arbitral body conducts adjudicatory proceedings that lead to a dispositive ruling.[40] Next, Part VIII provides a two-step judicial framework to determine whether or not to grant a § 1782 petition. First, district courts should ensure basic § 1782 statutory required elements are satisfied.[41] Second, district courts should apply *Intel*'s discretionary guidance test when exercising their discretion in deciding § 1782 petitions.[42] This step is the appropriate place to advance the policy rationales underlying international arbitration agreements. Lastly, Part VIII proposes a statutory amendment to § 1782 which would require district courts to make specific findings when exercising their discretion.

*II. Pre-*Intel*: Section 1782(a)'s Interpretive Framework*

The United States Courts of Appeals for the Second and Fifth Circuits were the first appellate courts to address the scope of § 1782.[43] Particularly, both courts were asked whether or not, under § 1782(a), "foreign and international tribunals" included private international commercial arbitral

40. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (providing the two prongs this Note adopts as the test to determine what constitutes a tribunal under § 1782).

41. *See* Esses v. Hanania, 101 F.3d 873, 875 (2d Cir. 1996) (explaining the elements as "(1) that the person from whom discovery is sought reside (or be found) in the district . . . to which the application is made, (2) . . . discovery be for use in a proceeding before a foreign tribunal, and (3) . . . be made by a foreign or international tribunal or 'any interested person'").

42. *See Intel Corp.*, 542 U.S. at 264 (noting "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so" and providing factors that should bear consideration in ruling on a § 1782(a) request).

43. *See* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) (discussing the scope of § 1782); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (same).

bodies.[44] Both courts ruled that § 1782 does not include private international arbitral bodies.[45] These opinions are critical because their precedential value is a source of the current split among the district courts.[46] Specifically, district courts are split on whether or not *Intel* overruled the Second and Fifth Circuit decisions.[47] Part VIII of this Note argues that *Intel* overruled both Circuits' decisions.[48]

In *National Broadcasting Co. v. Bear Stearns & Co., Inc.*,[49] TV Azteca S.A. de C.V. (Azteca) and National Broadcasting Company (NBC) entered into a contract which contained an arbitration provision.[50] Under the terms of the provision, any dispute between NBC and Azteca would be arbitrated in Mexico by the International Chamber of Commerce (ICC) under ICC rules and Mexican law.[51] After Azteca initiated arbitration against NBC for failure to perform under the contract, NBC applied to the Southern District of New York for authorization under § 1782 to serve document subpoenas on third-party financial institutions that had assisted Azteca.[52] The court granted the request, and Azteca and the financial institutions subsequently moved to quash the subpoenas.[53] The district court's decision noted that the

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44. *See* 28 U.S.C. § 1782(a) (2006) ("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 . . . .").

45. *See Nat'l Broad. Co., Inc.*, 165 F.3d at 190 (holding § 1782(a) only "cover[s] governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" and not private arbitral tribunals); *Republic of Kazakhstan*, 168 F.3d at 883 (5th Cir. 1999) ("[T]he term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations.").

46. *See infra* Part IV (discussing the current district court split and the precedential treatment of *NBC* and *Republic of Kazakhstan*).

47. *Compare* Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008) (noting that *Republic of Kazakhstan v. Biedermann Int'l* is still good law that the court is bound to follow), *with In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("I do not find the reasoning in *National Broadcasting Co.* and *Republic of Kazakhstan* to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*.").

48. *See infra* Part VIII (proposing a comprehensive solution which argues that *National Broadcasting Co.* and *Republic of Kazakhstan* are overruled by *Intel*).

49. *See* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 190 (2d Cir. 1999) (holding § 1782(a) only "cover[s] governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" and not private arbitral tribunals).

50. *See id.* at 186 (discussing the factual background).

51. *Id.*

52. *Id.*

53. *Id.*

issue of whether or not a private commercial arbitration tribunal, such as the ICC, constitutes a "tribunal" under § 1782 "emerged only recently" despite the fact that "the Statute was adopted in 1964."[54] The district court held that § 1782 did not apply to private commercial arbitration and granted the motion to quash.[55]

On appeal, the Second Circuit affirmed, holding that "Congress did not intend for [§ 1782] to apply to an arbitral body established by private parties."[56] According to the congressional reports, the court noted "the word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts."[57] Looking at the context of these reports, however, the court concluded that the authors were referring only to governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state.[58] The court further noted 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."[59] Moreover, "[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 . . . ."[60] The court's narrow reading of the legislative history is extremely problematic. As Parts V and VI of this Note argue, the 1964 amendments were design to expand the scope of § 1782.[61]

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54. *In re* Application of Nat'l Broad. Co., Inc., No. M-77 (RWS), 1998 WL 19994, at *1 (S.D.N.Y. Jan. 21, 1998).

55. *See id.* at *6 ("[T]here is no evidence in the legislative history, including the congressional committee reports, the contemporaneous articles written by the director of the Project assisting the legislation drafting commission, or the statutes preceding the current version of the Statute to suggest that private commercial arbitrations were even contemplated by Congress.").

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

57. *See id.* at 189 (discussing the legislative history of the 1964 Amendments to § 1782).

58. *Id.*

59. *Id.*

60. *Id.* at 190.

61. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 239–40 (D. Mass. 2008) ("[T]he Court in *Intel* emphasized Congress's intent to expand the applicable scope of § 1782(a). The Court noted Congress's use of the broad term 'tribunal,' and it favorably quoted Professor Smit's definition of the term, which expressly included 'arbitral tribunals.'").

The court further determined, because of legislative silence, that policy cuts against including private international arbitral bodies within the scope of § 1782.[62] The court stated that the "popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness-characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure."[63] The court's policy based rationale is misplaced in light of *Intel*'s analytical framework.[64] Policy considerations are legitimate concerns that all courts should consider *when exercising their discretion*, but not when determining what constitutes a tribunal.[65]

The Court of Appeals for the Fifth Circuit reached a similar decision in *Republic of Kazakhstan v. Biedermann International*.[66] Kazakhstan petitioned the Southern District of Texas, pursuant to § 1782, to order a nonparty to submit to a deposition and produce documents for use in an arbitration between Kazakhstan and Biedermann International.[67] The arbitration was before the Arbitration Institute of the Stockholm Chamber of Commerce.[68] The district court granted the request, holding that § 1782 applies to private international arbitration.[69]

On appeal, the Fifth Circuit reversed and held that "the term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations."[70] The court concluded that "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration."[71] Furthermore, "[r]eferences

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62. *See* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 191 (2d Cir. 1999) ("In sum, policy considerations of some magnitude reinforce our conclusion . . . .").

63. *Id.* at 190–91.

64. *See infra* Part III (providing a succinct overview of the analytical framework provided by the *Intel* Court).

65. *See infra* Part VIII (proposing a comprehensive solution that will provide a sound judicial analytical framework when dealing with § 1782 petitions).

66. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (concluding that § 1782 "was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration").

67. *See id.* at 881 (discussing the factual background).

68. *Id.*

69. *See In re* Republic of Kazakhstan, 33 F. Supp. 2d 567, 568 (S.D. Tex. 1998), *overruled by Republic of Kazakhstan*, 168 F.3d at 883 ("*Biedermann* says that the statute's term 'foreign or international tribunal' does not include commercial arbitration. The statute covers commercial arbitration by its plain meaning, informed by common sense.").

70. *Republic of Kazakhstan*, 168 F.3d at 883.

71. *See id.* at 882 (providing a detailed discussion of the legislative history behind the

in the United States Code to 'arbitral tribunals' almost uniformly concern an adjunct of a foreign government or international agency."[72] In other words, "foreign and international tribunals" only include "international government-sanctioned tribunals."[73]

In an attempt to bolster their loosely based statutory argument, the court gave an exposition on the policies behind international arbitration agreements.[74] The court stated that "[e]mpowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution."[75] The court further noted that "arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration . . . . Resort to § 1782 . . . suggests a party's attempt to manipulate United States court processes for tactical advantage."[76] Thus, the court concluded that § 1782 was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration.[77] This argument made very little sense then[78] and makes even less sense now in light of *Intel*'s analytical framework.[79] As Parts VII and VIII argue, policy considerations are legitimate concerns when *the court is exercising their discretion* to extend discovery, but not in determining what constitutes a tribunal under § 1782.

1964 Amendments to § 1782).

72. *Id.*

73. *See id.* ("But the new version of § 1782 was drafted to meld its predecessor with other statutes which facilitated discovery for international government-sanctioned tribunals.").

74. *See id.* (providing the policy rationales of international commercial arbitration).

75. *Id.* at 883.

76. *Id.*

77. *Id.*

78. *See* Smit, *supra* note 35, at 1026 (discussing how Congress intended to expand the scope of § 1782).

79. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (providing an analytical framework to determine what constitutes a tribunal and providing factors which should be considered when the district court is exercising its discretion under § 1782).

III. Intel Corp. v. Advanced Micro Devices, Inc.: *The U.S. Supreme Court Weighs In*

In *Intel Corp. v. Advanced Micro Devices, Inc.*,[80] the Supreme Court issued its first opinion interpreting § 1782.[81] In the underlying dispute, Advanced Micro Devices, Inc. (ADM) filed an antitrust complaint against Intel Corporation (Intel) with the Directorate-General for Competition of the Commission of the European Communities (DG-Competition).[82] DG-Competition is the European Union's "primary antitrust law enforcer."[83] AMD asked the DG-Competition to seek discovery of documents that Intel had produced in litigation against Intergraph Corporation (Intergraph) in the Northern District of Alabama.[84] The DG-Competition declined AMD's request.[85] After the DG-Competition declined AMD's request, AMD petitioned the District Court for the Northern District of California pursuant to § 1782 for an order directing Intel to produce documents discovered in the Intergraph litigation for use in connection with the complaint it had filed with the DG-Competition.[86] The district court denied AMD's § 1782 request on the ground that DG-Competition was not an adjudicative body.[87]

On appeal, the Court of Appeals for the Ninth Circuit reversed and remanded for a decision on the merits.[88] The Ninth Circuit held that, because the decisions of the DG-Competition can be appealed to the Court of First Instance and then the European Court of Justice, "the proceeding for which discovery is sought is, at minimum, one leading to quasi judicial

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80. *See id.* (holding that the DG-Competition is a tribunal under § 1782).

81. *See id.* at 253 (noting that the Court granted certiorari to determine several issues involving the scope of § 1782).

82. *See id.* at 246 (discussing the factual background).

83. *Id.* at 250.

84. *Id.* at 251.

85. *Id.*

86. *Id.*

87. *See* Advanced Micro Devices, Inc. v. Intel Corp., No. C-01-7033 MISC WAI, 2002 WL 1339088, at *1 (N.D. Cal. Jan. 7, 2002), *overruled by* Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002) ("A 'proceeding' within the meaning of § 1782 means one in which an 'adjudicative function is exercised.'").

88. *See* Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002) ("The district court's determination that the proceeding for which AMD seeks discovery does not qualify under 28 U.S.C. § 1782 is reversed.").

proceedings."[89] The Supreme Court granted certiorari to resolve several issues under § 1782.[90]

First, the Court was asked to determine whether AMD constituted an "interested person" under § 1782.[91] Intel argued that the "catalog of 'interested persons' authorized to apply for judicial assistance under § 1782(a) includes only 'litigants, foreign sovereigns, and the designated agents of those sovereigns,' and excludes AMD, a mere complainant before the [DG-Competition]."[92] The Court, quoting an article by Hans Smit, rejected this argument and held "'any interested person' is 'intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance.'"[93] In other words, an interested person is any person with a reasonable interest in obtaining judicial assistance.[94] Meaning, any person with a reasonable interest in obtaining judicial assistance can request § 1782 discovery.[95]

Next, the Court was asked to determine whether a proceeding before a foreign tribunal needs to be pending or at least imminent for an applicant to invoke § 1782 successfully.[96] Intel argued that because AMD's complaint had not yet progressed beyond the investigative stage before the DG-Competition, there was no pending or imminent adjudicative action.[97] The Court, again citing Hans Smit's article, held that "§ 1782(a) requires only that a dispositive ruling . . . be within reasonable contemplation."[98] The Court reasoned that "[i]n 1964, when Congress eliminated the requirement that a proceeding be 'judicial,' Congress also deleted the requirement that a

89. *See id.* at 665 ("Because we conclude that the proceeding for which the discovery at issue is sought meets the statutory definition, we reverse the district court.").

90. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 253 (2004) (noting that the Court granted certiorari in view of the "division among the Circuits").

91. *See id.* ("[D]oes § 1782(a) make discovery available to complainants, such as AMD, who do not have the status of private 'litigants' and are not sovereign agents?").

92. *Id.* at 256.

93. *Id.* at 257.

94. *Id.*

95. *Id.*

96. *Id.* at 253.

97. *See id.* at 258 ("Intel also urges that AMD's complaint has not progressed beyond the investigative stage; therefore, no adjudicative action is currently or even imminently on the Commission's agenda.").

98. *Id.* at 259.

proceeding be 'pending.'"[99] Thus, the Court concluded, it is not necessary for the adjudicative proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.[100]

Also, the Court was asked to determine whether § 1782(a) contains a foreign-discoverability requirement[101]—in other words, whether the evidence sought under §1782(a) must be of a sort that would be discoverable if it were located in the foreign jurisdiction.[102] Intel advanced two policy reasons in support of a foreign-discoverability limitation on § 1782(a): International comity and parity.[103] Intel argued, on international comity grounds, that foreign governments will find American-style discovery offensive.[104] The Court, citing again Hans Smit's article, rejected this argument and noted "[t]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use."[105]

Additionally, Intel argued that if the Court granted § 1782 discovery, then parity would be destroyed among the adversaries.[106] The Court, again citing Hans Smit's article, also rejected this argument and noted that "[w]hen information is sought by an 'interested person,' a *district court could condition* relief upon that person's reciprocal exchange of information."[107] Furthermore, the Court concluded, "[c]oncerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule."[108]

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99. *Id.* at 258.

100. *Id.* at 259.

101. *See id.* at 253 (noting the "division among the Circuits on the question whether § 1782(a) contains a foreign-discoverability requirement").

102. *See id.* at 259–60 ("Does § 1782(a) categorically bar a district court from ordering production of documents when the foreign tribunal or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction?").

103. *See id.* at 261 (noting Intel's position that "Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation" (citations omitted)).

104. *See id.* ("Intel raises two policy concerns in support of a foreign-discoverability limitation on § 1782(a) aid-avoiding offense to foreign governments, and maintaining parity between litigants.").

105. *Id.*

106. *See id.* at 262 (noting that Intel's second policy argument is predicated on parity concerns).

107. *Id.* (emphasis added).

108. *Id.*

Therefore, the Court held that "[w]hile comity and parity concerns may be important as touchstones for a *district court's exercise of discretion* in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a)."[109]

Finally, the Court provided a discretionary guidance test to be used by district courts when exercising their discretion in deciding § 1782 petitions by enumerating several factors that they should consider.[110] These factors provide the analytical framework for the second prong of the comprehensive framework proposed by this Note in Part VIII.[111] It is important to note that the Court cited Hans Smit's article and the 1964 Senate Report to support these factors.[112] Parts V and VIII argue that the *Intel* Court, Hans Smit, and the legislative history all stand for the proposition that policy considerations should be used *only* when the district court is exercising its discretion and not when considering what constitutes a tribunal.[113]

The first factor courts should consider is whether discovery is being sought from a party to the proceedings.[114] The need for judicial assistance is "not as apparent" where discovery is sought from a party to the foreign proceeding, since the tribunal itself can order parties to produce evidence.[115] Discovery sought from nonparties, however, may only be obtainable pursuant to § 1782 because the nonparty is out of the jurisdiction of the foreign tribunal.[116] Second, the district court may take into account the nature of the foreign tribunal, the character of the proceedings underway

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109. *Id.* at 261 (emphasis added).

110. *See id.* at 264 ("As earlier emphasized, a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." (citations omitted)).

111. *See infra* Part VIII (proposing a comprehensive solution that will provide a sound judicial analytical framework when dealing with § 1782 petitions).

112. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004) (relying on Professor Hans Smit's law review article to guide the Court's analysis).

113. *See infra* Part VIII (arguing policy should be considered under prong two of the proposed solution).

114. *See Intel Corp.*, 542 U.S. at 264 ("First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.").

115. *See id.* ("A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.").

116. *See id.* ("[N]onparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.").

abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.[117] For example, a court could consider whether the § 1782 petition constitutes an attempt to make an end-run around "foreign proof-gathering restrictions or other policies of a foreign country or the United States."[118] Third, the district court should consider whether the request is "unduly intrusive or burdensome," and whether such request should be narrowed.[119]

While the Court was not asked to decide whether a private arbitration tribunal constitutes a "tribunal" under the statute, its decision sheds light on that issue.[120] The Court had to determine whether AMD's application for § 1782 discovery was "for use in a foreign or international tribunal."[121] The Court noted that "when Congress established the Commission on International Rules of Judicial Procedure in 1958," it instructed the Rules Commission to "recommend procedural revisions 'for the rendering of assistance to foreign courts *and quasi-judicial agencies*.'"[122] Before the 1964 amendments, § 1782 had previously referred to "any judicial proceeding."[123] The Rules Commission's draft, which Congress subsequently adopted in 1964, replaced the term "any judicial proceeding" with "a proceeding in a foreign or international tribunal."[124] The Court concluded that "Congress understood that change to 'provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'"[125] In other words, "Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'"[126]

Furthermore, the Court emphasized Congress's intent to expand the applicable scope of § 1782 and favorably quoted Hans Smit's definition of

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117. *Id.*

118. *Id.* at 265.

119. *See id.* ("Also, unduly intrusive or burdensome requests may be rejected or trimmed.").

120. *See id.* at 258 (providing a detailed discussion of the legislative history of § 1782, and using Hans Smit's article to structure the Court's analysis).

121. *See id.* at 246 ("This case concerns the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal.").

122. *Id.* at 257–58 (emphasis in original).

123. *Id.* at 258.

124. *Id.*

125. *Id.*

126. *Id.* at 249.

the statutory term tribunal.[127] "[T]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[128] After adopting Hans Smit's definition, the Court determined that it "ha[d] no warrant to exclude the [DG-Competition], to the extent it acts as a first-instance decisionmaker, from § 1782(a)'s ambit."[129] Moreover, the DG-Competition would conduct proceedings which lead to a dispositive ruling.[130] Thus, the DG-Competition is a tribunal under the Supreme Court's interpretation of § 1782.[131]

*IV. Post-*Intel*: The Split Occurs in Navigating § 1782*

Despite *Intel*, the question of whether international arbitral tribunals constitute "foreign tribunals" has continued to generate conflict among the district courts.[132] Some district courts have held that *NBC* and *Biedermann* remain good law, unaffected by the Supreme Court's dicta.[133] Conversely, other district courts have ordered discovery in private international commercial arbitration proceedings citing *Intel* as authority.[134] Currently, no Federal Court of Appeals has ruled on this issue since *Intel*.[135] This Part

127. *See id.* at 258 (noting the expansiveness of the statutory scope of § 1782, which includes arbitral bodies).

128. *Id.*

129. *Id.*

130. *See id.* at 255 ("The statute authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling . . . .").

131. *See id.* at 258 ("[I]n addition to affording assistance in cases before the European Court of Justice, § 1782, as revised in 1964, 'permits the rendition of proper aid in proceedings before the European Commission in which the Commission exercises quasi-judicial powers.'").

132. *Compare In re* Application of Roz Trading Ltd., 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006) (holding that a private arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber was a § 1782 tribunal), *with In re* Application of Oxus Gold PLC, No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006) (noting that international arbitral panels created exclusively by private parties are not included in Section 1782(a)'s meaning).

133. *See* Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008) (noting that *Republic of Kazakhstan v. Biedermann Int'l* is still good law and that the court is bound to follow).

134. *See, e.g.*, *In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (holding that a private Israeli arbitral body was a § 1782 tribunal).

135. The Seventh Circuit is currently reviewing the district court's decision in *Norfolk Southern Corp. v. Ace Bermuda Ltd.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).

is a review of the relevant post-*Intel* cases that attempt to navigate the application of § 1782 to international arbitration.

A. District Court Decisions: A Private International Arbitral Body Is Not a § 1782 Tribunal

In *In re Application of Oxus Gold PLC*,[136] the District Court for the District of New Jersey noted that "international arbitral panels created exclusively by private parties . . . are not included in the statute's meaning."[137] In *Oxus Gold*, the dispute involved a joint venture between a subsidiary of Oxus Gold PLC (Oxus) and a company owned by the Kyrgyz government that was created in order to develop and exploit a gold deposit in the Kyrgyz Republic.[138] Oxus initiated arbitration against the Kyrgyz Republic under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) pursuant to the United Kingdom-Kyrgyz Bilateral Investment Treaty (the BIT) claiming that the government violated the BIT.[139] Oxus applied to the District Court for the District of New Jersey for an order compelling a corporate finance company, SIG Overseas Ltd., and its managing director, to provide discovery in aid of arbitration.[140]

The district court granted Oxus's discovery request.[141] In examining whether or not private arbitration tribunals are within the scope of § 1782, the court relied primarily on the Second Circuit's *NBC* decision.[142] Though the *Oxus* court referred to *Intel*, it did so only to evaluate the "interested person" requirement for § 1782.[143] Therefore, the court never analyzed *Intel* in the context of what constitutes an "international tribunal."[144]

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136. *See In re* Application of Oxus Gold PLC, No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006) (holding that the international proceeding in the present case is included as a foreign or international tribunal and noting that a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, and purely private arbitrations established by private contract).

137. *Id.*

138. *See id.* at *1 (discussing the factual background).

139. *Id.*

140. *Id.*

141. *Id.* at *10.

142. *See id.* at *6 (noting the Second Circuit's *NBC* opinion directly held that private arbitral tribunals are beyond the scope of § 1782).

143. *Id.*

144. *See id.* (applying the Second Circuit's *NBC* analytical framework to the issue of whether or not a private arbitral tribunal is within the scope of § 1782).

Instead, the court concluded that *NBC* is still good law.[145] The court noted, however, that "[t]he arbitration is not the result of a contract or agreement between private parties as in *National Broadcasting*. The proceedings in issue have been authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the Bilateral Investment Treaty."[146] Thus, "a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, a body operating under the United Nations and established by its member states, and purely private arbitrations established by private contract."[147] Accordingly, the court held that the international proceeding in the present case is included as a "foreign or international tribunal."[148]

Similarly, in *Norfolk Southern Corp. v. Ace Bermuda Ltd.*,[149] the District Court for the Northern District of Illinois held that private arbitral tribunals "do[] not fall within the definition the Supreme Court embraced in its *Intel* dictum."[150] In this case, there was an ongoing arbitration dispute in London between Norfolk Southern Corporation (Norfolk) and Ace Bermuda LTD. (Ace).[151] The underlying dispute involved insurance coverage for losses incurred in connection with a train derailment in South Carolina.[152] Norfolk filed a motion under § 1782, asking the court to order the deposition of Ace's former counsel.[153]

The district court denied Norfolk's discovery request.[154] The court cited approvingly *NBC* and *Biedermann*, and interpreted "the *Intel* Court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations."[155] Furthermore, the court looked

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145. *Id.*

146. *Id.* (citations omitted).

147. Norfolk Southern Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).

148. *In re* Application of Oxus Gold PLC, No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006).

149. *See Norfolk Southern Corp.*, 626 F. Supp. 2d at 886 (holding that private arbitral tribunals do not fall within the definition the Supreme Court embraced in its *Intel* dictum).

150. *Id.*

151. *See id.* at 882 (discussing the factual background).

152. *Id.*

153. *Id.*

154. *See id.* at 886 ("I generally agree with the conclusion of the Second and Fifth Circuits that the legislative history of § 1782 does not support the inclusion of private arbitral tribunals within the scope of § 1782(a), I am without authority to order the relief movants seek. Accordingly, their motion is denied.").

155. *Id.* at 885.

at the legislative history and concluded that "although the *Intel* Court acknowledged the ways in which Congress has progressively broadened the scope of § 1782, it stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statute."[156] Moreover, "the ellipses in the Court's citation to Smit . . . suggest that the Court was not willing to embrace the full breadth of Smit's definition."[157] Thus, the court held private arbitral bodies are outside the scope of § 1782.[158]

Additionally, in *Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp.*,[159] the District Court for the Southern District of Texas concluded "[t]he Supreme Court in *Intel* shed no light on the issue" of whether § 1782(a) discovery was available to parties to private foreign arbitrations, and held "under the controlling precedent of *Biedermann Int'l*, the Court has no power to grant CEL's application for discovery."[160] This case involved an ongoing arbitration between Nejapa Power Company, L.L.C. and Comisión Ejecutiva, Hidroeléctrica del Río Lempa (CEL) in Geneva, Switzerland.[161] CEL filed an application with the court requesting discovery from El Paso Corporation (El Paso), a third-party.[162] The court initially granted the discovery order.[163] El Paso filed a motion for reconsideration arguing that the court lacked authority to consider CEL's application because § 1782 is unavailable to litigants in a private international arbitration.[164]

The court agreed with El Paso and denied CEL's discovery request.[165] The court determined that "the Supreme Court has not addressed the

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156. *Id.*

157. *Id.*

158. *See id.* at 886 (noting that Professor Hans Smit's statutory definition of § 1782 is that "the term 'tribunal' embraces *all bodies exercising adjudicatory powers*, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts" (emphasis in original)).

159. *See* Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008) (holding that *Intel* shed no light on the issue of whether § 1782(a) discovery was available to parties to private foreign arbitrations and under the controlling precedent of *Biedermann Int'l*, the Court has no power to grant § 1782 discovery).

160. *Id.* at 485.

161. *See id.* at 482 (discussing the factual background).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 487.

application of § 1782 to arbitral tribunals, not even in *dicta*."[166] Moreover, "*Intel* never mentions arbitral tribunals in the text of the opinion itself. . . . Consequent with *Intel*'s line of direction, it comes as no surprise that arbitral tribunals make not so much as a cameo appearance, but more that of an 'extra' in *Intel*'s consideration of the scope of § 1782 tribunals."[167] Also, the court noted that the legislative history and the Court's use of Professor Hans Smit's article stands only for the proposition that § 1782 applies to quasi-judicial agencies and administrative courts.[168] Furthermore, the court noted, *Intel* does not endorse Professor Smit's expansive view to include private arbitral tribunals within the scope of § 1782.[169] Therefore, the court concluded it was bound by the Fifth Circuit's holding in *Biedermann*.[170]

B. District Court Decisions: A Private International Arbitral Body Is a § 1782 Tribunal

In contrast, a number of district courts have relied upon the *Intel* decision to support their conclusions that private international arbitral bodies qualify as "tribunals" for purposes of § 1782. In *In re Application of Roz Trading Ltd.*,[171] the District Court for the Northern District of Georgia, applying the *Intel* analysis, held that the International Arbitral Centre of the Austrian Federal Economic Chamber (Centre) constituted a "tribunal" within the meaning of § 1782.[172] In this case, there was an ongoing arbitration between Roz Trading and Coca-Cola Export Company, a Coca-Cola subsidiary.[173] The dispute involved a joint venture agreement entered into by Roz Trading, the government of Uzbekistan, and the Coca-Cola subsidiary.[174] Roz Trading sought documents from the Coca-Cola

166. *Id.* at 485 (emphasis in original).

167. *Id.*

168. *Id.* at 486.

169. *See id.* ("Smit does not speak for the Supreme Court. Until, and, if, the Supreme Court itself adopts Hans Smit's statements as its own within the text of the opinion itself, Hans Smit's opinions on arbitral tribunals has no more weight and authority than any other article.").

170. *Id.*

171. *See In re* Application of Roz Trading Ltd., 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006) (holding that when applying *Intel*'s analysis, private international arbitral bodies constitute a tribunal within the statutory construction of § 1782).

172. *Id.*

173. *See id.* at 1223 (discussing the factual background).

174. *Id.*

Company for use in the arbitration.[175] Objecting to the discovery request, Coca-Cola argued that the Centre is not a "tribunal" for purposes of § 1782 because "the Centre is a private institution whose proceedings are voluntary and arbitral."[176]

The district court rejected Coca-Cola's argument and granted the discovery request.[177] The court interpreted the *Intel* decision as providing "sufficient guidance . . . to determine that arbitral panels . . . are 'tribunals' within the statute's scope."[178] Furthermore, "[s]tatutory construction of § 1782(a) confirms this conclusion."[179] Also, the court rejected *Biedermann* and *NBC* as good law because "[t]he reasoning in *Intel* demonstrates the structural and analytical flaws in the Second and Fifth Circuits' interpretations of § 1782(a)."[180] Moreover, "[t]he Supreme Court's interpretation and application of the legislative history contradicts the interpretations and applications of the Second and Fifth Circuits, which incorrectly concluded that Congress intended to limit the availability of judicial assistance under § 1782 to governmental—that is criminal, civil, or administrative—proceedings."[181] Instead, "Congress expressly struck the phrase 'judicial proceeding,' and replaced it with 'international or foreign tribunal.' The clear import of the change is to broaden the scope of the statute to include non-judicial proceedings."[182] Thus, private arbitral tribunals are within the scope of § 1782.[183]

Similarly, in *In re Application of Babcock Borsig AG*,[184] the District Court for the District of Massachusetts, following *Intel*'s analytical framework, held that the International Chamber of Commerce International Court of Arbitration (ICC) is a "tribunal" within the meaning of § 1782(a). In this case, Babcock Borsig AG (BBAG), a German corporation, moved to compel Babcock Power Inc. (BPI), a corporation headquartered in

175. *Id.*

176. *Id.* at 1224.

177. *See id.* at 1224–25 ("A finding that an arbitral panel of the Centre is a 'tribunal' within the meaning of § 1782(a) is consistent with the reasoning in *Intel*.").

178. *Id.* at 1224

179. *Id.* at 1225.

180. *Id.* at 1226.

181. *Id.* at 1227.

182. *Id.* at 1226 (quoting 23 U.S.C. § 1782(a) (2006)).

183. *See id.* at 1228 (concluding *Intel* only stands for the proposition that private international arbitral bodies constitute a tribunal under § 1782).

184. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("For these reasons, I conclude that the ICC is a 'tribunal' within the meaning of § 1782(a), and that all of the required elements of the statute have been met.").

Massachusetts, to produce documents and give testimony pursuant to § 1782(a) for use in a potential arbitration between BBAG and Babcock-Hitachi K.K. (Hitachi), a Japanese corporation, in the ICC.[185] The dispute involved an arbitration provision in a contract between BBAG and Hitachi for the sale of BBAG's business assets.[186] BPI and Hitachi both objected to BBAG's § 1782 motion, claiming that § 1782(a) does not authorize discovery orders for proceedings before private arbitral bodies such as the ICC.[187]

The district court rejected this argument.[188] The court interpreted *Intel* as providing "meaningful insight regarding the Supreme Court's view of arbitral bodies in the context of § 1782(a)."[189] The court noted that although "*Intel* did not directly address whether private arbitral bodies like the ICC qualify as 'tribunals' under § 1782(a), the Court's reasoning and dicta strongly indicate that these types of adjudicative bodies also fall within the statute."[190] Moreover, Hans Smit, the "dominant drafter of, and commentator on, the 1964 revision of . . . § 1782," concluded that private arbitral bodies are included within the statutory term "tribunal."[191] Furthermore, private arbitral bodies are "first-instance decisionmaker[s]" that conduct proceedings which lead to a dispositive ruling.[192] In other words, "if it looks like a duck, walks like a duck, and quacks like a duck, then it's a duck."[193] Thus, the court concluded, the ICC is a tribunal under § 1782.[194]

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185. *See id.* at 235 (discussing the factual background).

186. *Id.*

187. *See id.* at 239 ("Hitachi and BPI rely primarily on pre-*Intel* cases that concluded that private arbitral bodies were not 'tribunals' under § 1782(a).").

188. *See id.* ("I do not find the reasoning in *National Broadcasting Co.* and *Republic of Kazakhstan* to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*.").

189. *Id.*

190. *Id.*

191. *Id.* n.4.

192. *See id.* at 238 ("The ICC, like the European Commission, is a 'first-instance decisionmaker' that conducts proceedings which lead to a dispositive ruling.").

193. *See* Lake v. Neal, 585 F.3d 1059, 1059 (7th Cir. 2009) ("The *Duck Test* holds that if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck." (emphasis in original)).

194. *See In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("I conclude that the ICC is a 'tribunal' within the meaning of § 1782(a), and that all of the required elements of the statute have been met.").

Also, the court provided a useful example on how to apply *Intel*'s discretionary test. After reaching the conclusion that the ICC is a tribunal, the court applied *Intel*'s discretionary test to determine whether or not to grant § 1782.[195] The court noted that § 1782 does not require a district court "to grant a § 1782(a) discovery application simply because it has the authority to do so."[196] In exercising discretion, the court argued, it should do so with great care and restraint.[197] Moreover, "if there is reliable evidence that the foreign tribunal would not make any use of the requested material, it may be irresponsible for a district court to order discovery, especially where it involves substantial costs to the parties involved."[198] The court concluded BBAG's § 1782 petition would be unduly intrusive, burdensome, and costly.[199] Also, the court was concerned that BBAG's petition might constitute an attempt to circumvent foreign proof-gathering restrictions.[200] Accordingly, the court denied BBAG's discovery request.[201]

Additionally, in *In re Application of Hallmark Capital Corp.*,[202] the District Court for the District of Minnesota, following *Intel*'s analytical framework, held that an Israeli arbitral body is an adjudicatory tribunal under § 1782.[203] This case involved ongoing arbitration between Hallmark and UltraShape, Inc. (UltraShape).[204] Hallmark filed an application with the court requesting discovery from Michael Berman (Berman), chairman

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195. *See id.* ("The Supreme Court in *Intel* identified two general factors that district courts should consider when determining whether an application brought under § 1782(a) should be granted . . . .").

196. *Id.*

197. *See id.* at 242 ("The apparent bad blood among these parties, coupled with the fact that BBAG has not taken any formal steps toward initiating arbitration in the ICC after allegedly discovering Hitachi's misconduct almost two years ago, are grounds for exercising restraint before ordering discovery in this setting.").

198. *Id.* at 241.

199. *See id.* ("In the present case, however, neither party has presented 'authoritative proof' regarding the receptivity of the ICC to the discovery materials requested.").

200. *See id.* at 242 (noting that "Hitachi and BPI have accused BBAG of using this discovery request . . . to circumvent the evidentiary restrictions of the ICC . . . or effectively to open a new front to obtain materials from BPI they were unable to obtain in the prior litigation").

201. *See id.* ("For now . . . I exercise this court's discretion under § 1782(a) to deny BBAG's motion to compel without prejudice.").

202. *See In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 957 (D. Minn. 2007) ("[T]his Court concludes that the assistance permissible under Section 1782 may extend to private arbitration bodies such as that at issue here.").

203. *See id.* (holding that a private Israeli body is a tribunal because of the general analytical framework provided by the Supreme Court in *Intel*).

204. *See id.* at 953 (discussing the factual background).

of UltraShape and a nonparty to the arbitration proceeding.[205] The court initially granted the discovery order.[206] Berman filed a motion for reconsideration arguing that the court lacked authority to consider Hallmark's application for discovery because § 1782 is unavailable to litigants in a private international arbitration.[207]

The court disagreed with Berman and granted Hallmark's discovery request.[208] The court determined that "[a]lthough the Supreme Court did not squarely hold that foreign private arbitration bodies qualify as a 'tribunal' under Section 1782," the Court's "general approach to Section 1782, as well as that statute's legislative history, makes clear that the statute is best read not to impose any restrictive definitional exclusions that would necessarily preclude assistance to all private arbitral bodies."[209] Furthermore, the court noted, "both the 'common usage' and 'widely accepted definition' of 'tribunal' include arbitral bodies."[210] So, had "Congress wanted to impose the limitation advanced by the party opposing extension of Section 1782 to private arbitration bodies, it would have been a simple matter to add the word 'governmental' before the word 'tribunal' in the 1964 amendment."[211] Therefore, it is implausible to add a restrictive definitional interpretation to "tribunal."[212]

Also, the court noted, "the [Supreme] Court cited Prof. Smit's 1965 article no less than six times, all apparently with approval."[213] Since the 1964 amendments, Hans Smit has continued to reiterate that "the new legislation also authorizes assistance in aid of international arbitral tribunals."[214] Moreover, "Mr. Smit's 1965 article appears to be the definitive work on the evolution of Section 1782 that culminated in the 1964 amendments, which broadened the scope of the statute from 'judicial proceedings' to 'a proceeding in a foreign or international tribunal.'"[215]

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205. *Id.*

206. *Id.*

207. *See id.* ("Mr. Berman now contends that Section 1782 does not authorize judicial assistance for proceedings before private arbitration panels . . . .").

208. *See id.* at 958 (rejecting the motion for reconsideration).

209. *Id.* at 955.

210. *Id.* at 954.

211. *Id.*

212. *See id.* at 955 (noting if Congress wanted a restrictive statute it could have qualified § 1782 to reflect their will).

213. *Id.*

214. *Id.*

215. *Id.*

Thus, the court concluded that the only plausible reading of the legislative history and Hans Smit's article is that § 1782 includes private international arbitral bodies.[216] Accordingly, the court held the Israeli arbitral body is a tribunal.[217]

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

Circuit Judge Ginsburg, now Justice Ginsburg, described Hans Smit as "the dominant drafter of, and commentator on, the 1964 revision" to § 1782.[218] Justice Ginsburg's description provides two important points that this Note adopts. First, Hans Smit is "the dominant drafter of" § 1782.[219] This point underscores Hans Smit's *legislative influence.* Smit played a dominant role in drafting the phrase "a proceeding in a foreign or international tribunal," which is the textual source of the current split.[220] Second, Smit is "the dominant . . . commentator on" § 1782.[221] This point underscores Hans Smit's *scholarship influence.* So, if there is confusion over what constitutes a "foreign or international tribunal," then courts should look to his subsequent scholarship.[222] Thus, Smit's interpretation of what constitutes a "tribunal" is of particular importance.

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216. *See id.* at 956 ("[O]bjections to extending the reach of Section 1782 to private arbitrations are at least implicitly countered by the Court's ruling in *Intel.*").

217. *See id.* at 957 (concluding private arbitral adjudicatory bodies constitute a tribunal under § 1782).

218. *In re* Letter of Request from Crown Prosecution Service of United Kingdom, 870 F.2d 686, 689 (D.C. Cir. 1989).

219. *Id.*

220. *Compare* Norfolk Southern Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) (holding that private arbitral tribunals do not fall within the definition the Supreme Court embraced in its *Intel* dictum), *with In re* Application of Roz Trading Ltd., 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006) (holding that when applying *Intel*'s analysis private international arbitral bodies constitute a tribunal within the statutory construction of § 1782).

221. In re *Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d at 689.

222. *See* Smit, *supra* note 17, at 155 ("[W]hether a particular aspect was addressed more specifically in the explanatory notes or in a law review article was essentially a matter of my choice.").

A. Legislative Influence

One scholar noted that § 1782 "is the product of a comprehensive revision of U.S. legislation governing international judicial assistance."[223] The revision process began in 1958, when Congress created the Commission on International Rules of Judicial Procedure (International Rules Commission) in order to address deficiencies in international cooperation in obtaining evidence, serving documents, and proving documents.[224] At that time, many international scholars believed that the "United States courts neither receive adequate assistance from, nor dispense adequate aid to other nations."[225] Additionally, scholars noted, the United States "permit[ted] such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations."[226] All of these concerns were to be addressed by the International Rules Commission.[227]

To assist the International Rules Commission, Columbia Law School established a Project on International Procedure.[228] Hans Smit noted that "[s]ince Congress had allocated no funds to the Advisory Committee and the [International Rules] Commission, the Columbia Law School Project . . . was requested by the Commission to develop and draft legislative measures relating to judicial assistance in international litigation."[229] Professor Smit was the Columbia Project's director and served as Reporter to the International Rules Commission.[230] Also, Ruth

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223. *See* 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, 68 (2008) (noting the legislative history of § 1782).

224. *See id.* (providing the historical context of the 1964 Amendments to § 1782).

225. Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 516 (1953). When the International Rules Commission was created, Jones became its director.

226. *Id.* at 538.

227. *See* Rothstein, *supra* note 223, at 68 (noting that Congress was concerned with the growth of international commerce).

228. *See* Smit, *supra* note 17, at 154 ("Since Congress had allocated no funds to the Advisory Committee and the Commission, the Columbia Law School Project on International Procedure, of which I was the Director, was requested by the Commission to develop and draft legislative measures relating to judicial assistance in international litigation.").

229. *Id.*

230. *See* Rothstein, *supra* note 223, at 68–69 ("Columbia Law School established a Project on International Procedure to assist the International Rules Commission. Professor Smit was the Columbia Project's director and served as Reporter to the Commission.").

Bader Ginsburg, who later wrote the Supreme Court's *Intel* decision, worked closely with Smit as an associate director of the Project.[231] Hans Smit's role was to select the specific subjects that were to be addressed by legislation, analyze the deficiencies of existing law, and draft proposals to eliminate those deficiencies.[232] Embracing his role, Smit drafted several legislative proposals and provided explanatory notes to the various legislative provisions proposed.[233] Congress adopted, wholesale and without change, Smit's legislative proposals.[234] In sum, Smit's legislative proposals are the 1964 amendments to § 1782.[235]

One of the most notable amendments was that federal district courts could order the production of documents or testimony "for use in a proceeding in a foreign or international *tribunal*."[236] "This quoted language replaced judicial proceedings pending in any *court* in a foreign country with which the United States is at peace."[237] The legislative intent of the phrase "international tribunal" and the purposes behind the 1964 amendments, Smit noted, is clear: "[T]he word 'tribunal,' clearly encompass[es] private arbitral tribunals . . . [and] the choice of that term was deliberate so as to depart from the text used in the legislation that was amended . . . and that the purpose of Section 1782 was to make assistance available on the most liberal terms."[238]

Furthermore, Smit determined, it is against public policy when district courts fail to recognize international private arbitral bodies as a tribunal.[239] As Smit noted, "[d]iscriminating against private international tribunals not only does violence to the plain and clear text of Section 1782, it also fails to give consequence to the repeatedly re-affirmed public policy favoring

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231. *See id.* at 69 ("Ruth Bader Ginsburg, who later wrote the Supreme Court's *Intel* decision, was an associate director of the Project.").

232. Smit, *supra* note 17, at 154.

233. *Id.*

234. *Id.*

235. *Id.* at 155.

236. *See* Conley, *supra* note 9, at 47 (providing the historical and political developments leading up to the 1964 Amendments to § 1782) (emphasis in original).

237. *Id.*; *see also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004) (providing the historical and political context of the 1964 Amendments to § 1782).

238. Smit, *supra* note 17, at 154.

239. *See id.* at 160 ("The [Second Circuit's NBC] opinion grants this assistance to public foreign and international tribunals, but denies it to private arbitral tribunals . . . . The policy that favors arbitration is ill served by a construction of Section 1782 that singles out private international and foreign arbitral tribunals for discriminatory treatment.").

arbitration."[240] Thus, "[t]here simply is no good reason for withholding from private international tribunals who have been accorded by the body politic the power to adjudicate controversies and in fact to do so largely in a single instance, the assistance that they may need to obtain requisite information."[241]

B. Scholarship Influence

Hans Smit has written extensively on the nature and scope of § 1782.[242] Notably, a year after his work on the 1964 congressional amendments, he wrote an article which was published in the 1965 edition of the *Columbia Law Review*.[243] In his article, Smit discussed the effect of the 1964 amendments to § 1782.[244] Smit noted that the "substitution of the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions."[245] Additionally, Smit provided examples of what constitutes a tribunal: "The term 'tribunal' embraces *all bodies exercising adjudicatory powers*, and includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[246] Justice Ginsburg's majority opinion in *Intel* quoted this language favorably when it determined that the DG-Competition constituted a tribunal under § 1782.[247]

Furthermore, when Justice Ginsburg reviewed the legislative history of § 1782 in *Intel*, she treated both the Congressional reports and Smit's article

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240. *Id.* at 155.

241. *Id.* at 156.

242. *See, e.g.*, Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 217 (1994) (discussing the composition of the International Rules Commission created by Congress, his role as the Reporter, and the changes to § 1782).

243. *See* Smit, *supra* note 35, at 1015 (discussing the political and historical events leading up to the 1964 Amendments and noting the purposes behind those amendments).

244. *Id.*

245. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 5 (1998).

246. *Id.* at 1026 n.71 (emphasis added).

247. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) ("The term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.").

as *equal* authority.[248] As already noted, Justice Ginsburg not only worked with Smit in drafting the 1964 amendments, but also recognized Smit as the "dominant drafter" of those amendments.[249] Ginsburg's sentiment and affection for Smit's scholarship is on display throughout the *Intel* opinion.[250] *Intel* was the Court's first opportunity to interpret § 1782.[251] And, the big winner of that case was Hans Smit's scholarship. Smit's scholarship was cited or quoted fourteen times to support the Court's holdings.[252] For example, the Court cited Smit when it held that "§ 1782(a) requires only that a dispositive ruling . . . be within reasonable contemplation," and when the Court provided the discretionary guidance test.[253]

Even more telling is that Smit's scholarship has never been discredited.[254] The district courts that have concluded that private arbitral bodies are outside the scope of § 1782 have *never* discredited Smit's scholarship.[255] At most, courts argue that Smit does not speak for the legislature.[256] But, the Court's opinion in *Intel* seems to suggest that Smit does not speak for the legislature, but as the legislator.[257]

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248. *See id.* at 248 (citing both the legislative history and Smit's article when "Congress unanimously adopted legislation recommended by the Rules Commission").

249. *See In re* Letter of Request from Crown Prosecution Serv. of United Kingdom, 870 F.2d 686, 689 (D.C. Cir. 1989) (describing Hans Smit as "the dominant drafter of, and commentator on, the 1964 revision" to § 1782).

250. *See Intel Corp.*, 542 U.S. at 258 (citing Smit's article to define the statutory term "tribunal").

251. *See id.* at 253 (noting that the Court is asked to resolve several questions involving § 1782).

252. *See generally id.*

253. *Id.* at 259.

254. *See, e.g., id.* at 247–66 (citing no contradicting authority when relying on Smit's scholarship).

255. *See* Norfolk S. Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (noting that the Supreme Court stopped short of declaring any foreign body exercising adjudicatory powers falls within the purview of § 1782 and thus did not fully embrace Hans Smit's interpretation).

256. *See* Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008) (concluding that Hans Smit does not speak for the legislature).

257. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (citing Hans Smit's scholarship and the Senate Report interchangeably).

VI. The Legislative History of the 1964 Amendments to § 1782: The Wholesale Adoption of Hans Smit's Work by Congress

Congress adopted, wholesale and without any change, the legislative proposals and explanatory notes drafted by Hans Smit.[258] Smit's legislative proposals are the 1964 amendments to § 1782.[259] The 1964 amendments replaced the phrase "any judicial proceeding" with "a proceeding in a foreign or international tribunal."[260]

A. The 1964 Amendments in Context

The Supreme Court, in *Intel*, provided the political and historical context leading up to the 1964 Amendments. The Court noted:

> Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals. Congress first provided for federal-court aid to foreign tribunals in 1855; requests for aid took the form of letters rogatory forwarded through diplomatic channels. In 1948, Congress substantially broadened the scope of assistance federal courts could provide for foreign proceedings. That legislation, codified as § 1782, eliminated the prior requirement that the government of a foreign country be a party or have an interest in the proceeding. The measure allowed district courts to designate persons to preside at depositions "to be used in any civil action pending in any court in a foreign country with which the United States is at peace." The next year, Congress deleted "civil action" from § 1782's text and inserted "judicial proceeding." In 1958, prompted by the growth of international commerce, Congress created a Commission on International Rules of

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258. *See* Smit, *supra* note 17, at 155 ("[I]t would appear fair to say that *Congress' wholesale adoption, without any change whatsoever, of the legislative proposals and the explanatory notes* accompanying them lends considerable force to the argument that the intent of the dominant draftsman of these texts should be given appropriate weight." (emphasis added)).

259. *See id.* at 154 ("I also drafted the report eventually submitted to the President and the Congress and the explanatory notes to the various legislative provisions proposed.").

260. *See* S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("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 before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court."); *Intel Corp.*, 542 U.S. at 248–49 ("Notably, Congress deleted the words 'in any judicial proceeding *pending* in any court in a foreign country,' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'" (emphasis in original)).

> Judicial Procedure . . . "to investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."[261]

This quoted opinion highlights two points. First, there was a growth of international commerce.[262] Second, Congress continued to expand the scope of § 1782 to address the growth of international commerce.[263] In sum, Congress was concerned that the district courts were not equipped with the legislative tools to respond to the growth of international commerce.[264] Hans Smit and the International Rules Committee created a more robust, expansive, and inclusive § 1782 in light of Congress's mandate to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."[265]

B. The Goal Defined: A Robust, Expansive, and Inclusive § 1782

The 1964 amendments replaced the phrase "any judicial proceeding" with "a proceeding in a foreign or international tribunal."[266] Congress understood that change to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad."[267] In other words, Congress intended to expand the scope of § 1782 to include private arbitral bodies when it added the term "tribunal."[268] The Senate Report supports this interpretation:

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261. *Intel Corp.*, 542 U.S. at 247–48 (emphasis in original) (citations omitted).

262. *See* Jones, *supra* note 225, at 516 (noting the growth of international commerce).

263. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004) (noting that the 1964 Amendments liberalized § 1782).

264. *See* S. REP. NO. 88-1580, at 3 ("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.").

265. *Id.* at 12; *see also* Smit, *supra* note 17, at 155 ("[T]he word 'tribunal' . . . clearly encompass[es] private arbitral tribunals . . . [T]he choice of that term was deliberate so as to depart from the text used in the legislation that was amended . . . and that the purpose of Section 1782 was to make assistance available on the most liberal terms.").

266. *See Intel Corp.*, 542 U.S. at 248–49 ("Notably, Congress deleted the words 'in any judicial proceeding *pending* in any court in a foreign country,' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'" (emphasis in original)).

267. *Id.* at 258.

268. *See* Smit, *supra* note 17, at 157 ("The substitution of the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.").

> 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 before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) [of § 1782] therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) [of § 1782] is also extended to international tribunals and litigants before such tribunals.[269]

Some district courts, however, reject this interpretation and argue that the quoted language above only includes public arbitral bodies.[270] But, there is nothing in the legislative history to suggest that the 1964 amendments were meant to exclude private arbitral bodies.[271] Actually, the entire legislative history suggests that the 1964 Amendments are meant to be robust, expansive, and inclusive.[272] The Senate Report's Statement sets this tone right away: "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."[273]

Furthermore, the Senate Report noted, "[t]he proposed revision of section 1782 . . . clarifie[d] and liberalize[d] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States."[274] This statement makes two points. First, when Congress replaced the phrase "any judicial proceeding" with "a proceeding in a foreign or international tribunal," it clarified existing U.S. procedures.[275] As Smit noted, "[t]he substitution of

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269. S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

270. *See* Norfolk S. Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("Accordingly, I interpret the *Intel* Court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations.").

271. *See* Smit, *supra* note 17, at 159 ("[T]he text of Section 1782, which speaks of aid to a 'foreign or international tribunal,' on its face, clearly includes a foreign or international arbitral tribunal.").

272. *See id.* at 157 ("The substitution of the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.").

273. S. REP. NO. 88-1580, at 1 (emphasis added).

274. *Id.* at 7.

275. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004) (noting that the 1964 Amendments clarified existing procedure because the amendments are to be interpreted expansively and to give the district courts discretion).

the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions. Clearly, private arbitral tribunals come within the term the drafters used."[276]

Second, Congress liberalized § 1782 when it replaced the word "court" with "tribunal."[277] The statutory term "tribunal" is meant to include all bodies exercising quasi-judicial functions.[278] It would be a hard task to argue, convincingly, that private arbitral bodies do not exercise quasi-judicial functions.[279] Moreover, the *Intel* Court noted, if "Congress had intended to impose such a sweeping restriction . . . at a time it was enacting liberalizing amendments to the statute, [then] it would have included statutory language to that effect."[280] In other words, the Court reads § 1782 as an inclusive statutory provision.[281] Meaning, if § 1782 does not explicitly exclude private arbitral bodies, then they are included. Certainly, § 1782's plain text does not exclude private arbitral bodies.[282]

VII. The Policy Flaw

The courts that have concluded that private arbitral bodies are outside the scope of § 1782 have *all primarily* based their conclusion on the policies that underlie international arbitration.[283] There are three policy rationales that courts often rely on. First, parties contract for arbitration because it is a relatively more speedy, efficient, and economical means of

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276. Smit, *supra* note 17, at 157.

277. *See Intel Corp.*, 542 U.S. at 260 (concluding that the 1964 Amendments liberalized § 1782).

278. *See* S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("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 before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.").

279. *See* Smit, *supra* note 17, at 157 ("Clearly, private arbitral tribunals come within the term the drafters used.").

280. *Intel Corp.*, 542 U.S. at 260.

281. *See id.* (noting that § 1782 is to be interpreted broadly).

282. *See* 28 U.S.C. § 1782(a) (2006) ("Assistance to foreign and international tribunals and to litigants before such tribunals.").

283. *See, e.g.*, Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (concluding that § 1782 "was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration").

dispute resolution than litigation.[284] Second, in the international commercial context, parties choose arbitration, in part, to avoid the risk of litigating in foreign countries' courts.[285] Third, because the substance and procedure of the arbitration is agreed upon in advance, parties to a contract often bargain for efficient discovery mechanisms, as well as neutral rules and fora.[286] In sum, courts have used policy as *the decisive* factor in determining whether or not a private arbitral body constitutes a "tribunal" under § 1782.[287]

The Supreme Court, however, rejected this argument. In *Intel*, the Court never discussed policy in determining whether or not the DG-Competition constituted a tribunal under § 1782.[288] Instead, the Court noted, policy arguments should be considered when the district court exercises its discretion.[289] Thus, courts' reliance on policy is completely misplaced. Despite *Intel*, courts continue to deny private arbitral bodies access to § 1782 discovery.[290]

A. Legislative Silence?

Enactment of the 1964 Amendments into law, the Senate Report concluded, "will constitute a major step in bringing the *United States to the*

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284. *See, e.g., id.* ("Arbitration is intended as a speedy, economical, and effective means of dispute resolution.").

285. *See, e.g., id.* ("[A]rbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.").

286. *See, e.g., id.* ("[B]oth the substance and procedure for arbitration can be agreed upon in advance.").

287. *See, e.g.*, Norfolk S. Corp. v. Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (concluding that "[w]hile the private arbitral tribunal at issue here likely falls within the scope of 'all bodies exercising adjudicatory powers,'" it still is not a tribunal under § 1782 because of the purpose of international arbitration agreements).

288. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (holding that the DG-Competition is a tribunal under § 1782 because the tribunal is a "first-instance decisionmaker" that conducts adjudicatory proceedings which lead to a dispositive ruling).

289. *See id.* at 264 (noting "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so" and providing factors that should bear consideration in ruling on a § 1782(a) request).

290. *See, e.g.*, Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008) (holding that *Intel* shed no light on the issue of whether § 1782(a) discovery was available to parties to private foreign arbitrations and under the controlling precedent of *Biedermann International*, the Court has no power to grant § 1782 discovery).

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."[291] The Senate Report statement illustrates Congress's intent: The 1964 Amendments were to be robust, expansive, and inclusive.[292] There is no evidence to suggest that private international arbitral bodies were to be excluded from § 1782's scope.[293] "If Congress had intended to impose such a sweeping restriction . . . at a time when it was enacting liberalizing amendments to the statute, [then] it would have included statutory language to that effect."[294] Furthermore, as Smit noted, "the word 'tribunal' clearly encompass[es] private arbitral tribunals."[295]

Courts and scholars, however, disagree with this statutory reading.[296] The legislative history's silence with respect to private tribunals, the Second Circuit concluded, "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."[297] In support of a narrower reading of § 1782, courts and scholars offer two main arguments.

First, "[t]he context of U.S. arbitration law [] suggests that § 1782 was not intended to apply to private arbitration."[298] This argument is based on the notion that § 1782 provides more discovery than the Federal Arbitration Act (FAA), which governs arbitration conducted in the United States.[299] Section 1782 allows requests to be made in any district and does not limit the scope or form of discovery that the court can order.[300] Under the FAA,

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291. S. REP. NO. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 (emphasis added).

292. *See* Smit, *supra* note 17, at 157 ("The substitution of the word 'tribunal' for 'court' was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.").

293. *See id.* at 159 ("[T]he text of Section 1782, which speaks of aid to a 'foreign or international tribunal,' on its face, clearly includes a foreign or international arbitral tribunal.").

294. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004).

295. Smit, *supra* note 17, at 155.

296. *See, e.g.*, Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 190 (2d Cir. 1999) (holding § 1782(a) only "cover[s] governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" and not private arbitral tribunals).

297. *Id.*

298. Rothstein, *supra* note 223, at 72.

299. *Id.*

300. *Id.*

arbitrators may summon witnesses and documents only in a district where they hold hearings.[301] Congress, critics conclude, could not have intended to give international arbitral bodies more access to discovery than domestic arbitral bodies.[302] This argument is flawed for two reasons. First, judicial discretion provides a check on § 1782 discovery requests.[303] Second, the 1964 Amendments were intended to be expansive.[304] It may be true that § 1782 is more generous, but that "proves only that [the FAA] should be amended to provide the same assistance to domestic arbitral tribunals."[305]

Second, critics argue that "[r]eferences in the United States Code to 'arbitral tribunals' almost uniformly concern an adjunct of a foreign government or international agency."[306] This argument makes very little sense. "Both the 'common usage' and 'widely accepted definition' of 'tribunal' include arbitral bodies."[307] Historically, arbitral bodies have always been considered a tribunal.[308] For example, William Blackstone referred to arbitral bodies as a tribunal in *Commentaries*.[309] Moreover, "[i]f Congress had intended to impose such a sweeping restriction . . . at a time when it was enacting liberalizing amendments to the statute, [then] it would have included statutory language to that effect."[310] In other words, it would have been a simple matter to add the word "governmental" before the word "tribunal" in the 1964 Amendments had Congress wanted to limit the statutory term "tribunal."[311] Understanding these weak arguments, courts and scholars turn to policy.

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301. *Id.*

302. *Id.*

303. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004) (holding that district courts have discretion in granting § 1782 discovery).

304. *See id.* (concluding that the 1964 Amendments liberalized § 1782).

305. *See* Smit, *supra* note 17, at 160 (proposing that Congress should amend the FAA to emulate § 1782).

306. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999).

307. *In re* Application of Roz Trading Ltd., 469 F. Supp. 2d 1221, 1225 (N.D. Ga. 2006).

308. *See id.* (noting the historical uses of the word tribunal).

309. WILLIAM BLACKSTONE, 3 COMMENTARIES *7 (1787).

310. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004).

311. *See* In re *Application of Roz Trading Ltd.*, 469 F. Supp. 2d at 1226 n.3 ("Had Congress wanted to impose the limitation advanced by Respondent, it would have been a simple matter to add the word 'governmental' before the word 'tribunal' in the 1964 Amendment.").

B. The Wrong Analysis

The courts that have concluded that private arbitral bodies are outside the scope of § 1782 have all employed the same analytical framework.[312] The basic analytical framework looks similar to this: First, the court concludes the legislative history is silent on the issue whether international arbitral bodies constitute a § 1782 tribunal.[313] Next, the court looks at the policy rationales underlying international arbitration. Here, the court determines that international arbitration is intended as a speedy, economical, and effective means of dispute resolution.[314] Finally, the court concludes that § 1782 "was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration."[315] This analytical framework suffers from one fundamental flaw: Policy should *only* be considered when the district court is determining whether or not to exercise its discretion.[316] Policy concerns are legitimate, and the Supreme Court provided a sound analytical framework to address these concerns in *Intel*.[317]

VIII. The Proposal

In order to resolve the district court split, this Note proposes a comprehensive solution that provides a sound judicial framework for analyzing § 1782 petitions. The starting point to this solution is to provide a workable definition of what constitutes a "tribunal." Next, this Note

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312. *See, e.g.*, Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 191 (2d Cir. 1999) ("In sum, policy considerations of some magnitude reinforce our conclusion . . . .").

313. *See id.* at 190 ("The 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 . . . .").

314. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) ("Arbitration is intended as a speedy, economical, and effective means of dispute resolution.").

315. *Id.*

316. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (noting that policy should be considered when the district court is exercising its discretion and not looking at policy rationales when considering whether the disputed arbitral body constitutes a tribunal).

317. *See id.* (concluding that policy should only be used when the court is exercising its discretion).

proposes a two-step judicial framework to determine whether or not to grant a § 1782 petition. Finally, this Note proposes a statutory amendment to § 1782 which would require district courts to make specific findings when exercising their discretion.

A. Tribunal Defined

The starting point of this Note proposal is to define a "tribunal." In *Intel*, the Court had to determine whether or not the DG-Competition constituted a "tribunal."[318] The Court concluded that the DG-Competition was a "tribunal" because they are "first-instance decisionmaker[s]" that conduct adjudicatory proceedings which lead to a "dispositive" ruling.[319] *Intel*'s analytical framework provides a two-prong test to determine what constitutes a tribunal: (1) whether the international arbitral bodies are "first-instance decisionmaker[s]," and (2) whether the arbitral body conducts adjudicatory proceedings that lead to a dispositive ruling.[320]

International commercial arbitration is the "accepted way of resolving international business disputes [between private parties] . . . . One estimate is that ninety percent of all international contracts contain arbitration clauses."[321] When a conflict arises, parties submit their disputes, in the first instance, to the arbitral body for resolution.[322] The arbitral body is the first-instance decisionmaker. In resolving the dispute, the arbitral body will conduct adjudicatory proceedings.[323] Those proceedings will lead to a dispositive ruling.[324] Thus, under the proposed two-prong test, private international arbitral bodies constitute a "tribunal" because they are first-instance decisionmakers that conduct adjudicatory proceedings which lead to a dispositive ruling.

The proposed two-prong test is consistent with Congress's intent. Congress intended to create a robust, inclusive, and expansive § 1782 discovery device. The two-prong tribunal test proposed is meant to be robust, inclusive, and expansive so that the United States remains at the "*forefront of nations* . . . providing equitable and efficacious procedures for

318. *See id.* (determining whether or not the DG-Competition is a "tribunal").

319. *Id.*

320. *Id.*

321. Drahozal, *supra* note 4, at 94.

322. *Id.*

323. *Id.*

324. *Id.*

the benefit of tribunals and litigants involved in litigation with international aspects."[325]

The two-prong tribunal test, however, does have limits. Not all alternative dispute resolution bodies will constitute a tribunal under the proposed two-prong tribunal test. For example, a mediation body will not constitute a tribunal under § 1782. Some international commercial transactions contain a contractual clause that refers disputes to mediation. The mediator, arguably, is a first-instance decisionmaker since it facilitates the dispute between the parties.[326] Assuming arguendo, that a mediation body is a first instance decisionmaker, the mediation body fails prong two. Mediation is a voluntary, confidential, nonbinding, facilitated negotiation in which a mediator assists the parties in reaching a consensual resolution of a dispute on terms that the parties themselves agree upon.[327] The mediator has *no authority* to impose an outcome on the parties and only controls the process of the mediation itself, not the results.[328] Furthermore, Congress did not intend for § 1782 to be used for parties to gain leverage in later negotiations. Thus, a mediation body does not conduct adjudicatory proceedings that lead to a dispositive ruling.

B. The Two-Step

This Note proposes a two-step judicial framework to determine whether or not to grant a § 1782 petition. The first step: District courts should ensure basic § 1782 statutorily required elements are satisfied. The second step: District courts should apply *Intel*'s discretionary guidance test when exercising their discretion in deciding § 1782 petitions.

The First Step: There are three basic § 1782 statutorily required elements: (1) that the person from whom discovery is sought reside (or be found) in the district to which the application is made, (2) discovery be for use in a proceeding before a foreign tribunal, and (3) be made by a foreign or international tribunal or any interested person.[329] Under the third

325. S. REP. NO. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 (emphasis added).

326. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 71 (2002) (discussing the different capacities of a mediator).

327. *See id.* (noting the characteristics of mediation).

328. *See id.* (discussing the role of the mediator).

329. *See In re* Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 954 (D. Minn. 2007) (noting the three basic § 1782 statutory required elements).

element, the district court must apply the two-prong tribunal test. All of the pertinent words have been defined either by the Court or this Note. The first element requires only that a person reside or be found in the district.[330] The second element requires only that a dispositive ruling be within reasonable contemplation.[331] The third element requires that the two-prong tribunal test be satisfied, or is made by an interested person. An interested person is any person with a reasonable interest in obtaining judicial assistance.[332]

Second Step: *Intel* provided a discretionary guidance test that all district courts should follow.[333] The Court enumerated several factors district courts should consider when exercising their discretion.[334] First, the district court should decide whether discovery is being sought from a party to the proceedings.[335] The need for judicial assistance is "not as apparent" where discovery is sought from a party to the foreign proceeding, since the tribunal itself can order parties to produce evidence.[336] Discovery sought from nonparties, however, may only be obtainable pursuant to § 1782 because the nonparty is out of the jurisdiction of the foreign tribunal.[337] Second, the district court "may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[338] For example, a court could consider whether the § 1782 petition constitutes an attempt to make an end-run around "foreign proof-gathering restrictions or other policies of a foreign country or the United States."[339] Third, the district court should consider

330. 28 U.S.C. § 1782(a) (2006).

331. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004) ("[Section] 1782(a) requires only that a dispositive ruling . . . be within reasonable contemplation.").

332. *See id.* at 257 ("'[A]ny interested person' is 'intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance.'").

333. *See id.* at 264 ("[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.").

334. *See id.* ("We note below factors that bear consideration in ruling on a § 1782(a) request.").

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 265.

whether the request is "unduly intrusive or burdensome," and whether such request should be narrowed.[340]

This step is the appropriate place for district courts to consider the policy rationales underlying international arbitration. For example, courts can determine that a party is only seeking § 1782 discovery to drive up litigation costs.[341] Thus, § 1782 discovery would be inappropriate. All of these factors, the *Intel* Court noted, are supported by Hans Smit and the legislative history of § 1782.[342] Also, this step provides adequate protection to third-parties. For example, the court could find that the § 1782 discovery request is unduly burdensome or intrusive on the third-party and thus deny the § 1782 petition.

Under this proposed framework, however, district courts could just import the broad policy rationales behind international commercial arbitration into this step to conclude that § 1782 discovery is inappropriate. In other words, this Note's proposal could just bring the district court fight to a different arena. To prevent this, this Note proposes a statutory amendment to § 1782 which would require district courts to make specific findings when exercising their discretion.

C. Statutory Amendment: Providing Teeth to the Two-Step

In order to give the two-step teeth, this Note proposes a statutory amendment to § 1782. The proposed amendment is as follows: "The district court must make specific findings when exercising its discretion under this statute." This amendment would have the effect of forcing district courts to be more diligent when exercising their discretion under the two-step judicial framework. Under this statute, a court cannot just decline a § 1782 petition because it undermines the policy rationales underlying international arbitration. Instead, a court can decline a § 1782 petition if it specifically finds, after reviewing the facts, that the § 1782 petition would be unduly intrusive. For example, a court can find that a party's § 1782 petition to depose a third party is unduly intrusive.

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340. *Id.*

341. *Id.*

342. *See id.* (citing and quoting both Hans Smit and the Senate Report as authority).

1. The Goal Achieved

The goal of the 1964 amendments was to create a robust, inclusive, and expansive § 1782. The proposed two-step is what Congress envisioned in 1964. Congress wanted the United States to remain at the "*forefront of nations* . . . providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[343] This proposal explicitly includes private international arbitral bodies within the scope of § 1782. Furthermore, it gives the court the discretion, which was recognized by the Supreme Court in *Intel*, to determine whether discovery is appropriate under the specific facts. Moreover, the proposed statutory amendment ensures that courts are not importing broad policy rationales to deny § 1782 petitions because the court must make specific findings when exercising its discretion.

Additionally, this proposal provides adequate protection to the parties involved in the dispute and third parties. If the court finds that the § 1782 petition would be unduly intrusive to a third party or is being sought from a party to the arbitral proceedings, then the court should deny the petition. Furthermore, the two-step allows the court to consider whether future (not yet developed) alternative dispute resolution tribunals would constitute a tribunal under the two-prong tribunal test. All of these features provide a robust, inclusive, and expansive judicial framework to analyze § 1782 petitions.

2. The Last Resort

If the two-step is not adopted, then Congress should make its intent even more explicit by amending the statute to include private international arbitral bodies. This can simply be done by adding the words "whether judicial, administrative, or arbitral be it private or public" after the statutory language "for use in a proceeding in a foreign or international tribunal." The proposed amendment to § 1782 would read as follows:

> 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, *whether judicial, administrative, or arbitral be it private or public* . . . .

343. S. REP. NO. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 (emphasis added).

This proposal, however, should be the last resort for three reasons.

First, Congress intended the 1964 amendments to be robust, inclusive, and expansive. This last resort proposal could be interpreted as providing an exhaustive list of what constitutes a tribunal. If this occurs, the court will be limited to granting petitions from judicial, administrative, and arbitral tribunals. For example, this proposal would explicitly exclude quasi-judicial tribunals. This is inconsistent with Congress's intent. In view of the *constant growth* of administrative and quasi-judicial proceedings all over the world, the Senate Report noted, "the necessity for obtaining evidence in the United States may be as impelling before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) [of § 1782] therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings."[344]

Certainly, Congress could include all quasi-judicial and quasi-administrative tribunals by explicitly writing it into § 1782. But, this is exactly what Congress wanted to prevent when it amended § 1782. Specifically, Congress did not want to have to keep amending § 1782 every time a new alternative dispute resolution tribunal is created to resolve disputes among international parties. The last resort proposal, however, will explicitly include private international arbitral bodies. Thus, the last resort proposal provides a solution that will resolve the current split. Still, the last resort proposal would not be completely consistent with Congress's intent due to its probable need for future amendments to maintain its expansive scope.

Second, the last resort proposal could present the same definitional problem of what constitutes a tribunal. For example, some district courts might interpret the last resort proposal as providing an exhaustive list of what constitutes a tribunal, while other district courts might interpret it as providing examples of what constitutes a tribunal. If this occurs, a comprehensive solution—similar to the proposed two-step—would have to be developed.

Finally, the last resort proposal would undermine the Court's *Intel* decision. The Court interpreted § 1782 as a liberal and expansive statute.[345] For example, the Court held that "[t]he language of § 1782(a), confirmed by its context . . . warrants this conclusion: The statute authorizes, but does

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344. *Id.* at 7.

345. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004) (concluding that the 1964 Amendments liberalized § 1782).

not require, a federal district court to provide assistance . . . ."[346] This quoted language provides the precedent that gives district courts the discretion to grant or deny § 1782 petitions. If Congress adopted the last resort proposal, then it would restrict the entire meaning of the statute. Thus, *Intel*'s precedential authority would be in question. In other words, under the last resort proposal, the preliminary issue of whether a court has the discretion to grant or deny § 1782 petitions would need to be determined. This is particularly problematic for two reasons.

First, parties to the arbitration agreement will have no protection from abuses of § 1782 discovery if the court interprets the last resort proposal as overruling *Intel*. If the court reaches the conclusion that *Intel* is overruled by the last resort proposal, then the court cannot exercise any discretion under § 1782. Meaning, parties can seek discovery without any constraints because the last resort proposal explicitly includes private arbitral tribunals. Second, third parties will also have no protection under the last resort proposal. Once the court concludes that the § 1782 petition is sought by a party from an international arbitral tribunal, the court must grant discovery. A third-party cannot challenge on the grounds that the discovery would be unduly intrusive.

D. A Hypothetical: The Two-Step Proposal at Work

Assume that there is a valid and enforceable arbitration agreement. There is an ongoing arbitration proceeding before the International Chamber of Commerce (ICC) between *B*'s Insurance Corporation (Spain) and *J* Corporation (Portugal). The underlying dispute involved insurance coverage for losses incurred in connection with a train derailment in South Carolina.[347] *J* Corp. petitions the District Court for the Southern District of New York, under § 1782(a), to require third-party *E* (New York), former counsel to *B*'s Insurance Corp.,[348] to appear for a deposition in New York so that her testimony may be used in connection with the ICC arbitration in London. *E* represented *B*'s Insurance Corp. in a similar train derailment dispute two years ago. There are two issues that the court must determine.

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346. *Id.* at 255.

347. The stated facts are similar to the facts found in *Norfolk Southern Corp. v. Ace Bermuda Ltd.*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009), in which the court held that private arbitral tribunals do not constitute a tribunal under § 1782.

348. *See* 28 U.S.C. § 1782(a) (2006) (noting that all confidential communications between lawyer and client are protected).

First, whether all the basic elements of § 1782 are satisfied, which includes the sub-issue of whether the ICC is a "tribunal" under § 1782. If the court concludes that the elements of § 1782 are satisfied, then the second issue is whether the court should exercise its discretion to grant the § 1782 petition.

The District Court for the Southern District of New York analysis: Section 1782 provides for a two-step analysis when reviewing § 1782 petitions for discovery. *Step One*: The court must ensure that the three basic elements of § 1782 are satisfied. First, the person from whom discovery is sought must reside (or be found) in the district to which the petition is made. Here, this element is easily satisfied because third-party *E* resides in NY. Second, the discovery must be for use in a proceeding before a foreign tribunal. Under these facts, *J* Corp. is seeking the deposition of *E* for use in the proceedings before the ICC. Thus, this element is satisfied. Third, the ICC must be a foreign or international tribunal. To determine whether the ICC is a tribunal under § 1782, the court must apply a two-prong tribunal test. The first prong asks whether the ICC is a first-instance decisionmaker. The contract between *J* Corp. and *B* Insurance Corp. provides that all disputes be brought to the ICC, in the first-instance, for resolution. Thus, this prong is satisfied because the ICC is a first-instance decisionmaker. The second prong asks whether the arbitral body conducts adjudicatory proceedings that lead to a dispositive ruling. Surely, the ICC will conduct adjudicatory proceedings between *J* Corp. and *B* Insurance Corp. that will lead to a dispositive ruling by the ICC. The ICC will review the facts, listen to oral arguments, and will reach a decision on the merits that is binding on both parties. Both parties must follow the dispositive outcome. Therefore, the second prong is satisfied.

Step Two: The second step provides that the court apply *Intel*'s discretionary guidance test. The *Intel* Court enumerated several factors a district court should consider when exercising its discretion under § 1782. Also, in light of the recent amendment to § 1782, the court must make specific findings when deciding whether to exercise its discretion.

The first factor the district court should consider is whether discovery is being sought from a party to the proceedings. *J* Corp. seeks to depose *E*. Clearly, *E* is not a party to the proceeding. Second, the court has to determine whether the § 1782 petition constitutes an attempt to make an end-run around "foreign proof-gathering restrictions or other policies of a foreign country or the United States."[349] *B* Insurance Corp. asserts that *J* Corp.'s § 1782 petition is an attempt to make an end-run around the policies

349. *Intel Corp.*, 542 U.S. at 260.

of the United Kingdom. There is no evidence, however, that the United Kingdom's policies would be offended if the court grants the § 1782 petition.[350] Third, the district court should consider whether the request is unduly intrusive or burdensome, and whether such request should be narrowed. Third-party *E* asserts that the § 1782 petition would be unduly intrusive because *E* would have to retain an attorney and show up for a deposition. The court finds that the deposition of *E* is not unduly intrusive. One of the purposes behind § 1782 is to provide the optimal level of judicial assistance to international tribunals. Depositions are a means to provide judicial assistance to the ICC. *E* represented *B* Insurance Corp. two years ago in a similar train derailment case. Although § 1782 protects privileged materials, *E* may have nonprivileged material that is relevant to the current dispute. Thus, the court grants *J* Corp.'s § 1782 petition because of the specific findings outlined above.

E. Any Protections?

Under this proposal, private parties will surely want additional protection from U.S. style discovery. Although the two-step proposal provides adequate protection to parties when the court is exercising its discretion, parties might want complete protection from § 1782 discovery. After all, this two-step proposal argues that private international arbitral bodies constitute a tribunal under § 1782. This Note provides two risk-assessment options.

First Option: Private parties can put a provision into the contract which states that "if a dispute shall arise, all parties are not allowed to seek discovery under 28 U.S.C. § 1782(a)." With a provision similar to this, it becomes very likely that, even if a party secures information under § 1782, the arbitral body itself will exclude the introduction of the discoverable materials.[351] Refusal to consider materials lawfully secured pursuant to a federal statute, however, "is susceptible to being characterized . . . as precluding a party from presenting its case. In such a situation, a ruling by the arbitral tribunal may directly and explicitly trigger application of Article

350. The facts regarding the United Kingdom policies are hypothetical.

351. *See* Martinez-Fraga, *supra* note 7, at 93 ("A[n] . . . issue arises when the movant unilaterally prosecutes a § 1782 petition, successfully secures documents and information, and, upon attempting to introduce these materials into evidence during the arbitration, is precluded from so proceeding by the arbitral tribunal.").

V of the New York Convention."[352] Article V(1)(b) proscribes the recognition and enforcement of an arbitral award where a party was "unable to present his case."[353] Certainly, "the petitioner to the § 1782 application may have a built-in appellate recourse with substantial and measurable basis for setting aside the award.... Therefore, an arbitral tribunal's blanket foreclosure of materials secured in accordance with § 1782 runs the very immediate and material risk of rendering any prospective award unenforceable."[354]

Second Option: Congress can amend § 1782(a) to read as follows: *Parties are allowed to contract out of this provision subject to the laws of the United States. Shall parties contract out of this provision, district courts cannot prevent enforcement under the New York Convention.*

This amendment would have the effect of making the parties' intent paramount. Under this amendment, parties can contract out of § 1782 and suffer no penalty when enforcing the arbitral award in the United States. Given the legislative history, however, it seems unlikely that Congress would restrict § 1782 in this way.[355]

Under this option, third parties would also have full protection if parties contract out of § 1782. Certainly, if parties contract out of § 1782 then there can never be any discovery sought from third-parties. There is, however, no way to provide statutory protection for third parties. Section 1782 is intended to assist a "foreign tribunal... with securing documents or deposition testimony from persons or entities present... in the United States." Providing a statutory amendment to protect third-parties would render the statute meaningless. This Note's two-step proposal, supported by the Court's *Intel* decision, does adequately protect third-parties from unduly burdensome and intrusive discovery requests.

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352. *Id.*

353. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 21 U.S.T. 2517, 30 U.N.T.S. 3 (ratified in the United States Dec. 29, 1970) (requiring state signatories to recognize and enforce foreign arbitral agreements and awards).

354. Martinez-Fraga, *supra* note 7, at 93.

355. *See* S. REP. NO. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 ("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.").

IX. Conclusion

Just like one should recognize a duck as a duck, proper § 1782 analysis demands the recognition of private international arbitral tribunals as a "tribunal." "There simply is no good reason for withholding from private international tribunals who have been accorded by the body politic the power to adjudicate controversies . . . the assistance that they may need to obtain requisite information."[356] Courts that have concluded otherwise, have mistakenly used policy at the peril of private international arbitral bodies.

When Congress amended § 1782 it intended to make § 1782 robust, expansive, and inclusive in order to respond to the growth of international commerce and disputes. This Note's proposal is what Congress intended, which is a robust, expansive, and inclusive judicial framework in which district courts can analyze § 1782 petitions. The two-step framework, which provides a workable definition of a tribunal, is the approach every district court should use when considering § 1782 petitions. Also, § 1782 should be amended so that district courts make specific findings when exercising their discretion. Utilizing these proposals, ducks can be ducks, and parties subject to international arbitration can have access to § 1782 discovery, which is what Congress intended.

356. Smit, *supra* note 17, at 156.