

2020

Authorization of Discovery in International Commercial Arbitration: Demystifying the Sixth Circuit's Statutory Construction of 28 U.S.C. § 1782(a)

Jason Arendt

American University Washington College of Law, ja2123a@student.american.edu

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/aubl>



Part of the [Commercial Law Commons](#)

Recommended Citation

Arendt, Jason "Authorization of Discovery in International Commercial Arbitration: Demystifying the Sixth Circuit's Statutory Construction of 28 U.S.C. § 1782(a)," *American University Business Law Review*, Vol. 9, No. 3 (2020) .

Available at: <https://digitalcommons.wcl.american.edu/aubl/vol9/iss3/3>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Business Law Review* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

AUTHORIZATION OF DISCOVERY IN INTERNATIONAL COMMERCIAL ARBITRATION: DEMYSTIFYING THE SIXTH CIRCUIT’S STATUTORY CONSTRUCTION OF 28 U.S.C. § 1782(a)

JASON ARENDT*

I. Introduction	418
II. Development, History, and Modern Application of 28 U.S.C. § 1782(a).....	420
a. The History of International Commercial Arbitration	420
b. The Statutory History of 28 U.S.C. § 1782(a)	421
c. 28 U.S.C. § 1782(a) Modern Statutory Language	423
d. Methods and Presumptions in Statutory Interpretation	424
e. Initial Attempts to Determine the Scope of § 1782(a): The Role of the Second and Fifth Circuits	425
f. An Avenue for Granting International Arbitration Discovery Requests: <i>Intel Corp. v. Advanced Micro Devices, Inc.</i>	426
g. The Sixth Circuit’s Interpretation of § 1782(a) in <i>Abdul Latif Jameel Transportation Co. v. FedEx Corp.</i>	428
III. Permissive Contemplation of International Commercial Tribunals under 28 U.S.C. § 1782(a).....	429
a. The Intel Test for District Court Authority	429
b. The Intel Test for Granting Discovery.....	433
c. Reconciling <i>NBC v. Bear Stearns and Republic of Kazakhstan v. Biedermann International</i>	435
i. Evaluating the Second and Fifth Circuits’ Reliance on Legislative History.....	436
ii. Repudiating the Second and Fifth Circuits’	

* Note and Comment Editor, *American University Business Law Review*, Volume 10; J.D. Candidate, 2021, American University Washington College of Law. I am forever grateful for the valuable guidance from the *American University Business Law Review* staff who made this piece possible. I would like to thank my parents, brother, and grandparents for their support. This piece is dedicated to my late grandmother, Marlen.

Interpretation of the Legislative History	436
iii. The Federal Arbitration Act and the Role of District Court Judges in International Commercial Arbitration	439
IV. Necessity for Unified Application of 28 U.S.C. § 1782(a)	441
V. Conclusion	443

I. INTRODUCTION

International commercial arbitration is a dispute resolution method between two or more parties who are contractually bound by the rules of a private arbitral body.¹ Parties voluntarily enter into contractual agreements that require arbitration if a dispute arises for a more predictable, efficient, and cost-effective dispute resolution method.² As international arbitration awards are subject to international treaties and conventions, parties may be certain their awards are enforceable regardless of venue.³

In March 2018, a dispute arose in the Dubai International Financial Centre-London Court of International Arbitration (“DIFC-LCIA”) between Abdul Latif Jameel Transportation Company (“ALJ”) and FedEx International Corporation.⁴ In July 2018, the District Court for the Western District of Tennessee denied Abdul Latif Jameel’s request for discovery citing a lack of authority to assist in discovery requests under 28 U.S.C. § 1782(a).⁵ On appeal, the Sixth Circuit reversed the district court’s opinion

1. Susan Gaultier, *International Commercial Arbitration*, HAUSER N.Y.U.L.: HAUSER GLOBAL L. SCH. PROGRAM (Nov./Dec. 2014), https://www.nyulawglobal.org/globalex/International_Commercial_Arbitration.html.

2. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995)) (noting that arbitration’s popularity as a dispute resolution method can be attributed to its “efficiency and cost-effectiveness”). See generally LATHAM & WATKINS, *GUIDE TO INTERNATIONAL ARBITRATION* (2017), <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> (attributing the rise of international commercial arbitration to multilateral enforceability, neutral forums, procedural flexibility, arbitrators’ experience, and party autonomy).

3. See, e.g., *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* art. 2, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (enforcing foreign arbitral awards among member states who are parties to the agreement).

4. *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 714 (6th Cir. 2019) (explaining that the dispute between ALJ and FedEx arose from a General Service Provider Agreement that was broken when FedEx partnered with an ALJ competitor).

5. *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 716; Order, *In re Application of Abdul Latif Jameel Transp. Co.*, No. 2:18-mc-00021 (W.D. Tenn. Mar. 13, 2019) (denying Application for Judicial Assistance and holding that the district court did not need to apply the discretionary factors laid out in *Intel Corp.*

and remanded to the lower court to determine whether to grant discovery under a test set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*⁶ The Sixth Circuit's decision in *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*⁷ departed from the pre-*Intel* decisions of the Second and Fifth Circuits, significantly altering the role of district courts in discovery assistance in international commercial arbitration.⁸

This Comment will support the Sixth Circuit's construction of 28 U.S.C. § 1782(a) over the earlier constructions of the Second and Fifth Circuits because of the U.S. Supreme Court's expansion of a district court's authority to compel discovery under 28 U.S.C. § 1782(a). Part II of this Comment will first provide context surrounding the history, development, and current domestic discovery practices of international commercial arbitration. Part II will then discuss the evolution, modern statutory function, and traditional tools used to interpret 28 U.S.C. § 1782(a). Part II will conclude by discussing the Second and Fifth Circuits' dicta on 28 U.S.C. § 1782(a), the influence of *Intel Corp. v. Advanced Micro Devices, Inc.*, and the procedural history of *Abdul Latif Jameel Transportation Co. v. FedEx Corp.* Part III of this Comment will analyze the construction of 28 U.S.C. § 1782(a) through the statutory interpretation structure set forth in Part II. The tests established in *Intel* will then be applied to *Abdul Latif Jameel* in affirmance of the Sixth Circuit's opinion. Part IV of this Comment will recommend that Congress directly address this issue in a similar fashion to the 1964 Amendments to § 1782(a) to resolve the discrepancy between the Sixth Circuit opinion and the opinions of the Second and Fifth Circuits.⁹ This Comment proposes that the

v. Advanced Micro Devices, Inc., where the district court lacked the authority to compel discovery). See generally 28 U.S.C. § 1782(a) (2018) (granting district courts the authority to assist in discovery requests from interested parties or arbitrators in an international tribunal and authorizing the district court to control which, if any, materials are discoverable and the procedure by which the materials are made discoverable — without reliance on foreign practices).

6. 542 U.S. 241 (2004); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 732 (reversing on the grounds that the district court had the authority, but not the obligation, to assist in discovery); see *Intel Corp.*, 542 U.S. at 264–65 (recommending district courts consider the nature of the discovery request, the nature of the tribunal, attempts to circumvent foreign proof-gathering restrictions, and the burden placed on the party against which the discovery is sought).

7. 939 F.3d 710 (6th Cir. 2019).

8. See *id.* at 714; see also *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 185–86, 191 (2d Cir. 1999) (declining to grant district courts the authority to compel discovery in international commercial arbitration, further prohibiting the district court from applying the discretionary factors laid out in *Intel Corp. v. Advanced Micro Devices, Inc.*); *Kaz. v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (following the Second Circuit in declining to grant district courts the authority to compel discovery in international commercial arbitration).

9. See Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 997; see also Harry

U.S. Supreme Court review and affirm the Sixth Circuit's decision and clarify the district court's role in international commercial arbitration.

II. DEVELOPMENT, HISTORY, AND MODERN APPLICATION OF 28 U.S.C. § 1782(a)

Section 1782(a) allows district courts to assist in discovery requests in international arbitration.¹⁰ Since the adoption of § 1782(a), the U.S. Supreme Court has clarified the district court's scope of authority, opening U.S. courts to assist in foreign arbitration.¹¹

a. The History of International Commercial Arbitration

International commercial arbitration has long been used to resolve disputes between private parties outside a traditional courtroom setting.¹² As international trade became increasingly more common, so too did commercial arbitration as a cost-effective and less-burdensome alternative to traditional legal action.¹³ English courts addressing merchant disputes before the Industrial Era initially rejected arbitration as an alternative dispute resolution method by invalidating arbitration awards to force parties into courts of common law.¹⁴ As England industrialized, the volume of commercial disputes necessitated English Parliamentary action to recognize arbitration agreements.¹⁵ England's formalization of commercial arbitration

LeRoy Jones, *A Commission and Advisory Committee on International Rules of Judicial Procedure*, 49 AM. J. INT'L L. 379, 379–80, 384 (1955) (detailing the need for Congress to adopt liberal discovery standards in international arbitration to affirm the United States' role as a global economic leader and reverse previous economic and legal isolationism).

10. See Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 620 (1990) (noting that courts' limited role in international arbitration includes discovery assistance).

11. See *Intel Corp.*, 542 U.S. at 246–47, 264–65 (granting district courts the authority to compel discovery in international arbitration under two four-part tests: (1) the *Intel* authority test; and (2) the *Intel* discretionary factors test).

12. See Lynden Macassey, *International Commercial Arbitration, — Its Origin, Development and Importance*, 24 AM. BAR ASS'N J. 518, 519–20 (1938) (finding an increase in international trade, a separate body of commercial law, tedious and time-consuming litigation, and the courts' lack of familiarity with merchant disputes were vital factors that led to an increase in international commercial arbitration).

13. See *id.* at 522–23 (detailing the rationale and rise of commercial arbitration within the United States and outlining the mechanisms of international commercial arbitration).

14. See *id.* at 520 (remarking that English courts had an “active hostility to arbitration”).

15. See *id.* at 520–21 (highlighting English Parliament's efforts to standardize and enforce arbitral agreements and awards to promote trade).

legitimized the practice and led the United States to adopt similar legislation.¹⁶

The industrialization of the U.S. economy also brought Congress to recognize and regulate arbitral agreements.¹⁷ In 1925, Congress passed the Federal Arbitration Act, which recognized domestic arbitral agreements and permitted arbitrators to petition a federal court to assist in discovery requests.¹⁸ Following the passage of the Federal Arbitration Act, U.S. courts lacked the authority to assist in foreign arbitration on behalf of arbitrators or interested parties.¹⁹

b. The Statutory History of 28 U.S.C. § 1782(a)

Until 1854, foreign litigants could successfully petition U.S. courts to assist in discovery through letters rogatory and commissions.²⁰ Because international litigation was far more difficult in the pre-Industrial era, no record exists of a foreign litigant exercising this privilege.²¹ In 1855, Attorney General Caleb Cushing issued an opinion letter prohibiting U.S. courts from authorizing discovery pursuant to a French court's letter rogatory.²²

16. See Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 246 (1928) (recognizing Parliament's 1889 arbitration legislation as the main inspiration for the Federal Arbitration Act).

17. See Gabriel Herrmann, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 780 (2003) (describing the Federal Arbitration Act as a "concrete expression of the new federal policy favoring arbitration"); cf. Jay E. Grenig, *Evolution of the Role of Alternative Dispute Resolution in Resolving Employment Disputes*, 71 DISP. RESOL. J. 99, 105–07 (2016) (enumerating state government actions recognizing and enforcing arbitration agreements before the passage of the Federal Arbitration Act).

18. See Act of July 30, 1947, ch. 392, Pub. L. No. 80-282, § 4, 61 Stat. 671 (codified as amended at 9 U.S.C. § 7 (2018)) (permitting arbitrators to petition a district court for any evidence of value to arbitration and further authorizing district courts to hold parties of an arbitration in contempt of court if they fail to comply with the court order).

19. Compare Michael Campion Miller et al., *28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts*, FED. LAW., May 2012, at 44, 44 (detailing Congress's initial unwillingness to provide judicial assistance to foreign discovery requests), with Arbitration Act 1996, c. 23, §§ 2, 43, 44 (Eng., Wales, & N. Ir.) (requiring permission of all interested parties or the tribunal to procure evidence for use in an international commercial arbitration).

20. See Miller et al., *supra* note 19, at 44 (citing case law tending to show that U.S. courts understood they had the authority to compel discovery on behalf of foreign litigants).

21. See, e.g., *id.* (recognizing the inability of merchants to participate in foreign legal proceedings without a means to quickly travel across the Atlantic Ocean).

22. See Brief for the United States as Amicus Curiae Supporting Affirmance at 3, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (citing 7 Op. Att'y Gen. 56 (1855)) (outlining the difficulty in conducting international legal matters due to

In an attempt to override the Attorney General's obstruction of discovery requests, Congress passed legislation that would have granted district courts the authority to assist in discovery requests; however, the law was lost and never enacted.²³ Instead of replacing the lost legislation, Congress changed its course in 1863, limiting discovery for use in foreign litigation where the foreign country is an interested party and "at peace" with the United States.²⁴ Although discovery aid was requested under this new authority, no federal record exists of any granted request.²⁵ Foreign litigants relied on state courts to assist in discovery requests, which was met with scrutiny from domestic and international commentators.²⁶

In 1948, Congress readopted the core principles of the previously lost 1855 Act, codifying the statute at 28 U.S.C. § 1782.²⁷ The original text of § 1782 kept the 1863 Act's requirement that the foreign nation be "at peace" with the United States.²⁸ The first iteration also required that the discovery request be in connection with a civil action in a foreign court.²⁹ Under the newly passed statute, testimony could only be procured from witnesses residing within the United States.³⁰

In 1949, Congress amended 28 U.S.C. § 1782 to further liberalize discovery aid to foreign decisionmakers.³¹ Congress eliminated the requirement that witnesses reside in the United States and authorized district

indexing errors and poor communication).

23. See Miller et al., *supra* note 19, at 44 (attributing the loss of the statute to "a comedy of errors . . . , a series of indexing mishaps result[ing] in the act literally becoming lost and accordingly disregarded by the federal courts").

24. See Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Miller et al., *supra* note 19, at 44 (theorizing Congress's shift away from liberal discovery in foreign courts resulted from international support for the Confederacy).

25. See Stahr, *supra* note 10, at 601–02 (postulating that the lack of federal record of a granted request was the result of barriers to international trade and the narrow confines of the 1863 Act).

26. See *id.* at 602 (noting that state courts were more receptive to arbitral discovery requests than federal district courts and crediting the start of World War II as the major cause in delaying foreign discovery assistance reform).

27. 28 U.S.C. § 1782 (2018); see Stahr, *supra* note 10, at 602–03 (crediting the discovery of the lost 1855 Act as the impetus for adopting § 1782 in 1948); see also Miller et al., *supra* note 19, at 44–45 (hypothesizing that the liberal approach to foreign discovery assistance was inspired by the United States' commitment to the newly-formed United Nations).

28. See Miller et al., *supra* note 19, at 45.

29. See *id.*

30. See *id.* (including temporary residents as persons residing in the United States for purposes of § 1782(a) discovery).

31. See Stahr, *supra* note 10, at 602–03 (clarifying that the 1949 Amendments were corrections made by Congress to conform to the 1855 Act).

courts to assist in discovery requests in judicial proceedings, not just civil actions.³²

In 1964, Congress broadened the scope of § 1782 by allowing discovery aid for use in foreign tribunals, permitting district courts to grant requests from any interested person, and omitting the requirement that the foreign nation be “at peace” with the United States.³³ By embracing liberal discovery aid in international litigation and arbitration, Congress hoped that other countries would follow the precedent set forth in § 1782; although, foreign nations have been apprehensive to adopt the same standard.³⁴

c. 28 U.S.C. § 1782(a) Modern Statutory Language

Congress created two routes for discovery under 28 U.S.C. § 1782. While § 1782(b)³⁵ permits a person within the United States to voluntarily give testimony for use in an international tribunal, § 1782(a) grants authority to district courts to compel discovery for use in international tribunals. Section 1782(a) sets forth:

The district court . . . may order him to give his testimony . . . for use in a proceeding in a foreign or international tribunal The order may be made pursuant to a . . . request made, by a foreign or international tribunal or upon the application of any interested person The order may prescribe the practice and procedure A person may not be compelled to give his testimony . . . in violation of any legally applicable privilege.³⁶

Upon passage of § 1782(a) in 1964, the Senate published a report detailing the purpose and intent behind enacting the statute.³⁷ This report, in part,

32. See *id.* at 603 (opening the door for federal courts to provide discovery aid to those residing outside of the United States if they have availed themselves of U.S. laws); *id.* (describing Congress’s intent in changing the language of 28 U.S.C. § 1782 in 1949 as an effort to conform the statute with the 1855 Act); see also Miller et al., *supra* note 19, at 45.

33. See Miller et al., *supra* note 19, at 45–46; Stahr, *supra* note 10, at 605–06 (noting the functional overlap of the Trading with the Enemy Act and the peace requirement of § 1782).

34. See Stahr, *supra* note 10, at 604 (“The general purpose of the [§ 1782] changes . . . was to provide ‘wide judicial assistance . . . on a wholly unilateral basis’ . . . [and] ‘equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects’”); see also Marat A. Massen, *Discovery for Foreign Proceedings after Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 885 (2010) (“The perceived intrusiveness of American discovery has led civil law nations to enact blocking statutes or other legal obstacles to American encroachment on their legal systems.”).

35. 28 U.S.C. § 1782(b) (2018).

36. *Id.* § 1782(a).

37. See S. REP. NO. 88-1580 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3782 (explaining that the legislative aim of 28 U.S.C. § 1782(a) is to improve the effectiveness

relied upon an article by Hans Smit to justify the Senate's liberalization of § 1782(a).³⁸

d. Methods and Presumptions in Statutory Interpretation

Statutory interpretation must begin with a determination that a given statute is ambiguous or contains ambiguous terms.³⁹ Only in cases where a plain reading of unambiguous terms would clash with the intentions of the drafters should courts interfere with such a construction.⁴⁰ As congressional drafters have remained silent as to whether unambiguous terms in § 1782(a) are being improperly applied, only the construction of ambiguous terms should be considered.⁴¹

In the statutory language of 28 U.S.C. § 1782(a), “foreign or international tribunal” is an ambiguous term used throughout the statute.⁴² A plain reading of the statute does not indicate to what extent quasi-judicial bodies must interact with a foreign nation's government to be considered a “foreign or international tribunal.”⁴³ As a result, traditional tools for statutory interpretation may be relied upon to resolve ambiguity.⁴⁴

When deciphering ambiguous language, courts should assume that Congress intended the term follow its “customary meaning.”⁴⁵ This is a

of international litigation).

38. *Id.* at 3784 (citing Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264 (1962) [hereinafter Smit, *Assistance Rendered*]); see also *id.* at 3788–89; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1033–34 (1965) [hereinafter Smit, *International Litigation*].

39. *United States v. Inv. Enters., Inc.*, 10 F.3d 263, 274 (5th Cir. 1993) (“Except in rare circumstances, judicial inquiry is complete when the terms of a statute are unambiguous.”).

40. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (limiting judicial interference in a plainly unambiguous statute to rare instances where the applied statute produces a result inconsistent with the drafters' intent).

41. *Cf. id.*

42. See, e.g., *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 726 (6th Cir. 2019) (identifying “tribunal” as an ambiguous term).

43. See 28 U.S.C. § 1782(a) (2018) (failing to specify what qualifies as a “foreign or international tribunal”).

44. *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993) (“Only where doubt or ambiguity resides . . . may legislative history and other tools of interpretation beyond a plain reading of the statute's words be utilized to shed light on verbiage that is unclear.”).

45. *United States v. Detroit Med. Ctr.*, 833 F.3d 671, 674 (6th Cir. 2016) (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)) (“In the absence of any statutory definition to the contrary, courts assume that Congress adopts the customary meaning of

context-based approach and presumes that the same term used multiple times in the same statute has the same meaning throughout.⁴⁶

Statutes rarely stand alone, free from the explicit control or implicit influence of other statutes or legal frameworks.⁴⁷ Therefore, courts should assume, absent evidence of a direct conflict, that statutes coexist to form a larger statutory scheme.⁴⁸ Courts should also assume that Congress repeals statutes explicitly.⁴⁹

*e. Initial Attempts to Determine the Scope of § 1782(a):
The Role of the Second and Fifth Circuits*

In 1999, the Second and Fifth Circuits decided *NBC v. Bear Stearns*⁵⁰ and *Republic of Kazakhstan v. Biedermann International*,⁵¹ respectively. These cases concluded that Congress did not intend for § 1782(a) to apply to international commercial tribunals.⁵²

In *NBC*, the Second Circuit declined to extend authority to the Southern District of New York to grant a discovery request under § 1782(a) to NBC for use in an international commercial tribunal.⁵³ NBC sought to compel discovery from TV Azteca, a Mexican television broadcast company, through TV Azteca's investment firm, Bear Stearns, for use in an International Chamber of Commerce arbitral tribunal.⁵⁴ The Second Circuit

the terms it uses.”).

46. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001) (presuming identical words have the same meaning throughout a statutory scheme, especially when the word serves the same purpose throughout).

47. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (finding that Congress typically intends for statutes to work within a cohesive system that does not needlessly repeal or supersede related statutes); see also Joseph B. Judkins, *The Rise of Footnote 9 (And Why Some TCJA Regulations Fail Chevron Step One)*, TAXES THE TAX MAG., Mar. 2020, at 51, 51–52, 56 (clarifying that courts interpret the statutory scheme established by the legislature).

48. *Brown & Williamson*, 529 U.S. at 133; see also *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (“Where there are two acts upon the same subject, effect should be given to both if possible.”).

49. *Posadas*, 296 U.S. at 503 (“The cardinal rule is that repeals by implication are not favored.”).

50. 165 F.3d 184 (2d Cir. 1999).

51. 168 F.3d 880 (5th Cir. 1999).

52. *NBC*, 165 F.3d at 191; *Biedermann*, 168 F.3d at 883.

53. *NBC*, 165 F.3d at 191 (“Opening the door to the type of discovery sought by NBC in this case likely would undermine one of the significant advantages of arbitration, and . . . would stand in stark contrast to the limited evidence gathering provided in 9 U.S.C. § 7 . . .”).

54. *Id.* at 185–86.

found that the text of § 1782(a) does not necessarily exclude an International Chamber of Commerce arbitral tribunal, but rather, legislative history and the limitations of the Federal Arbitration Act imply that Congress did not intend for this tribunal to receive judicial assistance.⁵⁵

In *Biedermann*, the Fifth Circuit followed the Second Circuit's framework regarding whether the Arbitration Institute of the Stockholm Chamber of Commerce was contemplated by the drafters of § 1782(a).⁵⁶ The Republic of Kazakhstan sought to procure several documents and a deposition from a nonparty for use in arbitration in the Stockholm Chamber of Commerce.⁵⁷ The Fifth Circuit relied upon statutory history and the limitations of the Federal Arbitration Act.⁵⁸ The Fifth Circuit's opinion gave great weight to the fear that § 1782(a) allows foreign parties to circumvent traditional discovery techniques in their country or through their arbitral body.⁵⁹

Despite the agreement between the Second and Fifth Circuits, in 2004, the U.S. Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, altering the standards employed by district courts to determine whether to grant a discovery request in connection with international arbitration.⁶⁰ Following *Intel*, the Second and Fifth Circuit opinions hold significantly less precedential value.⁶¹

*f. An Avenue for Granting International Arbitration Discovery Requests:
Intel Corp. v. Advanced Micro Devices, Inc.*

In 2004, the U.S. Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, providing guidance to district courts contemplating a discovery request under 28 U.S.C. § 1782(a).⁶² Advanced Micro Devices ("AMD") filed an antitrust complaint against Intel with the Directorate-

55. See *id.* at 187, 188–90 (observing ambiguity in the statute and relying upon traditional methods of statutory interpretation).

56. *Biedermann*, 168 F.3d at 881, 883.

57. *Id.* at 881.

58. See *id.* at 881–83 (remarking that it would be improper to think that Congress intended for international arbitration to be afforded a more liberal discovery standard than domestic arbitration).

59. See *id.* at 883 (noting that Congress likely did not authorize federal courts to provide parties in foreign private arbitration more discovery aid than they are provided in domestic arbitration).

60. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

61. See, e.g., *In re Children's Inv. Fund Found.*, 363 F. Supp. 3d 361, 368–70 (S.D.N.Y. 2019) (questioning *NBC's* applicability following *Intel Corp. v. Advanced Micro Devices, Inc.*).

62. See generally *Intel Corp.*, 542 U.S. 241 (providing two four-pronged inquiries regarding § 1782 and the district court's role in discovery requests for matters engaged in foreign or international arbitration).

General for Competition of the Commission of the European Communities, a branch of the European Union.⁶³ AMD failed to persuade the Directorate-General to seek documents from Intel in a separate antitrust suit in an Alabama federal court.⁶⁴ AMD then petitioned the U.S. District Court for the Northern District of California to order Intel to produce the documents under § 1782(a).⁶⁵ The district court did not believe § 1782(a) authorized discovery and denied the request.⁶⁶ On appeal, the Ninth Circuit reversed and remanded, and the U.S. Supreme Court affirmed the Ninth Circuit's opinion to extend authority to the Northern District of California to assist in discovery.⁶⁷

The U.S. Supreme Court in *Intel* clarified the four-part inquiry into whether a district court has the authority to assist in discovery requests.⁶⁸ The application must be by an "interested person" seeking testimony or documents free from privilege for use in a reasonably contemplated proceeding before a "foreign or international tribunal" regardless of the foreign nation's discovery practices.⁶⁹

The U.S. Supreme Court further established a four-part inquiry into whether a district court should grant discovery requests.⁷⁰ First, district courts should consider whether the petitioner is a party or interested person in the litigation.⁷¹ Then, the district court should determine whether the request is "an attempt to circumvent foreign proof-gathering restrictions."⁷² Next, it must determine whether the request is "unduly intrusive or

63. *Id.* at 246.

64. *See id.* at 250–51.

65. *See* *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C-01-7033 MISC WAI, 2002 WL 1339088, at *1–2 (N.D. Cal. Jan. 7, 2002).

66. *Id.*

67. *Intel Corp.*, 542 U.S. at 246, 266–67. *See generally* *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002) (denying the request without considering the *Intel* discretionary factors).

68. *Intel Corp.*, 542 U.S. at 246.

69. *Id.* at 261 ("Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here."); *see* *Miller et al.*, *supra* note 19, at 45 (noting that the change in language to § 1782 means that "assistance is not confined to proceedings before conventional courts . . . [and] extends to administrative and quasi-judicial proceedings all over the world").

70. *Intel Corp.*, 542 U.S. at 246–47.

71. *Id.* at 264 (finding that AMD is an interested person under § 1782(a) and declining to limit the inquiry to litigants only).

72. *Id.* at 265. *Compare id.* (permitting district courts to consider foreign-discoverability requirements when granting discovery requests), *with id.* at 263 (prohibiting district courts from considering foreign-discoverability requirements when determining their authority to assist in discovery).

burdensome.”⁷³ Finally, the district court must consider the nature of the foreign tribunal and its receptivity to federal court assistance.⁷⁴ Following *Intel*, district courts exercised the tests set forth by the U.S. Supreme Court when deciding whether to grant a request under § 1782(a).⁷⁵

*g. The Sixth Circuit’s Interpretation of § 1782(a) in
Abdul Latif Jameel Transportation Co. v. FedEx Corp.*

A party may be subject to arbitration resulting from operations within a special economic zone.⁷⁶ Special economic zones operate outside the economic and regulatory schemes of the founding nation to provide a conducive business environment for foreign investors.⁷⁷ One such special economic zone, the Dubai International Financial Centre (“DIFC”), subjects parties to arbitration through the Dubai International Financial Centre-London Court of International Arbitration.⁷⁸ The DIFC-LCIA arbitrates disputes under the London Court of International Arbitration Rules.⁷⁹

Following a contractual dispute with FedEx International Corporation, Abdul Latif Jameel Transportation Company, a private Saudi corporation, petitioned the U.S. District Court for the Western District of Tennessee for assistance in discovery for documents related to the performance of the

73. *Id.* at 265 (balancing the amount at issue in the dispute with the burden of the request and necessitating that the burden on the party against which the discovery is sought be unduly intrusive or overly burdensome as any discovery request is a burden).

74. *Id.* at 264 (emphasizing the need for the tribunal to be receptive to the requested documents; absent a clear and explicit prohibition on the discovery from the arbitral panel, the tribunal is assumed to be receptive).

75. *See, e.g., In re Application of Guy*, No. M 19–96., 2004 WL 1857580, at *1–4 (S.D.N.Y. Aug. 19, 2004) (granting modified discovery assistance under *Intel*). *But see Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84–85 (2d Cir. 2004) (declining to grant discovery assistance under *Intel*).

76. *See* TERESA CHENG, DEP’T OF JUSTICE GOV’T OF H.K. SPECIAL ADMIN. REGION, SPECIAL ECONOMIC ZONES: A CATALYST FOR INTERNATIONAL TRADE AND INVESTMENT IN UNSETTLING TIMES? 31 (2019), https://www.doj.gov.hk/en/community_engagement/speeches/pdf/sj20190211e1.pdf (highlighting the pervasiveness and utility of special economic zones and describing the legal implications of joining a special economic zone).

77. *See id.* at 4 (explaining the allure of special economic zones to foreign investors).

78. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710, 715 (6th Cir. 2019) (explaining the rules and procedures for the DIFC-LCIA); *About, DUBAI INT’L FIN. CTR.*, <https://www.difc.ae/about/> (last visited Aug. 9, 2020) (detailing the DIFC’s commitment to foreign investment and consistent legal standards).

79. *Overview, DIFC-LCIA ARB. CTR.* [hereinafter *Overview, DIFC-LCIA ARB. CTR.*], <http://difc-lcia.org/overview.aspx> (last visited Aug. 9, 2020) (describing the DIFC-LCIA as an arbitral body governed by English arbitration laws subject to limited review by the governments of Dubai and United Arab Emirates).

contract.⁸⁰ The district court denied ALJ's request, citing a lack of authority in § 1782(a) to compel discovery in connection with a private international tribunal; on appeal, the Sixth Circuit reversed and remanded to the district court to decide whether the request should be granted.⁸¹ Although this dispute has yet to be resolved, this decision created a conflict between the liberal Sixth Circuit's interpretation and the restrictive Second and Fifth Circuits' interpretations.⁸²

III. PERMISSIVE CONTEMPLATION OF INTERNATIONAL COMMERCIAL TRIBUNALS UNDER 28 U.S.C. § 1782(a)

The Sixth Circuit Court of Appeals properly ruled in *Abdul Latif Jameel Transportation Co. v. FedEx Corp.* that district courts have the authority, but not the obligation, to assist in discovery requests from interested parties in arbitration before a foreign or international tribunal, such as the DIFC-LCIA, under the test put forth in *Intel*.⁸³

a. *The Intel Test for District Court Authority*

The Sixth Circuit properly applied the test set out in *Intel Corp. v. Advanced Micro Devices Inc.* when determining the authority of district courts to assist in discovery. The Sixth Circuit was correct in granting the authority to the Western District of Tennessee to assist in discovery, regardless of whether discovery assistance would be provided on remand.⁸⁴

The first prong of the four-step inquiry into a district court's authority to compel discovery requires a court to examine whether the request comes from an interested person seeking documents or testimony.⁸⁵ The U.S.

80. *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 714–15 (identifying ALJ's cause for the dispute as FedEx's acquisition of TNT Express, N.V., an ALJ competitor in Saudi Arabia, the lack of communication between FedEx and ALJ regarding the acquisition, and the nonrenewal of the General Service Provider Agreement).

81. *See id.* at 732 (allowing, but not obligating, the Western District of Tennessee to assist in ALJ's discovery request).

82. *Compare id.* (granting authority and allowing the district court to address the *Intel* discretionary factors), *with Kaz. v. Biedermann Int'l*, 168 F.3d 880, 880 (5th Cir. 1999) (denying authority to assist in a discovery request for litigants in private international arbitration proceedings), *and NBC v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999) (holding that § 1782(a) does not compel district courts to assist in discovery requests for proceedings heard before a private arbitration panel).

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

84. *See id.* at 264 (“[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.”); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 732 (noting that the trial court is in the best position to make a case-by-case determination of the *Intel* factors).

85. *See Intel Corp.*, 542 U.S. at 256 (arguing that, as a complainant, AMD should

Supreme Court in *Intel* plainly read § 1782(a) to broadly include any interested person.⁸⁶ ALJ is a party to the arbitration and, therefore, has an interest under § 1782(a) to request documents or testimony.⁸⁷ ALJ made seventy-nine production requests from FedEx in connection with the arbitration and requested all documents concerning the ALJ-FedEx contract from the district court under § 1782(a).⁸⁸ As such, the first prong of the *Intel* authority inquiry is satisfied.

The second prong prevents a district court from assisting in discovery requests of privileged materials.⁸⁹ Lower courts had been divided on whether this inquiry should include a foreign-discoverability rule.⁹⁰ In *Intel*, the U.S. Supreme Court rejected the foreign-discoverability rule and, in its place, required courts to determine whether the requested documents are subject to “any legally applicable privilege.”⁹¹ As *Intel* struck down the foreign-discoverability requirement, and ALJ’s requested materials are not subject to privilege, this prong is satisfied.⁹²

The third prong grants a district court authority to assist in discovery in a reasonably contemplated proceeding.⁹³ The 1964 Amendments to § 1782(a)

not be included as an “interested person” and should only be afforded “limited rights”).

86. *Id.* at 256–57 (quoting Smit, *International Litigation*, *supra* note 38, at 1027) (“[A]ny interested person’ is ‘intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining assistance.’”).

87. *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 714; *see also Intel Corp.*, 542 U.S. at 256 (explaining that litigants are considered “interested person[s]” and are, therefore, eligible to invoke § 1782(a)).

88. Brief for the Respondent-Appellee FedEx Corp. at 11–12, *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019) (No. 24); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 716.

89. *Intel Corp.*, 542 U.S. at 259–61.

90. *See, e.g., Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995) (declining to authorize a foreign-discoverability rule as U.S. judges are only permitted to interpret U.S. legal standards). *But see, e.g., In re Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (remanding to the district court to determine whether the evidentiary rules of Hong Kong would permit discovery).

91. *Intel Corp.*, 542 U.S. at 259–63 (prohibiting discovery of privileged materials under the discovery procedures of the United States, the foreign nation, or the arbitration tribunal).

92. *See Reply Brief for Movant-Appellant Abdul Latif Jameel Transp. Co.* at 7 n.3, *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019) (No. 27) (noting § 1782(a)’s exclusion of any privileged materials).

93. *See Intel Corp.*, 542 U.S. at 259 (“Instead, we hold that § 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation.”); *see also 28 U.S.C. § 1782(a)* (2018) (“The district

removed the requirement that the proceeding be pending.⁹⁴ Instead, the 1964 Amendments require a reasonably contemplated proceeding to petition a court under § 1782(a).⁹⁵ Since 1964, one amendment was made to § 1782(a) in 1996, affording the same discovery privileges to foreign criminal investigations.⁹⁶ As the U.S. Supreme Court noted in *Intel*, the 1996 amendment sought to expand the scope of the reasonably contemplated proceeding prong.⁹⁷ The appellees do not contest the third prong of the *Intel* authority inquiry and thus this prong is satisfied.⁹⁸

The final prong of the *Intel* authority inquiry requires that the discovery request be in connection with a “foreign or international tribunal.”⁹⁹ A “foreign or international tribunal” is ambiguous and thus courts should primarily rely upon traditional and customary usage of the term before relying upon legislative history.¹⁰⁰

Courts may resolve the ambiguity of a term by looking at how the term is used elsewhere in the statutory scheme.¹⁰¹ The preceding section, 28 U.S.C. § 1781, contains the only other instance of “foreign or international tribunal” in the statutory scheme and, likewise, does not explicitly include or exclude private arbitral bodies.¹⁰² The Second and Fifth Circuits improperly assumed that because the statute does not explicitly include private arbitral bodies, then, by negative inference, these bodies must be excluded.¹⁰³

court . . . 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 . . .”).

94. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 997.

95. See 28 U.S.C. § 1782(a).

96. See *id.*

97. See *Intel Corp.*, 542 U.S. at 259 (noting that the 1996 amendment affirms the U.S. Supreme Court’s construction of § 1782(a)).

98. See generally Corrected Brief for Respondent-Appellee FedEx Corp., Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710 (6th Cir. 2019) (No. 26) (foregoing the opportunity to argue that the proceeding has not reached the level of reasonable contemplation).

99. See 28 U.S.C. § 1782(a).

100. E.g., *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 726–27 (concurring with the Second Circuit and Fifth Circuit opinions that “foreign or international tribunal” is an ambiguous term).

101. See *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001) (stating that when a word is used in two different sections of a statutory scheme, the rule is to assume the words have the same intended meaning).

102. See 28 U.S.C. § 1781 (“The Department of State has power . . . to receive a letter rogatory issued . . . by a foreign or international tribunal . . .”).

103. Compare *NBC v. Bear Stearns, & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) (relying upon the lack of congressional contemplation of private arbitral bodies to negatively infer that those bodies were intentionally excluded), and *Kaz. V. Biedermann Int’l*, 168 F.3d

Absent a clear statutory definition, courts should consider the customary meaning of an ambiguous term.¹⁰⁴ Before the adoption of § 1782(a) in 1948, the U.S. Supreme Court often referred to purely commercial arbitral bodies as “tribunals.”¹⁰⁵ During the formative years between the adoption of § 1782(a) and the 1964 Amendments, the U.S. Supreme Court continued to refer to such bodies as “tribunals.”¹⁰⁶ Following the 1964 Amendments of § 1782(a), the U.S. Supreme Court continued to refer to purely commercial arbitral bodies as “tribunals.”¹⁰⁷ The Second and Fifth Circuits failed to address the customary usage of “tribunals” when determining district court authority; therefore, the Second and Fifth Circuits prematurely relied upon a restrictive construction of § 1782(a)’s legislative history.¹⁰⁸

While traditional legal usage suggests that international commercial arbitration resides within the contemplation of § 1782(a), the U.S. Supreme Court provides that a tribunal is within the scope of § 1782(a) where it functions as a “first-instance decisionmaker.”¹⁰⁹ The DIFC-LCIA arbitrates disputes as a “first-instance decisionmaker” as it permits the submission and gathering of evidence, imposes liability and awards on parties, and is subject to limited judicial review.¹¹⁰ Given that the traditional and customary legal

880, 882 (5th Cir. 1999) (denying extending § 1782(a) to private international arbitrations because Congress did not include international commercial arbitration in the statute’s language), *with* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 344–45 (1997) (discouraging the use of negative inferences in statutory construction).

104. *See* *United States v. Detroit Med. Ctr.*, 833 F.3d 671, 674 (6th Cir. 2016) (recognizing that courts rely upon a context-based approach to determine the customary meaning of an ambiguous term).

105. *See* *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121 n.1 (1924) (citing *Tobey v. County of Bristol*, 3 Story 800, 821 (Cir. Ct. D. Mass. 1845)) (discussing private arbitration where parties appoint the arbitrators as a “tribunal”).

106. *See* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (recognizing a dispute before the American Arbitration Association as a proceeding before a “tribunal”).

107. *See generally* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (referring to an arbitration pursuant to a private contract as a proceeding before a “transnational tribunal” and a “foreign tribunal”).

108. *See* *NBC*, 165 F.3d at 188–90 (examining House and Senate reports pertaining to § 1782); *see also* *Biedermann*, 168 F.3d at 881 (following the precedent set by the Second Circuit of reviewing the language and legislative history of the statute).

109. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–47 (2004); *see also id.* at 257 (noting that a “first-instance decisionmaker” resolves disputes and may, but need not, collect proof from parties); *e.g.*, *Mitsubishi Motors Corp.*, 473 U.S. at 623 (“[T]he court directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go.”). *See generally* S. REP. No. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782 (providing background about sections of the U.S. Code concerning international litigation and their proposed amendments).

110. *See* *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 3, art. 5 (reviewing arbitral awards where there was a procedural

usage, legislative history, and the considerations put forth in *Intel* all imply that commercial arbitration is within the scope of § 1782(a), the Sixth Circuit properly extended the authority, but not the obligation, to the district court to assist in discovery.¹¹¹

b. The Intel Test for Granting Discovery

The Sixth Circuit properly deferred to the district court to determine whether to grant ALJ's discovery requests on remand.¹¹² On review, appellate courts should not decide discretionary matters traditionally left to lower courts.¹¹³ As at least one of the *Intel* discretionary factors is a fact-intensive review, the Sixth Circuit properly recused itself from deciding whether to grant the discovery requests.¹¹⁴ The U.S. Supreme Court laid out a four-part inquiry for lower courts to consider when granting discovery.¹¹⁵

The first *Intel* discretionary factor favors FedEx.¹¹⁶ When determining whether to grant discovery requests, district courts should consider whether the request was made to a participant to the dispute.¹¹⁷ ALJ sought contract performance documents from FedEx International, a subsidiary of FedEx Corporation, through the parent entity.¹¹⁸ As ALJ could discover these

deficiency, the incapacity of one or more parties, or the jurisdiction was improper, but not where the substance of the arbitral agreement is at issue). *But see* Pak. v. Arnold & Porter Kaye Scholer LLP, No. 18-103 (D.D.C. signed Apr. 10, 2019) (labeling the International Centre for Settlement of Investment Disputes Tribunal as a tribunal contemplated under § 1782(a) despite the lack of judicial review).

111. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*In re* Application to Obtain Discovery for Use in Foreign Proceedings), 939 F.3d 710, 730–31 (6th Cir. 2019).

112. *See id.* at 732 (refusing to address the *Intel* discretionary factors).

113. *See* Davis v. Lifetime Capital, Inc., 560 F. App'x 477, 495 (6th Cir. 2014) (leaving discretionary issues to the lower court unless the issue is “purely legal” or “in the interest of judicial economy”).

114. *See Intel Corp.*, 542 U.S. at 264 (remarking that district courts should review §1782(a) requests); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 731–32.

115. *See Intel Corp.*, 542 U.S. at 264–65 (recommending courts should consider whether the requested material is within the jurisdiction of the tribunal, the nature of the tribunal and its receptivity to the requested materials, whether the request is “an attempt to circumvent foreign proof-gathering restrictions,” and whether the request is “unduly intrusive or burdensome”).

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

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

118. *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d

documents through the DIFC-LCIA evidentiary rules, the first discretionary factor favors FedEx.¹¹⁹

The second discretionary factor, a fact-intensive review of the nature of the tribunal and its receptivity to the requested material, favors ALJ.¹²⁰ Absent clear evidence that the tribunal would not be receptive to the documents requested, this factor weighs in favor of the petitioners.¹²¹ Respondents have the burden of showing that the discovery would offend the foreign jurisdiction.¹²² Given that there is no showing that the DIFC-LCIA is deficient, and the DIFC-LCIA has not explicitly stated their opposition to this discovery, the second discretionary factor favors ALJ.¹²³

The third discretionary factor, whether the request is an attempt to circumvent the tribunal's discovery rules, favors FedEx.¹²⁴ Article 34 of the DIFC Arbitration Law provides that a party, with the consent of the tribunal, may petition the DIFC courts to execute a discovery request.¹²⁵ Because ALJ has not petitioned the DIFC courts through the proper discovery channels, their § 1782(a) request is an attempt to circumvent the tribunal's discovery

at 714.

119. See Corrected Brief for Respondent-Appellee FedEx Corp., *supra* note 98, at 42–45; see also *In re* Judicial Assistance Pursuant to 28 U.S.C. § 1782 by Macquarie Bank Ltd., No. 2:14-cv-00797-GMN-NJK, 2015 WL 3439103, at *14 (D. Nev. May 28, 2015) (declining to grant a discovery request when the petitioner seeks discovery from a separate, but related entity).

120. See *Intel Corp.*, 542 U.S. at 264–65 (stating that multiple factors, including the nature of the foreign tribunal, the characteristics of the proceedings underway abroad, and the foreign government's receptiveness are taken into account when presented with a request).

121. *E.g.*, *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (ruling that courts should reject evidence obtained under § 1782 if there is "authoritative proof that a foreign tribunal" would not consider it).

122. See *In re* Application Pursuant to 28 U.S.C. § 1782 for an Order Permitting Bayer AG, 146 F.3d 188, 196 (3d Cir. 1998) (holding the opposing party had the burden of demonstrating that the application should be denied based on the foreign jurisdiction or any other relevant matter).

123. See Corrected Brief for Movant-Appellant at 48–49, *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710 (6th Cir. 2019) (No. 22) ("FedEx International failed to show that the law governing the DIFC-LCIA Arbitration prohibited ALJ from seeking Section 1782 relief."). See generally Corrected Brief for Respondent-Appellee FedEx Corp., *supra* note 98 (stating that DIFC Court's denial of FedEx's motion to enjoin ALJ's § 1782 application is not proof of the court's receptivity).

124. See *Intel Corp.*, 542 U.S. at 265.

125. DIFC, ARBITRATION LAW NO. 1 14 (2008), [http://www.arbiter.com.sg/pdf/laws/UAE%20DIFC%20Arbitration%20Law%20\(2008\).pdf](http://www.arbiter.com.sg/pdf/laws/UAE%20DIFC%20Arbitration%20Law%20(2008).pdf) (stating that, with the Arbitral Tribunal's approval, a party may request assistance from the DIFC Court in taking evidence).

rules.¹²⁶

The fourth discretionary factor, whether the request is overly burdensome or intrusive, favors ALJ.¹²⁷ The discovery request by ALJ, although wide-ranging, enjoys the presumption that the district court judge will limit discovery to only the necessary documents.¹²⁸ The burden must be proportionally larger than the amount at issue in the arbitration.¹²⁹ As over \$100 million is in dispute in this arbitration, the final discretionary factor favors ALJ.¹³⁰

Since the first and third discretionary factors of the *Intel* inquiry favor denying the discovery request, the U.S. District Court for the Western District of Tennessee will likely deny ALJ's request. Nevertheless, the Sixth Circuit properly granted the authority to the district court on remand to decide these four factors.

*c. Reconciling NBC v. Bear Stearns and
Republic of Kazakhstan v. Biedermann International*

In 1999, the Second and Fifth Circuits improperly decided *NBC v. Bear Stearns* and *Republic of Kazakhstan v. Biedermann International*, respectively.¹³¹ Following the U.S. Supreme Court's decision in *Intel*, courts in the Second and Fifth Circuits have called into question the applicability and precedential value of the 1999 decisions.¹³² These courts correctly

126. See Corrected Brief for Respondent–Appellee FedEx Corp., *supra* note 98, at 48–49 (arguing that ALJ failed to seek approvals required by DIFC Arbitration Law “to obtain the discovery sought in the § 1782 Application,” that ALJ is in violation of the third-party discovery prohibition rules, and that ALJ seeks deposition testimony without a proper “basis under DIFC-LCIA Arbitration Law or in the GSP Contract”).

127. See *Intel Corp.*, 542 U.S. at 265 (“[U]nduly intrusive or burdensome requests may be rejected or trimmed.”).

128. See *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995) (preferring a district court limit the discoverable materials over outright rejection of a broad discovery request).

129. See *FDIC v. Ark-La-Tex Fin. Servs., LLC*, No. 1:15 CV 2470, 2016 WL 3460236, at *3 (N.D. Ohio June 24, 2016) (approving the review of tens of thousands of documents in a \$1.5 million dispute, arguing it is not “overly burdensome”).

130. See Reply Brief for Movant-Appellant Abdul Latif Jameel Transp. Co., *supra* note 92, at 24–25 (comparing the relative burden placed on the party against whom the discovery is sought with the amount at issue in the dispute).

131. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999) (concluding § 1782(a) did not apply to “an arbitral body established by private parties” according to the statute’s text and the legislative history); see also *Kaz. v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding the mention of “foreign and international tribunals” in § 1782(a) was not an authorization for courts to assist with discovery in international commercial arbitrations).

132. See, e.g., *Ecuador v. Connor*, 708 F.3d 651, 658 (5th Cir. 2013) (declining to extend the holding in *Biedermann* following *Intel Corp. v. Advanced Micro Devices*,

discounted the precedential value of *NBC* and *Biedermann* and, following the Sixth Circuit's decision in *ALJ*, all district courts should adopt this liberalized discovery standard.¹³³

i. Evaluating the Second and Fifth Circuits' Reliance on Legislative History

Both the Second and Fifth Circuit opinions rely upon legislative history to interpret the ambiguous term, "foreign or international tribunal," in § 1782(a).¹³⁴ The Second and Fifth Circuits should not have immediately relied upon legislative history where traditional tools of statutory construction could have resolved the ambiguity.¹³⁵ Analyzing statutory history through congressional reports may not accurately reflect Congress's intent, only the intent of a majority of the legislators.¹³⁶ While statutory history and legislative intent may be helpful tools in resolving ambiguity, they should not be viewed as dispositive evidence of a certain statutory construction.¹³⁷

ii. Repudiating the Second and Fifth Circuits' Interpretation of the Legislative History

Despite the arguments from the Second and Fifth Circuits, the legislative history of 28 U.S.C. § 1782(a) provides that Congress may have intended international commercial tribunals to fall within the scope of § 1782(a).¹³⁸

Inc.); see also *In re Children's Inv. Fund Found.*, 363 F. Supp. 3d 361, 368–70 (S.D.N.Y. 2019) (questioning *NBC*'s applicability following *Intel Corp. v. Advanced Micro Devices, Inc.*).

133. See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 726–28 (6th Cir. 2019).

134. See *NBC*, 165 F.3d at 188–90 (analyzing the legislative history § 1782 to interpret the statute); *Biedermann*, 168 F.3d at 881–82 (following the precedent set by the court in *NBC* and using the legislative history to interpret § 1782).

135. See *Lamie v. United States Tr.*, 540 U.S. 526, 539, 542 (2004) (recommending courts consider statutory history and legislative intent only where other statutory construction tools do not provide a clear resolution to the ambiguity, and the history helps to add more clarity than confusion).

136. See *Hirschey v. FEREC*, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring) (cautioning against adherence to legislative history because of the lack of bipartisan participation and negotiation).

137. See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60–61 (1988) (dismissing legislative history as solely indicative of the drafters' intent, not the statute's intent); see also *Towne v. Eisner*, 245 U.S. 418, 425 (1918) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.").

138. See generally S. REP. NO. 88-1580 (1964), as reprinted in 1964 U.S.C.C.A.N. 3788 (emphasis added) ("The proposed revision of section 1782, set forth in section 9(a)

Furthermore, the legislative history of § 1782(a) suggests a permissive reading of the ambiguity, not the restrictive reading the Second and Fifth Circuits follow.¹³⁹

Congress revised § 1782(a) in 1964 to pertain broadly to tribunals, not just courts.¹⁴⁰ This purposeful liberalization opened U.S. courts to discovery requests from interested parties in foreign arbitration.¹⁴¹ Upon passage of the 1964 Amendments to § 1782(a), the Senate released a report detailing its purpose and aims in liberalizing the language of the statute, contradicting the restrictive view of the Second and Fifth Circuits.¹⁴² The main purpose of retooling § 1782(a), the Senate Report details, was to assist with discovery requests for proceedings before foreign tribunals.¹⁴³

The legislative history of § 1782(a) does not explicitly exclude international commercial arbitration, and the Sixth Circuit properly held that the district court's broad authority to compel discovery, curtailed by the *Intel* discretionary factors, is a reasonable construction of § 1782(a).¹⁴⁴ The Senate Report demonstrates that district court judges have the ultimate gatekeeping authority when granting § 1782(a) requests; Congress constructed the statute with a broad interpretation of "tribunal" that would be limited by the district court judge.¹⁴⁵ Therefore, the Second and Fifth

clarifies and *liberalizes* existing U.S. procedures for assisting foreign and international tribunals . . .").

139. See Abdul Latif Jameel Transp. Co. v. FedEx Corp. (*In re* Application to Obtain Discovery for Use in Foreign Proceedings), 939 F.3d 710, 727–28 (6th Cir. 2019) (acknowledging the successive steps taken by Congress to liberalize international arbitration discovery rules through changes to § 1782(a) and disagreeing with the overly restrictive reading of the legislative history by the Second and Fifth Circuits).

140. See generally S. REP. NO. 88-1580 (opening U.S. courts to assist broadly in judicial proceedings, including tribunals).

141. See generally *id.* (liberalizing the applicability of § 1782(a) to include international tribunals and extend beyond conventional courts).

142. Compare NBC v. Bear Stearns & Co., 165 F.3d 184, 188–89 (2d Cir. 1999) (establishing that the authors of the Senate and House Reports had clearly stated what constituted a tribunal), and Kaz. v. Biedermann Int'l, 168 F.3d 880, 881–82 (5th Cir. 1999) (narrowing congressional interpretation of the statute), with S. REP. NO. 88-1580, at 3782 (granting district courts broad authority to compel discovery).

143. See S. REP. NO. 88-1580, at 3782 ("The purpose of the proposed legislation is to improve U.S. judicial procedures for — (1) Serving documents in the United States in connection with proceedings before foreign and international tribunals.").

144. See *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 726 (recognizing that the broad authority of district courts is reined in by the *Intel* discretionary factors). See generally S. REP. NO. 88-1580 (making no mention of the still primitive international commercial arbitration tribunals that would gain popularity abroad following the amendments to § 1782(a) in 1964).

145. See S. REP. NO. 88-1580, at 3788–90 (clarifying that assistance is open to all proceedings before a foreign court, tribunal, or quasi-judicial agency and that the district

Circuits improperly identified § 1782(a) as the primary limitation on discovery, not the district court judge as *Intel* and *ALJ* provide.¹⁴⁶

The Senate Report cites Hans Smit's *International Litigation Under the United States Code*, a law review article written by a professor who helped draft the 1964 Amendments to clarify the term "tribunal."¹⁴⁷ Smit's definition, although not dispositive, broadly includes adjudicative bodies of all kinds.¹⁴⁸ The Second Circuit only recognizes the authority of Smit's article insofar as it claims that international tribunals are the result of an international agreement.¹⁴⁹ An international agreement is an ambiguous term broad enough to include the private tribunal in *ALJ* created by an international agreement between the DIFC and the LCIA.¹⁵⁰

Although Congress's policy intentions when drafting and amending § 1782(a) are not controlling, they may supply some insight when determining the intended statutory function.¹⁵¹ The United States' unique position as a global economic leader may influence other countries to adopt similar discovery standards in international arbitration.¹⁵² Out-of-court dispute resolution methods are becoming more common; Congress's intention to

court judge ultimately decides whether the dispute at issue needs judicial assistance from U.S. courts).

146. Compare *NBC*, 165 F.3d at 188–89 (misinterpreting the scope of § 1782 based on its legislative history), and *Biedermann*, 168 F.3d at 881–82 (stating § 1782 is limited and should be interpreted based on Congress's deliberate intentions), with *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004) ("Nothing suggests that this amendment was an endeavor to rein in, rather than to confirm, by way of example, the broad range of discovery authorized in 1964."), and *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 725–26 (establishing the Second and Fifth Circuits' misconceptions of the statute).

147. See S. REP. NO. 88-1580, at 3788.

148. Smit, *International Litigation*, *supra* note 38, at 1026 n.71 ("The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes . . . arbitral tribunals . . .").

149. See *NBC*, 165 F.3d at 190 (concluding that Congress intended to include intergovernmental arbitral tribunals in its 1964 Amendments).

150. See *Overview*, DIFC-LCIA ARB. CTR., *supra* note 79 (describing the DIFC-LCIA as a joint venture between the two arbitration groups for the purpose of making Dubai a regional hub for international commercial arbitration and mediation).

151. See *Stafford v. Briggs*, 444 U.S. 527, 536 (1980) (quoting *Brown v. Duchesne*, 60 U.S. 183, 194 (1856)) (stressing the importance of considering "the objects and policy of the law" alongside the statute's text).

152. Compare Miller et al., *supra* note 19, at 45 (recognizing that Congress's intent to influence foreign countries' discovery laws in arbitration have thus far failed to materialize), with Richard Wike et al., *Globally, More Name U.S. than China as World's Leading Economic Power*, PEW RES. CTR. (July 13, 2017), <https://www.pewresearch.org/global/2017/07/13/more-name-u-s-than-china-as-worlds-leading-economic-power/> (labeling the United States as the global economic superpower influencing economies abroad).

broadly open discovery to first-instance decisionmaking bodies would include international commercial arbitration as it becomes more commonplace.¹⁵³ Following the passage of § 1782(a), the U.S. Supreme Court's disposition towards international commercial arbitration has followed Congress's.¹⁵⁴ Foreign corporations would likely be hesitant to contract with U.S. corporations if U.S. courts stonewalled judicial assistance to those foreign entities.¹⁵⁵ Congress's policy intentions suggest a permissive reading of § 1782(a) to allow discovery aid in international commercial tribunals.¹⁵⁶

iii. The Federal Arbitration Act and the Role of District Court Judges in International Commercial Arbitration

The Second and Fifth Circuits incorrectly inferred that the constraints of the Federal Arbitration Act and 9 U.S.C. § 7 implicitly restricted the construction of 28 U.S.C. § 1782(a).¹⁵⁷ The Federal Arbitration Act only applies to domestic arbitration, where discovery rules are a matter of contract and courts will not intervene unless there is a clear abuse of discovery power.¹⁵⁸ Parties willingly submit to domestic arbitration as an alternative

153. See S. REP. NO. 88-1580, at 3788-89 ("In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court."); see also Markus Altenkirch & Malika Boussihmad, *International Arbitration Statistics 2018 — Another Busy Year for Arbitral Institutions*, GLOB. ARB. NEWS (July 2, 2019) <https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/> (observing a fifty-percent increase in resolved disputes through arbitration from 2013 to 2018).

154. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."); see also *id.* ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.").

155. Todd Weiler et al., *Are United States Courts Receptive to International Arbitration?*, 27 AM. U. INT'L L. REV. 869, 890 (2012) (encouraging U.S. courts to embrace a more liberal and receptive discovery standard, such as the one adopted by Canada, to increase parity between international parties).

156. See S. REP. NO. 88-1580, at 3788-89 (granting district courts broad authority to compel discovery in foreign tribunals).

157. See *NBC v. Bear Stearns, & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); see also *Kaz. v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

158. See George E. Lieberman, *Discovery in an Arbitration Proceeding and Appealing an Award Under the Federal Arbitration Act: It's Not That Simple (and What You Do Not Know Can Hurt You)*, FED. LAW., May 2009, at 54, 54 <https://www.fedbar.org/wp-content/uploads/2009/05/discoveryinarbitrationmay2009-pdf-1.pdf> (stating that without an overreach "by the party with greater bargaining power, the courts will respect what the parties contracted for in terms of discovery" under the

to burdensome and costly litigation.¹⁵⁹ Because the parties control the discovery rules, the Federal Arbitration Act grants discovery power to arbitrators to balance their power with the parties' power.¹⁶⁰

Discovery in international commercial arbitration in a special economic zone, such as the DIFC, is not necessarily a matter of contract.¹⁶¹ U.S. parties must submit to foreign discovery procedures of the arbitral panel that may weaken their ability to resolve disputes.¹⁶² As a result, § 1782(a) grants district courts the authority to assist in discovery requests to balance the power between U.S. parties, foreign parties, and arbitrators.¹⁶³ Although 9 U.S.C. § 7 grants arbitrators discovery power to balance the power disparity between arbitrator and party, 28 U.S.C. § 1782(a) grants parties and interested persons discovery power through district courts to balance the power disparity between domestic parties, foreign parties, and arbitrators.¹⁶⁴

Following the Sixth Circuit's decision, the Second Circuit reinforced the district court judge's role in equalizing the power imbalance between parties to an arbitration.¹⁶⁵ The Second Circuit clarified that § 1782(a) permits district courts to compel discovery of extraterritorial materials.¹⁶⁶ As a result, domestic parties to an international commercial arbitration would enjoy the same privileges to compel extraterritorial materials as an

Federal Arbitration Act).

159. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 UNIV. ILL. L. REV. 1, 4 (2010) (attributing the increase in arbitration rate and decrease in trial rate from 1962 to 2002 to the cost, delays, and risks associated with trial).

160. 9 U.S.C. § 7 (2018) (granting discovery power in domestic arbitration exclusively to arbitrators).

161. See generally *DIFC-LCIA Arbitration Rules 2016*, DIFC-LCIA ARB. CTR. (Oct. 1, 2016), <http://www.difc-lcia.org/arbitration-rules-2016.aspx> (establishing that when operating within the DIFC, there are specific arbitral rules parties must follow as opposed to parties being able to contract arbitral rules themselves).

162. But see Carolyn B. Lamm et al., *International Arbitration in a Globalized World*, DISP. RESOL. MAG., Winter 2014, at 4, 5 (recommending several well-established arbitration panels' rules to avoid unforeseen intrusive discovery).

163. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) (giving greater weight to § 1782(a) requests from nonparticipants in the first *Intel* discretionary inquiry, implying that the district court judge resolves power imbalances in international arbitration through § 1782(a) authority).

164. 9 U.S.C. § 7; 28 U.S.C. § 1782(a) (2018).

165. See *In re Del Valle Ruiz*, 939 F.3d 520, 533–34 (2d Cir. 2019); see also *id.* at 533 (quoting *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015)) (“[W]e have instructed that it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright.”).

166. See *id.* at 533–34 (holding that the Federal Rules of Civil Procedure authorize extraterritorial discovery).

international party's privilege to compel domestic materials.¹⁶⁷

IV. NECESSITY FOR UNIFIED APPLICATION OF 28 U.S.C. § 1782(a)

The Sixth Circuit's deviation from the Second and Fifth Circuits' precedents regarding discovery in international commercial arbitration will inevitably lead to foreign litigants and arbitral parties forum shopping for judicial assistance.¹⁶⁸ To prevent inconsistent standards in discovery, Congress and the U.S. Supreme Court should address this issue directly.

Before the passage of the 1964 Amendments to § 1782(a), Congress assembled a group of legal experts to retool the statute.¹⁶⁹ This group altered the statute to reflect changes in the global economy and arbitration.¹⁷⁰ Congress should likewise convene another commission with the sole intent to address discovery in international commercial arbitration. The commission should work with lawmakers to enact effective, easily interpretable legislation for district and appeals courts to follow. This commission should aim to codify the *Intel* authority inquiry and the discretionary inquiry to provide further guidance on how courts should interpret these factors. The commission should also reaffirm the district court's role as a negotiator between the parties, balancing the power disparity between U.S. parties, foreign parties, and foreign arbitrators. The district court should have the authority to limit the discovery requests, limit the purpose for which the evidence is entered, and negotiate an exchange of documents, where appropriate.

Congress should quickly enact the proposed changes by this commission and further publish a legislative report detailing the tribunals entertained under § 1782(a).¹⁷¹ Congress should specifically identify arbitral panels that

167. See *id.*; see also Marisa Marinelli et al., *Discovery in International Arbitration: The Ever-Expanding Scope*, HOLLAND & KNIGHT (Oct. 31, 2019), <https://www.hk.com/en/insights/publications/2019/10/discovery-in-international-arbitration-the-ever-expanding-scope> (arguing that courts granting private arbitration applications provide an advantage to non-domestic parties seeking discovery from U.S.-based entities).

168. See Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 93 (2011) (outlining how inconsistent rulings on § 1782 have created an incentive for foreign companies to forum shop for jurisdictions with less restrictive interpretations of the statute).

169. See Miller et al., *supra* note 19, at 45 (highlighting the success of the commission and Congress's acceptance of the 1964 Amendments).

170. See *id.* (illustrating how the federal courts' review of § 1782(a) cases underscored Congress's aim of refitting the statute for "modern commercial needs").

171. See Beale et al., *supra* note 168, at 93 (highlighting the harmful impact of inconsistent judicial interpretations of § 1782(a)).

fall within the purview of the second *Intel* discretionary factor, the nature of the tribunal, and its receptivity to U.S. courts.¹⁷² Additional credence should be granted to arbitral panels that have adopted the rules of one of the whitelisted arbitral panels, such as the DIFC-LCIA.

Absent clear direction from Congress, the U.S. Supreme Court should address this issue to resolve any potential forum shopping. The U.S. Supreme Court can often react to changes in legal standards faster than Congress, although later congressional action may supersede the U.S. Supreme Court's ruling. Although no petition for a writ of certiorari has been filed, FedEx should challenge the Sixth Circuit's ruling that the district court had the authority, but not the obligation, to assist in discovery. On appeal, the U.S. Supreme Court should affirm the Sixth Circuit's judgment. The U.S. Supreme Court should further support its authority and discretionary factors from *Intel* by providing additional guidance on how to interpret and adjudicate on those factors. The U.S. Supreme Court should explicitly abrogate the decisions in *NBC* and *Biedermann* to prevent confusion among the lower courts.

If the U.S. Supreme Court does not clarify whether international commercial arbitration tribunals fall within the scope of § 1782(a), district and appeals courts should err towards liberal discovery authority to provide equitable and reliable relief to arbitral parties. In the interests of international comity and parity, district courts should follow the Sixth Circuit's permissive construction of § 1782(a).¹⁷³

Finally, on remand, the district court should deny ALJ's request for discovery assistance in connection with the DIFC-LCIA tribunal. As previously noted, the first and third discretionary factors from *Intel* heavily favor the respondents, and therefore, the request should be denied. The Sixth Circuit properly overturned the denial of discovery assistance based on a lack of district court authority, however, that does not necessarily suggest that the district court should grant the discovery request. Instead, the district court should deny the request, not on the grounds of lack of authorization, but rather, as the requests were made to a party to the arbitration and the request

172. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004) (recommending district courts consider the nature of the discovery request, the nature of the tribunal, “attempt[s] to circumvent foreign proof-gathering restrictions,” and the burden placed on the party against which the discovery is sought).

173. See *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710, 732 (6th Cir. 2019); see also *Intel Corp.*, 542 U.S. at 261 (“While comity and parity concerns may be important as touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).”).

was an attempt to circumvent foreign proof-gathering restrictions.

Regardless of the outcome of a congressional statute or a U.S. Supreme Court decision, a unifying standard for discovery in international commercial arbitration is necessary. Foreign parties will be less likely to contract with U.S. companies if there is legal uncertainty surrounding how evidence will be gathered in the event of a contractual dispute.

V. CONCLUSION

The Sixth Circuit properly decided *Abdul Latif Jameel Transportation Co. v. FedEx Corp.* when the court found that international commercial arbitration tribunals fall under the scope of 28 U.S.C. § 1782(a). The Sixth Circuit correctly applied the *Intel* authority test to determine that district courts have the authority, but not the obligation, to assist in discovery requests. On remand, the district court will determine whether ALJ's discovery request should be granted under the *Intel* discretionary factors.

The need for consistent discovery standards in the evolving body of international commercial arbitration will only increase as the prevalence of such arbitration increases. The Sixth Circuit's proper application of the *Intel* authority test should be adopted by other jurisdictions to promote efficacious out-of-court dispute resolution.