

Coming To America: The Use of 28 U.S.C. § 1782

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Since 1855, the federal courts of the United States have been empowered to assist in the gathering of evidence for use before foreign tribunals. Today, the source of that authority is 28 U.S.C. §1782 which permits the courts to order a person “to give [] testimony, . . . or to produce a document . . . for use in a proceeding in a foreign or international tribunal...”

It was generally assumed, until the United States Supreme Court’s decision of Intel Corp. v. Advanced Micro Devices, Inc. in 2004, that arbitration tribunals were not “foreign tribunals” for purposes of 28 U.S.C. §1782. While the issue in Intel did not involve an arbitration tribunal, a statement by the Supreme Court in dicta has called into question the exact parameters of the words “foreign tribunal,” resulting in a split of opinion among the federal courts of the United States.

This article explores the legislative history of 28 U.S.C. §1782, examines the United States Supreme Court decision in Intel, and discusses the split among the courts of the United States regarding the interpretation of “foreign tribunal.” The article further surveys emerging issues: is

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an arbitration tribunal in a case involving foreign parties and seated in the United States a "foreign tribunal"; does agreeing to the use of the IBA Rules on the Taking of Evidence in International Arbitration circumscribe the use of 28 U.S.C. §1782; can a party be ordered to produce documents located outside the United States; and is there a role for judicial estoppel in determining whether an application pursuant to 28 U.S.C. §1782 should be granted?

Key Words : International Arbitration, 28 U.S.C. 1782, Section 1782, International Tribunal, Foreign Tribunal, Discovery, Aid, Intel

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I . Introduction

In 1855, a time when international disputes were few, the United States Congress first provided federal-court assistance in gathering evidence for use before foreign tribunals.¹⁾ To obtain aid in gathering evidence, the government of a foreign country was required either to be a party or to have an interest in the proceeding and aid was obtained through diplomatic channels using letters rogatory.²⁾

By 1948, the world was a decidedly different place. Two world wars had been fought, the far corners of the world were substantially closer due to improved methods of transportation and communication, and the potential for international commercial disputes was greater. Against this backdrop, the United States Congress broadened the scope of assistance federal courts could provide to foreign tribunals through new legislation, codified as 28 U.S.C. §1782. In expanding the scope of permitted aid,

1) See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (circuit court may appoint "a United States commissioner designated ... to make the examination of witnesses" on receipt of a letter rogatory from a foreign court).

2) "Letters rogatory are requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty." *Preparation of Letters Rogatory*, U.S. Department of State, <http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html>.

Congress eliminated the foreign government involvement requirement and authorized the district court “to designate persons to preside at depositions ‘to be used in any civil action pending in any court in a foreign country with which the United States is at peace.’”³⁾ The “any civil action” requirement was not long-lived, however. One year later, Congress eliminated the phrase “any civil action” and inserted “judicial proceeding.”⁴⁾

The year 1958 heralded the adoption of the seminal Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, by a United Nations diplomatic conference. That same year, the United States Congress, in recognition of the growth in international commerce, created a Commission on International Rules of Judicial Procedure (“Rules Commission”) to “investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.”⁵⁾ Six years later, in 1964, Congress unanimously adopted the Rules Commission’s recommended legislation. Included in these recommendations were extensive revisions to §1782.

The revised §1782 deleted the phrase “in any judicial proceeding *pending* in any court in a foreign country,” and replaced it with “in a proceeding in a foreign or international tribunal.”⁶⁾ It further provided for assistance in obtaining not only documentary and other tangible evidence but also testimony.⁷⁾

The accompanying Senate Report explained that Congress used the word “tribunal” to ensure that “assistance is not confined to proceedings before conventional courts,” but extends also to “administrative and quasi-judicial proceedings.”⁸⁾ Congress made one final amendment to §1782 in 1996 when the phrase “including criminal investigations conducted before formal accusation” was added.⁹⁾

3) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (citing Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949) (emphasis added).

4) *Id.* at 248 (citing Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103; Harry Leroy Jones, “International Judicial Assistance: Procedural Chaos and a Program for Reform,” *Yale Law Journal*, Vol. 62, 1953, p. 515).

5) *Id.* (quoting Act of Sept. 2, Pub.L. 85-906, § 2, 72 Stat. 1743; S. Rep. No. 85-2392, at 3 (1958)).

6) *Id.* at 241 (emphasis supplied).

7) *Id.* at 248.

8) *Id.* at 249 (quoting S. Rep. No. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).

9) *Id.* at 249; *see* 28 U.S.C. § 1782.

Thus, since 1996, §1782 has stated:

- (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.
- (b) 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.

Although seemingly straightforward, as will be seen, the use of §1782 has spawned significant litigation, often with divergent results.

II. *Intel Corporation v. Advanced Micro Devices, Inc.*

Prior to 2004, §1782 was rarely used. In fact, from 1964 to 2004 the courts decided only approximately 94 applications.¹⁰⁾ But the United States Supreme Court's decision in *Intel Corporation v. Advanced Micro Devices, Inc.*,¹¹⁾ coupled with the continuing growth of international commerce,¹²⁾ has created a valuable international dispute resolution tool that has been employed with frequent success. Unfortunately, the Supreme Court's *Intel* decision failed to clearly define the exact parameters of §1782's applicability, resulting in a division of opinion among the courts of the United States concerning whether §1782 can be employed to obtain discovery for use in private international arbitrations.

At issue in *Intel* was Advanced Micro Devices's ("AMD") request to a United States District Court for an order directing Intel to produce documents relating to a private anti-trust action brought in Alabama. AMD and Intel were world-wide competitors in the microprocessor industry.¹³⁾ In 2000, AMD filed an antitrust complaint with the Directorate-General for Competition of the European Commission ("DG Competition"). The European Commission exercises responsibility over a wide range of subject areas covered by the European Union treaty, including the treaty provisions and regulations governing competition. AMD's anti-trust complaint alleged that Intel had abused its position in the European market through loyalty rebates, exclusive purchasing agreements with manufacturers and retailers, price discrimination and standard-setting cartels. When the DG Competition declined to seek discovery of the documents Intel

10) "Based on a Westlaw search of cases from 1964, when the statute was amended, to 2004, when *Intel* was decided, there . . . [were] 94 reported cases addressing Section 1782 requests in forty years," Roger P. Alford, "Ancillary Discovery to Prove Denial of Justice," *Virginia Journal of International Law*, Vol. 53 No. 1, 2012, p. 155 n.149.

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

12) Compare "International Trade Statistics 2014", (2014), Retrieved Aug. 3, 2015, available at https://www.wto.org/english/res_e/statis_e/its2014_e/its2014_e.pdf, p. 8 (last visit on Aug. 14, 2015) (quantifying "merchandise exports of 160 WTO members in 2013" at US\$ 17.8 tn), with "International trade statistics 2004", (2004), Retrieved Aug. 3, 2015, available at https://www.wto.org/english/res_e/statis_e/its2004_e/its2004_e.pdf, p. 198 (listing "[t]otal merchandise exports" in the world as US\$ 7.29 tn).

13) "AMD files antitrust suit against Intel", (2005), Retrieved Aug. 6, 2015, available at http://www.nbcnews.com/id/8386156/ns/business-us_business/t/amd-files-antitrust-suit-against-intel/#.VcO-uOIRG70 (last visit on Aug. 6, 2015).

had produced in a private anti-trust suit filed against Intel in federal court in Alabama, *Intergraph Corp. v. Intel Corp.*, AMD, pursuant to §1782, petitioned the United States District Court for an order directing Intel to produce documents discovered in the *Intergraph* litigation and on file in the Alabama federal court.

The District Court denied the application. On appeal, the Ninth Circuit, after making certain observations regarding the breadth of §1782, remanded the case to the trial court for disposition on the merits. On remand, the Magistrate Judge found AMD's application "overbroad" and recommended an order directing AMD to submit a more specific request confined to documents directly relevant to the European Commission investigation. The District Court stayed further proceedings, pending the resolution of the questions presented by Intel on *certiorari* to the United States Supreme Court.

The United States Supreme Court was called upon to address three primary questions: (1) does §1782 permit complainants who are not private "litigants" or sovereign agents to obtain discovery; (2) must a proceeding before a foreign tribunal be pending or at least "imminent" to invoke §1782 successfully; and (3) does §1782(a) bar a district court from ordering production of documents when the foreign tribunal or "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction?

1. Does § 1782 permit complainants who are not private "litigants" or sovereign agents to obtain discovery?

Taking a narrow view, Intel contended that "'interested person[s]' authorized to apply for judicial assistance pursuant to §1782(a) include[d] only 'litigants, foreign sovereigns, and the designated agents of those sovereigns,' and exclude[d] AMD, a mere complainant before the Commission, accorded only 'limited rights.'"¹⁴⁾ The Supreme Court rejected this contention, noting that a complainant who triggers a European Commission investigation has a significant role in the process, including the right to submit information for consideration by the DG Competition and the ability to proceed to court if the Commission discontinues the investigation or dismisses the complaint. Thus, reasoned the Supreme Court, because AMD possessed these participation rights,

14) *Intel Corp.*, 542 U.S. at 256.

AMD had a reasonable interest in obtaining [judicial] assistance and qualified as an “interested person.”¹⁵⁾

Having concluded that AMD was an “interested person,” the subsidiary question was whether the documents AMD sought were “for use in a foreign or international tribunal.” The Supreme Court had little difficulty in concluding that the European Commission, to the extent it acts as a first-instance decision maker, falls within the ambit of §1782. Relying on the history of §1782, the Supreme Court observed that in 1958 when the Rules Commission was established, Congress “instructed the Rules Commission to recommend procedural revisions ‘for the rendering of assistance to foreign courts and quasi-judicial agencies.’”¹⁶⁾ The Supreme Court, quoting from scholarly commentary by Hans Smit, further stated in *dicta*, that “[t]he term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts .”¹⁷⁾ The inclusion of the words “arbitral tribunals” in the definition of “tribunals” is the genesis of the division among the courts of the United States as to whether use of §1782 extends to private international arbitration.

2. Must a proceeding before a foreign tribunal be pending or at least “imminent” to invoke § 1782 successfully?

Intel argued that because AMD’s complaint had not progressed beyond the investigatory stage, there was no adjudicative action currently or even imminently on the Commission’s agenda. The Supreme Court, relying again on the legislative history and scholarly commentary, gave short shrift to the argument, holding that “Section 1782(a) does not limit the provision of judicial assistance to ‘pending’ adjudicative proceedings.”¹⁸⁾

15) *Id.*

16) *Id.* at 257-58.

17) *Id.* at 258.

18) *Id.*

3. Does § 1782(a) bar a district court from ordering production of documents when the foreign tribunal or “interested person” would not be able to obtain the documents if they were located in the foreign jurisdiction?

In answering this question, the Supreme Court found significant that §1782(b) expressly shields privileged material from production.¹⁹⁾ Holding that “[i]f 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,”²⁰⁾ the Supreme Court rejected Intel's two policy concerns: avoiding offense to foreign governments and maintaining parity between the litigants.

Consequently, based on §1782 and the Supreme Court's holding in *Intel*, a petitioner must meet the following four threshold requirements:

(1) the request must be made “by a foreign or international tribunal,” or by “any interested person” and an “interested person” need not be a litigant; (2) the request must seek evidence, whether it be the “testimony or statement” of a person or the production of “a document or other thing”; (3) the evidence must be “for use in a proceeding in a foreign or international tribunal”; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.²¹⁾

19) *Id.* at 260 (“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.”); see S. Rep. No. 88-1580, at 9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789-90 (“[N]o person shall be required under the provisions of [§ 1782] to produce any evidence in violation of an applicable privilege.”).

20) *Id.* at 260 (quoting *In re Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993)).

21) *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1269 (11th Cir. 2014); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-MC-00226-MSK-KMT, 2015 WL 1810135, at *3 (D. Colo. Apr. 17, 2015) (quoting *In re Michael Wilson & Partners, Ltd.*, Case No. 06-cv-02575-MSK-PAC, 2007 WL 22221438, at *2 (D. Colo. July 27, 2007) (quoting *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007)).

4. Discretionary factors for consideration

The Supreme Court additionally emphasized that even if these four threshold requirements are met, a United States district court is not required to grant a §1782(a) discovery application and enumerated the following discretionary factors for a district court's consideration when deciding the issue:

- Is the person from whom discovery is sought a participant in the foreign proceeding?
- Considering the nature and character of the foreign proceeding is judicial assistance appropriate?
- Will the foreign government, court or agency be receptive to U.S. federal-court judicial assistance?
- Is the discovery request a veiled attempt to avoid foreign evidence gathering restrictions or other policies?
- Is the request unduly intrusive and burdensome?²²⁾

III. What is a Tribunal? Pre-*Intel* decisions

Since the Supreme Court's decision in *Intel*, the courts have widely been in agreement that §1782 can be used in aid of treaty-based arbitrations, finding that an arbitral tribunal established pursuant to a bilateral investment treaty is an "international tribunal."²³⁾ Consequently, in deciding whether to grant the §1782 application in the context of bilateral investment treaty arbitration, the court's focus is not on the nature of the tribunal but on the *Intel* discretionary factors.²⁴⁾

The debate regarding the meaning of "tribunal," therefore, centers around whether §1782 extends to private international arbitration. Prior to the Supreme Court's decision

22) *Intel Corp.*, 542 U.S. at 264-65.

23) *But see* V.4., *infra* where the Fifth Circuit in *Republic of Ecuador v. Connor*, 708 F.3d 651 (5th Cir. 2013) refused to reach the question of whether an arbitration tribunal based on a bilateral investment treaty falls within §1782.

24) Roger P. Alford, "Ancillary Discovery to Prove Denial of Justice," *Virginia Journal of International Law*, Vol. 53 No. 1, 2012, p. 136. This article is an excellent examination of the use of ancillary discovery in general and in particular for treaty based arbitrations.

in *Intel*, two Courts of Appeals, the Second Circuit in *Nat'l Broad. Co. v. Bear Stearns & Co., Inc.*²⁵⁾ and the Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l*,²⁶⁾ each held that §1782 does not provide a vehicle for obtaining discovery in a private international arbitration.²⁷⁾ In reaching identical holdings, each case turned to the legislative history of §1782 to conclude that the word “tribunal” did not include private international arbitration tribunals. Pivotal to each Court’s decision was the lack of reference to “private international arbitration” in §1782’s legislative history.²⁸⁾

1. *Nat'l Broad. Co. v. Bear Stearns & Co., Inc.*

While the House and Senate Committee Reports of 1964 stated “[t]he word “tribunal” is used to make it clear that assistance is not confined to proceedings before conventional courts,’ to which the predecessor statute had been expressly limited,” the Second Circuit nevertheless noted that “the absence of any reference to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute.”²⁹⁾ The Court found this absence compelling “because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken without at least a mention of this legislative intention.”³⁰⁾

In further support of its holding, the Court examined the interplay between the Federal Arbitration Act (“FAA”) and international arbitration.³¹⁾ The FAA applies to private commercial arbitration conducted in the United States. It is also applicable to arbitrations in certain foreign countries by virtue of legislation implementing the New York Convention³²⁾ and the Panama Convention.³³⁾ “The statute principally provides

25) 165 F.3d 184 (2d Cir. 1998).

26) 168 F.3d 880 (5th Cir. 1999).

27) Since *Intel*, only one United States Appellate Court has addressed the issue, the Fifth Circuit of Appeals in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 32 (5th Cir. 2009) which will be discussed at IV. 1. *infra*.

28) *Bear Stearns*, 165 F.3d at 190.

29) *Id.* at 189 (citing H.R. Rep. No. 88-1052, at 9 (1963) (“House Report”); S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788 (“Senate Report”).

30) *Id.* at 190.

31) Federal Arbitration Act, 9 U.S.C. §1 et seq.

32) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 (implemented at 9 U.S.C. §§ 201-08)

for the enforcement of agreements to arbitrate, supplying judicial assistance to facilitate arbitration, and providing for confirmation, vacation, or modification of the arbitrators' resulting decisions."³⁴⁾

Section 7 of the FAA establishes statutory authority for invoking the powers of a federal district court to assist arbitrators in obtaining evidence, by allowing arbitrators to subpoena witnesses and to direct those witnesses to bring material documentary evidence to an arbitral hearing.³⁵⁾ If a witness fails to comply, "the district court for the district in which the arbitrators are sitting may compel compliance with such subpoenas. "³⁶⁾ As stated by the Second Circuit, permitting

such broad discovery in proceedings before 'foreign or international' private arbitrators would stand in stark contrast to the limited evidence gathering provided in 9 U.S.C. §7 for proceedings before domestic [United States] arbitration panels. Such an inconsistency not only would be devoid of principle, but also would create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitral panels as domestic, foreign, or international. As noted above, therefore, it is our view that Congress intended not this broad result, but rather only the limited expansion described in the House and Senate reports.³⁷⁾

2. *Republic of Kazakhstan v. Biedermann Int'l*

In *Biedermann*, as in *Bear Stearns*, the Court focused on the history surrounding the substitution of the word "tribunal" for "court." The Court noted that although the substitution of "tribunal" evidenc[ed] Congress's intention to expand the discovery provision beyond "conventional courts" to include "foreign administrative and quasi-judicial agenc[ies],"³⁸⁾ ". . . the new version of §1782 was drafted to meld its

33) Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (implemented at 9 U.S.C. §§ 301-07)

34) *Bear Stearns*, 165 F.3d at 187.

35) *Id.*

36) *Id.* (citing 9 U.S.C. § 7).

37) *Id.* at 191.

predecessor with other statutes which facilitated discovery for international government-sanctioned tribunals.”³⁹⁾ Importantly,

[n]either the report of the Commission that recommended what became the 1964 version of §1782 nor contemporaneous reports of the Commission's director ever specifically goes beyond these types of proceedings to discuss private commercial arbitrations. There is no contemporaneous evidence that Congress contemplated extending §1782 to the then-novel arena of international commercial arbitration. References in the United States Code to “arbitral tribunals” almost uniformly concern an adjunct of a foreign government or international agency.⁴⁰⁾

Recognizing that the term “tribunal” is imprecise and therefore required judicial interpretation consistent with the statute’s purpose, the Fifth Circuit remarked that the term “[t]ribunal” has been held not to include even certain types of fact-finding proceedings, like those enforcing tax assessment and currency exchange regulations, conducted under the auspices of foreign governments.”⁴¹⁾ Consequently, the Court reasoned, “not every conceivable fact-finding or adjudicative body is covered, even when the body operates under the imprimatur of a foreign government.”⁴²⁾

Finally, the Fifth Circuit observed that using §1782 in private international disputes to seek ancillary discovery through the federal courts would undercut arbitration’s principal advantage, a speedy, economical, and effective means of dispute resolution.⁴³⁾ “Resort to §1782 in the teeth of such agreements⁴⁴⁾ suggests a party’s attempt to manipulate

38) *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881-82 (5th Cir. 1999) (citing S. Rep. No. 88-1580, at 9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).

39) *Biedermann*, 168 F.3d at 882 (citing *National Broad. Co.*, 165 F.3d 184 at 188-90 (discussing combination of § 1782 with 22 U.S.C. §§ 270-270(g)).

40) *Biedermann*, 168 F.3d at 882.

41) *Id.* at 882 (citing *Fonseca v. Blumenthal*, 620 F.2d 322, 323 (2d Cir.1980); *In re Letters Rogatory Issued by Dir. of Inspection of Gov’t of India*, 385 F.2d 1017, 1020-22 (2d Cir.1967); *Okubo v. Reynolds (In re Letters Rogatory from the Tokyo Dist. Prosecutor’s Office)*, 16 F.3d 1016, 1018-19 (9th Cir. 1994)).

42) *Id.* at 882.

43) *See id.* at 883 (“It is not likely that Congress would have chosen to authorize federal courts to assure broader discovery rights in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart.”).

United States court processes for tactical advantage. Section 1782 need not be construed to demand a result that thwarts private international arbitration's greatest benefits."⁴⁵⁾

In light of the *Bear Stearns* and *Biedermann* decisions, it was generally presumed that discovery in aid of private international arbitration pursuant to §1782 was not available. The Supreme Court's passing reference to "arbitral tribunals" in the *Intel* decision has cast doubt on this premise, however.⁴⁶⁾

IV. What is a Tribunal? Post-*Intel* decisions

The federal courts of the United States are divided into thirteen circuits, each typically comprised of more than one state.⁴⁷⁾ Each circuit has a Court of Appeals that hears appeals from the district courts within that circuit. For example, the Fifth Circuit considers appeals from the federal district courts of Texas, Louisiana and Mississippi. The district courts are courts of first instance, meaning they are the initial courts to decide a §1782 application.

In the wake of *Intel*, the United States district courts are divided on the question of whether private international arbitrations fall within the definition of "tribunal." This division results in an inequity: some district courts hold a party may use §1782 to obtain discovery in aid of private international arbitration while in other district courts, this assistance is not possible. Since *Intel*, only two Courts of Appeals have addressed the issue of whether private international arbitration falls within the definition of "tribunal," the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals, but as will be discussed more fully, the Eleventh Circuit subsequently withdrew its opinion *sua sponte*, leaving the Fifth Circuit as the only Court of Appeals to address the issue post-*Intel*.⁴⁸⁾

44) *Id.* ("Moreover, as a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance. The parties may pre-arrange discovery mechanisms directly or by selecting an established forum or body of governing principles in which the conventions of discovery are settled.")

45) *Id.*

46) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

47) "Comparing Federal & State Courts: Court Structure", (2015), Retrieved Aug. 5, 2015, available at <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visit on Aug. 14, 2015).

48) The Seventh Circuit has expressly recognized this tension, stating that "the applicability of section

1. The Fifth Circuit – *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*

In *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*,⁴⁹⁾ La Comision Ejecutiva Hidroelectrica del Rio Lempa (“CEL”) sought discovery pursuant to §1782 for use in a private international arbitration seated in Geneva, Switzerland. When the arbitral tribunal was informed of CEL’s §1782 application, it issued an order stating it was not receptive to CEL’s §1782 discovery efforts.⁵⁰⁾

The District Court, relying on the Fifth Circuit’s decision in *Biedermann*, held that use of §1782 was not applicable to a private international arbitration.⁵¹⁾ The District Court further held that, even if it did have the authority under §1782, “it would not [grant the application], out of respect for the efficient administration of the Swiss arbitration.”⁵²⁾

CEL appealed to the Fifth Circuit arguing that the Court’s decision in *Biedermann* was no longer controlling in light of the Supreme Court’s decision in *Intel*. In rejecting this argument, the Fifth Circuit in an unpublished *per curiam* opinion⁵³⁾ noted that nothing in the *Intel* decision effected the analysis of the *Biedermann* court:

The question of whether a private international arbitration tribunal also qualifies as a “tribunal” under §1782 was not before the [Intel] Court. The only mention of arbitration in the Intel opinion is in a quote in a parenthetical from a law review article by Hans Smit. That quote states that “the term ‘tribunal’. . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well

1782 to evidence sought for use in a foreign arbitration proceed is uncertain.” See *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (7th Cir. 2014) (citing S.I. Strong, “Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration,” *Stanford Journal of Complex Litigation*, Vol. 1 No. 2, 2013, p. 295.

49) 341 Fed. Appx. 31 (5th Cir. 2009).

50) *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 32 (5th Cir. 2009).

51) *Id.*

52) *Id.*

53) The Court determined pursuant to Fifth Circuit Rule 47.5 that the opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

as conventional civil, commercial, criminal, and administrative courts.” Nothing in the context of the quote suggests that the Court was adopting Smit’s definition of ‘tribunal’ in whole. Moreover, none of the concerns raised in *Biedermann* regarding the application of § 1782 to private international arbitrations [i.e., unprincipled inconsistency between Section 7 of FAA and Section 1782, and “destroy[ing] arbitration’s principal advantage as a speedy, economical, and effective means of dispute resolution”] were at issue or considered in *Intel*.⁵⁴⁾

The Fifth Circuit concluded with “[b]ecause ‘[w]e cannot overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent,’ we remain bound by our holding in *Biedermann*.”⁵⁵⁾

2. The Eleventh Circuit – *In re Consorcio Ecuatoriano de Telecomunicaciones, S.A.*

In *In re Consorcio Ecuatoriano de Telecomunicaciones, S.A.*,⁵⁶⁾ the Eleventh Circuit initially took the opposite position, holding that private international arbitration fell within the definition of “tribunal.” In *Consorcio Ecuatoriano*, Consorcio Ecuatoriano de Telecomunicaciones (“CONECEL”) filed a §1782 application in the Southern District of Florida to obtain discovery for use in foreign proceedings in Ecuador.⁵⁷⁾ The foreign

54) *Id.* at 34.

55) *Id.* At the same time CEL filed its § 1782 application in the United States District Court in Texas against El Paso, it filed a § 1782 application in the District Court of Delaware against Nejapa Power Company LLC (“Nejapa”) seeking discovery of documents for use in the same Swiss arbitration. In this instance, CEL was able to persuade the District Court of Delaware that the private arbitration was in fact a “tribunal” within the meaning of §1782. *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC*, C.A. No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008). Nejapa appealed the ruling. The appeal was ultimately dismissed as moot. *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC*, 341 Fed. Appx. 821 (3d Cir. 2009).

56) *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 989 (11th Cir. 2012), *opinion vacated and superseded sub nom. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014).

proceedings included a private arbitration and contemplated civil and private criminal suits against two former employees.⁵⁸⁾ The Eleventh Circuit's decision concentrated extensively on the question of whether the private arbitration in Ecuador was a "tribunal" under §1782. In affirming the district court's decision to order discovery pursuant to §1782, the Eleventh Circuit held that an arbitral panel in Ecuador was a "tribunal" under § 1782.⁵⁹⁾ Judge Black, in a specially concurring opinion, concurred in the opinion affirming the district court but on the basis of the second theory advanced by CONECEL, that its potential litigation against the former employees was "within reasonable contemplation"⁶⁰⁾and therefore satisfied the requirements of §1782(a).

Two years later, the Eleventh Circuit *sua sponte* vacated its prior opinion.⁶¹⁾ In its later decision, the Eleventh Circuit explicitly declined to answer the question of whether a private arbitration tribunal can be considered a "tribunal" under §1782⁶²⁾ and instead focused solely on CONECEL's contemplated suits in Ecuador. Relying on the Supreme Court's decision in *Intel*, the Eleventh Circuit held that the two suits CONECEL contemplated filing in Ecuador against the former employees satisfied the statutory requirements because the anticipated proceedings were "within reasonable contemplation."⁶³⁾

V. Emerging Issues in the Use of § 1782

The question of whether a private "arbitration tribunal" is a "tribunal" remains unresolved. For those courts taking the restrictive view, the word "tribunal" is not to be interpreted as including private arbitration tribunals.⁶⁴⁾ If the Supreme Court

57) *In re Consorcio Ecuatoriano*, 685 F.3d at 989.

58) *Id.*

59) *Id.* at 995.

60) *Id.* at 1002.

61) *Consorcio Ecuatoriano*, 747 F.3d at 1265.

62) *Id.* at 1270 n. 4 (11th Cir. 2014) ("We decline to answer [whether the arbitration is a 'tribunal'] on the sparse record found in this case. The district court made no factual findings about the arbitration and made no effort to determine whether the arbitration proceeding in Ecuador amounted to a section 1782 tribunal Thus we leave the resolution of the matter for another day.").

63) *Id.* at 1265 (citing *Intel*, 542 U.S. 241).

64) See *La Comision*, 617 F.Supp.2d at 486; *In re Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277-JST (DMR), 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015); *In re Grupo Unidos Por El Canal*, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015); *In re Dubey*, 949 F. Supp. 2d 990, 993 (C.D. Cal. 2013), appeal dismissed (Aug. 27, 2013); *In re*

intended to make a sweeping change in legal jurisprudence, it would have done so explicitly, not *sub silentio*.⁶⁵⁾ For those taking the expansive view, the Supreme Court's quoting a passage from the commentary of Hans Smit is sufficient to extend the application of §1782 to privately contracted-for arbitration despite the fact that the tribunal at issue in *Intel* was not based on a private contract.⁶⁶⁾

But as will be explored, the unresolved issue of what constitutes a "tribunal" is not the only unresolved issue arising from the application of §1782. A number of ancillary issues have arisen that potentially impact a party's ability to obtain discovery using §1782.

1. Is a private arbitration tribunal seated in the United States "international"?

For those jurisdictions interpreting "tribunal" expansively, there is a subsidiary issue: if the privately contracted arbitration is between foreign parties and seated in the United States is it a "tribunal" within the meaning of §1782? In *In re Grupo Unidos Por El Canal, S.A.*,⁶⁷⁾ the Court faced that precise question. The underlying and still on-going arbitration arises out of a dispute relating to the expansion of the Panama Canal. The parties are Grupo Unidos por El Canal, S. A. ("GUPC"), a Panama-based company, and Autoridad del Canal de Panama, also known as the Panama Canal Authority ("ACP"). The arbitration, seated in Miami, Florida, is being conducted under the Rules of the International Chamber of Commerce. The arbitrators are from England,

Operadora DB Mex., S.A. de C.V., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009); *In re Arbitration in London, England*, 626 F.Supp.2d 882, 886 (N.D.Ill. 2009).

65) See *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 194 (3d Cir. 1995) (Nygaard, J., dissenting) (discussing judicial ambiguity in the context of administrative law).

66) See, e.g., *In re Chevron Corp.*, 709 F. Supp.2d 283, 291 (S.D.N.Y. 2010) (holding that "international arbitral bodies . . . constitute 'foreign tribunals' for purposes of Section 1782."); *Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("[T]he ICC is a 'tribunal' within the meaning of §1782(a)."); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (concluding "that the assistance permissible under Section 1782 may extend to private arbitration bodies"); *In re Oxus Gold PLC*, Misc. No. 06-82-GEB, 2007 WL 1037387, at *5 (D. N.J. Apr. 2, 2007) (upholding conclusion that the arbitration panel in a case between two private litigants "constituted a 'foreign tribunal' for purposes of a 28 U.S.C. §1782 analysis"); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1225 (N.D. Ga. 2006) (deeming the Austrian arbitral panel a "tribunal" under §1782).

67) *In re Grupo Unidos Por El Canal, S.A.*, Civ. A. No. 14-MC-00226-MSK-KMT, 2015 WL 1810135 (D. Colo. Apr. 17, 2015).

Spain and Belgium.⁶⁸⁾ The arbitration agreement provides that any dispute “shall be finally settled by international arbitration.”⁶⁹⁾

GUPC sought the production of documents pursuant to §1782 from CH2M Hill Companies, Ltd. (“CH2M Hill-US”). ACP, as intervenor, opposed the application, asserting, numerous bases, including but not limited to,⁷⁰⁾ the tribunal was not “foreign” within the meaning of §1782 because the arbitration was seated in Florida.⁷¹⁾

In support of its position that an arbitral tribunal seated in Miami, Florida is foreign for purposes of §1782, GUPC argued that none of the parties is a United States citizen and that the subject matter of the proceeding is a “dispute over a project located in Panama, involving construction on Panamanian land, pursuant to a contract governed by Panama law, with performance in Panama.”⁷²⁾ GUPC additionally focused on the FAA’s broad definition of “international or ‘foreign’ arbitration agreement or award that is subject to review under FAA Chapter 2, i.e., recognition and enforcement under the [United Nations] Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention].”⁷³⁾ GUPC further argued that “agreements and awards . . . are subject to the Convention not because they were made abroad, but because they were 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.*”⁷⁴⁾

68) *Id.* at *8.

69) GUPC’s Reply to CH2M Hill’s Opp’n to Ex Parte Application for Order Under 28 U.S.C. § 1782 (Nov. 24, 2014) [Docket Entry 13], at p. 2 (quoting Conditions of Contract, Art. 20.6).

70) The bases asserted were: (1) the private arbitration seated in the United States is not a foreign or international tribunal; (2) §1782 cannot be used to obtain documents located outside the United States; (3) the “application is an attempt to circumvent the contractually negotiated and agreed-to discovery rules” and (4) many of the documents should be obtained from ACP as opposed to a third party. *Autoridad del Canal de Panama’s Mtn. for Leave to Intervene in the 28 U.S.C. § 1782 Action Initiated by Grupo Unidos por el Canal, S.A.* (Oct. 30, 2014) [Docket Entry 8], at pp. 1-2..

71) *See In re Grupo Unidos*, 2015 WL 1810135 at *2. At least one noted commentator’s view is in accord with ACP’s position: “[I]t is doubtful that [foreign or international] would encompass an arbitral tribunal sitting in the United States. Rather, § 1782 is likely limited to providing assistance to arbitral tribunals sitting abroad, on the theory that it is only these tribunals that are either ‘foreign’ or ‘international.’” Gary B. Born, *International Commercial Arbitration* (2d ed.), 2014, p. 2416.

72) *In re Grupo Unidos*, 2015 WL 1810135 at *8.

73) GUPC’s Reply to CH2M HILL’s Opp’n to *Ex Parte* Application for Order Under 28 U.S.C. § 1782 (Nov. 24, 2014) [Docket Entry 13], at p. 2 (citing June 10, 1958, 21 U.S.T. 2517, 330, U.N.T.S. 38 (“New York Convention”), codified at FAA §§ 201-208, 9 U.S.C. §§ 201-208 (2000)).

ACP responded that the question was not whether the dispute is international under the FAA and the New York Convention. Rather, the question was whether the Miami tribunal is a “foreign or international tribunal” under §1782. ACP noted that “[u]nder GUPSCA’s [GUPC] conflation, parties to a private arbitration in Miami involving an international dispute would have broader rights to take non-party discovery than parties before a different Miami arbitral panel hearing a domestic dispute, solely because the dispute – not the panel – was considered ‘international’ under an related statute.”⁷⁵⁾ ACP further observed that GUPC had failed to cite to a single decision supporting its proposition that §1782 was applicable to a private arbitration proceeding seated in the United States.⁷⁶⁾

The Magistrate Judge found the Fifth Circuit’s reasoning in *Biedermann* and the Second Circuit’s reasoning in *Bear Stearns* persuasive and untouched by the Supreme Court’s decision in *Intel*. Because the Magistrate Judge rejected the broad interpretation of “tribunal,” it was not necessary for the Court to examine in depth the question of whether §1782 applies to a private arbitration seated in the United States between foreign parties. The Court did observe, however, that all the cases the Court had considered in reaching its conclusion that private arbitration is not within the confines of §1782 -- whether the case found for or against inclusion of private arbitration -- involved an arbitration seated in a foreign country.⁷⁷⁾

74) *Id.* at p. 3 (quoting *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998)) (emphasis omitted).

75) Autoridad Del Canal de Panama’s Reply in Supp. of Mot. for Leave to Intervene and Compl. in Intervention (Dec. 11, 2014) [Docket Entry 14], at p. 11-12.

76) *Id.* at p. 11.

77) *In re Grupo Unidos*, 2015 WL 1810135 at *8 (citing *In re Arbitration in London, England*, 626 F. Supp. 2d 882, 883 (N.D. Ill. 2009) (London arbitration); *In re Operadora DB Mex., S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *1 (M.D. Fla. Aug. 4, 2009) (Mexico arbitration conducted under the International Chamber of Commerce (“ICC”) Court of Arbitration); *La Comision Ejecutiva Hidroelectric Del Rio v. El Paso Corp.*, 617 F. Supp. 2d 481, 482 (S.D. Tex. 2008) (foreign arbitration pending in Switzerland); *Babcock Borsig AG*, 583 F. Supp. 2d 233, 236 (D. Mass. 2008) (potential German arbitration before an ICC panel); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 952 (D. Minn. 2007) (Israeli arbitration proceeding); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1222 (N.D. Ga. 2006) (foreign arbitration before International Arbitral Centre in Austria); *In re Oxus Gold PLC*, Misc. No. 06-82-GEB, 2007 WL 1037387, at *1 (D. N.J. Apr. 2, 2007) (arbitration between United Kingdom and Kyrgyz Republic nationals pursuant to UNCITRAL); *In re Winning (HK) Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at *1 (S.D. Fla. Apr. 30, 2010) (London maritime arbitration); *In re Finserve Grp., Ltd.*, No. CA 4:11-MC-2044-RBH, 2011 WL 5024264, at *1 (D.S.C. Oct. 20, 2011)(London Court of International

Similarly in *In re Hanwha Azdel, Inc.*,⁷⁸⁾ the arbitration was seated in the United States, and was to be decided under American law by three American arbitrators. The applicant argued that because the arbitration was “before the International Chamber of Commerce, International Court of Arbitration, which is headquartered in Paris, France, the arbitration was taking place before a ‘foreign or international tribunal.’”⁷⁹⁾ The Court held that even if the proceeding were occurring before a “foreign or international tribunal,” it was unnecessary “to resolve this vigorously contested controversy” because the Court exercising its discretion declined to permit discovery.⁸⁰⁾

. . . a serious question exists whether the arbitration forum in this case can be considered a “foreign tribunal” when it is taking place in Virginia before a panel of American arbitrators applying American law. Even if this fact did not bar the court from exercising its discretion under §1782, the characteristics of this specific arbitration persuade the court not to permit discovery under §1782. The nature of the “foreign” tribunal in this case is peculiar, given that it is arguably not foreign at all: the arbitrators are from the United States and will be applying New York law. The character of the proceedings weighs against Applicants too, since the proceedings are not occurring “abroad” but in Virginia. Moreover, Applicants’ effort to obtain discovery appears to be an attempt to “circumvent foreign proof-gathering procedures.” Put differently, the arbitration proceeding itself offers the possibility of

Arbitration); *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 989 (11th Cir. 2012) overruled on other grounds by *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 747 F.3d 1262, 1270 (11th Cir. 2014) (foreign arbitration in Ecuador); *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999) (arbitration proceeding in Mexico); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881 (5th Cir. 1999) (proceeding before Arbitration Institute of the Stockholm Chamber of Commerce); *Ukrnafta v. Carpathy Petroleum Corp.*, (No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *1 (D. Conn. Aug. 27, 2009); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998) (arbitral award granted to a foreign corporation by an arbitral panel sitting in the United States and applying American federal or state law was not considered a domestic award for purposes of invocation of the New York Convention)).

78) 979 F. Supp. 2d 178 (D. Mass. 2013).

79) *Id.* at 180.

80) *Id.*

discovery, under the supervision of the arbitrators. The overlay of the §1782 mechanism threatens unfairness and virtually ensures unnecessary complication and expense. These considerations conclusively steer the court to deny discovery under §1782 in this case, even assuming such discovery might be hypothetically possible.⁸¹⁾

2. Does agreeing to the use of the IBA Rules circumscribe the use of § 1782?

Assuming a court has determined that a private arbitration tribunal falls within the meaning of “tribunal” for purposes of §1782, the *Intel* decision cautions that not all requests need be granted and requires the court to examine certain discretionary factors.⁸²⁾ One of those factors is whether the discovery request is a veiled attempt to avoid foreign evidence gathering restrictions or other policies.

Because a §1782 application can be filed *ex parte*, it is possible to obtain a subpoena to be served on a third party without either opposing counsel or the tribunal’s being aware of the request. *Ex parte* applications, however, can result in “defective discovery, unfairness, and perhaps, irreparable damage to those other parties.”⁸³⁾ When an *ex parte* application is filed, a court can, and often will, order that the parties in the foreign proceeding be notified prior to the issuance of the subpoena.⁸⁴⁾ In other instances, following the allowance of an *ex parte* order, intervention is permitted and a ruling on a motion to quash on the merits will follow.⁸⁵⁾

In 1999, after many years of collaboration among arbitration practitioners, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”) were adopted. Their stated purpose is “to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those

81) *Id.* at 180-81.

82) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004).

83) *In re Merck & Co., Inc.*, 197 F.R.D. 267, 270-71 (M.D.N.C. 2000) (citing *Okubo v. Reynolds (In re Letters Rogatory from the Tokyo Dist. Prosecutor’s Office)*, 16 F.3d 1016 (9th Cir. 1994)).

84) See *In re Merck* (holding the court has authority to require notification of other parties in the foreign litigation prior to the issuance of an order to a Section 1782(a) applicant for subpoenas).

85) *In re Hanwha Azdel, Inc.*, 979 F.Supp.2d 178, 179 (D. Mass. 2013) (relying on *Gushlak v. Gushlak*, 486 Fed. Appx. 215, 217 (2d Cir. 2012)).

between Parties from different legal traditions.”⁸⁶⁾

Since their adoption, the IBA Rules have enjoyed wide acceptance. At the time of their adoption in 1999, however, it was generally agreed, based on *Bear Stearns* and *Biedermann*, that a party to a private arbitration seated outside the United States could not utilize §1782. Since the Supreme Court’s 2004 *Intel* decision, as has been discussed, §1782 applications have been filed numerous times in private arbitrations, albeit with varying results.

In 2010, the IBA Rules were amended to address a variety of issues including evidence gathering, legal privilege and good faith.⁸⁷⁾ In an attempt to eliminate *ex parte* §1782 applications (and the concomitant extensive and often raucous briefing that follows), the 2010 IBA Rules added a new provision, Article 3.9, providing, in pertinent part:

If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing,⁸⁸⁾

While the IBA Rules have been embraced by the international arbitration community, most parties and arbitrators prefer that the IBA Rules act as guidelines in order to preserve flexibility in the arbitration process, as opposed to being imposed on the arbitrators by party agreement.⁸⁹⁾ Importantly, at least two cases have held that the

86) IBA Rules on the Taking of Evidence in International Arbitration (2010) at Preamble ¶ 1.

87) Steven P. Finizio & Charlie Caher, “Revised IBA Rules on the Taking of Evidence in International Arbitration”, (2010), Retrieved Aug. 12, 2015, available at <<https://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=94984>> (last visit on Aug. 14, 2015).

88) *Id.* at Art. 3.9. The LCIA Rules have similar provision, providing that “[b]y agreeing to arbitration under these rules, the parties shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the Arbitral Tribunal . . . except with the agreement in writing of all parties. LCIA Arbitration Rules (2014), Art. 22.2.

89) Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge

parties' agreement to the IBA Rules and the failure to adhere to the Rules can support a denial of a §1782 application.

In *In re Caratube Int'l Oil Co.*,⁹⁰ Caratube proposed and the other party, Kazakhstan, and the tribunal agreed that document disclosure should be guided by the IBA Rules. Despite the agreed upon applicability of the IBA Rules, Caratube filed an *ex parte* §1782 application. Two days before Caratube filed its §1782 application, the tribunal issued its Second Procedural Order reiterating that the IBA Rules "can be considered as a guideline giving indications regarding the relevant criteria for what documents may be requested and ordered to be produced."⁹¹

After filing the §1782 application, Caratube informed the tribunal of its filing and requested a six-month extension of the arbitration schedule. Kazakhstan, in turn, requested the tribunal enter a cease and desist order against Caratube.

In response, the tribunal issued its Third Procedural Order stating:

[W]hilst the Tribunal might have been minded to find that its prior consent should have been sought by [Caratube] before the presentation of its Section 1782 petition, the Tribunal concludes that it is not necessary for it to order Claimant to cease and desist from the U.S. action. A party starting a Section 1782 procedure before the U.S. courts does so and chooses the time for such a petition at its own risk. But the existence of such a petition to domestic courts cannot interfere with the Tribunal's maintenance of its authority over the arbitral procedure and with the timetable established with the consent of the Parties.⁹²

The tribunal also rejected Caratube's request to delay the arbitration proceedings and reserved the question of whether it would admit any documents obtained through the §1782 application.

University Press, 2008, p. 165. The author notes that Pierre Karrer prefers to state in the Terms of Reference that the arbitrators will be "inspired though not bound" by the IBA Rules.

90) 730 F. Supp. 2d 101 (D.D.C. 2010). Although an ICSID arbitration, the rationale is nevertheless applicable to private arbitrations.

91) *Id.* at 107 (quoting Procedural Order No. 2 at ¶ 1.2).

92) *Id.* at 103-04 (quoting Procedural Order No. 3 at ¶ 2.6).

The Court denied Caratube's §1782 application, finding it was a veiled attempt to circumvent the foreign proof gathering restrictions. The Court was careful to acknowledge that there is no exhaustion requirement forcing a party "to seek 'information through the foreign or international tribunal' before requesting discovery from the district court"⁹³⁾ but also noted that "the district court may, in its discretion, properly consider a party's failure first to attempt discovery measures in the foreign jurisdiction."⁹⁴⁾

The Court also observed that although the tribunal appeared somewhat open to admitting documents acquired through the §1782 application, the Court found "substantially more important" that the arbitration was "already 'late in the procedure,' and that Caratube appear[ed] to be circumventing the Tribunal's control over its own discovery process."⁹⁵⁾

In *In re Grupo Unidos*, the result was similar. The parties had agreed in the Terms of Reference that the IBA Rules would be applicable and that the arbitral tribunal had the power to issue procedural orders and to set a procedural timetable.⁹⁶⁾

The Magistrate Judge held that that private arbitration is not within §1782 and declined to do an in-depth analysis of the *Intel* discretionary factors.⁹⁷⁾ Nevertheless, the Court did state that it would have declined to order production even if the other requirements of §1782 were met. In particular, the Magistrate Judge found persuasive the IBA Rules' requirement of advance authorization from the panel before third-party discovery is permitted.⁹⁸⁾ Observing that the applicant failed to obtain the tribunal's approval, the Magistrate Judge stated: "[i]t seems obvious to this court that such a grandiose document production would not be welcomed by the arbitration panel nor would the delay associated with the privilege and other review which would go along with such a discovery production be well-received."⁹⁹⁾

93) *Id.* (citing *In re Euromepa*, 51 F.3d 1095, 1098 (2d Cir. 1995) (quoting *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir.1992)).

94) *Id.* (quoting *In re Babcock Borsig AG*, 583 F.Supp.2d 233, 241 (D.Mass.2008)).

95) *Id.* at 108.

96) No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *2 (D. Colo. Apr. 17, 2015).

97) *Id.*

98) *Id.* at *11.

99) *Id.*

3. Can a party be ordered to produce documents located abroad?

The location of the documents a petitioner requests be produced pursuant to a §1782 application plays a role in a court's analysis of whether production should be ordered. Section 1782 does not affirmatively authorize extraterritorial discovery and some courts view the absence of an express authorization as a complete bar to discovery of documents abroad.¹⁰⁰⁾

"[Section] 1782 does not authorize discovery of documents held abroad.... Therefore, to the extent [that applicant] seeks documents located outside of the United States... they are not discoverable under § 1782."¹⁰¹⁾

Those courts that do not view the lack of an express authorization as prohibiting the discovery of documents held outside the United States, nevertheless, have typically determined that the "location of the information [outside the United States] militates against granting the petition."¹⁰²⁾ The analysis, however, becomes even more nuanced when the documents are located abroad but can be retrieved electronically from the United States.

100) See *id.* at *9 (citing *Four Pillars Enters. v. Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002) (finding no error in the denial of discovery of materials that party possessed in Asia); *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) ("Thus, despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States."); see also *In re Kreke Immobilien KG*, No. 13 Misc. 110(NRB), 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) ("This Court... agrees that '[t]he bulk of authority in this Circuit' suggests that a §1782 respondent cannot be compelled to produce documents located abroad."); *In re Godfrey*, 526 F.Supp.2d 417, 423 (S.D.N.Y. 2007) ("[F]or purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States."); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F.Supp.2d 45, 52-53 (D.D.C. 2005)("[Section] 1782 is not properly used to seek documents held outside the United States as a general matter. . . . [T]he Court has found no case in which §1782 has been used to permit the extraterritorial application of § 1782").

101) *In re Microsoft Corp.*, 428 F.Supp.2d 188, 194 n. 5 (S.D.N.Y. 2006).

102) *In re Thai-Lao Lignite (Thailand) Co., Ltd.*, 821 F.Supp.2d 289, 297-98 (D.D.C. 2011); see *In re Veiga*, 746 F.2d 8, 26 (D.D.C. 2010); *Pinchuk v. Chemstar Prods. LLC*, No. 13-mc-306-RGA, 2014 WL 2990416, at *4 (D. Del. June 26, 2014); *In re Nokia Corp.*, 2007 WL 1729664 at *5 (W.D. Mich. June 17, 2013) (unpublished) (denying Section 1782 application based, in part, upon location of documents in Germany).

In *In re Kreke Immobilien KG*,¹⁰³⁾ Kreke Immobilien KG (“Kreke”) applied for an order authorizing the issuance of a subpoena to Deutsche Bank AG (“Deutsche Bank”) for the production of documents in aid of a lawsuit it intended to file in Germany against Deutsche Bank’s wholly owned subsidiary. Kreke’s application satisfied the mandatory requirements for discovery in aid of a foreign proceeding under §1782, to wit: Deutsche Bank was operating a business within the jurisdiction of the court, the application sought information to be used in a foreign proceeding, and Kreke qualified as an “interested person” under the statute.¹⁰⁴⁾

Nevertheless, Deutsche Bank asserted that §1782 did not “permit the discovery of documents located outside of the United States, even where the statutory requirements are met” and that to allow the discovery “would render U.S. federal courts ‘clearinghouses’ for global litigation.”¹⁰⁵⁾ In response, Kreke argued that “given the electronic data storage practices of modern businesses, there is reason to believe that the ‘great bulk’ of the documents requested could be accessed just as easily from [the location of a parent company in the United States].”¹⁰⁶⁾

Denying the §1782 application, the *Kreke* court, stated:

“[t]he bulk of authority in this Circuit” suggests that a §1782 respondent cannot be compelled to produce documents located abroad. Given that this case arose out of conduct that took place in Germany, that the parties are all located in Germany, that all physical documents are in Germany, and that all electronic documents are accessible just as easily from Germany as from Deutsche Bank’s offices in New York, “the connection to the United States is slight at best and the likelihood of interfering with [foreign] discovery policy is substantial.” Thus, this Court finds that it would be inappropriate to compel Deutsche Bank, pursuant to §1782, to produce the documents sought by Kreke, and the petitioner’s application is therefore denied.¹⁰⁷⁾

103) No. 13 Misc 110(NRB), 2013 WL 5966916, (S.D.N.Y. Nov. 8, 2013)

104) *Id.* at *3.

105) *Id.* (quoting Resp’t Opp. at 5).

106) *Id.* at *3.

107) *Id.* at *4 (quoting *In re Godfrey*, 526 F.Supp.2d 417, 423 (S.D.N.Y. 2007)).

After denying the application, the Court, although not required, undertook a further analysis utilizing the discretionary *Intel* factors.¹⁰⁸⁾ Of particular import to the Court was Kreke's "attempt to circumvent the foreign proof gathering restrictions."¹⁰⁹⁾

Because the locus of this action is so clearly in Germany and there is no suggestion that any documents sought are outside the jurisdictional reach of the German courts, this Court is concerned that Kreke's application is an attempt to circumvent foreign discovery procedures.¹¹⁰⁾ In light of the overwhelmingly German character of Kreke's discovery application, we are loath to sanction forum shopping under the guise of §1782.

The Court concluded with "whether we apply a territorial analysis or a discretionary one, the result is the same."¹¹¹⁾

The identical issue arose in *In re Grupo Unidos*.¹¹²⁾ In its §1782 application, GUPC sought documents from CH2M HILL-US, an affiliate of CH2M HILL-Panama, S. de R.L which had contracted with ACP to provide program management services in connection with the Panama Canal expansion.¹¹³⁾ The documents that GUPC sought were physically located in Panama and the electronic documents could be accessed from Panama. Denying the application, the Court followed the logic of *Kreke* and found the documents requested by GUPC were physically in Panama, the documents concerned

108) See II.4. *supra*.

109) *Id.* at *6 (citing *Intel*, 542 U.S. at 265). The Court also noted that an attempt to circumvent foreign proof gathering was "not the same as a foreign discoverability requirement; the fact that a §1782 application requests documents that would not be discoverable by the foreign court if those documents were located in the foreign jurisdiction is not enough to render the application a 'circumvention' of foreign rules." *Id.* (citing *Intel*, 542 U.S. at 260; *In re Servicio Pan Americano de Proteccion*, 354 F.Supp.2d 269, 275 (S.D.N.Y. 2004)).

110) *Id.* at *6 (citing *In re OOO Promneftstroy*, Misc. No. M 19-99 (RJS), 2009 WL 3335608, at *8 n. 10 & *9 (S.D.N.Y. Oct. 15, 2009) (finding that the third *Intel* prong cut against discovery when the documents concerned foreign companies and were "principally of a foreign nature," even if the respondent had access to the documents in the United States); *Pan Americano*, 354 F.Supp.2d at 274-75 (finding that the third *Intel* prong supported discovery when the requested documents concerned an insurance claim filed in the United States by a U.S. corporation that were then essential in a foreign proceeding)).

111) *Id.* at *8.

112) *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00226-MSK-KMT, 2015 WL 1810135 (D. Colo. Apr. 17, 2015).

113) *Id.* at *1 n.1.

conduct in Panama regarding construction of the Panama Canal and the electronic documents were accessible just as easily in Panama as from the United States.¹¹⁴⁾

4. Is there a role for judicial estoppel in determining whether a § 1782 application should be granted?

Despite the Fifth Circuit's long-standing precedent of *Biedermann*, the Republic of Ecuador, in *Republic of Ecuador v. Connor*,¹¹⁵⁾ using the doctrine of judicial estoppel, was successful in persuading the Fifth Circuit that discovery could issue based on its §1782 application. As has been widely reported, Chevron Corporation and the Republic of Ecuador have been engaged in a litigious battle spanning almost two decades over alleged environmental contamination of oil fields in Ecuador. A court in Lago Agrio, Ecuador, issued a multi-billion dollar judgment against Chevron.¹¹⁶⁾ During the Lago Agrio litigation, Chevron filed for arbitration under the rules of UNCITRAL, as allowed by the U.S.-Ecuador Bilateral Investment Treaty ("BIT").

For use in the BIT arbitration, Ecuador applied to the district court for ancillary discovery pursuant to §1782. Chevron intervened and opposed the application, contending that the BIT arbitration was not an "international tribunal" within the meaning of §1782. The District Court, compelled by the *Biedermann* decision, denied the discovery request.

On appeal, Ecuador argued that Chevron was judicially estopped to contend that the BIT arbitration was not an "international tribunal" within the meaning of §1782. The Fifth Circuit agreed. Stating "Why shouldn't the sauce for Chevron's goose be sauce for the Ecuador gander as well?," the Fifth Circuit noted that in connection with the BIT arbitration and ongoing Lago Agrio litigation in Ecuador, both parties had repeatedly sought discovery in United States courts through the use of §1782. At least 20 orders had been issued on behalf of Chevron and no previous discovery request had been denied on the basis that the BIT arbitration was not an "international arbitration."

The Fifth Circuit observed that "[i]n numerous district courts, and on appeal in other circuits, Chevron asserted that the BIT arbitration [was] an international proceeding" and was successful in obtaining "such discovery by persuading courts to reject Ecuadorian

114) *Id.* at *10.

115) 708 F.3d 651 (5th Cir. 2013).

116) *Id.* at 653.

(and related parties') objections and by contending, opposite to its current position, that the BIT arbitration is an 'international tribunal.'"¹¹⁷⁾ The Court also opined: "if Chevron is permitted to shield itself under *Biedermann* against Ecuador's current discovery request, it will have gained an unfair advantage over its adversary."¹¹⁸⁾

The Court concluded that Chevron was judicially estopped from asserting its legally contrary position, stated "we need not and do not opine on whether the BIT arbitration is in [sic] an 'international tribunal'"¹¹⁹⁾ and ordered the District Court on remand to proceed in its discretion to evaluate Ecuador's request for discovery pursuant to §1782.

VI. Conclusion

Section 1782 can be a powerful tool. In certain instances, §1782 affords a foreign party the means to avail itself of American-style discovery but the availability of §1782 is dictated by the court's interpretation of the word "tribunal." The Fifth Circuit is the only Court of Appeals post-*Intel* to opine on the issue of whether the phrase "foreign tribunal" encompasses a private arbitration, holding that its earlier decision in *Biedermann* is unaffected by the *Intel* holding and that private arbitrations do not fall within the definition of "tribunal." The district courts throughout the remainder of the United States are divided in their interpretation of "tribunal." Until the United States Supreme Court provides further definitive guidance, the inequities resulting from the split among the courts will undoubtedly persist. The Fifth Circuit, however, has signaled that despite its holding in *Biedermann*, given appropriate circumstances, a party may be judicially estopped from contending that discovery is not available. Case law counsels that selection of the IBA Rules to govern the arbitration may eliminate §1782 *ex parte* applications and that the selection of the United States as the seat may thwart its use. Reaching documents outside the United States by using §1782 may prove challenging, however, as even the most liberal courts take pause in ordering production.

There are, in short, many questions without definite answers. What is known, however, is that parties will continue to come to America in the hopes of enjoying the fruits of American-style discovery.

117) *Id.* at 654, 658.

118) *Id.* at 658.

119) *Id.*

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