Commentary

Should There Be Unique Restrictions On The Use Of 28 U.S.C. § 1782(A) To Obtain Discovery In International Arbitration?

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Introduction

Section 1782(a) of Title 28 of the United States Code provides, *inter alia*, that:

> [t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made . . . upon the application of any interested person.[1]

This provision has become the subject of considerable attention in the international arbitration community in the last few years.[2]

Section 1782 in its current form traces its roots back to legislation adopted in 1855.[3] That legislation has been supplemented, amended and changed numerous times over the years, most recently in 1996.[4] For present purposes, the most significant change to Section 1782 occurred in 1964, when the language "in a proceeding in a foreign or international tribunal" replaced the phrase "in any judicial proceeding pending in any court in a foreign country."[5] It is clear that, in effectuating a complete overhaul of Section 1782, Congress intended to expand the concept of assistance to foreign courts to encompass quasi-judicial bodies as well. Whether a "foreign or international tribunal" includes a private international commercial arbitration, however, is a question that has provoked substantial disagreement.

Prior to the U.S. Supreme Court decision in *Intel Corp. v. Advanced Micro Devices, Inc.*[6] in 2004, the case law almost uniformly answered this question in the negative.[7] In particular, the United States Courts of Appeal for the Second and Fifth Circuits interpreted Section 1782(a) to exclude applicability to arbitration.[8] Some believed that these decisions "effectively sounded the death of 1782(a) as a tool for private international arbitration."[9] The *Intel* decision, however, while not concerning the issue of Section 1782(a)'s use in aid of arbitration, did read the statute expansively and suggested that the prior case law negating the applicability of Section 1782(a) to arbitration might not be the last word on the subject after all. Indeed, the Supreme Court quoted with apparent approval an article by Professor Hans Smit, in which Professor Smit stated that "[t]he term 'tribunal' . . . includes . . . arbitral tribunals . . . ."[10] Professor Hans Smit has been "acknowledged as the 'dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782.'"[11]

Following *Intel*, the courts have differed in their interpretation of whether the term "tribunal" includes arbitral tribunals. Specifically, the United States District Courts for the Districts of Massachusetts, Delaware, Minnesota, and the Northern District of Georgia have squarely held that after *Intel*, Section 1782(a) applies in the context of private international arbitration.[12] Relying on the dicta in *Intel*, and finding the term "tribunal" unambiguous and inclusive of arbitral bodies, the Northern District of Georgia in *In re Roz Trading Limited*, expressly rejected the rationale of the United States Courts of Appeal for the Second and Fifth Circuits, finding that "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*."[13]

The United States District Courts for the Districts of New Jersey, Connecticut, the Middle District of Florida, and the Northern District of Illinois, have taken a more limited approach to the application of Section 1782(a), holding that it applies only to *state*-sponsored arbitral bodies and excludes purely private bodies.[14] The Northern District of Illinois in *In re an Arbitration in London, England*, explained that "while the *Intel* Court acknowledged the ways in which Congress has progressively broadened the scope of § 1782, it stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statue. "[15]

The United States Court of Appeals for the Fifth Circuit has flatly rejected the interpretation that *Intel* dictates the application of Section 1782 to arbitrations.[16] In *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, the Fifth Circuit explained that the question of whether a private international arbitration tribunal also qualifies as a "tribunal" under Section 1782(a) was not before the Supreme Court in *Intel*. The Fifth Circuit observed that the only mention of arbitration in the *Intel* opinion was Professor Smit's definition and "nothing in the context of the quote suggests that the [Supreme] Court was adopting Smit's definition of 'tribunal' in whole."[17] Because the Fifth Circuit could not overrule the decision of a prior Fifth Circuit panel unless "such overruling is *unequivocally* directed by controlling Supreme Court precedent," they "remained bound" by their holding in *Biedermann*.[18]

While attention has been focused on the question of whether Section 1782(a) applies to private commercial arbitrations at all, other more nuanced issues remain waiting in the wings should the courts eventually concur that Section 1782(a) applies to arbitration. It is to these other issues that we now turn.

Should Section 1782(A) Apply To An Arbitration Involving Foreign Elements Seated In The United States?

Assuming that the term "tribunal" includes arbitral bodies, should Section 1782(a) apply to arbitrations seated in the United States, but which involve foreign elements, *e.g.*, a foreign party or performance in a foreign country? It has been suggested that, while "foreign tribunal" includes a private commercial arbitral body seated in a foreign country, an "international tribunal" encompasses only arbitral bodies created pursuant to a treaty or inter-state agreement, such as the International Centre for the Settlement of Investment Disputes ("ICSID") established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.[19]

The purported basis for this dichotomy is the legislative history of Section 1782. The 1964 amendments to Section 1782 introduced concepts derived from a 1930 Act of Congress (which was later amended and repealed)[20] that empowered an "international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments"[21] to gather evidence. According to this view, when Sections 270-270g were subsequently folded into Section 1782,[22] Congress intended that an international tribunal be limited to those established pursuant to an agreement between the United States and any foreign government or governments, even though the latter phrase was omitted from Section 1782.[23] Advocates of this view also contend that, with respect to a purely private commercial arbitration, if the arbitration tribunal is sitting in the United States, the parties should be limited to the same discovery rights they would have in a purely domestic arbitration.[24]

This view results in arbitrary and counterproductive distinctions based upon where the seat of an arbitra-

tion is set. The seat of an international arbitration is often set in a "neutral" country, which might have no relationship to any of the parties. As a matter of policy, the United States has been desirous of encouraging international arbitrations to be seated in the United States.[25] This view, however, handicaps international arbitrations seated in the United States by making less discovery available when so seated than if the arbitration were seated anywhere else in the world, despite the fact that the parties, arbitrators, and applicable rules would be wholly unaffected by the location of the seat.

It is respectfully submitted that the foregoing view is not persuasive as a matter of statutory construction, legislative history, or public policy. Rather, if Section 1782(a) is to apply to arbitral tribunals at all, it should apply regardless of where the tribunal is seated.

"[S]tatutory construction . . . begin[s] with the language of the statute."[26] Section 1782(a) permits a federal district court in its discretion to order testimony or the production of documents "for use in a foreign or international tribunal . . . ."[27] The words "foreign" and "international" are alternative adjectives delimiting the noun "tribunal." If one assumes that a "foreign tribunal" includes a private arbitral body located in a country other than the United States, then "international tribunal" logically includes a private arbitral body that is "international" in some respect. Presumably, "international" does not mean precisely the same thing as "foreign," because otherwise the words "foreign" and "international" would be rendered redundant of one another in violation of basic principles of statutory construction.[28] What then does "international" mean in this context?

A similar question of interpretation has arisen under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[29] The New York Convention by its terms applies only to the recognition and enforcement of two sorts of arbitral awards: (1) awards made in a country other than the one in which enforcement is sought (*i.e.*, foreign awards), and (2) "awards not considered as domestic awards in the State where their recognition and enforcement are sought."[30] The New York Convention, however, does not define non-domestic awards. Chapter 2 of the Federal Arbitration Act,[31] which implements the Convention, does so indirectly. 9 U.S.C.§ 202 provides that the Convention does not apply to agreements or awards arising out of a relationship which is entirely between citizens of the United States *and* does not involve property located abroad, envisage performance or enforcement abroad, or have some other reasonable relation with one or more foreign states. In light of Section 202, the United States Court of Appeals for the Second Circuit has held that non-domestic awards under the New York Convention are those that "are subject to the Convention not because made abroad, but because made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction."[32] Decisions in the First, Seventh, Ninth and Eleventh Circuits are to the same effect.[33]

Ascribing to "international," as used in Section 1782(a), a meaning equivalent to "non-domestic" as defined for purposes of the New York Convention: would give full and differentiated effect to both the terms "foreign" and "international"; would be consistent with the ordinary meaning of international;[34] and would lead to a reasonable and consistent reading of the statute. It would also have the virtue of giving Section 1782(a) and Chapter 2 of the Federal Arbitration Act parallel constructions.

Moreover, the legislative history of Section 1782(a) does not suggest a different conclusion. The 1930 Act, which was melded into Section 1782(a) by the 1964 amendments, expressly dealt with international tribunals of a particular sort, namely, those "established pursuant to an agreement between the United States and any foreign government or governments."[35] The 1933 amendment of the 1930 Act gave agents of the United States the power to apply to federal district courts for the issuance of subpoenas to gather evidence for use in international tribunals "in which the United States participates as a party."[36] Neither of these express limitations on the type of "international tribunal" were preserved in the 1964 amendments to Section 1782.[37] On the contrary, acting on the recommendation of the Commission on International Rules of Judicial Procedure which it had created, Congress completely revised Section 1782(a) in 1964. That complete revision not only eliminated the limitation restricting use of Section 1782(a) only in aid of a judicial proceeding pending in a foreign

court, but "replace[d], and eliminate[d] the undesirable limitations of, the assistance extended by sections 270 through 270g."[38] By omitting what had previously been express statutory limitations on the type of international tribunal to be aided, Congress signaled its intent that those limitations should no longer apply. Moreover, nothing in the legislative history of the 1964 amendments indicates a different, more restrictive Congressional intent. The Senate Report on the 1964 amendments indicates that the new reference to "a proceeding in a foreign or international *tribunal*" includes unspecified "quasi-judicial proceedings."[39] As the court noted in *Roz Trading*:

> While . . . [the former 22 U.S.C.] § 270 was limited to intergovernmental tribunals, . . . the statutory language was *expressly* so limited. The fact that Congress included the express limitation 'established pursuant to an agreement between the United States and any foreign government or governments' indicates that when Congress wants to limit a statute to apply to governmental bodies, it is capable of doing so.[40]

From a public policy perspective, there does not appear to be much justification for excluding international arbitrations seated in the United States from the ambit of Section 1782(a) if those seated abroad are included. It seems anomalous indeed that parties to an international arbitration can take advantage of Section 1782(a) if the seat of the arbitration is outside the United States, but cannot do so if the seat is within the United States — even though the parties, arbitrators and issues are precisely the same.

Public policy in fact favors treating "foreign" and "international" arbitrations the same for purposes of Section 1782. Otherwise, the parties (especially the non-U.S. party) to an arbitration would be disadvantaged solely by reason of having agreed to arbitrate in the United States. The consequence, over time, of such a disadvantage will be to discourage the selection of a U.S. seat in agreements to arbitrate. This would be unfortunate, since U.S. law otherwise provides a favorable and supportive legal environment for international arbitrations. Moreover, for American parties, the loss of a U.S. seat will mean added costs for travel and perhaps legal representation.

The argument that, if the arbitration tribunal is sitting in the United States the parties should be limited to the same discovery rights they would have in purely domestic arbitration, makes little sense. The fact of the matter is that the issue to be addressed is discovery in aid of an "international" arbitration, *not* discovery in a purely domestic arbitration. Discovery arguably is more limited in domestic arbitrations largely because Chapter 1 of the Federal Arbitration Act, which governs domestic arbitrations, was adopted in 1909, at a time when discovery even in court litigation was virtually non-existent. The limited nature of discovery in domestic arbitration may or may not require fixing, but either way it provides no reason for discriminating between international arbitrations seated in the United States and those seated abroad for purposes of Section 1782(a). If one favors only limited discovery in arbitration, that may be a ground for opposing the application of Section 1782(a) to arbitrations at all, but not for purposes of opposing the application of Section 1782(a) to arbitrations involving foreign elements only when the place of arbitration is within the United States.

Should Section 1782(a) Discovery Requests Be Granted Only If It Comes From the Arbitrators?

As the decision in *Intel* makes clear, discovery pursuant to Section 1782(a) is a matter within the district court's discretion. "[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."[41] Nevertheless, the Supreme Court in *Intel* declined to adopt categorical limitations on the power of a district court to order discovery under Section 1782(a).

Despite *Intel*, it has been suggested that, assuming Section 1782 applies to private arbitrations, certain guiding principles should be adopted by the district courts in ruling on Section 1782 applications.[42] One of these suggested principles is that Section 1782 discovery be granted only if the request comes from, or with the consent of, the arbitrators.[43]

Proponents of this view argue that the decision whether to request Section 1782 discovery should be left to the arbitrators in order to minimize the intrusion of courts into the sphere of arbitration and to avoid potentially wasted energy and expense, since the arbitrators will ultimately determine whether any

evidence procured via Section 1782(a) will be admitted at the hearing.[44] There is a real danger, they say, that unless the arbitrators are permitted to serve as gatekeepers, the parties may use Section 1782(a) to introduce U.S.-style discovery into international arbitrations, where it has not traditionally been permitted and where it does not belong.[45]

Doubtless it would be appropriate for a district court to take such considerations into account when determining whether to exercise its discretion to order Section 1782(a) discovery in a particular case. The problem with establishing a presumption that such discovery will never (or almost never) be permitted unless the request comes from, or is approved by, the arbitrators is that it runs afoul of the Supreme Court's determination in *Intel* that categorical rules foreclosing Section 1782 discovery are inappropriate and, indeed, that that particular rule is inappropriate.

In *Intel*, Advanced Micro Devices, Inc. ("AMD") sought discovery in aid of a European Commission antitrust investigation of Intel, in which AMD was the complainant. The European Commission did not seek or approve the Section 1782(a) discovery request and, in fact, the Commission appeared as an *amicus curiae* and stated that it did not need or want the assistance of an American court. The Supreme Court, however, did not find this to be an absolute bar to discovery pursuant to Section 1782(a).[46]

Intel argued that Section 1782(a) precludes a district court from ordering production of documents when the foreign tribunal or "interested person" would not be able to obtain the documents if they were located in a foreign jurisdiction. The Supreme Court concluded that, if Congress had intended such a restriction when enacting the liberalizing 1964 amendments, it would have said so, and that nothing in the legislative history suggested otherwise.[47]

Intel raised two policy concerns in support of a foreign-discoverability limitation on the reach of Section 1782(a), namely, avoiding offense to foreign governments (*i.e.*, international comity) and maintaining parity between litigants.[48] With respect to the former, the Supreme Court expressed doubt that foreign governments would in fact be offended by a U.S. statute permitting, but not requiring, judicial assistance. "A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions — reasons that do not necessarily signal objection to aid from United States federal courts."[49]

The Supreme Court's reasoning applies with even greater force in the context of a foreign or international arbitration. The notion of international comity has little applicability to a commercial arbitral tribunal, which is a private body, and not a governmental one. While arbitration statutes or case law operative at the seat of arbitration may lend little or no judicial assistance to discovery in aid of arbitration, they do not affirmatively preclude arbitrators from receiving evidence procured through lawful means in other jurisdictions.

Likewise, while arbitrators in international arbitration may not, as a matter of tradition or practice, compel broad discovery or discovery of certain types (*e.g.*, depositions), or may even lack the legal power to do so under the law of the seat, nothing precludes arbitrators from receiving evidence procured by the parties in accordance with lawful means outside the arbitration itself. For example, while an arbitral tribunal might not order broad production of documents or deposition testimony, it may well receive documents or party admissions secured through the efforts of a private investigator.

Just because arbitrators feel constrained in the discovery they themselves can or will require, it should not be assumed that they will not receive or consider evidence obtained through other means. Moreover, this also suggests a reason why it may not always be appropriate to require that a request for Section 1782(a) discovery come from or be approved by the arbitrators. Doing so makes the arbitrators part of the Section 1782 process and, perhaps more importantly, makes the Section 1782 process in some sense an extension of the arbitral process. Arbitrators might well feel that by making or approving a Section 1782 request, they are doing indirectly what they could not or would not do directly as arbitrators — which is different from making a determination as to whether evidence procured by a party through procedures outside the arbitration should be considered in the arbitration.

It is also worth noting that when Section 1782(a) discovery is sought in aid of a proceeding in a foreign court, there is no requirement that the foreign court

make or approve the Section 1782(a) request.[50] Presumably, this would be true even if the parties by contract had designated the foreign court the exclusive forum for resolution of disputes under their contract. To impose a requirement of tribunal approval in the context of arbitrations would be to accord more deference to private arbitrators than to officially appointed judges of a foreign nation.

With respect to "international," as distinguished from "foreign" arbitrations, *i.e.*, when the seat of an arbitration with transnational elements is in the United States, the notion of comity is completely irrelevant. Rather, the question in that context is whether Section 1782(a) trumps the arguably more limited discovery available in domestic arbitration. If we assume, as argued in the preceding section of this article, that Section 1782(a) applies to such international arbitrations, the answer clearly is yes. There are no considerations of international comity that would support a requirement that a request for Section 1782(a) discovery come from or be approved by the arbitrators.

The other policy concern acknowledged by *Intel* and relied upon to supposedly justify a foreign-discovery limitation on Section 1782(a), maintaining parity between litigants, was easily disposed of by the Supreme Court: "When information is sought by an 'interested person,' a district court could condition relief upon that person's reciprocal exchange of information. . . . Moreover, the foreign tribunal can place conditions on its acceptance of the information, to maintain whatever measure of parity it concludes is appropriate."[51] These considerations apply with equal force regardless of whether the foreign tribunal is a court or an arbitral body.

Should A Party To An Arbitration Agreement Be Permitted To Apply For A Discovery Order Under Section 1782 Prior To Appointment Of The Panel?

The 1964 revisions to Section 1782(a) deleted the requirement previously contained therein that the foreign proceeding be "pending." In *Intel*, the Supreme Court noted that "Section 1782 does not limit the provision of judicial assistance to 'pending' adjudicative proceedings."[52] The Court held "that § 1782(a) requires only that a dispositive ruling . . . be within reasonable contemplation."[53]

It has been suggested that, in the context of international arbitration, applications for Section 1782(a) discovery should not be entertained prior to the time the tribunal is constituted (because such applications should only be made by or with the consent of the arbitrators) except in the case of emergencies (such as where a witness is dying) or when there is a risk of irreparable harm.[54] Once again, however, there is no support in the statute or the legislative history for such a blanket limitation on a district court's discretion under Section 1782(a). While the fact that an arbitration proceeding has not yet been initiated or arbitrators appointed might well be factors to be considered by the district court, there should be no rule automatically barring — absent an emergency — a discovery order under such circumstances. For example, one can imagine circumstances where a discovery order might be appropriate to enable a party to frame a demand for arbitration or to preserve third-party evidence that might otherwise be destroyed or become unavailable while an arbitral tribunal is being constituted.

Conclusion

Whether private commercial arbitrations should be considered "tribunals" within the meaning of Section 1782(a) may be legitimately debated. If such arbitrations are to be considered tribunals, however, there are no persuasive reasons for discriminating between international arbitrations seated in the United States and those seated abroad. Nor should special rules circumscribing a district court's discretion be engrafted onto the statute when discovery in aid of an international arbitration seated in the United States is sought pursuant to Section 1782(a).

Endnotes

1. 28 U.S.C.S. § 1782(a) (2008).

2. *See, e.g.*, Jessica Weekley, Comment, *Discovering Discretion: Applying Intel to § 1782 Requests for Discovery in Arbitration*, 5 CASE W. RES. L. REV. 535 (2009); Lawrence W. Newman and David Zaslowsky, *Use of Section 1782 in Aid of International Arbitration*, N.Y.L.J., July 30, 2008; Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial*

Assistance in Taking Evidence for International Arbitration, 19 AM. REV. INT'L ARB. 61 (2008); 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 (2005).

3. 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 (1855).

4. The 1855 Act was supplemented in 1863 by an Act to Facilitate the Taking of Depositions Within the United States, to be Used in the Courts of Other Countries, and for other Purposes, 37 Cong. Ch. 95; 12 Stat. 769 (1863). In 1948, the 1855 and 1863 Acts, and revised statutes modeled thereon, were broadened and blended into one consolidated and revised statute, Section 1782. *See* Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (1948). The statute was further amended in 1949, Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949), completely revised in 1964, Act of October 3, 1964, Pub. L. 88-619, § 9, 78 Stat. 997 (1964), and most recently amended in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1342(b), 110 Stat. 186, 486 (1996).

5. *See* Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 997 (1964).

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

7. *See, e.g., National Broadcasting Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999); *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997).

8. *See National Broadcasting Co.*, 165 F.3d at 191; *Republic of Kazakhstan*, 168 F.3d at 883.

9. *See* Thurston K. Cromwell, Note, *The Role of Federal Courts in Assisting International Arbitration*, J. DISP. RESOL. 177, 184 (2000).

10. *Intel*, 542 U.S. at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. No. 6, 1015, 1026-27 (1965)).

11. *In re An Arbitration In London, England*, 626 F. Supp. 2d 882, 885 n.3 (N.D. Ill. 2009) (citing *In re Letter Request from Crown Prosecution Service*, 870 F.2d 686, 689 (D.C. Cir. 1989)).

12. *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008); *Comision Ejecutiva Hidroelectrica Del Rio Lempa v. Nejapa Power Co., LLC*, No. 08-135-GMS, 2008 U.S. Dist. LEXIS 90291 (D. Del. Oct. 14, 2008), *dismissed as moot*, No. 08-3518, 2009 U.S. App. LEXIS 17289, at *10 (3rd Cir. Aug. 3, 2009)(not precedential); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007); *In re ROZ Trading Ltd.*, 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006), *denying stay*, 1:06-cv-02305-WSD, 2007 U.S. Dist. LEXIS 2112 (N.D. Ga. Jan. 11, 2007)(not for publication).

13. *In re ROZ Trading Ltd.*, 1:06-cv-02305-WSD, 2007 U.S. Dist. LEXIS 2112, * 4.

14. *In re An Arbitration In London, England*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009); *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 JBA, 2009 U.S. Dist. LEXIS 109492, * 13 (D. Conn. Aug. 27, 2009); *In re Oxus Gold PLC*, Misc: 06-82, 2006 U.S. Dist. LEXIS 74118, *14-16 (D.N.J. Oct. 10, 2006), *denying appeal*, MISC 06-82-GEB, 2007 U.S. Dist. LEXIS 24061, * 14 (D. N.J. April 2, 2007) (not for publication); *see also In Re Operadora DB Mexico, S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091(M.D. Fla. Aug. 1, 2009)(concluded that the term "international tribunal" was likely to mean solely governmental and state-sponsored proceedings and after applying a functional analysis found that the ICC did not fall within the scope of Section 1782).

15. *In re An Arbitration In London, England*, 626 F. Supp. 2d 882 at 885 (emphasis in original). Interestingly, the Northern District of Illinois observed that in *Intel*, the Supreme Court's use of ellipses in its citation to Smit's definition of tribunal suggested that the Supreme Court was not willing to embrace the full breadth of Smit's definition. Smit's definition without the ellipses reads, "'[t]he term 'tribunal' *embraces all bodies exercising adjudicatory powers, and* includes investigating magistrates, administrative and arbitral tribunals, quasi-judicial

agencies, as well as conventional civil, commercial, criminal, and administrative courts.'" *Id.* (emphasis in original).

16. *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485-488 (S.D. Tex. 2008), *aff'd sub nom, El Paso Corp. v. La Comision Ejecutiva Hidroelectrica*, No. 08-20771, 2009 U.S. App. LEXIS 17596 (5th Cir. Aug. 9, 2009) (unpublished) (§ 1782 does not apply to private arbitration); *see also In Re Operadora DB Mexico, S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091(M.D. Fla. Aug. 1, 2009)(concluded that the term "international tribunal" was likely to mean solely governmental and state-sponsored proceedings and after applying a functional analysis found that the ICC did not fall within the scope of Section 1782).

17. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica*, 2009 U.S. App. LEXIS 17596 at * 7.

18. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica*, 2009 U.S. App. LEXIS 17596 at * 9. We note that in the related case in Delaware, the District of Delaware concluded the opposite, namely, that it was authorized to grant an application from La Comision. This particular ruling was later mooted due to other grounds. *Comision Ejecutiva, Hidroelectrica Del Rio Lempa v. Nejapa Power Co., LLC*, 2008 U.S. Dist. LEXIS 90291 ("[T]he Supreme Court's decision in Intel (and post-Intel decisions from other district courts) indicate that *Section 1782* does indeed apply to private foreign arbitrations"), *dismissed as moot*, No. 08-3518, 2009 U.S. App. LEXIS 17289, at *10.

19. *See The Thorny Issue of Obtaining U.S. Discovery In Aid Of International Arbitration; A Report By the International Commercial Disputes Committee Of the Bar Of The City Of New York*, MEALEY'S INTERNATIONAL ARBITRATION REPORT, Vol. 23, #5, page 37 at page 49 (expressing the view of a majority of the Committee; one of the co-authors of this article is a member of the International Disputes Committee, but does not share the view of the majority on this particular issue) (hereinafter referred to as the "ICDC Report."). *See also In re an Arbitration In London, England*, 626 F.2d at 885; *In re Oxus Gold PLC*, 2006 U.S. Dist. LEXIS 74118, at *14-16, *denying appeal*, 2006 U.S. Dist. LEXIS 24061, *11-14; *see also, National Broadcasting Co.*, 165 F.3d at 189-90; *Republic of Kazakhstan*, 168 F.3d at 882.

20. *See* Act of July 3, 1930, Pub. L. No. 71-524, 46 Stat. 1005 (1930), *amended by* Pub. L. No. 73-31, 48 Stat. 117 (1933), *codified in* 22 U.S.C. §§ 270 – 270(g), *repealed by* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995 (1964). The Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 997 (1964) contains the revisions to Section 1782 (1949), which was later amended in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1342(b), 110 Stat. 186, 486 (1996).

21. Act of July 3, 1930, Pub. L. No. 71-524, 46 Stat. 1005-06 (1930).

22. Act of July 3, 1930, Pub. L. No. 71-524, 46 Stat. 1005 (1930), *amended by* Pub. L. No. 73-31, 48 Stat. 117 (1933), *codified in* 22 U.S.C. §§ 270 – 270(g), *repealed by* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995 (1964). The Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 997 (1964) contains the revisions to Section 1782 (1949), which was later amended in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, § 1342(b), 110 Stat. 186, 486 (1996).

23. *See, e.g.*, Daniel Schimmel and Melissa E. Byroade, *Does 28 U.S.C. § 1782 Allow U.S. Courts to Order Discovery for Use in Private International Arbitration?*, in INTERNATIONAL ARBITRATION 2009 — VOLUME ONE 4 (Practicing Law Institute, 2009).

24. *See, e.g.*, ICDC Report, *supra* note 19; Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782.* 17 AM. REV. INT'L ARB. 45, 66-67 (2006); Sofia E. Biller and Howard S. Suskin, *May Courts Assist Private International Arbitration? The Judicial Split Over the Reach of 28 U.S.C. §1782*, LAW.COM (MAR. 19, 2009), http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/2437/Law.com_Suskin_Biller.pdf.

25. Winston Stromberg, *III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes,* 40 Loy. L.A. L. Rev. 1337, 1384, 1394-96 (2008); 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, 1051-57 (2005).

26. *Intel Corp.*, 542 U.S. at 255 (quoting *Barnhart v. Sigmon Coal* Co., 534 U.S. 438, 450 (2002)).

27. 28 U.S.C.S. § 1782(a) (2008).

28. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983).

29. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

30. Convention on the Recognition and Enforcement of Foreign Arbitral Awards at art. I, para. 1.

31. 9 U.S.C.S §§ 201-208 (2009).

32. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997) (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983)).

33. *DiMercurio v. Sphere Drake, Ins. PLC No 1 A/C*, 202 F.3d 71, 74 (1st Cir. 2000) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982)); *Jain v. deMere*, 51 F.3d 686, 689 (7th Cir. 1995); *Minister of Defense of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440-41 (11th Cir. 1998).

34. "The term 'international' is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries and so are international or, in the terminology adopted by Judge Jessup, 'transnational.'" Alan Redfern & Martin Hunter with Nigel Blackaby & Constantine Partasides, Law and Practice Of International Commercial Arbitration 1-21 (4th ed. 2004). *Merriam Webster's Collegiate Dictionary* also defines "international" as "of, relating to, or affecting two or more nations." Merriam-Webster's Collegiate Dictionary 654 (11th ed. 2004).

35. Act of July 3, 1930, Pub. L. No. 71-524, 46 Stat. 1005 (1930), *amended by* Pub. L. No. 73-31, 48 Stat. 117 (1933).

36. Act of June 7, 1933, Pub. L. No. 73-31, 48 Stat. 117 (1933).

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

38. H.R. Doc. No. 88-88 (1963); S. Rep. No. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788-89.

39. S. Rep. No. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

40. *In re Roz Trading Ltd.*, 469 F. Supp. 2d at 1227 n. 5 (italics in original); *see also Intel*, 542 at 260 (quoting *In re Application of Aldunate*, 3 F.3d 54, 59 (2nd Cir. 1993)(wherein the Supreme Court stated in rejecting arguments to read Section 1782 narrowly: "'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'").

41. *Intel*, 542 U.S. at 264 (citing *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001).

42. ICDC Report, *supra* note 19 at page 48; Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782.* 17 Am. Rev. Int'l Arb. 45 (2006).

43. ICDC Report, *supra* note 19 at pages 48-49; Anna Conley, *A New World of Discovery: The Ramifications*

of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782. 17 AM. REV. INT'L ARB. 45, 71 (2006).

44. ICDC Report, *supra* note 19 at page 48; Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782.* 17 AM. REV. INT'L ARB. 45, 65-68,72 (2006).

45. *See, e.g.,* ICDC Report, *supra* note 19 at page 48; Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782.* 17 AM. REV. INT'L ARB. 45, 67,69 (2006); Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration,* 19 AM. REV. INT'L ARB. 61, 64 (2008);

46. *Intel,* 542 U.S. at 265-66.

47. *Intel,* 542 U.S. at 259-60.

48. *Intel,* 542 U.S. at 261.

49. *Intel,* 542 U.S. at 261.

50. *Cf. Intel,* 542 U.S. at 265-66.

51. *Intel,* 542 U.S. at 262 (citing *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2nd Cir. 1995).

52. *Intel,* 542 U.S. at 258

53. *Intel,* 542 U.S. at 259.

54. ICDC Report, *supra* note 19 at page 50; Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration,* 19 AM. REV. INT'L ARB. 61, 64 (2008). ■