"FOR USE IN A FOREIGN OR INTERNATIONAL TRIBUNAL": *ZF AUTOMOTIVE* SETTLES THE DEBATE OVER WHO CAN USE 28 U.S.C. § 1782 TO REQUEST DISCOVERY ASSISTANCE IN UNITED STATES DISTRICT COURTS

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ABSTRACT

In deciding ZF Automotive US, Inc., et al. v. Luxshare, Ltd. ("ZF Automotive") (June 13, 2022), the United States Supreme Court sought to determine whether either a private international arbitration or a semi-private investor-state arbitration was a "tribunal" for the purposes of 28 U.S.C. § 1782 ("§ 1782"), in particular section (a)–a provision which authorizes a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal." This Note will comprehensively review the statutory history of § 1782, canvas the circuit split on defining a "proceeding in a foreign or international tribunal," and cover the Supreme Court's most recent ruling on § 1782 in ZF Automotive. This Note will further analyze the effects of the decision, identify this author's understanding of both of the new and revised applicable tests for determining a body's qualification as a "foreign or international tribunal" that is "imbued with governmental authority," and survey the few cases addressing this question in the post-ZF Automotive landscape. The statute has a long history dating back to 1855 and underwent significant changes in 1964. Following amendments made in 1964, there has been a question as to what constitutes a "foreign or international tribunal" under the statute. Before deciding this case, five federal circuit courts were split on the issue, with the Fourth and Sixth arguing that a private arbitration tribunal was a "tribunal" for the purposes of the statute, and the Second, Fifth, and Seventh arguing

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that it was not. To resolve this split, the U.S. Supreme Court consolidated and granted certiorari to ZF Automotive from the Sixth Circuit, and AlixPartners, LLP, et al. v. The Fund for Protection of Investor Rights in Foreign States ("AlixPartners") from the Second Circuit. In ZF Automotive, the tribunal at issue was a private dispute-resolution organization resolving a dispute between two corporations. In AlixPartners, the tribunal was an ad hoc arbitration panel resolving a dispute between a sovereign state and a private party as outlined in an international treaty. The Court held in a 9–0 ruling that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under 28 U. S. C. § 1782, and that both bodies at issue in these cases did not qualify. According to the Court, for the purposes of § 1782, the inquiry is whether the features of the adjudicatory body and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority. The U.S. Supreme Court's decision in ZF Automotive did much to clarify not only the meaning of the statutory term "foreign or international tribunal" but also subtly clarify the entire statutory analysis of § 1782 applications. First, the Court analyzes the statutory factors. The "For Use" factor now has two clearly defined tests available to discern whether a body is both a tribunal to begin with (the Intel Functional test) and whether it is a "foreign or international tribunal" intended to be imbued with governmental authority (the "Governmental Intended Authority Test" with the Guo Tribunal Character Factors). Then, only if the statutory requirements of § 1782 are met should the court apply Intel's Discretionary test when exercising its discretion in granting or denying the § 1782 application for discovery. While the door is now closed to private arbitrations, there is sure to be continued debate on § 1782's application to investor-state and other "public" arbitrations, but these clarified and categorized tests should help to properly focus the debate until the U.S. Supreme Court offers more guidance, hopefully in less time than transpired between their decisions in Intel and ZF Automotive.

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I. INTRODUCTION

28 U.S.C. § 1782 ("§ 1782"):

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing *for use in a proceeding in a foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil

> Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
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> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.[1]

§ 1782 establishes a mechanism for litigants, or potential litigants, to compel nonparties located in the United States (U.S.) to produce information (testimony, documents, etc.) for use in a proceeding in a foreign or international tribunal.[2] The 289-word statute is seemingly straightforward and commonly regarded as "merely a discovery device to obtain evidence . . . in the jurisdiction where the evidence exists, and then to litigate elsewhere."[3] However, one should not underestimate the significant impact that the effective use of § 1782 can have. "[W]hen used responsibly as part of a wider litigation strategy, it can yield extremely valuable information—in most cases information unavailable from other sources—and apply significant pressure to move the needle of victory toward the party seeking discovery."[4] The statute's importance and impact becomes even clearer when considering that the U.S.'s mechanism for discovery is more broad and robust than most other jurisdictions, be they civil or common law jurisdictions.[5] The statute not only benefits foreign litigants from increased access to discovery, but also furthers U.S. interests as well:

> 'Section 1782 serves important interests for [the United States], international commerce, the rule of law, and international comity,' aiming 'to provide an efficient means of assistance to participants in international litigation and to encourage foreign countries by example to provide similar means of assistance to [U.S.] courts.'[6]

Alongside a decades-long trend in expanding international commerce, the need and demand for § 1782 has increased dramatically.[7] § 1782 applications

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

[2] *Id.*

[3] LUCAS V. M. BENTO, GLOBALIZATION OF DISCOVERY : THE LAW AND PRACTICE UNDER 28 U. S. C. § 1782, at 21 (Kluwer L. Int'l, 2019) (citing *In re Application of Bracha Found.*, 2016 WL 5219862, at *1 (11th Cir. Sept. 22, 2016)). *See* 28 U.S.C. § 1782.

[4] BENTO, *supra* note 3, at 5.

[5] *Id.* at 26.

[6] *Id.* at 20.

[7] *See* S. REP. NO. 1580-88, at 13 (1964) ("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

have increased by more than 300% over the previous decade, and by 3,400% since the 1960s.[8] With this increase in demand, U.S. courts have considered requests from increasingly diverse adjudicative bodies, including from privately adjudicated international arbitrations.[9]

Federal courts developed an increasingly blurry doctrine of case law to determine whether these applicants were requesting discovery for use in a qualifying "foreign or international tribunal" under the statute,[10] culminating most recently with the consolidated cases of *ZF Automotive US, Inc. v. Luxshare, Ltd.* ("*ZF Automotive*") and *AlixPartners, LLP, et al. v. The Fund for Protection of Investor Rights in Foreign States* ("*AlixPartners*"), at the Supreme Court in 2022.[11] The justices unanimously held, in an opinion written by Justice Amy Coney Barrett, that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782, and the bodies at issue in these cases did not qualify.[12] Noting that while the statutory phrase "foreign or international tribunal" created "the possibility of U. S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad,"[13] the statutory defaults for discovery rules, statutory history, and a comparison to the Federal Arbitration Act ("FAA") all support § 1782's focus on tribunals "imbued with governmental authority."[14] In arguing that the Supreme Court's decision in *ZF Automotive* not only clarified the meaning of the statutory term "foreign or international tribunal," but also clarified the entire statutory analysis of § 1782 applications, this Note will comprehensively review the statutory history of § 1782, canvas the circuit split on defining a "proceeding in a foreign or international tribunal," and cover the Supreme Court's most recent ruling on § 1782 in *ZF Automotive*. This Note will then analyze the effects of the decision, identify this author's understanding of both the new and revised applicable tests for determining a body's

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devices to facilitate the conduct of such litigation."); 28 U.S.C. § 1782, Historical and Revision Notes ("The improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances."), https://perma.cc/VA69-DW4V.

[8] BENTO, *supra* note 3, at 32.

[9] *See* R Zachary Torres-Fowler & Albert Bates, *US Supreme Court Determines That Section 1782 Does Not Grant Access to US Discovery in Aid of Most International Commercial and Investor-State Arbitration Proceedings*, INT'L BAR ASS'N (Sept. 26, 2022), https://www.ibanet.org/clint-september-2022-country-updates.

[10] 28 U.S.C. § 1782.

[11] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619 (2022); AlixPartners, LLP v. Fund for Prot. of Invs. Rts. in Foreign States, 142 S. Ct. 638 (2021).

[12] ZF Auto., 142 S. Ct. at 2083.

[13] *Id.* at 2086 (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004)) (alterations omitted).

[14] *Id.* at 2087.

qualification as a "foreign or international tribunal" that is "imbued with governmental authority," and survey the few cases addressing this question in the post-*ZF Automotive* landscape.

II. STATUTORY HISTORY OF 28 U.S.C. § 1782

A. Pre-28 U.S.C. § 1782

§ 1782 is "the product of congressional efforts," evolving "over a span of nearly 150 years, "to provide federal-court assistance in gathering evidence for use in foreign tribunals."[15] With the Act of March 2, 1855, the U.S. Congress created the first avenue for federal courts to aid foreign tribunals,[16] granting federal circuit courts broad powers to appoint "a U.S. commissioner designated . . . to make the examination of witnesses" on receipt of a letter rogatory from a foreign court.[17] The Act of 1855 permitted federal district courts to compel witnesses to appear in court for a deposition at the requests of non-U.S. courts. However, it allowed only the gathering of testimony, not the production of documents.[18]

The Act of 1855 later fell out of favor. It was omitted from the index of the Federal Register and subsequently ignored by federal courts.[19] In 1863, Congress severely narrowed the Act of 1855 by limiting the district courts' ability to respond to letters rogatory and compel witnesses in their districts to provide testimony to only for use in "suit[s] [abroad] for the recovery of money or property."[20] It also required that the foreign government requesting assistance be a party or have an interest in the suit.[21] Federal courts took the hint and continued to narrow the scope of the law through their court decisions.[22] By 1936, the Third Circuit had declared that in regard to letters rogatory courts only had the power to respond in ways granted to them by the Constitution or by statute, meaning that district courts could not issue subpoenas for the submission of documentary evidence or conduct "roving oral examination[s]" of witness in lieu of interrogatories.[23] Going further,

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[15] Intel Corp., 542 U. S. at 247.

[16] *In re* Letter Rogatory from Justice Court, Dist. of Montreal, Can., 523 F.2d 562, 564 (6th Cir. 1975).

[17] Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855). Letters rogatory are requests for aid that are forwarded through diplomatic channels following an individual's petition to their government to engage with a foreign county on their behalf. BENTO, *supra* note 3, at 44.

[18] Eileen P. McCarthy, *A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance*, 15 FORDHAM INT'L L. J. 772, 778 n.22 (1991).

[19] *See In re* Letter Rogatory, 523 F.2d at 564.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 565.

[23] Janssen v. Belding-Corticelli, Ltd., et al., 84 F.2d 577, 578-79 (3rd Cir. 1936).

federal courts disfavored the use of letters rogatory to secure evidence for use in foreign criminal cases, with the end result being a very narrow and inflexible landscape for judicial assistance in discovery to foreign courts.[24]

B. The Creation of 28 U.S.C. § 1782 and Its First Amendment

The next major change would not come until 1948, when Congress significantly broadened the scope of assistance that federal courts could provide for foreign proceedings by eliminating the requirement that the foreign government be a party to or have an interest in the proceeding, and no longer limiting requests for aid to the letters rogatory system.[25] This meant that private parties did not need to involve their government directly in their request for aid in U.S. courts.[26] Formally codified as 28 U.S.C. § 1782, "the scope of federal courts' authority to assist foreign tribunals has expanded ever since."[27] The 1948 text of the statute read as follows:

> The deposition of any witness residing in the United States to be used in any *civil* action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such deposition shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.[28]

Noted limitations to the statute included the exclusion of foreign criminal proceedings, the continued exclusion of document requests, and the requirement that the foreign action at least be "pending;" therefore excluding

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[24] Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 541 (1953); *see In re* Letters Rogatory from Examining Magistrate of Tribunal of Versailles, Fr., 26 F. Supp. 852, 853 (D. Md. 1939) ("[T]his court's jurisdiction is limited to situations where the testimony is to be used in civil, not criminal, cases in the foreign court;"); *In re* Letters Rogatory from First Dist. Judge of Vera Cruz, 36 F. 306, 306 (C.C.S.D.N.Y. 1888) ("The order must therefore be set aside. Section 875 of the Revised Statutes does not help the petitioner; it only provides for the procedure when letters rogatory are addressed and commissioner appointed; it does not extend the cases in which examination of witnesses will be ordered.").

[25] *See In re* Letter Rogatory from Justice Court, Dist. of Montreal, Can., 523 F.2d 562, 564 (6th Cir. 1975).

[26] BENTO, *supra* note 3, at 44-45; *In re* IPC Do Nordeste, LTDA, For an Order Seeking Discovery Under 28 U.S.C. 1782 , No. 12-50624, 2012 WL 4448886, at *3 (E.D. Mich. Sept. 25, 2012).

[27] Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1269 (11th Cir. 2014).

[28] Act of June 25, 1948, ch. 117, § 1782, 62 Stat. 949 (1948).

assistance to merely contemplated actions.[29] That same year, Congress also adopted § 1785, later subsumed into § 1782, which privileged witnesses against incrimination This statute did not explicitly cover privilege beyond a criminal nature (including attorney-client privilege) and was limited to testimonial evidence.[30]

A year later in 1949, Congress amended § 1782 by replacing the term "civil action" with "judicial proceeding" and striking out the work "residing," broadening the statute to allow its use in foreign criminal proceedings and to permit depositions in judicial proceedings without reference to whether the deponent "resided" in the district or was merely present.[31] This change in language would later become relevant to the debate as to what types of proceedings could be assisted by U.S. Courts under the statute.[32]

C. The Commission on International Rules of Judicial Procedure

As announced to the Judicial Conference by U.S. Attorney General James P. McGranery in the Report of the September 1952 Judicial Conference, President Harry S. Truman approved a recommendation to establish a governmental commission "to study existing international practices of judicial assistance for the purpose of drafting such legislation and international agreements as may be deemed appropriate."[33] In his remarks on the study of "international judicial assistance and procedure," Attorney General McGranery commented that as a result of the end of World War Two and the subsequent rise in international litigation it had become clear that the present state of U.S. law and procedure related to these types of proceedings was confusing and at times even inoperable.[34]

McGranery expanded on this contention by highlighting the inadequacy of then-current U.S. practices relating to judicial assistance for both foreign and domestic litigants, observing that the process of taking evidence abroad was "frustrated by prohibitions and limitations put upon their use by foreign governments."[35] As examples, he brought attention to the fact that many

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[29] BENTO, *supra* note 3, at 45.

[30] *Id.* 28 U.S.C. § 1785 (1958).

[31] BENTO, *supra* note 3, at 45, 50-51 ("SEC. 93. Section 1782 of title 28, United States Code, is amended by II § S74-94 striking out 'residing', which appears as the sixth word in the first 28 U.S.C., Supp. paragraph, and by striking out from the same paragraph the words II 1782. 'civil action' and in lieu thereof inserting 'judicial proceeding'.") 28 U.S.C.A. § 1782, Historical and Statutory Notes (Westlaw 1996).

[32] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U. S. 241, 245 (2004).

[33] Report of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States (1952) [hereinafter 1952 Judicial Conference Report].

[34] *Id.* at 38.

[35] *Id.* at 39.

foreign governments either lacked measures to compel witnesses to testify or outright prohibited the taking of depositions within their borders and also the fact that letters rogatory are subject "to the law of and in the language of the foreign country."[36] McGranery then issued a reminder that "foreign courts find equally unsatisfactory the limited judicial assistance which American courts are able to render them."[37] He proposed pursuing legal reform through the adoption of international treaties.[38] While McGranery's proposals were well received, funding restrictions would delay the establishment of a commission for several more years.[39]

It was not until 1958, "prompted by the growth of international commerce,"[40] that Congress finally created the proposed Commission on International Rules of Judicial Procedure (the "Commission") to "investigate and study existing practices of judicial assistance and cooperation between the U.S. and foreign countries with a view to achieving improvements."[41] The nine members[42] of the Commission spent the next six years on the task of drafting and recommending legislation to ensure that "procedures of [U.S.] State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies," including "the obtaining of evidence," "be more readily ascertainable, efficient, economical, and expeditious."[43] The Commission worked in collaboration with the Columbia Law Project on International Procedure and the Advisory Committees on Civil, Criminal, and Admiralty Rules of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.[44] Among the

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[36] *Id.*

[37] *Id.*

[38] *Id.*

> From time to time over the last hundred years, several countries have offered to enter into agreements with the United States to correct deficiencies of international practice. Yet the United States remains the only country of major importance which has not entered into treaties or conventions codifying international legal procedure. Practice can be simplified, expedited, and rendered more certain and less expensive by treaty. . . . Much of Latin America and Europe is covered by a network of procedural treaties. Great Britain has entered into 22. This is a good demonstration that the common law and the civil law systems can be coordinated procedurally.

[39] 1952 Judicial Conference Report, *supra* note 33, at 40 ("However, because the establishment of such a commission and advisory committee would require financing which is not now available, it was deemed best to defer the establishment of the proposed commission until such time as congressional authorization and appropriations could be obtained-which will not be before 1953.").

[40] Intel Corp. v. Advanced Micro Devices, Inc., 542 U. S. 241, 248 (2004).

[41] Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743 (1958).

[42] *Id.* at § 3(a).

[43] *Id.* at § 2.

[44] S. REP. NO. 1580-88, at 12 (1964) (letter from Oscar Cox, Chairman, The Comm'n on

collaborators was Professor Hans Smit, the leader of the Columbia Law Project whose writings would later be prolifically quoted by courts when interpreting § 1782, in particular when considering whether aid was being sought for use in a proper "foreign or international tribunal."[45]

On May 28, 1963, the Commission presented proposed language to the Senate that would become the foundational text of § 1782.[46] In doing so, the Chairman of the Commission commented that:

> 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 False It is hoped that the initiative taken by the United States in improving its procedures *will invite foreign countries similarly to adjust their procedures*.[47]

The Commission's proposal gradually made its way through the legislative process, ending up on the desk of President John F. Kennedy, who endorsed it, saying that "the procedural reforms which its enactment would accomplish would be most desirable from the standpoint of the administration of international justice on behalf of private litigants."[48]

D. Congress Adopts the Commission's Proposed Legislation

Once the Senate Judiciary Committee had signaled its approval of the Commission's language, Congress adopted the proposed legislation, endorsing what a Senate Report referred to as a "'complete revision' of Section 1782 that 'clarif[ied] and liberalize[d] assisting foreign obtaining oral and documentary evidence . . . to the requirements of foreign practice and procedure.'"[49] The statute as adopted in 1964 reads as follows:

> § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.
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> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use *in a proceeding in a foreign or international tribunal*. The order may be made pursuant to a letter

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Int'l Rules of Jud. Proc. to Speaker Hon. John W. McCormack, Speaker, U.S. House of Representatives (May 28, 1963)).

[45] BENTO, *supra* note 3, at 47.

[46] *Id.*; S. REP. NO. 1580-88, at 18-19 (1964).

[47] S. REP. NO. 1580-88, at 2 (1964) (emphasis added); BENTO, *supra* note 3, at 51.

[48] S. REP. NO. 1580-88, at 13 (appended letter from John F. Kennedy to Oscar Cox (May 27, 1963)).

[49] S. REP. NO. 1580-88, at 7; BENTO, *supra* note 3, at 47.

> rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
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> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.[50]

Most noteworthy to this Note's discussion, the 1964 statute replaced the phrase "in any judicial proceeding pending in any court in a foreign country" with "in a proceeding in a foreign or international tribunal." By omitting the words "judicial" and "pending" the result was an expansion of the range of actions allowable under § 1782.[51] Here, the Senate intended to ensure that "assistance is not confined to proceedings before conventional courts" but is also available to "administrative and quasi-judicial proceedings" and "investigative magistrates" from whom the Senate had observed a large number of judicial requests for assistance had originated [52] Later litigation, concluding with *ZF Automotive*, would debate how far this expansion was intended to reach.

Notably, but less relevant to this Note's later analysis of this statute, he 1964 statute also deleted the requirement that the U.S. and the country of the court seeking aid be "at peace," noting in the Senate Report that the provision was "devoid of real significance" where a court has the discretion to deny requests where judicial assistance might be deemed improper.[53] The new

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[50] S. REP. NO. 1580-88, at 18-19. (emphasis added)

[51] S. REP. NO. 1580-88, at 7; BENTO, *supra* note 3, at 48.

[52] S. REP. NO. 1580-88, at 7-8.

[53] *Id.* at 8.

> [T]his provision [should] be omitted as devoid of real significance. Even though the United States is not technically at war with a foreign country, its relations with that country may be so strained as to make the rendering of judicial assistance under this section improper. In such a case, the court will use its discretion to deny a request for

statute further widened the obtainable scope of discovery to include documentary and other "tangible evidence" in addition to oral testimony, as the Senate recognized each of these types of evidence as potentially equally imperative.[54] The inclusion of subsection (b) in the statute, which states that a person is not precluded from voluntarily giving their testimony, was "[e]xplicit reaffirmation . . . considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area in the United States."[55] § 1782 has only been amended once since 1964, with the addition of the phrase "including criminal investigations conducted before formal accusation" following the reference to "foreign or international tribunal" in 1996.[56]

III. LEGAL FRAMEWORK AND COMPONENTS OF § 1782 ANALYSIS

A. Traditional Legal Framework

The statutory text of § 1782 provides the core framework for interpreting the law, the twin aims of which focus on the need to promote international judicial cooperation and assistance.[57] The purpose of filing a § 1782 application in a federal district court is to request that the court issue a subpoena to a discovery target located in the U.S. so as to compel the production of the requested information for use in the foreign litigation.[58] Leading up to the U.S. Supreme Court decision made in *ZF Automotive*, a robust case law of over 1,000 reported federal district court decisions, over 150 federal appellate decisions, and one U.S. Supreme Court decision has expanded and supplemented the judicial interpretation of the statutory text upon which a court must rely when determining whether such a request should be granted.[59] The relevant analysis has historically been divided into two-steps; first, the "Statutory Test" where the court must determine that the request can be granted under the dictates of the statute, and second, the "Discretionary Test" where the court must judge whether that request should be granted.[60]

Upon receipt of a § 1782 application, the district court must first consider whether it has the statutory authority to grant the request. This is often

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assistance although the United States and that country are technically at peace.

[54] *Id.* at 7.

[55] *Id.* at 9.

[56] 28 U.S.C.A. § 1782 (Westlaw).

[57] BENTO, *supra* note 3, at 54.

[58] *Id.* at 56.

[59] *Id*. at 54-56.

[60] *Id.* at 56.

referred to as the "Statutory Test," or alternatively the "Jurisdictional Test:"[61]

> A district court has authority to grant a § 1782 application where: (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.[62]

The Statutory Test essentially requires an applicant to meet the appropriate expectations of who the applicant wishes to be issued a subpoena, where and how the requested information will be used once a subpoena is granted, and why the applicant is qualified for judicial assistance in the first place. The first, or "Found Factor," focuses on the location of the target for discovery, the respondent, which in turn determines which district court the § 1782 application can be filed.[63] The threshold for a discovery target to be "found" to be under the jurisdiction of the district in which a § 1782 application has been filed varies based on precedent in the particular district.[64] The second, or "For Use Factor," broadly considers the statutory propriety of where the evidence will be submitted; put another way, whether the requested evidence being sought is to be used before an appropriate "foreign or international tribunal." This is arguably the most debated of the statutory requirements, and the one at the heart of the issue argued in *ZF Automotive* which will be further discussed below.[65] The third, or "Standing Factor," categorizes who qualifies as an "interested party" entitled to even file a § 1782 application.[66] While the standard for qualification is not particularly strict, it does impose some limitations such as the existence or pending existence of actual litigation.[67]

If the application passes each part of the Statutory Test, meaning that the court has the authority to grant a § 1782 application, then the court must next consider whether it should "exercise its discretion to do so," otherwise referenced as the "Discretionary Test."[68] The discretionary aspect of considering a § 1782 application had been previously recognized in Senate

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[61] *Id.* at 56-57; *see* Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 83 (2d Cir. 2004).

[62] Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015) (internal quotation marks, citation, and alterations omitted).

[63] BENTO, *supra* note 3, at 57.

[64] *Id.*

[65] *Id.*; *see* ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619 (2022).

[66] BENTO, *supra* note 3, at 57.

[67] *Id.*

[68] *Id.* at 56

reports and case law.[69] In exercising its discretion, the district court should "tak[e] into consideration the 'twin aims' of the statute, namely, 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'"[70]

The current Discretionary Test, amounting to four considered factors, was laid out in *Intel Corporation v. Advanced Micro Devices, Inc.* ("*Intel*"), which was the first (and before *ZF Automotive*, the only) case involving § 1782 to be considered by the U.S. Supreme Court.[71] These non-exhaustive factors include the following:

(1) The "Jurisdictional Reach Factor" or "*Intel* Factor One," is concerned with whether the foreign tribunal has the jurisdiction to obtain the itself.[72] When the person from whom discovery is being sought is not a participant in the foreign proceeding, discretion should be more in favor of granting the § 1782 request: "[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. In contrast, nonparticipants in foreign proceedings may be outside the foreign tribunal's jurisdictional reach; thus, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."[73]

(2) The "Receptivity Factor" or "*Intel* Factor Two," considers "the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance."[74]

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[69] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 245 (2004); S. REP. NO. 1580-88, at 7 (1964).

> In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it. The terms the court may impose include provisions for fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers and similar provisions.

[70] Certain Funds, Accts. and/or Inv. Vehicles v. KPMG, L.L.P. et. al., 798 F.3d 113, 117 (2d Cir. 2015) (quoting *In re* Metallgesellschaft, 121 F.3d 77, 79 (2d Cir. 1997)).

[71] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 245 (2004). *See* Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216 (2d Cir.), cert. granted sub nom. AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States, 142 S. Ct. 638 (2021), and rev'd sub nom. ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619 (2022) ("The seminal Supreme Court case in this area, Intel, approached the 'foreign or international tribunal' statutory requirement of § 1782 cautiously and flexibly.").

[72] Intel Corp., 542 U.S. at 244; BENTO, *supra* note 3, at 59.

[73] Intel Corp., 542 U.S. at 264.

[74] *Id.*; BENTO, *supra* note 3, at 59.

(3) The "Circumvention Factor" or "*Intel* Factor Three" encourages a district court to consider "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States" and reject applications where this is the case.[75]

(4) The "Burden Factor" or "*Intel* Factor Four" encourages district courts to reject or trim applications for discovery assistance that are "unduly intrusive or burdensome."[76]

Since its opinion was published in 2004, *Intel* has been considered "the starting line of any § 1782 analysis."[77] As assertedly nearly all "district courts have since followed the Supreme Court's direction in interpreting § 1782 petitions" through both the Statutory and Discretionary tests, it is valuable to look at the whole of the *Intel* decision to have an understanding of the standard approach to § 1782 applications leading up to the *ZF Automotive*.[78] The Supreme Court's analysis and introduction of the Discretionary test also garnered confusion around when each test should be applied.[79] While facially requiring two separate analyses, the Statutory and Discretionary tests have frequently been blended when considering whether a body qualifies as a "foreign or international tribunal," leading to discord and confusion amongst the district and circuit courts.[80]

1. Intel Corporation v. Advanced Micro Devices, Inc.

The background legal dispute that led *Intel* to the U.S. Supreme Court began with an antitrust complaint which was filed with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (Commission), now the European Union, by Advanced Micro Devices, Inc. (AMD) against Intel Corporation (Intel Corporation).[81] Related to this complaint, AMD filed a § 1782 application in the District Court for the Northern District of California seeking an order for Intel Corporation to produce documents related to a separate private antitrust

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[75] Intel Corp., 542 U.S. at 264-65; BENTO, *supra* note 3, at 59.

[76] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004); BENTO, *supra* note 3, at 59.

[77] BENTO, *supra* note 3, at 58. *See, e.g.*, *In re* Accent Delight Int'l Ltd., 869 F.3d 121, 129 (2d Cir. 2017).

[78] Kulzer v. Esschem, Inc., 390 Fed.Appx. 88, 91 (3d Cir. 2010).

[79] *In re* Application to Obtain Discovery in Foreign Proceedings, 939 F.3d 710, 725-26 (6th Cir. 2019); *see generally* ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 624 (2022).

[80] *See generally* ZF Auto., 142 S. Ct. (2021).

[81] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 241 (2004). The DG-Competition was the "primary antitrust law enforcer" of the Commission of the European Communities, now the European Union. Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020).

suit in an Alabama federal court, to which Intel Corporation objected.[82] Senior District Judge William A. Ingram rejected the application based on his finding that the statute did not authorize the requested discovery.[83]

On appeal, the Ninth Circuit reversed and remanded the application with instructions to make a ruling based on its merits.[84] Intel Corporation appealed this ruling, and the U.S. Supreme Court granted certiorari.[85]

In a decision written by Justice Ruth B. Ginsburg, the U.S. Supreme Court held that § 1782 authorizes, but does not require, that a district court provide discovery aid to AMD.[86] The opinion further resolved the following questions related to the Statutory Test: (1) does § 1782(a) contain a foreign-discoverability requirement; (2) does § 1782(a) make discovery available to complainants, such as AMD, who do not have the status of private "litigants" and are not sovereign agents; and (3) must a "proceeding" before a foreign "tribunal" be "pending" or at least "imminent" for an applicant to invoke § 1782(a) successfully?[87] In answering the first question, the U.S. Supreme Court held that § 1782 does not impose a foreign-discoverability requirement.[88] In answering the second question, the Court found that yes; § 1782 does make discovery available to complainants who are not sovereign agents or lack the status of private "litigants.[89] The Court found the answer to the third question to be no; a "proceeding" before a foreign "tribunal" need not be "pending" or "imminent" in order for an applicant to successfully invoke § 1782.[90]

Also important to the future impact of this decision, the U.S. Supreme Court had to determine whether the DG-Competition, while clearly part of an "international" government, even qualified as a "tribunal" within the meaning of § 1782. In analyzing the specific case before them, Justice Ginsburg first contextualized how the Commission enforced European competition laws.[91] Following a preliminary investigation into alleged violations of those laws, during which the Commission can consider information provided by the complainant and seek information from the investigation's target, it issues a formal written decision on whether to pursue the complaint.[92] This decision is then able to be reviewed first by the Court

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[82] Intel Corp., 542 U.S. at 241.

[83] *Id.* at 251.

[84] *Id.*

[85] *Id.* at 252.

[86] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004).

[87] *Id.* at 25.

[88] *Id.*

[89] *Id.* at 254.

[90] *Id.*

[91] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 254 (2004).

[92] *Id.*

of First Instance and finally by the Court of Justice for the European Communities (European Court of Justice).[93] In summation, the complainant, who has significant procedural rights even if lacking formal "litigant" status, may submit relevant information to the Commission and seek judicial review of the Commission's decision.[94]

Justice Ginsburg then ventured into the Court's analysis:

> As "in all statutory construction cases, we begin [our examination of § 1782] with the language of the statute." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). The language of § 1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion: *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, i.e., a final administrative action both responsive to the complaint and reviewable in court. Accordingly, *we reject the categorical limitations* Intel would place on the statute's reach.[95]

In coming to this conclusion, Justice Ginsburg emphasized that "[a] statute's caption . . . cannot undo its text's plain meaning."[96] An applicant qualifies as an "interested person" when they maintain significant participation rights in the proceedings, whether they are labeled as a "litigant" or otherwise.[97] Because the Commission granted significant procedural rights to the claimant, AMD qualified as an "interested person."[98] Additionally, Congress had expanded what types of adjudicative bodies qualify to include administrative and quasi-judicial proceedings when it replaced the term "any judicial proceeding" with "a proceeding in a foreign or international tribunal;" thus an adjudicative body, such as the Commission, qualifies as a "tribunal" when it acts as a first-instance decisionmaker.[99] Further, neither the statutory text of § 1782(a) nor its legislative history suggests that Congress intended to "impose a blanket foreign-discoverability rule on § 1782 assistance," noting that the statute only "expressly shields from discovery matters protected by legally applicable privileges."[100] This

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[93] *Id.*

[94] *Id.* at 255.

[95] *Id.* at 255 (emphasis added).

[96] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 242 (2004).

[97] *Id.* at 256.

[98] *Id.*

[99] *Id.* at 257-58. The term "court of first instance" is often referred to as a "trial court," defined as "[a] court of original jurisdiction where evidence is first received and considered"; "[a]lso termed court of first instance[.]" *Trial Court*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[100] Intel Corp., 542 U.S. at 243.

analysis created a test, hereinafter referred to as the "*Intel* Functional Test," to determine whether a given body was in fact a "tribunal."[101] However, later courts would read this as a test to determine whether a body was a "foreign or international tribunal," seemingly forgetting that whether the body in *Intel* was "foreign or international" had already been established, and that the test laid out by Justice Ginsberg only identifies a "tribunal" while ignoring any "foreign or international" considerations.[102]

The U.S. Supreme Court, having resolved the statutory questions put before them and resisting setting firm statutory limits on the adjudicative bodies qualifying for § 1782 assistance as "foreign or international tribunals,"[103] Justice Ginsburg then outlined the factors that district court judges should consider when exercising their discretion in determining the appropriateness of a particular § 1782 application, thereinafter commonly referred to as the *Intel* factors.[104] These non-exhaustive factors weigh overlapping considerations and should not be analyzed as stand-alone categorical constraints:[105] (1) whether the requested discovery is within the foreign tribunal's jurisdictional reach to request itself; (2) "the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance;" (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States;" and (4) whether the application would result in an "unduly intrusive or burdensome" request.[106]

"The Court leaves it to the courts below, applying closer scrutiny, to ensure an airing adequate to determine what, if any, assistance is appropriate."[107] Thus, no single factor controls, and should be viewed holistically rather than mechanically: "[a] district court should also take into account any other pertinent issues arising from the facts of the particular dispute."[108] In laying out these non-exhaustive discretionary factors, the U.S. Supreme Court

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[101] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 254 (2004).

[102] *See In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 714 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020).

[103] Intel Corp., 542 U.S. at 263 n.15 ("[i]n light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'").

[104] *Id.* at 264.

[105] BENTO, *supra* note 3, at 60; *see* In Matter of Application of Action & Prot. Found. Daniel Bodnar, No. C1480076MISCEMCLB, 2014 WL 2795832, at *5 (N.D. Cal. 2014).

[106] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 244-45 (2004); BENTO, *supra* note 3, at 59.

[107] Intel Corp., 542 U.S. at 245.

[108] Kiobel v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 245 (2d Cir. 2018); *see* Intel Corp., 542 U.S. at 264-65; BENTO, *supra* note 3, at 60.

declined to adopt any supervisory rules: "[a]ny such endeavor at least should await further experience with Sec. 1782(a) applications in the lower courts."[109] Eighteen years later when the U.S. Supreme Court next took up § 1782 in *ZF Automotive*, it turned out that courts did not need further supervisory guidance on the Discretionary factors, but rather clarification was needed in defining a statutory "For Use" factor and more clearly separating the statutory and discretionary analyses.

The U.S. Supreme Court clarified several aspects of § 1782 in its *Intel* decision, and while the question of what qualifies as a "foreign or international *tribunal*" was not before the court in this particular case, the U.S. Supreme Court's consideration of whether the DG-Competition, a public entity, constituted a "tribunal" under § 1782 demonstrated that the U.S. Supreme Court endorsed a functional approach to answering such a question.[110] For much of the statute's history, the phrase "foreign or international tribunal" was commonly understood by federal courts to apply only to governmental bodies like courts and administrative agencies.[111] The functional approach of the *Intel* decision opened the door for differing judicial interpretations as to what constituted a "tribunal" under the statute, and namely whether parties to private international arbitrations could seek judicial assistance under § 1782.[112] Much of this debate stemmed from the U.S. Supreme Court's citation of a footnote from a law review article written by law professor Hans Smit, who had served as the reporter for the 1958 Commission on International Rules of Judicial Procedure that had proposed the statutory language for § 1782 adopted by Congress in 1964[113]: "The term 'tribunal' [in § 1782(a)]. . .includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[114] A circuit split arose as to whether private international arbitrations qualified as "foreign or international tribunals," with the Second, Fifth, and Seventh circuits categorically rejecting private international arbitrations, and the Sixth and Fourth Circuits adopting a more functional approach to the question.[115]

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[109] Intel Corp., 542 U.S. at 265.

[110] *In Re* Guo, 965 F.3d 96, 103 (2d Cir. 2020).

[111] Niamh Gibbons, *International Arbitration: Supreme Court Holds District Courts May Not Order Discovery for Use in Private International Arbitration*, 27 SUFFOLK J. TRIAL & APP. ADVOC. 241, 241 (2022).

[112] Practical Law Litigation 5-565-5925, *Expert Q&A on the Ambiguities of 28 U.S.C. § 1782*, WESTLAW (Aug. 30, 2022) [hereinafter *Expert Q&A*] https://perma.cc/EN6Z-HQQC.

[113] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 696 (7th Cir. 2020).

[114] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004) (emphasis added) (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965)).

[115] *Expert Q&A*, *supra* note 112; ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 624-

Eighteen years after its *Intel* decision and in response to this circuit split, the U.S. Supreme Court would finally adopt a new supervisory rule in relation to the definition of "foreign or international tribunal" in its *ZF Automotive* decision.[116]

IV. CIRCUIT SPLITS: IS A PRIVATE ARBITRATION A "PROCEEDING IN A FOREIGN OR INTERNATIONAL TRIBUNAL"?

Federal courts have the authority to grant a § 1782 application where the discovery is for use in a foreign proceeding before a foreign or international tribunal.[117] But what constitutes a "foreign or international tribunal?" Courts have noted that the use of the word 'tribunal' in § 1782 is used to "make it clear that assistance is not confined to proceedings before conventional courts."[118] The 1964 Senate Report makes it clear that they wanted the statute to be flexible enough to cover a variety of proceedings that would reflect the diverse legal systems around the world, but since the 1964 amendments to the statute changed the word "court" to "tribunal" there has been debate as to whether their intent was to include arbitral proceedings.[119]

Arbitration is an alternative method of dispute resolution wherein parties agree to have their dispute resolved by a neutral arbitrator, whose binding authority and jurisdiction stem from the parties' agreement.[120] In the U.S., arbitration matters are governed by the FAA,[121] including the validity of agreements,[122] the procedures to compel arbitration[123] and order discovery[124], and the grounds for which an arbitral award can be vacated.[125] "The FAA reflects the fundamental principle that arbitration is a matter of contract."[126] The FAA also later incorporated the 1970 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), allowing for the global enforcement of international arbitration awards.[127] Since World War II there has been a global growth of international arbitration as the preferred method to resolving commercial disputes, which has led to an increase in applications for discovery assistance from U.S.

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25 (2022).

116 ZF Auto. US, Inc., 596 U.S. at 619.

117 28 U.S.C. § 1782.

118 BENTO, *supra* note 3, at 110.

119 *Id.* at 48.

120 *Id.* at 111.

121 *Id.*

122 9 U.S.C. § 2.

123 *Id.* at § 4.

124 *Id.* at § 7.

125 *Id.* at § 9.

126 Rent-A-Center., W., Inc. v. Jackson, 561 U.S. 63, 66 (2010).

127 BENTO, *supra* note 3, at 111.

courts under § 1782, especially following the U.S. Supreme Court's *Intel* decision in 2004.[128]

Within the broad scope of international arbitration, there has arisen a distinction between private arbitrations, involving disputes between private parties and are almost always conducted as private proceedings, and public arbitrations, namely investor-state arbitrations, which involve disputes between a private party and a public one, such as a State, usually over alleged violations of a treaty (such as a bilateral investment treaty) or other internationally binding agreement.[129] While both types of international arbitration are established under contract,[130] U.S. jurisprudence has noted the differences between these two general types of arbitration, and have distinctly approached each under § 1782 in different ways.[131]

A. Private Arbitrations

While there was a general consensus that § 1782 was available for "public" arbitrations such as investor-state disputes,[132] there was much more debate as to whether § 1782 assistance was available to private international arbitrations, particularly following the U.S. Supreme Court's 2004 *Intel* decision.[133] The Second and Fifth Circuits had held prior to the *Intel* decision that private arbitral tribunals were not foreign or international tribunals under § 1782, and this formalistic position was also later endorsed by the Seventh Circuit.[134] By contrast, post-*Intel* decisions from the Sixth and Fourth Circuits kept the door open for private arbitrations that satisfied a "Functional Test" of constituting a "tribunal."[135]

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[128] *Id.*

[129] *Id.*

[130] *See In re* Dubey, 949 F. Supp. 2d 990, 992 (C.D. Cal. 2013) ("The crux of the dispute is whether a 'proceeding in a foreign or international tribunal' applies to private arbitrations established by contract, such as the arbitration at issue here. The case law is unclear on this.").

[131] BENTO, *supra* note 3, at 111.

[132] *See* Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP, No. MC 18-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. 2019) ("District courts . . . have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals under the statute.").

[133] BENTO, *supra* note 3, at 111.

[134] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189-90 (2d. Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 880-81, 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. The provision was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration."); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 693-94 (7th Cir. 2020).

[135] Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 716-17 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 213-14 (4th Cir. 2020).

1. Exclusionary Definition Approach of the 2nd, 5th, and 7th Circuits: Private Arbitrations are not "tribunals."

The principal font from which jurisprudence rejecting private international arbitrations from § 1782 assistance arose was the concurrent pre-*Intel* decisions from *National Broadcasting Company v. Bear Stearns & Co.* (*NBC/Bear Stearns*) in the Second Circuit in and *Republic of Kazakhstan v. Biedermann International* ("*Biedermann*") in the Fifth Circuit, both decided in 1999.[136] These decisions exemplify the "formalistic approach" to the "For Use" factor of § 1782.[137]

The Second Circuit was the first appellate court to address the question of whether private international arbitrations were "foreign or international tribunals" within the meaning of § 1782.[138] In its *NBC/Bear Stearns* decision, after an analysis of the statutory language, statutory and legislative history, and policy considerations, the Second Circuit held that § 1782 does not authorize courts to order discovery for use in private international arbitrations.[139] This decision would prove to be quite influential, not only in other circuit courts such as the Fifth and Seventh Circuits, but also at the Supreme Court, whose *ZF Automotive* opinion closely mirrors the legal reasoning outlined first by the Second Circuit in its *NBC/Bear Stearns* decision twenty-three years earlier.[140]

The initial dispute arose when a Mexican television company (Bear Stearns & Co.) initiated arbitration proceedings in Mexico under the aegis of the International Chamber of Commerce (ICC) and sought to quash § 1782 subpoenas that had been issued to its investment bankers and advisors at the request of NBC, the American broadcaster, who cross-moved to compel compliance.[141] The Southern District of New York quashed the subpoenas,

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[136] BENTO, *supra* note 3, at 112; *see* El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed.Appx. 31, 34 (5th Cir. 2009) ("[W]e remain bound by our holding in Biedermann.").

[137] *See In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006).

> [I]t is the function of the body that makes it a 'tribunal,' not its formal identity as a 'governmental' or 'private' institution. Where a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of 'tribunal,' the reasoning of Intel, and the scope of § 1782(a), regardless of whether the body is governmental or private. The Supreme Court's approach recognizes this reality, and thus undermines the *formalistic approach* taken by the Second and Fifth Circuits.
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> (emphasis added).

[138] Servotronics, Inc., 975 F.3d at 692.

[139] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189-91 (2d. Cir. 1999).

[140] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 627-29 (2022).

[141] Nat'l Broad. Co., 165 F.3d at 184-85.

and NBC appealed.[142]

On appeal, the Second Circuit found that private arbitrations do not qualify as "foreign or international" tribunals within the meaning of § 1782.[143] In reaching this conclusion, the Second Circuit first looked to the language of § 1782 itself, and found that "'the term 'foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here."[144] The court then "look[ed] to legislative history and purpose to determine the meaning of the term in the statute," namely the House and Senate Committee reports on the 1964 amendments to § 1782.[145]

Noting that the 1964 change in statutory language from limiting assistance to "judicial proceedings" in any "court" to "a proceeding in a foreign or international tribunal," was indeed emphasized in the reports as having the intent to expand the reach of the statute, the court stressed that this expansion was only intended to reach other previously excluded governmental entities, such as investigating magistrates in foreign countries and intergovernmental arbitral tribunals.[146] The court observed that previous statutes that the current § 1782 had replaced had applied only to intergovernmental tribunals, and that Congress had enacted those provisions in "direct response to problems that arose in an arbitration proceeding between the U.S. and Canada . . .[and] proceedings before the United States–German Mixed Claims Commission."[147] Further, "[i]t bears underscoring that those international arbitrations were intergovernmental, not private, arbitrations. More importantly, the old statute applied only to international tribunals 'established pursuant to an agreement between the U.S. and any foreign government or governments.'"[148] The Second Circuit additionally reasoned 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."[149]

The Second Circuit then exemplified policy reasons that supported a conclusion of excluding private international arbitral tribunals.[150] First, that the extensive American-style discovery made available by § 1782 was at odds with the benefits of efficiency and cost-effectiveness that make private arbitration proceedings an appealing alternative to traditional litigation.[151]

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142 *Id.* at 185.

143 *Id.*

144 *Id.* at 188.

145 *Id.* at 188-89.

146 Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d. Cir. 1999).

147 *Id.*

148 *Id.* at 189-90.

149 *Id.* at 189.

150 *Id.* at 190.

151 Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190-91 (2d. Cir. 1999).

Second, that an interpretation of § 1782 allowing "such broad discovery in proceedings before 'foreign or international' private arbitrators would stand in stark contrast to the limited evidence gathering provided in [FAA § 7] for proceedings before domestic arbitration panels."[152]

Later that same year, the Fifth Circuit followed the Second Circuit's *NBC/Bear Stearns* ruling and likewise held that a private arbitral proceeding is not a "foreign or international tribunal" under the meaning of § 1782 in *Republic of Kazakhstan v. Biedermann International*.[153] The Fifth Circuit's opinion largely focused on the policy concerns of allowing § 1782 assistance to private arbitral tribunals.[154] Reiterating the Second Circuit's observation that allowing discovery assistance through the U.S. District Courts was counterproductive to the economic and efficiency benefits of the arbitration process, the court noted that "[r]esort[ing] to § 1782 in the teeth of such arguments suggests a party's attempt to manipulate United States court processes for tactical advantage," and that the statute "need not be construed to demand a result that thwarts private international arbitration's greatest benefits."[155] The Fifth Circuit also acknowledged the discord that would arise between § 7 of the FAA and a broad reading of § 1782, stating that "[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded in its domestic dispute-resolution counterpart."[156]

Following the *Intel* decision in 2004, both the Second and Fifth Circuits reaffirmed their holdings in *NBC/Bear Stearns* and *Biedermann* respectively, finding that *Intel* had no effect on its prior analyses.[157]

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[152] *Id.* at 191; *see* 9 U.S.C. § 7 (conferring the authority to request discovery assistance only on arbitrators rather than any interested parties, and also limits the type of discovery which can be requested to testimony before the arbitrators and material physical evidence such as documents and books).

[153] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 880-82 (5th Cir. 1999).

[154] *Id.* at 882.

[155] *Id.* at 883.

[156] *Id.*

[157] *See* El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed.Appx. 31, 33-34 (5th Cir. 2009); *In Re* Guo, 965 F.3d 96, 104-106 (2d Cir. 2020).

> The only language in *Intel* that is even arguably in tension with *NBC*'s determination that the statute is limited to state-sponsored tribunals is a passing reference in dicta: namely, a parenthetical quotation of a footnote in an article by Professor Hans Smit, setting forth the proposition that '[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.' We doubt whether such a fleeting reference in dicta could ever sufficiently undermine a prior opinion of this Court as to deprive it of precedential force. . . . Ultimately, Intel's approach to interpreting § 1782, including its emphasis on the primacy of plain textual meaning, is based on general principles of statutory construction that cast no doubt on

The Seventh Circuit joined the Second and Fifth Circuits in holding as a matter of first impression that § 1782 assistance does not apply to private foreign arbitrations in *Servotronics, Inc. v. Rolls-Royce PLC*, (7th Cir. 2020).[158] Cognizant of the by-then current circuit split between the Second and Fifth on one side and Sixth and Fourth Circuits on the other, the Seventh Circuit first looked for a dictionary definition of "tribunal," legal or otherwise, which they found to be inconclusive, leaving both possible interpretations of the statute plausible.[159] The court, following a similar logical approach as that first taken by the Second Circuit, found that once the word "tribunal" was viewed in its proper statutory context, "the more expansive reading of the term—the one that includes private arbitrations—becomes far less plausible."[160]

The court further supported this conclusion by noting that this narrower reading of the statute would avoid serious conflict with the FAA, just as the Second and Fifth circuits had addressed, stating that "[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."[161] Finally, the court dismissed the relevance of the Hans Smit footnote in *Intel*, seeing "no reason to believe that the Court, by quoting a law-review article in a passing parenthetical, was signaling its view that § 1782(a) authorizes district courts to provide discovery assistance in private foreign arbitrations."[162]

2. Functional Analysis Approach of the 4th and 6th Circuits: Private Arbitrations can be "tribunals."

The functional approach taken by the Sixth and later Fourth Circuit finds its roots in the Supreme Court's ruling in *Intel*; specifically its holding that the Directorate-General for Competition of the European Commission, a body more akin to an administrative agency than a conventional "court", qualified as a tribunal under § 1782.[163] Supporting this holding, the U.S.

> our precedent. NBC's thorough analysis, which began with a threshold finding of ambiguity before turning to legislative history and purpose to elucidate the meaning of the statutory language, comports with both Intel's reiteration of broad principles and its specific analysis of §1782.

(internal citations omitted).

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

[159] *Id.* at 693-94 ("In both common and legal parlance, the phrase 'foreign or international tribunal' can be understood to mean only state-sponsored tribunals, but it also can be understood to include private arbitration panels. Both interpretations are plausible.").

[160] *Id.* at 694.

[161] *Id.* at 695.

[162] *Id.* at 696.

[163] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257-58 (2004); BENTO,

Supreme Court brought attention to Congress's 1964 amendment of the statute from "judicial proceeding" to "proceeding in a foreign or international tribunal" and noted their intent to expand the scope of § 1782 to reach beyond "judicial proceedings" to also include "administrative and quasi-judicial proceedings abroad."[164] By synthesizing the U.S. Supreme Court's analysis of the function and procedures of the European Commission, including its acting as a "first-instance decision maker," its "proof-taking" role, and its decisions being subject to judicial review,[165] later courts distilled what they considered to be a "Functional Test" for determining whether a given forum for dispute resolution qualifies as a "tribunal" within the meaning of § 1782.[166] Under this "Functional Test," a body qualifies as a tribunal where "(1) it's a first-instance adjudicative decisionmaker, (2) it permits the gathering and submission of evidence, (3) it has authority to determine liability and impose penalties, and (4) its decision is subject to judicial review."[167]

The Sixth Circuit was the first appellate court following the Supreme Court's *Intel* decision to revisit the question of what bodies qualify as "a foreign or international *tribunal*" under § 1782 when it granted review in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*[168] Based on its analysis of the statutory text, context, and history of § 1782, the Sixth Circuit held that district court's statutory authority to compel discovery for use in "foreign or international tribunals" extended to private foreign arbitrations.[169] While noting that this holding was in contrast to the ones held by the Second and Fifth Circuits, the Sixth Circuit defended its position by arguing that it was consistent with the Supreme Court's *Intel* decision because "the Intel Court said nothing that would make [the court] doubt the outcome of [its] textual analysis" and "Intel contains no limiting principle suggesting that" the word "tribunal" be read to exclude private arbitrations.[170] While the Sixth Circuit did not suggest that the *Intel* decision had overruled the Second and Fifth Circuit, they noted that they found their reasoning, specifically in the Second

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supra note 3, at 110.

[164] Intel Corp., 542 U.S. at 248-49.

[165] *Id.* at 257-58.

[166] BENTO, *supra* note 3, at 110.

[167] *In re* Application of Mesa Power Grp., LLC, 878 F. Supp. 2d 1296, 1302 (S.D. Fla. 2012); *see also In re* Arb. between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd., 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (noting that arbitration clause included a provision excluding review by courts and holding that "the Intel Court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations.").

[168] *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 714 (6th Cir. 2019).

[169] *Id.*

[170] *Id.* at 725.

Circuit NBC decision, to be unpersuasive.[171]

While the Sixth Circuit makes a compelling argument, and even correctly applied *Intel*'s Functional Test to identity a body as a "tribunal" within the meaning of § 1782, the court's error was rather one of omission by accepting that the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA),[172], was indeed "foreign or international" in nature, which notably was not in dispute between the parties.[173] To illustrate, recall the fact that all squares are rectangles, but not all rectangles are squares. Here, the Sixth Circuit stopped at identifying the DIFC-LCIA as a "tribunal" while ignoring the imperative question as to whether that "tribunal" was an appropriately "foreign or international;" the court identified a rectangle but did not also consider if it was also a requisite square.[174]

In pulling support for its own opinion from *Intel*, the Sixth Circuit first highlighted the U.S. Supreme Court's observation that "Congress understood that change [from "judicial proceeding" to "proceeding in a foreign or international tribunal"] to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].'"[175] The Sixth Circuit next pointed to the U.S. Supreme Court's citation of Hans Smit's law review article, which included arbitral tribunals in its definition of "tribunal."[176] Finally, the Sixth Circuit referenced the U.S. Supreme Court's quotation of "an amicus brief from the Commission that explained how the Commission's "investigative function blur[red] into decision-making" when it decided what action to take pursuant to the DG-Competition's report." Thus, the Sixth Circuit concluded that the U.S. Supreme Court's focus on the decision-making power of a body and congressional intent was not in conflict with their textual analysis supporting a broad interpretation of § 1782.[177] FedEx had attempted to apply the Discretionary Test from *Intel* in support of its argument that the DIFC-LCIA arbitration panel was not a qualifying tribunal under § 1782, but the Sixth

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[171] *Id.* at 726.

[172] *Id.* at 719.

[173] *Id.*

[174] *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 719 (6th Cir. 2019).

[175] *Id.* at 724 (citing Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004).

[176] *Id.*; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 nn. 71, 73 (1965) ("[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"; in 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.") (emphasis added).

[177] *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d at 725.

Circuit correctly noted that the discretionary factors laid out in *Intel* should only be considered after a statutory determination has been made, and thus the factors were not applicable to defining tribunals.[178]

The Sixth Circuit also took the time to defend its conclusion against the conflicting conclusions of the Second and Fifth Circuits.[179] The Sixth Circuit felt that the Second and Fifth Circuits had turned to legislative history too early in the interpretation process, and questioned the reliability of legislative history as indicative of statutory meaning.[180] Further, the court argued that the legislative history did not indicate that the statute would not apply to private arbitration, and further inferences must only rely on speculation.[181] In response to policy considerations, the Sixth Circuit was dismissive: "[a]chieving a better policy outcome . . . is a task for Congress, not the courts."[182] Finally, the Sixth Circuit dismissed concerns that providing discovery assistance to participants in private arbitration would fail to serve the twin aims of § 1782, promoting efficient assistance and comity, by stating that "we would not conclude that arbitration is outside the reach of the statute simply because providing discovery assistance for use in arbitration might serve those purposes less directly than providing assistance for use in litigation."[183]

The Fourth Circuit endorsed the Sixth Circuit's broader interpretation of "foreign or international tribunal" just a few months later in *Servotronics, Inc. v. Boeing Co*.[184] The Fourth Circuit's opinion differentiates from the Sixth Circuit solely on its view that contractual arbitration is the "product of government-conferred authority" in both the U.S. and the United Kingdom, where the arbitral body in dispute was seated.[185]

This opinion seemingly attempts to offer an olive branch solution to the division between the Second and Fifth Circuits and the Sixth Circuit. The Fourth Circuit also sought to address policy concerns by stressing that the ability of District Courts to exercise discretion in granting § 1782 applications would prevent any undue burdens that might result from a broader inclusion of qualifying tribunals.[186] Additionally, the court dismissed concerns that their reading of the statute could affect the FAA, observing that § 1782 is designed to apply even in circumstances where "a

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[178] *Id.*

[179] *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 726 (6th Cir. 2019).

[180] *Id.* at 726.

[181] *Id.* at 728.

[182] *Id.* at 728-29.

[183] *Id.* at 730.

[184] Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020).

[185] *Id.*

[186] *Id.* at 215.

foreign proceeding [has] no direct analogue in our legal system."[187]

It is worth noting that the Eleventh Circuit also briefly held that private arbitration came within the scope of § 1782 when applying the functional approach laid out in *Intel*, but the court withdrew that decision in lieu of one that took no position on the question.[188]

B. "Public" or Investor-State Arbitrations

While the Sixth and Fourth Circuits recognized that the functional approach as first laid down in the Supreme Court's *Intel* decision could be used to effectively define a "tribunal" within the meaning of § 1782,[189] the Second Circuit realized that a similar functional approach could be useful when approaching the question of whether "public" or investor-State arbitrations qualified as "foreign or international tribunals" within the context of § 1782. In *In Re Guo* ("*Guo*"), the Second Circuit reaffirmed its holding in *NBC/Bear Stearns*, following the *Intel* decision, and implicitly recognized a functional difference between a "foreign or international" tribunal and a private tribunal.[190] While State-founded arbitral bodies and investor-state arbitrations were at this time widely considered to qualify under § 1782 due to the involvement of States as parties, the Second Circuit found that there should be a closer inquiry where an arbitral body arguably possesses attributes of both private and governmental arbitration.[191] This includes attributes such as a state-created body where the tribunal is founded on a private contractual agreement (such as in this case), or a panel established under a bilateral investment treaty.[192]

The court thus adopted a "functional approach" to be considered by courts when conducting the "foreign or international tribunal" inquiry, emphasizing that this inquiry "does not turn on the governmental or nongovernmental origins of the administrative entity in question."[193] Rather, the inquiry "consider[s] a range of factors" to determine "whether the body in question possesses the functional attributes most commonly associated with private

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[187] *Id.* at 216.

[188] *See In re* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 994-95 (11th Cir. 2012), opinion vacated and superseded sub nom. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1269-70, 1270 n.4 (11th Cir. 2014) ("leav[ing] the resolution of the matter for another day").

[189] *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 717 (6th Cir. 2019).

[190] *See In Re* Guo, 965 F.3d 96, 107 (2d Cir. 2020).

[191] *Id.*

[192] *Id.* at 108.

[193] *Id.* at 107.

arbitration."[194] These factors include:

(1) the "degree of state affiliation and functional independence possessed by the entity";

(2) the "degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision";

(3) the "nature of the jurisdiction possessed by the panel"; and

(4) the "ability of the parties to select their own arbitrators."[195]

The body in dispute in this case was the China International Economic and Trade Arbitration Commission (CIETAC), which "was originally created through state action" but had "subsequently evolved such that it arguably no longer qualifie[d] as a 'governmental or intergovernmental arbitral tribunal[,] . . . conventional court[, or] . . . other state-sponsored adjudicatory body."[196]

In addressing whether CIETAC arbitrations qualified as "tribunals" within the meaning of § 1782, the Second Circuit began their analysis with the factor of state affiliation, focusing on "the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body."[197] The court found the facts that CIETAC maintains confidentiality over its arbitrations, limits opportunities of ex parte intervention by state officials, and employs a pool of arbitrators from diverse backgrounds and nationalities rather than those who are affiliated with the Chinese government suggested "a high degree of independence and autonomy, and, conversely, a low degree of state affiliation."[198]

Next, the court considered "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision."[199] The court found that the enforceability of a body's arbitral awards is of no import when considering this factor, reasoning that since governments around the world have committed to enforcing arbitral awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), virtually all arbitration would qualify within the scope of § 1782, undermining the Second Circuit's *NBC/Bear Stearns* decision and its practical distinction between private and "foreign or international" arbitrations.[200]

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194 *Id.*

195 *In Re* Guo, 965 F.3d 96, 107-108 (2d Cir. 2020).

196 *Id.* at 107.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.* at 108.

Next, the Second Circuit considered "the nature of the jurisdiction possessed by the panel."[201] Here, the court found that CIATAC's jurisdiction "flows exclusively from the parties and not any governmental grant of authority," where, by contrast, "state-affiliated tribunals often possess some degree of government-backed jurisdiction that one party may invoke even absent the other's consent."[202] Thus, the court concluded that on this factor CIETAC more closely resembled a private arbitration.[203]

Lastly, the Second Circuit considered "the ability of the parties to select their own arbitrators," and found that this characteristic suggested a "private arbitral body rather than a "foreign or international tribunal" under § 1782."[204] The court did take special care to note that "this factor is not determinative, as agreements between countries to arbitrate disputes between their citizens may involve selection of the arbitrators by the parties, and such a tribunal may be a 'foreign or international tribunal' notwithstanding this fact," but that "the ability of parties to select their arbitrators is an additional indicator of the private status" of an arbitration.[205]

In holding that the CIETAC arbitration was a private commercial arbitration and could therefore not rely on § 1782 to request discovery, the Second Circuit recognized–just as the U.S. Supreme Court had in *Intel*–that Congress had intended to expand access to § 1782 discovery requests to "the broad panoply of unilateral, multilateral, international, and novel administrative bodies created by governments in the wake of the Second World War."[206] The Second Circuit also recognized that, in accordance with their prior *NBC/Bear Stearns* decision, § 1782 "does not sweep so broadly as to include private commercial arbitrations."[207] The Second Circuit further emphasized that arbitral bodies formed under bilateral investment treaties, such as investor-state arbitrations, may be "foreign or international tribunals" when the body derives adjudicatory authority from the "intervention or license of any government to adjudicate cases arising from certain varieties of foreign investment."[208] Essentially, in contrast to the interpretation of *Intel* by the Sixth and Fourth Circuits, the Second Circuit found that to qualify for § 1782 assistance a body must not only function as a "tribunal," but also as a functionally appropriate "foreign and international" tribunal.[209] As the last major circuit decision delivered before the U.S. Supreme Court's *ZF*

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201 *In Re* Guo, 965 F.3d 96, 108 (2d Cir. 2020).

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.* at 109.

207 *In Re* Guo, 965 F.3d 96, 109 (2d Cir. 2020).

208 *Id.* at 108.

209 *Id.* at 109.

Automotive decision, this ruling would not only prove influential in the litigation of *AlixPartners*, but also provide the building block of the "Governmental Intended Authority" test proscribed by the U.S. Supreme Court in its *ZF Automotive* opinion.

V. ZF AUTOMOTIVE US, INC. V. LUXSHARE, LTD. AND ALIXPARTNERS, LLP, ET AL. V. THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES

Given the increase in § 1782 applications and the growing split between several circuits, it is not surprising that the U.S. Supreme Court found the time ripe to revisit the statute. In fact, the U.S. Supreme Court granted a petition for certiorari in *Servotronics, Inc. v. Rolls-Royce PLC*, from the Seventh Circuit on the issue of "[w]hether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in 'a foreign or international tribunal' encompasses private commercial arbitral tribunals[,]" but that case was later dismissed as moot.[210] While the Seventh Circuit Servotronics case sat on the U.S. Supreme Court's docket, the two cases that were eventually combined into *ZF Automotive* were just beginning to make their way through the courts.

A. ZF Automotive US, Inc. v. Luxshare, Ltd.

The relevant procedural history for *ZF Automotive* began in the U.S. District Court for the Eastern District of Michigan when Luxshare filed a § 1782 discovery application against ZF Automotive US to be used in a prospective arbitration by the German Arbitration Institute ("DIS") in Germany.[211] The District Court granted this application on October 22, 2020, and ZF Automotive US promptly filed a motion to quash the granted subpoenas.[212] The U.S. District Court Magistrate Judge, Judge Patti, acknowledged ZF Automotive US's argument regarding the tribunal's qualification for use under § 1782 and the pending *Servotronics* case at the U.S. Supreme Court, but held that they were still bound to the Sixth Circuit's holding in *Abdul Latif Jameel Transportation Company Limited*, therefore ZF Automotive US's objections were overruled.[213] Following subsequent objections filed by ZF Automotive to the District Court, Judge Laurie J. Michelson held that the magistrate did not abuse his discretion in refusing to stay proceedings pending a U.S. Supreme Court decision in *Servotronics*, and

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[210] Luxshare, Ltd. v. ZF Auto. US, Inc., No. 2:20-MC-51245, 2021 WL 2154700, at *3 (E.D. Mich. May 27, 2021), objections overruled, 547 F. Supp. 3d 682 (E.D. Mich. 2021) (citing Servotronics, Inc. v. Rolls-Royce PLC, 141 S. Ct. 1684, 209 L. Ed. 2d 463 (2021)).

[211] *Id.* at *1, *3-4.

[212] *Id.* at *1.

[213] *Id.* at *3-4.

also that he did not abuse his discretion in his consideration of factors determining whether to allow discovery.[214] Luxshare then moved to compel discovery and ZF Automotive US moved to stay.[215] Subsequently, ZF Automotive US also then filed an appeal and a separate motion to stay in the U. S. Court of Appeals for the Sixth Circuit.[216] The District Court held that granting a stay pending appeal of a prior discovery order was not warranted, denied ZF Automotive US's motion to stay, and granted Luxshare's motion to compel discovery.[217]

On appeal at the Sixth Circuit, the court denied ZF Automotive US's motion to stay and Luxshare's motion to expedite as moot, since the U.S. Supreme Court had since dismissed *Servotronics*.[218] Worth noting, the Sixth Circuit also held that as a matter of first impression, discovery orders under § 1782, including orders on motions to quash subpoenas, are final, appealable orders.[219] ZF Automotive US again appealed the decision, and the U.S. Supreme Court granted Certiorari before Judgement, in combination with *AlixPartners,* on December 10, 2021,[220] on the question of:

> [W]hether 28 U.S.C. § 1782(a), which permits litigants to invoke the authority of United States district courts to render assistance in gathering evidence for use in "*a foreign or international tribunal*," authorizes those courts to order discovery for use in a purely *private foreign commercial arbitration* proceeding conducted by private parties, and private arbitrators, pursuant to a private contract."[221]

B. AlixPartners, LLP, et al. v. The Fund for Protection of Investor Rights in Foreign States

The relevant procedural history of *AlixPartners* began when The Fund for Protection of Investor Rights in Foreign States (The Fund) filed a § 1782 application in the U.S. District Court for the Southern District of New York to obtain discovery from Simon Freakley and AlixPartners, LLP (AlixPartners).[222] The petition for discovery was initiated for use in an ad

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[214] Luxshare, Ltd. v. ZF Auto. U.S., Inc., 547 F. Supp. 3d 682, 694 (E.D. Mich. 2021).

[215] *See generally* Luxshare, LTD. v. ZF Auto. US, Inc., 555 F. Supp. 3d 510, 518-19 (E.D. Mich.), cert. granted before judgment, 142 S. Ct. 637 (2021), and rev'd, 596 U.S. 619 (2022).

[216] *Id.* at 519.

[217] *Id.*

[218] Luxshare, Ltd. v. ZF Auto. U.S., Inc., 15 F.4th 780, 780-783 (6th Cir. 2021).

[219] *Id.* at 782-83.

[220] ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 637, 637 (2021).

[221] Brief for the Petitioners at *i*. ZF Auto., 142 S. Ct. 637 (No. 21-401).

[222] *See generally In re* Fund for Prot. of Inv. Rts. in Foreign States, No. 19 MISC. 401 (AT), 2020 WL 3833457, at *1 (S.D.N.Y. July 8, 2020).

hoc arbitration pursuant to a bilateral investment treaty, the Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (the Treaty).[223] The District Court granted the application on the question of whether the discovery sought was "for use in a foreign proceeding before a foreign or international tribunal."[224] The court held that the arbitration "should be treated as an international tribunal [because]: it was convened under the authority of the Treaty. . . [the] Applicant [was seeking] to enforce rights established by that treaty against Lithuania as a state; and the Arbitration [would] be conducted pursuant to UNCITRAL rules.".[225]

AlixPartners then requested that this order (the July Order) be reconsidered in light of the Second Circuit's holding in *In Re Guo* (2d Cir. 2020), the opinion for which was published on the same day as the order was granted.[226] AlixPartners argued that since the *Guo* decision had outlined the factors that courts in the Second Circuit should use as guidance when determining whether a proceeding constitutes a "foreign or international tribunal" for the purposes of § 1782, the July order could not stand because its analysis was now inaccurate.[227] When considered under the *Guo* factors, AlixPartners argued that the ad hoc arbitration possessed more functional attributes commonly associated with private arbitration.[228] In denying the request for reconsideration, the District Court found that "[c]ontrary to. . . AlixPartners contentions, *Guo* suggests that arbitrations conducted pursuant to a bilateral investment treaty like the Treaty do qualify as 'foreign or international tribunals' under § 1782."[229] Further, AlixPartners had presented arguments based on the same factors they had asked the court to previously consider and the court "nonetheless held that the Arbitration was taking place before a 'foreign or international tribunal' within the meaning of § 1782."[230] Furthermore, there was nothing in *Guo* that required the court to revisit its conclusion in the July Order.[231]

On appeal at the Second Circuit Court of Appeals, the court reviewed *de novo* the District Court's conclusions that the arbitral panel qualified as a

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[223] *Id.*

[224] *Id.* at *2.

[225] *Id.*

[226] *Id.*

[227] *See id.*

[228] *In re* Fund for Prot. of Inv. Rts. in Foreign States, No. 19 MISC. 401 (AT), 2020 WL 3833457, at *2 (S.D.N.Y. July 8, 2020) (Factors include "the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction.").

[229] *Id.*

[230] *Id.*

[231] *Id.*

"foreign or international tribunal."[232] They first observed that the U.S. Supreme Court had approached the "foreign or international tribunal" statutory requirement "cautiously and flexibly" in its seminal § 1782 case, *Intel*, in part because "[i]n light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'"[233] The Second Circuit then pointed out that their own precedents had "likewise made it clear that this statutory requirement of § 1782 is broad, but not boundless."[234] The court referenced their recent decision in *Guo*, where the Second Circuit had adopted a "functional approach" that considered a range of factors to determine "whether the body in question possesses the functional attributes most commonly associated with private arbitration."[235] Following this approach, the court considered the arbitral panel under these factors as "a closer inquiry is required where the arbitral body arguably possesses attributes of both private and governmental arbitration."[236] After analyzing each of the factors outlined in *Guo*, the Second Circuit held that the arbitration was "between an investor and a foreign State party to a bilateral investment treaty (here, the Treaty), taking place before an arbitral panel established by that Treaty, and therefore it is a 'proceeding in a foreign or international tribunal' under § 1782."[237] AlixPartners again appealed, and the U.S. Supreme Court granted certiorari of the case in the consolidated *ZF Automotive* case on the question of:

> Whether the phrase "international tribunal" in 28 U.S.C. § 1782(a) excludes an international arbitral tribunal constituted pursuant to a treaty signed by two sovereign States and charged with the authority to adjudicate with finality whether one of the two sovereigns breached its obligations under the treaty.[238]

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[232] Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216, 224 (2d Cir.), cert. granted sub nom. AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States, 142 S. Ct. 638, 211 L. Ed. 2d 397 (2021), and rev'd sub nom. ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619 (2022).

[233] *Id.*

[234] *Id.* at 225.

[235] *Id.*

[236] *Id.* at 225 n.3.

[237] *Id.* at 233.

[238] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 625 (2022); Brief for the Respondent at I, Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216 (2d Cir.) (No. 21-518).

C. Supreme Court Ruling

In a 9-0 ruling and an opinion written by Justice Amy Coney Barrett, the U.S. Supreme Court held that "[o]nly a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U.S.C. § 1782."[239] The Court defined a "foreign tribunal" as "a tribunal belonging to a foreign nation," and defined "international tribunal" as one that "involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[240] The Court affirmed the complementary meanings of "foreign tribunal" and "international tribunal" by offering this simplified definition: "the former [foreign tribunal] is a tribunal *imbued with governmental authority* by one nation, and the latter [international tribunal] is a tribunal *imbued with governmental authority* by multiple nations."[241] Noting that governmental and intergovernmental bodies may take many forms, the Court emphasized that it would not attempt to prescribe how they should be structured; the relevant question is "whether the nations intended that the ad hoc panel exercise governmental authority."[242] The Court held that "private adjudicatory bodies do not fall within § 1782," and that neither body at issue in either case qualified for assistance under the statute.[243]

The Court found that standing alone, the word "tribunal" could either be construed narrowly as a synonym for "court," or more broadly to mean any adjudicatory body.[244] Read in context with Congress's intent to create "the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad"[245] and with tribunal "attached to the modifiers 'foreign or international'"—§ 1782's phrase is "best understood to refer to *an adjudicative body that exercises governmental authority*."[246]

Justice Barrett more specifically defined "foreign tribunal" as "a tribunal belonging to a foreign nation," meaning that "the tribunal must possess sovereign authority conferred by that nation."[247] It is not enough that a tribunal is "simply located in a foreign nation."[248] Further, § 1782 presumes that a "'foreign tribunal' follows 'the practice and procedure of the foreign

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[239] ZF Auto. US, Inc., 596 U.S. at 623-24.

[240] *Id.* at 627-30.

[241] *Id.* at 631 (emphasis added).

[242] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 637 (2022)

[243] *Id.* at 633, 638 ("Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies").

[244] *Id.* at 627-28.

[245] *Id.* at 628 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004)).

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

[247] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 629 (2022)

[248] *Id.*

country.'"[249] By contrast, "that would be an odd assumption to make about a *private* adjudicatory body, which is typically the creature of an agreement between private parties who *prescribe their own rules*."[250]

When defining "international tribunal," Justice Barrett found that "international" should be understood to mean "involving or of two or more 'nations'" rather than "involving or of two or more 'nationalities'" as "it would be strange for the availability of discovery to turn on the national origin of the adjudicators.[251] Thus, an "international tribunal" is one that "involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[252] On this point, the Court cited the U.S., which had intervened as an amici and presented at the oral arguments of these cases, who argued that "the touchstone" is whether the body is "exercising official power on behalf of the two governments."[253]

The Court asserted that this interpretation was supported by both the statutory history of § 1782 and a comparison to the Federal Arbitration Act ("FAA").[254] "From the start," the Court found, "the statute [§ 1782] has been about respecting foreign nations and the governmental and intergovernmental bodies they create." "By broadening the range of governmental and intergovernmental bodies included in § 1782, Congress increased the 'assistance and cooperation' rendered by the United States to those nations," but "the amendment did not signal an expansion from public to private bodies."[255] Further, because "the animating purpose of § 1782 is comity," limiting federal court assistance to foreign and international governmental bodies "promotes respect for foreign governments and encourages reciprocal assistance," whereas it is not clear how assisting private bodies would serve that same purpose.[256] The Court further justified its decision to exclude private bodies from § 1782 by highlighting the "significant tension" and "notable mismatch" that a broader reading of § 1782 would create with the FAA, which governs domestic arbitration in the U.S. and allows for much more limited discovery than § 1782 permits.[257]

Having defined both "foreign and international" tribunals, the Court

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[249] *Id.*

[250] *Id.* at 630 (2022) (emphasis added).

[251] *Id.*

[252] *Id.*

[253] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 630 (2022) (quoting Tr. of Oral Arg. 77).

[254] *Id.* at 631.

[255] *Id.*

[256] *Id.* at 632.

[257] *Id.*

looked to the bodies at issue in these cases and found that neither qualified.[258] They easily dismissed the DIS arbitral panel involved in the dispute between ZF Automotive and Luxshare as a private arbitration, finding that the DIS arbitrator would resolve any dispute between the parties, that DIS panels operate under their own private arbitral rules, and that the parties were able to choose their own arbitrators.[259] Thus, because no government was involved in creating the DIS panel or proscribing its procedures, this adjudicative body did not qualify as a governmental body as required by § 1782.[260] The Court further soundly rejected the argument put forward by Luxshare that the DIS panel would qualify as governmental "so long as the law of the country in which it would sit (here, Germany) governs some aspects of arbitration and courts play a role in enforcing arbitration agreements."[261] Furthermore stating that "private entities do not become governmental because laws govern them and courts enforce their contracts" and that Luxshare's broad and implausible definition of a governmental adjudicative body was "nothing but an attempted end run around § 1782's limit."[262]

The Court found the ad hoc arbitration panel at issue in the dispute between The Fund and AlixPartners to present "a harder question."[263] There were factors that offered support to The Fund's claim that the ad hoc panel was governmental, namely that there was "a sovereign [Lithuania] on one side of the dispute" and that "the option to arbitrate [was] contained in an international treaty rather than a private contract," but the Court found these factors not to be dispositive.[264] Rather, the Court found that "[w]hat matters is the substance of their agreement: Did these two nations *intend to confer governmental authority* on an ad hoc panel formed pursuant to the treaty?"[265] The Court found that "[a]s a general matter, a treaty is a contract, though between nations," and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."[266] Looking to the Treaty, the Court found that the provision providing for the ad hoc tribunal was in Article 10, which grants an investor the option of four forums in which to resolve disputes:

(a) [a] competent court or court of arbitration of the Contracting Party

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[258] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 633 (2022)

[259] *Id.*

[260] *Id.* at 634.

[261] *Id.*

[262] *Id.*

[263] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 634 (2022)

[264] *Id.*

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

[266] *Id.* (quoting BG Group plc v. Republic of Argentina, 572 U.S. 25, 37 (2014)).

> in which territory the investments are made;
>
> (b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> (c) the Court of Arbitration of the International Chamber of Commerce;
>
> (d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[267]

Here, the Court found that the inclusion of courts on the list of options "reflects Russia and Lithuania's intent to give investors the choice of bringing their disputes before a pre-existing governmental body" whereas "nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority."[268]

Using the factors laid out by the Second Circuit in *Guo*, the Court engaged in a functional analysis of the ad hoc arbitration panel and found that it more closely resembled a private body.[269] The Court observed that the Treaty did not create the panel, it merely outlined the set of rules that should govern the panel's formation and procedure in the investor's chosen forum.[270] Further, the Court found that the panel functioned independently of and was "not affiliated with either Lithuania or Russia."[271] Rather, it consisted of arbitrators chosen by the parties who lacked any "official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity," and "other possible indicia of a governmental nature" such as government funding and limits to confidentiality.[272] Thus, the Court found that the panel involving The Fund was "materially indistinguishable in form and function" from the DIS panel at the heart of the dispute between ZF Automotive US and Luxshare–the authority of the panel "exists because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority."[273] Contrary to the Fund's argument

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[267] *Id.* at 634-35 (quoting Petition for a Writ of Certiorari at 64a–65a, AlixPartners, LLP v. Fund for Prot. of Inv. Rts. In Foreign States, 142 S. Ct. 638 (2021) (No. 21-518)).

[268] *Id.* at 635.

[269] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 635 (2022) (citing Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216, 226 (2d Cir. 2021)).

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.* at 636; *see* Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "); AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648–649 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

that the ad hoc arbitration's inclusion in the treaty automatically rendered it governmental, the Court found that rather it "reflects the countries' choice to offer investors the potentially appealing option of bringing their disputes to a private arbitration panel that operates like commercial arbitration panels do," which makes sense when the Treaty was designed to offer "favorable conditions for investments."[274]

The Court took care to note that "[n]one of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority," reasoning that "[g]overnmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured."[275] Justice Barrett reiterated that the relevant question is "whether the nations intended that the ad hoc panel exercise governmental authority" and in this case, all indications are that Lithuania and Russia did not.[276]

Examples could be drawn from past adjudicatory bodies for which there appears to be a broad consensus that they would qualify as intergovernmental: "the body at issue in the dispute over the sinking of the Canadian ship *I'm Alone*, which derived from a treaty between the U.S. and Great Britain," and the United States-Germany Mixed Claims Commission.[277] "[T]hose treaties specified that each sovereign would be involved in the formation of the bodies," and "specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other officers to assist in the proceedings."[278]

In concluding that "[n]either the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies," the U.S. Supreme Court reversed the order of the District Court in *ZF Automotive* and reversed the judgement of the Second Circuit Court of Appeals in *AlixPartners*.[279]

VI. INTERPRETING "FOREIGN OR INTERNATIONAL TRIBUNAL" WITHIN § 1782 GOING FORWARD

A. The Impact of the ZF Automotive

ZF Automotive was just one of five cases decided during the 2021-2022 U.S. Supreme Court term that addressed issues related to arbitration, all of

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[274] ZF Auto. US, Inc., 142 S. Ct. at 636-37 (citing Petition for a Writ of Certiorari at 56a, AlixPartners, 142 S. Ct. at 638).

[275] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 637 (2022)

[276] *Id.*

[277] *Id.*

[278] *Id.* at 637-38.

[279] *Id.* at 638.

which will have a pronounced effect on the role of federal courts in the arbitration process.[280] Historically, the Court's arbitration decisions had been largely driven by federal policies strongly favoring arbitration.[281] This term's decisions now demonstrate that the Supreme Court will be taking a more restrained and textual approach to issues involving arbitration.[282] According to Justice Kagan, "[w]e are all textualists now."[283] The decision in *ZF Automotive* further demonstrates the Court's shifting focus towards closer scrutiny of statutory text.[284] According to Imre Szalai, the Court's interest in the systems governing arbitration should be welcomed and affirms "the alternative dispute resolution process as a critical part of our legal system, as helping to alleviate the burdens of the judiciary, and as involving a partnership with the judiciary."[285]

The unanimous *ZF Automotive* ruling that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782" will have a distinct effect on the global practice of international arbitration.[286] The Sixth and Fourth Circuit rulings that the statute did indeed embrace private international arbitration proceedings and the Second Circuit's acknowledgement that § 1782 could apply to some investor-state arbitrations had resulted in "a groundswell of cases" that "placed [§] 1782 at the forefront in the field of international arbitration."[287]

While the *ZF Automotive* ruling places most international commercial arbitrations and investor-state arbitrations outside the scope of § 1782, it does not significantly alter the status quo within the field of international arbitration,[288] even if it means that parties to private arbitrations will no longer be able to obtain evidence located in the U.S. in support of their claims

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[280] Lionel M. Schooler, *Arbitration at the Supreme Court: A Record-Setting Term*, DISP. RESOL. MAG. (Sept. 19, 2022), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2022/september/arbitration-at-the-supreme-court-record-setting-term/.

[281] *See* Imre Szalai, *The Supreme Court's 2021-2022 Arbitration Cases: A More Textualist Approach*, 40 ALTS. TO HIGH COST LITIG. 121, 121 (2022).

[282] *Id.* at 127; *see generally* Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022); Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1792-93 (2022); Badgerow v. Walters, 142 S. Ct. 1310, 1319 (2022); Viking River Cruises v. Moriana., 142 S. Ct. 1906, 1913 (2022).

[283] Harvard L. Sch., *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg%20.

[284] Lionel M. Schooler, *supra* note 280.

[285] Szalai, *supra* note 281, at 121-29.

[286] Zachary Torres-Fowler, *supra* note 9; ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. at 2091.

[287] Torres-Fowler, *supra* note 9.

[288] *Id.*

or defenses.[289] In fact, the decision allays "concerns about allowing American-style discovery into international arbitration, where it has never been part of the traditional practice."[290] Many practitioners around the world had worried that an opposite conclusion in *ZF Automotive* would upend the "carefully designed document exchange practices commonly used in international arbitration proceedings" when many parties opted in to arbitration precisely to avoid expansive American-style discovery.[291]

Other practitioners were left disappointed with the decision, arguing that § 1782 had been a crucial tool that enabled parties to "uncover key evidence and enable foreign arbitral tribunals to render more informed determinations in their proceedings."[292] One critic expressed concern that the Court "may have erred in treating a dispute under a [bilateral investment treaty] as a private dispute, when in fact the rights the private party asserts against the foreign state are the treaty rights of the investor's home state."[293]

There will likely still be more litigation regarding the "foreign or international tribunal" requirement of § 1782, especially regarding defining a sufficient intent to imbue governmental authority.[294] Most notably, before the ruling in *ZF Automotive*, courts had universally held that investor-state arbitrations, or arbitration tribunals that arise from obligations contained in bilateral or multilateral investment treaties, constituted tribunals within the meaning of § 1782.[295] Thus, it can be expected that "US courts will continue to grapple with the question of when an arbitral tribunal is imbued with specific government authority, particularly in the field of investment arbitration where some institutions, such as ICSID, carry unique quasi-governmental characteristics."[296] Two district courts have already ruled that ICSID tribunals are not international tribunals under § 1782, but it is a close enough issue that other courts are likely to disagree.[297]

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[289] Gibbons, *supra* note 111, at 267-68.

[290] *Id.* at 266.

[291] Torres-Fowler, *supra* note 9.

[292] *Id.* at 14.

[293] Ted Folkman, *Case of the Day: ZF Automative v. Luxshare*, LETTERS BLOGATORY (June 14, 2022), https://lettersblogatory.com/2022/06/14/case-of-the-day-zf-automotive-v-luxshare.

[294] Torres-Fowler, *supra* note 9.

[295] Expert Q&A, *supra* note 112, at 6-7.

[296] Torres-Fowler, *supra* note 9; *see also* Expert Q&A, *supra* note 112, at 6 ("The ICSID system was created by nations that signed on to the Washington Convention and the signatory countries agreed that they would enforce the award 'as if it were a final judgment of a court in that State.'" (ICSID Convention article 54(1))).

[297] *See In re* Alpene, Ltd., No. 21MC2547MKBRML, 2022 WL 15497008, at *1 (E.D.N.Y. Oct. 27, 2022); In re Webuild S.P.A., No. 22-MC-140 (LAK), 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

B. Analyzing § 1782 Going Forward

Zooming out to a macro-view of the analysis a district court should conduct upon receipt of a § 1782 application, the *ZF Automotive* has not altered the fundamental structure of the analysis. Rather, it has better defined the boundaries between the factors relevant to the statutory requirements and those that are relevant to the court's exercise of discretion. Most notably, *ZF Automotive* clarified the definition of "foreign or international tribunal" as meaning "an adjudicative body that exercises governmental authority."[298] In specifying the analytical boundaries of what constitutes a "foreign or international tribunal" under the "For Use" factor of the Statutory Test, the U.S. Supreme Court made the distinctions between the Statutory and Discretionary Tests much more distinguishable.[299]

As can now be interpreted following the *ZF Automotive*, when considering a § 1782 application, this author proposes the following analytical approach:

A district court has authority to grant a § 1782 application where:

(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made,

(2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and

(3) the application is made by a foreign or international tribunal or any interested person.[300]

A district court must first determine whether it has the statutory authority to grant the application. Importantly, regarding the second factor, "for use in a foreign proceeding before a foreign or international tribunal," the U.S. Supreme Court holds that a "foreign or international tribunal" refers to "an adjudicative body that exercises governmental authority."[301] "Thus, a 'foreign tribunal' is one that exercises governmental authority conferred by a single nation, and an 'international tribunal' is one that exercises governmental authority conferred by two or more nations."[302] This requirement is not limited to adjudicative proceedings that are pending; § 1782(a) may be invoked where such proceedings are "likely to occur" or are "within reasonable contemplation."[303] "[T]he animating purpose of

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[298] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 620 (2022).

[299] *See id.* at 627-28.

[300] Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015) (internal quotation marks, citation, and alterations omitted).

[301] ZF Auto. US, Inc., 596 U.S. at 620.

[302] *Id.*

[303] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258-59 (2004).

§ 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance."[304] "[P]rivate entities do not become governmental because laws govern them and courts enforce their contracts."[305] In determining whether a tribunal qualifies under this "For Use: factor of § 1782, there are now two potentially relevant tests: the "*Intel* Functional Tribunal Test" and the "Governmental Intended Authority Test," which is supplemented by the "*Guo* Tribunal Character Factors."

If the district court must determine whether a given body is in fact a "tribunal," the appropriate analysis is to apply the Functional Test first presented in *Intel*.[306] The *ZF Automotive* decision did not reject this Functional Test, but rather indicated that its proper application is as a test to determine whether a given body is a "tribunal" at all.[307] This "*Intel* Functional Tribunal Test" should be applied in situations as the U.S. Supreme Court faced in *Intel*, when they had to determine whether the Directorate-General for Competition of the Commission of the European Communities (EU), a clearly governmental body, was a "tribunal" within the meaning of § 1782.[308] "[A] body qualifies as a tribunal if (1) it's a first-instance adjudicative decisionmaker, (2) it permits the gathering and submission of evidence, (3) it has authority to determine liability and impose penalties, and (4) its decision is subject to judicial review."[309]

If the district court must determine whether a given body is a "foreign or international tribunal," the appropriate inquiry is the "Governmental Intended Authority Test;" whether the specific features of the tribunal or other evidence establish the intent of the relevant government(s) to imbue the tribunal with its own governmental authority.[310] The factors first laid out by the Second Circuit in *Guo* and cited in the *ZF Automotive* form an effective framework for this analysis, although it should be noted that since the Court did not wish to proscribe how ad hoc arbitration panels or intergovernmental bodies should be structured, no particular factor is singularly dispositive.[311] These "*Guo* Tribunal Character Factors" include:

(1) the "degree of state affiliation and functional independence possessed by the entity";

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[304] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 621 (2022).

[305] *Id.* at 634.

[306] *See* Intel Corp., 542 U.S. 241 at 258-59.

[307] *See* ZF Auto. US, Inc., 596 U.S. at 628.

[308] Intel Corp., 542 U.S. at 241.

[309] *In re* Application of Mesa Power Grp., LLC , 878 F. Supp. 2d 1296, 1303 (S.D. Fla. 2012).

[310] ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 634 (2022).

[311] *Id.*

(2) the "degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision";

(3) the "nature of the jurisdiction possessed by the panel"; and

(4) the "ability of the parties to select their own arbitrators."[312]

Each of these factors also serve as an umbrella for related subfactors. While these subfactors are certain to develop and proliferate as new case law evolves, the Supreme Court did offer further guidance to navigating possible subfactors for the *Guo* Tribunal Character Factors considering the "degree of state affiliation and functional independence possessed by the entity" and the "nature of the jurisdiction possessed by the panel,"[313] and the Second Circuit also went into greater detail of these factors in their decision in Guo as outlined previously.[314]

Once the statutory requirements have been found to have been met, the district court must apply *Intel*'s discretionary factors to determine if it is appropriate to grant the § 1782 application or if it should be denied. Contrary to the contention that because the statute simply does not encompass private arbitrations district courts no longer need to conduct an assessment of the *Intel*'s discretionary factors,[315] the Supreme Court did not explicitly reject them, and the *Intel* Discretionary Factors retain a vital role in allowing the district courts discretion in granting or denying § 1782 applications for reasons varying from the practical to the diplomatic, even where the statutory

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[312] *In Re* Guo, 965 F.3d 96, 107-08 (2d Cir. 2020).

[313] ZF Auto. US, Inc., 596 U.S. at 620-21, 635, 637-38. When considering "degree of state affiliation and functional independence possessed by the entity," the District Court should consider that §1782 "presumes that a 'foreign tribunal' follows 'the practice and procedure of the foreign country.' That the default discovery procedures for a "foreign tribunal" are governmental suggests that the body is governmental too." For international tribunals, especially those involving States as parties, the District Court should additionally consider whether the relevant treaty actually establishes a panel or whether it merely proscribes "the set of rules that govern the panel's formation and procedure." For example, treaties that "specif[y] that each sovereign would be involved in the formation of the bodies," specify where the body would initially meet, and/or allow the commissioners of the panel to appoint other officers to assist in the proceedings would be favored to be governmental bodies. Further, courts should consider whether any of the individuals presiding over the panel has any "official affiliation" with "any governmental or intergovernmental entity." When considering the "nature of the jurisdiction possessed by the panel" the District Court should consider such factors as whether the body receives any government funding, whether records of the proceedings are published or remain confidential, and whether awards can be made public regardless of the consent of the parties.

[314] *See In Re* Guo, 965 F.3d at 107-08.

[315] *See* Gibbons, *supra* note 111, at 267.

requirements have been met.[316] Rather, now that the Supreme Court has better defined the statutory requirements "for use in a foreign or international tribunal," these Discretionary Factors can now cease to blur into the statutory analysis of a given application and be clearly understood to be part of the secondary discretionary analysis. These non-exhaustive factors include: (1) whether the requested discovery is within the foreign tribunal's jurisdictional reach to request itself; (2) "the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States"; and (4) whether the application would result in an "unduly intrusive or burdensome" request.[317]

C. A Survey of Post-ZF Automotive § 1782 Cases

Only one case, *In re EWE Gasspeicher GmbH*, has addressed a § 1782 application stemming from a private international arbitration since the release of the *ZF Automotive* decision, and the Third Circuit Court of Appeals was able to make a swift and simple decision.[318] In this case, like in *ZF Automotive*, because private parties had agreed in a private contract that a private dispute-resolution organization and no government had been involved in creating the panel or prescribing its procedures, "the private arbitration panel in this case 'does not qualify as a governmental body' . . . [and] had no right to seek discovery under [§] 1782."[319]

Two additional cases have addressed the closer issue of whether certain bodies that govern investor-State arbitration disputes are within the statutory definition of "foreign or international tribunal," both addressing the qualifications of arbitration panels seated by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).[320] In *In re Alpene, Ltd.*, the Eastern District of New York noted that "a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it" or because one of the parties is a sovereign" and found that their inquiry was "whether the treaty parties, in this case Malta and China, indicated an intent 'to imbue the body in question [here, the ICSID

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316 *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 628 n.1 (2022); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 244-45 (2004).

317 Intel Corp., 542 U.S. at 244-45; BENTO, *supra* note 3, at 59.

318 *See In re* EWE Gasspeicher GmbH, No. 20-1830, 2022 WL 2233915, at *1 (3d Cir. June 22, 2022).

319 *Id*

320 *See In re* Alpene, Ltd., No. 21MC2547MKBRML, 2022 WL 15497008, at *1 (E.D.N.Y. Oct. 27, 2022); *In re* Webuild S.P.A., No. 22-MC-140 (LAK), 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

arbitration panel] with governmental authority.'"[321] The district court modeled their analysis after the Supreme Court's analysis of the ad hoc arbitration panel in dispute in *AlixPartners*.[322]

In the end, what the district court found to be the most dispositive in determining whether the ICSID panel was private rather than governmental was that "ICSID arbitral tribunals have no authority to provide reciprocal discovery assistance for United States proceedings."[323] The court reasoned that because the "animating purpose of § 1782 is comity" between foreign and intergovernmental bodies, "one question for this court is whether the ICSID exercises governmental authority such that granting discovery requests by parties in arbitrations before the ICSID would 'promote[ ] respect for foreign governments and encourage[ ] reciprocal assistance.'"[324] Based on their analysis, and the fact that "the ICSID (and investor-state arbitration generally) did not yet exist in 1964 when § 1782 was amended to include the phrase 'foreign or international tribunals,'" the court found it "hard to imagine" how ICSID could provide reciprocity.[325] This may seem like a narrow view to take when one considers that the Supreme Court did not foreclose "the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority," as "[g]overnmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured."[326] Further, the relevant question is whether the nation(s) intended that the tribunal, ad hoc panel or otherwise, exercise governmental authority,[327] and neither the statutory text of § 1782(a) nor its legislative history suggests "that Congress intended to impose a blanket foreign-discoverability rule on § 1782 assistance."[328] Additionally, comity considerations, while they may be helpful in identifying bodies that are imbued with governmental authority, may arguably be better left to a judge's discretion *after* a determination has been made on whether the § 1782 application has met all of the statutory requirements. It can be expected that this particular point of contention will be further debated as more district courts grapple with how to categorize investor-state arbitrations in a post-*ZF Automotive* era.

In this case, the district court did acknowledge that until *ZF Automotive*, "federal courts uniformly held that investor-state arbitrations were eligible

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321 *In re* Alpene, Ltd., No. 21MC2547MKBRML, 2022 WL 15497008, at *2.

322 *See id.* at *2.

323 *Id.* at *3.

324 *Id.*

325 *Id.*

326 ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619, 637 (2022).

327 *Id.*

328 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 243 (2004).

for § 1782 discovery."[329] However, they argued that while "the Supreme Court did not address ICSID investor-state arbitrations specifically, by reaching out to decide this issue absent a circuit split, it did signal a desire to limit the availability of discovery in U.S. courts for international commercial arbitrations."[330]

The District Court for the Southern District of New York has similarly ruled that an ICSID panel was not a "foreign or international tribunal" within the meaning of § 1782.[331] The opinions only significantly differ in that this district court did not consider comity as a deciding factor.[332] The district court found that the ICSID tribunal derived its authority from the parties' consent to arbitrate, and that "[t]hat authority exists because [Panama] and [Webuild] consented to the arbitration, not because [Italy] and [Panama] clothed the panel with governmental authority."[333] As in *ZF Automotive*, "[t]he inclusion of courts on the list [of several options of dispute resolution forums including courts in Panama] reflects [Panama] and [Italy's] intent to give investors the choice of bringing their disputes before a pre-existing governmental body."[334] While this analysis is in line with the U.S. Supreme Court's in *ZF Automotive*, ICSID's permanent body and governing treaty deserves further analysis and debate in determining its status as a private or governmental entity.

VII. CONCLUSION

The U.S. Supreme Court's decision in *ZF Automotive* did much to clarify not only the meaning of the statutory term "foreign or international tribunal," but also subtly clarify the entire statutory analysis of § 1782 applications. First, the Court analyzes the statutory factors. The "For Use" factor now has clearly defined tests available to discern whether a body is both a tribunal to begin with (the *Intel* Functional Tribunal test) and whether it is a "foreign or international tribunal" imbued with governmental authority ("Governmental Intended Authority Test" with the *Guo* Tribunal Character Factors). Then, only if the statutory requirements of § 1782 are met, should the court apply *Intel*'s Discretionary test when exercising its discretion in granting or denying the § 1782 application for discovery. There is sure to be continued debate on § 1782's application to investor-state and other "public" arbitrations, but these clarified and categorized tests should help to properly

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[329] *In re* Alpene, Ltd., No. 21MC2547MKBRML, 2022 WL 15497008, at *4 (E.D.N.Y. Oct. 27, 2022).

[330] *Id.*

[331] *In re* Webuild S.P.A., No. 22-MC-140 (LAK), 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

[332] *See id.*

[333] *Id.* at *2.

[334] *Id.*

focus the debate until the Supreme Court offers more guidance, hopefully in less time than transpired between their decisions in *Intel* and *ZF Automotive*.