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Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(a)'s Application in Private International Arbitration Proceedings

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Americanization of Discovery: Why Statutory Interpretation Bars 28
U.S.C. § 1782(a)'s Application in Private International Arbitration
Proceedings

COMMENT

AMERICANIZATION OF DISCOVERY:
WHY STATUTORY INTERPRETATION BARS
28 U.S.C. § 1782(a)'s APPLICATION
IN PRIVATE INTERNATIONAL
ARBITRATION PROCEEDINGS

JENNA M. GODFREY*

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INTRODUCTION

The transnational world of business frequently requires parties and courts to obtain evidence located in foreign nations for dispute resolution. For foreign litigants, this often means seeking evidence located in the United States. Historically, foreign parties have been required to use stringent diplomatic measures, such as the Hague Evidence Convention, to obtain evidence located in the United States.¹ Statute 28 U.S.C. § 1782(a) sought to simplify the process and provide foreign proceedings a less formal yet effective method for obtaining judicial assistance from U.S. courts.²

1. See, e.g., Hague Convention on the Taking of Evidence in Civil and Commercial Matters, art. I, Mar. 18, 1970, 23 U.S.T. 2555, 2557, 847 U.N.T.S. 231, 241 [hereinafter “HEC”] (“In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.”); Organization of American States, Inter-American Convention on Letters Rogatory, art. II, Jan. 30, 1975, O.A.S.T.S. No. 43, 14 I.L.M. 339 (“This Convention shall apply to letters rogatory . . . that have as their purpose . . . the taking of evidence and the obtaining of information abroad . . .”).

2. Compare HEC, *supra* note 1, with 28 U.S.C. § 1782(a) (2006). See generally *infra* Part III.A (discussing the statute’s relatively simple measures for obtaining evidence).

Section 1782(a), which permits parties before a “foreign or international tribunal” to request U.S. judicial assistance in obtaining evidence, supplanted strict, formalistic conditions that hindered foreign requests for judicial assistance.³ The statute permits foreign party requests to be sent directly to district courts without necessitating the use of diplomatic channels.⁴ It was enacted in an attempt to promote international judicial comity with hopes that other nations would follow similar practice.⁵

While § 1782(a)’s presence in foreign litigation is well established, courts have continually contemplated its application in private international arbitration⁶ proceedings.⁷ Courts have struggled to determine whether the

3. *Id.*

4. *See id.* For example, under the HEC, requests for evidence must be sent to the Central Authority designated by the signatory of the treaty and may not be sent to any other authority or agency within the state. *See HEC, supra* note 1, at 2558.

5. *See S. REP. NO. 88-1580*, at 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783. Congress enacted § 1782 to assist foreign proceedings and parties by “bringing the United States to the forefront of nations adjusting their procedures to those of sister nations,” with the goal of encouraging foreign nations to correspondingly adjust their procedures. *Id.*

6. The term “private international arbitration” has no definitive definition. It is used in this Comment to encompass *commercial* arbitration with some *international* aspects, adjudicated by a (private) non-governmental body and without the implication of a bilateral investment treaty (“BIT”). *See ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 14 (3d ed. 1999) (“[T]he international nature of arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example, a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State.” (quoting *The International Solution to International Business Disputes—ICC Arbitration*, ICC PUBLICATION No. 301 (1977), at 19)); *id.* at 19 (“The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, . . . includ[ing] . . . any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.” (quoting U.N. Comm. on Int’l Trade L., UNCITRAL Model Law on Int’l Comm. Arb., art. 1 n.2 U.N. Doc. A/40/17 (1985) (amended 2006))). Although the UNCITRAL encompasses the term “investment” in a general sense, it does not necessarily include public investment international law, such as investments made pursuant to BITs. *See Julian Davis Mortenson, The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. INT’L L.J. 257, 258 (2010) (discussing the International Centre for the Settlement of Investment Disputes (“ICSID”), which serves as a forum to adjudicate bilateral and multilateral investment treaty disputes between States and individual foreign investors). Although § 1782(a)’s application in public international arbitration, that is investment arbitration concerning a State and a private individual or entity by contractual means of a BIT, is also debated, this Comment will focus solely on § 1782(a)’s application in private international arbitration. *See generally ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 22 (4th ed. 2004) (discussing the differences between public and private arbitration).

7. *Compare Hans Smit, A-National Arbitration*, 63 TUL. L. REV. 629, 639 (1989) (noting that statutes providing assistance to international tribunals should include arbitration tribunals), *with NBC v. Bear Stearns & Co.*, 165 F.3d 184, 189-91 (2d Cir. 1999) (holding that since § 1782 is silent as to international arbitration, it cannot be used as a tool to obtain evidence for this type of proceeding).

statutory language or the legislative history envisaged private international arbitration as a “foreign or international tribunal.”⁸ In addition, courts have examined whether § 1782(a) actually furthers the goals of private international arbitration, or whether permitting the use of the statute to obtain evidence undermines the federal government’s rationale behind its pro-arbitration policy.⁹

Arbitration, a private system of dispute resolution, permits parties to choose to resolve their disputes outside the judicial system.¹⁰ It provides a neutral forum for parties to settle their dispute, rather than a “home court” advantage of one or the other party.¹¹ It is relatively speedier and less costly than litigation because parties can choose the procedural rules and the forum where the arbitration will take place before a dispute arises.¹² Arbitration also has limited discovery.¹³ Further, arbitration awards are final and binding with narrow grounds for their vacation or annulment.¹⁴ The U.S. government has maintained a pro-arbitration policy because federal court litigation is “costly and time consuming,” whereas arbitration provides “a swift, fair, and inexpensive remedy.”¹⁵ It also lessens the

8. See *NBC*, 165 F.3d at 185.

9. See *In re Medway Power Ltd.*, 985 F. Supp. 402, 404 (S.D.N.Y. 1997) (holding that § 1782 is only for evidence to be used in a judicial or quasi-judicial proceedings rather than for a private arbitration panel, of which the authority is based on a private agreement between the parties). *But see* Daniel A. Losk, Note, *Section 1782(a) After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 *CARDOZO L. REV.* 1035, 1057–58 (2005) (citing the federal policy towards arbitration as proof of § 1782(a)’s applicability for international arbitration).

10. See Sarah Rudolph Cole, *Updating Arbitrator Ethics*, 10 *NO. 4 DISP. RESOL. MAG.* 24, 24 (2004) (contending that resolving disputes outside of the judicial system permits parties to overcome jurisdictional limitations of traditional courts).

11. See John Fellas, *Stage in International Litigation*, 826 *PLI/Lit* 213, 218 (discussing the advantages in choosing arbitration, instead of litigation, to resolve international commercial disputes).

12. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* at 1 (2008) (noting that particularly in the realm of international commercial arbitration, parties champion the ability to have their disputes resolved in a neutral forum by decision makers (arbitrators) chosen by the parties).

13. See *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) (“When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses . . . the litigating parties have no comparable privilege.”) (emphasis added) (citations omitted); MOSES, *supra* note 12, at 4 (noting that arbitration is normally a shorter process than litigation in part because there is less discovery).

14. See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581–90 (2008) (emphasizing the Federal Arbitration Act’s limited and exclusive grounds for judicial review of an arbitration award to facilitate arbitration’s finality and efficiency); see also *infra* note 112 (discussing the limited grounds for review of an arbitral award).

15. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747, 748 (1981) (Burger, C.J., dissenting).

burden on the federal court dockets by providing an effective alternative forum.¹⁶

Early decisions uniformly excluded § 1782(a)'s application in private international arbitration, finding that the statutory language and legislative history did not contemplate private arbitration as an "international tribunal" under the statute.¹⁷ In 2004, however, the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,¹⁸ expanded the established notions of what constituted an "international tribunal."¹⁹ Although the Supreme Court in *Intel* did not address the question of whether private international arbitration proceedings are "tribunals" pursuant to the statute, many courts have broadened the holding and permitted foreign arbitration proceedings to utilize § 1782(a) to obtain evidence.²⁰

This Comment argues that, based on § 1782(a)'s language and legislative history, private international arbitration proceedings are not "foreign or international tribunals" pursuant to the statute. Part I traces the historical development of U.S. judicial assistance in foreign proceedings. It then explores formation of § 1782(a) through its many amendments. Part II explains the divergent readings that circuit courts currently apply to § 1782(a) and the uncertainty that the *Intel* decision created.²¹ Part III examines the statute's plain language and extensive legislative history. It further analyzes the policy implications behind contracting to arbitrate and the reasons why the use of § 1782(a) in private international arbitration would undermine the fundamental advantages of participating in arbitration. This Part concludes that although Congress sought to liberalize

16. See generally John E. Taylor, *Helping Those Who Help Themselves: The Fourth Circuit's Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims* in Brown v. ABR Freight Systems, Inc. and EEOC v. Waffle House, Inc., 79 N.C. L. REV. 239, n.178 (2000) (contending that recent court decisions supporting arbitration clauses have been primarily motivated by the desire to clear federal dockets).

17. See, e.g., *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999) (holding that the International Chamber of Commerce is not a "foreign tribunal" for purposes of § 1782(a)); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (holding that the Stockholm Chamber of Commerce arbitral panel was not a "tribunal" under § 1782(a)).

18. 542 U.S. 241 (2004).

19. See *id.* at 258 ("[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.") (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71)).

20. See, e.g., *In re Application of Oxus Gold PCL*, No. MISC. 06-82, 2006 WL 2927615, at *10 (D.N.J. Oct. 11, 2006) (granting a request for discovery pursuant to § 1782(a) for an arbitration proceeding); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006) (holding that the International Chamber of Commerce is a "foreign tribunal" under § 1782(a) based on *Intel* even though the Supreme Court did not address the question of international arbitration proceedings directly).

21. See John Fellas, *Using Section 1782 in International Arbitration*, 23 ARB. INT'L 379, 379 (2007) (discussing how § 1782 has only recently been considered applicable to international arbitration); *supra* note 17 and accompanying text.

§ 1782(a) through its amendments, it excluded private international arbitration to maintain the practical benefits of participating in arbitration and to preserve the principles underlying the federal government's pro-arbitration policy.

I. BACKGROUND

A. *Historical Development of Judicial Assistance in Foreign Proceedings*

With the emergence of the transnational world, Congress increasingly realized that federal courts would have an important role in strengthening diplomatic relations by facilitating international proceedings.²² In 1855, as confirmation of courts' diplomatic importance, Congress passed the first act to provide judicial assistance to foreign courts.²³ The Act of March 2, 1855 permitted federal courts to grant foreign courts assistance in locating evidence in the United States, through the use of letters rogatory.²⁴ Despite its potential significance, however, the Act had minimal impact because a recording error caused it to be absent from the index of federal codes, leaving federal courts unaware of its enactment.²⁵

The Act of 1855 did not accomplish the goal of facilitating international comity among the courts, and Congress further limited the use of letters rogatory for assistance to foreign proceedings with its enactment of the Act of 1863.²⁶ Since the Act of 1863 created more limitations for judicial

22. See Brian Eric Bomstein & Julie M. Levitt, Comment, *Much Ado about 1782: A Look at Recent Problems with Discovery in the United States for Use in Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 429-30 (1989) (noting that in order for foreign courts to render competent and fair judgments, they need all necessary facts, which requires U.S. court assistance for obtaining evidence); Harry LeRoy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 540 (1953).

23. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855). In 1855, when a French court submitted a request to the State Department for assistance in securing testimony for a French proceeding, the United States government realized that it had no statutory grant of power to execute the letter rogatory. Rogatory Commissions, 7 Op. Att'y Gen. 56, 56 (1855). In response to the lack of statutory grant, Congress enacted Act of March 2, 1855. *Id.* at 57.

24. See § 2, 10 Stat. at 630. The Act permitted circuit courts "to compel the witnesses to appear and depose in the same manner as to appear and testify in court." *Id.* Requests for Assistance were made through letters rogatory and transmitted through diplomatic channels. *Id.* Letters rogatory are defined as "requests from courts in one country to the judiciary of a foreign 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. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, http://travel.state.gov/law/judicial/judicial_683.html (last visited Oct. 26, 2010).

25. See Jones, *supra* note 22, at 540 n.77 (noting that the Act was incorrectly "indexed in the Statutes at Large only under the heading 'Mistrials'").

26. Compare § 2, 10 Stat. at 630, with Act of March 3, 1863, ch. 95, 12 Stat. 769, 770 (1863). The Act of March 3, 1863 added three additional requirements before judicial assistance would be granted. The additional requirements were (1) the foreign country requesting assistance must be a party or have an interest in the case, (2) the suit must seek

assistance to foreign courts, most federal courts declined to exercise judicial assistance to foreign proceedings altogether.²⁷ While Congress had intended to give federal courts statutory authority to assist foreign courts in their proceedings abroad, they inadvertently constricted judicial assistance.²⁸

In recognition of their previous failed attempts at foreign judicial assistance and the necessity for the United States to espouse these foreign proceedings, Congress amended the Act of 1863 and codified these changes as 28 U.S.C. § 1782.²⁹

B. *The Amended Language of § 1782(a)*

Although Congress's previous attempts to "expand" judicial assistance rendered the statute futile, the 1948 and 1949 amendments provided actual statutory authority to grant judicial assistance to foreign proceedings.³⁰ The 1948 amendment significantly broadened the statute by removing the requirement that a foreign nation requesting judicial assistance be a party to or have an interest in the proceedings.³¹ Additionally, in 1949 Congress replaced the term "civil action" with "judicial proceeding."³² As a result,

monetary or property restitution, and (3) the country requesting assistance must be a friendly country with United States. § 4, 12 Stat. at 769–70. Courts relied on the stringent measures of the 1863 Act and declined to exercise judicial assistance for most requests. *See Jones, supra* note 22, at 540–41.

27. *See, e.g., In re Letters Rogatory from Examining Magistrate of Tribunal of Versailles, France*, 26 F. Supp. 852, 853 (D. Md. 1939) (relying on the Act of March 3, 1863, the court denied judicial assistance); *In re Spanish Consul's Petition*, 22 F. Cas. 854, 854 (S.D.N.Y. 1867) (the court denied request for judicial assistance relying on the Act of March 3, 1863); *see also Jones supra* note 22, at 515 (discussing that while the United States fortified "economic, military, and cultural cooperation with other nations," the government overlooked the area of judicial assistance, imposing hardships on both foreign and domestic lawyers and litigants); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 602 (1990) (contending that due to the federal court's unawareness of the 1855 Act and the rigid measures of the 1863 Act, it was easier to obtain judicial assistance from state courts than federal courts).

28. *See Jones, supra* note 22 at 540–41 (noting that for almost a century foreign requests for evidence were denied by the federal courts and the federal government did nothing to encourage judicial assistance); *see also Stahr, supra* note 27.

29. *See Act of June 25, 1948*, Pub. L. 80-773, ch. 646, 62 Stat. 869 (1948); S. REP. NO. 88-1580, at 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. The amendments of § 1782 seek to clarify and liberalize existing U.S. judicial assistance procedures. *See H.R. REP. NO. 80-308*, at A153 (1947) ("[I]mprovement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances.").

30. § 1782, 62 Stat. at 949; Act of May 24, 1949, Pub. L. 81-72, ch. 139, sec. 93, § 1782, 63 Stat. 89, 103 (1949).

31. *See § 1782*, 62 Stat. at 949 ("The deposition of any witness residing within the United States to be used in *any civil action pending in any court in a foreign country* with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.") (emphasis added).

32. *See sec. 93, § 1782*, 63 Stat. at 103.

by 1949, federal courts could compel oral testimony of any witness found within the United States for use in a pending foreign judicial proceeding.³³

As international trade and commercial activities continued to develop, Congress recognized that the previous amendments were insufficient for the evolving needs of the international business community.³⁴ In order to better meet these needs, in the late 1950s Congress created the Commission on International Rules of Judicial Procedure (“International Rules Commission”) to study and recommend modifications for foreign judicial assistance in regard to service of process and obtaining evidence.³⁵ Professor Hans Smit directed the project and Ruth Bader Ginsburg, who eventually wrote the Supreme Court’s *Intel* opinion, served as an associate director.³⁶ In 1964, Congress unanimously adopted the International Rules Commission’s proposals, including a complete overhaul of § 1782(a), without alteration.³⁷

The Senate Judiciary Committee Report on the 1964 amendments stated that the twin aims of the statute were “[to] provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects . . . [as well as] invite foreign countries similarly to adjust their procedures.”³⁸ The 1964 amendments permitted federal courts to compel the production of various types of evidence located in the United States, including documents and oral testimony.³⁹ In

33. See Jones, *supra* note 22 at 541–42. Although the statute was revised from the 1855 Act, it was still limited to the taking of depositions. Act of June 25, 1948, § 1782, 62 Stat. at 949.

34. See S. REP. NO. 85-2393, at 3 (1958) (stating that the significant increase in business transactions required a “comprehensive study” to ensure an optimal level of judicial assistance was being provided to the foreign courts).

35. See Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743. The purpose of the Commission was to draft

procedures necessary or incidental to the conduct and settlement of litigation in State and Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, . . . [that are] more readily ascertainable, efficient, economical, and expeditious.

Id.; see also Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 218 (1994) (noting that the two goals of the project were (1) to assist the Commission in developing rules of international comity in litigation, and (2) to create studies of foreign procedures to provide a basis for comparative study generally in the United States).

36. Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 397 (2004).

37. See Act of Oct. 3, 1964, Pub. L. No. 88-619, sec. 9, § 1782, 78 Stat. 995, 997 (1964); Stephan B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 107–11 (1994) (noting that the Commission’s recommendations were unanimously accepted “without change”).

38. S. REP. NO. 88-1580, at 12–13 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793–94.

39. See 28 U.S.C. § 1782(a) (2006). If a federal court grants discovery pursuant to § 1782(a), then the federal rules of civil procedure will govern the request. See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature,

addition, the phrase “judicial proceedings pending in *any court* in a foreign country with which the United States is at peace” was replaced by “proceeding in a foreign or international tribunal,” which expanded the proceedings that could utilize § 1782(a).⁴⁰

In 1996, to further broaden the scope of foreign tribunals that could utilize § 1782(a), Congress explicitly added “criminal investigations conducted before formal accusation” as a type of foreign tribunal pursuant to the statute.⁴¹

Currently, the statute states in pertinent part: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.”⁴²

The statute further provides:

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 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.⁴³

Thus, § 1782(a) permits a district court to grant a petitioner’s request for judicial assistance if: (1) the discovery sought “resides or is found” within the district; (2) the requesting party is a foreign or international tribunal or an “interested person” in the proceeding; and (3) the discovery is sought “for use” in a proceeding in a foreign or international tribunal.⁴⁴

custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter Relevant information *need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.*” (emphasis added)); *see also* S. REP. NO. 88-1580, at 7, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. The American-style production of documents is especially problematic because most civil law nations do not permit similar extensive pre-trial discovery proceedings. *See* HEC *supra* note 1, art. 23 (reservations in the Convention are taken by nations such as France and Germany, which prohibit the production of all or most documents in pre-trial discovery).

40. *See* sec. 9(a), § 1782, 78 Stat. at 997.

41. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486, 486 (1996).

42. 28 U.S.C. § 1782 (2006).

43. *Id.*

44. *See id.* *See generally* Scott R. Boesel, *Arbitration Bodies Should be Considered Tribunals Under § 1782: An analysis of NBC v. Bear Stearns & Co.*, 63 ALB. L. REV. 637, 648–52 (1999) (discussing how the 1964 amendments expanded the scope of § 1782(a)).

Section 1782(a) does not define “international tribunal” or “foreign . . . tribunal.”⁴⁵ However, the Senate Report noted that Congress used the word “tribunal” to ensure “assistance [was] not confined to proceedings before conventional courts,” and to permit its extension to other foreign *governmental bodies*, including investigating magistrates, administrative bodies, and quasi-judicial agencies.⁴⁶ The Senate Report also referenced a 1962 article by Hans Smit that advocated the liberalization of U.S. judicial assistance to international tribunals.⁴⁷ However, despite the clear indications that Congress intended to broaden the statute, the plain language and the legislative history of § 1782(a) did not contemplate expanding its use outside governmental adjudicatory bodies to include private international arbitrations as “tribunals.”⁴⁸

II. *INTEL CORP. V. ADVANCED MICRO DEVICES, INC.*: THE BEGINNING OF INCONGRUENCE AMONG THE FEDERAL COURTS

Congress failed to clearly define what constitutes an “international tribunal,” and as a result, the circuits have applied different standards to determine whether the party requesting judicial assistance is part of a “tribunal” pursuant to § 1782(a).⁴⁹ The Second and Fifth Circuits have held that private international arbitrations are not “tribunals” because § 1782(a) was intended solely for governmental adjudicatory bodies.⁵⁰ Further, these Circuits have found that legislative history and public policy support their exclusion from the statute.⁵¹

However, because dicta in *Intel* suggested that arbitration panels may be considered “international tribunals” without further elaboration, some

45. See S. REP. NO. 88-1580, at 7–8 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788 (lacking any narrow definitions for the pertinent terms).

46. *Id.*

47. See Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 COLUM. L. REV. 1264, 1267, 1274 (1962) (cited in S. REP. NO. 88-1580, at 8 (1964), reprinted in 1964 U.S.C.C.A.N. 3784, 3789) (noting that because the United States has accepted the compulsory competence of the International Court of Justice, the United States should also assist other foreign tribunals).

48. See *infra* parts III.A and B. (discussing why the plain language and legislative history exclude private international arbitration from § 1782(a)).

49. Compare *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (holding that among other reasons, policy considerations and legislative history of § 1782(a) indicate “that Congress did not intend for [the] statute to apply to an arbitral body established by private parties.”), with *In re Application of Roz Trading, Ltd.*, 469 F. Supp. 2d 1221, 1227–28 (N.D. Ga. 2006) (in applying the factors from *Intel*, the court, located within the Fifth Circuit, held that arbitral proceedings are “foreign tribunals” pursuant to § 1782(a)).

50. See *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding that the term “international tribunal” in § 1782(a) was never calculated to assist in private international arbitration); *NBC*, 165 F.3d at 191 (holding that an arbitral tribunal is not a “foreign tribunal” pursuant to § 1782(a)).

51. See *Biedermann*, 168 F.3d at 883; *NBC*, 165 F.3d at 191.

courts have misapplied the rationale set forth in *Intel* and utilized § 1782(a) for private international arbitrations.⁵²

Thus, a number of post-*Intel* courts have focused their analysis on the dicta of *Intel*, using the factors set forth in that decision, while the Second and Fifth Circuits have ascribed greater importance to the language and the legislative history of § 1782(a).⁵³ As discussed in Part III, giving greater deference to the statutory language and legislative history achieves the twin aims of the statute while preserving the fundamental advantages of participating in arbitration.⁵⁴

A. *Before Intel, the Second and Fifth Circuits Did Not Authorize the Use of § 1782(a) for Private International Arbitration Proceedings*

Recognizing § 1782(a)'s ambiguous use of "international tribunal," the Second and Fifth Circuits have relied on statutory language, legislative history, and public policy to exclude international arbitration proceedings from use of the statute.⁵⁵ The Second Circuit first adopted this position in *NBC v. Bear Stearns & Co.*,⁵⁶ holding that § 1782(a)'s language and legislative history did not support including private arbitration proceedings

52. See, e.g., *In re Roz Trading*, 469 F. Supp. 2d at 1225–28 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)) (reasoning that since the arbitration proceeding is a first-instance decision maker, it is a "foreign tribunal" under § 1782(a)); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238–40 (D. Mass. 2008) (reasoning that a private, international arbitral body, operated by the International Chamber of Commerce, was a "tribunal" within meaning of § 1782(a)); see also *In re Oxus Gold PLC*, MISC No. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (holding that the framework defined by two nations and governed by UNITCRAL is a "foreign tribunal" under § 1782(a)). But see *La Comision Ejecutiva Hidroelctrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 486–87 (S.D. Tex. 2008) (holding that § 1782(a) did not extend to arbitral tribunals).

53. Compare *supra* note 51, with *supra* note 52 (discussing courts that have focused on the factors specified in *Intel*). It is important to note that the Second Circuit has not always excluded arbitral panels from § 1782(a). Prior to *NBC*, in 1994, the Southern District of New York, without authority and in dicta, concluded that arbitrations are "tribunals" under § 1782(a). *In re Technostroyexport*, 853 F. Supp. 695, 697 (S.D.N.Y. 1994). However, three years later the same district court reached the opposite conclusion, excluding arbitral panels from § 1782(a). In *In re Medway Power Ltd.*, the court assessed the "plain meaning" of the statute and examined the procedural differences between litigation and arbitration, determining that an arbitral panel was not a "tribunal" for purposes under § 1782(a). 985 F. Supp. 402, 403 (S.D.N.Y. 1997). The court reasoned that private arbitration clauses are "creatures of a contract which a court should enforce just like any other obligation imposed by a private agreement." *Id.* at 403.

54. See *infra* Part III and accompanying notes. Cf. Nathan Reierson, Comment, *Out of Bounds? Applicability of Federal Discovery Orders Under 28 U.S.C. Section 1782 by International Athletic Governing Bodies for use in Internal Dispute Resolution Procedures*, 19 LOY. L.A. ENT. L. REV. 631, 647 (1999) (arguing that limiting § 1782(a) to exclude arbitration disputes would be contrary to public policy because the statute would facilitate discovery and improve the representation of clients).

55. See *infra* notes 56–77 and accompanying text.

56. 165 F.3d 184 (2d Cir. 1999).

as “international tribunals.”⁵⁷

The National Broadcasting Company (“NBC”) had requested discovery from a third-party financial institution for use in a private foreign arbitration proceeding between NBC and Azteca, S.A. de C.V. (“Azteca”), a Mexican Company, administered by the International Chamber of Commerce (“ICC”).⁵⁸ Initially the district court granted the discovery requests, but later it quashed the subpoenas, reasoning that the terms “foreign or international tribunal” in § 1782(a) did not extend to private international arbitration.⁵⁹ The Second Circuit affirmed the district court’s order quashing the discovery, confirming that a private international arbitration was not a “foreign or international tribunal” under § 1782(a).⁶⁰

To determine whether the ICC was a “foreign or international tribunal,” the Second Circuit first examined the language of the statute.⁶¹ Recognizing that § 1782(a)’s language was insufficient to include or exclude international arbitration proceedings, the court looked to the statute’s legislative history and concluded that Congress only intended to provide assistance to governmental authorities.⁶² The court reasoned that Congress had added “administrative or investigative courts, *acting as state instrumentalities or with the authority of the state*” when it broadened the statute’s language in the 1964 amendment to “foreign or international tribunal” and did not contemplate extending the use beyond governmental adjudicatory bodies.⁶³ Thus, under this rationale, while governmental arbitral bodies could be considered “international tribunals,” private international arbitration was excluded.⁶⁴

The Second Circuit also examined the policy implications of construing § 1782(a) to extend to private international arbitration.⁶⁵ The court

57. *Id.* at 190–91.

58. *Id.* at 185–86. The ICC is a private administrative body that is responsible for supervising the arbitration process for the parties that choose ICC Institutional Arbitration. MOSES, *supra* note 12, at 10.

59. *In re NBC*, No. M-77 (RWS), 1998 WL 19994, at *8 (S.D.N.Y. Jan. 21, 1998).

60. *NBC*, 165 F.3d at 185.

61. *See id.* at 188.

62. *Id.* at 189. *But see* Steven A. Hammond, Note, *The Art of Missed Opportunity—How U.S. Courts Declined to Assist Private International Arbitral Tribunals under the U.S. Law Authorizing Discovery in Aid of Foreign and International Proceedings*, 17 J. INT’L ARB. 131, 137–43 (2000) (discussing why § 1782(a) should extend to international arbitration proceedings); *see also* Thurston K. Cromwell, Note, *The Role of Federal Courts in Assisting International Arbitration: National Broadcasting Co. v. Bear Stearns & Co.*, 2000 J. DISP. RESOL. 177, 185–86 (suggesting that the Second Circuit interpreted § 1782(a) too narrowly).

63. *NBC*, 165 F.3d at 189 (emphasis added).

64. *Id.* *But see In re Caratube Int’l Oil Co., LLP*, Misc. Action No. 10-0285 (JDB), 2010 WL 3155822, at *4–6 (D.D.C. Aug. 11, 2010) (denying a request for discovery under § 1782(a), even though the arbitration was a state-sponsored proceeding administered by ICSID pursuant to a bilateral investment treaty between the United States and Kazakhstan).

65. *NBC*, 165 F.3d at 190–91.

recognized that many benefits of arbitration, such as its cost-effectiveness, timeliness, and confidential nature, would be foregone if American-style discovery were permitted in private arbitration.⁶⁶ The court further noted that while domestic arbitrations are deprived of extensive discovery, § 1782(a) would allow foreign arbitration proceedings to have free use of the Federal Rules of Civil Procedure to obtain documents and take depositions of persons located in the United States.⁶⁷

The Fifth Circuit paralleled *NBC*'s rationale in its interpretation of "international tribunal" under § 1782(a).⁶⁸ In *Republic of Kazakhstan v. Biedermann International*,⁶⁹ both parties were implicated in an arbitration proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce.⁷⁰ Kazakhstan requested that the U.S. District Court for the Southern District of Texas compel a third-party to produce documents and submit a deposition for use in an arbitration proceeding.⁷¹ The district court granted Kazakhstan's request, but, on appeal, the Fifth Circuit reversed.⁷² Looking to the plain language of § 1782(a), the court found the statute to be inconclusive.⁷³ The court then proceeded to examine the legislative history, noting that in 1964, when § 1782(a) was amended from "international courts" to "international or foreign tribunals," private international arbitration was a "then-novel arena."⁷⁴ The court concluded that it was highly unlikely that Congress intended to include a form of dispute resolution that was infrequently used at the time.⁷⁵ The court also examined other statutory uses of the term "tribunal," finding that it was

66. *See id.* (reasoning that "[t]he popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.").

67. *See id.* at 191 (discussing the limitations on discovery imposed by § 7 of the Federal Arbitration Act that would be overridden if § 1782(a) was permitted for use in private international arbitration proceedings).

68. *See Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999) ("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.").

69. 168 F.3d 880 (5th Cir. 1999).

70. *Id.* at 881.

71. *Id.*

72. *See id.* ("Having reviewed the parties' submissions and examined the language and history of § 1782, we elect to follow the Second Circuit's recent decision that § 1782 does not apply to private international arbitrations.").

73. *Id.* at 882.

74. *See id.* (discussing that the amendments broadened § 1782 to include only international "government-sanctioned tribunals," not private adjudicatory bodies).

75. *Id.* For example, the International Chamber of Commerce (ICC) has seen an increase in arbitrations from thirty-two arbitrations in 1956 to over five hundred in 2009. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS, 7 n.30 (2d ed. 2001); *What is ICC?*, INT'L CHAMBER OF COMMERCE, <http://iccwbo.org/id93/index.html> (last visited Sept. 15, 2010).

used synonymously with governmental adjudicatory bodies.⁷⁶ The court, therefore, concluded that private international arbitrations were not tribunals pursuant to § 1782(a).⁷⁷

B. Background and Summary of Intel

In 2004 the Supreme Court interpreted § 1782(a) for the first time in deciding *Intel Corp. v. Advanced Micro Devices, Inc.*⁷⁸ Although the case did not concern an arbitration proceeding, district courts have applied its dicta and rationale to expand § 1782(a) to encompass arbitral tribunals.⁷⁹

Intel involved a discovery request in a U.S. district court for use in a proceeding before the state-sponsored Commission of the European Communities (“CEC”).⁸⁰ Advanced Micro Devices (“AMD”) filed an antitrust complaint against Intel with the Directorate-General for Competition (“DG-Competition”) alleging that Intel had abused its dominant position in the European market through anticompetitive practices.⁸¹ After filing its complaint with DG-Competition, AMD recommended that DG-Competition seek discovery of additional documents under court seal that Intel had provided in a previous U.S. antitrust suit.⁸² However, DG-Competition did not proceed on AMD’s recommendation, and, consequently, AMD requested an order from the U.S. District Court for the Northern District of California to compel Intel to produce the documents pursuant to § 1782(a).⁸³

76. *Biedermann*, 168 F.3d at 882. The court noted that the references to “arbitral tribunals” in the United States Code almost uniformly referred to an adjunct of a foreign government. *See, e.g.*, 16 U.S.C. § 973n (2006) (establishing an arbitral tribunal by treaty and operating under the auspices of the U.S. government to resolve disputes with Pacific Island parties); 22 U.S.C. § 290k-11(a) (2006) (referring to arbitral tribunals established by treaty and operating between foreign entities).

77. *Biedermann*, 168 F.3d at 883. Similarly to the Second Circuit, the court examined the policies behind arbitration as a “speedy, economical, and effective means of dispute resolution” and articulated unease that “arbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.” *Id.*

78. 542 U.S. 241, 253 (2004).

79. *See Losk, supra* note 9, at 1038–39 (noting that the liberal reading of § 1782(a) in *Intel* implicates *NBC* and requires additional examination of the precedent that excludes private international arbitral tribunals).

80. *Intel*, 542 U.S. at 246.

81. *Id.*

82. *Id.* at 250.

83. *Advanced Micro Devices, Inc. v. Intel Corp.*, No.C-01-7033 MISC WAI, 2002 WL 1339088, at *1 (N.D. Cal. Jan. 7, 2002), *rev’d* 292 F.3d 664 (9th Cir. 2002), *aff’d* 542 U.S. 241 (2004). In order to satisfy the requirements of § 1782, AMD argued that DG-Competition performed similar functions as the Federal Trade Commission. *Id.* However, the CEC itself submitted a brief which stated that DG-Competition’s procedures were “administrative and not judicial” and incomparable to the practices of the Federal Trade Commission. *Id.*

The district court denied AMD's § 1782(a) request for discovery, reasoning that since DG-Competition was not an adjudicative body, it was not a "tribunal" overseeing a "proceeding" within the context of § 1782(a).⁸⁴

On AMD's appeal, the Ninth Circuit reversed, holding that DG-Competition qualified as an "international tribunal" pursuant to § 1782(a).⁸⁵ The court reasoned that because DG-Competition's final recommendations are adopted by the CEC, "a body authorized to enforce the [C]EC Treaty with written, binding decisions, enforceable through fines and penalties," and that because "[C]EC decisions are appealable to the Court of First Instance and then the Court of Justice," the requested discovery was for a proceeding "leading to quasi-judicial proceedings."⁸⁶ The court further noted that "allowance of liberal discovery seems entirely consistent with the twin aims of Section 1782: providing efficient assistance to participants in international *litigation* and encouraging foreign countries by example to provide similar assistance to our courts."⁸⁷

The Supreme Court agreed with the Ninth Circuit that DG-Competition was a "tribunal" within the meaning of § 1782(a).⁸⁸ The

84. *Id.* at *2. In addition, the court noted DG-Competition's hostility towards receiving the requested documents for fear that their investigatory functions would be "turned into a trial." *Id.* at *1.

85. *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 665, 668 (9th Cir. 2002).

86. *Id.* at 667. Additionally, the court held that § 1782(a) had no requirement for foreign discoverability, and therefore discovery requested under § 1782(a) was not obliged to be discoverable in the foreign jurisdiction. *Id.* at 669. The court examined the statute's language and the legislative history, finding no threshold requirement that the requesting party demonstrate that what is sought is discoverable in the foreign jurisdiction. *Id.* at 668. Therefore, even though AMD was not permitted to request discovery under DG-Competition regulations, AMD could nonetheless request discovery pursuant to § 1782(a). *Id.* at 668–69. *Cf.* Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in the United States of America*, 32 J. BAR ASS'N D.C. 24, 32 (1965) (discussing that in deciding whether to grant judicial assistance, the court "may consider the nature and attitudes of the foreign government"). Amram chaired the Advisory Committee to the Congressional Commission that presented the § 1782 amendments. *FOURTH ANNUAL REPORT ON THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE*, H.R. DOC. NO. 88-88, at viii (1963); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265–66 (2004) (noting that a court may deny a party's request for evidence if the party is trying to "conceal an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States").

87. *Advanced Micro Devices*, 292 F.3d at 669 (emphasis added). The Ninth Circuit applied an "exclusive conduit" test; for a requesting party to satisfy the requirements of § 1782, the proceeding for which the discovery is sought must be "at minimum, one leading to quasi-judicial proceedings." *Id.* at 667.

88. *Intel*, 542 U.S. at 251–254. The Supreme Court deemed DG-Competition a tribunal even though the CEC filed amicus curiae briefs supporting Intel's opposition to the discovery request, stating that the DG-Competition was not a "tribunal" for purposes of § 1782. *See* Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, at 1–3, *Intel*, 542 U.S. 241 (No. 02-572), 2002 WL 32157391 at *1–3 [hereinafter First CEC Brief]. The CEC further reasoned that the discovery AMD requested

Court held that even though DG-Competition was an investigatory body, its findings were reviewable by the European Courts, which were undeniably tribunals under § 1782(a).⁸⁹ The Court observed that the investigatory stage was AMD's only opportunity to present potential evidence that would end up in those courts on a possible appeal, and therefore that admission of evidence at the complaint stage was the only way the documents could reach the judicial stage.⁹⁰ Because DG-Competition acted as a first-instance decision maker, capable of rendering a decision on the merits as part of a process that could ultimately lead to a final resolution of the dispute, the Court concluded that it was a "tribunal" for the purposes of § 1782(a) and that the discovery sought was "for use" in an "international or foreign tribunal."⁹¹

In loosely defining the term "international tribunal," the Court implied that arbitration proceedings could also be considered "tribunals" for the purpose of § 1782(a).⁹² The Court relied on the fact that in 1958, when Congress created the Commission on International Rules of Judicial Procedure, the Commission was required to recommend procedures that would permit judicial assistance to "foreign courts and quasi-judicial agencies."⁹³ In dicta, Justice Ginsburg quoted an article written by

was "information that the Commission has thus far declined to seek on its own behalf," and that "[o]ther channels exist for the [CEC] . . . to obtain information located in the United States if the Commission considers it necessary It is the Commission's clear preference . . . to rely on the formal mechanisms that it has carefully negotiated with the United States specifically for . . . cooperation in competition law enforcement." Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal at 4, 8, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23138389, at *3, *12 [hereinafter Second CEC Brief]. The CEC reiterated that "this is a very serious matter" and cautioned that permitting complainants before the DG-Competition to use § 1782(a) to request discovery "would be a breach of the principle of international comity." First CEC Brief, at *4.

89. *Intel* contended that the DG-Competition was not a "foreign or international tribunal" within the meaning of § 1782(a) since it was merely an investigatory body; however, the Court found it instructive that the DG-Competition's findings were reviewable by the Court of First Instance (CFI) or the Court of Justice of the European Communities (ECJ). *See Intel*, 542 U.S. at 257-58.

90. *See id.*

91. *See Intel*, 542 U.S. at 246-47, 257-58. Justice Breyer dissented, stating that courts should not grant a discovery request pursuant to § 1782(a) when the private person seeking the discovery would not be entitled to that discovery under foreign law, and the discovery would not be available under domestic law in analogous circumstances. *Id.* at 270 (Breyer, J., dissenting) (emphasis in original). Justice Breyer also contended that the majority had extended § 1782's scope beyond what Congress had intended it to cover. *See id.* at 267-68. As to whether DG-Competition was a "tribunal" within the meaning of § 1782(a), Justice Breyer advocated that "when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word 'tribunal' is in serious doubt, then a court should pay close attention to the foreign entity's own view of its 'tribunal'-like or non-'tribunal'-like status." *Id.* at 269.

92. *Id.* at 257-58 (majority opinion). Although the *NBC* and *Biedermann* courts attempted to define "tribunal" within § 1782(a), *Intel* relied solely on the fact that the legislative amendments continually broadened the scope of the statute. *See id.*

93. *Id.*; *see also* BLACK'S LAW DICTIONARY 1278-79 (8th ed. 2004) ("Quasi-judicial is a term that is . . . not easily definable. In the United States, the phrase often covers judicial

Professor Hans Smit which claimed that “the term “tribunal” . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”⁹⁴ The Court concluded that because Congress had used Smit’s article in the construction of the statute, they must have wanted “tribunal” to be construed broadly.⁹⁵

The Supreme Court laid out four factors for a district court to consider when determining whether a request for assistance should be granted.⁹⁶ First, a district court must examine whether the party requesting the discovery is a participant in the foreign or international tribunal.⁹⁷ Second, a district court must determine the nature of the foreign tribunal, the character of the proceeding abroad, and the receptivity of the foreign government, court, or agency to the U.S. court assistance.⁹⁸ Third, a district court must determine whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of the foreign nation.⁹⁹ Last, a district court must examine whether the request is unduly intrusive or burdensome.¹⁰⁰ While the four factors may be instructive to lower courts, the Supreme Court did not indicate how to balance the factors or whether any of the factors were determinative.¹⁰¹

C. *Post-Intel Confusion Regarding Private International Arbitration*

Speculation grew after the Supreme Court’s *Intel* decision as to whether § 1782(a) would be available to parties participating in private international arbitration.¹⁰² Indeed, the reaction to the decision by lower courts has been

decisions taken by an administrative agency. . . .”) (quoting GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 336 (G.W. Paton & David P. Derham eds., 4th ed. 1972). However, the Court failed to recognize that even the reference to “quasi-judicial” connotes some sort of government-sponsorship. See generally BLACKS LAW DICTIONARY 1121 (5th ed. 1979) (Quasi-judicial is “a term applied to the action, discretion, etc. of *public administrative officers or bodies*, who are required to investigate facts, or ascertain the existence of facts, hold hearings and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature”) (emphasis added).

94. *Intel*, 542 U.S. at 258 (emphasis added) (quoting Smit, *supra* note 19, at 1026 n.71).

95. See *id.* at 258. The Court also noted that § 1782(a) is permissive, and that courts may use their discretion when deciding whether to grant a discovery request. *Id.* at 264. The Court remanded *Intel* to the lower court, to apply the Court’s four-part analysis. See *id.* The lower court denied AMD’s § 1782(a) request, concluding that the CEC had jurisdiction and therefore, U.S. judicial assistance was superfluous. See *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at *1, *2 (N.D. Cal. Oct. 4, 2004).

96. See *Intel*, 542 U.S. at 264–66.

97. *Id.* at 264.

98. *Id.*

99. *Id.* at 264–65.

100. *Id.* at 265.

101. See *id.* at 264–65 (noting only that the listed factors “bear consideration” in deciding a request to grant discovery under § 1782(a)).

102. See generally Barry H. Garfinkel & Yuval M. Miller, *The Supreme Court’s*

mixed: some lower courts have held that *NBC* and *Biedermann* are unaffected by the Supreme Court's dicta in *Intel*,¹⁰³ while others have permitted requests for discovery for public and private international arbitration proceedings pursuant to § 1782(a).¹⁰⁴ Although the Supreme Court did not specifically address international arbitration, some lower courts interpreted *Intel* to permit the application of § 1782(a) in both public and private international arbitration.¹⁰⁵

1. *In re Roz Trading Ltd.*

In *Roz Trading*,¹⁰⁶ the Northern District of Georgia held that *Intel* provided "sufficient guidance . . . to determine that arbitral panels . . . are 'tribunals' within the statute's scope."¹⁰⁷ The dispute arose from a joint venture agreement between Roz Trading, the government of Uzbekistan, and the Coca-Cola Company.¹⁰⁸ Roz Trading requested documents from the Coca-Cola Company for use in the international arbitration between Roz Trading and The Coca-Cola Export Company ("CCEC"), a subsidiary of Coca-Cola, at the International Arbitral Centre before the Austrian Federal Economic Chamber (the "Arbitral Centre").¹⁰⁹ Coca-Cola contended that the Arbitral Centre was not a 'tribunal' within the meaning of § 1782(a) because "the [Arbitral] Centre is a private institution whose proceedings are voluntary. . . ."¹¹⁰

Using the factors established by *Intel*, the court determined that the Arbitral Centre was a tribunal for purposes of § 1782(a).¹¹¹ The court reasoned that the Arbitral Centre, like the tribunal in *Intel*, acted as a

Reasoning in Intel Calls into Question Circuit Court Rulings on Inapplicability of 28 U.S. Code Section 1782 to International Arbitration, 19(8) INT'L ARB. REPORT 25, 25-28 (2004) (discussing whether *Intel* would be dispositive for international arbitrations wanting to use § 1782(a)).

103. See, e.g., *La Comision Ejecutiva Hidroelectric del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485-87 (S.D. Tex. 2008) (holding that § 1782(a) does not extend to arbitral panels and that the *Intel* decision is not the controlling precedent for international arbitration panels), *aff'd* 341 F. App'x 31 (5th Cir.) (per curiam); see also *In re Oxus Gold PLC*, MISC No. 06-82-GEB, 2007 WL 1037387, at *4-5 (D.N.J. Apr. 2, 2007) (following the rationale from *Intel* and permitting a discovery request pursuant to § 1782(a), however reasoning that the proceeding concerned a public-governmental arbitral body pursuant to a bilateral investment treaty, not a private arbitration like *NBC* or *Biedermann*).

104. See *infra* notes 106-141 and accompanying text (discussing post-*Intel* cases permitting the use of § 1782(a) in arbitration proceedings).

105. See *infra* notes 106-141 and accompanying text (detailing courts' struggle to ascertain whether they should look to *Intel* in granting requests under § 1782(a) when the parties are involved in arbitration proceedings).

106. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

107. *Id.* at 1224.

108. *Id.* at 1222-23.

109. *Id.* at 1222.

110. *Id.* at 1224.

111. See *id.* at 1224-25.

“first-instance decision-maker that issue[d] decisions ‘both responsive to the complaint and reviewable in court.’”¹¹²

In addition, the *Roz Trading* court found the language of § 1782(a) unambiguous and contended that the term “tribunal” was widely recognized to include arbitration proceedings.¹¹³ The court further reasoned that the underlying purpose for the 1964 amendments was to broaden the scope of the proceedings under § 1782(a).¹¹⁴ Although the court noted that *Intel* did not precisely address “whether private arbitral panels [were] ‘tribunals,’” it concluded that since the Arbitral Centre had the authority to render a decision on the merits, “as part of the process that could ultimately lead to final resolution of the dispute,” the Arbitral Centre was a “tribunal” pursuant to § 1782(a).¹¹⁵

2. *In re Hallmark Capital Corp.*

The court in *Hallmark* focused on *Intel*’s broad interpretation of § 1782(a).¹¹⁶ *Hallmark* had initiated a private arbitration in Israel against

112. *Id.* at 1225. (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004)). The court failed to discuss whether the reviewing courts would be able to take their own evidence, or, as a deciding factor in *Intel*, be limited to the evidence obtained by the first-instance decision maker. *See id.* In addition, a key characteristic of arbitration is that the decisions are binding and the merits of the decision are usually unreviewable by the national courts unless there is fraud, corruption, partiality, or misconduct. *See, e.g.*, 9 U.S.C. §§ 10-11 (“To prevail on a claim of fraud or undue means under the Federal Arbitration Act, a party must show: (1) existence of fraud by clear and convincing evidence; (2) the fraud was not discoverable through due diligence prior to or during the arbitration proceeding; and (3) the fraud materially related to an issue in the arbitration”); *see also*

THE FRENCH CODE OF CIVIL PROCEDURE IN ENGLISH 328 (Nicolas Brooke trans., 2009) (“An appeal against the decision which grants recognition or enforcement of an award is only available in the following cases: 1) Where the arbitrator has ruled upon the matter without any arbitration agreement or where this agreement is invalid or has expired; 2) Where the arbitral tribunal has been invalidly constituted or the sole arbitrator irregularly appointed; 3) Where the arbitrator has made a ruling that is not in accordance with the task conferred upon him; 4) Where the principle of involving all the parties has not been complied with; [and] 5) If the recognition or enforcement is contrary to international public policy.”).

113. *See Roz Trading Ltd.*, 469 F. Supp. 2d at 1226 (“In the absence of ambiguity, it would be improper for the Court to consider legislative history or impose its own limitations upon the meaning of the statute’s terms.”) (citing *United States v. Turkette*, 452 U.S. 576, 587 (1981))). The court also noted that “[h]ad Congress wanted to impose the limitation advanced by [the party opposing extension of § 1782 to private arbitration bodies], it would have been a simple matter to add the word ‘governmental’ before the word ‘tribunal’ in the 1964 amendment.” *Roz Trading*, 469 F. Supp. 2d at 1226 n.3.

114. *See id.* at 1226.

115. *See id.* at 1224 (“Although *Intel* did not expressly hold arbitral bodies to be ‘tribunals,’ it quoted approvingly language that included ‘arbitral tribunals’ within the term’s meaning in § 1782(a)”). The court further contended that *Intel*’s holding had “materially impacted” the decisions in *NBC* and *Biedermann*. *Id.* at 1226.

116. *See In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 956 (D. Minn. 2007); Jessica Weekley, Comment, *Discovering Discretion: Applying Intel to § 1782 Requests for Discovery in Arbitration*, 59 CASE W. RES. L. REV. 535, 543 (2009) (noting that while the *Roz Trading* court relied on *Intel* and examined the plain language of § 1782, the *Hallmark*

UltraShape Inc.,¹¹⁷ and sought discovery from UltraShape's non-party Chairman pursuant to § 1782(a).¹¹⁸ Citing *Roz Trading*, the court granted Hallmark's request, reasoning that the "common usage" and "widely accepted definition" of the term "tribunal" included private international arbitration panels.¹¹⁹ As in *Roz Trading*, the court in *Hallmark* acknowledged that the Supreme Court had not specifically addressed private international arbitration, but nonetheless reasoned that:

any lack of a clear holding from the Supreme Court on this issue is of little moment because the Court's general approach to Section 1782, as well as that statute's legislative history, makes clear that the statute is best read not to impose any restrictive definitional exclusions that would necessarily preclude assistance to all private arbitral bodies.¹²⁰

The court noted that because *Intel* did not limit the "interested persons" requirement in § 1782(a) to "private 'litigants' or sovereign agents," the Supreme Court's expansive approach indicated that private arbitrations should be considered "tribunals."¹²¹ Additionally, the court looked to the *Intel* factors, noting that the Israeli arbitrator "ha[d] expressly indicated his willingness to consider any evidence that results from the requested discovery."¹²² The court concluded that based on the *Intel* factors and the broad construction of the statute, private international arbitration proceedings were "tribunals" pursuant to § 1782(a).¹²³

3. *In re Oxus Gold PLC*

The court in *Oxus* took a different approach.¹²⁴ The dispute arose between Oxus Gold PLC, an international mining group from the United Kingdom, and the Kyrgyz Republic.¹²⁵ The Kyrgyz government had

court focused mainly on the holding of *Intel*).

117. *In re Hallmark*, 534 F. Supp. 2d at 953.

118. *Id.*

119. *See id.* at 954. The court noted that § 1782 did not define 'tribunal' and used the Black's Law Dictionary definition of "[a] court or other adjudicatory body." *See id.* (quoting BLACK'S LAW DICTIONARY 1512 (7th ed. 1999)).

120. *Id.* at 955. *See generally* 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, 66 (2008) (discussing how *Intel*'s mere mention of "arbitral tribunals" has led four courts to conclude that § 1782 includes private international arbitration).

121. *See In re Hallmark*, 534 F. Supp. 2d at 955.

122. *Id.* at 958; *see Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) (noting that when granting a request for discovery, one factor to consider is the "receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.").

123. *In re Hallmark*, 534 F. Supp. 2d at 955-58.

124. *See In re Oxus Gold PLC*, MISC No. 06-82-GEB, 2007 WL 1037387, at *1 (D.N.J. Apr. 2, 2007). Instead of contradicting the Second and Fifth circuits, the court distinguished *Intel*, holding that public international arbitrations are included under § 1782(a). *See id.* at *5.

125. *Id.* at *1.

granted licenses to Oxus Gold and the State of Kyrgyz to form a joint venture for the development of gold deposits.¹²⁶ When the license was revoked, Oxus Gold initiated arbitration proceedings against Kyrgyzstan for unlawful and discriminatory conduct in violation of the UK-Kyrgyz Bilateral Investment Treaty (“BIT”).¹²⁷ Oxus Gold proceeded to request documents and testimony from a nonparticipant to the arbitration who was located in the United States pursuant to § 1782(a).¹²⁸ Although the district court permitted the request for evidence, it did not specifically apply *Intel*’s “tribunal analysis” of a first-instance decision maker or close resemblance to an adjudicatory agency.¹²⁹ Conversely, the court distinguished the Second and Fifth circuits, noting that *Oxus* involved a public international arbitration pursuant to a state-sponsored BIT, whereas the other circuits had merely excluded private international arbitration.¹³⁰ The court reasoned that although the arbitration was undoubtedly between two private litigants, because the arbitration was being administered under UNCITRAL rules pursuant to the BIT Agreement, it was “thus being conducted within a framework defined by two nations” and constituted a “tribunal” pursuant to § 1782(a).¹³¹ Although the court did not adopt the framework established in *Intel*, it used the broad interpretation of the term “tribunal” to grant the discovery request pursuant to the government-sponsored arbitral proceeding.¹³²

4. *La Comision Ejecutiva Hidroelecctrica del Rio Lempa v. El Paso Corp.*

A more recent decision concerning the terms “international tribunal” within the meaning of § 1782(a) was decided in the Southern District of

126. *Id.*

127. *Id.* See generally John Fellas, *Using Section 1782 in International Arbitration*, 23 *ARB. INT’L* 379, 396 (2007) (discussing the significance of the agreement to be bound by a bilateral investment treaty).

128. *In re Oxus Gold*, 2007 WL 1037387, at *2. Oxus Gold filed an ex parte application for documents and testimony from Jack A. Barbanel, who *likely* possessed evidence and who was “found” within the district of New Jersey pursuant to the requirements of § 1782. See *id.* at *2-4.

129. *Id.*

130. See *id.* at *5 (distinguishing the arbitral proceedings pursuant to a BIT from the private tribunals at issue in *NBC* and *Biedermann*); see also Fellas, *supra* note 127, at 396 (noting that the court distinguished *Oxus Gold* on the grounds that the arbitration proceeding was established by a governmental body and therefore it was not a private international arbitration).

131. *In re Oxus Gold*, 2007 WL 1037387, at *5. (“Article 8 of the [BIT] Agreement between the United Kingdom and Kazakhstan specifically mandate[d] that disputes between nationals of the two countries would be resolved by arbitration governed by international law.”).

132. *Id.* The court did not address whether § 1782 was available for private international arbitrations and that question remains unanswered in the Third Circuit. See *id.*

Texas.¹³³ In *El Paso Corp.*, the dispute between Nejapa Power Co. L.L.C. and Comision Ejecutiva Hidroelectrica (“CEL”), a company controlled by the government of El Salvador, was being privately arbitrated pursuant to the UNCITRAL Arbitration Rules.¹³⁴ CEL requested discovery pursuant to § 1782(a) to obtain documents from a non-party located in the United States for use in the arbitration proceedings.¹³⁵

Although the court initially granted the request for discovery, the arbitration panel in Geneva, Switzerland issued procedural orders in opposition of the requested discovery.¹³⁶ The arbitral panel expressed concern that CEL’s discovery request was “unwarranted in view of the parties’ choice of international arbitration and the procedure [for the production of documents] established by the Arbitral Tribunal in the present proceedings.”¹³⁷ Further, it was only after the Arbitral Panel had determined the arbitration procedures, including discovery limitations, that CEL requested discovery pursuant to § 1782(a).¹³⁸

Ultimately the Southern District of Texas did not grant CEL’s discovery request.¹³⁹ The court distinguished the ongoing arbitral proceeding from the tribunal in *Intel*, noting that “[a]n arbitral tribunal exists as a parallel source of decision-making to, and is entirely separate from, the judiciary, which was not the case with the DG Competition as the Court was at pains to point out in *Intel*.”¹⁴⁰ The court further criticized the lower courts that had construed § 1782(a) to apply to private arbitration panels, concluding “[u]ntil, and, if, the Supreme Court itself adopts Hans Smit’s statements as its own within the text of the opinion itself, Hans Smit’s opinions on arbitral tribunals has no more weight and authority than any other scholarly article.”¹⁴¹

133. *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481 (S.D. Tex. 2008).

134. *Id.* at 483-84. Unlike the public investment arbitration established between the governments in *Oxus Gold*, this case concerned two private parties who had agreed to have their disputed arbitrated under the UNCITRAL rules, without the mandate of a BIT. *See id.* at 483.

135. *El Paso Corp.’s Motion for Reconsideration* at 1, *El Paso Corp.*, 617 F. Supp. 2d 481 (No. 4:08-mc-00335), 2008 U.S. Dist. Ct. Motions LEXIS 74188 at *1.

136. *Id.* Similar to the Amicus filed by the DG-Competition in *Intel*, the arbitration panel expressed its opposition to costly American-style discovery for obtaining evidence in the arbitration proceeding. Second CEC Brief, *supra* note 88, at *12-13 (stating that permitting parties to use § 1782(a) for American-style discovery would burden their agency and hinder their investigations).

137. *El Paso Corp.’s Motion for Reconsideration*, *supra* note 135, at *5 (quoting Procedural Order No. 3 ¶ 37).

138. *Id.* at *4.

139. *El Paso Corp.*, 617 F. Supp. 2d at 482.

140. *Id.* at 485-86.

141. *Id.* at 486. *See generally* State v. Jackson, 546 S.E.2d 570, 573 (N.C. 2001) (“[G]eneral expressions in every opinion are to be taken in connection with the case in

III. PROPER INTERPRETATION OF *INTEL* AND “FOREIGN TRIBUNALS”

Congress intended for courts to interpret the term “international tribunal” to apply exclusively to governmental adjudicatory bodies. Section 1782(a) offers no statutory authority to grant discovery requests for private international arbitration proceedings.¹⁴² Further, the legislative history does not indicate Congressional intent to include private international arbitration pursuant to § 1782(a).¹⁴³ Consequently, while Congress broadened the scope of the statute through the 1964 amendments, it used the term “tribunals” solely in the context of governmental adjudicatory bodies.¹⁴⁴

Moreover, the *Intel* decision is not dispositive of the issue because the Supreme Court did not directly address whether § 1782(a) could be used for private international arbitration.¹⁴⁵ Therefore, in order to maintain the cost and efficiency benefits of using private international arbitration, *Intel*’s rationale should be limited to circumstances involving governmental adjudicatory bodies.¹⁴⁶

A. *Statutory Language of § 1782(a) Does Not Enumerate Private International Arbitration Proceedings as “International Tribunals”*

The Supreme Court established that legislative interpretation must begin with an examination of the plain and unambiguous language of the statute, by referring to “the language itself, the specific context in which that

which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision.”) (quoting *Moose v. Bd. of Comm’rs*, 90 S.E. 441, 448-49 (N.C. 1916)).

142. See 28 U.S.C. § 1782(a) (2006); see also *supra* note 9 and accompanying text (suggesting that there is no statutory authority to grant assistance to private international arbitration tribunals).

143. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) (“[L]egislative history’s silence with respect to private tribunals is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention.”).

144. See *id.*

145. See *supra* note 115 and accompanying text (asserting that the *Intel* decision did not specifically address arbitration).

146. See Fulbright & Jaworski, L.L.P., *U.S. Courts Expand Discovery in International Arbitration*, 2007 INT’L ARB. REPORT, May 2007, at 1, 3, available at <http://www.fulbright.com/images/publications/09102007ARIssue2.pdf> (noting that although citation to Professor Hans Smit’s article was dicta, Justice Ginsburg’s reference presents the possibility of extending the reach of § 1782(a) far beyond its intended application). But see Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT’L ARB. 295, 298 (2003). Upon the Supreme Court’s grant of certiorari to the *Intel* case, Professor Smit asserted “I also hope that the Supreme Court may find it appropriate to reject the now unanimous, but clearly incorrect, view of two appellate courts that Section 1782 does not extend its reach to private international arbitral tribunals.” *Id.*

language is used, and the broader context of the statute as a whole.”¹⁴⁷ The inquiry ends “if the language is clear and ‘the statutory scheme is coherent and consistent.’”¹⁴⁸

The disputed terms read in relevant part: “[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, including criminal investigations . . .*”¹⁴⁹ Since “foreign or international tribunal” is undefined in § 1782(a), the plain language of the words must be given their ordinary or natural meaning.¹⁵⁰ The ordinary meaning of the words controls unless a literal application of the statute would produce results contrary to the statutory purpose.¹⁵¹

However, as the court in *NBC* pointed out, the plain meaning of the word “tribunal” is unclear because “tribunal” has several definitions.¹⁵² The term “tribunal” may refer to the physical seat or platform on which a judge

147. *Bautista v. Star Cruises*, 396 F.3d 1289, 1295 (11th Cir. 2005) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see, e.g.*, *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 255 (2004) (“[I]n all statutory construction cases, we begin [our examination of § 1782] with the language of the statute.” (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002))); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (holding that the plain meaning of the statute is decisive “except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of [the] drafters’” (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

148. *Bautista*, 396 F.3d at 1295 (quoting *Robinson*, 519 U.S. at 340); *see also* *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993) (“Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”) (quoting *Griffin*, 458 U.S. at 570).

149. 28 U.S.C. § 1782(a) (2006) (emphasis added).

150. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (discussing that when a statute does not define a word, it should be construed in accordance with its natural or plain meaning) (citing *Smith v. United States* 508 U.S. 223, 228 (1993)); *accord* *Bailey v. United States*, 516 U.S. 137, 144-46 (1995) (reasoning that absent some indication that Congress intended to use a term of art, the ordinary or natural meaning must be given to the word).

151. *See Griffin*, 458 U.S. at 571 (noting that courts must avoid statutory interpretations that would produce bizarre results).

152. *See NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999) (“In our view, the term ‘foreign or international tribunal’ is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here.”); *see also* Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (No. 02-572), 2004 WL 214306 at *14 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2441 (Philip Babcock Gove et al. eds., 1993)) (contending that a “tribunal” can mean “a court of forum of justice” or “something that decides or judges”); *cf.* *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1405-06 (2010) (discussing that the term “administrative” may in various contexts have different meanings pertaining to private and governmental bodies). *See generally* Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2048 (2005) (noting that when trying to decipher the ordinary meaning of a word within a statute a problem that arises “is that courts find ordinary meaning anywhere they look and judges are not restrained in deciding where they are willing to look”).

sits.¹⁵³ Webster's Dictionary references "the Supreme Court [as] the highest [tribunal] of the United States."¹⁵⁴ The colloquial meaning of the word, meanwhile, refers to "something that has the power to determine or judge."¹⁵⁵ Yet there is no evidence that Congress elected to use these uncommonly broad constructions of the term.¹⁵⁶ Because Congress merged two "threads" of legislation to create a comprehensive statute concerning judicial assistance to foreign sovereign adjudicatory bodies, it is unlikely that it intended to assist all of the forms of dispute resolution encompassed by this broad definition.¹⁵⁷

In *In re Medway Power*,¹⁵⁸ the court examined the Webster's dictionary definition of "tribunal," observing that private arbitration is generally not

153. See, e.g., BLACK'S LAW DICTIONARY 1506 (6th ed. 1990) (defining 'tribunal' as "[t]he seat of a judge; a court of law; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise."); WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2441 (Philip Babcock Gove et al. eds., 1976) ("seat of a judge or one acting as a judge"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1369 (William Morris ed., 1969) (defining 'tribunal' as "[t]he platform or seat on which a judge or other presiding officer sits in court."); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2019 (2d ed. 1987) ("a place or seat of judgment.").

154. WEBSTER'S, *supra* note 153, at 2441. Under this definition, private international arbitration would not be considered a "tribunal" because it is a private adjudicatory body outside the national courts. *Id.*

155. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1909 (3d ed. 1992). However this definition is uncommonly used and therefore not recognized by most unabridged dictionaries. See, e.g., BLACK'S LAW DICTIONARY, *supra* note 153 (defining tribunal as "The seat of a judge; a court of law; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise.").

156. See, e.g., *Office Max, Inc. v. United States*, 309 F. Supp. 2d 984, 995 (N.D. Ohio 2004) (discussing that while a word may have several meanings, construing it to utilize the uncommon usage is improper for statutory interpretation), *aff'd*, 428 F.3d 583 (6th Cir. 2005); see also *supra* notes 76-77 and accompanying text (discussing other statutory uses of "tribunal" in reference to governmental bodies).

157. Act of July 3, 1930, ch. 851, 46 Stat. 1005-1006, amended by Act of June 7, 1933, ch. 50, 48 Stat. 117-118 (codified as amended at 22 U.S.C. §§ 270-270g (2006) (granting federal courts power to assist in foreign tribunals between the United States and foreign governments to which the United States was a party). These blended statutes were repealed by the Act of Oct. 3, 1964, Pub. L. No. 88-619, 78 Stat. 995 and replaced in the same act by 78 Stat. 997, which granted federal courts authority to assist in foreign proceedings to which the United States was not a party. See 28 U.S.C. § 1782(a) (2006); see also Committee on International Commercial Disputes, 28 U.S.C. § 1782 As a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices, 63 REC. B. ASS'N. OF THE CITY OF N.Y. 752, 760-64 (2008) (discussing how the amendments of 1964 consolidated two statutes: § 1782, which provided judicial assistance to "foreign courts;" and §§ 270-270g of Title 22, which permitted federal courts to assist in foreign tribunals between the United States and foreign governments to which the United States was a party). In addition, it is difficult to construe § 1782(a) to encompass all forms of dispute resolution when in 1996 Congress specifically amended the statute to include criminal investigations. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 486. Although the text is identical to the 1964 statute, "including criminal investigations conducted before formal accusation," was added to the first sentence in 1996. *Id.*

158. *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997).

referred to as a tribunal.¹⁵⁹ The court noted that although arbitration proceedings may be casually referred to as “tribunals,” they are not intended to be included in the formal sense under § 1782(a).¹⁶⁰ The court further reasoned that merely because the term “tribunal” can include private arbitration panels, it does not necessarily follow that the term as used in § 1782(a) encompasses private arbitration proceedings.¹⁶¹

While referring to a dictionary definition may be helpful, it is not sufficient for determining the meaning of a word in a statute.¹⁶² As noted in *Intel*,¹⁶³ it is important to look at the legislative history and the statutory scheme to determine if Congress made further attempts to define the disputed terms.¹⁶⁴

*B. Legislative History Did Not Include Private
International Arbitration Pursuant to § 1782(a)*

Although Congressional amendments have continued to broaden § 1782(a), there is no indication that Congress intended to extend the statute to include private international arbitration.¹⁶⁵

159. *See id.* at 403 (noting that a “Bet Din” (a Jewish religious court) could be referred to as a tribunal, however they would not be considered tribunals in the formal sense nor pursuant to § 1782(a)).

160. *Id.*

161. *Id.*; *see NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999) (discussing that while § 1782 does not expressly prohibit private international arbitration, it also does not expressly include it within the statute); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-42 (1997) (noting that the term “employees” was general enough to include former employees and that Congress did not expressly specify “current employees” making the terminology in the statute ambiguous).

162. *See Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary”), *aff’d*, 326 U.S. 404 (1945); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“[a]mbiguity is a creature not of definitional possibilities but of statutory context”).

163. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255-56 (2004).

164. *See, e.g., Castellano v. New York City Fire Dep’t Pension Fund*, 142 F.3d 58, 67 (2d Cir. 1998) (“Where the language is ambiguous, we focus upon the ‘broader context’ and ‘primary purpose’ of the statute.”); *Garza v. United States*, 324 F. Supp. 91, 96 (Cust. Ct. 1971) (“The courts are bound to determine the intent of Congress by the language which was actually used and have no right to give any meaning to such language other than that conveyed by the words in which the legislative will was expressed.”); *see also Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. New York State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 531 (2d Cir. 1994) (“[W]here ambiguity resides in a statute, legislative history and other tools of interpretation may be employed to determine legislative purpose more perfectly.”). While some judges and commentators oppose the use of legislative history, many appreciate its usefulness in discerning the meaning of a statute. *See, e.g., John F. Manning, The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2389 (2003) (supporting the use of legislative history to decipher a statute due to the fact that “Congress does not always accurately reduce its intentions to words” and “because legislators necessarily draft statutes within the constraints of bounded foresight, limited resources, and imperfect language”).

165. *See NBC*, 165 F.3d at 190 (noting that Congress’s silence regarding private international arbitration may indicate that Congress did not intend to extend the statute to this form of private dispute resolution).

As illustrated by the court in *NBC*, the amendments lend greater support for the claim that international arbitration was excluded from § 1782(a).¹⁶⁶

The 1964 amendments of § 1782(a) resulted in the merging of two different methods for foreign sovereign adjudicatory bodies to obtain judicial assistance from U.S. district courts.¹⁶⁷ The two threads of legislation combined the 1930 enactment of 22 U.S.C. §§ 270-270g, which permitted the gathering of evidence in the United States for claims being adjudicated in international tribunals sponsored by sovereign states,¹⁶⁸ and the Act of May 24, 1949, which aimed to provide judicial assistance in gathering evidence for litigation in foreign courts.¹⁶⁹

Sections 270-270c were enacted to assist governmental adjudicatory bodies.¹⁷⁰ These sections were passed in response to complications that occurred during arbitration proceedings between the United States and Canada.¹⁷¹ Further, §§ 270d-270g were passed to assist proceedings between the United States and the German Mixed Claims Commission.¹⁷²

166. *See id.* (asserting that the consolidation of 22 U.S.C. §§ 270-270g, which confers powers on commissioners or members of “international tribunals” in which the United States is a party, and 28 U.S.C. § 1782(a), which permits non-state parties to request discovery, still assumes use only by governmental proceedings); *see also* Republic of Kazakhstan v. Biedermann Int’l, 168 F.3d 880, 881-82 (5th Cir. 1999) (noting that the statutory history demonstrates that Congress intended to broaden the scope for international government-sanctioned tribunals).

167. *See NBC*, 165 F.3d at 189 (noting that the House and Senate committee reports indicate that the use of the word tribunal “[f]or example . . . is intended [so] that the court[s] have discretion to grant assistance when proceedings are pending before investigation magistrates in foreign countries” (quoting H.R. REP. NO. 88-1052, at 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788)). *See generally* Committee on International Commercial Disputes, *supra* note 157, at 754-61 (discussing the state-sponsored tribunals leading to the merger of the two judicial assistance statutes).

168. *See* Act of July 3, 1930, §§ 1-4, ch. 851, 46 Stat. 1005, 1005-06, *amended by* Act of June 7, 1933, §§ 5-8, ch. 50, 48 Stat. 117, 117-18 (codified as amended at 22 U.S.C. §§ 270270(g) (2006)) *repealed by* Act of Oct. 3, 1964, Pub. L. No. 88-619, § 3, 78 Stat. 995; *see also* Smit, *supra* note 47, at 1266 n.17, 1269 n.30, 1270 n.31, 1271 n.35, 1273-74 n.48, 1275 n.52 (highlighting the text of the now-repealed 22 U.S.C. §§ 270-270(g)).

169. Act of May 24, 1949, ch. 139, 63 Stat. 103.

170. *See* Committee on International Commercial Disputes, *supra* note 157, at 755-57 (discussing the history of § 1782 and its roots grounded in foreign-state litigation).

171. Smit, *supra* note 47, at 1264. During arbitration proceedings between the United States and Canada concerning the sinking of the vessel *I’m Alone*, there was no available device to compel the testimony of witnesses. *Id.* As a result, Congress, at the initiation of Secretary of State Henry L. Stimson, adopted a law “authorizing commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records, and to punish for contempt.” *Id.*

172. *Id.* at 1264, 1269 (noting that the statute applied only to international tribunals “established pursuant to an agreement between the United States and any foreign government.”). In the United States-German Mixed Claims Commission, a German agent successfully contended that the powers granted by the law could not be invoked since they exceeded the agreement under the treaty creating the Commission. *Id.* at 1264. Congress enacted an additional statute to avoid future complications. *Id.*

As observed by the court in *NBC*, both of these statutory provisions were clearly directed at state-sponsored courts: Canada and Germany.¹⁷³

Both the Fifth and Second Circuits concluded that the merger of these provisions into § 1782(a) was meant to assist procedures for obtaining evidence before foreign government-sponsored adjudicatory bodies, not private international arbitration proceedings.¹⁷⁴ Although the amendments eliminated the requirement that sovereigns be a party to the proceeding, the requirement that sovereigns sponsor the proceeding in order to obtain judicial assistance remained in effect.¹⁷⁵

In addition, Congress's only attempt to further clarify the meaning of "tribunal" in § 1782(a) was the 1996 amendment, which introduced criminal investigations as "tribunals" pursuant to the statute.¹⁷⁶ As the court in *NBC* noted, if Congress had intended to extend "tribunal" beyond government-sponsored bodies, they would have amended the statute as was done in the 1996 amendment.¹⁷⁷

Finally, for legislative history to be useful for statutory interpretation, it must be examined from the time of the statute's enactment to be relevant in deciphering the meaning of a statute.¹⁷⁸ As the *Biedermann* court noted, when § 1782(a) was enacted, private international arbitration was a "novel

173. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999) (noting that the term "international tribunal" derives directly from §§ 270-270g, which only applied to intergovernmental tribunals); see also *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999) (discussing that the revised version of § 1782 combined other statutes which facilitated discovery only for international governmental tribunals).

174. See *NBC*, 165 F.3d at 189 (discussing that in context of the revisions, the drafters only contemplated "governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state."). The House and Senate reports state that the 1964 amendments to § 1782 would assist obtaining evidence "before a foreign administrative tribunal or quasi-judicial agency." See H.R. REP. NO. 88-1052, at 9 (1963); S. REP. NO. 88-1580 at 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788. Neither of these reports refer to private dispute resolution proceedings such as arbitration, suggesting that Congress did not contemplate including them within the statute. See *id.*

175. See *Biedermann*, 168 F.3d at 882 ("References in the United States Code to 'arbitral tribunals' almost uniformly concern an adjunct of a foreign government or international agency.>").

176. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 486 (1996). This amendment was merely a codification of common practice among the federal courts. See generally Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: It's Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, n. 17 (2003) (discussing federal courts that permitted foreign criminal investigations to utilize § 1782 before the 1996 amendments which specifically added "criminal investigations").

177. *NBC*, 165 F.3d at 190. See generally *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) (citation omitted) ("Congressional inaction cannot amend a duly enacted statute.>").

178. See, e.g., *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1409 (noting that letters written by individual legislators thirteen years after enactment of legislation that they had sponsored, regarding the meaning of this legislation, "[did] not qualify as legislative 'history,'" and was "of scant or no value" in construing it).

arena.”¹⁷⁹ Although at present private international arbitration is a widely accepted method of dispute resolution, historically it was regarded with great suspicion by the courts and the federal government.¹⁸⁰ Many U.S. courts felt that arbitration was an inadequate alternative to litigation for resolving disputes.¹⁸¹ While the federal government currently projects a pro-arbitration policy, favoring arbitration agreements to be construed liberally, the legislative history of § 1782(a) must be evaluated in the context of its enactment.¹⁸² Therefore, because the United States was uncertain of the adequacy of private international arbitrations when the statute was enacted, Congress did not include it within § 1782(a).¹⁸³

C. *The Statutory Scheme References Government-Sponsored Tribunals*

When evaluating the meaning of a word in a statute, it is also important to evaluate the statutory scheme in which the word appears.¹⁸⁴ When the Second Circuit examined the significance of the statutory scheme of § 1782(a), it found that expanding the statute to private international arbitration ignored not only the purpose behind its enactment, but also the

179. *Biedermann*, 168 F.3d at 882.

180. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984) (discussing the common law hostility towards arbitration); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953) (explaining that arbitration was not preferable to litigation in cases pursuing statutory enforcement due to the inferiority of arbitration proceedings); *cf.* Lawrence S. Schaner & John R. Schleppebach, *Looking Back at 2007: Another Good Year in the Enforcement of International Arbitral Awards in the US*, 63 DISP. RESOL. J. 80, 80 (2008) (“In 2007, the parties challenging enforcement were remarkably unsuccessful. U.S. district courts confirmed international arbitration awards almost across the board.”).

181. *See generally* Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 343 (2010) (discussing the historical “inferiority of process attitude” taken by the U.S. judiciary towards arbitration); *see also* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974) (noting that arbitration, when compared to federal courts, generates an incomplete record, is not governed by evidentiary rules, and may lack many of the safeguards provided by discovery).

182. *See* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-80 (1989) (discussing traditional hostility to arbitration and current pro-arbitration policy reflected by the Arbitration Act).

183. Although there was generally hostility towards arbitration, Congress did enact legislation *specific* to arbitral proceedings during this time. *See, e.g.*, United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-16 (2006)), Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947).

184. *See generally* *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 130 S.Ct. 1396, 1404 (2010) (“Courts have a ‘duty to construe statutes, not isolated statutory provisions’” (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995))). The court must consider not only the plain meaning of the word, but also its placement within the statutory scheme. *See* *Bailey v. United States*, 516 U.S. 137, 145 (1995) (“‘The meaning of statutory language, plain or not, depends on context’” (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994))); *see also* *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir. 1998) (“Where the language is ambiguous, we focus upon the ‘broader context’ and ‘primary purpose’ of the statute.” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997))).

statutory scheme in which it was found.¹⁸⁵ Additionally, the *NBC* court found the use of “international or foreign tribunal” in the other amendments further clarified the scope of the statute.¹⁸⁶

Section 1782 and ten other amendments were part of a bill from the Commission on International Rules of Judicial Procedure.¹⁸⁷ As noted earlier, the Commission was established to study the federal and state statutes and the Federal Rules of Civil Procedure utilized in practice in *international litigation*.¹⁸⁸ However, the creation of the Commission provides no evidence that it was meant to attend to anything other than the litigation process concerning governmental adjudicatory bodies.¹⁸⁹

Section 1782 was titled “An Act to Improve Judicial Procedures of Serving Documents, Obtaining Evidence, and Proving Documents in *Litigation* with International Aspects.”¹⁹⁰ The Report uses the terminology “international or foreign tribunal” sixty-one times in the 105-page Commission Report; however, only fourteen of those mentioned are within § 1782.¹⁹¹

To determine the significance of the terms “international or foreign tribunal” within the § 1782(a) amendments, the statutory scheme of the forty-seven other usages will help decipher its meaning.¹⁹² The Commission Report first used the terms “international or foreign tribunal”

185. *See NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999). The court observed that academic literature supported its conclusion that “foreign tribunals” were only those formed by international treaty. *Id.* at 190. The court also noted that the 1962 law review article written by Hans Smit stated that “an international tribunal owes both its existence and its powers to an international agreement.” *Id.* at 190 (quoting Smit, *supra* note 47, at 1267).

186. *NBC*, 165 F.3d at 189-90.

187. Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 *YALE L. J.* 515, 538 (1953). Section 1782 was part of the following amendments to the U.S. code pertaining to procedures in international litigation: (1) Instructing when perjury laws are applicable to testimony found outside the United States, 18 U.S.C. § 1621; (2) Improvement of the procedures for the service of subpoenas in international litigation, 28 U.S.C. § 1745; (3) Instructing when a foreign document requires a single certification, 18 U.S.C. § 3491; (4) Categorization of procedures for transmittal of letter rogatory or request, 28 U.S.C. § 1781; (5) Repeal of 22 U.S.C. §§ 270–270(g) (repealed 1964); replaced by amended 28 U.S.C. § 1782; (6) Repeal of 28 U.S.C. 1785 (repealed 1964), replaced by 28 U.S.C. 1782; and (7) Clarified service in foreign and international litigation 28 U.S.C. § 1696. *Id.*

188. *FOURTH ANNUAL REPORT*, *supra* note 86, at 1.

189. *See id.* at 13 (stating that the purpose of the Commission was to propose to the President actions that “may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings”).

190. *Id.* at 17 (emphasis added).

191. *Id.* at 43-47.

192. *See generally* *Kucana v. Holder*, 130 S. Ct. 827, 836 (2010) (noting that “[t]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)).

in discussing the repeal of 22 U.S.C. §§ 270-270c,¹⁹³ recommending that it extend beyond application to cases involving U.S. nationals or the U.S. government.¹⁹⁴ However, the only usage of “international or foreign tribunal” in the Commission’s Fourth Report refers to a governmental-sponsored tribunal—the United States German Mixed Claims Commission.¹⁹⁵ The sole reason for repeal of this provision in the 1964 amendments was to expand the scope of persons who could utilize § 1782(a) by effectively eliminating the requirement that U.S. nationals or the U.S. government be parties to the proceeding.¹⁹⁶ However, the repeal did not change the requirement that the foreign tribunal be state-sponsored.¹⁹⁷

The subsequent section that uses “international or foreign tribunal” pertains to 28 U.S.C. § 1696, enacted to assist the service of process “in foreign or international litigation.”¹⁹⁸ This statute mandated that service “be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal”¹⁹⁹ As noted earlier, letters rogatory are formal requests from a court in one country to “the appropriate judicial authorities” in another country requesting compelled testimony, documents, or other forms of evidence.²⁰⁰ It is important to note that private citizens and arbitrators are not permitted to issue letters rogatory—they must be sent and received by national courts.²⁰¹ Therefore, the usage in this section of “international or foreign tribunal” did not include private international arbitration because letters rogatory requires sovereign-to-sovereign transmission.²⁰²

The third section that refers to an “international or foreign tribunal” is in the discussion of 28 U.S.C. § 1781, which included a provision relating to the transmission of letters rogatory.²⁰³ Section 1781 contains four

193. 22 U.S.C. §§ 270-270c (1940). This statute pertained to obtaining evidence in the United States to assist foreign adjudicatory state-proceedings.

194. FOURTH ANNUAL REPORT, *supra* note 86, at 46. This suggestion is similar to the 1948 amended language of § 1782 removing the requirement that a sovereign have an interest in the suit. *See supra* note 31 and accompanying text.

195. *See* FOURTH ANNUAL REPORT, *supra* note 86, at 36 (1963).

196. *See id.* at 36-37 (advocating elimination of this requirement and extension of discovery to a broader category of persons implicated in the proceedings).

197. *See id.* at 36 (arguing that the limitation of discovery to proceedings in which the United States or a U.S. national is involved is “undesirable” and should be eliminated but not addressing extending discovery to arbitral proceedings beyond that).

198. *Id.* at 37.

199. *Id.*

200. *See supra* note 24 and accompanying text (explaining letters rogatory).

201. *See* BLACK’S LAW DICTIONARY 905 (6th ed. 1990) (Letters Rogatory are “[t]he medium whereby one country, *speaking through one of its courts*, requests another country, *acting through its own courts* and by methods of court procedure . . . to assist the administration of justice in the former country.”) (emphasis added).

202. *See id.*

203. FOURTH ANNUAL REPORT, *supra* note 86, at 42-43. This amended statute

references to the transmission or receipt of letters rogatory to “international or foreign tribunals.”²⁰⁴ As previously stated, a private arbitrator is not authorized to transmit or receive a letter rogatory, and therefore the use of “international or foreign tribunal” within this section cannot refer to private international arbitration.²⁰⁵

The last section that uses “international or foreign tribunal” contains what became § 1782, which permits a U.S. court to grant discovery in connection with proceedings before “an international or foreign tribunal.”²⁰⁶ The prior forty-seven uses in the statutory scheme do not include a reference to private international arbitration and there is no indication that the usage in § 1782 derogates from the prior “international or foreign tribunal” uses.²⁰⁷ Therefore it would be inconsistent with the statutory scheme to consider the term “tribunal” in § 1782(a) to include private international arbitration proceedings, when every other section exclusively references state-sponsored proceedings when discussing “tribunals.”²⁰⁸

D. Interpreting “Tribunal” To Encompass Private International Arbitration Would Undermine Fundamental Principles of Arbitration

Despite the plain language, legislative history, and statutory scheme of § 1782(a), the *Roz Trading* court and its followers have frustrated the purpose of the statute by failing to recognize crucial differences between private arbitration and government-sponsored adjudicatory bodies.²⁰⁹ Further, applying the factors set forth in *Intel* to private arbitration violates arbitration’s fundamental principles.²¹⁰ Because discovery procedures in arbitrations are predetermined and foreign arbitrators are typically opposed

designated the State Department as the “central authority” and permitted the Department to receive and transmit letters rogatory between a “tribunal in the United States” and an “international tribunal, officer, or agency to whom it is addressed.” *Id.* at 42.

204. *Id.*

205. *See supra* notes 24, 201 and accompanying text (discussing the requisite that letters rogatory be transmitted through official measures, sovereign-to-sovereign).

206. FOURTH ANNUAL REPORT, *supra* note 86, at 43–44.

207. *See id.* at 45. The other usages of “international tribunal” clearly envisage a state-agency that can receive or transmit letters rogatory; *see also In re Medway Power Ltd.*, 985 F. Supp. 402, 404 (S.D.N.Y. 1997) (noting that the phrase “proceeding in a foreign or international tribunal,” as amended to the statute in 1964, reflect a legislative intent to extend the reach of the statute only to foreign governmental agencies exercising a judicial or quasi-judicial function).

208. *See supra* notes 190-207 and accompanying text.

209. *See infra* part III.D.1. *See generally* Louis L. C. Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 JUL DISP. RESOL. J. 15, 15 (noting that in order to maintain the benefits of arbitration, arbitrators “should emphasize the differences between litigation and arbitration and urge parties to avoid importing judicial procedures into the arbitration if they want a swift but fair process.”).

210. *See infra* notes 215-246 and accompanying text .

to permitting American-style discovery,²¹¹ the *Intel* factors in the context of private international arbitration should be considered inapplicable.

Finally, expanding § 1782(a) to private international arbitration panels would place a heavy burden on the federal court system,²¹² alter the public policy favoring private arbitration,²¹³ and place certain parties at a significant disadvantage.²¹⁴

1. *Fundamental Arbitration Principles*

Private international arbitration is a creature of contract that permits parties to settle their disputes outside the public judicial system.²¹⁵ The parties are able to choose the procedural rules of the arbitration, giving them significant autonomy and control over the process that will be imposed to resolve their disputes.²¹⁶ The will of the parties must control unless it violates a mandatory rule in the country where the arbitration takes place.²¹⁷ Therefore, procedural questions, such as discovery, are usually agreed upon between the parties, or determined by the private institution administering the arbitration proceedings, prior to the commencement of the arbitration.²¹⁸

211. See generally Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, ABA J., April 2010, at 50, 54 (discussing the push-back of foreign arbitrators to American-style discovery in foreign arbitration proceedings).

212. Since § 1782(a) would require use of the federal court system to request documents or witnesses for private international arbitration proceedings, the federal policy behind favoring arbitration in part due to its ability to lessen the burden on federal dockets would be lost. See Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 385 (1996) (indicating that the motive behind the Supreme Court’s pro-arbitration stance is a desire to reduce judicial dockets). See generally JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 3 (2003) (listing an alternative forum to the national courts as one of arbitration’s advantages).

213. See LEW ET AL., *supra* note 212, at 721.

214. See *infra* notes 277-282 and accompanying text; see also Cynthia Day Wallace, *‘Extraterritorial’ Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judicial Overload?*, 37 INT’L LAW. 1055, 1060–61 (2003) (observing that because there is no foreign discoverability requirement pursuant to the statute, application of § 1782 would unfairly favor foreign parties).

215. See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.”).

216. See MOSES, *supra* note 12, at 2 (“Arbitrators are . . . expected to apply rules, procedures, and laws chosen by the parties.”); see also *Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145, 151 (1968) (White, J., concurring) (“[T]he parties [to an arbitration] . . . are the architects of their own arbitration process. . .”).

217. See NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 185 (5th ed. 2009) (explaining that while parties can choose a particular law to govern the procedure of their arbitration, the place of the arbitration may have certain mandatory laws that must be followed).

218. In instances where the parties have not pre-determined the procedural rules, private institutions administering the proceedings provide “gap-filler” provisions.

Parties often engage in arbitration as a comparatively more efficient means of dispute resolution than litigation.²¹⁹ Owing in part to the autonomy that the arbitration process affords to parties, arbitration proceedings can usually be initiated much more quickly than traditional court proceedings since the parties can select arbitrators as soon as the dispute arises.²²⁰ Further, if both parties agree to do so, they can obtain an arbitrator at very short notice, present their cases, and have their dispute resolved in a minimal amount of time.²²¹

Private international arbitration is also generally less expensive than traditional methods of litigation.²²² Because arbitration proceedings can be held in a short period of time and the award may be issued without delay, the costs of arbitration may be minimal in comparison to lengthy procedures in national courts.²²³

Additionally, arbitration can be less expensive than litigation because arbitrations have limited discovery.²²⁴ Although this varies depending on the institution selected to hear the arbitration proceeding, the background of the arbitrators, and the general will of the parties, discovery in an arbitration proceeding is more akin to the limited discovery procedures found in civil law countries.²²⁵ While this may force a party to prove a

See, e.g., INT'L CHAMBER COM. RULES ARB. art. 15(1) ("The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where the Rules are silent, by any rules which the parties, or failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.").

219. *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 9-11 (2001) (discussing how arbitration has long been thought to be a more efficient means than litigation for resolving international and domestic commercial disputes.)

220. *See* LEW ET AL., *supra* note 212, at 8 (noting that in some countries national court dockets are so overcrowded that it may require years for a hearing date to be set). While parties have a wide variety of arbitrators to choose from, increasingly well-sought-after arbitrators are the source of some time delays. *See* Lucy Reed, *More on Corporate Criticism of International Arbitration*, KLEWER ARBITRATION BLOG (Jul. 16, 2010), <http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (discussing how arbitrators should be more forthcoming on their busy schedules to facilitate the obtaining hearing dates in a prompt amount of time).

221. LEW ET AL., *supra* note 212, at 8.

222. *Id.* at 9 (explaining that arbitration, when held in a timely manner, tends to be less costly than litigation in national courts).

223. *Id.* (stating that complicated international arbitrations, which involve higher costs and more time than the usual speedy, cost-efficient arbitration, are still resolved more quickly and for less cost than cases in national courts).

224. *See* D. Brian King & Lise Bosman, *Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide*, 12 I.C.C. INT'L CT. OF ARB. BULL. 24, 24, 27, 36 (2001) (discussing the extent to which the discovery process should be permitted in international arbitration and how to manage it); *see also* Seidenberg, *supra* note 211, at 54 (discussing the "push to curb the Americanization of arbitration," specifically as it relates to American-style methods of discovery).

225. *See* INT'L CHAMBER COM. RULES ARB. art. 20(2) ("[T]he Arbitral Tribunal shall hear the parties together in person if any of them so requests, or failing such a request, it may of its own motion decide to hear them."); U.N. Comm. on Int'l Trade L., UNCITRAL Model Law on Int'l Comm. Arb., art. 27, U.N. Doc. A/40/17 (1985) (amended 2006) ("The

violation of the law or a contract with restricted access to documents, the limited scope of discovery is often what contributes to the efficiency and lower cost of participating in arbitration.²²⁶

Last, private international arbitration is confidential.²²⁷ The proceedings in the arbitration are kept private between the parties and remain confidential to the public.²²⁸ The confidentiality includes the “existence of the arbitration, the subject matter, the evidence, the documents that are prepared for and exchanged in the arbitration, and the arbitrators’ awards. . . .”²²⁹ It also follows that only the parties to the proceedings and their legal representation may attend the arbitration hearing; each attendee is also subject to “the duty of confidentiality.”²³⁰ This is a clear and fundamental advantage for businesses contracting to arbitrate.²³¹ Companies prefer these confidential procedures to ensure that their company information is not disclosed to the public.²³² In addition, many arbitration institutions provide for exemptions for trade secrets, which provide companies with the ability to keep their business strategies protected.²³³

Many of these benefits would be foregone if American-style discovery were permitted in private arbitration.²³⁴ For example, private arbitration’s

arbitral tribunal or a party *with the approval* of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.”) (emphasis added). *See generally* GARY B. BORN, *International Commercial Arbitration in the United States* 825–27 (Kluwer 2008) (discussing how the discovery process is significantly different than the process used in national courts).

226. *See* Commonwealth Ins. Co. v. Beneficial Corp., No. 87 Civ. 5056 (CSH), 1987 WL 17951, at *4 (S.D.N.Y. Sept. 29, 1987) (“[F]ull scale discovery is not automatically available in arbitration. . . . [T]he unavailability of the full panoply of discovery devices, with their attendant burdens of time and expense, may fairly be regarded as one of the bargained-for benefits (or burdens, depending on one’s subsequent point of view) of arbitration”). *See* Paul D. Deorgiadis & Paul A. Sinclair, *Legal Fees—A Question of Trust*, ARIZ. ATT’Y, Apr. 1997, 409 (noting that arbitration forces parties to give up the right to broad discovery); *see also* J. Greenblatt and C. Ryan, *New York Civil Practice Law and Rule 3102(C): A Potential Tool for Parties Seeking Discovery in Aid of Arbitration*, (November 2010) at 1,

<http://www.investmentarbitration.net/journal-advance-publication-article.asp?key=371> (noting that due to the limited discovery procedures in arbitration, “a party may be deprived of information necessary to assert claims or prove its case.”).

227. LEW ET AL., *supra* note 212, at 8.

228. *Id.*

229. *Id.*

230. *Id.*; *see e.g.*, INT’L CHAMBER COM. RULES ARB., app. II art. 1(1) (“The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.”).

231. LEW ET AL., *supra* note 212, at 8 (“[C]onfidentiality . . . is clearly a concept that many consider to be a fundamental and important advantage to arbitration.”).

232. BLACKABY ET AL., *supra* note 217, at 136; LEW ET AL., *supra* note 212, at 8.

233. *See, e.g.*, INT’L CHAMBER COM. RULES ARB., art. 20(7) (“The Arbitral Tribunal may take measures for protecting trade secrets and confidential information.”).

234. *See* Seidenberg, *supra* note 211, at 50–52 (discussing how American-style discovery is overcoming the many cost-efficient benefits of arbitration).

timeliness would likely be hindered if parties were required to wait for federal courts to rule on requests for discovery.²³⁵ Since *Intel* held that discovery requests must be determined on a case-by-case basis while the federal court determines whether a request for discovery should be granted, the entire arbitration process would be delayed and the costs of participating in arbitration would likely increase.²³⁶

In addition, permitting parties to use the Federal Rules of Civil Procedure to obtain full discovery would have drastic effects on the world of private arbitration.²³⁷ Allowing parties to circumvent their negotiated contractual agreements to obtain American-style discovery undermines the fundamentals of private arbitration and increases the cost and time required to settle these disputes.²³⁸

Moreover, although private arbitration is confidential, parties who petition district courts pursuant to § 1782(a) must disclose information ordinarily kept private.²³⁹ The decisions by these courts are public. As previously mentioned, many businesses prefer private arbitration not only because of the timeliness and cost-effectiveness, but also because it keeps the companies' disputes and information out of the public.²⁴⁰ Forcing companies to disclose vast amounts of confidential information that may not be kept private could negatively impact international businesses willing to come to the United States.²⁴¹

235. *Id.* at 52-53. See, e.g., *In re Caratube Int'l Oil Co., LLP*, Misc. Action No. 10-0285 (JDB), 2010 WL 3155822, at *2 (D.D.C. Aug. 11, 2010) (where the Claimant requested for the ICSID arbitration proceedings to be requested while the § 1782(a) discovery request was determined by the D.C. District Court).

236. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267-68 (2004) (Breyer, J., dissenting).

237. See generally Seidenberg, *supra* note 211, at 50-52 (discussing how Americanization of discovery in foreign arbitration is hindering the advantages of parties contracting to arbitrate).

238. *Id.*; see *Intel*, 542 U.S. at 267-68 (Breyer, J., dissenting) (noting the high cost of American-style discovery); see also Anibal Sabater, *Towards Transparency in Arbitration (A Cautious Approach)*, 5 BERKELEY J. INT'L L. 47, 51 (2010) (noting that when tribunals derogate away from the parties agreed upon terms, "arbitrations run the risk of too closely resembling court litigation (with its delays, complexities, and publicity), which is exactly what many parties tried to avoid when they bargained for arbitration.") (emphasis added).

239. See generally BLACKABY ET AL., *supra* note 217, at 138-39 (noting that the confidentiality of arbitrations has diminished over time, including under U.S. laws).

240. See MOSES, *supra* note 12, at 4 (discussing how businesses prefer the confidential nature of arbitrations to keep their disputes private).

241. This is troublesome for businesses in the U.S. since any person or document located within the district of the court would be subject to the discovery request pursuant to § 1782(a). See Dana C. MacGrath, *The Possibility of Judicial Assistance in Aid of International Commercial Arbitration Under 28 U.S.C. § 1782*, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS,

http://www.enewsbuilder.net/uscib_news/e_article000348767.cfm?x=b11,0,w (describing how permitting businesses to use § 1782 for discovery in foreign arbitrations raises issues of parity between parties and requires assurances that "discovery does not jeopardize business secrets or other confidential information.").

Finally, a fundamental premise of arbitration is to effectuate the will of the parties.²⁴² Under § 1782(a) an “interested person” may circumvent the contracted discovery procedures and request discovery pursuant to the Federal Rules of Civil Procedure.²⁴³ The statute could further frustrate the arbitration process because even if the arbitrator conducting the arbitration proceedings does not request a U.S. court’s assistance to obtaining evidence, “interested persons” may still request the information pursuant to § 1782(a).²⁴⁴ This includes “interested persons” who are nonparticipants in the proceeding.²⁴⁵ Therefore the principle that arbitration is a “creature of contract” risks being violated because § 1782(a) would allow parties to contravene agreed upon contractual provisions and allow persons not directly involved in the dispute to petition courts for discovery for the proceedings.²⁴⁶

2. *The Intel factors should be considered inapplicable in the realm of private international arbitration*

Although the factors set forth in *Intel* may be helpful in determining whether a discovery request should be granted for a governmental adjudicatory body, they should be considered inapplicable in the context of private international arbitration. First, *Intel* requires the district court to determine whether the person requesting the discovery is a participant in the foreign proceedings.²⁴⁷ If so, “the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.”²⁴⁸ However in private international arbitration, only the parties to the agreement are bound by the arbitration clause.²⁴⁹ Therefore, permitting nonparticipating parties to

242. See *In re Technostroyexport*, 853 F. Supp. 695, 697-99 (S.D.N.Y. 1994) (discussing the importance of upholding the contractual agreements of the parties to arbitrate under specifically chosen institutional rules); J. KIRKLAND GRANT, *SECURITIES ARBITRATION FOR BROKERS, ATTORNEYS, AND INVESTORS* 11 (1994) (explaining that arbitration is a creature of contract, and that absent a public policy against such arrangement, the intent of the parties will be enforced by courts).

243. See 28 U.S.C. § 1782(a) (2006).

244. *Id.*; see *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256–57 (2004) (quoting Smit) (noting that the term “any interested person” is “intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person . . . [who] possess[es] a reasonable interest in obtaining the [required judicial] assistance”); see also Sabater, *supra* note 238, at 50–51 (noting the inherent problems caused by permitting third-parties to intervene in arbitration proceedings without the agreement of the original parties).

245. See *id.* (and accompanying text).

246. *Id.*; see Sabater, *supra* note 219, at 50–51 (“Arbitration is a dispute resolution mechanism freely chosen and ultimately controlled by the parties. They have the last word on how the process is structured, including under what circumstances non-signatories of the arbitration consent should be able to participate in it.”).

247. *Intel*, 542 U.S. at 264.

248. *Id.*

249. See Starvos Brekoulakis, *The Relevance of the Interests of Third Parties in*

intervene in the arbitration proceedings may violate not only the arbitration agreement, but also a fundamental principle of arbitration.²⁵⁰ Because arbitration is a creature of contract, binding only the parties to the arbitration agreement, the first factor of *Intel* should be considered inapplicable in the context of private international arbitration.²⁵¹

Second, *Intel* requires district courts to determine the nature of the foreign tribunal, the character of the proceeding abroad, and the receptivity of the foreign government, court, or agency to the U.S. court assistance.²⁵² A district court's inquiry should consider "only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782."²⁵³ However, in private international arbitration, the parties agree to be bound by limited discovery procedures.²⁵⁴ Therefore, unless the arbitrators expressly request for supplemental evidence, most arbitrators will be disinclined to accept the additional evidence.²⁵⁵

Third, *Intel* requires the district court to evaluate whether the petitioner's request is an attempt to "circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."²⁵⁶ In most circumstances, the requesting party will be petitioning the district court in an attempt to "circumvent foreign proof-gathering" because the Federal Rules of Civil Procedure allow for liberal discovery while most private arbitrations institutions and civil law nations drastically limit requests for discovery.²⁵⁷ Further, if the discovery sought is necessary for the

Arbitration: Taking a Closer Look at the Elephant in the Room, 113 PENN ST. L. REV. 1165, 1166 ("The consensual nature of arbitration lies at the heart of this discussion: only those persons that have clearly consented to an arbitration agreement may participate in the arbitration proceedings.").

250. *Id.* (discussing the principle of "procedural party autonomy" which permits parties the ability to contractually determine the persons entitled to participate in the arbitration process.)

251. *Id.* (noting that arbitration proceedings are exclusively established by contractual provisions.)

252. *Intel*, 542 U.S. at 264.

253. *In re Euromepa*, 51 F.3d 1095, 1100 (2d Cir. 1995).

254. *See Card v. Stratton Oakmont, Inc.*, 933 F. Supp. 806, 813-14 (D. Minn. 1996) ("Arbitration is a creature born of a contract between the parties who are desirous of avoiding litigation in a court of law. Arbitration requires the parties to agree to rules of arbitration. Frequently, rules of arbitration specially exclude the application of judicial rules of evidence.") (quoting *Bowles Fin. Grp. Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1011 (10th Cir. 1994)); *see also DeSapio v. Kohlmeyer*, 321 N.E.2d 770, 773(N.Y. 1974) ("It is contemplated that disclosure devices will be sparingly used in arbitration proceedings. If the parties wish the procedures available for their protection in a court of law, they ought not to provide for the arbitration of the dispute.").

255. *See supra* notes 224-25 (discussing international commercial arbitration's push back on American-style discovery in arbitration proceedings); *see also* Cynthia Day Wallace, 'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judicial Overload?, 37 INT'L LAW. 1055, 1066 (2003) (contending that most foreign jurisdictions have "vehemently resisted 'extraterritorial' U.S. discovery").

256. *Intel*, 542 U.S. at 264-65.

257. *See Charles Moxley, Discovery in Commercial Arbitration*, 68 AUG DISP. RESOL. J.

proceeding, the arbitrators should be the only persons permitted to request such evidence.²⁵⁸

Last, *Intel* requires a district court to determine whether the request is unduly intrusive or burdensome.²⁵⁹ Although this could be a valid factor in the realm of private international arbitration, as stated above, the discovery requests should be left to the discretion of the arbitrators.²⁶⁰ It is the arbitrator's role, not the parties, to determine the information necessary for the proceeding.²⁶¹ Therefore, the factors set forth in *Intel*, should be considered incompatible in private international arbitration.²⁶²

3. *Excluding private international arbitration from § 1782(a) does not contradict U.S. pro-arbitration policy*

The United States strongly favors arbitration agreements.²⁶³ Contrary to scholarly opinion, limiting § 1782(a) to governmental adjudicatory bodies

21, 23 (2008) (asserting that arbitrators, in order to keep the time delays to a minimum and costs lower, subject discovery to close scrutiny in arbitration); *see also* George M. von Mehern, *Submitting Evidence in an International Arbitration, The Common Lawyer's Guide*, 20 J. INT'L ARB. 3, 285, 285 (2003) (contending that disputes may arise in determining the scope of discovery between common law and civil law attorneys); *see also* Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957) (asserting that once a party agrees to arbitration, it "cannot then vacillate and successfully urge a preference for a unique combination of litigation and arbitration" solely because a particular procedure of litigation would better serve that party's immediate needs).

258. *See generally* Louis Chang, *Keeping Arbitration Easy, Efficient, Economical and User Friendly*, 61 JUL DISP. RESOL. J. 15, 15 (2006) (noting that under the Federal Arbitration Act, the arbitrators have the power to issue document subpoenas to third parties for production at the hearing); *see also supra* note 225 (asserting the role of arbitrators in arbitration proceedings).

259. *Intel*, 542 U.S. at 265.

260. *See* George M. von Mehern, *Submitting Evidence in an International Arbitration, The Common Lawyer's Guide*, 20 J. INT'L ARB. 3, 285, 286 (2003) (noting that although most international arbitration rules contain general provisions on the submission of evidence, broad discretion is left to the arbitrators).

261. *Id.* at 285 ("[T]he applicable 'rule' in international arbitration is that the tribunal has broad discretion to determine what evidence it should hear.").

262. It is also important to note that while the *Intel* decision found it important that the DG-Competition findings were reviewable by a court of law, and that the only opportunity for evidence to be introduced was during this investigatory stage, arbitration awards are usually only scrutinized by the private institution administering the proceedings, with limited grounds for their annulment in national courts. . *See, e.g.*, International Chamber of Commerce Rules of Arbitration, art. 27 (2008) Scrutiny of the Award by the Court ("Before signing any Award, the Arbitral Tribunal shall submit it in a draft form to the [ICC] Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the [ICC] Court as to its form").

263. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (noting that federal pro-arbitration policy applies in particular to the field of international commerce); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (discussing the pro-arbitration policy embodied by the United States Arbitration Act).

preserves the federal government's pro-arbitration policy.²⁶⁴ The reason behind liberally construing arbitration agreements is in part that it lessens the burden on the federal docket by keeping dispute resolution private.²⁶⁵ If private international arbitration proceedings are able to utilize § 1782(a), it will compel the use of the federal court system because parties can only obtain discovery orders from the federal courts.²⁶⁶ Section 1782(a) will further burden the federal system, because under *Intel*, courts are required to analyze on a case-by-case basis whether the request for discovery should be granted.²⁶⁷

In addition, arbitration has been favored as "swift, fair, and inexpensive remedy."²⁶⁸ However, recently, arbitration has come under criticism for its increasing costs and delays.²⁶⁹ International businesses and investors have begun to question whether arbitration is an effective forum for dispute resolution.²⁷⁰ If these actors determine that arbitration is an inadequate alternative to litigation, due to the increasing costs and time inefficiency, arbitration risks becoming obsolete.²⁷¹ Therefore, permitting § 1782(a) to be used in private international arbitration further delegitimizes the process by negating many of the advantages of contracting to arbitrate.²⁷²

Moreover, allowing § 1782(a) in foreign arbitration proceedings would construe the statute to permit, in certain circumstances, a foreign party to have liberal use of the Federal Rules of Civil Procedure to obtain

264. See *supra* Part III.A (discussing congressional intent to limit the application of § 1782(a) to governmental proceedings while still espousing a pro-arbitration policy).

265. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 267-68 (1987) (Blackmun, J., concurring in part and dissenting in part) (contending that pro-arbitration decisions are "no doubt animated by [the Court's] desire to rid the federal courts of . . . suits"); *Barrentine v. Arkansas Best-Freight Sys., Inc.*, 450 U.S. 728, 752-53 (1981) (Burger, C.J., dissenting) (asserting that the Court's failure to favor arbitration over litigation "runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts.").

266. See 28 U.S.C. § 1782(a) (2006) (authorizing application to the federal courts for discovery in international proceedings).

267. See *Intel*, 542 U.S. at 268 (Breyer, J., dissenting) (reasoning that courts should not take a case-by-case approach because "discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes").

268. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747, 748 (1981) (Burger, C.J., dissenting).

269. See Lucy Reed, *More on Corporate Criticism of International Arbitration*, KLEWER ARBITRATION BLOG (Jul. 16, 2010),

<http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (discussing the recent criticisms of arbitration surrounding the rising costs and increasing time required to settle disputes).

270. *Id.* (finding that a recent study showed that 100% of corporate counsel thought that international arbitration "takes too long").

271. *Id.* (contending that the recent criticism of arbitration must be addressed in order to keep arbitration's legitimacy).

272. See *supra* note 265 (stating arbitration's traditional advantages over litigation).

documents and take depositions of any U.S. citizen, while depriving that U.S. citizen of the same right.²⁷³ Since there is no reciprocity requirement under the statute, if the foreign party has no evidence in the United States and is not physically located within the U.S. jurisdiction, the U.S. party will be unable to obtain the same discovery request.²⁷⁴ This disparity could be determinative in the field of private international arbitration.²⁷⁵ Therefore, to preserve the principles and equity of arbitration, § 1782(a) should be excluded from private international arbitration.²⁷⁶

CONCLUSION

Before *Intel*, district courts uniformly excluded private international arbitration proceedings from § 1782(a).²⁷⁷ The *Intel* decision, while expanding the notion of what constitutes an “international or foreign tribunal,” has caused courts to apply “*Intel* Factors” that are inapplicable to private arbitration proceedings.²⁷⁸ This has resulted in inconsistent rulings among U.S. courts and grave concern for private contractual agreements agreeing to arbitrate under certain pre-determined procedures.²⁷⁹

Businesses have increasingly looked to private international arbitration to resolve their disputes in a timely, cost-effective, and confidential manner.²⁸⁰ The steady increase in private arbitration proceedings magnifies the need for a uniform definition of what constitutes an “international or foreign tribunal” to create congruency among the circuits.²⁸¹ Although the

273. See *supra* text accompanying note 39 (discussing broad discovery provisions under American law that are unavailable under the laws of civil law countries); see also Pedro J. Martinez-Fraga, *The Future of 28 U.S.C. § 1782: The Continued Advance of American-Style Discovery in international Commercial Arbitration*, 64 U. MIAMI L. REV. 89, 90 (2009) (suggesting that a U.S. party contracting to arbitrate with a foreign person may be “decisively and materially disadvantaged should a dispute arise precipitating the invocation of an arbitration clause and, consequently, the possible filing of a § 1782 petition by the adverse party.”).

274. See 28 U.S.C. § 1782(a) (2006); see also Cynthia Day Wallace, ‘*Extraterritorial*’ *Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judicial Overload?*, 37 INT’L LAW. 1055, 1060–61 (2003) (discussing the inherent problems that U.S. citizens face because the statute does not require the discovery sought by the foreign party to be reciprocal).

275. *Id.*

276. See *supra* Part III.D (arguing that application of § 1782(a) undermines the fundamental principles of arbitration).

277. See Part II.A. (discussing the Second and Fifth Circuits decisions holding that § 1782(a) did not apply to private arbitration).

278. See Part II.C. (examining why the *Intel* factors are ill-suited for private arbitration proceedings).

279. See *supra* Part II (discussing contradictory rulings among federal district courts in the wake of *Intel*).

280. See generally MOSES, *supra* note 12, at 4 (discussing the advantages of businesses participating in arbitration); BLACKABY ET AL., *supra* note 217, at 31–34.

281. See *supra* note 75 (demonstrating the increase in arbitration filings from the enactment of § 1782(a) to present).

1964 Amendments clearly broaden § 1782(a), the statutory language, legislative history, and statutory scheme clearly demonstrate Congress's exclusion of private international arbitration pursuant to the statute.²⁸² Even if the courts are attempting to further the United States' pro-arbitration policy by liberally construing § 1782(a) to extend to international arbitration proceedings, courts are affectively defeating the principles of arbitration by flooding the federal dockets and creating an expensive, time-consuming, non-confidential process.²⁸³ The current trend will only discourage international businesses from entering the United States, a consequence in the current economic atmosphere that the United States cannot afford to suffer.²⁸⁴

282. *See supra* Part III.

283. *See supra* Part III.D (discussing the advantages of arbitration).

284. *See* Seidenberg, *supra* note 211, at 53 (noting that increased discovery in arbitration has frustrated businesses seeking to use arbitration and will discourage them from using the process).