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Semantic Cues And Legislative Muse: Discovery Does Not Ensue Under § 1782 For International Private Commercial Arbitration

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I. Introduction

In *Servotronics Inc. v. Rolls-Royce PLC* ("*Servotronics*"), the Seventh Circuit stamped its approval of the narrow reading of 28 U.S.C. § 1782 ("§ 1782") and added its opinion to an already hotly contested split among the circuits.[2] The Seventh Circuit held that private commercial arbitration tribunals do not fall within the scope of § 1782, which grants parties to foreign tribunals the right to seek traditional U.S. discovery from federal courts.[3] A district court, pursuant to § 1782, is authorized to order a person within the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal."[4] This language is the subject of the enduring circuit split that this Comment addresses. The Supreme Court granted a writ of certiorari of *Servotronics* for the 2021 term to resolve the split in the circuits over the interpretation of § 1782.[5] The Court, however, dismissed the case pursuant to Rule 46,[6] because the underlying arbitration proceedings had concluded, and the parties stipulated to dismissal.[7]

One critical question arises from *Servotronics*'s journey through the U.S. judicial system that this Comment will address: how should the Supreme Court resolve the circuit split if a § 1782 controversy ripens in the future?

This Comment argues the Court should reject application of § 1782 to international private commercial arbitrations and establish a narrow reading of § 1782, as was done by the Second Circuit in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, the Fifth Circuit in *Republic of Kazakhstan v. Biederman Int'l*, and the Seventh Circuit in *Servotronics*. Part II introduces the foundations of textualism and purposivism, the Supreme Court's reference to 'arbitral tribunals'

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[2] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020) ("*Servotronics*"); *see infra* Circuit Split.
[3] 28 U.S.C. § 1782.
[4] *Id*.
[5] Servotronics, Inc. v. Rolls-Royce PLC, 2021 WL 4619271 (2021).
[6] *Id*. (dismissing suit pursuant to Rule 46 after parties stipulated to dismissal – arbitration concluded, and issue would have been moot).
[7] *Id*.

in *Intel*, and the cases that have facilitated the circuit split. Finally, Part III argues that a proper textualism approach to § 1782 demands reading 'foreign or international tribunal' in the context of the 1964 revisions. Alternatively, a proper purposivism approach points to the statute preceding § 1782 that limited application of judicial assistance only to government-sponsored tribunals, as well as congressional reports published alongside § 1782's enactment that endorse a continuation of that limited application. Ultimately, application of either approach, textualism or purposivism, reveals Congress's objective intent[8] to exclude parties to private commercial arbitrations from the scope of § 1782.

II. The Circuit Split

The utility that § 1782 provides to parties to foreign tribunal proceedings grants the United States judicial system the power to exert influence where it possesses no jurisdictional grasp. Under § 1782(a):

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing *for use in a proceeding in a foreign or international tribunal*, 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.[9]

[8] John F. Manning, Inside Congress's Mind, 115 COLUM. L. REV. 1911, 1932-33 (2015). *Cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (arguing that textualism and purposivism use an element of "the subjective intent of the enacting legislature").

[9] 28 U.S.C. § 1782(a) (emphasis added).

Circuit courts are split on where to draw the line in the sand on foreign shores: to what classes of foreign proceedings of a 'foreign or international tribunal' the United States may extend its judicial power.[10] The controversy over this line in the sand originates in *Intel Corp. v. Advanced Micro Devices, Inc.*, where the Court found § 1782 extended to quasi-judicial proceedings but fueled debate over the statute's applicability to private commercial arbitrations.[11]

In the years preceding *Intel,* the Second and Fifth Circuits found the phrase ambiguous, examined the statutory and legislative history of § 1782, and determined that the phrase is limited to state-sponsored parties in foreign arbitrations and excluded private parties to foreign arbitrations.[12] This precedent stood unchallenged for two decades. In the view of these circuits, the *Intel* decision turned on the application of § 1782 to a quasi-governmental tribunal, not a private commercial tribunal.[13] Thus, *Intel* did not explicitly repudiate the conclusions of the Second and Fifth Circuits.[14] The Fourth and Sixth Circuits, however, recently challenged this narrowly tailored precedent with a broad interpretation, reading § 1782 to apply to foreign private commercial arbitrations.[15] The Seventh Circuit's decision in *Servotronics* is the most recent in the string of opinions and aligns with the narrow, state-sponsored party interpretation of the Second and Fifth Circuits.[16]

A. Distinguishing Textualism And Purposivism

[10] *See infra*, Circuit Split.
[11] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
[12] National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biederman Int'l, 168 F.3d 880 (5th Cir. 1999).
[13] *Intel*, 542 U.S. 241.
[14] *See id.*
[15] Servotronics, Inc. v. The Boeing Co., 954 F.3d 209 (4th Cir. 2020); Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019).
[16] *Servotronics*, 975 F.3d 689.

Legal minds approaching statutory interpretation through textualism and purposivism share the common goal of adhering to the power of the legislature as the supreme lawmaker when interpreting a statute's text.[17] While the ultimate goal of either approach is to determine the objective meaning of a particular statute, scholars disagree as to whether these avenues of interpretation rely on evidence of Congress's objective or subjective intent.[18] However, the relevant dispute between textualists and purposivists for the purpose of this note is their disagreement over the most effective way to interpret Congress's objective intent: "they advocate different modes of interpretation and turn on different tools for evidence of Congress's objective intent."[19]

On the one hand, textualists "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."[20] Through a textualism approach, Congress's purpose of enacting the statute is only relevant insofar as it is evident from the text of the statute.[21] Thus, semantic context is the key inquiry of textualists, who seek "evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words."[22] Two textualists, Scalia and Garner, advocate that purpose

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[17] John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2413, 2425 (2017); Congressional Research Service, *Statutory Interpretation: Theories, Tools, and Trends*, R45153 (April 5, 2018).
[18] John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932-33 (2015) (noting that some versions of textualism emphasize the importance of creating "clear interpretive rules" as a background against which Congress may legislate (quoting Finley v. United States, 490 U.S. 545, 556 (1989))). *Cf.* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (arguing that textualism and purposivism both rely on "the subjective intent of the enacting legislature" to "construct their sense of objective meaning"). *See Statutory Interpretation: Theories, Tools, and Trends*, supra note 17.
[19] *Statutory Interpretation: Theories, Tools, and Trends*, supra note 17 (citing Manning, *Without the Pretense of Legislative Intent*, supra note 17; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 10 n.26 (2006)).
[20] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988). *See Statutory Interpretation: Theories, Tools, and Trends*, supra note 17.
[21] *Statutory Interpretation: Theories, Tools, and Trends*, supra note 17 (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 30 (2012) (arguing against using the word "intent" even if it refers solely to the intent "to be derived solely from the words of the text" because it "inevitably causes readers to think of subjective intent")).
[22] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

is derived from a fair reading of the semantic "text itself, [when read] consistently with the other aspects of its context."[23] They contend this context includes "textual purpose" by way of, "(1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance."[24] Finally, from the perspective of textualists, "any attempt to overlay coherence on a statutory text that otherwise seems to have problems of fit unacceptably threatens to undermine the bargaining process that produced it."[25] For instance, textualists may argue that § 1782 does not apply to private arbitration because Congress used the language, 'foreign or international tribunal' in the semantic context of awarding assistance to quasi-governmental agencies throughout the 1964 statutory scheme; they would reason that expanding the statute's scope would have problems of fit, where one revised statute applies to quasi-governmental proceedings while § 1782 applies to quasi-governmental *and* private proceedings, which would undermine the bargaining process that produced the 1964 revisions—if Congress meant to expand the scope in this manner, it would have said as much.

On the other hand, purposivists focus on the legislative process and their primary intent is to construct the statutory interpretation inquiry "in a way that is faithful to Congress's purposes."[26] Purposivists thus approach the aforementioned example by evaluating evidence in the legislative history of § 1782 and may argue that based on such evidence a reasonable legislator would have intended the statute *only* apply to quasi-governmental proceedings. Purposivists would engage in this statutory interpretation process by considering the evidence in which "Congress makes its

[23] Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, supra note 21.
[24] Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, *supra* note 21, at 33.
[25] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 445 (2005).
[26] Robert A. Katzmann, JUDGING STATUTES 31 (2014); *see* Henry M. Hart, Jr. & Albert M. Sack, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 1182 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

purposes known, through text and reliable accompanying materials constituting legislative history."[27] Thus, the primary difference between purposivists and textualists is that purposivists tend to trust and rely on the legislative history and policy context of the statute, which tends to be "evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy."[28]

The canons of construction evidenced in the textualism and purposivism approaches are employed throughout the circuit split surrounding § 1782, which will be disseminated, in turn.

B. Intel Sets The Circuit Stage For Debate

In *Intel,* the Supreme Court set the stage for debate surrounding § 1782 by way of a footnote citing a reference to 'arbitral tribunal' by Hans Smit. The substance of the *Intel* footnote is subject to extensive debate within the circuit split of § 1782. In *Intel,* the Court's opinion turned on whether a quasi-governmental commission is a 'tribunal' under § 1782.[29] The underlying proceeding in *Intel* was a quasi-governmental commission in nature because it was controlled by the U.K. government.[30] The Court found the commission in question did fall within the scope of § 1782's 'tribunal' language.[31] In support of its conclusion, the Court turned to Congress's intent in the context of the 1964 legislative recast of § 1782.[32]

The Court found it notable that "Congress deleted the words 'in any judicial proceeding pending in any court in a foreign country,' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'"[33] In the Court's view, the change in language signaled that

[27] Katzmann, *supra* note 26, at 31; *see Statutory Interpretation: Theories, Tools, and Trends*, supra note 17, at 10.
[28] Manning, *What Divides Textualists from Purposivists?*, *supra* note 22; *see Statutory Interpretation: Theories, Tools, and Trends*, supra note 17, at 11.
[29] *Intel*, 542 U.S. 241 at 245.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Intel*, 542 U.S. 241 at 246.

"Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].'"[34] The proceeding in question fell within a quasi-governmental commission, not a private commission or tribunal of any sort.[35] Thus, the Court did not directly examine whether its interpretation of 'tribunal' to include administrative and quasi-judicial proceedings extended to private commercial arbitration proceedings.[36]

In relevant part, however, the Court stated, "Congress introduced the word 'tribunal' to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to '*administrative* and quasi-judicial proceedings.'"[37] Subsequently and in support, the Court cited a law review article written by Hans Smit, a member of the Commission on International Rules of Judicial Procedure ("Rules Commission") and a key drafter of the 1964 revisions to § 1782.[38] The Court outlined Smit's intent in drafting the recommended revisions to § 1782 that Congress implemented; in relevant part, Smit wrote, "[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."[39]

The Court has not revisited the scope of § 1782 since *Intel*, and a string of contradicting appellate decisions have followed as circuit courts attempt to apply *Intel* to applications for discovery in underlying foreign private commercial arbitrations.[40] In the wake of the *Intel* decision, the Fourth and Sixth Circuits have found *Intel*'s reliance on Hans Smit's 'arbitral tribunal' language dispositive to extend § 1782's line in the sand to include private commercial

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* (emphasis added).
[38] *Id.* (The Rules Commission makes recommendations to Congress for laws).
[39] *Intel*, 542 U.S. 241 at 245.
[40] *See infra*, Circuit Split.

arbitrations. In contrast, the Second, Fifth, and Seventh Circuits have found *Intel*'s indirect reference to Hans Smit's 'arbitral tribunal' language inconclusive, and instead found support in the statutory text and legislative history to narrow the scope of § 1782. These courts draw the § 1782 line in the sand to exclude private commercial arbitrations. The aforementioned circuit decisions will be discussed, in turn.

C. The Broad Interpretation Of § 1782

The Fourth and Sixth Circuits have expounded upon *Intel* and outlined a broad interpretation of § 1782 supported by attenuated evidence of drafter and congressional intent.[41] In *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp*. ("*FedEx*"), the Sixth Circuit held § 1782 applicable to all non-judicial foreign proceedings, broadening the scope to encompass not only government-sponsored proceedings, but also private proceedings.[42] Similarly, in *Servotronics, Inc. v. The Boeing Co.* ("*Boeing*"), the Fourth Circuit held that the use of 'tribunal' in § 1782 applied to all foreign arbitration tribunals.[43] The aligning interpretations of § 1782 from the Sixth and Fourth Circuits derive primarily from *Intel* and the Court's reliance on the interpretation of the drafter of the 1964 recast of § 1782, Hans Smit.[44] The Fourth Circuit's decision in ***Servotronics Inc. v. The Boeing Co.*** is particularly fascinating and useful precedent because it is the sister case to the Seventh Circuit's *Servotronics, Inc. v. Rolls-Royce PLC* dispute.

In *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, the Sixth Circuit heard the appeal by Abdul, which challenged the District Court's denial of Abdul's application for discovery against FedEx.[45] The court began its analysis with the ordinary meaning of 'tribunal.'[46] The court

[41] *FedEx*, 939 F.3d 710; *Boeing*, 954 F.3d 209.
[42] *FedEx*, 939 F.3d 710 at 713.
[43] *Boeing*, 954 F.3d 209 at 211; *see Servotronics*, 975 F.3d 689.
[44] *See FedEx*, 939 F.3d 710; *Intel*, 542 U.S. 241.
[45] *FedEx*, 939 F.3d 710 at 711.
[46] *Id.*

found dictionary definitions of 'tribunal' varied in scope and therefore left room for interpretation, so the court turned to historical usage of the word 'tribunal' by U.S. courts to find evidence that 'tribunal' traditionally includes privately contracted arbitrations.[47] Despite these avenues of interpretation that tend to "support a linguistic definition of 'tribunal' that includes a privately contracted-for arbitral body[,] if the overall context and structure of the statute indicate that Congress used the word in a different sense than its linguistic meaning, the congressional meaning controls."[48] Accordingly, the court turned to the version of § 1782 that predated the 1964 legislative revisions, reasoning that statutory interpretation demands that "the context of a statute's text includes a word's historical associations acquired from recurrent patterns of past usage."[49] The court found nothing in the statute suggesting that a private arbitration tribunal was excluded from the meaning because the statute "contains only one other instance of 'tribunal,' and that instance is not inconsistent with a definition of the word that includes private arbitrations."[50]

Absent a clear indication from the ordinary definition of 'tribunal' and statutory context to exclude private arbitral panels from the scope of 'tribunal' in § 1782, the court turned its attention to *Intel*.[51] Analyzing and applying *Intel*, the Sixth Circuit found significant the indirect references the Supreme Court made to the scope of § 1782.[52] For instance, the Supreme Court in *Intel* noted, "Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].'"[53] Addressing the

[47] *FedEx*, 939 F.3d 710 at 713.
[48] *Id.*
[49] *FedEx*, 939 F.3d 710 (quotations omitted).
[50] *Id.* ("Specifically, section 1781 addresses the transmittal of 'a letter rogatory issued, or request made, by a foreign or international tribunal' to a 'tribunal, officer, or agency in the United States.' A private arbitral panel can make a request for evidence, so this section does not indicate that the word 'tribunal' in the statute refers only to judicial or other public entities.").
[51] *Id.*
[52] *FedEx*, 939 F.3d 710.
[53] *Id.*

Court's discussion of Congress's intent to apply § 1782 to administrative and quasi-judicial proceedings abroad, the Sixth Circuit painted this reference with a broad brush, interpreting such language to extend § 1782 to non-judicial proceedings and inferring the inclusion of private commercial arbitrations to that context.[54] In painting the Supreme Court's § 1782 dialogue with broad strokes, the Sixth Circuit gave significant weight to the Supreme Court's brief reference in dicta to a footnote of the law review article written by Hans Smit.[55]

The Sixth Circuit reasoned that Smit's language did not indicate a ceiling or limitation preventing application of § 1782 to private commercial arbitrations.[56] Conversely, other courts have found the citation within the context of the *Intel* facts—the dispute underlying *Intel* was governed by a quasi-governmental, explicitly non-private commission—to imply a ceiling on § 1782's 'tribunal' language to only apply to public, quasi-governmental tribunal proceedings.[57] The Sixth Circuit rejected this ceiling and continued its inquiry into the definition of 'tribunal.'[58]

Consequently, the Sixth Circuit criticized the Second and Fifth Circuits, reasoning those circuits erred in turning to legislative history too quickly in the process.[59] The Sixth Circuit found that the judiciary's historical use of 'tribunal' was dispositive in defining the term, which ended the inquiry into its meaning *prior* to turning to legislative history.[60] Where the Second and Fifth Circuits turned to legislative history after finding the dictionary definitions too broad, the Sixth Circuit here turned to the judiciary's historical use after finding the dictionary definitions too

[54] *Id.* But consider the Sixth Circuit's framing of congressional intent may provide a stronger argument for advocates of a narrow § 1782 scope, because administrative and quasi-judicial proceedings are consistent with the House and Senate reports in light of the 1964 legislative recast of § 1782. For explanation of this view see *NBC* supra, note 64.
[55] *Id.* ("[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").
[56] *FedEx*, 939 F.3d 710 at 726.
[57] *See Servotronics infra*, note 112.
[58] *FedEx*, 939 F.3d 710 at 726.
[59] *Id.*
[60] *Id.* (emphasis added).

broad.[61] The Sixth Circuit was unpersuaded by the Congressional reports that the Second Circuit relied on in producing its opinion, because in the Sixth Circuit's view, the statutory interpretation inquiry ends after deriving a clear meaning of the term by judicial history; regardless of clarity by way of judicial history, the Sixth Circuit noted that those reports indicated an expansion of applicability, such that Congress merely failed to stop short of excluding private arbitration from the scope of § 1782.[62] Additionally, the Sixth Circuit rejected the public policy considerations that opening the floodgates of U.S. courts to private arbitrators would cause efficiency issues in private arbitrations because such action would defeat the principle of private arbitration: avoiding the costly pitfalls of civil litigation.[63] The Sixth Circuit noted that extending § 1782 to private arbitrators would not frustrate the twin aims of § 1782: providing for efficiency and encouraging foreign countries to extend the same assistance as here.[64]

Subsequently, the Sixth Circuit dismissed efficiency considerations and the possibility of offending the twin aims, pointing to the district court's substantial discretionary power to parse burdensome discovery.[65] The Sixth Circuit relied on *Intel*, where the Supreme Court outlined four considerations for a district court to consider when assessing a § 1782 application for discovery.[66]

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[61] *FedEx*, 939 F.3d 710 at 726-727 ("Although the word 'tribunal' has a broad definition and a narrow definition in dictionaries, we do not agree that legislative history is required to resolve the scope of the word in § 1782(a)… [W]e agree that dictionary definitions alone do not necessarily produce the conclusion that 'tribunal' extends to the proceeding at issue here; however, courts' longstanding usage of the word shows not only that one permissible meaning of 'tribunal' includes private arbitrations but also that that meaning is the best reading of the word in this context. Thus, it is not necessary or appropriate to consult extra-textual sources of information.").

[62] *Id.* at 728 ("If anything, what the [reports] make clear is Congress's intent to expand § 1782(a)'s applicability. Although FedEx Corp. argues that 'there is nothing in the legislative history suggesting the expansion extended to private arbitration,' this argument fails to appreciate that the legislative history does not indicate that the expansion stopped short of private arbitration. The facts on which the legislative history is most clear are that the substitution of 'tribunal' for 'judicial proceeding' broadened the scope of the statute, and the repeal of §§ 270–270g removed the requirement that the United States be a party to an international agreement under which a proceeding takes place. Further inferences from the legislative history must rely on speculation.") (citations omitted).

[63] *FedEx*, 939 F.3d 710 at 728.

[64] *Id.*

[65] *Id.*

[66] *FedEx*, 939 F.3d 710 at 728.

The factor at the center of the Sixth Circuit's reasoning here was the district court's substantial discretionary power in deciding to grant a § 1782 application.[67] This discretion, in the Sixth Circuit's view, was an appropriate safeguard that would allow district courts to reject discovery applications where granting the application would circumvent foreign proof-gathering limitations or be unduly burdensome in the context of the underlying proceeding.[68] The court further cited *Intel* in determining it was not concerned with offending the twin aims of § 1782 and sparking a conflict between domestic and foreign arbitration.[69] The court concluded that it would be for the district courts to discern whether a discovery request was from a legitimate foreign arbitrator, or a schematic maneuver by a domestic arbitrator to gain access to extensive discovery (conflicting with the Federal Arbitration Act ("FAA")).[70] The Sixth Circuit applied § 1782 to the underlying private arbitration and rejected the contention that § 1782 is confined to public or governmental tribunals, in turn establishing a broad scope of § 1782's 'tribunal' language.

Shortly after the Sixth Circuit's decision in *FedEx,* the Fourth Circuit took a similar aim at § 1782's scope in *Servotronics, Inc. v. The Boeing Co.* ("*Boeing*"). The Fourth Circuit's decision in *Boeing* is at odds with the Seventh Circuit's decision in *Servotronics*—both of which arose out of the same underlying arbitration.[71] An appeal of the *Servotronics* decision to the Seventh Circuit reached the docket of the Supreme Court before being squashed by a stipulation to dismiss.[72]

In *Boeing*, the Fourth Circuit first turned to Boeing's argument that construing § 1782 to exclude private arbitration avoids a serious FAA conflict. The court rejected Boeing's argument

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[67] *Id.* ("The district court may well conclude, in some cases, that discovery of a scope appropriate for civil litigation would be "unduly intrusive or burdensome" in the context of an arbitration. And the district court may withhold or shape discovery assistance accordingly."). *See Intel*, 542 U.S. 241.
[68] *FedEx*, 939 F.3d 710 at 727; *see Intel*, 542 U.S. 241.
[69] *FedEx*, 939 F.3d 710 at 728.
[70] *Id.*
[71] *See Boeing*, 954 F.3d 209 at 214; *Servotronics*, 975 F.3d 689.
[72] *Servotronics*, 2021 WL 4619271 (dismissing suit pursuant to Rule 46 after parties stipulated to dismissal – arbitration concluded, and issue would have been moot).

that § 1782 should not apply to private arbitrations because the discovery authorized by § 1782 is far broader than that of the FAA, effectively providing foreign arbitrators with an avenue to judicial supervision that is absent for domestic arbitrators under the FAA; Boeing contended the conflict would arise where both statutes were applicable to an arbitration.[73] In rejecting this argument, the Fourth Circuit reasoned that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes. Thus, contrary to Boeing's general assertion that arbitration is not a product of 'government-conferred authority,' under U.S. law, it clearly is."[74] The court noted that including all arbitration tribunals under § 1782's 'tribunal' umbrella aligns with the purpose of § 1782 because 'tribunal' refers to arbitral panels acting within government-conferred authority, whether those arbitral panels are public or private.[75]

The court's reasoning, unlike in other circuits, appears to rely on 'tribunal' as applicable to panels acting within *government-conferred* authority, which markedly diverges from *Boeing*'s counterpart case in the Seventh Circuit, *Servotronics*. There, the Seventh Circuit explicitly confined 'tribunal' to administrative and quasi-judicial panels pursuant to the practice of the

[73] *Boeing*, 954 F.3d 209 at 214 (Boeing argues that "[c]onstruing Section 1782(a) to exclude private arbitration ... avoids a serious conflict with the FAA and the pro-arbitration policies embodied in that act. The discovery authorized by Section 1782(a) is much broader than the FAA contemplates. At a minimum, therefore, applying Section 1782(a) to 'foreign or international' private arbitration would lead to the bizarre result that participants in such arbitrations could obtain far broader discovery in the United States than participants in comparable domestic arbitrations. Moreover, Section 1782(a) would displace the FAA in the considerable subset of arbitrations subject to both statutes, without any hint of congressional intent to accomplish that result. This outcome would undermine the strong federal policy favoring arbitration.").

[74] *Id.* at 214.

[75] *Id.* ("The current version of the statute, as amended in 1964, thus manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international tribunals. This policy was intended to contribute to the orderly resolution of disputes both in the United States and abroad, elevating the importance of the rule of law and encouraging a spirit of comity between foreign countries and the United States. Notwithstanding Congress' articulated purpose for increasing such foreign assistance, Boeing maintains that 'tribunal,' as used in § 1782(a), still refers only to 'an entity that exercise[s] government-conferred authority.' And from this premise, it reasons that because arbitration is a private proceeding 'deriv[ing] its authority not from the government, but from the parties' agreement,' an arbitral panel is not a 'tribunal.' We conclude, however, that Boeing's argument represents too narrow an understanding of arbitration, whether it is conducted in the United Kingdom or the United States.").

government, explaining that the panel be *government-sponsored* in order to trigger § 1782 applicability.[76] The *Boeing* court, however, found only *government-conferred* authority need be present to curtail an arbitral panel under the purview of § 1782.[77] This key distinction resulted in the Fourth Circuit finding that § 1782 accords discretion on the district court to grant or deny applications for discovery for use in the underlying private arbitration.

D. The Narrow Interpretation of § 1782

However, the Second and Fifth Circuits found the phrase ambiguous, examined the statutory and legislative history of § 1782, and determined that the phrase is limited to state-sponsored parties in foreign arbitrations and excluded private parties to foreign arbitrations.[78] This precedent stood unchallenged for two decades. The *Intel* decision turned on the application of § 1782 to a quasi-governmental tribunal, not a private commercial tribunal.[79] Thus, *Intel* did not explicitly repudiate the conclusions of the Second and Fifth Circuits.[80] The Seventh Circuit's decision in *Servotronics* is the most recent in the string of opinions and aligns with the narrow, state-sponsored party interpretation of the Second and Fifth Circuits.[81]

In *NBC*, the Second Circuit heard an appeal by NBC after the District Court for the Southern District of New York granted Bear Stearns' motion to quash Broadcasting's subpoenas.[82] The court looked to the legislative history and purpose of the statute to determine the meaning of 'tribunal.'[83] The court found persuasive that the Rules Commission's recommendations were implemented as the 1964 revisions to §1782.[84] The Rules Commission's purpose was to "study

[76] *Servotronics*, 975 F.3d 689.
[77] *Boeing*, 954 F.3d 209 at 204.
[78] *NBC*, 165 F.3d 184; *Biederman*, 168 F.3d 880.
[79] *Intel*, 542 U.S. 241.
[80] *See id.*
[81] *Servotronics*, 975 F.3d 689.
[82] *NBC*, 165 F.3d 184.
[83] *Id.*
[84] *Id.*

existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."[85] In explaining the purpose of the revision, the court turned to the House and Senate Committee reports: as an explanation to the choice of the word 'tribunal,' the reports state that, "[f]or example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries, … or before a foreign administrative tribunal or quasi-judicial agency."[86] The court also found the legislative history compelling in the context of 'international tribunal,' which it found to have been expressly applied only to intergovernmental tribunals:[87] "the old statute applied only to international tribunals 'established pursuant to an agreement between the United States and any foreign government or governments.'"[88] The court found the House and Senate committee reports persuasive in explaining the *limited expansion* that Congress sought in revising § 1782.[89]

In *In re Guo*, the Second Circuit revisited and reaffirmed its longstanding precedent established in *NBC*.[90] Examining the scope of § 1782 in the wake of *Intel*, the Second Circuit found that nothing expressed by SCOTUS in *Intel* overruled *NBC*, and therefore the narrow reading in *NBC* remained good law.[91] Accordingly, the Second Circuit affirmed.[92] In its analysis, the court outlined the three primary conclusions in *NBC*: (1) the statutory text, namely the phrase 'foreign or international tribunal,' was ambiguous as to the inclusion of private arbitrations;[93] (2) the legislative and statutory history of the insertion of the phrase 'foreign or international tribunal'

[85] Pub.L. No. 85–906, § 2, 72 Stat. 1743 (1958).
[86] *NBC*, 165 F.3d 184 (quoting S. Rep. No. 88-1580 (1964); H.R. Rep. No. 88–1052, at 9 (1963)).
[87] *Id.* (citing §§ 270-270g Repealed Pub.L. 88-619 (Oct 3, 1964) 78 Stat 995).
[88] *Id.* (quoting §§ 270-270g Repealed Pub.L. 88-619 (Oct 3, 1964) 78 Stat 995).
[89] *Id.* (emphasis added).
[90] *In re Guo*, 965 F.3d 96 (2d Cir. 2020).
[91] *Id. See NBC*, 165 F.3d 184; *Intel*, 542 U.S. 241.
[92] *In re Guo*, 965 F.3d 96.
[93] *Id.*

into § 1782(a) demonstrated that the statute did not apply to private arbitration;[94] and (3) a contrary reading would impair the efficient and expeditious conduct of arbitrations.[95]

The Second Circuit explained why its prior decision in *NBC* was not overruled by *Intel*. First, *Intel* did not cast sufficient doubt to render *NBC* non-binding: "the Supreme Court's conclusion in a particular case must have broken the link on which we premised our prior decision or undermined an assumption of that decision."[96] Next, the court addressed *Intel*'s citation quoting Hans Smit and found it insignificant because Smit's article did not specify private tribunals—the article only stated 'arbitral tribunals' with no indicatory context describing the breadth of the term. The court thus held, "Hans Smit's reference to 'arbitral tribunals' does not necessarily encompass private tribunals, particularly in light of his view, expressed in a 1962 article cited in *NBC*, that 'an international tribunal owes both its existence and its powers to an international agreement.'"[97] In fact, in conjunction with the lack of contextual language supporting a finding that arbitral tribunals includes private arbitrations, the very legal underpinnings of *Intel* rested on the applicability of § 1782 to a quasi-governmental panel. In the Second Circuit's view, not only was the *Intel* citation inconclusive itself, it also appeared primarily to support the inclusion of a quasi-governmental panel within the scope of § 1782.[98] In interpreting this citation, the court found ambiguity where the Fourth and Sixth Circuits found clarity.[99] Thus, the Second Circuit determined that *Intel*'s indirect reference to 'arbitral tribunals' can thus be read consistently with *NBC* as referring solely to state sponsored arbitral bodies.[100]

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[94] *Id.*
[95] *Id.*
[96] *In re Guo*, 965 F.3d 96.
[97] *Id.* (quoting Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1267 (1962)).
[98] *In re Guo*, 965 F.3d 96.
[99] *Id.*
[100] *Id.* ("At bottom, Intel's reference to Professor Smit's article casts no doubt upon our analysis in *NBC*.").

In the same year as *NBC* and years before *Intel*, the Fifth Circuit in *Republic of Kazakhstan v. Biederman Int'l* aligned with the Second Circuit's *NBC* decision in finding the purpose of 'tribunal' was intended to expand § 1782 applicability only to government-sanctioned tribunals. In *Biederman*, the Fifth Circuit heard an appeal by Biederman from the District Court for the Southern District of Texas's grant of Kazakhstan's request for discovery assistance.[101] The court turned to the background and purpose of the statute, acknowledging first that the meaning of 'tribunal' was ambiguous.[102] The court found the substitution of 'court' with 'tribunal' in the 1964 revisions significant, indicating Congress intended to expand the provision to cover foreign administrative and quasi-judicial agencies, not just courts.[103] Additionally, the court found the purpose of tribunal was to include international *government-sanctioned* tribunals, and cited the following bases: "(1) an absence of evidence suggesting the intention was to include 'then-novel' international commercial arbitrations, and (2) the U.S.C.'s nearly uniform references to 'arbitral tribunal' as adjunct of a foreign government or international agency."[104]

The court also noted the conflict between § 1782 and the FAA that an inclusive reading of 'tribunal' would impose, expressing that Congress did not intend to allow such broad discovery opportunities for international arbitration parties through § 1782.[105] The court reasoned that Congress expressly prohibited those same opportunities to domestic parties in the FAA.[106] On its final note, the court expressly concluded that a broad reading of § 1782 would destroy the aims and advantages of arbitration, those being speedy, economical, and effective means of dispute resolution.[107]

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[101] *Biederman*, 168 F.3d 880.
[102] *Id.*
[103] *Biederman*, 168 F.3d 880.
[104] *Id.* This reference to "arbitral tribunal" almost expressly negates the footnote from *Intel*.
[105] *Id.*
[106] *Id.*
[107] *Id.*

While the Fifth Circuit has not revisited its precedent in *Biederman* in the wake of *Intel*, the most recent decision in the circuit split supports *Biederman* In *Servotronics, Inc. v. Rolls-Royce PLC*, the Seventh Circuit heard an appeal by Servotronics from the District Court for the Northem District of Illinois's grant of Rolls-Royce's motion to quash.[108] Servotronics had previously filed an ex parte application requesting a subpoena to compel Rolls-Royce to produce documents for the purposes of the parties' foreign arbitration proceedings.[109] The District Court initially granted Servotronics' request for subpoena, but later quashed it.[110] Servotronics appealed and the Seventh Circuit addressed the issue as a matter of first impression.[111] The Seventh Circuit affirmed the District Court's grant of Rolls-Royce's motion to quash.[112] In doing so, the Seventh Circuit added the split amongst the circuits on the interpretation of § 1782, aligning with the narrow view of the Second and Fifth Circuits.[113]

First, the court attempted to find an unambiguous definition of 'tribunal' in the phrase 'a foreign or international tribunal.'[114] The court found that the statute did not provide a definition and turned to dictionary definitions for guidance.[115] The court determined this route inconclusive because although all definitions agreed that tribunal means 'court,' some definitions are more expansive than others.[116] Both an inclusive reading and an exclusive reading of 'tribunal' in the context of private arbitration were plausible.[117]

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[108] *Servotronics*, 975 F.3d 689.
[109] *Id*.
[110] *Id*.
[111] *Servotronics*, 975 F.3d 689.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Servotronics*, 975 F.3d 689.
[117] *Id*.

Second, in the absence of a conclusive definition of 'tribunal,' the court turned its analysis to the statutory context.[118] The conclusions derived from this analysis made the expansive definition of tribunal far less plausible.[119] The court tracked back to the birth of the tribunal phrasing.[120] In 1964, Congress unanimously adopted legislation recommended by the Commission on International Rules of Judicial Procedure.[121] The legislation adopted complete revisions of three statutes (including § 1782), all of which contained the identical phrase 'foreign or international tribunal' in describing district courts' purview of litigation assistance.[122] "Identical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning."[123] In the context of the two statutes included in the revisions with § 1782, the use of 'foreign or international tribunal' appeared within the context of the statute's purpose of establishing comity between governments, thus suggesting that Congress used the phrase consistently in the revision to describe state-sponsored tribunals, not private arbitration tribunals.[124]

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[118] *Id*.
[119] *Id*.
[120] *Servotronics*, 975 F.3d 689.
[121] *Id*.
[122] *Id*.
[123] *Servotronics*, 975 F.3d 689.
[124] *Id*. ("Service-of-process assistance and letters rogatory—governed by §§ 1696 and 1781—are *matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels*. Within § 1782(a) itself, the word 'tribunal' appears three times—first in the operative sentence authorizing the district court to order discovery 'for use in a proceeding in a foreign or international tribunal,' and again in the next sentence, which authorizes the court to act on a letter rogatory issued by 'a foreign or international tribunal.' Two sentences later the word 'tribunal' appears again where the statute provides that the court's discovery order 'may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal.' The highlighted phrase parallels the earlier phrase 'foreign or international tribunal.' Harmonizing this statutory language and reading it as a coherent whole suggests that a more limited reading of § 1782(a) is probably the correct one: a 'foreign tribunal' in this context means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.' Private foreign arbitrations, in other words, are not included.") (emphasis added).

The three statutes included in the 1964 revisions that reference 'foreign or international tribunal' are §§ 1696, 1781, and 1782.[125] The three statutes, in the context of references to service-of-process assistance and letters rogatory "use the identical phrase 'foreign or international tribunal' to describe the object of the district court's litigation assistance."[126] The Seventh Circuit determined these references constituted a clear indication that 'foreign or international tribunal' referred to government-sponsored tribunals. In § 1782, the court found significant the appearance of 'tribunal' in "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*."[127] Accordingly, the court interpreted the phrase *consistently in the context of the legislative scheme of revisions from 1964* to find that the phrase was intended to apply to governmental, administrative, and quasi-governmental tribunals that operate pursuant to a foreign country's practice and procedure, not private arbitration tribunals.[128]

The court's analysis used another judicial canon: to interpret legislation as harmonious, rather than at war, and an obligation to avoid such warring conflict whenever a harmonious construction of two interpretation is possible and reasonable.[129] The court summoned the FAA in reasoning 'tribunal' must not be intended to apply to foreign private arbitrations because that broad interpretation would allow litigants in those settings much more expansive permission to obtain discovery assistance.[130] Appositely, the FAA prohibits litigants from this permission, restricting the act of requesting discovery assistance to the arbitrator.[131] Recognizing this conflict, the

[125] *Id*. (citing Act of Oct. 3, §§ 4, 78 Stat. 995, §§ 8, 78 Stat. 996) ("the legislation also revised 28 U.S.C. § 1696, pertaining to service of process in foreign litigation, and § 1781, regarding letters rogatory.").
[126] *Id*.
[127] *Id*. (emphasis added).
[128] *Servotronics*, 975 F.3d 689 (emphasis added).
[129] *Id*.
[130] *Id*.
[131] *Id*.

Seventh Circuit stated that it is difficult "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."[132]

Finally, the Seventh Circuit awarded minimal weight to *Intel*, dismissing the significance of its citation quoting Hans Smit and calling it *a passing parenthetical with no indication that arbitral tribunal includes private tribunals*.[133]

On March 22, 2021, the Supreme Court granted the petition for a writ of certiorari under *Servotronics*.[134] On September 29, 2021, however, the petition for the writ of certiorari was dismissed, pursuant to Rule 46.[135] The stipulation to dismiss illuminates the key problem that underlying arbitration hearings and awards often conclude before § 1782 applications can navigate through the U.S. judicial appellate process.[136] The question thus becomes, how and when will circuit debate over the scope of § 1782 be resolved? The following part examines the scope of § 1782 from textualism and purposivism approaches, and moreover the distinctions between arbitration proceedings and U.S. court proceedings to explain why the circuit split has no clear timeline for resolution.

III. Textualism And Purposivism Properly Narrow § 1782

This Part argues that in enacting the 1964 revisions to 28 U.S.C. §§ 1696, 1781, and most importantly 1782, Congress intended the 'foreign or international tribunal' language to expand

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[132] *Id*.
[133] *Id*. (emphasis added).
[134] *Servotronics*, 2021 WL 4619271 (dismissing suit pursuant to Rule 46 after parties stipulated to dismissal – arbitration concluded, and issue would have been moot).
[135] *Id*.
[136] The Circuit Split on the Scope of Section 1782 Discovery in the United States: Will it Ever Get Resolved?, KLUWER ARBITRATION BLOG (September 14, 2021) (The anticipation of the Court's scheduled oral argument to finally resolve the circuit split was drowned out by the parties' stipulation to dismiss.), http://arbitrationblog.kluwerarbitration.com/2021/09/14/the-circuit-split-on-the-scope-of-section-1782-discovery-in-the-united-states-will-it-ever-get-resolved/.

statutory applicability from conventional foreign courts *only* to unconventional, government-sponsored tribunals, and Congress provided context to illuminate that intended meaning.[137] To ignore semantic context and legislative context in favor of a dicta citation to an inconclusive quote from a drafter of the 1964 revisions would undermine the power of the legislative process unnecessarily expand the brush of the judiciary's power. A modern textualism or purposivism reading of § 1782 is proper because semantic statutory context *and* legislative context clearly construct 'tribunal' under § 1782 narrowly, rendering § 1782 inapplicable to foreign private arbitration proceedings and leaving district courts no discretionary power to provide discovery assistance to litigants or interested persons in such proceedings.[138] Whether examining § 1782 from a textualism or purposivism approach, "practitioners of each methodology will consider both forms of context in cases of ambiguity. But textualism gives determinative weight to clear semantic cues even when they conflict with evidence from the legislative context. Purposivism allows sufficiently pressing legislative cues to overcome such semantic evidence."[139]

Employing textualism, the Seventh Circuit in *Servotronics* correctly turned to the semantic context in §§ 1696, 1781, and 1782, and rendered a sound, concise, and narrow analysis of the scope of 'tribunal' as it appears in § 1782.[140] Furthering this textual analysis, the Seventh Circuit, joined by the Fifth Circuit in *Biederman*, avoided § 1782's potential conflict with the FAA by excluding private arbitration from the scope of 'tribunal' because courts must interpret statutes as harmonious rather than at war with one another when possible and reasonable.[141] The Sixth and Fourth Circuit decisions in *FedEx* and *Boeing* respectively fail a textualism critique, as both

[137] *See* 28 U.S.C. §§ 1696, 1781, 1782; H.R.Rep. No. 88–1052, at 9 (1963); S.Rep. No. 88-1580 at 3788 (1964).
[138] *See* Manning, *What Divides Textualists from Purposivists?*, supra note 22 at 76.
[139] *Id.*
[140] *Servotronics*, 975 F.3d 689.
[141] *Biederman*, 168 F.3d 880.

decisions markedly ignored semantic context in the statutes and tethered a weak connection between *Intel*'s citation to Hans Smit and an expansive scope of 'tribunal' that conflicts with the language of the 1964 revisions.[142] Additionally, the Fourth Circuit's conceptualization of § 1782 and the FAA as harmonious under the broad scope of 'tribunal' lacks support in the semantic context, because the 1964 revisions, read together, reference 'tribunals' as panels of government-sponsored authority, not government-conferred authority.[143] Because the statutory context for 'tribunal' refers to government-sponsored authorities, the scope of 'tribunal' cannot be extended to private tribunals that merely exercise government-conferred authority under § 1782. To read the statutes with such an expansive scope would ignore the context in which 'tribunal' is placed.

Even if a textualism approach is not adopted, a purposivism analysis illuminates a narrow reading of § 1782, consistent with the reasoning of the Second Circuit in *NBC*, the Fifth Circuit in *Biederman*, and the Seventh Circuit in *Servotronics*. The Sixth Circuit explicitly diverged from purposivism in *FedEx* by ignoring legislative history and purpose, and instead relying on judicial historical use of 'tribunal.'[144] Finally, *Intel*'s citation to Hans Smit's 'arbitral tribunal' language is not relevant to the purposivism analysis because it does not accurately reflect the legislative purpose.[145] Even if this citation is relevant to the legislative purpose, it does not support a broad reading of 'tribunal' to include private arbitrations precisely because of the context in which the

[142] *FedEx*, 939 F.3d 710; *Boeing*, 954 F.3d 209.
[143] *Compare FedEx*, 939 F.3d 710, *with Boeing*, 954 F.3d 209 (government-conferred authority versus government-sponsored authority).
[144] *FedEx*, 939 F.3d 710.
[145] *Id.*

citation occurred.[146] The Seventh Circuit in *Servotronics* effectively addressed the appropriate significance of the hotly disputed citation by Hans Smit.[147]

i. The Textualism Approach

The Seventh Circuit's reasoning in *Servotronics* and the Fifth Circuit's reasoning in *Biederman* properly determine the scope of § 1782 by way of a textualism approach because the semantic context of the 1964 revisions illuminates the meaning of 'tribunal' as it appears in § 1782. The narrow interpretations of § 1782 articulated in these opinions convincingly explain the way a reasonable person would use the word 'tribunal' under the circumstances of the 1964 revisions.[148] The textualism framework prioritizes semantic context and values legislative supremacy and the legislative process of compromise to surmise that the text is reasonably adopted, regardless of the legislator's underlying intent.[149] One scholar, Manning, writes, "[w]hether or not legislators formed any specific intention concerning the details of legislative policy, the demands of legislative supremacy are met if one plausibly assumes that those legislators 'intend to say what one would be normally understood as saying, given the circumstances in which one said it.'"[150]

When textualism is applied to § 1782, the resulting scope of § 1782 and its accompanying reasoning is best exemplified in *Servotronics*. In *Servotronics*, the Seventh Circuit found that

[146] The underlying proceeding in the Intel case was conducted by a quasi-governmental agency, and the applicability of § 1782 to private arbitrations was not a disputed issue in the case. The Court's reference to Hans Smit's intent, when read in full, states "[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." *Intel*, 542 U.S. 241. The Smit citation represents an explanatory parenthetical used by the Court with intent to establish the applicability of § 1782 to government-sponsored tribunals or quasi-governmental agencies, and the references to the European Court of Justice and European Commission exemplify the isolated significance of 'tribunal' as applying to such like entities.

[147] *Servotronics*, 975 F.3d at 689.

[148] Manning, *supra* note 121, at 76 ("Textualists give precedence to semantic context—evidence that goes to the way a reasonable person would use language under the circumstances.").

[149] Manning, *supra* note 121, at 99.

[150] Manning, *supra* note 121, at 100.

"[i]dentical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning."[151] The three statutes of the 1964 revisions are related, and the court gave significant weight to the language surrounding the phrase, 'foreign or international tribunal,' because it appeared consistently in each statute.[152] For instance, § 1696 ("Service in foreign and international litigation") states, "[t]he district court … may order service [ ] of any document issued in connection with a proceeding in a *foreign or international tribunal*. The order may be made pursuant to a *letter rogatory* issued, or *request* made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service."[153]

If the meaning of the plain language is unclear, textualism demands examination of the statutory scheme and provisions surrounding the unclear language.[154] The Seventh Circuit employed an effective textualism analysis of the statutory scheme of the 1964 revisions, finding that they modestly expanded the scope of the statutes from foreign or international courts to foreign or international tribunals sponsored by the government.[155] "Letters rogatory are *requests from a court* in the United States to a *court in a foreign country* seeking international judicial assistance. They are often employed to obtain evidence abroad, but may also be utilized in effecting service of process, particularly in those countries that prohibit other methods of service."[156] Because textualism suggests courts interpret identical language consistently across a statutory scheme, the

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[151] *Servotronics*, 975 F.3d at 689.
[152] *Id*.
[153] 28 U.S.C. § 1696 (emphasis added).
[154] Manning, *supra* note 121, at 100
[155] *Servotronics*, 975 F.3d at 689 (also finding the expansion of the revisions to government-sponsored tribunals is consistent with the goal of generating comity between governments in response to globalization and increasing presence of quasi-judicial state agencies); *See* 28 U.S.C. §§ 1696, 1781, 1782.
[156] Travel.State.Gov., *Service of Process*, U.S. Department of State (https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html) (emphasis added).

meaning of 'foreign or international tribunal' in the intergovernmental context of § 1696 should be transmitted to § 1782.[157]

However, in *FedEx*, although the Sixth Circuit employed a textualism approach, the court came to two conclusions that led its statutory inquiry awry from that of an effective textual analysis as employed by the Seventh Circuit in *Servotronics*. First, the court examined § 1782's language in a vacuum, and concluded the statutory scheme was limited specifically to § 1782.[158] Second, the court narrowed its linguistic inquiry to 'tribunal,' evidenced instances of legal usage of 'tribunal' in a broad manner, and concluded 'tribunal' encompassed private commercial arbitrations.[159]

The Sixth Circuit in *FedEx* foreclosed 'foreign tribunal' and 'international tribunal' from classification as terms of art because it found no evidence that such phrases had specialized meaning.[160] The court based its conclusion on the absence of a dictionary that defines either phrase in conjunction with no other evidence of specialized meaning.[161] Further, the court cited *New Prime Inc. v. Oliveira* for support that the absence of dictionary definitions for a phrase is "a first hint the phrase wasn't then a term of art bearing some specialized meaning."[162] The resulting conclusion narrowed the inquiry from the *phrase* 'foreign or international tribunal' to the *word* 'tribunal.' In doing so, the court "set up a false dichotomy: either 'international' or 'foreign tribunal' was a term of art like 'double jeopardy,' or 'tribunal' must be read in isolation, without reference to the adjectives modifying it."[163]

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[157] *See Servotronics*, 975 F.3d at 689; *see also* Manning, *supra* note 121.
[158] *FedEx*, 939 F.3d at 718-19.
[159] *FedEx*, 939 F.3d at 718-19.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 719 (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 539, 539 (2019)).
[163] *Statutory Interpretation – Textualism – Sixth Circuit Holds that Private Commercial Arbitration is a Foreign or International Tribunal*, 133 Harv. L. Rev. 2627, 2631 (2020) (citing John R. Taylor, *Cognitive Models of Polysemy*, *in* POLYSEMY 3, 31, 38 (Brigitte Nerlich et al. eds., 2003)).

Contrasting the Sixth Circuit's narrow semantic approach to solely § 1782, the Seventh Circuit in *Servotronics* broadened the semantic context to the 1964 revisions in which § 1782, as well as other revised statutes, where enacted. In this broadened and more informing semantic context, the Seventh Circuit found that, "[s]ervice-of-process assistance and letters rogatory—governed by §§ 1696 and 1781—are *matters of comity between governments, which suggests that the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels.*"[164] This semantic context is key to a textualism approach, and supports the conclusion that the phrase was used consistently in the revision to describe state-sponsored tribunals, not private arbitration tribunals.[165]

ii. The Purposivism Approach

Alternatively, the Supreme Court should resolve the circuit split consistent with the narrow interpretation of the Second, Fifth, and Seventh Circuits because even if the analysis is expanded outside the semantic context, the policy context articulates a narrow definition of 'tribunal' as it appears in § 1782.[166] The policy context that drove the revisions of 1964 suggests that a reasonable legislator intended the statutes to address only government-sponsored tribunals.[167] Purposivists find that:

> [J]udges can best observe legislative supremacy by paying attention to the legislative process. The Constitution 'charges Congress, the people's branch of

[164] *Servotronics*, 975 F.3d at 689 ("Within § 1782(a) itself, the word 'tribunal' appears three times—first in the operative sentence authorizing the district court to order discovery 'for use in a proceeding in a foreign or international tribunal,' and again in the next sentence, which authorizes the court to act on a letter rogatory issued by 'a foreign or international tribunal.' Two sentences later the word 'tribunal' appears again where the statute provides that the court's discovery order 'may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal.' The highlighted phrase parallels the earlier phrase 'foreign or international tribunal.' Harmonizing this statutory language and reading it as a coherent whole suggests that a more limited reading of § 1782(a) is probably the correct one: a 'foreign tribunal' in this context means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.' Private foreign arbitrations, in other words, are not included.") (emphasis added).

[165] *Id*.

[166] *See Servotronics*, 975 F.3d at 689; *NBC*, 165 F.3d 184; *Biederman*, 168 F.3d 880.

[167] Manning, *supra* note 132 ("Purposivists give priority to policy context—evidence that suggests the way a reasonable person would address the mischief being remedied.").

> representatives, with enacting laws,' and accordingly, purposivists contend that courts should look to 'how Congress actually works.' As such, they argue that to preserve the 'integrity of legislation,' judges should pay attention to "how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history.[168]

To uncover this legislative purpose and policy considerations, the Supreme Court should look to the House and Senate Committee reports explaining the 1964 revisions.[169] In reviewing these reports, the Court should align with the Second Circuit and find them determinative of legislative purpose and policy context and reject the Sixth Circuit's minimalist approach toward the reports.[170]

In *NBC*, the Second Circuit considered the House and Senate Committee reports, and concluded that the authors of the reports clearly intended 'foreign or international tribunal' to apply to quasi-governmental entities that act as state instrumentalities with the sponsorship or authority of the state.[171] The court cited directly to the House and Senate committee reports to interpret the meaning of 'tribunal' as Congress intended: "'[f]or example, it is intended that the court have discretion to grant assistance when proceedings are pending *before investigating magistrates in foreign countries*.' The new § 1782 would facilitate the collection of evidence for use '*before a foreign administrative tribunal or quasi-judicial agency*.'"[172] For the Second Circuit, this demonstration of legislative intent was determinative in conjunction with the distinction between

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[168] *Statutory Interpretation: Theories, Tools, and Trends*, supra note 17 (Also noting that "[c]ourts should take into consideration any 'institutional device that facilitates compromise and helps develop the consensus needed to pass important legislation.' As one purposivist judge has said, '[w]hen courts construe statutes in ways that respect what legislators consider their work product, the judiciary not only is more likely to reach the correct result, but also promotes comity with the first branch of government.' To discover what a reasonable legislator was trying to achieve, purposivists rely on the statute's 'policy context,' looking for 'evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy.'").

[169] *See* H.R.Rep. No. 88–1052, at 9 (1963); S.Rep. No. 88-1580 at 3788 (1964).

[170] *See id.*; *see also FedEx*, 939 F.3d 710.

[171] *Contra* Alejandro A. Nava Cuenca, *Debunking the Myths: International Commercial Arbitration and Section 1782*, 46 YALE J. INT'L L. 155, 161 (2021) ("Congress sought to extend judicial assistance to impartial adjudicative authorities that act like a 'tribunal,' which means that NBC's focus on the body's source of authority rather than its functions was misplaced.").

[172] *NBC*, 165 F.3d 184 at 189 (quoting H.R.Rep. No. 88–1052, at 9 (1963); S.Rep. No. 88-1580 at 3788 (1964) (emphasis added)).

'the new § 1782' and the statute it replaced—22 U.S.C. §§ 270-270g.[173] Specifically, the Senate Committee report referenced the undesirable limitations of §§ 270-270g as providing

> assistance only to a tribunal established by a treaty to which the United States was a party and then only in proceedings involving a claim in which the United States or one of its nationals was interested. This limitation is undesirable. The availability of assistance to international tribunals should not depend on whether the United States has been a party to their establishment or on whether it is involved in proceedings before them.[174]

The *NBC* court determined the intent to eliminate these undesirable outcomes was in the context of tribunals created by intergovernmental agreement because the Senate Report also referenced in the same context an article by Hans Smit, which stated "an international tribunal owes both its existence and its powers to an international agreement."[175] Therefore, "the legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[176]

If a "foreign or international tribunal" under § 1782 is not clear under a textualism approach, the alternative lens should be purposivism. The purposivism approach relies on the standard of what a reasonable legislator's intent was, or rather how a reasonable legislator would have addressed the problem sought to be remedied.[177] The House and Senate committee reports are pieces of legislative history that convey the presumably reasonable intent of the legislature. Therefore, the purposivism approach:

> should take into consideration any 'institutional device that facilitates compromise and helps develop the consensus needed to pass important legislation.' As one purposivist judge has said, '[w]hen courts construe statutes in ways that respect what legislators consider their work product, the judiciary not only is more likely

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[173] *Id*.

[174] *NBC*, 165 F.3d 184 at 189 (quoting S.Rep. No. 88-1580 at 3784).

[175] *NBC*, 165 F.3d 184 at 190 (citing S.Rep. No. 88-1580 at 3784-85, 3788-89 (quoting Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1267 (1962))).

[176] *NBC*, 165 F.3d 184 at 190.

[177] Manning, *supra* note 132 ("Purposivists give priority to policy context—evidence that suggests the way a reasonable person would address the mischief being remedied.").

> to reach the correct result, but also promotes comity with the first branch of government.' To discover what a reasonable legislator was trying to achieve, purposivists rely on the statute's 'policy context,' looking for 'evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy.'[178]

Absence of any such reference "to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute."[179] Opposite to the Second Circuit's reasoning, the Sixth Circuit dismissed the House and Senate Committee reports because it found no need to examine the reports.[180]

However, pursuant to a purposivism approach, the House and Senate Committee reports must be given weight in the statutory interpretation process when the meaning of the statute is unclear.[181] Atop the hierarchy of legislative history sources for determining intent are Committee reports: "Justice Sotomayor mirrored these views in a recent opinion, maintaining that committee reports 'are a particularly reliable source' of legislative history because they are circulated with a bill to Members and their staff, and are viewed by those people as reliable indicators of the bill's meaning."[182] For example, the Second Circuit held that the legislative history of repealing §§ 270-270g and enacting § 1782 reveals an intent to cover governmental or intergovernmental arbitral tribunals, as well as conventional courts and state-sponsored adjudicatory bodies.[183] In seeking to remedy the undesirable limitations of §§ 270-270g, the reasonable legislator would have intended to expand the scope of discovery assistance only so far as to those such tribunals because any further expansion of "judicial assistance to international arbitral panels created exclusively by

[178] *Statutory Interpretation: Theories, Tools, and Trends*, supra note 17.
[179] *NBC*, 165 F.3d 184 at 189 (quoting H.R.Rep. No. 88–1052, at 9 (1963); S.Rep. No. 88-1580 at 3788 (1964)).
[180] *See FedEx*, 939 F.3d 710 at 728.
[181] Manning, *supra* note 132.
[182] *Statutory Interpretation: Theories, Tools, and Trends*, supra note 17.
[183] *NBC*, 165 F.3d 184 at 190.

private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."[184]

Purposivism reveals that two avenues existed for the reasonable legislator in enacting § 1782: (1) the reasonable legislator would have expanded § 1782 only insofar as to remedy the undesirable limitations of §§ 270-270g, which applied only to governmental and intergovernmental tribunals, or (2) the reasonable legislator would have explicitly mentioned a significant departure from the scope of §§ 270-270g and expansion of the scope through § 1782 to apply to private tribunals. The reports emphasize an intent to reform judicial assistance to international tribunals created by intergovernmental agreement, and "[t]he legislative history's silence with respect to private tribunals is especially telling."[185]

Furthermore, the Fourth Circuit gave weight to legislative evidence that required attenuated, subjective inferences in its purposivism analysis by straying from the reliability of the House and Senate committee reports.[186] The Fourth Circuit instead focused on the differences between the repealed §§ 270-270g and § 1782, emphasizing that "Congress deleted from the former version of the statute the words 'in any judicial proceeding pending in any court in a foreign country' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'"[187] The court found that this change "manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*."[188] However, the primary fallacy in the Fourth Circuit's analysis is the change in language from *court* to *tribunal* invites subjective

[184] *Id.*
[185] *Id.*
[186] *See Boeing*, 954 F.3d 209 at 212-14.
[187] *Boeing*, 954 F.3d 209 at 213.
[188] *Boeing*, 954 F.3d 209 at 213.

inferences that are not supported by legislative evidence. This cuts against the grain of purposivism because the purpose of Congress is found within reliable materials accompanying the legislative history.[189] The House and Senate Committee reports objectively and explicitly explain the 1964 revisions, while the noted change in language subjectively and implicitly invite an expansive interpretation of the 1964 revisions. In addition, legislative reports sit atop the hierarchy of legislative history in the context of statutory interpretation because they "are a particularly reliable source of legislative history [in that] they are circulated with a bill to Members and their staff and are viewed by those people as reliable indicators of the bill's meaning."[190] Furthermore, deriving a scope that expands "judicial assistance to international arbitral panels created exclusively by private parties" would frustrate the purpose of Congress because such a meaningful change by way of substituting *court* with *tribunal* "would not have been lightly undertaken by Congress without at least a mention of this legislative intention."[191] Congress reasonably would have emphasized an intent in the Committee reports or anywhere in the legislative history if it intended to effectuate such an expansion in § 1782. However, Congress made no such mention, and to infer it meant to include private tribunals notwithstanding this silence would frustrate the objective canon of purposivism.

Conclusion

As the circuit split surrounding § 1782 rages on with no clear timeline for resolution in sight, litigants in international private commercial arbitrations will continue to forum shop and take advantage of access to U.S. jurisdiction-based discovery from circuits employing the broad scope of § 1782. Meanwhile, the uncertainty regarding Congress' 1964 revisions and the Supreme

[189] Katzmann, *supra* note 26, at 31.
[190] *Statutory Interpretation: Theories, Tools, and Trends*, *supra* note 17 (quotations omitted).
[191] *NBC*, 165 F.3d 184 at 190.

Court's ambiguous reference to Professor Smit's 'arbitral tribunal' explanation in *Intel* set the stage for a future landmark decision from the Supreme Court. Nonetheless, the incompatible nature of streamlined arbitration and the lethargic judicial system was showcased in the dismissal of *Servotronics* and the continuance of this enduring split, enticing the question of when this judicial dispute will meet resolution. Conclusively, the § 1782 storm must be weathered through textualism or purposivism by the Supreme Court to enumerate the semantic context, articulate the reasonable legislator's objective intent, and ultimately narrow the scope of 'foreign or international tribunal' to exclude international private commercial arbitrations.