Discovering Section 1782: Expanding Discovery To Private International Arbitral Tribunals

By Alyssa Gjedsted

I. Introduction

Section 1782 of the United States Code, Chapter 28, provides in relevant part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." The statute is the primary means by which the United States provides assistance to foreign and international tribunals by allowing for discovery requests and necessary evidence for litigation. While the statute is praised for its broad application and liberal assistance, confusion about crucial aspects of its framework have created circuit splits, often making its application more difficult than beneficial.

One of the main issues to arise for circuit courts interpreting the statute has been whether private international arbitration qualifies as a "foreign tribunal" for purposes of allowing discovery by the requesting party. While several circuit courts have held that the section allows discovery in private international arbitration, other circuit courts have analyzed the legislative history and concluded that neither the plain language nor the legislative history supports this broad interpretation. Many opponents argue that, in applying the broad discovery rules to private international arbitration, this takes the authority to manage discovery from the arbitrators and defeats the underlying purpose of arbitration as being cost-effective, speedy, private, and narrowly controlled through the decisions of the arbitrator. This paper will analyze the holdings of the split circuit courts, and then examine the legal implications of expanding the statute to apply to private international arbitration. This author posits that the statute should be applied to private international arbitration, as this should be considered a foreign tribunal to promote

international arbitration in both the public and private realm; however, it should ultimately remain in the court's discretion as to whether broad discovery should be allowed, in an effort to maintain the underlying objectives of private arbitration.

II. Background

A. Section 1782

Prior to 1855, there was no formalized process in the United States for obtaining international judicial assistance.[1] In 1949, Congress enacted a new statute including a provision to regulate "testimony for use in a foreign country."[2] However, this provision was strictly limited to taking depositions in foreign litigation, and federal courts had no authority to compel the production of any documents located within the United States.[3] As the United States became increasingly involved in international trade and commerce, Congress recognized the need to modernize the procedure for providing international judicial assistance, and subsequently, in 1964, Congress unanimously enacted legislation to include a complete overhaul of section 1782.[4] The legislature's objectives were to introduce a "fundamental policy" that states should provide international judicial assistance "with the greatest . . . liberality," as well as offering "a model and an invitation to foreign states to follow the American example."[5] The changes thus allowed

[1] Okezie Chukwumerijie, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV 649, 654 (2005). In 1855, in response to this gap in judicial assistance, Congress passed an act which provided that where a letter rogatory is directed to a circuit court from a foreign country, a commissioner designated by the circuit court "shall be empowered to compel the witness to appear and depose in the same manner as to appear and testify in court." *Id*.

[2] *Id.* at 655. The provision was aimed at broadening the scope for the grant of judicial assistance because, in the view of Congress, the "improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by great distances." *Id*. at 655-56.

[3] *Id.* at 656. Additionally, the scope of the revised statute also limited the taking of depositions "to be used in any civil action pending before any *foreign non-judicial adjudicative tribunal*." *Id*. (emphasis added).

[4] *Id.* at 657. The comprehensive overhaul of section 1782 was aimed at "bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." *Id*. at 657-58.

[5] *Id.* at 658; *see also In re Letter Rogatory from Justice Court*, 523 F.2d 562, 565 (6th Cir. 1975) (stating the purpose behind the proposals was to incite other nations to follow the United States in expanding procedures for assistance of foreign litigants).

foreign litigants to obtain documents and other tangible evidence, and broadened the proceedings for which evidence could be requested in a foreign or international tribunal.[6]

Currently, section 1782(a) states, in part: "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." Under its explicit terms, "any interested person" can make an application directly to a US court to take evidence pursuant to section 1782; this includes a party to the foreign proceeding or anyone with "a reasonable interest in obtaining [judicial assistance]."[7] The section permits evidence to be taken from a person who resides or is found in the district covered by the district court to which the application is made, including a non-party to the foreign proceeding.[8] The section further requires that the evidence sought be "for use in a proceeding in a foreign or international tribunal."[9] It is here that the application and the interpretation of the section generates confusion, primarily in that circuit courts are split as to what constitutes a "foreign or international tribunal."

1. Pre-*Intel* Application of Section 1782

Prior to the Supreme Court's ruling in 2004, it gradually became evident that there was much confusion surrounding the section's application—namely, courts were having a difficulty in determining whether or not, under the statute's language, "foreign and international tribunals" included private international arbitral bodies.[10] The Second and Fifth Circuits ruled in separate

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[6] Chukwumerijie, *supra* note 1, at 658-59. Though the 1949 version of section 1782 restricted international judicial assistance to cases where the requested information was "for use in any judicial proceeding *pending* in any court," the word "pending" was removed from section 1782 with the result that judicial assistance became available where the evidence gathered would be used in "a proceeding in a foreign or international tribunal." *Id.* at 679. (emphasis added).

[7] John Fellas, *Using Section 1782 In International Arbitration*, 2008 PLI/LIT 287, 294; *see also Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 256.

[8] *Id.* at 294.

[9] *Id.* at 294.

[10] *See* Brandon Hasbrouck, *If It Looks Like A Duck . . . : Private International Arbitral Bodies Are Adjudicatory Tribunals Under 28 U.S.C. §1782(A)*, 67 WASH. & LEE L. REV. 1659, 1666-67 (2010).

holdings that the section did *not* include private international arbitral bodies. These opinions are crucial because their precedential value is a source of the current split among the district courts as to whether or not *Intel* overruled the Second and Fifth Circuit decisions.[11]

In *National Broadcasting Co. v. Bear Stearns & Co., Inc.*, TV Azteca S.A. de C.V. ("Azteca") and National Broadcasting Company ("NBC") entered into a contract containing an arbitration provision requiring any dispute between NBC and Azteca to be arbitrated in Mexico by the International Chamber of Commerce ("ICC") under ICC rules and Mexican law.[12] The Court of Appeals reviewed the 1782 application, looking primarily at the legislative history and language of the statute itself.[13] The Court determined that "the absence of any reference to private dispute resolution proceedings as such arbitration [within the statute] strongly suggests that Congress did not consider them in drafting the statute."[14] Moreover, the Court noted in a footnote that Professor Smit, who claimed that the amended statute should be read to encompass private as well as governmental arbitration, relied on insufficient knowledge and his "reasoning [was] unpersuasive."[15] Finally, the court looked at the narrow discovery restrictions imposed by domestic arbitration law under section 7 of the Federal Arbitration Act ("FAA"), stating that the limitations would be overridden by the liberal application of section 1782 proceedings before private arbitral panels, thereby conflicting with the strong federal policy favoring arbitration as

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[11] *Id.* at 1667.

[12] *Nat'l Broad. Co., Inc. v. Bear Stearns & Co.,* 165 F.3d 184, 186 (2d Cir. 1999). In anticipation of the ICC arbitration proceeding in Mexico, but prior to the appointment of the arbitration panel, NBC filed an ex parte application under section 1782 for authorization to serve document subpoenas on six third-party financial institutions involved with Azteca. *Id.* at 188. The district court denied NBC's motion, concluding that the term "foreign or international tribunal" under section 1782 does not encompass private international commercial arbitration. *Id*.

[13] The Court characterized the statute's language regarding a "foreign or international tribunal" as "sufficiently ambiguous" so as to render inconclusive the debate as to whether the statute excludes or includes arbitral panels. Daniel A. Losk, *Section 1782(A) After Intel: Reconciling Policy Considerations And A Proposed Framework To Extend Judicial Assistance To International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035, 1045; *see* Nat'l Broad. Co., 165 F.3d at 188.

[14] *Nat'l Broad. Co.,* 165 F.3d at 189-90.

[15] *Id.* at 190 n.6. The Court further noted that Professor Smit's most recent interpretation of the statute was so broad that it contained "no discernable limits, and could theoretically encompass even the most informal, unorthodox private dispute resolution proceedings." *Id*. at 191 n.9.

an alternative means of dispute resolution.[16] Thus, the Second Circuit concluded that Congress did not intend for the statute to apply to an arbitral body established by private parties, and NBC's motion was quashed.[17]

Meanwhile, in *Republic of Kazakhstan v. Biedermann International*, the Fifth Circuit relied upon the Second Circuit's holding in *National Broadcasting*, and set forth a similar argument relying upon the legislative history and Congressional intent in drafting the amendment to section 1782.[18] The Court concluded that "[t]here is no contemporaneous evidence that Congress contemplated extending section 1782 to the then-novel arena of international commercial arbitration,"[19] and the words "foreign and international tribunals" only included "international government sanctioned tribunals."[20] Moreover, the Court stated that "[e]mpowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process, [which] is intended as a speedy, economical, and effective means of dispute resolution."[21]

2. Definition of "Foreign Tribunal" in *Intel v. Advanced Micro Devices*

In 2004, to address the pervading question of what constitutes a "foreign or international tribunal" for purposes of section 1782, the Supreme Court granted *certiorari* in *Intel Corp. v.*

[16] *Id.* at 191. The Court went on to state that such an inconsistency would not only be devoid of principle, but also would create an entirely new category of disputes concerning appointment of arbitrators and the characterization of arbitral panels as domestic, foreign, or international—a conflict which, the Court believed, Congress did not intend for. *Id*.

[17] *Id.* at 191.

[18] *Republic of Kazakhstan v. Beidermann Int'l,* 168 F.3d 880, 881 (5th Cir. 1999). In this case, the Fifth Circuit considered whether the Republic of Kazakhstan could obtain third-party discovery under section 1782 in a private arbitration proceeding conducted by the Arbitration Institute of the Stockholm Chamber of Commerce. *Id*. The Republic sought a nonparty deposition, as well as the production of relevant documents. *Id*. at 191. Initially, the district court granted the request, holding that section 1782 *does* apply to private international arbitration. *Id*. at 883. (emphasis added).

[19] *Id.* at 882.

[20] *Id.* at 882.

[21] *Id.* at 883. The Court posited that "arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration," and may suggest a "party's attempt to manipulate United States court processes for tactical advantage." *Id.*

Advanced Micro Devices.[22] Justice Ginsburg examined the legislative history of the statute, including the 1964 revision of the section, and determined that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings."[23] She went on to cite an article by Professor Hans Smit, which posited that the term "tribunal" includes "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional, civil, commercial, criminal, and administrative courts."[24] The Supreme Court held that the Directorate-General for Competition of the Commission of the European Communities was a "tribunal" for purposes of section 1782 because it had the authority not only to investigate complaints but also to issue dispositive rulings (including determining liability and imposing penalties), which rulings could be reviewed by the Court of First Instance.[25] As such, the Supreme Court reasoned that the Commission was, at the least, a proceeding leading directly to quasi-judicial proceedings, and should be considered a "tribunal" for purposes of section 1782.[26]

3. Court's Discretion in Granting 1782 Application

Additionally, the Court reiterated that a district court is not *required* to grant a section 1782 discovery application simply because it has the authority to do so if the parties are a foreign

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[22] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246 (2004). This case arose out of a complaint filed by Advanced Micro Devices ("AMD") with the Directorate-General for Competition of the Commission of the European Communities that a competitor, *Intel*, had engaged in anti-competitive behavior. *Id*. In connection with the complaint, AMD made a section 1782 application to the district court for the Northern District of California for an order requiring *Intel* to produce certain documents. *Id*. The court denied AMD's application, but the Court of Appeals for the Ninth Circuit reversed. *Id*.

[23] *Id*. at 258.

[24] *Id*. at 258.

[25] *Id*. at 246. The European Commission is the executive and administrative body of the European Communities, established under the European Union Treaty. Amy Moore, *Expanding the Power Of U.S. Courts In Private International Arbitration-Moderation Loses To An Extreme*, 2008 J. DISP. RESOL. 321, 325. The Commission is authorized to enforce the Treaty components with written, binding decisions, enforceable through fines and penalties and appealable to the Court of First Instance and ultimately, the European Court of Justice. *Id*.

[26] Moore, *supra* note 25, at 325; *see Intel*, 542 U.S. at 258. The Court then addressed the split among the lower courts as to whether section 1782 categorically bars a district court from ordering production of documents when the foreign tribunal or "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction." *Id*. at 259-60. The Court found that nothing in the statute imposed a "foreign discoverability" requirement or any other "substantive limitation" on discovery available under the statute. *Id*.

or international tribunal.[27] The Court offered guidance to district courts exercising their discretion in deciding section 1782 petitions by enumerating several factors to weigh; first, courts should look at whether discovery is being sought from a party to the proceedings.[28] Second, the district court may "take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[29] Finally, the district court should consider whether the request is "unduly burdensome or intrusive," and whether such requests should be narrowed if granted.[30]

III. Current Interpretation of Section 1782

Although the Supreme Court sought to clarify the term "foreign or international tribunal" for purposes of applying section 1782, subsequent to the *Intel* decision, courts have still encountered confusion in that it is unclear whether *Intel* overturned the prior decisions of the Second and Fifth Circuits or whether those holdings are still good law.

A. Section 1782 Does Apply to Foreign Arbitration

In *In re Oxus Gold*, the U.S. District Court for the District of New Jersey became the first post-*Intel* court to examine whether section 1782 should apply to discovery requests in foreign arbitral proceedings.[31] The District Court granted the request, citing the Supreme Court ruling in *Intel* that "Congress introduced the word 'tribunal' to ensure that assistance is not confined to proceedings before conventional courts, but extends also to 'administrative and quasi-judicial

[27] *Intel*, 542 U.S. at 264.

[28] *Id.* at 264. The Court found that when the person from whom discovery is sought is a participant in the foreign proceeding, the need for the statute's aid is generally not as apparent as it ordinarily is when evidence is sought from a nonparticipant in a matter arising abroad. *Id*.

[29] *Id.* at 264-65. For example, a court could consider whether the § 1782 petition constituted an attempt to circumvent foreign discovery restrictions or other policies of a foreign country or the United States. *Id*. at 268.

[30] *Id.* at 265.

[31] Kenneth Beale, Justin Lugar & Franz Schwarz, *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, 68 (2011); *see In re Oxus Gold PLC, No. MISC.* 06-82, 2006 WL 2927615, at *1 (D.N.J. Oct. 11, 2006). An international mining group, Oxus Gold, initiated arbitration under the bilateral investment treaty between the United Kingdom and the Republic of Kyrgyzstan, pursuant to the United Nations Commission on International Trade Law Rules ("UNCITRAL"). In re Oxus, 2006 WL 2927615 at *2.

proceedings."[32] However, the key distinction made by *Oxus* was that, although the arbitration was between two private litigants, it was conducted within a framework governed by the United Nations Commission on International Trade Law Rules ("UNCITRAL"), and it was because of the influence of the public governmental agency that the arbitration panel in the case constituted a "foreign tribunal" for purposes of section 1782.[33] Accordingly, the court in *In re Oxus Gold*, evaded the question as to whether the section should apply to private foreign tribunals, and held instead that section1782 applied to this proceeding before an international arbitral tribunal created pursuant to a bilateral investment treaty, rather than by a contract between two private parties.[34] As it did not answer the question of whether section 1782 covers *private* foreign arbitral proceedings, the court in *In re Oxus Gold* left this question open until the end of 2006, when the U.S. District Court for the Northern District of Georgia's decided *In Re Roz Trading*.[35]

In re Roz Trading became the first post-*Intel* court to address whether section 1782 covers "private" foreign arbitral tribunals.[36] In its opinion, the district court stated that it could only grant Roz's request if it had the authority to do so under section 1782; even then, the

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[32] *In re Oxus*, 2006 WL 2927615 at *5 (citing *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004)).

[33] *See id*. at *6. The district court discussed the NBC decision, noting that it applied to foreign arbitral tribunals rather than to tribunals constituted pursuant to bilateral investment treaties between sovereign nations. *Id*. Based on a partially flawed understanding of the UNCITRAL Rules, the court concluded:

> The international arbitration at issue is being conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member states. The arbitration is not the result of a contract or agreement between private parties as in [NBC]. The proceedings at issue has [sic] been authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the Bilateral Investment Treaty (citation omitted). Therefore, it appears to the Court as if the international arbitration proceeding in the present case is included as a 'foreign or international tribunal' in Section 1782.

Id. at *6). However, the UNCITRAL Rules are a set of procedural rules that parties may use to govern the conduct of arbitral proceedings arising out of a purely commercial relationship. Beale, Lugar & Schwarz, *supra* note 31, at 69, n.118. Arbitrations pursuant to these rules are not administered by any United Nations body and are often ad hoc proceedings between private parties. *Id*.

[34] Beale, Lugar & Schwarz, *supra* note 31, at 69. (emphasis added).

[35] *Id*. at 69.

[36] *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). Roz Trading Ltd. ("Roz") petitioned the district court to compel the Coca-Cola Company to produce certain documents pursuant to section 1782. *Id*. at 1222. Roz was a party to an arbitration against a subsidiary to the Coca-Cola Company, and had previously entered into a joint venture agreement between the Company and Uzbekistan. *Id*.

request would only be granted if the *Intel* factors weighed in favor of granting the request.[37] Citing to *Intel*, the court found that section 1782 did in fact apply to private arbitral tribunals, stating that this finding was consistent with not only the Supreme Court's decision but also the "widely accepted definition of 'tribunal.'"[38] After concluding that section 1782 applies to private foreign arbitral tribunals, the district court considered the factors set forth in *Intel* in analyzing the court's discretion as to whether to accept or reject the discovery petition.[39] The court ultimately granted Roz's petition, limiting the time period for discovery and the scope of disclosure.[40]

Several months later, U.S. Magistrate Judge Susan Nelson issued a decision in *In re Hallmark Capital Corp.*, permitting discovery for use in a private foreign arbitral proceeding.[41] Its initial inquiry was as to whether the court even had authority under section 1782 to allow for discovery; it looked at the language of the statute and determined that (1) the nonparty from whom Hallmark requested discovery maintained his residence and principal place of business in the district in which the court had jurisdiction;[42] (2) the discovery sought was for use in a foreign arbitration, which it stated was a "tribunal" under the section;[43] and (3) the applicant, Hallmark, was an "interested person" under the statute.[44] Finding that the prerequisites were met, and the statute applied to the tribunal at hand, the court looked at *Intel* in analyzing its discretion; it

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[37] *Id.* at 1223. As to the first issue, whether the district court had the authority to grant Roz's request, the court noted that "[t]his issue is both interesting and one of first impression in this Circuit." *Id.* at 1224.

[38] *Id.* at 1225-26. Furthermore, the court "decline[d] to follow the Second and Fifth Circuits because, in light of *Intel*, they are not persuasive authority." *Id.* at 1227-28.

[39] *Id.* at 1231. The court concluded that Coca-Cola was a nonparty to the foreign proceedings, the foreign arbitral panel was receptive to the aid of the court, and many of the documents requested by Roz were solely held by the Respondent. *Id.*

[40] *Id.* at 1231.

[41] *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007). At the time of the proceeding, Hallmark Capital was the claimant in an arbitration against a company called UltraShape, Inc. and Mr. Berman, while the Chairman of the Board of UltraShape, was not a party to the proceeding. *Id.*

[42] *Id.* at 954.

[43] *Id.* at 954. Judge Nelson relied heavily on *Intel* and *In re Roz Trading Ltd.* for the proposition that "[h]ad Congress wanted to impose the limitation advanced by [the party opposing the extension of § 1782 to private arbitration bodies], it would have been a simple matter to add the word 'governmental' before the word 'tribunal' in the 1964 amendment." *Id.*

[44] *Id.* at 952.

concluded that the twin aims of expanding the statute to foreign arbitration—providing an efficient means of assistance to participants in international litigation and encouraging foreign countries to provide reciprocal means of assistance to United States courts and litigants—would be met by permitting the requested discovery.[45]

Several years passed before another circuit court issued a decision on whether section 1782 applies to foreign arbitral tribunals. In 2008, the United States District Court for the District of Massachusetts decided *In re Babcock Borsig AG*, holding that section 1782 does apply to foreign arbitral tribunals; however, the court made an important distinction and restricted discovery to only those cases in which the foreign arbitral tribunal was receptive to the U.S. court's assistance.[46] The court relied on *In re Roz Trading Ltd.*, *In re Oxus Gold*, and *In re Hallmark Capital Corp.* in finding that section 1782 did apply to foreign tribunals, stating that "there is no textual basis upon which to draw a distinction between public and private arbitral tribunals, and the Supreme Court in *Intel* repeatedly refused to place 'categorical limitations' on the availability of §1782."[47] However, the court further found that placing a restriction on the scope of discovery was necessary to uphold the statute's objectives.[48]

B. Section 1782 Does Not Apply to Foreign Arbitration

Less than one month after *Babcock*, any consensus among the district courts regarding section 1782's application to private foreign arbitration was extinguished when the U.S. District Court for the Southern District of Texas wrote its decision for *La Comision Ejecutiva*

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[45] *Id.* at 952.

[46] *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) (hereinafter "Babcock"). In this case, the petitioner, a German company, requested assistance from a U.S. court in obtaining discovery from Hitachi, a Japanese company, for use in a "potential arbitration," that, if filed, would proceed under the rules of the ICC. *Id.* at 235-36.

[47] *Id.* at 240.

[48] *Id.* at 241. According to the court, "[i]n a situation where the foreign tribunal restricts discovery, granting the application could undermine the statute's objective [to assist foreign tribunals in obtaining useful information]." *Id.* The court further stated that it "may be irresponsible" to order discovery where there is "reliable evidence that the foreign tribunal would not make any use of the requested material." *Id.*

Hidroelectrica Del Rio Lempa v. El Paso Corp.[49] The district court was once again confronted with a request for assistance under section 1782 in connection with a private foreign arbitral proceeding.[50] The court found that *Biedermann* was still binding precedent on the Fifth Circuit and that *Intel*, which was decided after *Biedermann*, "shed no light on the issue" of whether section 1782 applies to foreign arbitral tribunals."[51] In an unpublished opinion, the Fifth Circuit affirmed the district court's decision denying the applicant's request for discovery pursuant to section 1782.[52]

One year later, in June 2009, the U.S. District Court for the Northern District of Illinois followed the court's holding in *El Paso* and decided *In re Norfolk Southern Corp.*[53] The court examined the legislative history of the statute, as well as the subsequent case law stemming from the Supreme Court's decision in *Intel*.[54] Though the court acknowledged that Professor Hans

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[49] *See* Beale, Lugar & Schwarz, *supra* note 31, at 74. Beale suggests that the consensus appeared to be, in light of the Supreme Court's decision in *Intel*, that the section applied to foreign arbitral proceedings but should be used sparingly and only if certain conditions were met. *Id*.

[50] *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp*., 617 F. Supp. 2d 481, 482 (S.D. Tex. 2008) (hereinafter "El Paso"). La Comision Ejecutiva Hidroelectrica del Rio Lempa ("CEL") was an El Salvadoran state-owned hydroelectric power operator who contracted with Nepaja Power Co. ("NPC") when a dispute regarding the contract arose. *Id*. at 482. CEL filed an application with the district court to allow CEL to subpoena El Paso, a third party, to produce documents and witnesses in connection with the arbitration that NPC contended it would imminently initiate against CEL. *Id*. Judge Harmon of the district court initially granted the subpoena requesting discovery from a third party; however, she subsequently issued an order reversing the court's previous discovery order. *Id*.

[51] *Id*. at 485. Judge Harmon stated that the Supreme Court had not addressed the application of § 1782 to arbitral tribunals, not even in *dicta*. *Id*. Instead, she argued that *Intel* broadened the scope of the section's "foreign and international tribunals" only so far as to clarify that it applied not only to court proceedings, but also to proceedings before the specific tribunal within that case. *Id*.

[52] *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. App'x 31, 32 (5th Cir. 2009). The Fifth Circuit held that "[t]he question of whether a private international arbitration tribunal also qualifies as a 'tribunal' under § 1782 was not before the [Supreme] Court [in *Intel*]." *Id*. at 34. The court based its decision on two factors: (1) *Intel* only mentioned arbitration "in a quote in a parenthetical from a law review article by Hans Smit" that contained no context as to whether the Supreme court was actually adopting this definition; and (2) "none of the concerns raised in Biedermann regarding the application of §1782 to private international arbitrations were at issue or considered in *Intel*." *See* Beale, Lugar & Schwarz, *supra* note 31, at 76 (quoting *El Paso Corp.*, 341 Fed. App'x at 34).

[53] *In re Norfolk Southern Corp.* arose from an insurance dispute regarding a train derailment. *In re Norfolk Southern Corp.*, 626 F. Supp. 2d 882, 883 (N.D. Ill. 2009). During arbitration, Norfolk Southern sought to depose an attorney who represented certain insurance companies, and applied for assistance under § 1782. *Id*.

[54] *Id*. at 884. The court concluded that *Intel* did not expressly resolve whether private arbitrations fall within the scope of §1782. *Id*. The court then acknowledged that while both NBC and Beidermann found that §1782 did not include private foreign arbitral proceedings, there was a string of cases favoring the expansion and inclusion of the statute. *Id*.

Smit's definition of "foreign or international tribunal" included the term "arbitral tribunals," the court refused to apply it to the arbitration at issue, concluding that the Supreme Court in *Intel* "stopped short of declaring that any foreign body exercising adjudicatory power falls within the purview of the statute."[55]

In August of 2010, the U.S. District Court for the District of Columbia issued a memorandum opinion in *In re Caratube International Oil*.[56] This case was distinct from the others denying statutory relief in that Judge John Bates refrained from making any determination as to whether the International Centre for Settlement of Investment Disputes ("ICSID") arbitration constituted a "foreign or international tribunal," and instead cited *Intel*'s holding that even where section 1782's threshold requirements are met, a judge still retains discretion over whether to grant or deny the request.[57] Judge Bates then denied the petition.

IV. Legal Impact of Section 1782

Though there is evident confusion among the circuit courts as to section 1782's application to private foreign tribunals, this author argues that the legislative intent as interpreted by the Supreme Court in *Intel* is decidedly clear in allowing section 1782 to apply to private international arbitration. Though several circuit courts continue to make policy arguments in favor of excluding private international arbitration from the scope of coverage provided within the section, a closer examination of the Supreme Court's reliance on Professor Smit's article, as

[55] *In re Norfolk Southern Corp.*, 626 F. Supp. 2d at 885. Judge Elaine Bucklo interpreted the "*Intel* court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations." *Id*. Moreover, Judge Bucklo argued that, in contrast to state-sponsored arbitral bodies, "private arbitrations are generally considered alternatives to, rather than precursors to, formal litigation." *Id*. at 886.

[56] The arbitration at issue arose out of an oil exploration and production contract between *Caratube* and the Republic of Kazakhstan that Kazakhstan cancelled in 2008, purportedly due to a family dispute. *In re Caratube Int'l Oil Co.*, 730 F. Supp. 2d 101, 102 (D. D. C. 2010). In 2008, Caratube filed a request for arbitration pursuant to the bilateral investment treaty between the United States and Kazakhstan with the International Centre for Settlement of Investment Disputes ("ICSID"). *Id*. at 103. Though the parties agreed to apply specific rules governing discovery and disclosure deadlines for documents, the ICSID tribunal extended the document production deadline by four weeks, prompting Caratube to file a motion for judicial assistance under section 1782. *Id*.

[57] *In re Caratube Int'l Oil Co.,* 730 F. Supp. 2d at 105. Based solely on the notion that the court had ultimate discretion over whether to grant or deny a section 1782 petition, Judge Bates evaded issuing any decision regarding whether ICSID was a "tribunal" for purposes of the statute, and instead went directly to the *Intel* factors. *Id*. at 104-08.

well as an analysis of *Intel*'s factor test, seem to indicate that the legislative history and the public policy concerns can be reconciled. Thus, this author posits that private international arbitration does in fact constitute a "foreign or international" tribunal for purposes of the statute, and its inclusion does not undermine the objectives and policy reasoning behind opting for private arbitration.

A. Expansion Undermines Cost-Effectiveness And Speediness of Arbitration

Opponents of expanding the statute to apply to private foreign arbitration posit that, if expanded, this will significantly increase the costs and duration of international arbitral proceedings and defeat one of the fundamental objectives of international arbitration.[58] Other commentators point out that an expansive interpretation of section 1782 could frustrate parties' expectations regarding arbitration and generate interim orders from courts that the parties did not anticipate when they originally contracted for arbitration.[59] These comments echo the concerns expressed in *NBC* and *Biedermann* that "unrestrained extension of section 1782 to foreign arbitral proceedings could undermine the cost effectiveness and speediness of arbitrations."[60]

However, this author asserts that these arguments fail for several reasons. First, correctly applying the section to private arbitral proceedings would not lead to the "unrestrained extension of section 1782" in that *Intel* expressly stated that the acceptance or rejection of the petition fell squarely within the court's discretion.[61] Thus, there are restraints in place to limit the scope and duration of discovery in private arbitral proceedings, as demonstrated by the restrictions the court imposed on evidence-gathering in *In re Roz Trading*. These restrictions help ensure that the

[58] Beale, Lugar & Schwarz, *supra* note 31, at 91. The authors cite to Claire Morel de Westgaver, who argues that "abuse of [§ 1782] could lead to arbitration becoming more like conventional litigation and losing some of its attraction as a quick, and sometimes, more proportional method of dispute resolution." *Id*. at 92.

[59] *Id.* at 92. The argument is made that a U.S. Court should not substitute its own judgment for that of the parties' arbitral tribunal and the parties may have agreed to the arbitration proceeding precisely because they do not wish to be subjected to interim court orders. *Id.*

[60] *Id.* at 92. The courts were worried that "[e]mpowering arbitrators, or worse, the parties . . . to seek ancillary discovery . . . [would] not benefit the arbitration process." *See* Losk, *supra* note 13, at 1061.

[61] *See Intel*, 542 U.S. at 264.

costs of discovery during arbitration do not increase more than what is necessary to gather evidence and present a party's case. Moreover, the framework of section 1782 could actually provide for a faster and more effective means of obtaining evidence for arbitration than is currently available, in fact promoting the underlying objective of efficiency in arbitration.[62]

B. Expansion Threatens the Equity Between the U.S. Parties and Their Foreign Counterparts

The second concern raised is that, if the statute were extended, U.S. parties to international arbitration agreements might be disadvantaged due to the limited discovery rules provided for in domestic arbitration under the Federal Arbitration Act section 7.[63] Opponents argue that extending the section would allow foreign companies outside the reach of U.S. Courts to "gain a discovery weapon against U.S. opponents that could not in turn be used against the foreign parties."[64] However, *Intel* addressed this potential issue by rejecting the foreign-discoverability rule, as well as the suggestion that an applicant in the foreign proceeding "must show that United States law would allow discovery in domestic litigation analogous to the

[62] Losk, *supra* note 13, at 1062. Indeed, the Second Circuit acknowledged that its decision could result in "some difficulty" for arbitral parties sitting outside of the United States, since the FAA § 7 only applies to arbitral panels sitting within the United States, and not all countries provide for such support. *Id*.; *see also Nat'l Broad. Co.*, 165 F.3d at 191 n.8.

[63] *Id*. at 1063. Section 7 of the FAA states that "arbitrators selected . . . may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C.A. § 7 (West). This statute places the power of discovery in the hands of the arbitrators, rather than the parties; many argue that the use of section 1782 undermines the central feature of international arbitration, namely, that arbitrators control discovery. Fellas, *supra* note 7, at 313. One commenter argues that the general absence of reciprocity places persons who reside or are found in the U.S. at a disadvantage since there is generally not a comparable disclosure obligation in the home country of the applicant. Beale, Lugar & Schwarz, *supra* note 31, at 93.

[64] Beale, Lugar & Schwarz, *supra* note 31, at 93. In the arbitration context, there is one situation in particular where the use of section 1782 might give a foreign party an advantage over its US adversary. *Id*. at 94. When a contract contains a multitiered dispute resolution clause requiring consultation, negotiation, or mediation as a predicate to the commencement of arbitration proceedings. *Id*. Typically, such clauses prohibit the commencement of arbitration proceedings for a period of time during which time the parties' representatives will try to resolve the dispute. *Id*. Once a notice of the dispute has been given, a party may argue that arbitration is within "reasonable contemplation," such that a party could apply to take evidence pursuant to section 1782. *Id*. If a foreign party makes a section 1782 application to take evidence from a US party during the period of negotiation as required under the contract, the effect might be to put extreme pressure on the US party to settle, rather than make its corporate officers available for deposition or turn over evidence. *Id*.

foreign proceeding."[65] Thus, it is axiomatic that the section, if applied, would provide both the US parties and the foreign parties *equal* opportunity for discovery, as FAA section 7 must only apply to *domestic* arbitral proceedings. Though this places a greater restriction on parties' access to discovery documents and testimony in domestic arbitration, the broader approach in section 1782 serves to promote international commerce and uphold international arbitration as the favored method of dispute resolution for foreign parties.[66]

C. Interpreting "Foreign or International Tribunal" According to Professor Smit

While the policy arguments are legitimate concerns, Brandon Hasbrouck argues in his article for the Washington and Lee Law Review that raising the arguments in support of excluding private international arbitration from the effect of the statute is misguided.[67] Instead, Hasbrouck suggests that policy should *only* be considered when the district court is determining whether or not to exercise its discretion in granting or denying a section 1782 petition.[68] This requires that there be a workable definition of "tribunal" before the policy arguments can be heard and the court can exercise its discretion. A good starting point for defining "tribunal" is Professor Smit, who authored the amended provision to the statute.

As a Circuit Court judge, Ginsburg described Professor Smit as the "dominant drafter of, and commentator on, the 1964 revision" to section 1782.[69] As such, it is vital to look to his commentary and guidance on the statue's role and application in today's private international

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[65] *Intel Corp*., 542 U.S. at 263. Furthermore, Professor Smit argues that § 1782 does not apply in providing judicial assistance to purely domestic arbitral tribunals, which would fall under FAA § 7, thereby undermining the argument that the two statutes are irreconcilable. Losk, *supra* note 13, at 1063.

[66] *See* Losk, *supra* note 13, at 1068.

[67] Hasbrouck, *supra* note 10, at 1697. He states that the basic analytical framework for examining the section is as follows: First, the court concludes the legislative history is silent on the issue whether international arbitral bodies constitute a § 1782 tribunal. *Id*. Next, the court looks at the policy rationales underlying international arbitration. *Id*. Finally, the court concludes that § 1782 "was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration." *Id*.

[68] *Id*. at 1697.

[69] *See In Re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989).

arbitration.[70] Smit's most notable, and perhaps most controversial amendment to the statute was replacing the language "judicial proceedings pending in any *court* in a foreign country" to "for use in a foreign or international *tribunal*."[71] Smit's comments regarding this amendment state that "[t]he word 'tribunal' clearly encompass[es] private arbitral tribunals . . . [and] the choice of that term was deliberate so as to depart from the text used in the legislation that was amended . . . [so] that the purpose of section 1782 was to make assistance available on the most liberal terms."[72] Moreover, Smit stated that the provision was intended to promote public policy favoring arbitration, noting that "[d]iscriminating against private international tribunals not only does violence to the plain and clear text of section 1782, it also fails to give consequence to the repeatedly re-affirmed public policy favoring arbitration."[73]

Not only did Justice Ginsburg rely heavily on Professor Smit's commentary in interpreting the statute in *Intel*, but it is also important to note that neither the Second nor Fifth Circuits have fully discredited Smit's scholarship. Indeed, both courts also analyzed the legislative history and Professor Smit's commentary in coming to the opposite conclusion that the section excludes private foreign tribunals, emphasizing the importance of considering the legislative intent behind the statute. This weighs in favor of analyzing the statute as it was intended to be read by the author himself.[74] Furthermore, Smit's proposals were adopted

[70] Hasbrouck, *supra* note 10, at 1686. Indeed, Professor Smit was selected by the International Rules Commission to assist in developing and drafting legislative measures relating to judicial assistance in international litigation. *Id*. Professor Smit served as Reporter to the International Rules Commission, and Ginsburg worked closely with Smit as an associate director of the Project, undertaken by Columbia Law School. *Id*. Within this capacity, Smit drafted several legislative proposals and provided explanatory notes to the various legislative provisions he proposed. *Id*. Congress then wholly adopted these provisions, without change. *Id*.

[71] *See* 28 U.S.C. § 1782(a); *see also* Hasbrouck, *supra* note 10, at 1686.

[72] Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 154 (1997).

[73] *Id*. at 155.

[74] *See* Hasbrouck, *supra* note 10, at 1689. At most, courts argue that Smit does not speak for the legislature; however, the Court's opinion in *Intel* seems to suggest that Smit does not speak *for* the legislature, but rather as the *legislator* himself. *Id*. (emphasis added).

wholesale by Congress, implying that Congress had read and reviewed his proposals and commentary and accepted them in light of the statute's interpretation and application.[75]

Thus, according to Professor Smit, and as promulgated by the holding in *Intel*, the term "foreign or international tribunal" applies to private international arbitration. This is consistent with Congress' intent to create a "robust, inclusive, and expansive section 1782 discovery device" so that the United States "remains at the forefront of nations . . . providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[76] It is important to note, however, that while allowing for broader discovery than its domestic counterpart, section 1782 does not go so far as to include *every* alternative dispute resolution body in its scope and some restrictions are necessary.[77]

D. Addressing Policy Concerns When Balancing the *Intel* Factors

To reign in unbridled discovery, the Court in *Intel* established several factors the court must weigh in its discretion to grant or deny the petition. Once the district court has determined that the basic statutory elements of section 1782 are met, and that the proceeding is considered a "tribunal" under the language of the statute, it must then apply *Intel*'s discretionary guidance test to determine whether or not to grant the petition.[78] Not only is it important for the court to weigh the factors set forth in *Intel*, but it is also important that the court considers and incorporate the policy concerns discussed above.[79] These concerns can be addressed by the court when analyzing the *Intel* factors.

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[75] *Id.* at 1686.

[76] *See* S. Rep. No. 88-1580, at 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783.

[77] Hasbrouck, *supra* note 10, at 1669. (emphasis added). For instance, a mediation body will not constitute a tribunal under § 1782. *Id*. Even if the mediation body is a decision maker in the first instance, mediation is a voluntary, confidential, nonbinding, facilitated negotiation in which the mediator assists the parties in reaching a consensual resolution. *Id*. As such, the mediator has *no authority* to impose an outcome on the parties and only controls the mediation process. *Id*. Thus, a mediation body does not conduct adjudicatory proceedings that lead to a dispositive ruling, and should not be considered a "tribunal" for purposes of the statute. *Id.*

[78] *See supra* Part II, Section (A)(3) and accompanying text.

[79] *See* Hasbrouck, *supra* note 10, at 1701. Examining the *Intel* factors is the appropriate place for district courts to consider the policy rationales underlying international arbitration in that the courts can determine that a party is

For instance, a district court faced with a section 1782 discovery application must consider whether the person from whom discovery is sought is a participant in the foreign proceedings.[80] Because the rules of most leading arbitral institutions generally only permit arbitrators to order discovery from parties to an arbitration, it is more difficult for a nonparty to be compelled to produce necessary evidence.[81] Thus, U.S. courts should generally only grant section 1782 demands to compel the disclosure of evidence from nonparties.[82] This restriction would help to prevent parties for using discovery as a means of compelling settlement from the other party, and reduces the risk that U.S parties to the arbitration would be disadvantaged against their foreign counterparts.[83] At the same time, it would allow arbitrators to obtain necessary evidence that might otherwise be unavailable.[84]

A federal district court must also consider whether the foreign arbitral tribunal would be receptive to judicial assistance from a federal court in the United States.[85] The court should examine the specific receptiveness of the individual tribunal in order to ensure that the statute does not undermine the discovery process.[86] This analysis also allows the arbitrator to act as a sort of "gatekeeper, guard[ing] the limited application of section 1782 in aid of foreign arbitral

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only seeking §1782 discovery to drive up litigation costs, or the discovery request is unduly burdensome or intrusive on the third-party. *Id*.

[80] *Intel*, 542 U.S. at 264. As discussed previously, if the party from whom discovery is requested is a *party* to the foreign proceeding, an order pursuant to § 1782 is less justified than if the party is a nonparticipant. Beale, Lugar & Schwarz, *supra* note 31, at 99.

[81] Beale, Lugar & Schwarz, *supra* note 31, at 99.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Intel Corp.*, 542 U.S. at 264.

[86] Beale, Lugar & Schwarz, *supra* note 31, at 97. *See also* In re Hallmark Capital Corp., 534 F. Supp. 2d 951, 957 (D. Minn. 2007). In In re Hallmark Capital Corp., the judge specifically recognized the foreign arbitrator's explicit receptivity to judicial assistance. *Id*. Because the arbitrator expressly accepted the petition, and because the other *Intel* factors weighed in favor of granting the motion, the district court granted the application. *Id*.

proceedings in various ways,"[87] including making the relief conditional upon the arbitral tribunal's approval.[88]

Intel also requires the district court to consider the "nature of the foreign tribunal" and "the character of the proceedings underway abroad."[89] As such, a court considering a section 1782 petition, particularly one in which the proceeding is governed by rules vesting the discovery authority in the hands of the arbitrators, should be hesitant to grant the discovery request if it is made by a party but more inclined to grant the petition if made by the arbitrators themselves.[90] Additionally, the court should consider the current forum of the arbitral proceedings, and what effect, if any, the petition would have on that forum.[91]

Finally, a court must consider whether the requested disclosure is "unduly intrusive or burdensome."[92] The court should be wary to avoid a party's attempt at a "fishing expedition" for information it could not otherwise obtain, and should narrowly tailor any discovery order to ensure that it serves a specific evidentiary purpose in the least burdensome manner possible.[93] Furthermore, the court should take into consideration the parties' freedom to contract and account for those contractual provisions in the discovery process.[94]

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[87] *Id.* at 99.

[88] *Id.* at 99.

[89] *Intel Corp*., 542 U.S. at 264; *see also* Beale, Lugar & Schwarz, *supra* note 31, at 100.

[90] Beale, Lugar & Schwarz, *supra* note 31, at 101.

[91] *Id.* For instance, it should not grant a §1782 application if the purpose was to frustrate the negotiation process in a contract's multitiered dispute resolution clause if evidence-gathering occurred. *Id*.

[92] *Intel Corp*., 542 U.S. at 265.

[93] Beale, Lugar & Schwarz, *supra* note 31, at 101. If courts scrupulously follow this guidance, concerns about extending the section to foreign arbitral proceedings opening the door for "fishing expeditions" should also be alleviated. *Id*.

[94] Losk, *supra* note 13, at 1069. Moreover, Beale, Lugar & Schwarz posit that parties to an arbitration agreement can actually limit the scope of discovery within their contractual agreements in three ways: First, the parties might include express language in their arbitration agreement that can limit the type of discovery obtained during arbitration. Beale, Lugar & Schwarz, *supra* note 31, at 104. If they do this, the court must abide by the contractual provisions and cannot grant a discovery request pursuant to § 1782. *Id*. Second, the parties may state that a particular institution shall govern their arbitration; if the parties do not opt out of the relevant institutional rules, the parties will bind themselves to only those means of discovery provided for by the specific institutional rules. *Id*. Lastly, the parties can amend their arbitration agreement to prohibit requests for discovery pursuant to § 1782, allowing the arbitral tribunal to maintain sole discretion over the order of disclosure. *Id*. at 105.

V. Conclusion

Although the Supreme Court's decision in *Intel* generated much confusion throughout the circuit courts attempting to apply it or reject it in private international arbitration agreements, it is evident that the Court interpreted the Legislature as providing a powerful and expansive means of discovery for international arbitration. Looking to the plain language of the statute, as well as the commentary of its primary drafter Professor Smit, the statute's clear purpose was to encourage international arbitration as well as set the standard for foreign parties to arbitration. Because of such an expansive reading of the statute, it is axiomatic that private international arbitral tribunals must be included within the definition of "foreign or international tribunal," in that both public and private international arbitration should be encouraged.

As the circuit courts begin to apply this language to the cases at hand, it will become apparent that reading the statute in this way does not open the discovery "floodgates" to every kind of quasi-judicial proceeding ever created; rather, the statute is just expansive enough to serve its objective of including those foreign tribunals that will promote international arbitration in both the public and private realm. Moreover, once it has been determined that the private foreign arbitration is indeed a "tribunal" for purposes of the statute, the courts are left to their discretion in granting or denying the discovery petition. This allows the courts to weigh the policy concerns that may arise from allowing for broader discovery than the U.S. counterpart to the section, and protects either party from entering into a private international arbitration agreement at its disadvantage.