No. 20-794

In the Supreme Court of the United States

SERVOTRONICS, INC.,

Petitioner,

v.

ROLLS-ROYCE, PLC AND
THE BOEING COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE INTERNATIONAL ARBITRATION CENTER IN TOKYO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

International Arbitration Center in Tokyo ("IACT") was organized in 2018 under the auspices of the Japanese Patent Office. IACT provides a forum for the arbitration and mediation of international disputes at the intersection of commerce and technology. IACT's leadership includes former judges from the United States, China, Japan, Korea, Europe, Australia, and South America. The retired U.S. judges involved in IACT include former circuit, district, and administrative law judges. *See* https://www.iactokyo.com/ (last visited June 21, 2021).

IACT differs from other arbitration forums in at least three respects. First, because IACT's substantive focus is at the intersection of commerce and technology, it offers particular expertise in associated legal areas, such as intellectual property and the contractual aspects of research, development, trade, and innovation. Second, IACT offers parties the opportunity to have their disputes considered by former judges and government officials from across the globe. Third, IACT seeks to promote consistency of outcomes across different legal regimes by promoting a cross-cultural approach to dispute resolution. In this regard, for example, Article 40 of IACT's arbitration rules provides for substantive

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than *amicus curiae* or its counsel contributed monetarily to the preparation and submission of this brief.

review of an arbitration award by a supervisory panel comprising one arbitrator from each of the U.S., Europe, China, Japan, and Korea.

IACT has a particular interest in promoting respect and cooperation between national judicial tribunals and international arbitration organizations. The fact that IATC's leadership includes former judges from countries with a variety of legal systems and traditions gives IACT a global perspective on transnational dispute resolution issues. This includes issues relating to discovery, and particularly judicial assistance in aid of foreign proceedings.

IACT offers its practical insights and perspectives to the Court with respect to the proper application of 28 U.S.C. § 1782(a), the United States statute directed to the provision of judicial assistance to "a foreign or international tribunal." For reasons stated below, IACT submits that the Court of Appeals' decision excluding private international arbitrations from the scope of § 1782(a) was incorrect, but the decision should be affirmed on the alternative ground that the Petitioner did not demonstrate that the requested discovery is "for use" in the foreign proceeding.

SUMMARY OF ARGUMENT

1. The Court of Appeals concluded that a private arbitration tribunal is not a "foreign or international tribunal" within the meaning of § 1782(a) based on the purported distinction between a "state-sponsored,

public, or quasi-governmental tribunal," and a tribunal whose "adjudicative authority" rests on "a party's contract, not a governmental grant of power." *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 692 n.2, 696 (7th Cir. 2020). The proposed distinction between tribunals operating under "state-sponsored" or "quasi-governmental" auspices on the one hand, and tribunals whose authority is "contractual" on the other, merely raises a new question as to how the term "tribunal" should be construed. That is, instead of asking whether a proceeding is conducted by a "tribunal," district courts will have to inquire into the basis of the tribunal's authority – an issue that is neither easily resolved nor directly relevant to the application of § 1782(a).

Most dispute resolution proceedings do not fall into neat "quasi-governmental" or "contractual" categories. Although virtually every arbitration proceeding is based on an agreement to arbitrate, most arbitrations are also "state-sponsored": they are conducted pursuant to statutes that provide for the enforceability of arbitration agreements, for judicial assistance in the initiation of an arbitration and the collection of evidence, and for judicial enforcement of arbitral awards. In this important respect, the Court of Appeals' decision fails to account for the intersection of public and private roles in most dispute resolution processes, and the important role that the judiciaries in many countries play in arbitration proceedings.

Moreover, the idea that proceedings can be categorized as "quasi-governmental" on the one hand, and "contractual" on the other, does not account for the wide variety of judicial, administrative, and arbitral procedures used around the world, and to the roles both public officials and private parties play in those processes. To the extent that arbitrations are more "contractual" than other proceedings because they leave more room for private choice, that simply places arbitration at one end of a spectrum ranging from private arbitration, through a variety of administrative or quasi-judicial proceedings, to full-fledged adjudication in a national court – all conducted pursuant to rules grounded in national policy, history, and tradition. The Court of Appeals' test, in fact, would result in the application of § 1782(a) in cases in which the foreign government's involvement and interest in a proceeding, and the prospects for interference with the foreign government's "judicial sovereignty" is at its highest.

2. This does not mean that § 1782(a) is without limits. The text of § 1782(a) offers another approach that is more consistent with the statute's text and purpose. The statute provides that the information sought must be "*for use* in a proceeding in a foreign or international tribunal" [emphasis added]. That is, the statute authorizes assistance to an international tribunal only if the information sought can or could be used in the underlying case. The statute should be applied, and the application for judicial assistance granted, only if the applicant demonstrates that the

introduction of the evidence sought would be consistent with the tribunal's rules and procedures.

3. The record in this case raises questions as to whether Petitioner has or could make the required showing that the material it seeks is "for use" in the underlying proceeding. The rules applied in the underlying proceeding grant discretion to the arbitration panel to decide on the scope of discovery and the admissibility of evidence. The record in the Seventh Circuit indicates that the tribunal has ordered the discovery it deems appropriate. The Seventh Circuit's decision should be affirmed on that ground.

ARGUMENT

I. An Applicant for Judicial Assistance Under § 1782(a) Should Not Have To Show That The Underlying Proceeding Is "State-Sponsored" Or "Quasi-Governmental"

A. The Seventh Circuit's Test Does Not Give Clear Guidance To Already-Divided Courts

Arbitration has been recognized as a method of dispute resolution for thousands of years. Homer describes an arbitration-like proceeding in the *Iliad* (Book 18, ll. 496-508). Legal historians explain that private arbitration was known to ancient Romans as well as ancient Greeks. Earl S. Wolaver, *The*

*Historical Background of Commercial Arbitratio*n, 83 U. PA. L. REV. 132, 132 (1934). The arbitration of commercial disputes had a long history in England long before the American Revolution. *Id.* at 144-45.

Following England's lead, arbitration was well-established in colonial America. Roger Haydock & Jennifer Henderson, *Arbitration and American Civil Justice: An American Historical Review and a Proposal for Private/Arbitral and Public/Judicial Partnership,* 2 PEPP. DISP. RES. L. J., ISS. 2 at 144 (2002). In 1854, this Court upheld judicial recognition of an arbitral award, concluding that "[a]rbitrators are judges chosen by the parties to decide the matters submitted to them. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." *Burchell v. March,* 58 U.S. 344, 349-50 (1854).

Given this experience, and the increasing importance of arbitration as a dispute-resolution tool in the United States, Congress incorporated the *Burchell* principles into Chapter 1 of the Federal Arbitration Act of 1925 ("FAA"), codified at 9 U.S.C. §§ 1-16. Additionally, the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 and codified the terms of the treat Chapter 2 (9 U.S.C. §§ 201-208). Congress thus established a national policy in favor of arbitration, and authorized federal courts (as necessary) to enforce arbitration agreements, assist

in the development of a record, and enforce arbitration awards. The FAA and NY Convention do not distinguish among different arbitration rules, or limit the parties' discretion to frame the manner in which their dispute will be resolved.

Congress' 1964 enactment of § 1782(a), authorizing courts to provide judicial assistance to "foreign or international tribunals," should be read in this historical context. Given the long tradition of support for alternatives to judicial proceedings in private disputes, and the then 40-year-old statute governing arbitration proceedings in particular, Congress presumably was aware that the statutory phrase "foreign or international tribunal" would be read to include arbitration tribunals. Nonetheless, the Courts of Appeals have divided over whether § 1782(a) should be read to allow judicial assistance to foreign arbitration proceedings.

In *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019), the Sixth Circuit discussed the state of play even before the Seventh Circuit's decision in this case: "[T]he Second and Fifth Circuits, respectively, determined that the word 'tribunal' in § 1782(a) does not clearly exclude private arbitrations but that the scope of the word is ambiguous. [Citations omitted.] . . . [H]owever, 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." *Id.* at 726-27.

The Seventh Circuit's approach follows that of the Second and Fifth Circuits. It concluded that § 1782(a) applies to "state-sponsored" or "quasi-governmental" proceedings, but not "contractual" proceedings like private arbitration. In addition to the points raised by the Sixth Circuit in *Abdul Latif*, the Seventh Circuit's test does not resolve the issue. Rather, the Seventh Circuit's approach restates the issue in new terms. That is, asking whether the phrase "foreign or international tribunal" refers only to "a state-sponsored, public, or quasi-governmental tribunal," 975 F.3d at 696, but not to a tribunal whose authority "is found in the parties' contract . . . not a governmental grant of power," *id.* at 693 n.2, raises a new question that district courts will have to answer. In other words, the Seventh Circuit's approach merely shifts the focus of the question from the definition of a "tribunal" to whether the "tribunal" falls within one category or another.

As the record of the arbitration between petitioner and respondents in this case shows, shifting the focus of the question does not answer it. In *Servotronics. Inc. v. The Boeing Company,* 954 F.3d 209 (4th Cir. 2020), the Fourth Circuit held that the parties' private arbitration was a state-sponsored proceeding in light of the FAA and public policy:

> In short, 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.

Id. at 214. The Seventh Circuit considered the Fourth Circuit's position, and rejected it: "This view strikes us as mistaken. Contractual arbitration is a private dispute resolution. . . . A private arbitral body does not exercise governmental or quasi-governmental authority." 975 F.3d at 693 & n.2.

The Seventh Circuit's test fares no better in other contexts. For example, judicial proceedings in national courts may have a contractual basis. Private parties have substantial leeway to designate a dispute resolution forum in their contracts. They may agree to a forum selection clause calling for resolution of disputes in one of the party's national courts, or in a particular venue. *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991) (upholding the forum-selection clause in a cruise-line ticket). The parties may opt for judicial resolution of a dispute for various commercial and practical reasons, *id.,* at 593-94, and even more so in contracts involving international matters between parties of different nationalities.

Alternatively, contracting parties (especially in international agreements) may opt to arbitrate their disputes so as to avoid national courts entirely. They may do so to ensure confidentiality, avoid the application of the substantive or procedural rules of a particular jurisdiction, to ensure that the decision-

maker has particular expertise, to allow for a multinational panel, for reasons related to the speed or cost of the proceedings, or for a host of other reasons. Nothing in the contracting parties' agreement to resolve their disputes in this way has any direct bearing on the scope of § 1782(a). More importantly for present purposes, it is not clear whether or why an agreement to resolve a dispute in a specified jurisdiction or venue would fall within the scope of the statute, but an agreement to arbitrate would not.

Moreover, the Fourth Circuit's conclusion that arbitrations are "state-sponsored" proceedings was correct. In the United States, the FAA confirms the enforceability of arbitration agreements as a matter of public policy (9 U.S.C. § 2). It also authorizes district courts to enforce arbitration agreements (§ 4), to enforce an arbitration tribunal's discovery orders (§ 7), and to enforce or vacate an arbitration award (§§ 9, 10). Contracting parties thus opt for "private arbitration" under an umbrella of state policy, and with judicial assistance provided for in the initiation, conduct, and resolution of their dispute. As the Fourth Circuit pointed out, to say that arbitrations are not "state-sponsored" or "quasi-governmental" for purposes of § 1782(a) ignores this context.

Countries representing a large majority of the world's population and global commercial trade have also adopted statutes that provide for judicial involvement at various points in the arbitration process. The International Bar Association's survey

of national arbitration laws confirms that private arbitrations in China, India, Germany, Japan, England, and South Korea are conducted under the backdrop of national statutes that provide for judicial intervention and assistance at various phases in in arbitration proceedings.[2]

Taking one example, private arbitrations in Japan are conducted under the Japanese Arbitration Law (Law No. 238 of 2003), which is based on the model arbitration law adopted by the United Nations Commission on International Trade Law's ("UNCITRAL") model arbitration statute.[3] The UNCITRAL model law provides (among other things): for the enforcement of arbitration agreements (*id.,*

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[2] *See* Hiroyuki Tezuka and Yutaro Kawabata, Arbitration Guide to Japan (IBA Arb. Comm., Jan. 2018); Peter Thorp and Huawei Sun, Arbitration Guide to China (IBA Arb. Comm., June 2018); Richard Kreindler, et al., Arbitration Guide to Germany (IBA Arb. Comm., Feb. 2018); Angeline Walsh, Arbitration Guide to England and Wales (IBA Arb. Comm., Jan. 2018); Sumeet Kachwaha, Arbitration Guide to India (IBA Arb. Comm., Dec. 2019); Kevin Kim, Arbitration Guide to South Korea (IBA Arb. Comm., Sept. 2012), available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Arbcountryguides#arbitrationguides (last visited June 9, 2021).

[3] UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985, WITH AMENDMENTS ADOPTED IN 2006 (Vienna 2008), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (last visited June 9, 2021).

Art. 8), for the adoption or enforcement of interim arbitration awards (*id.,* Arts. 17 I, 17 J), for assistance in taking evidence (*id.*, Art. 27), for the setting aside of an award in limited circumstances (*id.*, Art. 34), and for enforcement of an award (*id.,* Art. 36).

Although national arbitration laws may vary from country to country, that is the point: to say that arbitration is a matter of "contract" and not "state-sponsored" or "quasi-governmental" separates the process from a national legal context that varies from country to country. What can be said is that the UNCITRAL model law, and the national arbitration laws based on the UNCITRAL approach or otherwise, reflect a strong global policy to support arbitration and for judicial involvement in the arbitration process. As the Fourth and Seventh Circuit's different decisions regarding petitioner's requests for judicial assistance illustrate, the effort to sort dispute resolution processes into different categories based on a "state-sponsored" or "quasi-governmental" versus "contractual" will not resolve the scope of the statute, but instead will raise new questions about which label applies.

B. The Court Of Appeals' Approach Would Result In Application Of § 1782(a) In Cases Where Interference With Foreign Sovereign Interests Is Most Likely

The Seventh's Circuit's decision calls for judicial assistance in "state-sponsored" proceedings, but not

proceedings based on a private contract. The Court of Appeals' approach would thus have U.S. courts become involved in those cases where they are most likely to interfere with another country's sovereign interests. The question this raises is why Congress would pass a statute that allows for assistance in cases involving proceedings conducted under the auspices of a foreign government, but not in cases in which private parties engaged in an alternative approach. That is, why would Congress authorize assistance only in cases in which a foreign government's interest or involvement in the process is at its highest?

This Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004), suggests that § 1782(a) should be given a broad scope. All of the Justices recognized that § 1782(a) should be construed by reference to the variety of adjudicative procedures around the world. Justice Breyer's dissent highlighted the "wide variety of nonprosecutorial, nonadjudicative bodies" to which the statute would apply. *Id.* at 268 (Breyer, J. dissenting). The majority responded by acknowledging that "a foreign proceeding may have no direct analogue in [America's] legal system," and many "foreign proceedings [are] resistant to ready classification in domestic terms." *Id.* at 263 n.15. Citing the statute's broad and discretionary language, the majority, too, raised concerns about categorical restrictions on the statute's scope. *Id.* at 255.

The Seventh Circuit's approach flies in the face of this caution.

Moreover, the Seventh Circuit's approach has the potential to inject U.S. district courts into foreign proceedings conducted under rules where their involvement is least appropriate. For example, national courts in Europe, Japan, and elsewhere follow a "civil law" approach to adjudication. Civil-law courts do not use pre-trial discovery in the American sense. Unlike plaintiffs in U.S. courts, claimants in civil-law courts present detailed and documented claims to the court, and then the judge or magistrate directs the further compilation and evaluation of an evidentiary record. Lauren Ann Ross, *A Comparative Critique to U.S. Courts' Approach to E-Discovery in Foreign Trials,* 11 Duke L. & Tech. Rev. 313, 318-19 (2012); John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. Chi. L. Rev. 823, 827 (1985) (in civil law jurisdictions, "Digging for facts is primarily the work of the judge.")

One scholar summarized the difference between American practice and civil law proceedings as follows:

> The contrast between U.S. and foreign discovery practices is stark. As explained above, American courts have long been comfortable exercising their broad discovery and jurisdictional powers over parties wherever located. Discovery in civil law countries is drastically different from U.S.

> methods. Because the inquisitorial system predominates in civil law countries, it is judges, not the parties themselves, who have the exclusive power to gather facts. After compiling evidence, civil law judges produce an official summary, or dossier, that is used at trial.

Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. OF INT'L LAW 157, 167-68 (2016) (footnotes omitted).

The civil-law approach to the compilation of an evidentiary record is not merely a difference in style. Rather, international lawyers refer to it as an act of "judicial sovereignty." *Id.* at 172 (quoting Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 I.L.M. 785, 787 (1979)). Scholars point out that the respective roles of judges and lawyers in different countries stem from cultural and historical traditions relating to factors like "the trust in individual self help rather than the State as a provider of legal protection" and "different conceptions of the relationships among private individuals and between individuals and public authority." Oscar G. Chase, LAW, CULTURE, AND RITUAL: DISPUTING PROCESSES IN CROSS-CULTURAL CONTEXT 62 (2005), excerpted in Oscar G. Chase, et al., CIVIL LITIGATION IN COMPARATIVE CONTEXT 350, 352-3 (2d ed. 2017).

This Court has recognized the differences in national approaches to discovery, as well as the principle of "judicial sovereignty" over "evidence-gathering." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543 (1987). In *Societe Nationale, the Court* highlighted the importance of local control over judicial proceedings, at least in American courts:

> It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts.

Id. at 542.

The Seventh Circuit's approach to § 1782(a), however, would result in U.S. district courts' granting applications for judicial assistance *only* in "state-sponsored" or "quasi-governmental" cases in which the compilation of an evidentiary record is subject to the most extensive judicial or administrative control, but foreclose assistance where the proceeding has the strongest "private" element. The outcome of the Court of Appeals' approach, therefore, would be to have the U.S. courts provide judicial assistance only in proceedings where the U.S. courts' intrusions on foreign "judicial sovereignty" interests are most likely. Conversely, by taking the view that § 1782(a)

does not apply to arbitration proceedings because they are not "state-sponsored," the Seventh Circuit forecloses judicial assistance in cases in which a foreign government is (by the Seventh Circuit's approach) least interested.

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Given the wide variety of proceedings to which § 1782(a) applies, and the fact that many foreign proceedings may have no analogue in American practice, any approach that limits the scope the statute by reference to the type of proceeding at issue is likely to raise more problems than it solves. The Court of Appeals' exclusion of disputes based on a private contract, with a focus on "governmental" or "quasi-governmental" proceedings highlights this concern. Under that approach, § 1782(a) would apply only in cases in which a foreign government's role or interest is manifest. The statute provides no indication that Congress intended that result, or any reason for this Court to adopt it.

II. Under § 1782(a), An Applicant Must Show That The Information Sought Would Be "Used For" The Underlying Proceeding

Although § 1782(a) does not readily yield to the categorization of "foreign or international tribunals," that does not mean that the grant of judicial assistance should be automatic. The statute's limiting factor is the requirement that the materials sought be "for use in a proceeding." The statute

therefore requires that the applicant in the district court make a reasonable demonstration that the evidence would be *used* in the underlying proceeding.

This approach is consistent with this Court's recognition in *Intel* that § 1782(a)'s "for use" term is the initial hurdle the petitioner has to overcome. *Intel* involved a § 1782(a) application by the complainant in a proceeding before the European Commission's competition authority ("DG-Competition"). The Court explained that DG-Competition initiates proceedings on the basis of a complaint or *sua sponte*, and that DG-Competition is open to the receipt of information from the complainant during its investigative phase. *Intel*, 542 U.S. at 254. DG-Competition prepares a written decision, which is subject to review in European courts. *Id.* In these circumstances, the *Intel* Court noted that the applicant could submit the information to DG-Competition at the investigative stage, and the record would be available not only at the investigative stage but at subsequent appellate review. *Id.* at 256-57. In these circumstances, the Court concluded that the applicant had satisfied the "for use" requirement. *Id.* at 257 ("Hence, AMD could 'use' evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage.").

The Court in *Intel* also instructed district courts considering judicial assistance applications to consider "the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance" and "whether the § 1782(a)

request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States." *Id.* at 264-65. Although the Court declined "at this juncture, to adopt supervisory rules" pending "further experience with § 1782(a) applications in the lower courts," *id.* at 265, the further experience with the application of § 1782(a) suggests that this threshold requirement – rather than the definition of "tribunal" – is the relevant threshold question that the district courts must address.[4]

First, the "for use" requirement is easily applied. Resolution of applications submitted by, or with the concurrence of, the foreign tribunal itself would be simple. If the application is by an "interested person," then applicant could show at least a substantial prospect that the information sought would lead to evidence admissible in the foreign or international tribunal. The applicant could refer to the arbitration agreement, the applicable rules of the tribunal regarding its role in the collection of evidence, the rules regarding the scope of allowable discovery (if

[4] The Court in *Intel* held that the decision on a § 1782(a) application should not turn on whether the information would be discoverable under the tribunal's local rules, but the Court also noted that this is a different question from whether the tribunal's rules would allow for the "use" of information collected in the United States. 542 U.S. at 261-62 ("[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use.") (citation omitted).

any), the record of the proceedings in the particular case, and similar information from which the district court could make an informed decision.[5]

Second, treating the "for use" language as a threshold issue in a § 1782(a) application would resolve concerns raised by the Seventh Circuit and other courts regarding a potential inconsistency between § 1782(a) and the FAA. As the Seventh Circuit noted, § 1782(a) allows for an application by "any interested person," but the FAA requires that a request for judicial assistance come from the tribunal. 975 F.3d at 695-96. That discrepancy has nothing to do with whether an arbitration is conducted by a tribunal – but it is relevant to whether the evidence is "for use" in the underlying proceeding. Just as the district court would look to the FAA's provisions to determine whether assistance should be granted in a domestic arbitration, the district courts should consider the applicable statutes and rules governing the foreign tribunal to determine whether the materials sought would be "for use" in that proceeding.

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[5] The Court also pointed out that the application of § 1782(a) should not require a "comparative analysis to determine whether analogous proceedings exist here." *Id.* at 263. The question of whether the information sought is "for use" in a foreign or international tribunal, however, does not require a comparative analysis of proceedings. For example, it might be accomplished by a review of the rules under which the proceeding is conducted, and the record of the proceeding itself.

Third, requiring a "for use" demonstration would also resolve concerns regarding comity and respect for foreign sovereign interests. The Court explained the concern in *Societe National*:

> In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See [*Hilton v. Guyot,* 159 U.S. 113 (1895)]. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

482 U.S. at 546. The Court in *Intel* explained that an application for judicial assistance under § 1782(a) raises the same concerns. 542 U.S. at 261 (noting that "comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases"). *See also, id.* at 266 ("Nor do we know whether the European Commission's views on § 1782(a)'s utility are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions.").

By considering whether the information sought in the § 1782(a) application is "for use" in the underlying proceedings, the district court would approach the matter sensitive to the concerns raised by the Courts

of Appeals that have tried to limit the statute in other ways. The district courts would consider and apply the applicable rules, review the scope and record of the proceedings, and determine whether the applicant has made a reasonable showing that the information is "for use" in the relevant proceeding.

III. Petitioner Has Not Shown That The Information It Seeks Is "For Use" In The Underlying Proceeding

The record in this case shows that petitioner has not made a "for use" demonstration. Petitioner and respondents are involved in an arbitration under the auspices of the Charted Institute of Arbiters ("CIArb") in the United Kingdom. *Servotronics,* 975 F.3d 691. CIArb rules provide the arbitration panel with discretion over the discovery of evidence and the compilation of a record. Specifically, Article 27 of the CIArb rules provides:

> **Article 27 – Evidence**
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> ***
>
> 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such time period as the arbitral tribunal shall determine.

> 4. The arbitral tribunal shall determine the admissibility, materiality and weight of the evidence offered.

CIArb Rules at 21 (1 December 2015), available at https://www.ciarb.org/media/2729/ciarb-arbitration-rules.pdf (last visited June 21, 2021). Appendix II of the rules further provides for the consideration of discovery issues at an early management conference, including matters relating to the production of documents. *Id.* at 47.

The record in the Court of Appeals shows that, in the underlying dispute, both Petitioner and Respondent Rolls Royce submitted requests for discovery from the other party. The Tribunal ruled on these requests, and ordered the production of documents, addressing both the burden and relevance of the materials sought. Amended Interim Award, *In the Matter of an Arbitration Under the Rules of the Chartered Institute of Arbitrators Between: Rolls Royce PLC and Servotronics, Inc.* (May 7, 2020).[6] In addition, the Tribunal addressed the question of "custody and control," and ordered that Rolls Royce "in the first instance" to "demand copies of any documents" from Boeing. *Id.,* ¶ 10. In sum, the Tribunal addressed the discovery requests, and allowed, denied, or limited the requests based on the

[6] The Amended Interim Award was filed in the Seventh Circuit. *See Servotronics,Inc. v. Rolls Royce PLC,* No. 19-1847, Dkt. No. 33-2 (7th Cir., filed May 8, 2020).

Tribunal's rules and other appropriate considerations.

At least two district courts that have addressed the issue since the Seventh Circuit's decision have ruled that, in these circumstances, the CIArb Tribunal "has the last word" on the conduct of its proceedings, including whether the arbitration should go forward without the discovery that petitioner seeks in the United States. *In re Servotronics, Inc.,* No. 2:18-mc-00364-DCN at *8 (D.S.C. Apr. 14, 2021); *Servotronics, Inc., v. Rolls-Royce PLC,* 2021 WL 1221189 at *3 (D. Minn. Apr. 1, 2021). To the extent that the Tribunal has ruled that the discovery petitioner seeks would be inadmissible, inappropriate, or not otherwise consistent with the Tribunal's rules or orders, then the Tribunal's decisions should be binding.

Insofar as the Tribunal's rules and decisions preclude the "use" of the information petitioner seeks, then § 1782(a) does not authorize the district court to grant the petitioner's application, and the decision of the district court and the Seventh Circuit should be affirmed on that ground.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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June 25, 2021