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## There Should be an Answer to § 1782(a) – *as to whether its scope includes private arbitral tribunals*

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*USC § 1782 donne à « un tribunal étranger ou international » la faculté d'obtenir d'une cour de district fédérale (E-U) une injonction obligeant une partie non-coopérative à divulguer des preuves. La question de savoir si cette disposition s'étend aux tribunaux d'arbitrage privé est devenue source de controverse, avec l'utilisation par les deux côtés du sens ordinaire du terme, de l'histoire législative de § 1782, et des principes de l'arbitrage international pour arriver à des conclusions opposées. Les cours fédérales sont elles aussi arrivées à des conclusions différentes sur ce sujet depuis 2004. Bien que l'auteur estime que § 1782 n'inclut pas les tribunaux d'arbitrage privé, cet article met en lumière la nécessité d'apporter une réponse claire à cette question au vu des preuves ambiguës et propose des pistes pour régler cette querelle de façon définitive.*

*USC § 1782 grants standing to “a foreign or international tribunal” to obtain an order from a US federal district court compelling the production of evidence from uncooperative parties. Whether this provision extends to private arbitral tribunals has been the subject of controversy, with both sides of the argument pointing to the plain meaning of the term, the legislative history of § 1782, and principles of international arbitration in order to reach opposite conclusions. Federal courts, too, have reached different conclusions on the issue since 2004. While it is the author's opinion that private arbitral tribunals are likely not within the scope of § 1782, this article highlights the need for a clear answer to the question in the face of ambiguous evidence, and provides avenues to finally settle the issue.*

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## I. INTRODUCTION

Evidence needed in international arbitration may frequently be located in countries different from the country where the arbitration is taking place. In such situations, the party seeking the evidence must either do without it or attempt to obtain it through the assistance of judicial authorities of the country in which the evidence is located.<sup>1</sup>

This is where 28 USC § 1782 (§ 1782) may be useful. The pertinent part of § 1782(a) reads:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court ...<sup>2</sup>

§ 1782(a) applies only when the possessor of evidence, whether a party or non-party, is uncooperative. If such a person is in the United States and refuses to provide evidence for use in a foreign or international tribunal, a party may have standing to obtain an order from a US federal district court compelling cooperation. A “foreign or international tribunal” or an “interested person” are the only parties with standing to request such an order.<sup>3</sup>

The issue of § 1782(a) in international commercial arbitration is whether a private arbitral tribunal or the parties to such an arbitration have standing to make a § 1782(a) request. There are compelling arguments for and those against including private arbitral tribunals within the scope of § 1782(a). Neither set of arguments, however, is conclusive, because the evidence for or against including private arbitral tribunals within § 1782(a) is far too conflicting or ambiguous.<sup>4</sup>

For example, both sides use the plain meaning of the term “tribunal” to reach opposite conclusions;<sup>5</sup> both sides use legislative history to reach opposite conclusions;<sup>6</sup> both sides use the

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1 Lawrence W Newman & Rafael Castilla, “Production of Evidence through U.S Courts for Use in International Arbitration” (1992) 9:2 J Intl Arb 61 at 61.

2 USC § 1782 (1996) [emphasis added].

3 Morris H Deutsch, “Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C 1782, for Use in a Foreign or International Tribunal” (1982) 5:1 Boston College Intl & Comp L Rev 175 at 178.

4 This includes myself, even though part of this paper submits that the evidence does point in the direction of a narrow interpretation of “foreign or international tribunal” and § 1782 should not be applied to international commercial arbitrations. However, I cannot be certain because there is not enough conclusive or definitive evidence.

5 See e.g. Hans Smit, “American Assistance to Litigation in Foreign and International Tribunals: § 1782 of Title 28 of the U.S.C. Revisited” (1998) 25:1 Syracuse J Intl L & Com 1 at 2 [Smit, “American Assistance to Tribunals”]; Okezie Chukwumerije, “International Judicial Assistance: Revitalizing Section 1782” (2005) 37:3 Geo Wash Intl L Rev 649 at 676—677; C.f. David W Rivkin & Barton Legum, “Attempts to Use Section 1782 to Obtain US Discovery in Aid of Foreign Arbitrations” (1998) 14:2 Arb Intl 213 at 222—223.

6 See e.g. Jenna M Godfrey, “Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. §

United States Congress' ("Congress") intent to reach opposite conclusions;<sup>7</sup> and both sides use the same international arbitration principles to, yes, reach opposite conclusions.<sup>8</sup>

Although the evidence is far too conflicting, after considering the arguments, the legislative history, Congressional intent, the fundamental cases, and the historical context in which § 1782 was enacted, it is this author's opinion that Congress did not intend for § 1782 to extend to private arbitral tribunals. In addition, the only time that the Supreme Court of the United States (the "Supreme Court") addressed § 1782, it did not provide sufficient direction on the issue of whether private arbitral tribunals are within the scope of § 1782(a).

Before 2004, the issue of whether § 1782(a) included private arbitral tribunals had not been discussed extensively.<sup>9</sup> The only two circuits that had considered the issue – the Second and Fifth Circuits – held that private arbitral tribunals did not fall within the definition of "foreign or international tribunal."<sup>10</sup> However, in 2004 the Supreme Court considered § 1782 for the first time in *Intel Corp v Advanced Micro Devices, Inc* "*Intel*".<sup>11</sup> In settling many important issues under § 1782(a), the Court nevertheless did not consider whether private arbitral tribunals were within the scope of "foreign or international tribunal."<sup>12</sup>

The Supreme Court did, however, in *dicta*, briefly refer to a definition of "tribunal" from a footnote in an article by Professor Hans Smit,<sup>13</sup> who has been called by many as the "dominant drafter" of § 1782.<sup>14</sup> Professor Smit later affirmed that his definition includes private arbitral

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1782(a)'s Application in Private International Arbitration Proceedings" (2010) 60:2 Am U L Rev 475 at 499—508 (going through the legislative history to reach the conclusion that Congress did not intend tribunal to include private arbitral bodies); but see *In Re Hallmark Capital Corp*, 534 F Supp (2d) 951 at 955 (Minn 2007) [*Hallmark Capital Corp*].

7 See e.g. Rivkin & Legum, *supra* note 5 at 214; but see Brandon Hasbrouck, "If it Looks Like a Duck...: Private International Arbitral Bodies Are Adjudicatory Tribunals Under 28 U.S.C. § 1782(a)" (2010) 67:4 Wash & Lee L Rev 1659 at 1686; Hans Smit, "International Litigation Under The United States Code" 65:6 (1965) 65 Colum L Rev 1015 at 1026, n 71 [Smit, "Intl Litigation Under US Code"].

8 See e.g. Wilhelmina A de Harder, "US Supreme Court Rules that Courts May Grant US-Style Discovery to Private Party in Antitrust Investigation" (2004) 32 Intl Bus Lawyer 257 at 258; but see Chukwumerije, *supra* note 5 at 678.

9 John Fellas, "Obtaining Evidence Abroad for Use in International Litigation: Evidence Located in the United States" (2001) 29:7 Intl Bus Lawyer 297 at 299; see also 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" (2011) 47:1 Stan J Intl L 51 at 60.

10 *National Broadcasting Company Inc NBC v Bear Stearns Co Inc SBC TV*, 165 F (3d) 184 at 185 (2nd Cir 1999) [*National Broadcasting*]; *Republic of Kazakhstan v Biedermann International*, 168 F (3d) 880 at 883 (5th Cir 1999) [*Biedermann International*].

11 See generally *Intel Corp v Advance Micro Devices Inc*, 542 US 241 (2004) [*Intel*].

12 *Ibid* at 253; *In Re Application of Babcock Borsig AG*, 583 F Supp (2d) 233 at 238 (Mass 2008) [*Babcock Borsig*] ("The Court in *Intel* did not directly address whether private arbitral bodies like the ICC qualify as 'tribunals' under § 1782(a)").

13 *Intel*, *supra* note 11 at 258, citing Smit, "Intl Litigation Under the US Code", *supra* note 7 at 1026, n 71 ("The term 'tribunal' ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial proceedings abroad").

14 See *In re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F (2d) 686 at 689 (DC Cir 1989) (Justice Ginsburg described Hans Smit as the "dominant drafter of, and commentator on, the 1964 revision").

tribunals.<sup>15</sup> Thus, it is argued that a correct understanding of the proper scope of § 1782 should reflect Professor Smit's interpretation of "foreign or international tribunal."<sup>16</sup> However, others view it differently, submitting that Professor Smit is neither the Supreme Court nor Congress.<sup>17</sup>

After *Intel*, practitioners soon began to use its *dicta* as ammunition, arguing that private arbitral tribunals were included within the scope of § 1782(a).<sup>18</sup> Addressing the issue, federal courts have reached three different conclusions.<sup>19</sup>

A settled decision is now more important than ever.<sup>20</sup> This debate has been going on for at least ten years,<sup>21</sup> but it could be traced back over fifty years.<sup>22</sup> The scope of the term tribunal under § 1782(a) should be resolved.<sup>23</sup>

The Supreme Court or Congress should alleviate the confusion and provide more certainty as to whether parties or non-parties to an international commercial arbitration could be subject to both US-style discovery and US court proceedings, when such an arbitration is not seated in the US.

If both the Supreme Court and Congress truly consider that international arbitration is a sound alternative to international litigation and if both endorse it as a benefit to international business, then at least one of them should address the issue of whether private international arbitral tribunals fall within the scope of § 1782.<sup>24</sup>

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15 Smit, "Intl Litigation Under US Code", *supra* note 7 at 1026 ("The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and *arbitral tribunals* (emphasis added), and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts").

16 Hasbrouck, *supra* note 7 at 1687.

17 *La Comision Ejecutiva Hidroelectric Del Rio Lempa v El Paso Corp*, 617 F Supp (2d) 481 at 486 (SD Tex 2008) [*La Comision*].

18 Kenneth R Adamo, Robert L Canala and Susan M Gerber, "Section 1782 – A Powerful Tool for Obtaining Discovery to Assist Foreign Litigation" (2005) 33:4 AIPLA QJ 337 at 338.

19 Brian A White, "Will the Eleventh Circuit Become a Magnet for Applications for Discovery in Aid of International Arbitrations Pursuant to 28 U.S.C. § 1782?" *Kluwer Arbitration Blog* (5 July 2012), online: <kluwerarbitrationblog.com/2012/07/05/will-the-eleventh-circuit-become-a-magnet-for-applications-for-discovery-in-aid-of-international-arbitrations-pursuant-to-28-u-s-c-%c2%a7-1782/>.

20 Roger Alford, "When is an Arbitral Panel an International Tribunal?" *Kluwer Arbitration Blog* (9 May 2012), online: <kluwerarbitrationblog.com/2012/05/09/when-is-an-arbitral-panel-an-international-tribunal/>; see also Thurston K Cromwell, "The Role of Federal Courts in Assisting International Arbitration: National Broadcasting Co v Bear Stearns & Co" [2000] 1 J Disp Res 177 ("[a]s a result of international arbitration's recent popularity, United States federal courts are now deciding cases that will define how the American legal system treats international arbitration vis-à-vis other international bodies" at 177).

21 Lawrence W Newman & David Zaslow, "Muddy Waters in the Land of 1782", *New York Law Journal* (31 January 2014) at 3.

22 Amy Moore, "Expanding the Power of U.S. Courts in Private International Arbitration - Moderation Loses to an Extreme" (2008) 2008:1 J Disp Res 321 ("[s]ince its inception, 28 U.S.C. § 1782 has been the subject of ... much debate" at 321).

23 Beale, Lugar, & Schwarz, *supra* note 9 at 95.

24 James H Carter & Suman Chakraborty, "United States" in James H Carter, ed, *The International Arbitration Review*, 2nd ed (London: Law Business Research Ltd, 2011) 485 at 487 ("[t]he FAA's largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous

Providing an answer allows counsel to more properly instruct their clients on whether the US judicial system can be used to gather important evidence for use in an international arbitration not seated in the US.<sup>25</sup> This benefits both the claimant and the respondent, as not knowing the answer may increase the time and costs of the arbitration, since otherwise there may be extensive litigation over whether the specific US federal district court has jurisdiction over the party or non-party.

In resolving the issue, one route would be through the Supreme Court. This route, however, is the least likely to resolve the issue relatively soon. The issue has not been decided by a circuit court of appeal post-*Intel*, and as such, there has not been a split in decisions of the circuit courts. It is unlikely that the Supreme Court would consider the issue without a significant circuit split. This could take years to manifest.

The alternative route is Congress. In addressing the issue, it is submitted that Congress should consider how the world views US-style discovery and whether it is compatible with the international arbitration principles of cost, efficiency, and equality.<sup>26</sup>

Congress should create another working group as it did when it drafted § 1782.<sup>27</sup> The working group should focus its efforts on how “tribunal” should be defined from an international perspective and on the US’s courts’ level of involvement in international arbitration.<sup>28</sup> A narrow definition of tribunal would promote the principles of international arbitration; opening the

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and inefficient courts”); see also *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985) [*Mitsubishi Motors*].

25 Charles McClellan, “America, Land of (Extraterritorial) Discovery: Section 1782 Discovery for Foreign Litigants” (2008) 17 *Transnat’l L & Contemp Probs* 809 at 814 (“[s]ection 1782 is a powerful tool for foreign litigants because discovery is much broader in the United States than in most other legal systems”).

26 See Lucy Reed & Ginger Hancock, “US-Style Discovery: Good or Evil?” in Teresa Giovannini & Alexis Mourre, eds, *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Paris: ICC Publishing, 2009) 339 at 340 (“full scale US-style discovery, which is tailored specifically to the US system, is not suitable for imposing on other regimes”); see also David Epstein, “Obtaining Evidence in the United States for use in foreign courts” [2001] 3 *Bus L Int’l* 260 at 269 (“[i]n the United States, discovery is more extensive in that depositions are permitted in addition to document discovery and interrogatories and non-parties to an action can be compelled to produce documents and give depositions”); Fellas, *supra* note 9 at 300 (“depositions are a common feature of discovery in the United States, but rare in other jurisdictions”).

27 The US Congress agreed in 1958 that such a project would need more than one person, one private body, or even one law school institute. It would need, rather, a group initiative of the bar and the government. See e.g., Peter Metis, “International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Implicit Discoverability Requirement?” (1994) 18:1 *Fordham Intl LJ* 332 at 345, n 60 (“[t]he study [looking into § 1782] is of such magnitude that it cannot readily be handled by some private body or law school institute. It should be an integrated study with participation by representatives of the bar and the government”), citing S Rep No 2392, 85th Cong 2d Sess (1958), reprinted in 1958 USCCAN 5201.

28 See Bernardo M Cremades & David JA Cairns, “The Brave New World of Global Arbitration” (2002) 3 *J World Investment* 173 at 188 (“[i]nternational arbitration will ultimately lose its appeal to international business, particularly non-American business, if it comes to resemble too closely United States-style litigation, and so it is imperative that the international community continue to work on means to maintain the historic advantage of flexibility”); see also Todd Weiler, Heather Bray & Devin Bray, “Are United States Courts Receptive to International Arbitration?” (2012) 27:4 *Am U Int’l L Rev* 869 at 870 (“[w]e contend that U.S. district courts would be better off refraining from rendering discovery assistance to arbitral tribunals unless they have first received the arbitral tribunal’s blessing”).

Federal Rules of Civil Procedure to an international arbitration not only does not promote the principles of international arbitration, but it also diminishes its benefits.<sup>29</sup>

However, if the working group thinks differently, the standing to bring a request should be limited to only the arbitral tribunal.<sup>30</sup> Such a limit maintains the international arbitration principle that the arbitral tribunal, and not the parties, ultimately controls the document production process.<sup>31</sup>

Based on the foregoing, this paper is divided into four sections.

1. A discussion of the history leading to § 1782's enactment, including the legislative history in its current form.

2. The history leading to its enactment and the legislative history do not, however, provide sufficient guidance as to whether private arbitral tribunals are included within the scope of § 1782(a).

3. The fundamental cases addressing the scope of the term tribunal under § 1782(a) in an international arbitration context.

4. Why the issue of § 1782(a)'s scope of the term tribunal has reached a point where it should be resolved by either the Supreme Court or Congress.

5. Lastly, it is submitted that if the Supreme Court does not address this issue, then Congress should do so. Congress should create a working group, as it did in the 1960s; this time however in consideration of (i) how the world views US-style discovery and (ii) whether US-style discovery has a role to play in international arbitration. In this light, it is further submitted that US-style discovery does not accord with the principles of international arbitration and, therefore, a narrow definition of tribunal should be enacted to preclude private arbitral tribunals from the scope of § 1782(a). However, if the working group or Congress think differently, then it is further submitted that standing to bring a § 1782 request should be limited to the arbitral tribunal, itself. This promotes the international arbitration principle that the arbitral tribunal and not the parties ultimately control the document production process.

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<sup>29</sup> *Bear Stearns Co Inc*, *supra* note 10 at 190—191.

<sup>30</sup> Many commentators have argued that a court, faced with a § 1782 request, should determine or receive the approval of the arbitral tribunal first before granting the request. See e.g. Beale, Lugar & Schwarz, *supra* note 9 at 100 (“The rules of many leading arbitral institutions . . . provide that the arbitrators shall control discovery. Likewise, the IBA Rules [On the Taking of Evidence] provide that the arbitral tribunal shall direct requests for discovery”). Given this proposition, it would be counter-productive for a court to wait for the arbitral tribunal to grant its approval. Rather, the arbitral tribunal should make the request itself, thereby implicitly granting its approval and, in turn, allowing a court to know that the arbitral tribunal approves of the request.

<sup>31</sup> See e.g. John Fellas, “Using Section 1782 in International Arbitration” (2007) 23:3 *Arb Intl* 379 at 401 [Fellas, “Using Section 1782”] (“there is a further and more important reason why the use of section 1782 in international arbitration is problematic: the use of section 1782 undermines a *central feature* of international arbitration, namely, *that arbitrators control discovery*”) (emphasis added); Newman & Castilla, *supra* note 1 at 68.

## II. HISTORY OF § 1782

### A. Pre- § 1782

The history of § 1782's began in the mid-1800s. Prior to 1855, federal district courts had no explicit authority "to compel an unwilling witness to give testimony or produce documents in response to a letter rogatory."<sup>32</sup> In 1855, however, a statute was enacted (the "1855 Act") with the "purpose of facilitating discovery in the United States for use in a foreign forum."<sup>33</sup> The statute authorized the execution of letters rogatory "from any court of a foreign country to any circuit court of the United States ... to make the examination of witnesses."<sup>34</sup>

The statute was enacted due to an incident with the French government, in which it had sent "a letters rogatory to the Department of State from a French court requesting witness testimony in connection with a preliminary criminal proceeding in France."<sup>35</sup> The request was denied because no statute authorized a federal court to grant such a request.<sup>36</sup> It is noteworthy, given the controversy that now exists regarding the scope of § 1782, that this initial request which prompted its precursor's enactment "was issued by a French *juge d'instruction*."<sup>37</sup>

In response, Congress passed the 1855 Act.<sup>38</sup> The 1855 Act granted the US federal courts with "broad authority to compel the testimony of witnesses to assist non-US Courts."<sup>39</sup> The statute's importance did not last long, however, because it was improperly indexed and was soon rendered obsolete.<sup>40</sup>

In particular, the 1855 Act was replaced by a new act of Congress (the "1863 Act"),<sup>41</sup> which governed "foreign requests for judicial assistance."<sup>42</sup>

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32 Metis, *supra* note 27 at 341.

33 Brian Eric Bomstein & Julie M Levitt, "Much Ado About 1782: A Look at the Recent Problems with Discovery in the United States for Use in Foreign Litigation under 28 U.S.C. 1782" (1989) 20:2 U Miami Inter-Am L Rev 429 at 430.

34 Amy Jeanne Conway, "In Re Request for Judicial Assistance From the Federative Republic of Brazil: A Blow to International Judicial Assistance" (1992) 41:2 Cath U L Rev 545 at 553, n 52, citing Act of March 2, 1855, ch 140, § 2, 10 Stat 630.

35 *Ibid* at 552, citing Harry L Jones, "International Judicial Assistance: Procedural Chaos and a Program for Reform" (1953) 62 Yale LJ 515 at 541.

36 Metis, *supra* note 27 at 342.

37 Conway, *supra* note 34 at 558, n 87; Deutsch, *supra* note 3 at 182—183 ("A *juge d'instruction* "is a legal practitioner with a status that is judicial in nature. This official, unique to the civil law system conducts criminal investigations. Once the *juge d'instruction* enters the case, he conducts the entire investigation, although he may delegate some investigating work to the police. The *juge d'instruction* questions the accused and decides whether to submit the case to the appropriate court for trial").

38 Conway, *supra* note 34 at 553.

39 Metis, *supra* note 27 at 342.

40 Conway, *supra* note 34 at 553.

41 Metis, *supra* note 31 at 343 (The 1863 Act stated in part, "Be it enacted ... that the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit").

42 Conway, *supra* note 34 at 553.

The 1863 Act, however, placed many conditions on federal judicial assistance<sup>43</sup> and was more restrictive than the 1855 Act,<sup>44</sup> as it “substantially curtailed the ability of American courts to provide assistance of any kind to a foreign court requesting it.”<sup>45</sup>

## B. The Enactment of § 1782 and the Birth of Confusion

The next important change to foreign requests for federal judicial assistance (and the possible birth of confusion)<sup>46</sup> came in 1948, when § 1782 was first enacted.

Facing the “tremendous growth of international commerce” and the increase in international litigation after World War II, Congress grasped the US’s “critical deficiencies” in international judicial assistance.<sup>47</sup> Congress responded by enacting § 1782.<sup>48</sup> In doing so, Congress eliminated the requirement that a foreign government be a litigant in the foreign action.<sup>49</sup> In addition, the statute’s scope broadly included “all civil actions pending in any court of the foreign country.”<sup>50</sup> The statute did not, however, include the term tribunal and was limited to court actions.<sup>51</sup> Congress further expanded § 1782 in 1949 by including criminal actions, while also simplifying the evidentiary procedures.<sup>52</sup> In doing so, Congress replaced the requirement that it be a “civil action” and used the term “any judicial proceeding pending in any court in a foreign country.”<sup>53</sup>

In spite of this expansion of the scope of § 1782, many international commentators believed that the statute was not broad enough.<sup>54</sup> Even though no reported case had interpreted the 1948 or 1949 versions of § 1782, there were still a number of deficiencies.<sup>55</sup> In particular, the term “any judicial proceeding” “excluded requests in cases not formally initiated, and requests from quasi-judicial and investigatory bodies and international tribunals.”<sup>56</sup>

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43 *Ibid* at 553—554.

44 *Ibid*.

45 *Ibid* at 553.

46 Moore, *supra* note 22 at 321 (“[s]ince its inception, 28 U.S.C. § 1782 has been the subject of revisions, amendments, and much debate”).

47 Conway, *supra* note 34 at 554.

48 Metis, *supra* note 27 at 344—345 (“[i]n an attempt to enable federal courts to meet the increasing demand for discovery requests from abroad, the U.S. Congress passed 28 U.S.C. § 1782 in 1948” at 344).

49 Bomstein & Levitt, *supra* note 33 at 430.

50 Conway, *supra* note 34 at 554—555.

51 Metis, *supra* note 27 at 345 (Act of 25 June 1948, ch 646, § 1782, 62 Stat 949 (1948) provides that “[t]he deposition of any witness within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person ... designated by the district court of any (emphasis added) district where the witness resides or may be found”).

52 *Ibid*.

53 *Ibid* at 343 (citing Pub L No 72, 63 Stat 89 at 103 (1949)).

54 See e.g. Conway, *supra* note 34 at 555, n 69, citing Harry L Jones, “International Judicial Assistance: Procedural Chaos and a Program for Reform” (1953) 62 Yale LJ 515 at 516.

55 “Judicial Assistance for the Foreign ‘Tribunal’”, Comment, (1968) 1968:5 Duke LJ 981 at 983 [“Judicial Assistance”].

56 *Ibid* at 983—984.

### C. The Current Version of § 1782

Facing increased pressure from international law commentators, Congress created the Commission on International Rules of Judicial Procedure (the “Commission”) in 1958 and instructed it to “investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.”<sup>57</sup> The Commission’s “objective was to make assistance ‘more readily ascertainable, efficient, economical, and expeditious, and [to improve] the procedures of [the] State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies.’”<sup>58</sup>

In 1960, the Commission requested the Project on International Procedure of the Columbia University School of Law (the “Project”) to help with this task.<sup>59</sup> Professor Smit directed the Project.<sup>60</sup> Interestingly, Ruth Bader Ginsburg was an associate director to Professor Smit on the Project; Justice Ginsburg wrote the *Intel* decision.<sup>61</sup>

In 1964, Congress enacted the Commission’s proposed amendments to § 1782 without any revisions.<sup>62</sup> The amendments were intended to:

provide a liberal and efficient means of assistance to international litigation in [US] federal courts [and] ... to encourage, by example, other nations to provide similar means of assistance to [US] courts.<sup>63</sup>

The most important revision was to replace “court” with “tribunal.” The Commission selected the term “tribunal” “to expand the nature and number of governmental bodies eligible for aid under § 1782.”<sup>64</sup> The committee report stated:

The word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts ... In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity of obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.<sup>65</sup>

One of the major issues in interpreting “foreign or international tribunal” today is that the legislative history does not go much further in explaining which “foreign or administrative

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<sup>57</sup> Smit, “Intl Litigation Under US Code”, *supra* note 7 at 1015, citing Act of 2 September 1958, § 5, 72 Stat 1744.

<sup>58</sup> Conway, *supra* note 34 at 556 n 72, citing Pub L No 85-906, 72 Stat 1743 (1958).

<sup>59</sup> Smit, “Intl Litigation Under US Code”, *supra* note 7 at 1015.

<sup>60</sup> Smit, “American Assistance to Tribunals”, *supra* note 5 at 2.

<sup>61</sup> Hasbrouck, *supra* note 7 at 1687.

<sup>62</sup> Godfrey, *supra* note 6 at 482, citing Sarah E Valentine, “Ruth Bader Ginsburg: An Associated Bibliography” (2004) 7 NY City L Rev 391 at 397.

<sup>63</sup> Metis, *supra* note 27 at 347.

<sup>64</sup> “Judicial Assistance”, *supra* note 55 at 984—985.

<sup>65</sup> *Ibid* at 985 (quoting Fourth Annual Report of the Commission on International Rules of Judicial Procedure, HR Doc No 88, 88th Cong, 1st Sess (1963) at 45; S Rep No 1580, 88th Cong, 2d Sess (1964) at 7—8; HR Rep No 1052, 88th Cong, 1st Sess (1963) at 9).

tribunal or quasi-judicial agenc[ies]” would be included in the definition of tribunal, except for one type, the French *juge d’instruction*. Congress stated that “it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.”<sup>66</sup> This was because Congress determined that many § 1782 requests came from investigating magistrates.<sup>67</sup> The reference to investigating magistrates was directed specifically to the *juge d’instruction*.<sup>68</sup> In addition to providing assistance to investigating magistrates or *juges d’instruction*, “Congress extended § 1782 judicial assistance to foreign ‘administrative tribunals’ and other ‘quasi-judicial’ bodies.”<sup>69</sup>

In passing the bill into law, Congress further elaborated upon its intent, stating that

until recently, the United States has not engaged itself fully in efforts to improve practices of international co-operation in litigation. The steadily growing development of the United States in international intercourse and the resulting increase in litigation with international aspects, have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects. . . . The Commission hopes that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.<sup>70</sup>

Since 1964, § 1782 has been revised only once. The revision broadened discovery grants to “criminal investigations conducted before formal accusation[s].”<sup>71</sup>

In the 1960s, the twin aims of Congress<sup>72</sup> were “to make assistance ‘more readily ascertainable, efficient, economical, and expeditious, and . . . [to improve] the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies.’”<sup>73</sup>

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<sup>66</sup> Bomstein & Levitt, *supra* note 33 at 440, citing 1964 United States Code Congressional & Administrative News at 3788.

<sup>67</sup> *Ibid.*

<sup>68</sup> Bomstein & Levitt, *supra* note 33 at 441; see also Deutsch, *supra* note 3 at 182; see also Conway, *supra* note 34 at 558 n 87.

<sup>69</sup> Deutsch, *supra* note 3 at 183.

<sup>70</sup> Newman & Castilla, *supra* note 1 at 63, citing US, S Rep No 1580, 88th Cong, 2d Sess, reprinted in [1964] USCCAN 3782 at 2793—2794.

<sup>71</sup> Anand Suryakant Patel, “International Judicial Assistance: An Analysis of Intel v. AMD And Its Affect on § 1782 Discovery Assistance” (2006) 18 Fla J Int’l L 301 at 309, citing 28 USC § 1782(a) (effective 10 Feb. 1996).

<sup>72</sup> Deborah C Sun, “Intel Corp. v. Advanced Micro Devices, Inc.: Putting “Foreign” Back into the Foreign Discovery Statute” (2005) 39:1 UC Davis L Rev 279 at 280 (“These two goals are commonly referred to as Congress’s twin aims”).

<sup>73</sup> Conway, *supra* note 34 at 556, n 72, citing Pub L No 85-906, 72 Stat 1743 (1958).

Unfortunately, the twin aims of Congress and the working group's considerations may not have provided sufficient weight as to how the world would consider the imposition of the US's broad document disclosure procedures. In fact, not one country has followed the US in establishing a broad judicial assistance statute since § 1782 was enacted.<sup>74</sup>

### III. THE LEGISLATIVE HISTORY OF § 1782 DOES NOT LEAD TO A DEFINITIVE ANSWER

Since its enactment, § 1782 has been the subject of debate.<sup>75</sup> The fact that Congress did not elaborate on the definition of an "international tribunal" has made its meaning difficult to ascertain.<sup>76</sup> It is in large part due to Congress' ambiguous intent.<sup>77</sup> First, the Commission's proposals passed Congress without debate and, thus, Congress never questioned or addressed the scope of tribunal. In fact, the Commission's proposal was enacted "verbatim by Congress."<sup>78</sup> Consequently, Congress' lack of discussion may have led to conflicting interpretations as to the interpretation of § 1782(a)'s scope.<sup>79</sup>

Nevertheless, in 1965, Professor Smit wrote an article where he elaborated on the term tribunal, stating:

The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.<sup>80</sup>

Later, in 1998, and partly due to the debate on the scope of the term tribunal,<sup>81</sup> Professor Smit wrote:

All too frequently, the development of considerable case law bears testimony to deficiencies in statutory text. But, as I hope to demonstrate, that is not the case here. The statutory text is straightforward and clear. The case law it has spawned has been caused by judicial unwillingness to give it the meaning that an unbiased reading requires.<sup>82</sup>

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74 Marat A Massen, "Discovery for Foreign Proceedings After *Intel v. Advanced Micro Devices*: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence" (2010) 83 S Cal L Rev 875 at 883.

75 Moore, *supra* note 22 at 321.

76 See also Alford, *supra* note 20.

77 Deutsch, *supra* note 3 at 182.

78 "Judicial Assistance", *supra* note 55 at 984.

79 Metis, *supra* note 27 at 350; See also Gilbert Fouché & Elliot E Polebaum, "Discovery in the US in Aid of Foreign Litigation Under Section 1782" (1996) 24 Intl Bus Lawyer 415 at 416.

80 Smit, "Intl Litigation Under US Code", *supra* note 7 at 1026, n 71 [emphasis added].

81 Arthur W Rovine, "Section 1782 and International Arbitral Tribunals: Some Key Considerations in Key Cases" (2012) 23 Am Rev Intl Arb 461 at 462 ("[Smit]" has said publicly that if anyone wanted to know the legislative history and underlying intent of § 1782 they had to come to him because he wrote § 1782, and it was his intention that the statute apply to foreign and international arbitration tribunals").

82 Smit, "American Assistance to Tribunals", *supra* note 5 at 1—2.

Considering his influence, Professor Smit stated that “[t]he substitution of the word ‘tribunal’ for ‘court’ was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.”<sup>83</sup> He further submitted that “Section 1782 does apply to international arbitral tribunals created by private agreement.”<sup>84</sup> Moreover, in line with Professor Smit, commentators have stated that the 1964 amendment “aimed at broadening the assistance to foreign tribunals with no intention of constricting it.”<sup>85</sup>

However, other commentators have not followed Professor Smit’s interpretation, choosing instead to rely upon the legislative history itself, including why the term “foreign or international tribunal” was used instead of the term “foreign or international *arbitral* tribunal.”

Against this backdrop, it has been argued that

for legislative history to be useful for statutory interpretation it must be examined from the time of the statute’s enactment to be relevant in deciphering the meaning of the statute. Although at present private international arbitration is a widely accepted method of dispute resolution, historically it was regarded with great suspicion by the courts and the federal government.<sup>86</sup>

At the time of § 1782’s amendment, the Congressional record does not reveal an intent to extend § 1782(a) to private arbitral tribunals. The expressed intent was to expand assistance beyond conventional courts.<sup>87</sup> The term “tribunal” was intended to accomplish this goal. In elaborating upon Congress’ intent, the Congressional record references only “investigating magistrates”, “administrative tribunals”, and “quasi-judicial agencies”, such as the French *juge d’instruction*.<sup>88</sup> Most likely, Congress did not even consider how changing the term court to tribunal could affect international arbitration, as it hardly existed at the time.

Putting § 1782 into context, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) was only signed in 1958.<sup>89</sup> The International Chamber of Commerce (the “ICC”) administered only 32 cases in 1956, compared to over 500 in 2009.<sup>90</sup> International investment arbitration was also virtually non-existent.<sup>91</sup> It was not until 1965,

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<sup>83</sup> *Ibid* at 5.

<sup>84</sup> *Ibid* at 8.

<sup>85</sup> Mousa Zalta, “Recent Interpretation of 28 U.S.C. § 1782(a) by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants” (2005) 17:2 *Pace Intl L Rev* 413 at 418, citing “Judicial Procedure – Litigation with International Aspects” [1964] USCCAN 3782 at 3788; see also Deutsch, *supra* note 3 at 182.

<sup>86</sup> Godfrey, *supra* note 6 at 502.

<sup>87</sup> Conway, *supra* note 34 at 558, citing US, HR Rep No 1052, 88th Cong, 1st Sess (1963) 19 at 45.

<sup>88</sup> The same *juge d’instruction* as when Congress first enacted a judicial assistance statute in 1855.

<sup>89</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”), 1958, 330 UNTS 3 (entered into force on 7 June 1959) (The introduction to the Convention states that it was created “[r]ecognizing the growing importance of international arbitration...”), online: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)> [*New York Convention*].

<sup>90</sup> Godfrey, *supra* note 6 at 487, n 75, citing Gary B Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2001) at 7, n 30.

<sup>91</sup> World Bank, *ICSID 2013 Annual Report* (Washington DC: World Bank, 2013) at 5 (“International investment

a year after § 1782 was enacted, that the Washington Convention on the Settlement of Investment Disputes between States and Nationals and Other States (the “Washington Convention”) which established the International Centre for Settlement of Investment Disputes (“ICSID”) was “open for signature.”<sup>92</sup> ICSID is one of the few major arbitral centers which administer investment arbitration disputes. There were about one to four cases registered each year from 1972 to 1996, and it was only in the early 2000s that ICSID began registering numerous cases.<sup>93</sup>

In addition, Congress did not consider how § 1782 may conflict with the policy rationale of the Federal Arbitration Act (“FAA”). The issue is that extending § 1782 “to foreign private arbitrations would result in greater judicial assistance to foreign arbitrations than to domestic ones.”<sup>94</sup> There is no evidence that Congress or Professor Smit appreciated this possible tension.

It is also important to consider why Congress chose this term instead of another. From 1855 to 1964, Congress did not adequately discuss international arbitration in relation to international judicial assistance. In fact, Congress made only “one oblique reference in the history of § 1782 to arbitrations, whether public or private.”<sup>95</sup> In replacing “court” with “tribunal”, § 1782 was also meant to replace 22 USC §§ 270—270g, which “had provided ‘commissioners or members of international tribunals’ with the power to ‘administer oaths, to subpoena witnesses and records, and to punish for contempt.’”<sup>96</sup> Although §§ 270—270g did not use the term “arbitration”, the sections were enacted “hurriedly” to compel testimony in a *public* arbitration between the United States and Canada.<sup>97</sup> Moreover, § 270 “specifically provided for discovery assistance to ‘an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments.’”<sup>98</sup> Thus, if there was any Congressional intent related to arbitration, it was most likely related to public international arbitration. Extending judicial assistance to foreign requests in international commercial arbitration had never been done by Congress before 1964; and it is not likely that Congress chose at this point to do so, given that it was never addressed or even referenced by Congress.

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law and international investment arbitration are relatively new disciplines: the first bilateral investment treaty was signed by Pakistan and Germany in 1959, the first investment offering investor-State arbitration was concluded in 1968 between the Netherlands and Indonesia, the first ICSID case was registered in 1972, and the first treaty-based investment case was registered by the Centre in 1987”), online: <documents.worldbank.org/curated/en/2013/01/18410770/icsid-2013-annual-report>.

92 Cremades & Cairns, *supra* note 28 at 175; see also International Centre for Settlement of Investment Disputes, online: <icsid.worldbank.org/>.

93 ICSID registered between one and four cases each year between 1972 and 1996. From 1997 to 2002 it was between 10 to 19 cases, increasing steadily. But from 2003 to 2013, ICSID has seen a rapid increase in cases, between 21 and 50 cases. International Centre for Settlement of Investment Disputes, “The ICSID Caseload – Statistics” [2016] 1 ICSID at 7, online: <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/ICSID-Caseload-Statistics.aspx>.

94 Rivkin & Legum, *supra* note 5 at 224.

95 *Ibid* at 217.

96 *Ibid*, citing US, Act of 3 July 1930, 46 Stat 1005 (formerly codified as 22 USC §§ 270—270g).

97 *Ibid*, citing “Letter from Secretary of State Henry L. Stimson addressed to the Chairman of the Senate Judiciary Committee and requesting authority for the arbitrators in the *I’m Alone* arbitration to compel the testimony from witnesses.”

98 *Ibid*, citing US, Act of 3 July 1930, 46 Stat 1005 (formerly codified as 22 USC §§ 270—270g).

Professor Smit disagreed with this, although he did agree that § 1782 “was expanded also to cover the assistance provided for in §§ 270—270g ...”<sup>99</sup> Professor Smit did not distinguish between public and private international arbitral bodies, stating instead that §§ 270—270g “were enacted especially for the purpose of providing for assistance to an international arbitral tribunal.”<sup>100</sup> The legislative history does not support Professor Smit’s view that a distinction should not be made between public and private arbitration. However, the legislative history does shed light on a stronger argument that the USC sections were limited to public international arbitrations, as this is the type of arbitration which the codal sections were specifically enacted for.

In 1964, Professor Smit cited the International Court of Justice (the “ICJ”) “as an example of such an ‘international tribunal.’”<sup>101</sup> The ICJ, a public body, was established by treaty to resolve disputes between countries. Professor Smit had an opportunity to also include an example of a private arbitral tribunal, but he did not. Why he omitted such an example is unclear, even though he included private arbitral tribunals in his 1998 article.<sup>102</sup> Professor Smit’s more contemporaneous 1965 article is the better guide to understanding Congress’ intent.

However, others have argued that even though international commercial arbitration was not well-known at the time, it does not mean that private arbitral tribunals cannot be read into the term “foreign or international tribunal.” If it can be assumed that laws are not static and that modern trends or concepts can and should be read into legal text through judicial interpretation, then maybe the absence of private arbitration in the legislative history should not be conclusive that private arbitral tribunals fall outside the statute’s scope.<sup>103</sup>

Notwithstanding, the prevalence of private international arbitration today does not necessarily entail that US courts should expand § 1782’s scope to include private arbitral tribunals.<sup>104</sup> Congress has not had the opportunity to consider the policy behind § 1782 and whether it comports with international arbitration. The decision to enact § 1782 was made in a different context and in a vastly different period of international arbitration. It was not until recently that international arbitration practitioners began to use § 1782 in arbitration. One of the very first articles to bring this tool to light was published in 1992 and stated that “since the provision became law in 1964, [there have been] no reported decisions in US courts concerning requests from either parties or arbitrators involved in international arbitrations.”<sup>105</sup> The past sixty

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<sup>99</sup> Smit, “American Assistance to Tribunals”, *supra* note 5 at 5.

<sup>100</sup> *Ibid.*

<sup>101</sup> Rivkin & Legum, *supra* note 5 at 218.

<sup>102</sup> *Ibid* at 219.

<sup>103</sup> Nathan D O’Malley & Luke N Eaton, “U.S. Discovery in Aid of International Arbitration: Where Things Presently Stand” (2014) 31:1 J Intl Arb 111 at 118 (this is a strong argument; and it involves a more philosophical discussion about how to interpret “law” in general, something which is beyond this paper’s scope).

<sup>104</sup> SI Strong, “Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration” (2013) 1:2 SJCL 295 at 304 (“Even if Congress could be supposed to have meant to include arbitral tribunals as a type of ‘foreign or international tribunal,’ it is entirely unclear whether that intent should be considered to include all types of arbitration currently in existence, since only one form of international arbitration – interstate arbitration – was well known in 1964, when the statute was revised”).

<sup>105</sup> Newman & Castilla, *supra* note 1 at 61—62.

plus years have brought major developments to international arbitration. Based on the relatively little legislative history on the issue of tribunal, it is unclear whether the policy rationale behind § 1782 should be extended to international commercial arbitration.

Notwithstanding Congress' intent and the historical context in which § 1782 was enacted, the contemporary definition of "tribunal" most likely includes private arbitral bodies.<sup>106</sup> Was this or is this Congress' intention? There is no obvious answer. Does Congress intend § 1782 to be used in private or investment arbitration? The legislative history is not sufficient enough to answer this question. Is an interpretation which includes private or investment arbitral tribunals within § 1782 beneficial to international private and investment arbitration?

These questions are challenging, yet important to the future of international arbitration. This is why Congress or the Supreme Court should address the issue and consider whether the case law which is currently being established is moving the United States in the same direction as the rest of the international arbitration community.

#### IV. CASE LAW HAS AGGRAVATED THE CONFUSION REGARDING § 1782'S PURPOSE AND LEGISLATIVE HISTORY

In the 1960s it was already clear that "[j]udicial construction of the term 'tribunal' will determine in large measure the usefulness of the new statute and the attitude of the United States toward international judicial assistance."<sup>107</sup> Although § 1782 has been used quite effectively in connection with foreign court proceedings, "it has not, until recently, been of much interest to international arbitration practitioners."<sup>108</sup>

##### A. *National Broadcasting Co v Bear Stearns & Co. (National Broadcasting)* and *The Republic of Kazakhstan v Biedermann International (Biedermann)*

###### i. *National Broadcasting*

The first decision to consider the issue of private arbitral tribunals under § 1782 came in 1999. In *National Broadcasting*, the Second Circuit Court of Appeals held that § 1782 could not be used in an international commercial arbitration under the ICC Rules.<sup>109</sup> In reaching this conclusion, the court considered the text, legislative history and Congress' intent in great detail.

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106 See e.g. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("Washington Convention"), 18 March 1965, 575 UNTS 159 (entered into force on 14 October 1966) ("The Arbitral Tribunal ... shall be constituted as soon as possible after registration of a [Request for Arbitration]" at art 37), online: <<https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention.aspx>>.); see also International Chamber of Commerce (ICC), *Rules of Arbitration* (2012), Articles 11—15 (on "The Arbitral Tribunal"), online: [www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/) [*ICC Rules 2012*]; International Centre for Dispute Resolution, *International Dispute Resolution Procedures* (2010), Articles 5—11 (on "The Tribunal"), online: <[www.icdr.org/icdr/ShowProperty?nodeId=UCM/ADRSTG\\_002037](http://www.icdr.org/icdr/ShowProperty?nodeId=UCM/ADRSTG_002037)>.

107 "Judicial Assistance", *supra* note 55 at 982.

108 Beale, Lugar, & Schwarz, *supra* note 9 at 60.

109 *Bear Stearns*, *supra* note 10 at 185.

The court first noted the possible inherent conflict between § 1782 and the FAA. However, the court did not explore this issue further, as it deemed that it was unnecessary due to its holding.<sup>110</sup>

The court observed that statutory interpretation begins by considering the statute itself.<sup>111</sup> If the language is ambiguous, then a court should consider the legislative history and purpose of the statute.<sup>112</sup> The court determined that the term “foreign or international tribunal” is ambiguous because “it does not necessarily include or exclude the arbitral panel at issue here.”<sup>113</sup> It stated:

[The] authority amply demonstrates that the term ‘foreign or international tribunal’ does not unambiguously *exclude* private arbitration panels. On the other hand, the fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in § 1782, does include both.<sup>114</sup>

Upon finding the term “tribunal” ambiguous, the court then considered § 1782’s legislative history and purpose. The court determined that the legislature “had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state.”<sup>115</sup> For example, the court quoted the House and Senate committee reports, which state that it was intended “that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.”<sup>116</sup> The court also considered Congress’s motivation to use the term “international tribunal.” As explained above, this term came from the replacement of §§ 270—270g. Such international tribunals were limited to governmental or intergovernmental arbitral tribunals. Lastly, the court considered it relevant that Congress never mentioned international commercial arbitration in the legislative history:

The legislative history’s silence ... is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention.<sup>117</sup>

## ii. Biedermann

The only other circuit court to make a ruling on the issue came soon after *National*

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110 *Ibid* at 188 (“If the broader evidence-gathering mechanisms provided for in § 1782 were applicable to proceedings before non-governmental tribunals such as private arbitral panels, we would need to decide whether 9 U.S.C. § 7 is exclusive, in which case the two statutes would conflict. Because we conclude instead that § 1782 does not apply to proceedings before private arbitral panels, we need not reach this issue”).

111 *Ibid*, citing *F.D.I.C. v Meyer*, 510 US 471 at 476 (1994).

112 *Ibid*, citing *Castellano v City of New York*, 142 F (3d) 58 at 67 (2d Cir 1998) and *Motor Vehicles Manufacturers Association v New York State Department of Environmental Conservation*, 17 F (3d) 521 at 531 (2d Cir 1994).

113 *Ibid*.

114 *Bear Stearns*, *supra* note 10 at 188 [emphasis in original], citing *Robinson v Shell Oil Co.*, 519 US 337 (1997).

115 *Bear Stearns*, *supra* note 10 at 189.

116 *Ibid*, citing US, HR Rep No 88-1052 (1963) at 9 and US, S Rep No 88-1580 [1964] USCCAN 3782 at 3788.

117 *Bear Stearns*, *supra* note 10 at 190.

*Broadcasting*.<sup>118</sup> In *Biedermann*, the Fifth Circuit Court of Appeals considered whether § 1782 could be used in a commercial arbitration under the rules of the Stockholm Chamber of Commerce (the “SCC”).<sup>119</sup> Before agreeing with the Second Circuit in *National Broadcasting* and holding that private arbitral tribunals are not within the scope of § 1782, the court likewise considered the peculiar challenge of reconciling § 1782 with the FAA,<sup>120</sup> stating that “[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart.”<sup>121</sup>

In looking at the statute’s language, the court also agreed with the Second Circuit in that the term tribunal was ambiguous.<sup>122</sup> In its analysis of the legislative intent and purpose, the court recognized that the term “foreign or international tribunal” was intended to replace the term court, however it agreed with the Second Circuit in that § 1782(a) “was drafted to meld its predecessor with other statutes [ §§ 270—270g ] which facilitated discovery for international government-sanctioned tribunals.”<sup>123</sup> Recognizing the legislative history and purpose of a narrow reading of tribunal, the court stated that

[n]either the report of the Commission that recommended what became the 1964 version of § 1782 nor contemporaneous reports of the Commission’s director [Professor Smit] ever specifically goes beyond these types of proceedings to discuss private commercial arbitration.<sup>124</sup>

## B. Intel

In *Intel*, the Supreme Court considered, for the first and only time, § 1782(a). In doing so, however, it brought about some uncertainty to the scope of the term “tribunal.”<sup>125</sup>

Factually, Advanced Micro Devices “AMD” “filed an antitrust complaint ... with the Directorate-General for Competition “DG-Competition” of the Commission of the European Communities “European Commission or Commission”.”<sup>126</sup> In pursuit of this, AMD made a request pursuant to § 1782 to order Intel Corp. to produce documents.<sup>127</sup> The court did not consider the issue of private arbitral tribunals,<sup>128</sup> but the opinion became particularly important in how the court could consider the issue in the future. The Supreme Court held that “the Commission is a §

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118 *In re Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F (3d) 987 (11th Cir 2012) [*Consorcio 2012*]. However, the same three-judge panel vacated the opinion, choosing in the latter opinion to not address the issue of “tribunal” (*In re Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 24 Fla W Fed C 936 (11th Cir 2014) [*Consorcio 2014*]); see also Douglas Thomson, “US court reverses section 1782 decision” *Global Arbitration Review* (15 January 2014), online: <[www.globalarbitrationreview.com/news/article/32158/us-court-reverses-section-1782-decision/](http://www.globalarbitrationreview.com/news/article/32158/us-court-reverses-section-1782-decision/)>.

119 *Biedermann International*, *supra* note 10 at 881.

120 *Ibid* at 883.

121 *Ibid*.

122 *Ibid* at 881.

123 *Biedermann International*, *supra* note 10 at 882 [parenthetical added].

124 *Ibid* [parenthetical added].

125 Fellas, “Using Section 1782”, *supra* note 31 at 380.

126 *Intel*, *supra* note 11 at 246.

127 *Ibid*.

128 *Ibid* at 253.

1782(a) ‘tribunal’ when it acts as a first-instance decision maker.”<sup>129</sup>

In reaching this conclusion, the court considered the legislative history<sup>130</sup> and then analyzed whether the Commission fell under the type of tribunal intended by Congress. The court noted that “[t]he European Commission is the executive and administrative organ of the European Communities”<sup>131</sup> and that its “overriding responsibility is to conduct investigations into alleged violations of the European Union’s competition prescriptions.”<sup>132</sup> Of particular importance in to how *Intel* would later be interpreted, Justice Ginsburg, writing for the majority, stated:

Ultimately, DG Competition’s preliminary investigation results in a formal written decision whether to pursue the complaint, if the DG-Competition declines to proceed, that decision is *subject to judicial review* by the Court of First Instance and, ultimately, by the court of last resort for European Union matters, the Court of Justice for the European Communities.<sup>133</sup>

In briefly considering the term tribunal, the Court held that “both the Court of First Instance and the European Court of Justice, qualify as tribunals. But those courts are not proof-taking fora. Their review is limited to the record before the Commission.”<sup>134</sup> The court, either with or without realizing the drastic effect that it would cause to international arbitration, approvingly, albeit partially, cited Professor Smit’s definition of tribunal in determining the Commission’s status under § 1782(a).<sup>135</sup> The part left out of Professor Smit’s definition of tribunal, which has caused judicial and scholarly debate, are the words “all bodies exercising adjudicatory powers.” No one, except maybe Justice Ginsburg, knows if this was deliberate.

### C. Post-*Intel*

Although *Intel* resolved many issues under § 1782(a), it left much undecided including, most importantly, whether § 1782 could be used in international commercial arbitration, with the issue later branching into the realm of international investment arbitration.<sup>136</sup>

#### i. Cases Holding that Private Arbitral Tribunals Within § 1782

[U]ntil recently, it had been settled for many years that section 1782 did not apply to the taking of evidence in the United States for use in an arbitration proceeding. That all changed when ... a [US] Court held that section 1782 could be used to take evidence for use in an international arbitration proceeding

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129 *Ibid* at 246.

130 *Ibid* at 248—249.

131 *Ibid* at 250.

132 *Ibid* at 254.

133 *Ibid* [emphasis added].

134 *Intel*, *supra* note 11 at 254.

135 *Ibid* at 258.

136 Adamo, Canala, & Gerber, *supra* note 18 at 338; Peter C Thomas & Christina Hioureas, “US Discovery in Aid of International Legal Proceedings: Developments Since the Intel Decision Under Section 1782” (2006) 31 *Deutsch-Amerikanische Juristen-Vereinigung Newsletter* 177 at 178.

in Austria.<sup>137</sup>

In *In re Roz Trading*, a federal district court considered whether a private arbitral tribunal constituted under the Vienna International Arbitral Centre (the “VIAC”) fell within the scope of § 1782(a).<sup>138</sup> The court found *Intel*’s reference and approval of Professor Smit’s definition to be instructive.<sup>139</sup> It reasoned that, similar to the DG-Competition tribunal in *Intel*, the “[International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna’s (“the Centre”)] arbitral panels are ... ‘first-instance decisionmakers’ that issue decisions both responsive to the complaint and reviewable in court.”<sup>140</sup> It is arguable, however, that a tribunal’s decision in an international commercial arbitration is *actually* judicially reviewable in a similar manner as that in *Intel*. Nevertheless, the court held that “[t]he Centre, when examined under the same functional lens with which the Supreme Court in *Intel* examined the DG-Competition, must necessarily be considered a ‘tribunal’ under § 1782(a).”<sup>141</sup>

In doing so, the court reasoned that the “common usage” and “widely accepted definition” of a tribunal includes arbitral bodies.<sup>142</sup> Further, the court reasoned that the language of § 1782(a) is not ambiguous, because “there is no clearly expressed legislative intent that the term ‘tribunal’ does not include arbitral panels such as those convened by the Centre or that the term should be construed in a manner other than as it is commonly defined.”<sup>143</sup> Lastly, the court stated that *Intel* rejected any “categorical limitations” on the scope of § 1782(a) and that “it is the function of the body that makes it a ‘tribunal,’ not its formal identity as a ‘governmental’ or ‘private’ institution.”<sup>144</sup>

The next case to hold that a private arbitral tribunal was within the scope of § 1782(a) was *In re Hallmark Capital*. In holding that the private arbitral tribunal at issue fell within § 1782(a), the court approvingly quoted *In re Roz Trading*, stating that “[h]ad Congress wanted to impose [a] limitation ... it would have been a simple matter to add the word ‘governmental’ before the word ‘tribunal’ in the 1964 amendment.”<sup>145</sup>

Granted; however, it could also be that Congress did not add the word “governmental” before “tribunal” because international commercial arbitration did not exist in nearly the same degree as it does today. Congress simply did not consider whether private arbitral tribunals could be included in § 1782(a), as is noticeably evident from the lack of any discussion in the Congressional Record. Had they known of this possible distinction, it seems very likely that Congress would have considered this issue, especially if a broad reading of § 1782(a) could possibly conflict with the policy behind the FAA. Congress’ ambiguity or silence in addressing

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137 Fellas, “Using Section 1782”, *supra* note 31 at 379.

138 *In re Roz Trading Ltd*, 469 F Supp (2d) 1221 at 1222 (ND Ga 2006) [*In re Roz Trading*].

139 *Ibid* at 1224.

140 *Ibid* at 1225.

141 *Ibid*.

142 *Ibid*.

143 *In re Roz Trading*, *supra* note 138 at 1226-1227.

144 *Ibid* at 1228.

145 *Hallmark Capital Corp*, *supra* note 6 at 954 [parentheticals in original], citing *In re Roz Trading*, *supra* note 139 at 1226, n 3.

this issue further underscores that the Congress' intent is not sufficient to provide a clear answer.

Notwithstanding, then came *In re Babcock Borsig*, in which the District Court of Massachusetts considered whether a party to a private arbitration under the ICC Rules could use § 1782.<sup>146</sup> In recognizing that *Intel* did not address the issue of “whether private arbitral bodies like the ICC qualify as ‘tribunals’ under § 1782(a)”, the court held that “the [Supreme Court’s] reasoning and dicta strongly indicate that these types of adjudicative bodies also fall within the statute.”<sup>147</sup>

It is important to note that *In re Babcock Borsig* has a flaw in its reasoning. The court’s reasoning indicates that it considered private arbitral tribunals as equivalent to the ICC, itself.<sup>148</sup> Yet, the ICC is *not* a private arbitral body. Rather, the ICC is an institution that administers international arbitrations.<sup>149</sup> Moreover, the ICC Court is not an arbitral body. For example, ICC Rules Article 6(2) states: “[b]y agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be *administered* by the [ICC] Court.”<sup>150</sup> *In re Hallmark Capital* made a similar leap in logic, having noted that the arbitral tribunal was “convened” under the VIAC.<sup>151</sup> However, an arbitral tribunal does not “convene” under an arbitral institution, such as the VIAC or the ICC; rather, it is “constituted”, “established”, or “formed” under the rules of such arbitral institutions. Regardless, it is unclear whether the court would have reached an opposite holding had it properly analyzed the analogy of a private arbitral tribunal to the DG-Competition tribunal.

Next was *In re Application of Winning (HK) Shipping*, which considered an arbitral tribunal constituted under the London Maritime Arbitration Association rules.<sup>152</sup> In first recognizing that *Intel* did not address the issue of private tribunals, the Southern District of Florida stated that *Intel* did expressly overrule other issues that had been brought to its consideration.<sup>153</sup> This fact is important in understanding whether *National Broadcasting* and *Biedermann* are still good law. The fact that *Intel* did not expressly overrule both cases, nor did it discuss them, while instead addressing and overruling other circuit court decisions on other issues, strongly suggests that the Supreme Court did not intend for Professor Smit’s definition to play as prominent a role as it does today.

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146 *Babcock Borsig*, *supra* note 12 at 235.

147 *Ibid* at 238.

148 *Ibid* at 235 (“... private arbitral bodies like the ICC ...”).

149 See e.g. *ICC Rules 2012* arts 1(1) and 1(2) (“[The International Court of Arbitration of the International Chamber of Commerce] does not itself resolve disputes. It *administers* the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC.” at art 1(2) [emphasis added]; in presenting the services it offers, the ICC states that “[a]n arbitral institution [like themselves] organizes and provides services in connection with arbitration proceedings”, see International Chamber of Commerce, online: “Arbitration”, <[www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/)>.

150 *ICC Rules 2012*, art 6(2) [emphasis added].

151 *Hallmark Capital Corp*, *supra* note 6 at 1226—1227.

152 *In re Application of Winning (HK) Shipping Co. Ltd.*, 2010 WL 1796579 at 2 (SD Fla 2010) [*In re Application of Winning*].

153 *Ibid* at 7, n 2 (“With respect to [*Intel*’s] holding, the Supreme Court expressly overruled the contrary precedent in the Eleventh Circuit Court of Appeals in *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988)”).

Nevertheless, the decision in *Winning (HK) Shipping* considered that *Intel* “opened the door to a wider interpretation of section 1782.”<sup>154</sup> The court noted the importance that *Intel* placed on the “function and procedures” of the European Commission, in that its decision was subject to judicial review.<sup>155</sup> “*Intel* suggests that courts should examine the *nature* of the arbitral body at issue to determine whether it *functions* as a ‘foreign tribunal’ for purposes of section 1782.”<sup>156</sup> In so doing, the court reasoned that *Intel* does not mandate the inclusion of private arbitral tribunals under § 1782(a).<sup>157</sup>

The court did, however, find this particular private arbitral tribunal as within § 1782(a), as it considered this arbitral tribunal different than others. Considering the function of this arbitral tribunal, the court held that “although certain aspects of the anticipated arbitration are akin to a purely private arbitration, the arbitral body in this instance actually acts as a first-instance decision maker whose decisions are subject to judicial review.”<sup>158</sup> The court emphasized that the arbitration was seated in London, and that under the English Arbitration Act 1996, “courts may review not only jurisdictional issues related to arbitration, but may also consider whether an error was made on a point of law by the arbitrators.”<sup>159</sup> The court found that in this particular commercial arbitration there is judicial review, because “the decisions of the arbitrators are reviewable by the English Courts.”<sup>160</sup> Therefore, the court held that “although the likely arbitration body herein ... is different from the quasi-judicial and/or agency body in *Intel*” it is such a tribunal under § 1782(a) because there is judicial review.<sup>161</sup>

## ii. Cases Holding that Private Arbitral Tribunals Are Not Within § 1782

Other federal district courts have taken the opposite view. The first federal district court to do so post-*Intel* was in *La Comision*. In this decision, the Southern District of Texas considered *Intel*, reasoning that the “Supreme Court ... shed no light on the issue” of private arbitral tribunals, not even in *dicta*.<sup>162</sup> That is, Professor Smit’s definition of tribunal made not even a “cameo appearance, but more of an ‘extra’ in *Intel*’s consideration of the scope of § 1782 tribunals.”<sup>163</sup> Moreover, the court reasoned that the “Supreme Court gave no indication they agreed with Smit on this issue ...”<sup>164</sup> Instead, the court concluded that *Intel* relied more on Congress’ reports “that §

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154 *Ibid* at 9.

155 *Ibid*.

156 *Ibid* at 14 [emphasis added].

157 *Ibid*.

158 *Ibid*.

159 *In re Application of Winning*, *supra* note 153 at 15; see *Arbitration Act 1996* (UK), c 23, ss 68—69 (“[a] party to arbitral proceedings may ... apply to the court challenging an award ... on the ground of serious irregularity ...” at s 68(1); “... a party to arbitral proceedings may ... appeal to the court on a question of law arising out of award made in the proceedings” at s 69(1); “Leave to appeal shall be given only if the court is satisfied ... (c)(i) that, on the basis of the findings of fact in the award the decision of the tribunal on the question is obviously wrong” at s 69(3)).

160 *In re Application of Winning*, *supra* note 153 at 16.

161 *Ibid*.

162 *La Comision*, *supra* note 17 at 485.

163 *Ibid* at 486.

164 *Ibid*.

1782 applied to administrative and quasi-judicial agencies” than on Professor Smit’s definition.<sup>165</sup>

Nevertheless, the court did find portions of the Court’s *dicta* informative. Importantly, in the context of judicial review, a party to a private international arbitration has very different procedural rights than a party before the DG-Competition.<sup>166</sup> The court reasoned:

An arbitral tribunal exists as a parallel source of decision-making to, and is entirely separate from, the judiciary, which was not the case with the [DG-Competition] as the Court was at pains to point out in *Intel*.<sup>167</sup>

Interestingly though, and reinforcing the divisiveness of this issue, the District Court of Delaware reached the opposite conclusion in the very same arbitration as that considered in *La Comision*.<sup>168</sup> This case, however, was “vacated as moot on appeal to the Third Circuit Court of Appeals due to the completion of the arbitration proceedings during the pendency of the appeal.”<sup>169</sup>

Next came *In re Norfolk Southern*, where the Northern District of Illinois considered another arbitration seated in London.<sup>170</sup> In agreeing with other courts which have held that private arbitral tribunals are within the scope of § 1782(a), the court stated that it was Congress’ intent to expand § 1782 and that *Intel* favorably quoted Professor Smit’s definition.<sup>171</sup> However, the court reasoned that *Intel* “stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statute.”<sup>172</sup> That is, “the ellipses in the [Supreme Court’s] citation to Smit ... suggest that the Court was not willing to embrace the full breadth of Smit’s definition.”<sup>173</sup> The Supreme Court left out the words “all bodies exercising adjudicatory powers.”<sup>174</sup> In not quoting the entirety of Professor Smit’s definition, the Northern District of Illinois found it decisive that the Supreme Court, when faced with the issue, would not include private arbitral tribunals in § 1782(a).<sup>175</sup> Had the Supreme Court quoted this definition in its entirety, the District Court likely would likely have been willing to include private arbitral tribunals within § 1782(a).<sup>176</sup> Notably, *In re Norfolk Southern* did not draw a similar distinction to arbitrations seated in the UK as did the court in *Winning (HK) Shipping*, or at all. The court in *In re Norfolk Southern* was correct in not drawing such a distinction.

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<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid* at 485.

<sup>167</sup> *La Comision*, *supra* note 17 at 485—486.

<sup>168</sup> *La Comision Ejecutiva Hidroelectric del Rio Lempa v Nejapa Power Co*, Case No 08-135 (D De, 2008), cited in *In re Application of Winning*, *supra* note 153 at 12, n 3.

<sup>169</sup> *In re Application of Winning*, *supra* note 153 at 12, n 3, citing and *La Comision Ejecutiva Hidroelectric del Rio Lempa v Nejapa Power Co*, Case No. 08-3518 (3rd Cir 2009).

<sup>170</sup> *In re Arbitration in London, England between Norfolk Southern Corp*, 626 F Supp (2d) 882 at 883 (ND Ill 2009) [*Norfolk*].

<sup>171</sup> *Norfolk*, *supra* note 170 at 885.

<sup>172</sup> *Ibid* [emphasis in original].

<sup>173</sup> *Ibid*.

<sup>174</sup> See *Intel*, *supra* note 11 at 258; but see Smit, “Intl Litigation Under US Code”, *supra* note 7 at 1026.

<sup>175</sup> *Norfolk*, *supra* note 171 at 885 (“[a]ccordingly, I interpret the Intel’s Court’s reference to ‘arbitral tribunals’ as ... excluding purely private arbitrations”).

<sup>176</sup> *Ibid* (“[w]hile the private arbitral tribunal at issue here likely falls within the scope of ‘all bodies exercising adjudicatory powers ...’”).

In the same year as *In re Norfolk Southern*, the next court to hold private arbitral tribunals as not within § 1782(a) was the Middle District of Florida in the case of *In re Application of Operadora*.<sup>177</sup> In that case, the private arbitral tribunal was constituted under the ICC Rules. The court first considered the plain language of § 1782(a), finding that it is ambiguous and that it is “sufficiently broad that it could include private arbitration proceedings, but is not sufficiently precise to dictate such a conclusion.”<sup>178</sup> In so doing, the court rejected the reasoning of *In re Roz Trading* and *In re Hallmark Capital*, in which those courts held that the phrase “foreign or international tribunal” unambiguously includes both private and government arbitrations.<sup>179</sup> Moreover, the court rejected the argument that *Intel*’s rejection of “categorical limitations” necessarily meant that private and government tribunals would be included in § 1782(a).<sup>180</sup> Instead, the court noted that it was a paradox to cite the “absence of a categorical limitation as evidence of Congress’ unambiguous intent to include private arbitration proceedings.”<sup>181</sup> Thus, the court found the language of § 1782(a) ambiguous.<sup>182</sup>

The court next considered the legislative history and purpose of § 1782. The court agreed with *National Broadcasting* in that tribunal “referred only to government entities.”<sup>183</sup> The court looked specifically at the term “international tribunal” and found that the term was also used in the repealed §§ 270—270g, “which applied only to governmental and state-sponsored proceedings.”<sup>184</sup> Further, the court used a 1962 article by Professor Smit against his own proposition. In that article, Professor Smit stated that “an international tribunal owes both its existence and its powers to an international agreement.”<sup>185</sup>

In addition, the court considered the function of an ICC arbitral tribunal and compared it to the DG-Competition tribunal in *Intel*. Particularly, the court noted many functions to be the same – including “an independent arbitrator who has the ability to gather evidence, the obligation to apply impartially the law to the facts, and the authority to enter a binding decision” – but found the *judicial review* “inherent” in a commercial arbitration to be different.<sup>186</sup>

In further considering the tribunal’s function, the court noted that the “criteria adopted” by *Intel* was “based, in part, on the particular characteristics of the DG-Competition and the European Commission.”<sup>187</sup> It could be that different criteria would have been adopted had the Supreme Court analyzed a private arbitral tribunal and not a “state-sponsored” tribunal, such as the DG-Competition and the European Commission.<sup>188</sup> Importantly, the court opined that Congress and

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177 *In re Application of Operadora DB Mexico, SA de CV*, 2009 WL 2423138, at 1 (MD Fla 2009) [*Operadora*].

178 *Ibid* at 8.

179 *Ibid*.

180 *Ibid*.

181 *Ibid*.

182 *Ibid*.

183 *Ibid* at 9.

184 Rivkin & Legum, *supra* note 5 at 217.

185 *Operadora*, *supra* note 178 at 1, citing Smit, “Assistance Rendered by the United States in Proceedings Before International Tribunals” (1962) 62 Colum L Rev 1264 at 1267.

186 *Operadora*, *supra* note 178 at 9.

187 *Ibid* at 10.

188 *Ibid*.

the Supreme Court would not “casually extend” § 1782 to private agreements “without some deliberation” and without even “acknowledging” the existence of *National Broadcasting and Biedermann*.<sup>189</sup>

Next, in *In re Application of Finserve Group*, a private arbitral tribunal was established under the London Court of International Arbitration (“LCIA”).<sup>190</sup> The District Court of South Carolina focused primarily on judicial review. In looking at the DG-Competition tribunal, the court found that its “decision not to pursue a complaint or a finding that a violation of the law has occurred is reviewable by the Court of First Instance and, ultimately, by the European Court of Justice.”<sup>191</sup> Conversely, private arbitrations are generally “alternatives to ... formal litigation” and arbitration agreements usually have an implicit “waiver of review by courts.”<sup>192</sup> In support of this, the court looked specifically at the LCIA Rules. It found that the LCIA treats “decisions by the arbitrators ... as administrative, and appeals to any judicial authority are generally taken to have been waived.”<sup>193</sup>

Then, in *In re Application of Prabhat K. Dubey*, the Central District of California considered a private arbitral tribunal established under the American Arbitration Association (“AAA”) International Rules (“ICDR”).<sup>194</sup> The court thoroughly considered the district court split and the past precedent of *National Broadcasting and Biedermann*, and concluded that “*Intel* did not intend to expand the meaning of ‘foreign or international tribunal’ to include private arbitrations.”<sup>195</sup> The court was convinced that a “reasoned distinction can be made between purely private arbitrations established by private contract and state-sponsored arbitral bodies, and the Supreme Court’s reasoning in *Intel* is more appropriate in the context of state or governmental adjudicatory bodies.”<sup>196</sup> The court was also convinced by the reasoning in *National Broadcasting and Biedermann*, because both “resolved the ambiguity against including private arbitrations in § 1782.”<sup>197</sup> However, with *Intel*’s reliance on Professor Smit’s definition and his importance in drafting § 1782, it is not quite clear that *National Broadcasting and Biedermann* resolved the ambiguity.

Lastly, the two most recent cases (both arising from the same international commercial arbitration) which have considered the issue of whether private arbitral tribunals fall within the scope of § 1782(a), have both held that private arbitral tribunals are outside of its scope.

In the case of *In re Application of Grupo Unidos por el Canal S.A.*, the Northern District of California considered an arbitral tribunal established under the ICC Rules.<sup>198</sup> In noting that

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189 *Ibid* at 11.

190 *In re Application of Finserve Group Limited*, 2011 WL 5024264, at 1 (DS C 2011).

191 *Ibid* at 3.

192 *Ibid*.

193 *Ibid*.

194 *In re Dubey*, 949 F Supp (2d) 990 at 991 (CD Cal 2013) [*In re Dubey*].

195 *In re Dubey*, *supra* note 194 at 993.

196 *Ibid* at 994 [internal quotation marks omitted].

197 *Ibid* at 995.

198 *In re Application of Grupo Unidos por el Canal SA*, 2015 WL 1815251 at 2 (ND Cal 2015) [*Grupos Unidos*]

*Intel* did not address the issue of the scope of the term “tribunal”,<sup>199</sup> the court was not convinced that a footnote reference to Professor Smit’s definition of tribunal was conclusive and determined that the analysis in *National Broadcasting* was “especially instructive.”<sup>200</sup> The court was likewise approving of the analysis in *Biedermann*.<sup>201</sup> Additionally, the court was “confident” that the court “would not have expanded § 1782 to permit discovery assistance in private arbitral proceedings and reversed [*National Broadcasting*] and *Biedermann* – without even acknowledging their existence – in a parenthetical quotation supporting an unrelated proposition.”<sup>202</sup>

The same private arbitral tribunal was considered by the District Court of Colorado.<sup>203</sup> The court first compared and analyzed private arbitral tribunals, established by contract, to administrative or quasi-judicial bodies – a comparison that had not been previously provided by prior courts in such detail. In comparing the level of judicial review of a private arbitral tribunal to that of a court or administrative or quasi-judicial body, the court first noted that an “ICC-guided private arbitration stands in stark contrast to judicially-resolved disputes.”<sup>204</sup> Given this difference, the court determined that the ICC proceedings “were privately bargained for as a part of the contract entered into by those private parties. Therefore, the ICC arbitration is privately contracted and is neither an administrative nor quasi-judicial proceeding.”<sup>205</sup>

In next considering whether the private arbitral tribunal at issue was within the scope of § 1782(a), the court likewise noted that *Intel* did not address the issue.<sup>206</sup> The court further noted that *Intel* did not “specifically disapprove of, or even mention” *National Broadcasting* or *Biedermann*.<sup>207</sup> Therefore, considering both the “body blow” that a broad interpretation of tribunal would have on international arbitration and the cases post-*Intel*, the court found that

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*ND Cal 2015*].

199 *Ibid* at 11.

200 *Ibid* at 8.

201 *Ibid* at 11 (“[t]his court concurs with the reasoning of the *NBC* and *Biedermann* courts regarding the ambiguity of the statutory language and the clearer instruction of the legislative history and policy considerations, and concludes that private arbitrations established by contract are not “tribunals” under Section 1782”).

202 *Grupos Unidos ND Cal 2015*, *supra* note 199 at 11 [internal quotations omitted], citing *In re Dubey*, at 240.

203 *In re Application of Grupo Unidos por el Canal SA*, 2015 WL 1810135 (D Colo 2015) [*Grupo Unidos D Colo 2015*].

204 *Ibid* at 5, citing *AT&T Mobility LLC v Concepcion*, 131 S Ct at 1740, 1751 (2011).

205 *Grupo Unidos D Colo 2015*, *supra* note 203 at 5 (“... simply providing for a set of voluntarily agreed-upon uniform rules of procedure, selectively applied by agreement of the parties, does not turn a private arbitration into an administrative or quasi-judicial proceeding”).

206 *Ibid* at 6.

207 *Ibid* at 7 (“It is completely implausible that the Supreme Court would have, in a parenthetical quotation supporting an unrelated proposition involving an quasi-judicial governmental body, expanded § 1782 to permit discovery assistance in private arbitral proceedings and reverse the only two circuits addressing this issue *sub silentio*, without even acknowledging the existence of the circuit precedent”); see also *Operadora*, *supra* note 178 at 11; *Elizabeth Blackwell Health Center for Women v Knoll*, 61 F (3d) 170 at 194 (3d Cir 1995), Nygaard J, dissenting (“Had the Supreme Court intended to make a sweeping change in administrative law jurisprudence, it would have done so explicitly [rather than *sub silentio*]”); *Hallmark Capital Corp*, *supra* note 6 at 995; *In re Application by Rhodianyl S.A.S.*, 2011 Lexis 72918 at 49 (D KS 2011) (“Congress would not have intended such a sweeping interpretation of § 1782, where the necessary result would be a contradiction of another strong policy, encouraging the use of arbitration”).

private arbitral tribunals are not within the scope of § 1782(a).<sup>208</sup>

### iii. Cases Making a Distinction Between State-Sponsored or Investment Arbitral Tribunals and Private Arbitral Tribunals

The last set of post-*Intel* cases comes from § 1782 requests in an international investment arbitration context. Unfortunately, this line of cases has created unsound law, as the opinions do not fully grasp the finer details of international arbitration or international law. Most of the cases stem from the Chevron-Ecuador “legal drama” that has been going on for over two decades.<sup>209</sup> The unsound law does not necessarily come from poor judging, but rather from these cases’ complexity.<sup>210</sup>

The case that laid the unsound precedent was *In re in the Matter of the Application of Oxus Gold PLC (Oxus Gold)*. The case dealt with an international arbitration under the UNCITRAL Arbitration Rules (the “UNCITRAL Rules”) and under the United Kingdom-Kyrgyz Republic BIT.<sup>211</sup> In considering whether this investment arbitral tribunal was within the scope of § 1782(a), the District Court of New Jersey reasoned that Congress had made a distinction between governmental and inter-governmental arbitral tribunals on the one hand and private arbitral tribunals on the other, before concluding that the former were within the scope of § 1782(a), but not the latter.<sup>212</sup>

Unfortunately, however, the court then determined that 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.”<sup>213</sup> Therefore, the court held that this arbitral tribunal fell within § 1782(a).<sup>214</sup>

The role of UNCITRAL or its rules in international arbitration has been misunderstood

208 *Grupo Unidos D Colo 2015*, *supra* note 203 at 9.

209 See e.g. *Aguinda v Texaco, Inc*, 303 F (3d) 470 at 473 (2d Cir 2002) (“[i]n November 1993, Ecuadorian plaintiffs filed the first ... lawsuits against Texaco ...”); Andrew Ross Sorkin & Neela Banerjee, “Chevron Agrees to Buy Texaco For Stock Valued at \$36 Billion”, *The New York Times* (16 October 2000), online: <[www.nytimes.com/2000/10/16/business/chevron-agrees-to-buy-texaco-for-stock-valued-at-36-billion.html](http://www.nytimes.com/2000/10/16/business/chevron-agrees-to-buy-texaco-for-stock-valued-at-36-billion.html)>.

210 SI Strong, *supra* note 105 at 5 (“If a single hard case can make bad law, then a multitude of decisions rendered in quick succession and relating to the same difficult legal and factual scenario can be disastrous for the development of a particular legal proposition. As it turns out, the complex factual and procedural posture of the Chevron-Ecuador dispute has allowed courts to avoid difficult questions regarding the scope of 28 U.S.C. § 1782 while nevertheless setting potentially problematic precedent”).

211 *In re in the Matter of the Application of Oxus Gold PLC*, 2006 WL 2927615 at 2–4 (D NJ) [*Oxus Gold*].

212 *Ibid* at 4 (“the Second Circuit [in *National Broadcasting C v Bear Stearns & Co*, 165 F 3d 184 (1999)] held that ‘when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.’ However, international arbitral tribunals created exclusively by private parties, such as private commercial arbitration administered by the International Chamber of Commerce, a private organization based in Paris, are not included in the statute’s meaning”).

213 *Oxus Gold 2006*, *supra* note 211.

214 *Ibid*.

and the court's ruling was "clearly in error."<sup>215</sup> The cases that have followed *Oxus Gold* have, nevertheless, agreed that a "reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL ... and purely private arbitrations established by private contract."<sup>216</sup> In fact, no distinction should be made because the mere use of the UNCITRAL Rules does not make an international arbitration any more or less "governmental" or "state-sponsored" than a private arbitration. For example, private international arbitrations or *ad hoc* international arbitrations can use the UNCITRAL Rules, even though they are established by private contract.

In addition, an international arbitration, whether it be commercial or investment, is not "conducted" by UNCITRAL. UNCITRAL's purpose is to develop a legal framework "in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade."<sup>217</sup> One way that UNCITRAL does this is through dispute resolution and the UNCITRAL Rules.<sup>218</sup> The UNCITRAL Rules are "used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes, and commercial disputes administered by arbitral institutions, in all parts of the world."<sup>219</sup>

It is not clear whether the District Court of New Jersey in *Oxus Gold* would have reached a similar decision had it known UNCITRAL's purpose and function. However, it is evident from the opinion that this was one of the court's main presumptions in holding that the arbitral tribunal at issue was a state-sponsored adjudicatory body.

Regardless, this case has spawned dozens of other cases based on its illogical reasoning. Most of these cases deal with the Ecuador-Chevron dispute.<sup>220</sup> Not one has been denied "on the grounds ... that the BIT arbitration is not an international tribunal."<sup>221</sup> Thus, federal courts seem to all agree that international arbitration established by a BIT falls within § 1782(a).<sup>222</sup>

For example, in holding that § 1782 could be used, the Southern District of New York

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<sup>215</sup> Newman & Zaslowsky, *supra* note 21 at 2.

<sup>216</sup> *Ukrnafta v Carpatsky Petroleum Corp*, 2009 WL 2877156 at 4 (D Conn), citing *In re Arbitration in London*, 2009 WL 1665936.

<sup>217</sup> UNCITRAL, *A Guide to UNCITRAL* (Vienna: UN, 2013) at 1, online: <[www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf](http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf)>.

<sup>218</sup> UNCITRAL, *UNCITRAL Arbitration Rules 2010* (Vienna: UN, 2011) at 1—2 [*UNCITRAL Arbitration Rules 2010*], online: <[www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf)>.

<sup>219</sup> *Ibid.*

<sup>220</sup> Carter & Chakraborty, *supra* note 25 at 499 ("[t]he use of Section 1782 to seek discovery in aid of foreign proceedings gained new prominence recently through the efforts by Chevron Corporation, which has used US courts to gain access to a wide range of documents in connection with pending litigation in Ecuador"). At least twenty § 1782 requests have been filed in federal courts across the United States; see e.g., *Ecuador v Connor*, 708 F (3d) 651 at 653 (5th Cir 2013) [*Ecuador v Connor*] (holding that judicial estoppel precludes Chevron from denying that an arbitral tribunal is a foreign proceeding covered by § 1782 after having repeatedly benefitted from arguing the opposite); see also e.g. *Chevron Corp v Camp*, 2010 WL 3418394 (WDNC *Chevron Corp v Stratus Consulting, Inc*, 2010 WL 3923092 (D Colo); *In re Application of Chevron Corp*, 2010 WL 8767265 (ND Ga); *Chevron v E-Tech International*, 2010 WL 3584520 (SD Cal); *In re Application of Chevron Corp*, 2010 No 2:10-cv-02675 (DNJ).

<sup>221</sup> *Ecuador v Connor*, *supra* note 220 at 653.

<sup>222</sup> *Alford*, *supra* note 20.

stated that “the arbitration here at issue is not pending in an arbitral tribunal established by private parties. It is pending in a tribunal established by an international treaty (the BIT between the United States and Ecuador) and is pursuant to UNCITRAL rules.”<sup>223</sup> In doing so, the Southern District maintained that *National Broadcasting* is still good law and that it is distinguishable from “a tribunal established by an international treaty.”<sup>224</sup> Nevertheless, one reason the Southern District did so was because the Chevron-Ecuador dispute is “pursuant to UNCITRAL rules.”<sup>225</sup>

Moreover, in *Chevron Corp v Shefftz*, the District Court of Massachusetts found that “international arbitral bodies operating under UNCITRAL rules constitute ‘foreign tribunals’ for purposes of § 1782.”<sup>226</sup> In effect, this leads to the inconsistent conclusion that private arbitral tribunals constituted under the UNCITRAL Rules would be within § 1782(a), but those that have not been would be outside of it. As noted previously, the mere fact that parties actually chose the UNCITRAL Rules does not change the status of the arbitral tribunal from private to governmental; they are merely one set of rules that parties are free to agree upon.

Making matters worse, some courts have relied so heavily on this poor precedent that they are not even considering the issue anymore. Rather, they now simply assume that the investment arbitral tribunal falls within the scope of § 1782(a), while concurrently recognizing the controversy surrounding the issue.<sup>227</sup>

There is no reason why courts should simply bypass an issue and assume it is true, disregarding the fact that the footing on which it relies upon is faulty. Simply assuming presumptions to be true, while at the same time recognizing the controversy surrounding the presumption, only exacerbates the poor precedent.

Therefore, it is the hope that counsel pursue this issue further and that federal courts reconsider the grounds upon which previous decisions have been based.

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223 *In re Application of Chevron Corp*, 709 F Supp (2d) 283 at 291 (SD NY 2010) [*Application of Chevron SD NY 2010*]; See also *Ecuador v Bjorkman*, 801 F Supp (2d) 283 at 291 (SD NY 2010); *Chevron Corp v Shefftz*, 754 F Supp (2d) 254 at 260 (D Mass 2010) [*Shefftz*] (“Rather, international arbitral bodies operating under UNCITRAL rules constitute ‘foreign tribunals’ for purposes of § 1782”); *In re Veiga*, 746 F Supp (2d) 8 at 22–23 (DC 2010) [*Veiga*] (“[t]he Court agrees, and concludes that the BIT Arbitration falls within the metes and bounds of § 1782(a)”).

224 *Application of Chevron SD NY 2010*, *supra* note 223.

225 *Ibid.*

226 *Shefftz*, *supra* note 223 at 260.

227 *In re Application of Chevron Corp*, 762 F Supp (2d) 242 at 250 (D Mass 2010) (“[a]s a preliminary matter, the court assumes that the Treaty Arbitration meets the tribunal requirement for present purposes, although the question of Section 1782’s applicability to international arbitration, whether private or public is not without some controversy”); See also *Veiga*, *supra* note 224 at 22 (“Those courts that have had the opportunity to address the issue have concluded that such arbitrations fall within the ambit of § 1782(a). Indeed, other district courts have concluded that the very arbitration at issue in this case falls within the ambit of the statute”).

## V. THE FEDERAL CIRCUIT COURTS OR THE SUPREME COURT SHOULD ADDRESS THE ISSUE

The above analysis is one compelling reason why the Federal Circuit Courts or the Supreme Court should address the issue of whether private or state-sponsored tribunals fall within the scope of § 1782(a). Another important reason is that the split in decisions makes it “unclear” whether US judicial assistance will be provided in the document disclosure process in international arbitration.<sup>228</sup> This lack of clarity can lead to inequity for parties and non-parties to international arbitration. Unfortunately, however, the issue will not be resolved soon, since the Supreme Court most likely will not consider the issue ripe due to a lack of a circuit court split.

Only one circuit court post-*Intel* has considered the issue.<sup>229</sup> This opinion held that private arbitral tribunals fell within § 1782(a).<sup>230</sup> However, the same Eleventh Circuit Court of Appeals three-judge panel vacated this judgment, with a substituted opinion explicitly stating that it would not address the issue of private arbitral tribunals within § 1782(a).<sup>231</sup> The court may have been reluctant to create a circuit split with the Second and Fifth Circuits.<sup>232</sup>

One other circuit court, the Second Circuit, had the opportunity to consider the issue, but chose not to do so because of its *National Broadcasting* precedent.<sup>233</sup> This case was, once again, part of the Chevron-Ecuador dispute, but the § 1782 petitions at issue were being sought for use in both Ecuadorian court litigation and the BIT arbitration.<sup>234</sup> The court chose not to address the issue, given that the Ecuadorian courts “clearly qualified.”<sup>235</sup>

Therefore, without the private arbitral tribunal issue yet creating a split amongst the federal circuits, there is most likely no need for the Court to address the issue in the near future.<sup>236</sup>

Notwithstanding, circuit courts should address the issue to preserve the equality between the parties to an international arbitration. There is no doubt that the federal district courts have

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228 Jessica Weekley, “Discovery Discretion: Applying Intel to § 1782 Requests for Discovery in Arbitration” (2008) 59 Case W Res L Rev 535 at 535.

229 *Conсорcio* 2012, *supra* note 118.

230 *Ibid* at 990.

231 *Conсорcio* 2014, *supra* note 118 (“We decline to answer [the tribunal] question on the sparse record found in this case. The district court made no factual findings about the arbitration and made no effort to determine whether the arbitration proceeding in Ecuador amounted to a section 1782 tribunal ... Thus we leave the resolution of the matter for another day”); *see also* Douglas Thomson, “US court reverses section 1782 decision” *Global Arbitration Review* (15 January 2014), online: <[www.globalarbitrationreview.com/news/article/32158/us-court-reverses-section-1782-decision/](http://www.globalarbitrationreview.com/news/article/32158/us-court-reverses-section-1782-decision/)>.

232 *Conсорcio Ecuatoriano de Telecomunicaciones SA v JAS Forwarding (USA), Inc*, 685 F (3d) 987 (11th Cir 2012).

233 White, *supra* note 19.

234 *Chevron Corp v Berlinger*, 629 F (3d) 297 at 304 (2nd Cir 2011) [*Chevron Corp v Berlinger*].

235 *Chevron Corp v Berlinger*, *supra* note 234 at 310-311; White, *supra* note 19.

236 Ryan Stephenson, “Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis” (2013) 102:1 Geo LJ 271 at 272, citing Rules of Supreme Court of the United States (Rule no 10) (“[t]he Supreme Court has identified two factors that guide its choice of which cases to hear: a split between the highest state courts or the federal courts of appeals on a matter of federal law, or an important federal law question necessitating Supreme Court review”).

created a “significant split.”<sup>237</sup> Given this, it is unfair that “one group of private parties, those that find they are covered by a Treaty, will have access to US courts” while the “other group, those in wholly private arbitration, will have access to US courts in some states but not in others.”<sup>238</sup> Similarly, it is unfair that one party or non-party to arbitration may be subject to broad document disclosure procedures merely because it is fortuitously within a court’s jurisdiction who favors a broad interpretation of tribunal. This issue becomes even more important when considering how expensive and time consuming US discovery can be compared to the ideals of international arbitration, namely efficiency in cost and speed to resolve disputes.<sup>239</sup>

## VI. IF THE COURTS DO NOT ADDRESS THE ISSUE, THEN CONGRESS SHOULD

### A. Congress Should Form a Working Group

Congress should again, as it did previously in the 1950s, create a working group to address the issue of whether private or investment arbitral tribunals should fall within § 1782(a). In doing so, the working group should consider two goals: (1) what role should US-style discovery have in international arbitration and (2) what role should US courts have in international arbitration? These goals, while they imply a negative connotation in the role that US courts should play in international arbitration, should nevertheless be the working group’s focus.

This is due to the US’s current international arbitration policy of favoring “arbitration as an alternative to sometimes congested, ponderous and inefficient courts.”<sup>240</sup> The pro-arbitration policy was stated in the famous *Mitsubishi Motors* case, where the Supreme Court opined that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of the arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>241</sup>

Further, a pro-arbitration policy should take precedence over a pro-international judicial assistance policy, as promulgated by Congress when it revised § 1782 in the 1960s.<sup>242</sup> The goals of Congress in the 1960s have not been achieved,<sup>243</sup> and in fact, some countries have taken the

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237 Moore, *supra* note 22 at 331.

238 *Ibid.*

239 Klaus Lionnet, “Once Again: Is Discovery of Documents Appropriate in International Arbitration?” in Gerald Aksen & Robert Briner, eds, *Global reflections on international law, commerce and dispute resolution: liber amicorum in honour of Robert Briner* (Paris: ICC Publishing, 2005) 491 at 498–499 (“A further argument against discovery in international arbitration is that the parties expect quick and efficient proceedings. Discovery of documents is however usually an extremely complex, tedious and costly undertaking and, as such, is at odds with the aims of arbitration”).

240 Carter & Chakraborty, *supra* note 25 at 487.

241 *Mitsubishi Motors*, *supra* note 25 at 627.

242 *Application of Malev Hungarian Airlines*, 964 F (2d) 97 at 99 (2d Cir 1992) (the twin goals were: (1) to provide efficient means of assistance in federal courts for litigants involved in international litigation and (2) that foreign courts would follow and provide similar assistance).

243 Cynthia Day Wallace, “‘Extraterritorial’ Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?” (2003) 37:4 *Intl Lawyer* 1055 at 1064–1065 (“With regard to the first goal ... the federal courts clearly have not been able to agree fundamentally on the grounds for permissibility

complete opposite approach and have enacted “blocking statutes” to prevent US-style discovery.<sup>244</sup>

The Supreme Court understands that the US is part of an ever increasingly globalized world and the decisions that it renders reflect this understanding.<sup>245</sup> However, the US Congress has not reflected the same understanding in that it, for the most part, has lagged behind in enacting laws that coincide with the importance of international arbitration in today’s globalized world.

It is fair to say that the climate of international investment and commercial arbitration has changed markedly since § 1782 was last seriously revised. The same can be said for when a working group was last created. In the mid-20<sup>th</sup> century, the working group was called on to “investigate and study existing practices of judicial assistance ... with a view to achieving improvements.”<sup>246</sup> There is no doubt that the Commission created to take on this monumental challenge excelled in its task, and Professor Smit and his team deserve much praise for the key role they played. However, much has changed since then – the existing practices of judicial assistance may not be geared towards the US’s pro-arbitration policy. Neither Professor Smit’s Commission nor Congress could have reasonably foreseen the increase and importance of international arbitration as it exists today.

#### B. The Working Group Should Call on Congress to Expressly Exclude Private Arbitral Tribunals from the Scope of § 1782

US-style discovery does not belong in international arbitration.<sup>247</sup> Importantly, “discovery in an arbitration proceeding is more akin to the limited discovery procedures found in civil law countries.”<sup>248</sup> For example, the International Bar Association’s Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules on Evidence) were created with a few principles in mind, but one in particular that “[e]xpansive American ... discovery is generally inappropriate in international arbitration.”<sup>249</sup> The IBA Rules on Evidence have “gained wide acceptance within the international arbitral community” and were designed to “reflect procedures in use in many different legal systems, and [to] be particularly useful when the parties come from different legal

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of applications. With regard to the second goal ... no such adjustments have materialized. In retrospect, since the scope of evidence-gathering in the United States is well recognized to be far broader than in most other jurisdictions, it is not entirely surprising that other governments did not expedite similar legislation”).

244 See e.g. Art 1 bis of the French blocking statute (*Loi n° 80-539 du 16 juillet 1980 relative à la communication de documents ou renseignements d’ordre économique, commercial ou technique à des personnes physiques ou morales étrangères*, JO 17 July 1980) which makes the exportation of information requested for legal proceedings abroad a criminal act (“It is prohibited for any individual to request, to investigate, or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial, or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as part of such proceedings”, and this applies “subject to treaties or international agreements and laws and regulations” [translated by author]).

245 See e.g. *The Bremen v Zapata OffShore Co*, S Ct 1907 at 1912—1913 (1972).

246 Conway, *supra* note 34 at 555—556, citing Pub L No 85-906, 72 Stat 1743 (1958).

247 Reed & Hancock, *supra* note 26 at 340 (“full US-style discovery, which is tailored specifically to the US system, is not suitable for imposing on other regimes”).

248 Godfrey, *supra* note 6 at 508.

249 Reed & Hancock, *supra* note 26 at 349.

cultures.”<sup>250</sup>

The international law community’s objection to US-style discovery stems from the time and cost involved; but also from the idea that it can be used to perform “fishing expeditions”, which are commonly unacceptable in international arbitration.<sup>251</sup> One of the main perceived benefits of international arbitration is efficiency and cost-effectiveness.<sup>252</sup> In one important respect, this is due to a limited document disclosure procedure in international arbitration.<sup>253</sup> Parties to international arbitration, in many respects, contract for this limited procedure in exchange for relatively more efficient proceedings.<sup>254</sup> Conversely, US-style discovery is “usually an extremely complex, tedious and costly undertaking, which is at odds with the aims of arbitration.”<sup>255</sup>

Many US courts recognize this too in denying to extend § 1782 to private arbitral tribunals. In *National Broadcasting*, the Second Circuit opined that the “popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness – characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.”<sup>256</sup> Moreover, in *Biedermann* the Fifth Circuit reasoned 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.”<sup>257</sup>

Further, US-style discovery is suitable for the US judicial system and was not created with the principles of international arbitration in mind. Document production is a “central feature” of the US litigation process.<sup>258</sup> That is, in “the common law system, discovery of documents is regarded as an indispensable procedural instrument in civil litigation.”<sup>259</sup> This is because common law litigators have been taught to seek the “truth”, which civil law trained lawyers often consider as

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250 International Bar Association, “Foreword” in *IBA Rules on the Taking of Evidence in International Arbitration*, (London: International Bar Association, 2010) at 2.

251 Philipp Habegger, “Document Production – An Overview of Swiss Court and Arbitration Discovery” [2006] Sp Suppl ICC Bull at 29 (“Fishing expeditions or US-style discovery, enabling a party to formulate its allegations and to present its case are thus not permitted”).

252 Fellas, “Using Section 1782”, *supra* note 31 at 394; see also Weekley, *supra* note 229 at 545.

253 Godfrey, *supra* note 6 at 508.

254 *Ibid*, citing *Burton v Bush*, 614 F (2d) 389 at 390 (4th Cir 1980) (“When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural necessities which are normally associated with a formal trial . . . One of these accoutrements is the right to pre-trial discovery.”); see also Massen, *supra* note 74 (“American discovery is more expansive than other nations’ in almost every way, not only giving requesting parties access to significantly more information than is available in civil discovery systems, but also allowing discovery to be taken from nonparties that may have evidence relevant to litigation” at 883); see also Reed & Hancock, *supra* note 26 at 339 (“full-fledged US-style discovery is ‘evil’ if transplanted into international arbitration”).

255 Lionnet, *supra* note 240 at 498–499.

256 *Bear Stearns*, *supra* note 10 at 190–191.

257 *Biedermann International*, *supra* note 10 at 881.

258 Louis B Kimmelman and Dana C MacGrath, “Document Production in the United States” (2006) Special Supplement ICC Bull at 43.

259 Lionnet, *supra* note 240 at 492.

an impossible task and not the goal of litigation.<sup>260</sup> A major part of this “truth” seeking expedition is to gather as much information as possible from as many sources as possible. Moreover, one of the differences of US litigation compared to international arbitration is that in the US, a plaintiff does not need to present much in its complaint. A plaintiff can then use discovery to find new possible claims that it could not have brought without certain evidence. This is a typical fishing expedition.

Conversely, in international arbitration this is usually looked down upon. For example, the ICC has a procedure called the Terms of Reference, which is drafted by the arbitral tribunal, and includes “the parties’ respective claims and relief sought.”<sup>261</sup> In turn, this procedure helps the arbitral tribunal and later enforcing courts understand the scope of the arbitration and provide guidance as to whether the arbitral tribunal has exceeded its mandate.<sup>262</sup>

If parties to an ICC arbitration performed fishing expeditions after the Terms of Reference had been set, any new evidence that would arise as a result thereof may cause one or more parties to seek new causes of action that it would otherwise have been unaware of prior to the Terms of Reference and the document production process. The arbitral tribunal would then be in a difficult situation of either allowing the party or parties to amend their pleadings, which would increase the time and cost of the arbitration, or denying the request for change and risk the party or parties not being heard and a possible set-aside of the award or it not being enforced.

US-style discovery simply does not comport with the principles of international arbitration and few arbitration practitioners are pleased that § 1782 may open the door to the US discovery process.<sup>263</sup> Given that the US discovery process differs in major respects to nearly every other system of evidence gathering, it is obvious that no other country would follow the US in 1964 as it had hoped.<sup>264</sup> For example, “Germany and France, leaders of the civil law tradition, continue to express their opposition toward the US system of discovery.”<sup>265</sup>

Private arbitral tribunals should be excluded from § 1782 because US-style discovery can provide inequalities in an otherwise international arbitration. Distinguished arbitration practitioner, John Fellas, provides an excellent example:

Imagine an international arbitration proceeding between a French company and a US company. The French company, as a party to the proceeding, is an ‘interested person’ for the purposes of section 1782. As such, it could apply directly to the US district court in which the US company is found (for example,

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260 D Brian King and Lise Bosman, “Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide” (2001) 12:1 ICC Bull at 25 (“Common lawyers tend to follow Lord Mustill in seeing discovery as a ‘powerful instrument for justice’”).

261 *ICC Rules 2012*, art 23 (“Terms of Reference”), online: <[www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Arbitration-process/Transmission-of-File,-Terms-of-Reference,-Case-Management-Conference/](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Arbitration-process/Transmission-of-File,-Terms-of-Reference,-Case-Management-Conference/)>.

262 See e.g. *Swedish Arbitration Act* (SFS 1999:116) at section 34(2).

263 Wallace, *supra* note 244 at 1057.

264 Massen, *supra* note 74 at 883.

265 *Ibid* at 885.

where it is headquartered) for an order seeking the pre-hearing depositions of officers or employees of that company as well as the production of documents under the Federal Rules of Civil Procedure. The US, party, however, would not be able to invoke section 1782 to make a parallel application for evidence from the French company because the French company ... does not reside and is not found in the United States. Rather, where the arbitration is pending, the US party would be confined to using the, almost certainly, far narrower procedures for the taking of evidence from the French party authorized by the arbitrators in the proceeding. Thus, the effect of the use of section 1782 in the international arbitration context is to create a disparity of access to evidence: the French party to the proceeding is able to obtain far broader disclosure from its US adversary than the latter is able to obtain from the former.<sup>266</sup>

Moreover, arbitrators will most likely consider the evidence as well, because not doing so could risk the award as being set aside or not enforced. Parties to international arbitration have a fundamental right to a reasonable opportunity to present their case.<sup>267</sup> One way this is achieved is by allowing parties a reasonable opportunity to present evidence in support of its case.<sup>268</sup> Failing to do this could cause the award to be set-aside or not enforced under New York Convention Article V(1)(b): “The party against whom the award is invoked was ... otherwise unable to present his case.”<sup>269</sup> Gary Born has stated that “Article V(1)(b) generally only applies in cases involving very grave denials of basic requirements of procedural fairness, such as ... denial of a reasonable opportunity to present ... evidence.”<sup>270</sup> Given this, arbitral tribunals tend to favor accepting the evidence instead of denying it, which causes inequality among the parties.<sup>271</sup>

Therefore, § 1782(a) should not include private arbitral tribunals, because it goes against the international arbitration principles of cost and efficiency, and may encroach upon the equity between the parties.

### C. However, if the Working Group Thinks Differently, Then Standing to Bring a § 1782 Request Should Be Limited to the Arbitral Tribunal

If private arbitral tribunals are to be included within § 1782(a), then standing to bring such a request should be limited to the arbitral tribunal itself.<sup>272</sup>

<sup>266</sup> Fellas, “Using Section 1782”, *supra* note 31 at 387—88.

<sup>267</sup> See e.g. *ICC Rules 2012* at art 22(4) (“In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case”); *UNCITRAL Arbitration Rules 2010*, at art 17(1) (“... each party is given a reasonable opportunity of presenting its case”).

<sup>268</sup> Gary Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2014) at 2157.

<sup>269</sup> *New York Convention*, *supra* note 91 at Article V(1)(b).

<sup>270</sup> Born, *supra* note 268 at 2157.

<sup>271</sup> Luis A Perez & Frank Cruz-Alvarez, “28 U.S.C. § 1782: The Most Powerful Discovery Weapon in the Hands of a Foreign Litigant” (2009) 5:1 *Florida Intl U L Rev* 177 at 187—188 (“This may result in one-sided discovery in a foreign litigant’s favor. Thus, the rights of a foreign litigant differ from the rights of a U.S. litigant”).

<sup>272</sup> Godfrey, *supra* note 6 at 512—513.

[T]here is a further and more important reason why the use of section 1782 in international arbitration is problematic: the use of section 1782 undermines a central feature of international arbitration, namely, that arbitrators control discovery.<sup>273</sup>

Moreover, putting the discovery process in the hands of the US courts and taking it away from the arbitral tribunal puts the control of document disclosure in a judicial body that either does not fully understand the principles of arbitration as would an arbitral tribunal or is not as familiar with the case as the arbitral tribunal.<sup>274</sup> Taking this role away from an arbitral tribunal also goes against many of the major institutional rules.<sup>275</sup> Other countries recognize this, because “no other country currently entertains [evidentiary requests] without the approval of the arbitral body.”<sup>276</sup> Additionally, it goes against the civil law tradition that evidence gathering is a judicial function, and is in part why the arbitral tribunal in international arbitration controls the document production procedure.<sup>277</sup> Ultimately, with a broad interpretation of “tribunal”, parties who have been denied a request for documents may attempt to bypass the arbitral tribunal and request that such documents be produced through the US judicial system.<sup>278</sup>

Some commentators, even those who believe that §1782(a) includes private arbitral tribunals, consider that the court should wait for an order from the arbitral tribunal prior to granting the request.<sup>279</sup> If this sound principle were to be followed, Congress should re-draft § 1782(a) in a manner that bypasses this step. That is, instead of having the court wait for an arbitral tribunal’s acceptance, an arbitral tribunal should make the request itself, thus impliedly stating its approval of the evidence sought.<sup>280</sup>

Although *Intel* provided that one of the factors court should consider in granting a § 1782 request is the tribunal’s receptivity, the Supreme Court nevertheless failed to provide guidance on the weight of the receptivity or how courts ought to apply it.<sup>281</sup> Moreover, sometimes an arbitral tribunal does not provide guidance to a court over whether it would be receptive to the evidence, as it must consider the equality of the parties in each decision that it makes. Even Professor Smit agreed that an “American court should honor an application under Section 1782 *only if* the application is approved by the arbitral tribunal.”<sup>282</sup>

## VII. CONCLUSION

Since 1964, when § 1782’s revisions were enacted, the statute has been the source of much

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273 Fellas, “Using Section 1782”, *supra* note 31 at 401.

274 *Ibid* at 402.

275 Reed & Hancock, *supra* note 26 at 346—47.

276 Moore, *supra* note 22 at 329.

277 Bomstein & Levitt, *supra* note 33 at 441, n 52.

278 Perez & Cruz-Alvarez, *supra* note 271 at 188.

279 Beale, Lugar, & Schwarz, *supra* note 9 at 97.

280 Newman & Castilla, *supra* note 1 at 68.

281 Weiler, Bray & Bray, *supra* note 28 at 878.

282 Beale, Lugar, & Schwarz, *supra* note 9 at 98, citing Smit, *American Assistance Tribunals*, *supra* note 5 [emphasis added].

confusion – the majority of which surrounds the definition of “tribunal.” Objectively, however, it is difficult to find sufficient Congressional intent to extend § 1782(a) to private arbitral tribunals. The history leading to § 1782’s enactment provides a similar conclusion. Therefore, private arbitral tribunals were not intended by Congress to be included within the definition of “tribunal.”

Nevertheless, even if the definition today of international tribunal would no doubt include private arbitral tribunals, it is unclear whether Congress would have wanted this. International private arbitration and investment arbitration were virtually non-existent at the time § 1782 was enacted. The policies and rationale for replacing the term “court” with “tribunal” did not provide sufficient Congressional discussions over whether this broad replacement should extend to private arbitral tribunals as well. It is very likely that such a broad definition, had it been intended, would have at least provoked a sliver of Congressional discussion. Without knowing whether Congress intended § 1782 to be used in private international arbitration, the policies expressed by Congress when it enacted § 1782 do not provide much guidance. Rather, the only guidance is the limited occasions in which the term “tribunal” was discussed.

This is the principal reason why Congress should create another working group. The issue of imposing US-style discovery procedures in an otherwise international arbitration is paramount. Faced with the questions of whether US-style discovery is appropriate in international arbitration and whether US courts should involve themselves in such arbitrations should lead to the conclusion that private arbitral tribunals should not be within the scope of § 1782(a). Congress should revise § 1782(a) to reflect this understanding.

However, if the working group or Congress think differently, then § 1782(a) should be revised so that only the arbitral tribunal has standing to bring such a request. This comports with the principles of international arbitration, namely that the arbitral tribunal controls the document disclosure process. Further, if courts already look to arbitral tribunals for guidance, why not simply have the requests come directly from the arbitral tribunals themselves? This would cut down on costs and time, while preventing the courts from having to guess whether an arbitral tribunal would want the evidence in the first place.