

**28 U.S.C. § 1782 AS A MEANS OF OBTAINING DISCOVERY IN AID OF  
INTERNATIONAL COMMERCIAL ARBITRATION—APPLICABILITY AND BEST  
PRACTICES**

*The Committee on International Commercial Disputes*

**Introduction**

Section 1782 of Title 28 of the United States Code is the mechanism by which the United States provides assistance to foreign or international tribunals in obtaining evidence.<sup>1</sup> It states, in pertinent part, “*The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .*”<sup>2</sup> This text has led to conflicting decisions and differing views. One such conflict exists over the meaning of the term “foreign or international tribunal” and whether Section 1782 encompasses assistance to foreign private arbitration. The 2004 Supreme Court case *Intel Corporation v. Advanced Micro Devices, Inc.*, along with recent district court cases, revived that debate. This report analyzes the developing jurisprudence and suggests best practices for the application of Section 1782 to international arbitration. It is our opinion that Section 1782 should be available in aid of foreign arbitration. Further, foremost among the best practices that we recommend, we believe that, once the tribunal is constituted, Section 1782 discovery be granted only if the request comes from the arbitrators or with the consent of the arbitrators and that, therefore, district courts consider the source of the request as a very important factor in exercising the discretion granted to them by the statute.

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<sup>1</sup> For a practical guide describing how to make a Section 1782 application, see John Fellas & David Zaslowky, *Obtaining Evidence Located in the U.S. for Use in Foreign Litigation: 28 U.S.C. § 1782*, Practising L. Inst., LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 129–30 (Mar. 2007).

<sup>2</sup> 28 U.S.C. § 1782.

**I. The Application of Section 1782 to International Arbitration – From Birth to *Roz Trading***

**A. The Birth of Section 1782—Statutory Developments in Judicial Assistance from 1855 to 1949**

**1. Section 1782’s Ancestors—the 1855 and 1863 Acts**

The history of Section 1782 begins in 1855,<sup>3</sup> when Congress enacted “An Act to Prevent Mis-Trials in the District and Circuit Courts of the United States, in Certain Cases.” 33 Cong. Ch. 140; 10 Stat. 630 (Mar. 2, 1855). Under Section 2 of that Act, “where letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States,” the circuit courts had power to “designate” a “commissioner” to “compel . . . witnesses to appear and depose in the same manner as to appear and testify in court.” *Id.* § 2. The 1855 Act was apparently enacted in response to a prior opinion by the United States Attorney General, to the effect that United States courts lacked statutory authority to execute a letter rogatory submitted by French judicial officials.<sup>4</sup>

Apparently because of indexing errors, the 1855 Act was “buried in oblivion” and was never applied by the United States circuit courts (which were ignorant of its existence).<sup>5</sup> The Act was supplemented in 1863, when Congress passed a further “Act to facilitate the taking of depositions within the United States, to be used in the Courts of Other Countries, and for other

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<sup>3</sup> We would like to acknowledge the authors of the January 2004 Brief for the United States as Amicus Curiae Supporting Affirmance in *Intel* (filed in the United States Court, January 2004) (“U.S. Amicus Br.”), which gives an excellent overview of the legislative history of Section 1782. Appearing on that brief as counsel for the United States were Paul D. Clement, Peter D. Keisler, Michael R. Dreeben, Gregory G. Katsas, Jeffrey P. Minear, James H. Thessin, Jeffrey D. Kovar, Michael Jay Singer and Sushma Soni.

<sup>4</sup> See 7 Op. Att’y Gen. 56 (1855); Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953) (hereinafter “Jones”). Mr. Jones became the Director of the Commission that drafted the modern version of Section 1782. (See *infra*.)

<sup>5</sup> See Jones, *supra* note 4, 62 Yale L.J. at 540–41; U.S. Amicus Br. 3.

purposes.” 37 Cong. Ch. 95; 12 Stat. 769 (Mar. 3, 1863). Under the 1863 Act,<sup>6</sup> district courts were empowered to receive and execute letters rogatory issued in any money or property suit pending in “any court in any foreign country with which the United States [is] at peace,” and, to that end, to order that witnesses be compelled to appear before a designated “officer or commissioner” to “testify in such suit.” *Id.* § 1. Jurisdiction was conferred on “any district where said witness resides or can be found.” *Id.* However, the scope of the Act was significantly [restricted] by an express requirement that “the government of such foreign country . . . be a party or have an interest” in the money or property suit in question. *Id.* Effectively, therefore, this Act only applied to foreign court actions in which a foreign sovereign had an interest.

## **2. 1948 Legislation Consolidates and Modifies the Previous Laws in the Form of Section 1782**

In 1948, Congress significantly broadened the 1863 Act and related legislation – designated as Section 1782<sup>7</sup>—by eliminating the requirement that a foreign sovereign have an interest in the proceeding in question. *See* Act of June 25, 1948, ch. 646, 1782, 62 Stat. 949.<sup>8</sup> In 1949, Congress further broadened the Act by extending the application of the 1863 Act to any

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<sup>6</sup> In 1877, Congress modified Revised Statutes § 875 to add language “similar to that used in the Act of March 2, 1855, providing assistance for foreign governments in cases in which they were parties or had an interest.” U.S. Amicus Br. 4 n.1 (citing Act of Bef. 27, 1877, ch. 69, 19 Stat. 241). This statute existed alongside Revised Statutes §§ 4071–4073 (1875 ed.), “drawn from part of the 1863 legislation, [which] set out more limited circumstances in which a foreign government could obtain assistance in United States courts.” U.S. Amicus Br. 4 n.1. “These two sets of statutes remained separate until 1948 when they were revised and consolidated at 28 U.S.C. § 1781 *et seq.* (62 Stat. 949).” *In re Letter Rogatory from Justice Ct., Dist. of Montreal, Can.*, 523 F.2d 562, 564 n.5 (6th Cir. 1975).

<sup>7</sup> From 1948 on, the 1855 and 1863 Acts, and revised statutes modeled thereon, were blended into one consolidated and revised statute (hereinafter “Section 1782”). *See supra* note 2; *see also In re Letter Rogatory*, 523 F.2d at 564 n.5.

<sup>8</sup> For a discussion of this expansion, *see* Daniel A. Losk, Note, *Section 1782(a) After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035, 1040–41 (2005).

“judicial proceeding.” Act of May 24, 1949, ch. 139, 93, 63 Stat. 103. Previously, the Act had allowed assistance only to a “civil action” involving money or property.

### 3. Another “Strand” Evolves—the 1930 “I’m Alone” Legislation and its Progeny, Permitting Discovery in Aid of “International Tribunals”

The 1948 version of Section 1782 enabled discovery to be obtained in aid of litigation in foreign courts. At the same time, however, a different “strand” of legislation was evolving,<sup>9</sup> which centered around the activities of “international tribunals.”

During the 1920s, the United States and Canada agreed to submit to arbitration before an international “Claims Commission” a then hotly contested international dispute between those two countries—known as the “*I’m Alone*” case.<sup>10</sup> In 1930, to facilitate the taking of evidence in that case, Congress passed a law enabling any member of a tribunal or commission to issue subpoenas. The law provided, in pertinent part:

1. That whenever any claim in which the United States or any of its nationals is interested is pending before an international tribunal or commission, established pursuant to an agreement

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<sup>9</sup> See *In re NBC*, No. M-77, 1998 U.S. Dist. LEXIS 385, at \*12–13 (S.D.N.Y. Jan. 16, 1998) (“*NBC (SDNY)*”) (noting the two separate “strands” of legislation culminating in the modern version of Section 1782), *aff’d*, 165 F.3d 184 (2d Cir. 1999); see also Scott R. Boesel, Note, *Arbitration Bodies Should be Considered Tribunals Under § 1782: An Analysis of NBC v. Bear Stearns & Co.*, 63 Alb. L. Rev. 637 (1999) (discussing legislative history); see also Hans Smit, *Assistance Rendered By the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264, 1264–66 (1962) (also discussing legislative history and background).

<sup>10</sup> See *id.* at 1264. The “*I’m Alone*” case was a prohibition-era controversy arising out of the sinking in 1924, by the U.S. Coast Guard, of a Canadian-flagged ship (the “*I’m Alone*”) that was allegedly attempting to smuggle liquor into the United States. See *id.* The proceeding was convened pursuant to a January 23, 1924 Convention between the United Kingdom and the United States “respecting the Regulation of the Liquor Traffic.” See [http://www.lexum.umontreal.ca/ca\\_us/en/cus.1924.509.en.html](http://www.lexum.umontreal.ca/ca_us/en/cus.1924.509.en.html). Article IV of that Convention provided for the submission of any British claims to a “Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910.” Significantly for present purposes, the 1924 treaty also referred to this “Claims Commission” as a “tribunal.” The ensuing award of this tribunal created important precedent on the right of a state’s vessels to engage in “hot pursuit” of a suspected felon, even if this impinged on another state’s sovereign territory. See *I’m Alone (Canada v. United States)*, 3 U.N. Rep. Int’l Arb. Awards 1609 (1933), 29 AM. J. INT’L L. 326.

between the United States and any foreign government or governments, each member of such tribunal or commission, or the clerk or a secretary thereof, shall have authority to administer oaths in all proceedings before the tribunal or commission; and every person knowingly and willfully swearing or affirming falsely in any such proceedings, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice.

2. Any such international tribunal or commission shall have power to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it. Any member of the tribunal or commission may sign subpoenas. . . .

4. To afford such international tribunal or commission needed facilities for the disposition of cases pending therein said tribunal or commission is authorized and empowered to appoint competent persons, to be named as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and such orders as the tribunal or commission may make in the particular case, and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence. Either party to the proceeding before the tribunal or commission may appear before the commissioner by attorney, produce evidence, and examine witnesses. Subpoenas for witnesses or for the production of testimony before the commissioner may issue out of the tribunal or commission by the clerk thereof and shall be served by a United States marshal in any judicial district in which they are directed. Subpoenas issued by such tribunal or commission requiring the attendance of witnesses in order to be examined before any person commissioned to take testimony therein shall have the same force as if issued from a district court and compliance therewith shall be compelled under such rules and orders as the tribunal or commission shall establish. Any person appointed as commissioner may be removed at the pleasure of the tribunal or commission by which he is appointed.

46 Stat. 1005 (1930).<sup>11</sup>

The legislative history indicates that the 1930 Act was intended to assist present and future international arbitral tribunals such as the *I'm Alone* tribunal. In a letter to Congress advocating passage of the bill, then Secretary of State Stimson described the object of what would become the 1930 Act as follows: “As occasions doubtless will arise in the future when it will be desirable to adopt a similar course of procedure in other arbitration cases, the language of the draft bill has been made general, so that its provisions may be made use of in subsequent arbitral proceedings to which the United States is a party.”<sup>12</sup> In a similar vein, the Senate Judiciary Committee found that the proposed Act would be of utility to “arbitral tribunal[s].”<sup>13</sup>

In the early 1930s, a further controversy arose in connection with proceedings before the U.S.-German Mixed Claims Commission.<sup>14</sup> During the late 1920s and early 1930s, this Mixed Claims Commission considered claims against Germany brought by U.S. nationals, arising out of the 1916 “Black Tom” explosion at Liberty Island, New Jersey, which (according to the claimants) had been caused by German agents who had infiltrated the New York area. During the initial proceedings, a conflict arose when the American Agent attempted to compel the attendance of certain witnesses, sparking objection by the German Agent. The Commission

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<sup>11</sup> Act of July 3, 1930. *See also* *NBC (SDNY)*, 1998 U.S. Dist. LEXIS 385, *supra* note 9, at \*12–13; Smit, *supra* note 9, at 1264.

<sup>12</sup> Letter from Secretary of State Henry L. Stimson to the Honorable George W. Norris, Chairman of the Judiciary Committee of the United States Senate, 72 Cong. Rec. 1044 (1929).

<sup>13</sup> *See* Report submitted by the Senate Committee on the Judiciary, indicating the purpose of the bill to operate “in such cases as the *I'm Alone* in which necessary witnesses might not be disposed to appear voluntarily on the invitation or request of the *commission or arbitral tribunal* to which it has been or may be referred.” S. Rep. No. 246, 71st Cong., 2d Sess. at 1 (Jan. 6, 1930) (emphasis added).

<sup>14</sup> The U.S.-German Mixed Claims Commission was established pursuant to an August 10, 1922 agreement between Germany and the United States, made in order to resolve reparations claims arising out of World War I. *See* 42 Stat. 2200 (1922). Pursuant to that Agreement a Mixed Claims Commission was to meet in Washington, D.C. and be comprised of two U.S. and German commissioners, plus a third umpire. *See id.*, Arts. II–III.

held that the 1930 Act was inapplicable because it increased the Commission's powers beyond those agreed upon in the enabling U.S.-German treaty.<sup>15</sup>

In 1933, at a later phase of the "Black Tom" proceedings,<sup>16</sup> Congress amended the 1930 Act, redirecting the subpoena power away from the treaty-bound Commission to the American agent. The 1933 amendment created a "present and future remedy" allowing American agents prosecuting claims on behalf of United States citizens in an "international tribunal," such as the Mixed-Claims Commission, to apply to United States courts for the administration of discovery assistance:<sup>17</sup>

SEC. 5. That the agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission.

SEC. 6. That any United States district court to which such application shall be made shall have authority to issue or cause to be issued such subpoenas upon the same terms as are applicable to the issuance of subpoenas in suits pending in the United States district court, and the clerk thereof shall have authority to administer oaths respecting testimony given therein, and the marshal thereof shall serve such subpoenas upon the person or persons to whom they are directed. The hearing of witnesses and

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<sup>15</sup> Sandifer, *Evidence Before International Tribunals* 211 (1939).

<sup>16</sup> In 1930, the claims before the Commission were dismissed by the Mixed-Claims Commission for lack of evidence, but granted re-hearing in 1932 upon a finding by United States Supreme Court Justice Owen Roberts (acting as arbiter/umpire based in Washington, D.C.) that the previous award had been obtained by fraud and false evidence. See *Lehigh Valley R.R. (U.S. v. Germany)*, 8 R.I.A.A. 84 (Mixed Cl. Comm'n 1930); *Lehigh Valley R.R. (U.S. v. F.R.G.)*, 8 R.I.A.A. 104 (Mixed Cl. Comm'n 1932) (rehearing granted).

<sup>17</sup> S. Rep. No. 88, 73d Cong., 1st Sess., at 1-2 (May 22, 1933).

taking of their testimony and the production of books and papers pursuant to such subpoenas shall be before the United States district court for that district or before a commissioner or referee appointed by it for the taking of such testimony, and the examination may be oral or upon written interrogatories and may be conducted by the agent of the United States to the agent or agents of the opposing government or governments concerned in such proceedings who shall have the right to be present in person or by representative and to examine or cross-examine such witnesses at such hearing. A certified transcript of such testimony and any proceedings arising out of the issuance of such subpoenas shall be forwarded by the clerk of the district court to the agent of the United States and also to the agent or agents of the opposing government or governments, without cost.

48 Stat. 117 (1933).<sup>18</sup>

It can therefore be seen that Congress intended for this strand of legislation to confer broad evidentiary powers on any “international tribunal” in which the United States participated as a party, to compensate for the fact that such tribunals were not part of the U.S. domestic judicial system. Notably, the 1933 amendment empowered a litigant to apply directly to district courts for discovery assistance, thus anticipating the later discovery structure of Section 1782. The Act of July 3, 1930, along with its 1933 amendment, was codified in §§ 270–270g of Title 22 of the United States Code, and was repealed and replaced with the 1964 amendments to § 1782.<sup>19</sup>

**B. The Work of the 1958 Commission on International Rules of Judicial Procedure**

In the late 1950s, Congress called for a complete overhaul of Section 1782. The United States Amicus Brief in *Intel* relates this history:

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<sup>18</sup> See also *NBC (SDNY)*, 1998 U.S. Dist. LEXIS 385, *supra* note 9, at \*13; Smit, *supra* note 9, at 1264. Ultimately, the “Black Tom” claims by the U.S. claimants were successful. See *Lehigh Valley R.R. (U.S. v. Germany)*, 8 R.I.A.A. 225 (Mixed Cl. Comm’n 1939) (granting claimants’ claims and awarding reparations against Germany based on the “Black Tom” sabotage).

<sup>19</sup> Sections 270–270g were repealed by Act of Oct. 3, 1964, Pub. L. 88–619, § 3. Section 9(a) of Pub. L. 88–619 contained the 1964 revisions to 28 U.S.C. § 1782.

In 1958, Congress concluded that “[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resulting disputes, leading sometimes to litigation, has pointedly demonstrated the need for comprehensive study of the extent to which international judicial assistance can be obtained.” S. Rep. No. 2392, 85<sup>th</sup> Cong., 2d Sess. 3 (1958). Congress therefore created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to “existing practices of judicial assistance and cooperation between the United States and foreign countries.” Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743.

. . . Congress charged the Commission with, inter alia, drafting legislation to render “more readily ascertainable, efficient, economical, and expeditious” those “procedures necessary or incidental to the conduct and settlement of litigation in State and Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law,” and to accomplish the same result for “the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies.” § 2, 72 Stat. 995, 997.

U.S. Amicus Br. 4–5 & n.9.

The Commission’s work<sup>20</sup> extended over a period of four years, and was conducted with the assistance of the Columbia Law School Project.<sup>21</sup> The Commission rendered a fourth and final report in 1963. In that report, “[t]he Commission drafted and recommended adoption of (1) amendments to the Federal Rules of Civil and Criminal Procedure, (2)

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<sup>20</sup> The Commission comprised “a superlative collection of international legal scholars, indicating an intentional decision to entrust the investigation and drafting of legislation essential to the improvement of international judicial assistance to experts in the field, who were selected by Congress.” Amy Jeanne Conway, *Note: In re Request for Judicial Assistance from the Federative Republic of Brazil: A Blow to International Judicial Assistance*, 41 *Cath. U. L. Rev.* 545, 555 n.71 (1992).

<sup>21</sup> See *Smit*, *supra* note 9, at 1264–65 n.7.

amendments to sections of the United States Code, and (3) a Uniform Interstate and International Procedure Act, to be enacted by individual States.”<sup>22</sup>

**C. 1964 Legislative Overhaul of Section 1782—Substitution of “Court” with “Foreign or International Tribunal”**

In 1964, acting on the recommendations of the Commission, Congress “completely revised” Section 1782(a),<sup>23</sup> substantially expanding the judicial assistance available to foreign litigants. The revision blended the concept of assistance to judicial proceedings available in the 1948 Act with the concept of discovery rights conferred directly upon parties to an international tribunal or commission under Sections 270 through 270g. As the legislative history of the 1964 revisions explicitly states, Section 1782 “replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g.”<sup>24</sup>

As the reporter of the Commission recounts, the purpose of the revision was “to liberalize in significant measure the assistance rendered by American courts to foreign and international tribunals.”<sup>25</sup> The statute’s “twin aims” were to provide “equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects . . . [and to] invite foreign countries similarly to adjust their procedures.”<sup>26</sup> Reflecting that same policy, the House Committee considering the proposed legislation remarked that:

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<sup>22</sup> U.S. Amicus Br. 4 (citing Fourth Annual Report of the Commission on International Rules of Judicial Procedures, H.R. Doc. No. 88, 88th Cong., 1st Sess. at 2 (1963)). *See also* Pub. L. No. 88-619, § 9, 78 Stat. 997; *see* H.R. 9435, 88th Cong., 2d Sess. (1964), *reprinted in* 110 Cong. Rec. 596–98, 22, 857 (1964)).

<sup>23</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004).

<sup>24</sup> This language is found in both the 1963 Report of the Commission on International Rules of Judicial Procedure (H.R. Doc. No. 88-88, at 45 (1963)), as well as in the 1964 House and Senate Judiciary Committee Reports (“the Committee Reports”) (S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).

<sup>25</sup> Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT’L ARB. 153, 153 (1997).

<sup>26</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793.

Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement 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.

H.R. Rep. No. 1052, 88th Cong., 1st Sess. at 19 (1963).

The full revision of Section 1782 was effected through the strategic replacement of particular terms within the statute. Specifically, Congress replaced the word “court” with “tribunal,” and extended assistance from “any judicial proceeding pending *in any court in a foreign country*”<sup>27</sup> to the broader “proceeding *in a foreign or international tribunal*.”<sup>28</sup> There are two key sources of legislative history in interpreting these revisions. A 1963 report by the Commission on International Rules of Judicial Procedure (“1963 Commission Report”)<sup>29</sup> reflects the recommendations of a conference of academic, private and government experts for the proposed revision of 1782, which “clarifies and *liberalizes* existing United States procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States.”<sup>30</sup> The later report of the Senate Judiciary Committee (“the Senate Report”),<sup>31</sup> which contains substantially the same text, provides the official legislative history of the bill as it was approved by Congress in 1964.

The Senate Report makes clear that the newly introduced language “foreign or international tribunal” includes “administrative and quasi-judicial proceedings,” and is “not

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<sup>27</sup> Precursor of Section 1782 (emphasis added).

<sup>28</sup> 28 U.S.C. § 1782(a) (emphasis added).

<sup>29</sup> H.R. Doc. No. 88-88 (1963).

<sup>30</sup> *Id.* at 45 (emphasis added).

<sup>31</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

confined to proceedings before conventional courts.”<sup>32</sup> The 1963 Commission Report clarified in its explanatory notes that:

“[t]he word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts.<sup>33</sup> In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.”<sup>34</sup>

As Professor Hans Smit recently recounted, “[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>35</sup> This recollection is echoed in Professor Smit’s 1965 remark that:

The term tribunal encompasses all bodies that have adjudicatory power, and is intended to include not only civil, criminal, and administrative courts (whether sitting as a panel or composed of a single judge), but also arbitral tribunals or single arbitrators. International tribunals are specifically named in order that in these times of increasing adjudication on the international level an international adjudicatory body should be granted the same assistance as tribunals of individual countries.<sup>36</sup>

The 1964 reforms emphasized that district courts would have substantial discretion over the application of 1782. In discussing subsection (a) of 1782, the Senate Report

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<sup>32</sup> S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788. *Intel*, 542 U.S. *supra* note 23, at 249 (quoting S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788) (“Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before conventional courts.’”); see also Fellas & Zaslowsky, *supra* note 1, at 136 (“The word ‘tribunal’ was substituted for ‘court’ in the 1964 amendments in order to ‘make it clear that assistance is not confined to proceedings before conventional courts.’”) (quoting S. Rep. 88-1580 (1964), 1964 U.S.C.C.A.N. 3782, 3788).

<sup>33</sup> Historical and Explanatory Notes to the proposed bill “To Improve Judicial Procedures for Serving Documents, Obtaining Evidence and Proving Documents in Litigation with International Aspects” (note to subsection (a)), at 45.

<sup>34</sup> It continues, “Subsection (a) therefore provides the possibility of United States judicial assistance in connection with all such proceedings.” *Id.*

<sup>35</sup> Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1, 5 (1998).

<sup>36</sup> Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1021 (1965) (interpreting the term “tribunal”).

emphasizes that, “[i]n exercising its discretionary power, the court may take into account . . . the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.”<sup>37</sup> This same emphasis on discretion can be seen in the 1963 Commission Report’s notes on the proposed revision to 1782.<sup>38</sup> It is against this backdrop that the issue has arisen of how far the meaning of “foreign or international tribunal” extends, including whether that term encompasses a private commercial arbitration tribunal sitting abroad.<sup>39</sup>

#### **D. Related Legislation**

Section 1782 was part of a broader package of legislative reforms. As the U.S.

Amicus Brief in *Intel* notes:

The legislation to improve international processes included, *inter alia*, amendments to 28 U.S.C. 1781(b), which authorizes the State Department to receive, and return after execution, both foreign and domestic letters rogatory and similar requests, while making clear that other means of transmittal continue to be available. See § 8, 78 Stat. 996. The legislation also included the new provisions of 28 U.S.C. 1696, which gives district courts discretionary authority to grant or deny requests for assistance in effecting service of documents issued in connection with proceedings in foreign or international tribunals, and 28 U.S.C. 1783(a), which gives district

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<sup>37</sup> See *supra* note 31. In all, conjugates of the word “discretion” appear five times in the discussion of subsection (a). For a discussion of the role of discretion in the legislative history of 1782, see Barry H. Garfinkel & Yuval M. Miller, *The Supreme Court’s Reasoning in Intel Calls Into Question Circuit Court Rulings on Inapplicability of 28 U.S.C. Section 1782 to International Commercial Arbitration*, MEALEY’S INT’L ARB. REP. (Aug. 2004).

<sup>38</sup> See *supra* note 33.

<sup>39</sup> See generally Steven A. Hammond, *The Art of the Missed Opportunity: How U.S. Courts Declined to Assist Private Arbitral Tribunals under the U.S. Law Authorizing Discovery in Aid of Foreign and International Proceedings*, 17 J. INT’L ARB. 131 (2000) (determining that it does and should include in international arbitration tribunal); *Discovery Assistance and “Private Foreign Arbitrations”: The Second and Fifth Circuit Rule*, 10 WORLD ARB. & MEDIATION REP. 119 (1999) (discussing the meaning of “tribunal” in light of various federal court cases and finding that private arbitral tribunals should be included); Review of Court Decisions, *Meaning of “Tribunal”*, 53 MAY DISP. RESOL. J. 91, 91–92 (1998) (surveying the court’s reasoning in *In re Application of Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997), which discusses the meaning of “tribunal” in light of its common meaning and the legislative intent of the statute).

courts discretion, under certain circumstances, to issue a subpoena requiring the appearance of a United States national or resident who is in a foreign country. See §§ 4, 10, 78 Stat. 995, 997.

*Id.* at 5 n.4.

#### **E. 1996 Reforms**

Congress most recently amended Sub-section 1782(a) in 1996; after the term “foreign or international tribunal,” it added the language “including criminal investigations conducted before formal accusation.” National Defense Authorization Act For Fiscal Year 1996, Pub. L. 104-106, § 1342(b), 110 Stat. 186 (1996).

#### **F. The Growth of Section 1782 Outside the Arbitration Context**

Section 1782, as now enacted, provides:

*Assistance to foreign and international tribunals and to litigants before such tribunals*

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter [28 USCS §§ 1781 et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Section 1782 has come to be a fruitful source of discovery for foreign litigants. A number of significant —indeed unique —features of Section 1782 have come to light in the case law. It has been held, for instance, that, because a Section 1782 application need only be made by an “interested party,” an applicant need not be a named litigant or party to the proceeding before the foreign or international tribunal; as the Supreme Court stated in *Intel*, the term “interested party” “plainly reaches beyond the universe of persons designated ‘litigant.’”<sup>40</sup> Furthermore, Section 1782 applications may be made on an *ex parte* basis by a party (or non-party) directly to a district court, without the need to notify in advance the party from whom discovery is sought or the adverse party in the foreign proceeding.<sup>41</sup>

Moreover, “Section 1782(a) does not limit the provision of judicial assistance to ‘pending’ adjudicative proceedings,”<sup>42</sup> meaning that an “interested person” may utilize Section 1782(a) to seek what is, in essence, pre-action discovery. And in seeking discovery, a Section 1782(a) applicant is not constrained by the fact that the sought-after material or deposition testimony would not have been discoverable, had the proceedings been located in the “foreign

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<sup>40</sup> *Intel*, 542 U.S., *supra* note 23, at 258.

<sup>41</sup> *See, e.g., In re Imanagement Servs. Ltd.*, No. Misc. 05-89, 2005 U.S. Dist. LEXIS 17025 (E.D.N.Y. Aug. 16, 2005); *In re Request for Assistance from Ministry of Legal Affairs*, 848 F.2d 1151 (11th Cir. 1989), *cert. denied*, 488 U.S. 1005 (1989). The court may, however, exercise its discretion to require that notice be given to interested parties prior to granting a section 1782 request: *See also In re Merck & Co.*, 197 F.R.D. 267, 271 (M.D.N.C. 2000).

<sup>42</sup> *Intel*, 542 U.S., *supra* note 23, at 258.

tribunal” to which the application relates.<sup>43</sup> Nor may Section 1782 relief be precluded merely because the foreign country does not have reciprocal arrangements with the United States.<sup>44</sup>

Several limitations on Section 1782 have been recognized. For instance, it has been held that Section 1782 does not entitle an applicant to obtain documents outside of the United States.<sup>45</sup> Section 1782 only enables the discovery of evidence for use in an adjudicative proceeding. The Supreme Court has clarified, however, that the proceeding need neither be imminent nor pending for discovery assistance to be available. Rather, courts may make evidence available to administrative bodies as long as a “dispositive ruling . . . , reviewable by the . . . courts, be within reasonable contemplation.”<sup>46</sup> Evidence thus may be submitted to an investigatory body that will not act in an objective adjudicative function, so long as the evidence will eventually be used in a future adjudicatory proceeding.<sup>47</sup>

#### **G. Pre-*Intel* Case law Disfavoring the Application of Section 1782 to International Arbitration**

Until the Supreme Court decision in June 2004, U.S. courts generally refused to extend Section 1782(a) to international arbitration.<sup>48</sup> Notably, the Second and Fifth Circuits both

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<sup>43</sup> *Id.* at 260.

<sup>44</sup> *In re Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), *cert. denied*, 506 U.S. 861 (1992).

<sup>45</sup> *See In re Sarrio S.A.*, No. M 9-372, 1995 U.S. Dist. LEXIS 14822, at \*7 (S.D.N.Y. Oct. 10, 1995) (relying on the affirmation of Professor Smit, who urged a “restrictive interpretation” of Section 1782 insofar as overseas documents were concerned, and holding that “[t]he Court is unwilling to hold that Section 1782 requires production of evidence located in Spain”); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45 (D.D.C. 2005); *but see In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 U.S. Dist. LEXIS 94161, at \*16 (S.D.N.Y. Dec. 29, 2006) (finding that it is within a district court’s discretion under Section 1782 to compel the production of documents located abroad).

<sup>46</sup> *Intel*, 542 U.S., *supra* note 23, at 259.

<sup>47</sup> *See id.*

<sup>48</sup> *See, e.g., In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994) (holding that “foreign or international tribunal[s]” included private international arbitral tribunals but declining to extend Section 1782 assistance where the arbitrators had not indicated their view on whether it was appropriate in the proceeding in question); *In re Medway Power Ltd.*, 985 F. Supp. 402, 403

interpreted Section 1782(a) as excluding judicial assistance to private arbitration, relying on similar arguments.

Reading Section 1782(a)'s statutory language and legislative history to exclude any reference to arbitration, in addition to relying on some policy arguments against extending 1782(a) assistance to arbitration, the Second and Fifth Circuits held in *NBC v. Bear Stearns & Co.*<sup>49</sup> and *Republic of Kazakhstan v. Biedermann International*<sup>50</sup> that federal district courts are barred from extending Section 1782(a) assistance to arbitral tribunals.

Finding the meaning of a “foreign or international tribunal” to be “sufficiently ambiguous” that they could not conclude whether the plain language of the 1964 revision included arbitral panels, both courts turned to legislative history for guidance.<sup>51</sup>

In *NBC*, a party to an International Chamber of Commerce arbitration in Mexico City petitioned a federal court in New York to permit discovery from New York-based third parties in furtherance of the Mexican proceedings. The Second Circuit upheld the district court's conclusion that a tribunal sitting in Mexico City in a private arbitration proceeding was not a

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(S.D.N.Y. 1997) (“I find that an arbitration is not a tribunal for the purposes of Section 1782”); *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (holding that private international arbitration falls outside Section 1782's coverage); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) (same). In *Quijada v. Unifrutti of Am. Inc.*, No. 2760 April Term, 1989, 1991 Pa. Dist & Cnty. Dec. LEXIS 155 (C.P. Ct. Phila. County May 17, 1991), however, a Pennsylvania state court dealt with an application, pursuant to its state law analog of Section 1782, to render judicial assistance in aid of a Chilean arbitration tribunal. *See id.* at \*4–14. Although the court initially declined that application on discretionary grounds, it noted that “chances [were] good that a Chilean arbitrator is the functional equivalent of a ‘foreign tribunal’” for purposes of the state statute. *See id.* at \*5. Ultimately, the issue was mooted when the Chilean Supreme Court issued letters rogatory requesting that the Pennsylvania state court render judicial assistance to the Chilean arbitration. *See id.* at \*17–22.

<sup>49</sup> *See NBC*, 165 F.3d 184, *supra* note 48.

<sup>50</sup> *Biedermann*, 168 F.3d 880, *supra* note 48.

<sup>51</sup> *Id.*; *NBC*, 165 F.3d, *supra* note 48 at 188.

“foreign or international tribunal” under Section 1782.<sup>52</sup> First, the Second Circuit determined that the plain meaning of the phrase “foreign or international tribunal” was ambiguous. The Second Circuit relied on the 1963 congressional commission report to determine that the drafters intended “tribunals” to extend only to “governmental entities . . . acting as state instrumentalities or with the authority of the state.”<sup>53</sup> Moreover, the court did not question the district court’s finding that the Mexican tribunal was not an “international tribunal” because it was not an “intergovernmental tribunal.”<sup>54</sup> Upon finding that the legislative intent was to confine the scope of 1782(a) assistance to tribunals established by governments, the Second Circuit determined that the statute’s silence regarding arbitral tribunals indicated that Congress did not intend an extension of the statute in this way.<sup>55</sup>

In *Biedermann*, a sovereign state party to a private arbitration pending in Sweden under the Stockholm arbitration rules sought discovery in aid of the Swedish proceedings from a third party in Texas. Like the Second Circuit, the Fifth Circuit determined that the phrase

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<sup>52</sup> See *NBC*, 165 F.3d, *supra* note 48, at 185. The Second Circuit upheld the finding of the district court in *In re NBC* that Section 1782 does not apply to “private commercial arbitration.” No. M-77, 1998 U.S. Dist. LEXIS 385, at \*9-10 (S.D.N.Y. Jan. 16, 1998), *aff’d*, 165 F.3d 184 (2d Cir. 1999). In reaching this conclusion, the district court relied on the reasoning of another S.D.N.Y. decision. See *In re Application of Medway Power Ltd*, 985 F. Supp. 402 (S.D.N.Y. 1997). In *Medway*, Medway Power Limited sought an order under Section 1782 compelling third-party discovery from General Electric for use in a United Kingdom arbitration. The court considered whether private arbitration constitutes a “proceeding in a foreign or international tribunal.” First, it determined that the plain meaning of “tribunal” generally did not include private arbitration, according to a Webster’s dictionary definition. *Id.* at 403. Second, it surveyed the legislative history of the statute, determining that the 1964 revision reflected a legislative intent to extend Section 1782 assistance to “foreign governmental agencies exercising a judicial or quasi-judicial function.” *Id.* at 404. It also noted that the legislative history was silent on private arbitrations specifically. *Id.* at 404. Thus, the court denied Section 1782 assistance.

<sup>53</sup> *NBC*, 165 F.3d, *supra* note 48, at 189. Notably, this intention is not expressly found in the text of the 1963 Commission Report; rather, the Second Circuit inferred this purpose from the “absence of any reference to private dispute resolution proceedings such as arbitration.” *Id.*

<sup>54</sup> *Id.* at 186, 191.

<sup>55</sup> *Id.* at 190.

“foreign or international tribunal” was “ambiguous,”<sup>56</sup> and purported to seek further guidance in the 1963 Commission Report. Instead of relying, however, on the 1964 Senate Report or the language in the 1963 Commission Report expressing the scope of the revision of 1782, the Fifth Circuit relied primarily on the absence of reference to private commercial arbitrations in the legislative history to determine that “tribunal” was not intended to cover private international tribunals.

**H. *Intel: The United States Supreme Court Considers the Meaning of the Term “Tribunal”***

The *NBC* and *Biedermann* decisions did not “effectively [sound] the death of 1782(a) as a tool for private, international arbitration,”<sup>57</sup> as some believed subsequent to those decisions. While the decisions remain legally binding in the Second and Fifth Circuits, the U.S. Supreme Court’s ruling in *Intel v. Advanced Micro Devices, Inc.*, decided in 2004, liberalized Section 1782(a), thus casting doubt upon the correctness of *NBC* and *Biedermann*.<sup>58</sup>

In *Intel*, Advanced Micro Devices, Inc. (“AMD”) filed an antitrust complaint against Intel Corporation with the European Community’s Directorate General for Competition (the “Directorate General”), an administrative body.<sup>59</sup> In pursuit of that grievance, AMD sought an order from the District Court for the Northern District of California, directing Intel Corporation to produce documents for discovery that Intel had previously produced for discovery in a private antitrust suit in an Alabama federal court.<sup>60</sup> At first instance, the district court

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<sup>56</sup> *Biedermann*, 168 F.3d, *supra* note 48, at 881 (“As the Second Circuit observed . . . the meaning of ‘foreign or international tribunal’ is ambiguous and must be construed in light of the background and purpose of the statute.”).

<sup>57</sup> Thurston K. Cromwell, Note, *The Role of Federal Courts in Assisting International Arbitration*, J. DISP. RESOL. 177, 184 (2000).

<sup>58</sup> Garfinkel & Miller, *supra* note 37, at 25 (noting that “*Intel* calls into question the continued validity of the Second and Fifth Circuit opinions”).

<sup>59</sup> *Id.* at 246.

<sup>60</sup> *Id.* at 250–51.

upheld Intel’s objection to this demand, holding that Section 1782 did not apply to the proceeding before the Directorate General. However, the United States Court of Appeals for the Ninth Circuit reversed that determination and remanded the case, instructing the District Court to rule on the merits of AMD’s application.

On appeal, the United States Supreme Court agreed with the Ninth Circuit, holding that the Directorate General was a “foreign or international tribunal” within the meaning of Section 1782. In a majority opinion authored by Justice Ginsburg, the Supreme Court extended Section 1782(a)’s application to non-judicial bodies, holding that its reference to “foreign or international tribunals” extended to the Directorate General.<sup>61</sup>

In reaching its decision, the Supreme Court began its analysis with the text of Section 1782: “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.”<sup>62</sup>

Although *Intel* provided an expansive reading of Section 1782 and eliminated some limitations lower courts had previously read into the statute, it did not explicitly address whether international arbitral tribunals may benefit from Section 1782(a) assistance. Nevertheless, in addition to referring to the legislative history of Section 1782, Justice Ginsburg specifically quoted the 1965 article by Professor Smit, stating that, as used in the text of Section 1782, “the term ‘tribunal’ . . . includes . . . arbitral tribunals.”<sup>63</sup> Thus, notwithstanding *NBC* and

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<sup>61</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249, 267 (2004).

<sup>62</sup> 28 U.S.C. § 1782.

<sup>63</sup> *Intel*, 542 U.S., *supra* note 61, at 258 (“[T]he term “tribunal” . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies.”) (emphasis added) (alterations in original) (quoting Hans Smit, *International Litigation*, *supra* note 36, 1026–27 & nn.71–73 (1965)).

*Biedermann*,<sup>64</sup> the above-quoted language in *Intel* leaves open, and arguably supports, the argument that the term “tribunal” includes arbitral tribunals.<sup>65</sup>

**I. Post-*Intel* Case Law Concluding that the Phrase “Foreign or International Tribunal” Includes a Foreign Arbitration Tribunal**

Since *Intel*, some courts have interpreted Section 1782 as applying to international arbitration.<sup>66</sup> One of those decisions has expressly held that *NBC* has been overruled by *Intel*.

In *Oxus Gold*, a district judge of the United States District Court for the District of New Jersey affirmed a magistrate judge’s ruling granting a Section 1782 application seeking discovery in aid of an international investor-versus-state arbitration being conducted pursuant to a bilateral investment treaty (“BIT”).<sup>67</sup> The applicant was Oxus Gold, an international mining group based in the United Kingdom. Oxus Gold was embroiled in a London-based BIT arbitration against the Kyrgyz Republic, with which Oxus Gold had jointly created a company that was granted a license to develop a gold deposit in Kyrgyzstan.<sup>68</sup> The Kyrgyz Republic later annulled the license, and this decision was challenged and upheld in the Kyrgyz courts.<sup>69</sup> In response, Oxus Gold initiated an *ad hoc* international arbitration against Kyrgyzstan pursuant to the UNCITRAL rules, as provided for in the UK-Kyrgyz BIT. In that proceeding, Oxus Gold claimed compensation for the alleged violation of its investment rights under the UK-Kyrgyz

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<sup>64</sup> See Losk, *supra* note 8, at 1028.

<sup>65</sup> See John Fellas, Outside Counsel, *The U.S. Supreme Court Rules on Section 1782*, N.Y.L.J., Aug. 18, 2004, at 3; see generally Lawrence W. Newman & David Zaslowsky, International Litigation, “*Intel*,” § 1702: *Discovery in International Arbitration*, N.Y.L.J., Jan. 29, 2007, at 3; *In re Application of Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006); Fellas & Zaslowsky, *supra* note 1, at 138.

<sup>66</sup> See *In re Oxus Gold PLC*, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

<sup>67</sup> *In re Oxus Gold PLC*, Misc. No. 06-82, 2007 WL 1037387, at \*6 (D.N.J. Apr. 2, 2007).

<sup>68</sup> *In re Oxus Gold*, 2006 WL 2927615, *supra* note 66, at \*1.

<sup>69</sup> *Id.* at \*1–2.

BIT. It concurrently commenced a Section 1782 proceeding, seeking to issue a subpoena to a third party for production of various documents.<sup>70</sup>

This application prompted an inquiry as to whether the London BIT arbitration, conducted under UNCITRAL rules, was “a proceeding in a foreign or international tribunal” under Section 1782.<sup>71</sup> Applying *Intel*, the *Oxus Gold* Court held that it was. But in doing so, it avoided addressing whether *NBC* had been overruled. Instead, it held that *NBC* and *Biedermann* were distinguishable because they only applied to private commercial arbitration.<sup>72</sup> In contrast, the district court held, an investor’s right to arbitrate under a BIT stems from a binding treaty between two countries.<sup>73</sup> In those circumstances, the arbitration panel constituted a non-private “tribunal” for the purposes of Section 1782,<sup>74</sup> since the proceedings were conducted within a framework defined by a bilateral treaty and were governed by the UNCITRAL Rules (a creation of the United Nations).<sup>75</sup> Such proceedings, it held, are not “created exclusively by private parties” as was the case in *NBC* and *Biedermann*.<sup>76</sup> The *Oxus Gold* decision therefore does not discuss whether a private commercial arbitration qualifies for Section 1782 treatment after *Intel*, much less suggest that *NBC* was incorrectly decided — especially if the BIT tribunal was indeed

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<sup>70</sup> *Id.* at \*2, \*7.

<sup>71</sup> *Id.* at \*5.

<sup>72</sup> *In re Oxus Gold*, 2007 WL 1037387, *supra* note 67, at \*5; *In re Oxus Gold*, 2006 WL 2927615, *supra* note 66, at \*6 (“The arbitration is not the result of a contract or agreement between private parties as in [*NBC*, but instead are] . . . proceedings . . . authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the [BIT].”).

<sup>73</sup> *In re Oxus Gold*, 2006 WL 2927615, *supra* note 66, at \*6.

<sup>74</sup> *In re Oxus Gold*, 2007 WL 1037387, *supra* note 67, at \*14.

<sup>75</sup> *Id.* at \*5 (“The Arbitration at issue in this case, between two admittedly private litigants, is thus being conducted within a framework defined by two nations and is governed by [UNCITRAL]. In light of these facts, this Court concludes that the Magistrate Judge’s holding that the arbitration panel in the case at bar constituted a “foreign tribunal” for purposes of a 28 U.S.C. § 1782 analysis was not clearly erroneous or contrary to law.”).

<sup>76</sup> *Id.* at \*6; *In re Oxus Gold*, 2006 WL 2927615, *supra* note 66, at \*6.

an “intergovernmental” tribunal in the sense that term was used in *NBC*. Indeed, *Oxus Gold* expressly provides that it was dealing with an “intergovernmental” tribunal which, according to *NBC*, falls within Section 1782: the BIT tribunal was set up pursuant to an intergovernmental treaty akin to the treaties establishing the *I’m Alone* and *Black Tom* arbitral tribunals.<sup>77</sup> Even so, *Oxus Gold* suggests that *Intel* permits a more liberal approach to the use of Section 1782 in an arbitration context.<sup>78</sup>

In *Roz Trading*, the District Court for the Northern District of Georgia went even further, upholding the use of Section 1782 in purely private international arbitration, demonstrating a bolder liberalization of Section 1782 than seen in *Oxus Gold*.<sup>79</sup> In *Roz Trading*, Roz Trading, Ltd., a Cayman Islands company in a dispute with the Coca-Cola Company, commenced a Section 1782 proceeding to compel the Coca-Cola Company to produce documents for use in private arbitration proceedings in Vienna.<sup>80</sup> In determining whether such an arbitral panel fell under the scope of Section 1782, the court analyzed the meaning of the phrase “foreign or international tribunal” in light of the Supreme Court’s reasoning in *Intel*.<sup>81</sup> Although the *Intel* Court did not explicitly define whether private arbitration panels qualify as “tribunals” within the meaning of Section 1782, the *Roz Trading* court noted that the Court “provided sufficient guidance for [it] to determine that arbitral panels . . . are ‘tribunals’ within

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<sup>77</sup> See *supra* Section 1(A)(3).

<sup>78</sup> Barry H. Garfinkel & Timothy G. Nelson, *Eureka! The Oxus Gold Decision Holds That Section 1782 Authorizes a U.S. Court to Grant Discovery in Aid of a Foreign Investment Arbitration*, MEALEY’S INT’L ARB. REP. (Nov. 2006).

<sup>79</sup> *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1229–30 (N.D. Ga. 2006) (concluding that Roz Trading “meets the requirements of the statute, and is, thus, entitled . . . to seek judicial assistance for use in the foreign proceeding”).

<sup>80</sup> *Id.* at 1221–26.

<sup>81</sup> *Id.* at 1227–28.

the statute's scope.”<sup>82</sup> First, the court noted that the Supreme Court expressly stated, albeit in dictum, that “‘the term ‘tribunal’ . . . includes . . . *arbitral* tribunals.’”<sup>83</sup> It then turned to the statutory construction of Section 1782(a). Starting “with the words of the statutory provision,” the court found that the words were unambiguous, such that further analysis or limitation by the court would be inappropriate: “[w]hen the words of a statute are unambiguous[,] . . . judicial inquiry is complete.”<sup>84</sup> The common usage and widely accepted definition of “tribunal” includes arbitral bodies.<sup>85</sup> Finally, because the language was unambiguous, and there was no clearly expressed legislative intent that the term “tribunal” does not include arbitral panels, the court ruled that there was no reason to construe the term in any other way than it is commonly defined.<sup>86</sup> The court noted that it would be improper to consider the legislative history or impose its own limitations on the term.<sup>87</sup>

*Roz Trading* went so far as to criticize the *NBC* and *Biedermann* decisions: “those opinions are inconsistent with the Supreme Court’s guidance in *Intel*, impose impermissible judicial limitations into the unambiguous text of 1782(a), and conduct legislative history analyses that are both unnecessary and unpersuasive, particularly in light of *Intel*.”<sup>88</sup> This decision is currently on appeal before the Eleventh Circuit Court of Appeals, which is expected

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<sup>82</sup> *Id.* at 1224.

<sup>83</sup> *Id.* (quoting *Intel*, 542 U.S. *supra* note 61, at 248) (emphasis added).

<sup>84</sup> *Id.* at 1225 (citation omitted).

<sup>85</sup> *Id.* at 1228.

<sup>86</sup> *Id.* at 1226.

<sup>87</sup> *Id.*

<sup>88</sup> *In re Roz Trading Ltd.*, No. 1:06 CV 02305, 2007 WL 120844, at \*1 (N.D. Ga. Jan. 11, 2007).

to rule on the availability of Section 1782 for use in foreign private arbitration in the coming months.<sup>89</sup>

## **II. Section 1782 Discovery Should Be Available in Aid of a Foreign Arbitration Pursuant to Section 1782**

As stated in the Introduction, this Report’s focus is on the question whether Section 1782 envisages assistance to a private arbitral tribunal located abroad. The text of the statute provides specifically that it applies to “proceeding[s] in a foreign or international tribunal.” Our Committee believes that this language should be construed to include both arbitral tribunals located abroad, as well as all international arbitral tribunals, irrespective of location. Set forth below are arguments that have been marshaled most often in favor of this interpretation of the statute and which, on balance, we find persuasive.

### **A. The Plain Meaning of the Text of Section 1782 in Light of *Intel***

Even before *Roz Trading*, many courts and commentators analyzed the plain meaning of the phrase “for use in a proceeding in a foreign or international tribunal” and urged that it be interpreted to permit discovery in aid of private international arbitration.<sup>90</sup> Foremost among these commentators is the reporter of the Commission on International Rules of Judicial Procedure, which drafted the 1964 revisions to Section 1782,<sup>91</sup> Professor Hans Smit. Professor

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<sup>89</sup> Barry H. Garfinkel & Timothy G. Nelson, *Sweet Georgia: Roz Trading Upholds the Use of Section 1782 in Aid of Foreign Private Arbitration*, MEALEY’S INT’L ARB. REPORT (Jan. 2007).

<sup>90</sup> See, e.g., *Intel*, 542 U.S., *supra* note 61, at 249; *NBC*, 165 F.3d, *supra* note 48, at 188; Garfinkel & Miller, *supra* note 37, at 25–26; Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT’L ARB. 295 (2003).

<sup>91</sup> The Second Circuit has recognized Professor Smit as the “chief architect of Section 1782.” *In re Euromepa S.A.*, 51 F.3d 1095, 1099 (2d Cir. 1995).

Smit expressed the belief that the federal policy in support of arbitration demands judicial assistance and that the orderly operation of international litigation requires such assistance.<sup>92</sup>

As Professor Smit has stated, “[t]he statutory text [of Section 1782] is straightforward and clear.”<sup>93</sup> Indeed, U.S. courts have consistently interpreted the word “tribunal” in this common usage,<sup>94</sup> and the word “tribunal” is often considered to include private commercial arbitral tribunals.<sup>95</sup> The New York Code of Professional Responsibility, as another example, defines “tribunal” to include arbitrators.<sup>96</sup>

Under such a plain meaning analysis, the inquiry likely should stop there.<sup>97</sup> “[A] canon of statutory construction . . . requires that the words of a statute be given their ordinary meaning. . . . If . . . there [is] a plain and common sense meaning to [a] phrase, then [courts] would . . . only . . . apply this meaning, without further analysis, to decide [a] case.”<sup>98</sup> Justice Scalia’s concurrence in *Intel* noted this: the plain meaning of the text of the statute provides all the answers, and any references to legislative history and academic commentary are

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<sup>92</sup> See Smit, *supra* note 35, at 1–8.

<sup>93</sup> *Id.* at 2.

<sup>94</sup> See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 636–40 (1985); *LaFarge Coppee v. Venezolana de Cementos*, 31 F.3d 70, 71 (2d Cir. 1994); see also Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT’L L. REV. 649, 674–76 (2005).

<sup>95</sup> Black’s Law Dictionary 1544 (8th ed. 2004) (defining “tribunal” as a “court or other adjudicatory body”); Webster’s Third New International Dictionary 2441 (1993) (defining “tribunal” as including “a person or body of persons having authority to hear and decide disputes so as to bind the disputants; [and] . . . something that decides or judges; something that determines or directs a judgment or course of action”).

<sup>96</sup> New York Lawyer’s Code of Professional Responsibility §1200.1(6): “‘Tribunal’ includes all courts, arbitrators and other adjudicatory bodies.”

<sup>97</sup> *Biedermann*, 168 F.3d, *supra* note 48, at 881 (“If this language [within a statute] is unambiguous, the inquiry is ended.”).

<sup>98</sup> Hammond, *supra* note 39, at 131.

unnecessary.<sup>99</sup> Accordingly, the text of Section 1782, standing alone, affords support for the view that a private commercial arbitral tribunal, located overseas, is a “foreign . . . tribunal” and/or a “foreign or international tribunal” for purposes of Section 1782.<sup>100</sup>

### **B. The *Intel* Decision**

*Intel* is the only Supreme Court decision to address Section 1782. Although the “tribunal” at issue in *Intel* was not an arbitration tribunal, the decision does provide guidance. *Intel* interpreted the term “a proceeding in a foreign or international tribunal” to extend to a quasi-judicial agency that serves as a “first-instance decisionmaker.”<sup>101</sup> An arbitral tribunal clearly acts as a “first-instance decisionmaker” with judicial powers.<sup>102</sup> Indeed, the Supreme Court has long explicitly proclaimed that “arbitration is now the functional equivalent of the courts.”<sup>103</sup> Moreover, under the conventional wisdom that the New York Convention provides for nearly global enforcement of arbitration awards but for those limited exceptions enumerated in the Convention, arbitral tribunals are actually the “final decisionmaker” in the overwhelming majority of arbitrations. It is therefore relatively straightforward to conclude that, under the plain meaning of the word “tribunal,” as reinforced with the Supreme Court’s interpretation, foreign arbitral tribunals qualify as a Section 1782 “tribunal.”

### **C. The Legislative History**

Prior to the 1964 revisions, Section 1782 offered limited assistance to proceedings before a foreign “court.” The current version extends to assistance to a “proceeding in a foreign or international tribunal.” Beyond conventional courts, the revised version broadened assistance

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<sup>99</sup> See *Intel*, 542 U.S., *supra* note 61, at 267 (Scalia, J., concurring).

<sup>100</sup> See *infra* Part III.B. for a discussion of the differences in meaning between “foreign” and “international” tribunals.

<sup>101</sup> *Intel*, 542 U.S., *supra* note 61, at 242–43.

<sup>102</sup> Losk, *supra* note 8, at 1049.

<sup>103</sup> *Shearson/Am. Express Inc. v. McMahan*, 482 U.S. 220, 257 n.14 (1987).

to include gathering evidence for use in “proceedings before a foreign administration tribunal or quasi-judicial agency.”<sup>104</sup> The 1963 Committee Report explains that the change was designed to bring “the United States to the forefront of nations adjusting their procedures to those of other sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.”<sup>105</sup> As Professor Smit put it, “[t]he 1964 revision of Section 1782 was a drastic one.”<sup>106</sup>

As the U.S. Supreme Court emphasized in *Intel*, giving district courts discretion in evaluating the merits of requests for assistance under Section 1782 was Congress’ means of achieving Section 1782’s legislative purpose. Categorical rules were disfavored. Indeed, the Committee Report references district court discretion. Importantly, Congress explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance under 1782.<sup>107</sup> This bolsters the *Intel* Court’s vehement rejection of “categorical limitations . . . on the statute’s reach.”<sup>108</sup>

#### **D. Recognized Status of International Arbitration Under U.S. Law**

Arbitral tribunals owe their legal existence to agreements between private parties to create such tribunals. But arbitral tribunals derive their legitimacy and efficacy from international conventions, national laws and the courts. In the United States, the wellspring of this statutory authority is the Federal Arbitration Act of 1925, 9 U.S.C. § 1 *et seq.* Comparable

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<sup>104</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

<sup>105</sup> *Id.*; *see also Fonseca v. Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980).

<sup>106</sup> Smit, *supra* note 35, at 1.

<sup>107</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

<sup>108</sup> *Intel*, 542 U.S., *supra* note 61, at 255.

legislation exists in numerous other countries, often pursuant to internationally-sanctioned model statutes.<sup>109</sup>

One of the critical legal features of a foreign private commercial arbitration tribunal is that its award is legally binding—not just as a matter of domestic arbitral law of the seat of arbitration but also pursuant to the New York, Panama and other Conventions.<sup>110</sup> These conventions also have the status of law, both under international law and under the local laws implementing them in each contracting state. *See, e.g.*, 9 U.S.C. §§ 201, 301 (implementing the New York and Panama Conventions, respectively). Therefore the deliberations and workings of an arbitration tribunal are the subject of an express grant of legal authority from the state. These policy considerations militate in favor of applying Section 1782 to foreign arbitrations.

### **III. Recommended Best Practices for Applying Section 1782 to Private Commercial Arbitration**

For the reasons just discussed, this Report takes the position that arbitration tribunals are “tribunals” within the meaning of Section 1782. Our position in that regard is informed in part by the fact that Section 1782 vests much discretion in the district court in its disposition of Section 1782 applications. Indeed, Congress explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance

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<sup>109</sup> *See, e.g.*, Arbitration Act 1996 (UK). Numerous other countries have implemented legislation based on the UNCITRAL Model Law on International Commercial Arbitration (1985), which contains detailed provisions to facilitate and regulate the conduct of international arbitration proceedings, and to enforce awards arising from those proceedings. According to an online review, legislation based on the UNCITRAL Model Law has been enacted in Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macau, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Korea, Russia, Singapore, Sri Lanka, Tunisia, Ukraine, Zambia and Zimbabwe. *See* <http://www.jus.uio.no/lm/un.conventions.membership.status/1.html#122>.

<sup>110</sup> *See* 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration, 1975 (also known as the “Panama Convention”).

under 1782.<sup>111</sup> It is well established in Section 1782 jurisprudence that a district court is not required to grant a Section 1782 application simply because it has the authority to do so. *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001) (“a district court’s compliance with a §1782 request is not mandatory”). Rather, “the permissive language of § 1782 vests district courts with discretion to grant, limit or deny discovery.” *Metallgesellschaft A.G. v. Hodapp*, 121 F.3d 77, 79 (2d Cir. 1997).

We believe that district courts faced with Section 1782 applications related to foreign arbitrations should utilize that discretion, and this section suggests “best practices” for how district courts might exercise their discretion. As discussed in greater detail in the next section of the Report, these best practices for exercising the court’s discretion address many of the concerns raised against the statute’s application to foreign arbitrations. District courts exercising discretion in a particular way when faced with a Section 1782 application relating to arbitration matters that differs from the way they might exercise such discretion concerning other matters before international tribunals is entirely consistent with the Supreme Court’s statement in *Intel* that the courts take into account the nature of the foreign tribunal.

**A. Recommendation that U.S. Courts Observe Comity by Seeking to Grant Discovery Only to the Extent Consistent with the Wishes of the Arbitral Tribunal (Once Appointed)**

We recommend that Section 1782 discovery be granted only if the request is made by the arbitrators or with the consent of the arbitrators and that, therefore, district courts consider the source of the request as a very important factor in exercising its discretion. Section 1782 should assist international arbitration, not distort it. As Professor Smit commented: “The purpose of Section 1782 is to provide liberal assistance to foreign and international tribunals, but

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<sup>111</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

this assistance should not be provided when it would interfere with the orderly processes of the foreign or international tribunal.”<sup>112</sup>

The first of Section 1782’s “twin aims” is to provide “efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects . . . .”<sup>113</sup> In order for assistance to tribunals to be quick and efficient, the application of Section 1782 should be simple.<sup>114</sup> This decision should be left to the arbitrators so as to minimize the intrusion of courts into the sphere of arbitration.<sup>115</sup> Additionally, a litigant will likely determine whether it can use the evidence before it spends the energy and expense required to seek Section 1782 assistance.<sup>116</sup> Relying on arbitrators to make or approve this decision would generally prevent inefficient and wasteful situations wherein the foreign tribunal rejects the documents gathered in connection with the discovery request.<sup>117</sup>

Moreover, leaving this decision to the arbitrators allows the tribunal and the litigants to tailor the scope of discovery to the particular needs of the individual case—one of the advantages of arbitration.<sup>118</sup> The parties and the tribunal will undoubtedly have a better understanding than will a national court of what would best serve the interests of the arbitrating parties, and thus the decision should be left to them.

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<sup>112</sup> Smit, *supra* note 35, at 8.

<sup>113</sup> S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793.

<sup>114</sup> *See* Smit, *supra* note 35, at 8. (“Recourse to Section 1782 should be left as simple as possible in order to keep the provision of assistance to foreign and international [tribunals] speedy and efficient.”).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (“And it may also safely be assumed that a litigant before a foreign or international tribunal will carefully consider whether it will be able to use the evidence in the foreign or international tribunal before it expends the effort and expense involved in seeking evidence pursuant to Section 1782.”).

<sup>117</sup> *See* Deborah C. Sun, Note, *Intel Corp. v. Advanced Micro Devices, Inc.: Putting “Foreign” Back into the Foreign Discovery Statute*, 39 U.C. DAVIS L. REV. 279, 293 (2005).

<sup>118</sup> *See* Smit, *supra* note 35, at 8.

Certainly, in the case of international arbitration, there is a real threat that arbitral parties might use Section 1782 in order to obtain U.S.-style discovery in a manner that would not have been permitted by the foreign arbitral tribunal. But U.S. courts have long been accustomed to managing discovery issues differently in the context of arbitration and to be more deferential to the will of the arbitrators. This should not change in their application of Section 1782. As a matter of policy, courts should defer to the arbitrators to manage the proceedings.

Finally, it is interesting to note that this result was portended by the very first reported decision on the issue of whether Section 1782 could be used in arbitration. In *In re Technostroyexport*,<sup>119</sup> the district court held that the term “foreign or international tribunal[s]” included private international arbitral tribunals but declined to grant the Section 1782 application assistance because the parties had “made no effort to obtain any ruling from the arbitrators.”<sup>120</sup> In support for its qualified denial of assistance, the court wrote “[w]hether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from courts rules) and by what the arbitrators decide.”<sup>121</sup> The court, however, provided that its “ruling [was] without prejudice to a future application based on the ruling” of the arbitrators.<sup>122</sup>

## **B. Foreign versus International Tribunal**

To date, no case has definitively addressed whether there is a distinction between a “foreign” tribunal and an “international” tribunal. Whereas the 1930 Act empowered an “international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments,” to gather evidence, the 1964 amendments blended this concept together with the 1863 Act’s conception of “foreign” courts, into the phrase

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<sup>119</sup> 853 F. Supp. 695 (S.D.N.Y. 1994).

<sup>120</sup> *Id.* at 697.

<sup>121</sup> *Id.* at 698.

<sup>122</sup> *Id.* at 699.

“foreign or international tribunal.” A plausible argument can be made that the phrase “foreign or international tribunals” is a composite phrase, and that the words are not intended to be parsed. Some support for this view is found in the Commission’s desire for legislation to “benefit . . . tribunals and litigants involved in *litigation with international aspects*.” Another view, however, is that Section 1782’s references to a “foreign . . . tribunal” are to any “tribunal” located overseas—whereas the phrase “international tribunal” is intended to connote what that phrase meant in the 1930 and 1933 Acts, *i.e.*, any commission or arbitral tribunal created pursuant to a treaty or inter-state agreement. Under this latter view, which finds some support in the legislative history,<sup>123</sup> certain arbitration bodies created by treaty, and sitting within the United States, might fall within the reach of Section 1782.<sup>124</sup> This point remains for the courts to resolve.

Should Section 1782 apply to an arbitration that, for example, is seated in New York and involves a Canadian party engaged in a dispute with a U.S. party concerning a construction project in Toronto? There is jurisprudence that has already developed in the context of the New York Convention’s treatment of foreign and “non-domestic” awards rendered in the

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<sup>123</sup> The Second Circuit’s decision in *NBC* is consistent with the view that an “international tribunal” is an “intergovernmental tribunal.” *NBC*, 165 F.3d, *supra* note 48, at 189–90 (“[T]he legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”). The *Oxus Gold* decision is also consistent with this approach. *Oxus Gold*, 2007 U.S. Dist. LEXIS 24061, at \*13–14.

<sup>124</sup> An example might include an international “ICSID” arbitration based at the World Bank’s headquarters in Washington, D.C., as such a category of proceeding arises out of a treaty, and is therefore comparable to, indeed arguably the lineal descendant of, the kind that qualified as “international tribunal” under the 1930 and 1933 Acts. By contrast, private arbitrations conducted within the U.S. that have international aspects would almost certainly fall outside the scope of Section 1782 (even if they might be regarded as “international” arbitrations for purposes of Chapters I and II of the FAA), because nothing in the 1930 Act or the other legislative history of Section 1782 indicated any intention to expand the scope of the term “international tribunals” to embrace U.S.-based arbitral proceedings.

United States that would suggest that the award in this hypothetical could be considered foreign and thus subject to the New York Convention.<sup>125</sup> Should this considerable body of law be used as a framework for Section 1782?

On the one hand, one can argue that, in the case of this hypothetical, the resultant award would be one that, under the *Bergesen* standard, would qualify as an award subject to the New York Convention. If so, then should it not also be considered an international award at the discovery phase, when one is seeking to apply Section 1782? The fact that Section 1782 would not be available for the same arbitration taking place in New York between domestic parties relating to a project in Buffalo can be ignored because that is the result mandated by the statute (as discussed in greater detail in Section IV, *infra*).

The other side of that argument is that the *Bergesen* line of cases is based on an analysis of the specific language and history of the New York Convention and that, therefore, it should not be extended to Section 1782. Furthermore, according to this side of the argument, a tribunal seated in the United States is not “foreign” as that term is used in Section 1782, nor is it “international” because it was not created pursuant to a treaty (as discussed in greater detail in the Section I description of the history of the statute). Also weighing in on this side of the argument is that the Supreme Court stated in *Intel* that “[Section] 1782 is a provision for assistance to tribunals abroad,”<sup>126</sup> whereas the Tribunal in the hypothetical is seated in New York.

The argument is a close one. It is, however, the opinion of a majority of this Committee that the jurisprudence developed with respect to the New York Convention should

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<sup>125</sup> See e.g., 9 U.S.C. § 202 (2007); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *Yusuf Alghanim & Sons v. Toys ‘R’ Us, Inc.*, 126 F.3d 15, 18–19 (2d Cir. 1997); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481–82 (7th Cir. 1997).

<sup>126</sup> See *Intel*, 542 U.S. *supra* note 61 at 263 (emphasis added).

not be extended to Section 1782 and that discovery in aid of foreign arbitration should be available only if the seat of the arbitration is outside the United States. Our decision in this regard is informed in no small part by recognizing that Section 1782 applications should be as streamlined as possible and that, especially in the case of arbitration, where the parties have evinced a desire to stay out of national courts, litigation over the application of Section 1782 should be avoided. Thus, a bright-line, objective test that looks to the seat of the arbitration is preferable to the *Bergesen* standard, which can include an analysis of various factors in a more subjective manner. Under this view, if an arbitration tribunal is sitting in the United States, the parties should have the same rights to discovery as are available in a domestic arbitration.

**C. Treatment of Applications Prior to the Appointment of a Tribunal**

One of the significant changes in the 1964 revision of Section 1782 is that Congress deleted the requirement that a proceeding be “pending.” Therefore, under Section 1782, the proceeding with respect to which Section 1782 assistance is sought need not have been started at the time a Section 1782 application is brought. In *Intel*, the Court noted that “Section 1782 does not limit the provision of judicial assistance to pending adjudicative proceedings.”<sup>127</sup> The Court read the 1964 revision to mean that Section 1782 assistance only requires that a dispositive ruling “be within reasonable contemplation.”<sup>128</sup> Professor Smit also supports this view.<sup>129</sup>

Under our first suggested best practice, namely, that any Section 1782 application in aid of a foreign arbitration should be made by or with the approval of the arbitrators, it would be impossible to obtain Section 1782 assistance prior to the time the tribunal is constituted. As a

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<sup>127</sup> *Intel*, 542 U.S. *supra* note 61, at 258 (quotations marks omitted).

<sup>128</sup> *Id.* at 259.

<sup>129</sup> See Smit, *supra* note 35, at 1026 (“It is not necessary . . . for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.”).

general matter, we believe that district courts should exercise their discretion to achieve that result. However, there will be times—such as the imminent death of a witness or situations where there is a risk of irreparable harm—in which discovery might be needed before the arbitral tribunal is constituted. We suggest a best practice in which Section 1782 discovery in aid of foreign arbitration be limited to these emergency situations.

**D. Applications by Persons Who are Not Party to the Arbitration**

If district courts in fact exercise their discretion in favor of requiring that the Section 1782 application come from, or with the approval of, the arbitrator, it seems unlikely that there would be a non-party who could bring a Section 1782 application in aid of foreign arbitration because such a non-party would have no standing to seek an order from the arbitrators. Because arbitration is a consensual proceeding arising out of a contractual agreement among the parties to the arbitration, Section 1782 applications from non-parties should in fact be disfavored.

**IV. Addressing the Arguments Against the Application of Section 1782 to Foreign Arbitration**

Courts and scholars have made various arguments against the application of Section 1782 to foreign arbitration. On balance, we do not believe that these arguments provide a sufficient basis for concluding that Section 1782 discovery should not be available in aid of foreign arbitration. Furthermore, we believe that the “best practices” suggested above address many of the more important concerns raised by these arguments. The most prevalent arguments are discussed below.

### A. Inconsistency With Section 7 of the Federal Arbitration Act

In domestic arbitrations, discovery is governed by Section 7 of the Federal Arbitration Act (“FAA”).<sup>130</sup> On its face, 9 U.S.C. § 7 is more limited in scope than is the discovery that is available under Section 1782. The subpoena power under Section 7 is available only to the arbitrators, whereas “interested persons” (including the parties to the arbitration) may bring applications under Section 1782. Enforcement of Section 7 powers is limited to the district court at the place of arbitration. And, while the courts are split on the issue whether Section 7

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<sup>130</sup> Some state laws permit third party discovery in domestic cases in excess of the scope of Section 7. *See, e.g.*, Tex. Civ. Prac. & Rem. Code 171.051 (Vernon 2005) (expressly granting arbitrators the power to compel third party attendance at depositions); Delaware Code, Title 10, § 5708 (authorizing arbitrators to permit depositions). In light of Congress’ broad exercise of its commerce power in drafting the FAA, however, it is unclear the circumstances in which such state statutes are not preempted by Section 7 of the FAA. *Cf. Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55 (2003) (FAA preempts contrary state law with regard to all activities which, “in the aggregate . . . would represent a general practice . . . subject to federal control.”). Nonetheless, state statutes, which expand rather than limit the enforceability of arbitration contracts, are found not to be preempted by the FAA. *See, e.g., Davis v. EGL Eagle Global Logistics LP*, No. 06-31019, 2007 U.S. App. LEXIS 16324, at \*10–11 (5th Cir. 2007) (“For the FAA to preempt [state law], state law must refuse to enforce an arbitration agreement that the FAA would enforce.” (citing *In re D. Wilson Constr. Co.*, 196 S.W.3d 774 (Tex. 2006))); *see also, Penn Va. Oil & Gas Corp. v. CNX Gas Co., LLC*, No. 1:06 cv0090, 2007 U.S. Dist. LEXIS 12206, at \*17 (D. Va. 2007) (surveying decisions in other circuits finding that the FAA does not preempt state law which furthers the cause of arbitration); *Miller v. Cotter*, 448 Mass. 671, 679 (2007) (“[E]ven when federal law applies to an arbitration agreement, the Federal Act has never been construed to preempt all state law on arbitration. Only those State acts that seek to limit the enforceability of arbitration contracts are preempted by the Federal Act.” (citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989)). The Uniform Arbitration Act, which has been highly influential on many states’ arbitration legislation, also allows a broader scope of third-party discovery than that available under the FAA. *See, e.g.*, Section 17 of the Revised Uniform Arbitration Act (RUAA) (allowing arbitrators subpoena powers, and allowing both the arbitrators and the parties to seek judicial assistance in case of a party’s non-compliance); *see also* Sebastien Besson, *The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility with the FAA*, 11 AM. REV. INT’L ARB. 211, 212–13 (2000). As Section 7 of the FAA does not purport to preempt more inclusive parallel statutes that allow third party discovery in aid of arbitration, it would be illogical to suggest that Section 7 should restrain the more inclusive provisions of Section 1782.

permits pre-hearing document discovery, and hold generally that it does not permit pre-hearing deposition testimony, both of those are permitted under Section 1782.<sup>131</sup>

In their decisions holding that Section 1782 does not apply to private international arbitral tribunals, both the Second and Fifth Circuits relied in part on the fact that there is no similar assistance available to domestic tribunals under the FAA.<sup>132</sup> In *Biedermann*, the court noted that it was unlikely that Congress “would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded to its domestic dispute-resolution counterpart.”<sup>133</sup>

The strongest retort to these points is that the text of Section 1782 requires these asymmetries. The statute is clear about the assistance that it provides to tribunals abroad, regardless of the current state of domestic law. The plain meaning of Section 1782 should not be strained to create consistency with Section 7 of the FAA or with U.S. case law. Nor should the inconsistency be allowed to cloud the question of whether Section 1782 assistance should be

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<sup>131</sup> See *Discovery Assistance and “Private Foreign Arbitrations”*: *The Second and Fifth Circuit Rule*, *supra* note 39, at 120. Compare *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410–11 (3d Cir. 2004) (no basis for pre-hearing discovery under 9 U.S.C. § 7); *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) (no pre-hearing discovery in arbitration unless there is a showing of “special need”); *Rippe v. West Am. Ins. Co.*, No. 35 39 54, 1993 WL 512547 (Conn. Super. Ct., Dec. 2, 1993) (“pretrial discovery is not available under our present statutes for arbitration.”), and *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980) (finding that a party to arbitration has no right to pre-hearing discovery) with *In re Security Life Ins. Co of America*, 228 F.3d 865 (8th Cir. 2000) (implicit in power to order documents at a hearing is power to order documents to be produced before a hearing); *In re Atmel Corp.*, 371 F. Supp. 2d 402 (S.D.N.Y. 2005) (pre-hearing document discovery available in arbitration but pre-hearing deposition discovery not available); and *In re Deiulemar di Navigazione*, 153 F.R.D. 592 (E.D. La. 1994) (requiring a showing of extraordinary circumstances before allowing discovery).

<sup>132</sup> See *NBC*, 165 F.3d *supra* note 140, at 191; *Biedermann*, 168 F.3d *supra* note 48, at 882–

83.

<sup>133</sup> *Biedermann*, 168 F.3d *supra* note 48, at 883.

available altogether in foreign arbitrations. As a matter of principle, these two issues are separate.

In addition, the Supreme Court in *Intel* rejected the idea that there must be discovery in domestic litigation analogous to that sought in aid of foreign litigation.<sup>134</sup> It noted that “[Section] 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.”<sup>135</sup> Section 1782 speaks to tribunals abroad, not domestic.<sup>136</sup> Likewise, the argument about potential inconsistency between discovery assistance to domestic and foreign arbitrations is no more persuasive.<sup>137</sup>

Moreover, some commentators have argued that the absence of parallel assistance under domestic law should not act as a bar to the application of Section 1782, but as a catalyst for changing the scope of discovery available in aid of domestic arbitrations, which they argue is insufficient.<sup>138</sup> While this argument only advises that Congress should change the scope of the FAA and does not inform judicial interpretation of Section 1782, it reminds us that the argument

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<sup>134</sup> See *Intel*, 542 U.S. *supra* note 61, at 263 (“We also reject Intel’s suggestion that a Section 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding.”).

<sup>135</sup> *Id.*; see also Garfinkel & Miller, *supra* note 37, at 31–32.

<sup>136</sup> See *id.* (“Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here”).

<sup>137</sup> Garfinkel & Miller, *supra* note 37, at n.90 (quoting lower court decisions emphasizing district court discretion in addressing potential inconsistencies between domestic and foreign proceedings).

<sup>138</sup> See Smit, *supra* note 25, at 160 (“[T]he courts and legislature would do well to emulate, rather than reject, in the domestic context, reforms introduced for international adjudication”); Chukwumerije, *supra* note 94, at 677–78.

for greater congruity between discovery in foreign and domestic proceedings is a matter for Congress and not for the courts.<sup>139</sup>

Finally, we note that courts, which follow the suggested best practice of requiring that Section 1782 requests be made by, or with the consent of, the arbitrators, will effectively nullify the criticism concerning the distinction between the two statutes on the issue of who may seek the discovery.

**B. “Discovery” Is Not Necessarily Inconsistent With Arbitration**

Another objection to the use of Section 1782 in international arbitration is that the broad discovery potentially available under Section 1782 is inconsistent with arbitration, in that it would undermine the “efficiency and cost-effectiveness” of arbitration.<sup>140</sup> Discovery is inherently time-consuming and expensive. Allowing arbitrators or the arbitrating parties to seek discovery under Section 1782, they argue, would burden the arbitral process and increase the cost of arbitration.<sup>141</sup> As the Fifth Circuit emphasized in *Biedermann*: “Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us

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<sup>139</sup> The Senate Reports discussing the drafting history of Section 1782 make clear that district courts are encouraged to act with discretion in applying Section 1782. *See* S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782. The *Intel* decision emphasized the importance of respecting this discretion. *See Intel*, 542 U.S. *supra* note 61, at 261 (“While comity and parity concerns may be important as touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discovery rule into the text of § 1782(a).”).

<sup>140</sup> *See NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (remarking that the advantages of arbitration include that it is “usually cheaper and faster than litigation”)); *Biedermann*, 168 F.3d *supra* note 48, at 883.

<sup>141</sup> *See Biedermann*, 168 F.3d *supra* note 48, at 883.

suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration."<sup>142</sup>

Although there is still a marked difference between the "discovery" available in international arbitration and U.S.-style discovery of the type used in U.S. litigation, it is incorrect to say that there is no discovery in arbitration. Indeed, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which are being used with increasing frequency in international arbitration, specifically contemplate document disclosure. Perhaps the more important issue is whether the parties control the discovery or the arbitrators (as under the IBA Rules).

Concerns about broad-based discovery infecting international arbitration may be obviated if the district courts exercise their discretion by requiring that the Section 1782 requests be made by or with the consent of the arbitrators. So long as district courts do not abandon their traditional respect for arbitrator autonomy, the matter of discovery remains within the hands of arbitrators who "govern their own proceedings."<sup>143</sup> Accordingly, extending discovery assistance to foreign arbitrations would have no impact on arbitrators' control of their proceedings. As some commentators have argued, it would be paternalistic for a court to deny a discovery request brought under Section 1782 on the grounds that the court has a superior understanding of what would best serve the interests of the arbitrating parties than the parties and the tribunal themselves.<sup>144</sup> Indeed, as Professor Smit noted, when an arbitrator requests Section 1782 assistance, compliance with the request would further the arbitral process, not frustrate it.<sup>145</sup>

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*Id.*

<sup>143</sup> *In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994).

<sup>144</sup> *See Chukwumerije*, *supra* note 94, at 678.

<sup>145</sup> *In In re Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997), the arbitrator requested Section 1782 assistance, yet Judge Duffy rejected the request. Professor Smit pointed

The alternative approach to allowing the district courts to exercise discretion, for example such as in accordance with the best practices in this Report, is the holdings by the Second and Fifth Circuits that a private international arbitration tribunal is not a “tribunal” for purposes of Section 1782. Under that holding, however, the U.S. federal courts would not be in a position to assist arbitrators who specifically seek the assistance of a U.S. court in obtaining evidence located in the United States.

### C. Lack of Reciprocity

One of the most consistent objections raised against Section 1782 has been the lack of reciprocity in discovery assistance between the United States and other countries. Applying Section 1782 to foreign arbitration would mean that foreign tribunals have access to a procedure that is not reciprocated by legislation in other jurisdictions.<sup>146</sup> Since parties outside the jurisdiction of a U.S. district court typically are not subject to any comparable procedures,<sup>147</sup> foreign companies would have a “weapon” against U.S. companies that U.S. companies would typically not have against those foreign companies.<sup>148</sup>

Many of the arguments against applying Section 1782 to foreign arbitration have been made, and rejected, in the litigation context. The lack of reciprocity between the United States and other countries exists already in the litigation context. For example, there is no reciprocal legislation in the U.K. or France allowing discovery in connection with U.S.

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out that Judge Duffy’s reasoning here was flawed because compliance with the Section 1782 request “would . . . further, rather than frustrate, the arbitral process.” Smit, *supra* note 35, at 6.

<sup>146</sup> See Eric Schwartz & Alan Howard, Outside Counsel, *International Arbitration Discovery Applications to Rise?*, N.Y.L.J., May 4, 2007, at 4 (arguing that persons who are found within the jurisdiction of a U.S. district court are at a “distinct disadvantage”).

<sup>147</sup> See Schwartz & Howard, *supra* note 146, at 4 (“Section 1782 therefore is a one-way street.”).

<sup>148</sup> *Id.*

litigation,<sup>149</sup> yet U.S. courts are empowered to grant discovery in aid of English or French litigation.<sup>150</sup>

The Supreme Court ruled in *Intel* on this issue of foreign-discoverability, namely whether Section 1782 “bar[s] a district court from ordering production of documents when the foreign tribunal or the ‘interested person’ would not be able to obtain the documents if they were located in the foreign jurisdiction.”<sup>151</sup> It held that there was no such foreign-discoverability requirement.<sup>152</sup> While district courts may consider comity and parity issues when exercising their discretion in individual cases, the Court refused to insert a foreign-discoverability rule into Section 1782.<sup>153</sup> In that sense, there is no meaningful difference between international arbitration and foreign commercial litigation,<sup>154</sup> and the fact that third parties in the U.S. may be affected by foreign arbitrations is merely an extension of this state of affairs.

In rejecting foreign discoverability requirements, the Second Circuit has noted that, absent clear statutory language to the contrary, the matter of providing greater discovery assistance in U.S. courts than is available abroad remains within the discretion of the district

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<sup>149</sup> See, e.g., *Euromepa S.A. v. R. Esmerian, Inc.*, 155 F.R.D. 80, 84 (S.D.N.Y. 1994) (pre-*Intel* case where the district court engaged in a review of French law and concluded that the discovery would not be allowed under French law), *rev’d*, 51 F.3d 1095 (2d Cir. 1995).

<sup>150</sup> See *Intel*, 542 U.S. *supra* note 61, at 262, 268.

<sup>151</sup> *Id.* at 259–60.

<sup>152</sup> See *id.* at 260 (“[N]othing in the text of Section 1782 limits a district court’s production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. ‘If Congress had intended to impose such a sweeping restriction on the district court’s discretion, at a time when enacting liberalizing amendments to the statute, it would have included statutory language to that effect.’” (citation omitted)). See also Smit, *supra* note 35, at 13 (“Section 1782 does not make discoverability or admissibility under foreign law a prerequisite to proper recourse to Section 1782 . . .”).

<sup>153</sup> See *id.* at 261 (“While comity and parity concerns may be important as touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of Section 1782(a).”).

<sup>154</sup> See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 257 n.14 (1987) (asserting that “arbitration is now the ‘functional equivalent’ of the courts”).

courts.<sup>155</sup> This approach translates readily to the arbitration context, where district courts are already accustomed to deferring to the findings of arbitrators. As the power to grant discovery is within the discretion of the arbitrators, absent an express negation of the right to discovery in the arbitration clause, district courts may yield to the arbitrator’s ruling on discovery matters, thereby furthering the general policy of promoting arbitral autonomy. Furthermore, in order to “level the playing field” that may be tipped against a U.S. party that cannot obtain elsewhere discovery like that available under Section 1782, both the arbitrators and the court can deal with the issue, as suggested in *Intel*, by “condition[ing] relief upon that person’s reciprocal exchange of information.”<sup>156</sup>

## V. Conclusion

Much has been written over the past few years, especially since the *Intel* decision, about whether Section 1782 should be available for use in connection with private international arbitration. In this Report, we have reviewed the history of the Section 1782 statute and related case law. We have also discussed the arguments in favor and against the use of Section 1782 in aid of arbitration.

It is this Committee’s opinion that the better position—based on the plain meaning of the statute, the Supreme Court’s decision in *Intel*, the legislative history and policy considerations—is that Section 1782 discovery should be available in private, international arbitration seated outside the United States. We also suggest that district courts respond to such Section 1782 applications using the best practices described in Section III of this Report, which

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<sup>155</sup> See *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79 (2d Cir. 2004); *In re Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993) (“If Congress had intended to impose such a sweeping restriction on the district court’s discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect”).

<sup>156</sup> *Intel*, 542 U.S. at 262.

will effectively address certain of the more compelling arguments that have been made against using Section 1782 in the arbitration realm.

*The Committee on International  
Commercial Disputes*

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