

Making or Breaking Your Billion Dollar Case: U.S. Judicial Assistance to Private International Arbitration Under 28 U.S.C. § 1782(a)

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I. INTRODUCTION: THE RISING STAKES OF ECONOMIC GLOBALIZATION

With the increasingly globalized economy, arbitration is becoming a popular mechanism for resolving disputes. The total value of international arbitration claims grew over one hundred percent in 2012, from \$96 billion in 2011 to \$206 billion in 2012.¹ The principal users of international arbitration are corporations.² In fact, for the shipping, energy, oil and gas, and insurance industries, international arbitration of multi-billion dollar disputes is the “default resolution mechanism.”³ Across all industries, approximately ninety percent of international contracts include an arbitration clause.⁴ Importantly, seventy-four percent of international arbitration proceedings involve exclusively private parties—no state entities are parties to the dispute.⁵

Due to the cross-border nature of many of these billion dollar private disputes, the private arbitral bodies⁶ that resolve them are

1. Quinn Emanuel Urquhart & Sullivan LLP, *Raising the Stakes in International Arbitration*, <http://perma.cc/8HBL-UAVC> (lexology.com, archived Mar. 13, 2014) (citing Sebastian Perry, *The GAR 30 Unveiled*, <http://perma.cc/W8YZ-UBUQ> (globalarbitrationreview.com, archived Mar. 13, 2014)).

2. See QUEEN MARY, UNIV. OF LONDON & PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2, 5 (2008) [hereinafter CORPORATE ATTITUDES AND PRACTICES], available at <http://perma.cc/N75U-TERE> (explaining the most recent study of corporate attitudes and practices showed eighty-eight percent of corporate counsel have used arbitration at least once and strongly favor international arbitration over transnational litigation).

3. *Id.* at 2.

4. CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 59 (2005).

5. CORPORATE ATTITUDES AND PRACTICES, *supra* note 2, at 3.

6. A “private” arbitral body is one in which only private parties, like corporations, not state-sponsored entities are involved.

frequently located outside the United States. Examples include the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna⁷ and the Center for Arbitration and Conciliation of the Guayaquil Chamber of Commerce in Ecuador.⁸ Because of their international locations, these private arbitral bodies often lack subpoena power to enforce discovery requests in the United States, absent diplomatic measures or U.S. judicial assistance.⁹ Given that the majority of international arbitrations are private commercial arbitrations, diplomatic measures are unavailable. Consequently, the ability of foreign companies to request a federal court's aid in compelling discovery in the United States often makes or breaks these billion dollar private arbitrations.¹⁰

Under the current statutory framework, however, the documents that are potentially dispositive of the adjudication's outcome can only be discovered if the arbitral body is considered a "foreign or international tribunal" within the ambit of 28 U.S.C. § 1782(a).¹¹ That statute reads as follows:

The district court of the district in which a person resides or is found may order . . . his testimony or . . . document[s] . . . for use in a proceeding in a *foreign or international tribunal* The order may be pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person The order may prescribe the practice and procedure . . . of the foreign country or the international tribunal To the extent that the order does not prescribe otherwise, . . . the Federal Rules of Civil Procedure [apply].¹²

7. *In re Roz Trading, Ltd.*, 469 F. Supp. 2d 1221, 1222 (N.D. Ga. 2006).

8. *Consortorio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, No. 11-12897, 2014 WL 104132, at *2 (11th Cir. Jan. 10, 2014).

9. For example, letters rogatory are appeals between courts in different countries requesting an action to be taken that if completed without the approval of the foreign court would be considered a violation of that country's sovereignty. See Bureau of Consular Affairs, U.S. Dept. of State, *Preparation of Letters Rogatory*, <http://perma.cc/NGT4-BY3Y> (travel.state.gov, archived Mar. 13, 2014).

10. For example, see *Consortorio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 990–91 (11th Cir. 2012), *vacated*, 2014 WL 104132, at *2, which explains that evidence located in the United States from JAS USA, relating to invoicing and rate calculations, was needed by CONECEL to prove JASE had overbilled CONECEL. Between 2002 and 2007, the amount CONECEL paid out to JASE was more than eighty-eight million dollars for transportation-logistics services.

11. 28 U.S.C. § 1782(a) (2012); see QUEEN MARY, UNIV. OF LONDON & WHITE & CASE, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS 3 (2012), *available at* <http://perma.cc/C6DH-4ATU> (showing fifty-nine percent of survey respondents stated discoverable documents have materially impacted arbitration outcomes in at least one-fourth of their arbitrations).

12. 28 U.S.C. § 1782(a) (emphasis added).

The threshold question of whether private international arbitral bodies are “foreign or international tribunals” within the meaning of the statute has resulted in a federal district court split.

Prior to 2004, the Second and Fifth Circuits, as well as most district courts, held that private arbitral bodies were not considered § 1782(a) “foreign or international tribunals.”¹³ In the 2004 *Intel Corp. v. Advanced Micro Devices* decision, however, the Supreme Court gave an expansive interpretation of Congress’s intent in enacting § 1782(a).¹⁴ Relying primarily on the unanimous adoption of the statute, and the 1964 amendments that broadened its reach, the Court refused to read any narrowing categorical exclusions into the statute.¹⁵ Nonetheless, because the Court’s holding did not directly address whether private arbitral bodies were “foreign or international tribunals,” the issue remains controversial.

After a number of district courts issued disparate conclusions, the Eleventh Circuit in August of 2012 became the first circuit after *Intel* to address whether private arbitrations fall within § 1782(a)’s scope. In *Consortio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, the Eleventh Circuit initially held that a private arbitral body qualifies as a “foreign or international tribunal” under § 1782(a).¹⁶ The circuit court applied the Supreme Court’s broad understanding of Congress’s intent and the Court’s functional definition of tribunal.¹⁷ Two years later, however, the Eleventh Circuit vacated its 2012 opinion, stating that it was not necessary to have determined whether private arbitral bodies were tribunals under § 1782(a).¹⁸ But, in a footnote, the court suggested that the Second and Fifth Circuits’ holdings may be wrong given that they were decided prior to the Supreme Court’s ruling in *Intel*.¹⁹ Given the similarity between the court’s footnote and its vacated opinion, *Consortio* is

13. See discussion *infra* Parts II–IV for discussion of the Second and Fifth Circuits’ opinions.

14. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 247–50 (2004). See discussion *infra* Parts II–IV for further analysis on the *Intel* decision.

15. *Intel*, 542 U.S. at 248–49, 255. See *infra* Part III for analysis of the Supreme Court’s expansive interpretation of the legislative history of § 1782(a).

16. See 685 F.3d at 990, *vacated*, No. 11-12897, 2014 WL 104132, at *1 (11th Cir. Jan. 10, 2014).

17. *Id.*

18. *Consortio*, 2014 WL 104132, at *1, *5 (explaining that whether the arbitration is a “proceeding already pending in a foreign tribunal” does not need to be addressed because a proceeding already existed as the evidence was desired for use in “reasonably contemplated civil collusion proceedings” against two employees).

19. *Id.* at *5 n.4.

important because it foreshadows how the Eleventh Circuit will likely rule the next time it addresses the issue. This could create a circuit split.

Because U.S. judicial assistance in compelling discovery is available only to “foreign or international tribunals,” resolution of the issue as to whether a private arbitral body qualifies under § 1782(a) has important consequences for parties who prefer international arbitration to costly litigation. As the continued growth of international commerce leads to more requests for judicial assistance, the Supreme Court will likely grant certiorari to resolve any split that emerges among the circuit courts.

This Note argues that private international arbitral bodies are “foreign or international tribunals” within the ambit of § 1782(a). Part II reviews the historical development of the district court split. Part III identifies the ambiguities in § 1782(a) and analyzes its legislative history as framed by the Supreme Court in *Intel*. Part IV evaluates the policy implications for international commercial arbitration if the Supreme Court deems private arbitral tribunals to be “foreign or international tribunals” under § 1782(a). Finally, Part V proposes a four-step framework for determining whether district courts should grant § 1782(a) discovery requests.

II. BACKGROUND: THE LOWER COURT SPLIT

To understand the current legal landscape, this Part briefly describes the federal courts’ divergent holdings as to whether private international tribunals are “foreign or international tribunals” under § 1782(a). Part II.A examines the Second and Fifth Circuits’ holdings that § 1782(a) does not encompass private international arbitral bodies. Part II.B explains the Supreme Court’s *Intel* decision, which gave guidance to the lower courts on how to interpret the language of the statute but did not directly resolve whether private international arbitrations are within its ambit. The *Intel* decision resulted in a split in the lower courts, as analyzed in Part II.C. Some courts concluded that the Supreme Court’s discussion was nonbinding dicta,²⁰ while others strictly followed the Court’s statutory interpretation and

20. See, e.g., *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 486 (S.D. Tex. 2008) (believing *Intel* was not responsive to resolving whether private international arbitrations are “foreign or international tribunals”).

functional definition of tribunal.²¹ Though the Eleventh Circuit vacated its opinion in *Conсорcio*, it initially held—and therefore forecasted its likely future holding—that private international arbitral entities are “foreign or international tribunals.”²² This decision is explored in Part II.D.

A. National Broadcasting and Biedermann: *The Second and Fifth Circuits Oppose Applying § 1782(a) to Private Arbitral Bodies*

Prior to the Supreme Court’s holding in *Intel*, the prevailing view was that private international arbitral bodies are not “foreign or international tribunals” and are therefore outside the ambit of § 1782(a). The Second and Fifth Circuits’ holdings in *National Broadcasting Co. v. Bear Stearns & Co.* and *Republic of Kazakhstan v. Biedermann International*, respectively, articulate this position.²³ In *National Broadcasting*, the Second Circuit affirmed the decision of the Southern District of New York to quash NBC’s request to serve subpoenas on the investment bankers and advisers of Azteca who were located in the United States.²⁴ The requests came while the parties were engaged in a private arbitration in Mexico that was administered by the International Chamber of Commerce.²⁵

The Second Circuit based its narrow definition of tribunal on the lack of any explicit reference to private arbitration in the statute’s legislative history.²⁶ Further, § 1782(a)’s repeal of several statutes clearly indicated that Congress wished to expand the statute’s scope to include intergovernmental tribunals that did not involve the United States; the language of the repealed statutes failed to indicate that Congress intended to expand the statute’s scope to private

21. See, e.g., *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006) (highlighting importance of the Supreme Court’s *Intel* decision to their holding); see *infra* Part II.B (discussing *Intel*’s functional definition of tribunal).

22. See *Conсорcio*, 685 F.3d at 997, *vacated*, No. 11-12897, 2014 WL 104132, at *1, *5 (11th Cir. Jan. 10, 2014) (holding private Ecuadorian arbitral tribunal falls within ambit of § 1782(a)).

23. *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881 (5th Cir. 1999); *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999). See *infra* Parts III–IV for analysis of the holdings.

24. *Nat’l Broad.*, 165 F.3d at 185–86 (describing U.S. documents as important to explain timing of Azteca’s IPO plans and valuation of Azteca shares).

25. *Id.* at 185.

26. *Id.* at 189. See *infra* Part III for discussion of the Second Circuit’s interpretation of the statute’s legislative history.

arbitration.²⁷ Finally, the court's public policy concerns played a major role in determining that § 1782(a) does not encompass private arbitral entities.²⁸

In the same year that the Second Circuit decided *National Broadcasting*, the Fifth Circuit in *Biedermann* stayed a discovery order from the Southern District of Texas, which the Republic of Kazakhstan had requested against a nonparty to their private arbitration proceeding in Sweden.²⁹ The Fifth Circuit closely followed the reasoning of the Second Circuit, citing *National Broadcasting* throughout the opinion.

However, five years later, in 2004, the Supreme Court cast doubt on the Second and Fifth Circuits' interpretations of the legislative history of § 1782(a).

B. Intel: Paving the Way for the Application of § 1782(a) to Private Arbitral Bodies

In contrast to the narrow interpretations of what constitutes a tribunal in *National Broadcasting* and *Biedermann*, the Supreme Court's decision in *Intel* set forth an expansive interpretation of § 1782(a).³⁰ In so doing, the Court provided a functional approach to analyzing whether an arbitral body is a § 1782(a) "foreign or international tribunal."³¹ In *Intel*, Advanced Micro Devices asked the Northern District of California to issue an order requiring Intel to produce documents located in the United States, for use in its arbitration with the Directorate-General for Competition of the Commission of the European Communities.³²

The Court held that the Commission is a § 1782(a) "foreign or international tribunal" based on four functional factors. First, the Court noted that the Commission acts as a "first-instance decisionmaker" because the Commission exercises "quasi-judicial powers."³³ For example, the Court of First Instance and the European Court of Justice review the Commission's initial decision to dismiss a

27. *Nat'l Broad.*, 165 F.3d at 189.

28. See *infra* Part IV for discussion of the Second Circuit's interpretation of the statute's legislative history and its policy concerns.

29. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999).

30. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 255 (2004).

31. *Id.* at 255, 258.

32. *Id.* at 251, 254 (explaining the European Commission, acting through the Directorate General for Competition, enforces European competition laws and regulations).

33. *Id.* at 258.

complaint or to find infringement.³⁴ Second, the Commission is a “proof-taking” body that receives evidence from investigations and includes this evidence in the record that the Court of First Instance and the European Court of Justice review.³⁵ Third, the Commission’s findings “lead[] to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court.”³⁶ Finally, the Commission may determine liability and impose penalties that are final unless overturned by a reviewing authority.³⁷ This power distinguishes an adjudicatory authority, such as the Commission, from a mere prosecutory authority. However, the Supreme Court in *Intel* articulated these factors in the context of the Commission, a governmental agency,³⁸ and therefore did not directly consider a *private* arbitral body.

C. District Courts Respond: What does Intel Mean for Private International Arbitration and American Judicial Assistance to International Trade Disputes?

As a result of the Supreme Court’s determination in *Intel* that § 1782(a) encompassed the Commission—but not necessarily private international arbitral entities—district courts have diverged as to whether private international arbitral bodies are in fact “foreign or international tribunals.” For instance, in *In re Roz Trading Ltd.*, the Northern District of Georgia held that private international arbitral bodies were “foreign or international tribunals” because “[w]here a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of ‘tribunal,’ the reasoning of *Intel*, and the scope of § 1782(a)”³⁹ Likewise, the District of Minnesota held in *In re Hallmark Capital Corp.* that private international arbitral bodies are “foreign or international tribunals” because the Supreme Court’s expansive interpretation of § 1782(a) in *Intel* and the statute’s legislative history

34. *Id.* at 254 & n.8, 255 (explaining that the European Court of Justice is the court of last resort while the Court of First Instance reduces the workload of the European Court of Justice and improves the protection of individual interests).

35. *Id.* at 255, 257.

36. *Id.* at 255.

37. *Id.* at 255 n.9.

38. *Id.* at 250. See *infra* Parts III–IV for analysis of the Court’s holding.

39. 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006); see *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 239–40 (D. Mass. 2008) (finding the reasoning in *National Broadcasting* unpersuasive because of *Intel*’s emphasis on Congress’s intent to expand the scope of § 1782(a) and the Court’s repeated refusal to impose categorical limitations on the statute’s reach).

make clear that no restrictive, categorical exclusion—such as distinguishing state-sponsored from private arbitrations—should be read into the statute.⁴⁰ Given the clear reasoning in *Intel*, the district court dismissed as insignificant the Supreme Court's silence regarding the Second and Fifth Circuits' holdings.⁴¹

In contrast, the Southern District of Texas held in *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.* that private arbitral bodies were not covered by § 1782(a).⁴² The court regarded *Intel*'s holding as irrelevant, stating that it provided no guidance on the specific subject of private international arbitration.⁴³ The Northern District of Illinois in *In re Norfolk Southern Corp.* drew the same conclusion after noting that the Court in *Intel* did not overrule *National Broadcasting or Biedermann*.⁴⁴ Thus, even after *Intel*, courts are divided as to whether § 1782(a) encompasses private international arbitral entities.

D. Consorcio: *The Turning Point?*

In the only circuit court decision following *Intel* to address whether private arbitral bodies come within the ambit of § 1782(a), the Eleventh Circuit held in *Consorcio* that such bodies are “foreign or international tribunal[s].”⁴⁵ Consorcio Ecuatoriano de Telecomunicaciones S.A. requested a discovery order from the Southern District of Florida, pursuant to § 1782(a), for use in a private arbitration at the Center for Arbitration and Conciliation of the Guayaquil Chamber of Commerce, located in Ecuador.⁴⁶ The Eleventh Circuit affirmed that the private Center for Arbitration and Conciliation was a tribunal under § 1782(a) based on the Supreme

40. *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 955 (D. Minn. 2007). See *infra* Part III for analysis of the Supreme Court's expansive interpretation of the legislative history of the statute.

41. *Hallmark Capital*, 534 F. Supp. 2d at 955.

42. 617 F. Supp. 2d 481, 483 (S.D. Tex. 2008).

43. *Id.* at 485.

44. *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 886 n.4 (N.D. Ill. 2009); see *In re Operadora DB Mex., S.A. DE C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *11 (M.D. Fla. Aug. 4, 2009) (noting that the Supreme Court would not overrule these two cases without even acknowledging their existence). But see *Hallmark Capital*, 534 F. Supp. 2d at 955 (drawing the opposite conclusion).

45. See *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 997 (11th Cir. 2012) (holding that private Ecuadorian arbitral tribunal falls within ambit of § 1782(a)), *vacated*, No. 11-12897, 2014 WL 104132, at *1 (11th Cir. Jan. 10, 2014).

46. *Id.* at 991.

Court's "far broader and wholly functional definition of the term 'tribunal'" and the Court's refusal "to impose 'categorical limitations' on the scope of section 1782(a)."⁴⁷

Though the Eleventh Circuit vacated its opinion two years later in January 2014, the court suggested in a footnote that the Supreme Court's guidance in *Intel* meant that the Second and Fifth Circuits' opinions were incorrectly decided.⁴⁸ Because of the "sparse record" in the case, the Eleventh Circuit declined to answer whether private arbitral entities are § 1782(a) tribunals.⁴⁹ Importantly though, repeating the central points in its vacated opinion, the court foreshadowed that it still believed the answer to that question was yes. These repeated central points were that the Supreme Court had both applied a functional definition of tribunal and in dicta had cited a definition of tribunal that explicitly stated that arbitral tribunals fall under § 1782(a).⁵⁰

Thus, despite vacating its original opinion, the Eleventh Circuit's reasoning—and the reasoning of the district courts that followed *Intel*'s guidance—implies that the Second and Fifth Circuits' opinions were wrongly decided. If the circuit courts do indeed split, the Supreme Court will likely be asked to resolve the debate. Just as the Supreme Court's statutory interpretation of § 1782(a) in *Intel* was pivotal to its holding, the legislative history is likely to reign supreme in any future decision. This Note will therefore analyze the courts' various interpretations of the statute's legislative history.

III. INTERPRETING THE LANGUAGE AND LEGISLATIVE HISTORY OF § 1782(A): MAKING OR BREAKING YOUR BILLION DOLLAR CASE

After Part III.A demonstrates that the language of § 1782(a) is ambiguous, Part III.B explores the lower courts' divergent interpretations of the statute's legislative history. This Part concludes that courts should focus their analysis on the Supreme Court's interpretation of congressional intent in *Intel*.

47. *Id.* at 989, 997 n.7.

48. *Consortio*, 2014 WL 104132, at *5 n.4.

49. *Id.*

50. *Id.*

A. “Foreign or International Tribunal”: Ambiguous or Not?

The first split in the lower courts turns on the proper interpretation of the language of § 1782(a) using traditional rules of statutory construction.⁵¹ Recognizing that the words “foreign or international tribunal” are not defined in the statute, the Second Circuit in *National Broadcasting* concluded that the phrase is ambiguous.⁵² Though the court noted that “court cases, international treaties, congressional statements, academic writings, and even the *Commentaries* of Blackstone and Story” refer to private arbitration panels as tribunals, the court construed these references as proving only that the language *could* encompass both state-sponsored and private tribunals; it “fails to mandate that conclusion.”⁵³ With no added explanation, the Fifth Circuit in *Biedermann* simply cited and adopted the Second Circuit’s conclusion that the statute is ambiguous.⁵⁴

Unlike the Second and Fifth Circuits, the Northern District of Georgia in *In re Roz Trading Ltd.* held that the statute’s language was unambiguous.⁵⁵ The district court explained that where a statute does not define a term, courts must look to how the words are commonly used.⁵⁶ Accordingly, the court looked at case law, *Black’s Law Dictionary*, and other reputable sources, each of which referred to arbitral bodies as tribunals.⁵⁷ The court also cited the definition of tribunal provided by Professor Hans Smit, the “dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782”⁵⁸ that first incorporated the “foreign or international tribunal” language into the statute. Professor Smit’s definition of tribunal—provided in his 1965 article and quoted in the *Intel* decision—“includes investigating

51. See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (beginning analysis with the plain language of the rule).

52. *Id.* at 188.

53. *Id.*

54. *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881 (5th Cir. 1999) (citing conclusively the Second Circuit’s opinion on the issue of ambiguity without further expanding on the reasoning).

55. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006).

56. See *id.* at 1225 (quoting *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001)).

57. *Id.* at 1226 (citing William Blackstone’s *Commentaries* and Joseph Story’s *Commentaries on Equity Jurisprudence*).

58. This view of Professor Hans Smit was noted by then-Judge Ruth Bader Ginsburg in *In re Letter of Request from the Crown Prosecution Serv.*, 870 F.2d 686, 689 (D.C. Cir. 1989). See also *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995) (describing Professor Smit as the “chief architect” of § 1782(a)).

magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional . . . courts.”⁵⁹

Although the district court in *In re Roz Trading* cited many sources to support its position, the stronger argument is that the language “foreign or international tribunal” is, in fact, ambiguous. Professor Smit’s definition of tribunals does include arbitral tribunals. He provided this definition, however, in his 1965 article—*after* the 1964 amendment that incorporated the “international or foreign tribunal” language.⁶⁰ Thus, while Professor Smit’s commentary on the scope of § 1782(a) is undoubtedly valuable given his role in the development of the statute and the Supreme Court’s quotation from his papers, his definition does not eliminate the ambiguity. More significantly, when Congress amended the statute, private international commercial arbitration was a relatively new phenomenon.⁶¹ Therefore the plain meaning of the word “tribunal” at the time did not obviously encompass a private arbitral tribunal.⁶² In light of this textual ambiguity, the Supreme Court’s analysis of the statute’s legislative history in *Intel* should guide the determination of whether § 1782(a) encompasses private international arbitrations.⁶³

B. Interpreting Legislative History: The Make-or-Break Moment

Prior to 1964, when Congress amended § 1782, the statute “provided limited evidence-gathering assistance to a ‘judicial proceeding in any *court* in a foreign country.’”⁶⁴ In addition, several other statutes, i.e., 22 U.S.C. § 270–270(g), provided U.S. judicial assistance only to tribunals established by a treaty that the United States had ratified and only when the claim involved the United

59. *Roz Trading*, 469 F. Supp. 2d at 1226 (emphasis added) (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965)).

60. Smit, *supra* note 59.

61. *See* Republic of Kazakhstan v. Biedermann Int’l, 168 F.3d 880, 882 (5th Cir. 1999) (noting that, at the time Congress was developing the 1964 version of § 1782, international commercial arbitration was a “novel arena”).

62. *Compare id.* (arguing that the novelty of private arbitration meant there was no evidence Congress intended to extend § 1782(a) to private arbitrations), *with id.* at 882 n.5 (admitting that the majority of commentators disagree with the court’s view that private arbitral entities do not fall within the ambit of § 1782(a)).

63. *See* Nat’l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2d Cir. 1999) (“Where the language is ambiguous, we focus upon the broader context and primary purpose of the statute.” (quoting *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir. 1998))).

64. *Id.* at 189 (emphasis in original) (quoting 28 U.S.C. § 1782 (1958)).

States or one of its nationals.⁶⁵ On the whole, § 270–270(g) conferred specific powers, such as subpoenaing witnesses or records, only to the commissioners or members of “international tribunals.”⁶⁶

In response to the growing involvement of the United States in international commerce and the resulting increase in transnational litigation, Congress, in 1958, created the Commission on International Rules of Judicial Procedure.⁶⁷ Directed by Professor Smit,⁶⁸ this Rules Commission studied and recommended legislative reforms concerning the expansion of U.S. judicial assistance to “foreign courts *and quasi-judicial agencies*.”⁶⁹ Ruth Bader Ginsburg, author of the Supreme Court’s *Intel* decision, served as an associate director on the project.⁷⁰

The Rules Commission’s draft, which Congress unanimously adopted in 1964, significantly amended § 1782.⁷¹ Most notably, the amended statute encouraged U.S. judicial assistance to compel the gathering of evidence in the United States for any use “in a proceeding in a foreign or international *tribunal*.”⁷² This language replaced the more narrow language of the old § 1782, which limited discovery assistance to uses in “any *court* in a foreign country.”⁷³ In addition, the 1964 amendments repealed § 270–270(g) per the Rules Commission’s suggestion.⁷⁴

Prior to the Supreme Court’s decision in *Intel*, the Second Circuit in *National Broadcasting* looked at the 1964 amendments and inferred that, in the absence of any explicit reference to private arbitration, Congress had only intended the word “tribunal” to refer to state-sponsored entities.⁷⁵ The Second Circuit based its holding principally on the explicit application in § 270–270(g) of the word

65. *Id.*

66. *Id.* at 188–89.

67. S. REP. NO. 88-1580, at 2 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 (explaining that it had become necessary for statutory improvements to “facilitate” international litigation by providing “equitable and efficacious procedures”).

68. *In re* Letter of Request from the Crown Prosecution Serv., 870 F.2d 686, 690 n.2 (D.C. Cir. 1989).

69. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 257–58 (2004) (quoting Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743) (emphasis added in original).

70. Daniel Rothstein, *A Proposal To Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT’L ARB. 61, 69 (2008).

71. *Intel*, 542 U.S. at 248.

72. *Id.* at 248–49, 258 (emphasis added).

73. *Id.*

74. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999); *see infra* notes 92–94 and accompanying text (discussing significance of repeal of § 270–270(g)).

75. 165 F.3d at 189.

“international tribunal” to “intergovernmental tribunals” involving the United States.⁷⁶ When § 1782 repealed § 270–270(g), Congress gave no indication that judicial assistance was to extend to private international arbitral entities, “which lay far beyond the realm of the earlier statute.”⁷⁷ Instead, according to the Second Circuit, Congress only meant to extend § 1782(a) to intergovernmental tribunals not involving the United States.⁷⁸ The court concluded it would therefore be inappropriate to read the statute so broadly as to encompass private arbitral bodies as “foreign or international tribunals.”⁷⁹ Had Congress intended to create such a “significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties,” the statute’s legislative history would include at least a comment about this intent.⁸⁰ Agreeing with the Second Circuit, the Fifth Circuit added that the use of the phrase “arbitral tribunal” in the U.S. Code has almost always concerned a foreign government or international agency, not a private entity.⁸¹

The Second Circuit also found unpersuasive Professor Smit’s 1965 and 1998 articles, which included private arbitral entities in the definition of tribunals, because Professor Smit could not have known what Congress intended.⁸² After all, Congress relied not on Professor Smit’s 1965 or 1998 articles, but rather his 1962 article, which stated

76. *Id.* at 188–89. Indeed, § 270–270(c) were enacted in response to an arbitration proceeding between the United States and Canada, while § 270(d)–(g) were enacted in response to an arbitration before the United States-German Mixed Claims Commission. *Id.*

77. *Id.* at 190.

78. *Id.* Specifically, the Second Circuit analyzed the Senate Report, which explained that the purpose of repealing § 270–270(g) was to eliminate the statutes’ “undesirable limitation” of requiring the United States to be a party to the international tribunal. *Id.*

79. *Id.*

80. *Id.*

81. *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 882 (5th Cir. 1999). See also Jenna M. Godfrey, Comment, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(A)’s Application in Private International Arbitration Proceedings*, 60 AM. U. L. REV. 475, 506–08 (2010), noting that of sixty-one references to the phrase “international or foreign tribunal” in the Rules Commission’s Report to Congress, only fourteen of these were mentioned in the § 1782(a) segment. Since the rest of the references referred to that phrase in state-sponsored proceedings, it would be inconsistent to interpret the § 1782(a) references as including private arbitral bodies. *Id.*

82. *Nat’l Broad.*, 165 F.3d at 190 n.6; see *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 486 (S.D. Tex. 2008) (stating *Intel’s* citation to Professor Smit’s definition of tribunal is not even dicta and Professor Smit’s article is no more authoritative than any other article).

that “an international tribunal owes both its existence and its powers to an *international agreement*.”⁸³

In contrast to the Second Circuit’s interpretation that the word “tribunal” referred only to state-sponsored entities, the Supreme Court in *Intel* ascribed a much broader meaning to the term. Referring to Senate Report 88-1580, the Supreme Court posited that Congress included the word “tribunal” in the amendments to guarantee that “‘assistance is not confined to proceedings before conventional courts,’ but extends also to ‘administrative and quasi-judicial proceedings.’”⁸⁴ The Court supported its expansive view of congressional intent by noting the congruence of the Senate Report with Professor Smit’s definition of tribunal, which “includes . . . *arbitral tribunals*, and quasi-judicial agencies, as well as conventional . . . courts.”⁸⁵ To further support its broad interpretation of the legislative history of § 1782(a), the Supreme Court highlighted how even Congress’s later 1996 amendments broadened the statute’s scope.⁸⁶ Each of Congress’s amendments were therefore designed not to “rein in,” but to “confirm . . . the broad range of discovery authorized” by the statute.⁸⁷ Accordingly, throughout the opinion, the Court refused to impose “categorical limitations” on the scope of § 1782(a), preferring a more expansive view.⁸⁸

Despite the Supreme Court’s concrete view in *Intel* that Congress intended § 1782(a) to be interpreted broadly, the Northern District of Illinois concluded four years later in *Norfolk Southern* that private arbitral bodies are not tribunals under § 1782(a). The district court stated that the Supreme Court had only included an abbreviated version of Professor Smit’s tribunal definition, replacing the following

83. *Nat’l Broad.*, 165 F.3d at 190 (emphasis added) (quoting Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1267 (1962)); *In re Operadora DB Mex.*, SA de CV, No. 6:09-CV-383-Orl-22GJK, 2009 WL 2423138, at *9 (M.D. Fla. Aug. 4, 2009) (agreeing with *National Broadcasting* that based off of the Senate Report’s reference to Professor Smit’s 1962 article, Congress did not consider private arbitral bodies when enacting § 1782(a)).

84. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 249 (2004) (citing S. REP. NO. 88-1580, at 7 (1964)).

85. *Id.* at 258 (emphasis added).

86. *Id.* at 259; see National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (expanding the scope of § 1782(a) to include criminal investigations).

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

88. *Id.* at 255 (rejecting categorical limitations on the statute’s scope because, for example, the text of the statute authorizes, but does not mandate, that the district court grant discovery aid to complainants); *id.* at 259–60 (rejecting limitations on the statute’s scope by requiring application of a categorical foreign-discoverability rule). *But see id.* at 269 (Breyer, J., dissenting) (suggesting statute’s language is subject to categorical limitations).

italicized phrase with ellipses—“[t]he term ‘tribunal’ *embraces all bodies exercising adjudicatory powers and* includes . . . arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts.”⁸⁹ The court interpreted the absence of the italicized phrase as an indication that the Supreme Court did not in fact endorse an expansive definition of the word “tribunal.”⁹⁰ Private arbitral entities, the Northern District of Illinois stated, are indeed “bodies exercising adjudicatory powers.” However, “arbitral tribunal,” according to the district court’s interpretation of *Intel*, only refers to state-sponsored arbitral tribunals, not private ones. Hence, the Court stopped short of concluding that a private arbitral body is a tribunal under § 1782(a).⁹¹

In contrast, the Northern District of Georgia held in *Roz Trading* that private arbitral bodies are tribunals within the scope of § 1782(a). Congress, the court stated, “expressly” limited the application of § 270–270(g) to intergovernmental tribunals—that is, tribunals to which the United States and a foreign government have agreed to be bound.⁹² This unequivocal language demonstrated Congress’s ability to limit a statute’s application to governmental entities alone. Therefore, the court reasoned that when Congress passed § 1782(a), which repealed these statutes, Congress could have likewise limited the scope of the new statute to intergovernmental tribunals by inserting the word “governmental” before “tribunal.” Yet, Congress refrained from doing so, suggesting that its omission was intentional.⁹³ Furthermore, the district court refuted the Second Circuit’s interpretation that the “international tribunals” language from § 1782(a) applies solely to intergovernmental tribunals because this would render superfluous the express limitation of § 270–270(g) to intergovernmental tribunals, a violation of a well-established canon of statutory interpretation.⁹⁴

Like the Northern District of Georgia, the District of Massachusetts in *In re Babcock Borsig AG* disagreed with the Second Circuit’s holding in *National Broadcasting* that Congress only intended the word “tribunal” to refer to state-sponsored entities. The

89. *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (emphasis added).

90. *Id.*

91. *Id.*

92. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006).

93. *Id.* at 1226 n.3, 1227.

94. *Id.* at 1227; *Astoria Fed. Savs. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (stating courts are required to “construe statutes, where possible, so as to avoid rendering superfluous any parts thereof”).

District of Massachusetts argued that there was in fact no textual basis in the statute for the Second Circuit to distinguish private from governmental arbitral tribunals.⁹⁵ Moreover, the Supreme Court had since disavowed categorical limitations on the scope of § 1782(a).⁹⁶ The court determined that private arbitral tribunals are foreign tribunals under § 1782(a) based on the Supreme Court's "reasoning and dicta" in *Intel*, which emphasized the breadth of the statutory term "tribunal" and therefore "strongly indicate[d]" this conclusion.⁹⁷ The court interpreted *Intel's* endorsement of Professor Smit's definition of tribunal (which included arbitral tribunals) as "offer[ing] meaningful insight regarding the Supreme Court's view of arbitral bodies in the context of § 1782(a)."⁹⁸

Similarly, the Eleventh Circuit in its nonvacated opinion in *Consortio* hinted that the Supreme Court's far-reaching interpretation of congressional intent in *Intel* likely means that the Second and Fifth Circuits are now wrong.⁹⁹ The Eleventh Circuit suggested that their contrary holdings were due to the circuit courts having decided the cases without the benefit of *Intel*, which set forth a far broader and wholly functional definition of the term "tribunal."¹⁰⁰ The court noted in its vacated opinion that the Supreme Court embraced Professor Smit's 1965 definition of tribunal, which explicitly included arbitral tribunals as § 1782(a) tribunals.¹⁰¹ Expanding on the Supreme Court's recognition of Professor Smit as an authority on § 1782, the Eleventh Circuit noted Professor Smit's explicit recognition in a 1998 article that "[c]learly, private arbitral tribunals come within the term the drafters used" and that "the term 'tribunal' in Section 1782 includes an arbitral tribunal created by private agreement."¹⁰² Further, the

95. *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008).

96. *Id.*

97. *Id.* at 238.

98. *Id.* at 239–40.

99. *Consortio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, No. 11-12897, 2014 WL 104132, at *5 n. 4 (11th Cir. Jan. 10, 2014).

100. *Id.* The Eleventh Circuit did not address why some district courts, such as the Northern District of Illinois in *Norfolk Southern*, which had the benefit of the Supreme Court's *Intel* decision still drew the opposite conclusion that § 1782(a) does not encompass private international arbitral tribunals. *Norfolk Southern* however did not deny the expansive scope of § 1782 the Court attributed to it. 626 F. Supp. 2d at 885. The district court simply believed the Supreme Court had not intended the scope to be all-encompassing. *Id.*

101. *Id.* (quoting Smit, *supra* note 59, 1026 n.71).

102. *Consortio*, 685 F.3d 987, 997 n.7 (11th Cir. 2012), *vacated*, 2014 WL 104132, at *1 (quoting Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 5–6 (1998)).

court explained that each time Congress amended § 1782, it “considerably broadened” its language to ensure that assistance was provided to an even larger scope of proceedings.¹⁰³ The amendments signaled that Congress’s wish was to “*strengthen* the power of district courts to respond to requests for international assistance.”¹⁰⁴

Though the Eleventh Circuit’s 2014 *Consortio* opinion declined to resolve the question of whether private arbitral tribunals are “foreign or international tribunals” under § 1782(a), the court’s 2012 vacated opinion explicitly concluded that they are.¹⁰⁵ Significantly, the Eleventh Circuit in its 2014 opinion repeated in dicta its vacated opinion’s central points as to why the court believed private arbitral tribunals should be considered “foreign or international tribunals.”¹⁰⁶ The Eleventh Circuit’s dicta foreshadows its likely conclusion the next time the issue arises.

Because many courts cite Professor Smit, it should be noted that his status as an authority on the legislative history of § 1782(a) is bolstered by the Supreme Court’s favorable reference to his 1965 article six times in *Intel*. Furthermore, Justice Ginsburg, who authored the *Intel* decision, actually served under Professor Smit as an associate director on the Congressional Rules Commission that recommended the § 1782(a) amendments with the “tribunal” language.¹⁰⁷

As such, the Supreme Court should overturn the Second and Fifth Circuits’ holdings in light of its broad interpretation of § 1782(a)’s legislative history in *Intel*. As further support for this conclusion, the Court’s expansive view of Congress’s intent is also in line with the policy implications resulting from the determination that § 1782(a) encompasses private international arbitral bodies, as explained in the next Part.

103. *Consortio*, 2014 WL 104132, at *4 (discussing the 1964 and 1996 amendments) (internal quotation marks omitted).

104. *Id.* (quoting *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1565 (11th Cir. 1988)).

105. *Consortio*, 685 F.3d at 994, *vacated*, 2014 WL 104132, at *1.

106. *Id.* at *5 n.4 (noting that Second and Fifth Circuit’s holdings may be wrong given the Supreme Court in *Intel* focused on a functional definition of tribunal and quoted Professor Smit’s 1965 definition of tribunal that explicitly included arbitral tribunals).

107. *See In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 956 n.2 (D. Minn. 2007) (discrediting Second and Fifth Circuits’ argument that Professor Smit’s post-1964 writings are not representative of Congress’s intent given that they were made by the Reporter for the responsible legislative committee and are consistent with the Supreme Court’s expansive interpretation of the § 1782(a) amendments).

IV. TAKING POLICY INTO CONSIDERATION: THE FEDERAL ARBITRATION ACT VERSUS § 1782(a)

Efficiency and cost-effectiveness are two principal reasons why arbitration is a popular dispute resolution mechanism. Courts undermine these virtues when they employ the broad, and often cumbersome discovery rules of the Federal Rules of Civil Procedure.¹⁰⁸ The differences between § 1782(a) and the Federal Arbitration Act (“FAA”) help explain why two of the Second Circuit’s concerns in *National Broadcasting*, which were influential in the court’s holding that private arbitral entities are not “foreign or international tribunals,” were mistaken.

The FAA applies to private commercial arbitration in both the United States and foreign nations that have implemented the Convention on the Recognition of Foreign Arbitral Awards (the “New York Convention”) and the Inter-American Convention on International Commercial Arbitration.¹⁰⁹ Section 7 of the FAA helps arbitrators obtain evidence by providing federal district courts the authority to permit arbitrators to subpoena witnesses.¹¹⁰ In addition, the FAA requires subpoenaed witnesses to bring material documentary evidence before the arbitral hearing.¹¹¹ If they refuse, the district court in the district where the arbitrators sit can compel compliance.¹¹² In contrast to the FAA, § 1782(a) allows any “interested person” to request a U.S. court to compel evidence for use in a foreign tribunal.¹¹³ Further, it provides for much broader discovery, permitting the “district court of the district in which a person resides or is found” to order that person to produce documents, and provide testimony and other discovery “for use in a proceeding in a foreign or international tribunal.”¹¹⁴

108. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999).

109. *Id.* at 187.

110. 9 U.S.C. § 7 (2012) (“The arbitrators . . . may summon in writing any person to attend before them . . . as a witness. . . . Said summons shall issue in the name of the arbitrator . . .”).

111. *Id.* (“The arbitrators . . . may summon in writing any person . . . and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . .”).

112. *Id.* (“[I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court . . . may compel the attendance of such person or persons . . .”).

113. See Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts’ Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*, 17 AM. REV. INT’L ARB. 45, 64–65 (2006) (comparing FAA to § 1782(a)).

114. 28 U.S.C. § 1782(a).

The following Parts will explore why the concerns of the Second and Fifth Circuits are overblown. Part IV.A will investigate why, if § 1782(a) encompasses private arbitral bodies, district courts need not concern themselves with the impact on the cost effectiveness and efficiency of arbitrations. Part IV.B explains why it is improper for district courts to compare the scope of parties' discovery rights and arbitrators' rights in § 1782(a) international proceedings to the scope of those rights in domestic proceedings.

A. Cost Effectiveness and Efficiency: The Effect on Private Arbitrations

The Second Circuit in *National Broadcasting* held that private arbitral bodies are not "foreign or international tribunals" under § 1782(a) in part because the statute's broader discovery provisions would conflict with the limited scope of discovery permitted under § 7 of the FAA.¹¹⁵ The concern is that under § 1782(a), the costs of discovery will increase because (1) arbitrators will no longer have the exclusive authority to order discovery, (2) more types of discovery will be permitted, and (3) discovery can be ordered outside the arbitral body's jurisdiction. Furthermore, parties will have to bear the costs of defending discovery requests under § 1782(a) and will have to wait for the court to issue its decision, thereby delaying the arbitration.¹¹⁶ These costs and inefficiencies could undermine both U.S. public policy, which strongly favors arbitration as an alternative to litigation,¹¹⁷ and parties' contract provisions, by effectively ignoring discovery-limiting clauses included in many arbitration agreements.¹¹⁸ In addition, the sheer volume of discovery requests in international private arbitration might place a significant burden on the judiciary.¹¹⁹

However, the Second Circuit's fears are overblown because the Supreme Court in *Intel* stated that the district court has discretion to

115. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999).

116. *See In re Caratube Int'l Oil Co.*, 730 F. Supp. 2d 101, 103 (D.D.C. 2010) (seeking six-month extension of arbitration schedule from ICSID Arbitral Tribunal after petitioner requested discovery order from district court).

117. *See, e.g., Nat'l Broad. Co.*, 165 F.3d at 190–91 (discussing underlying policy and efficiency justifications for federal arbitration law).

118. *See id.* (describing policy justifications for excluding private arbitral bodies from 28 U.S.C. § 1782(a)); *see also* Conley, *supra* note 113, at 67–69 (discussing potential undermining of parties' contracting provisions if § 1782(a) applied to private arbitrations).

119. *See Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 268–69 (2004) (Breyer, J., dissenting) (cautioning against district courts having to review discovery orders for arbitration because of delay and expense involved and threat parties will be forced to settle to avoid exorbitant costs).

deny a discovery request after weighing the party's need for discovery against the impact of "unduly intrusive or burdensome requests."¹²⁰ In addition, the Supreme Court in *Intel* repudiated the dissent's concern that the costs and inefficiencies of American-style discovery warrant categorical limitations.¹²¹ The Court's rejection stemmed from the lack of any empirical evidence "in the 40 years since § 1782(a)'s adoption" of any burdensome costs or delays.¹²² The Court cautioned, however, that it might take into reconsideration the need to adopt supervisory rules after further experience by the lower courts with § 1782(a).¹²³ Nevertheless, almost ten years after *Intel*, there is still no significant burden on the judiciary given there have been relatively few requests for discovery assistance in connection with an international tribunal.¹²⁴

Further, the Senate's goals in expanding the scope of § 1782(a) are contrary to the concern of the Southern District of Texas in *El Paso* that the costs and delays from extending § 1782(a) to private arbitral bodies will harm international comity.¹²⁵ The Senate Report states:

In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. [Section 1782(a)] therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals¹²⁶

120. *Id.* at 264–65; *Consortio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 997 n.7 (11th Cir. 2012), *vacated*, No. 11-12897, 2014 WL 104132, at *1 (11th Cir. Jan. 10, 2014); *see In re Application of Winning (HK) Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *10 n.5 (S.D. Fla. Apr. 30, 2010):

[T]he broadened definition of 'international tribunal' by the Supreme Court in *Intel* may result in additional discovery burdens that parties to private arbitration seek to avoid. However, because courts may modify discovery requests based upon the discretionary factors set forth in *Intel*, such burdens may be significantly curtailed by a court, and thus allow parties to still reap the benefits of private arbitration.

121. *Intel*, 542 U.S. at 265 n.17.

122. *Id.*

123. *See id.*

124. *See* Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 51, 108–09 (2011) (discussing why there has been limited use of § 1782(a) in foreign arbitrations and why this trend is likely to continue even if the Supreme Court brings certainty to the debate by holding § 1782(a) encompasses private international arbitral bodies).

125. *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008).

126. S. REP. NO. 88-1580, at 7–8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

In fact, the *El Paso* court, which held that private arbitral tribunals were not covered by § 1782(a), even acknowledged that it might be wrong about the implications for international comity.¹²⁷ The court conceded that globalization has caused international commerce to increase exponentially since 1999, the year the Fifth Circuit decided *Biedermann* and the Second Circuit decided *National Broadcasting*.¹²⁸ In sum, the persuasiveness of the arguments against including private arbitral bodies under § 1782(a) is minimized by the discretion that *Intel* provides district courts, the relatively small number of requests for judicial assistance that have been made, and the Senate's desire to provide assistance to international tribunals in light of the growth of global commerce. Consequently, the Supreme Court should overturn the Second and Fifth Circuits' opinions and hold that private arbitral bodies are tribunals within the scope of § 1782(a).

B. FAA Versus § 1782(a): The Scope of Parties' Discovery Rights and Arbitrators' Rights in International Versus Domestic Proceedings

The Second Circuit in *National Broadcasting* wrote that there is an inconsistency between the scope of discovery available in proceedings before a "foreign or international tribunal" under § 1782(a) and the scope of discovery available in a domestic arbitration under the FAA.¹²⁹ For example, in domestic proceedings, only arbitrators (not parties) have the power to compel testimony and document production.¹³⁰ By contrast, in a foreign tribunal, any "interested person" can request a U.S. court to compel evidence.¹³¹ Further, while § 1782(a) merely requires that the evidence be sought "for use" in a foreign proceeding,¹³² the FAA only allows discovery of information "deemed material" to the arbitration.¹³³ Thus, Congress has created two different discovery standards, allowing far broader discovery rights in § 1782(a) foreign arbitrations than in FAA

127. See *El Paso*, 617 F. Supp. 2d at 487 ("The Supreme Court may yet be moved by the stronger gravitational pull of international comity, concomitant with international commerce, to apply § 1782 to arbitral tribunals.").

128. *Id.*

129. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999).

130. See Conley, *supra* note 113, at 64–67 (comparing § 7 of the FAA with § 1782(a)).

131. See *id.* at 65.

132. 28 U.S.C. § 1782(a) (2012).

133. 9 U.S.C. § 7.

domestic arbitrations.¹³⁴ In addition, the FAA only grants district courts the authority to compel discovery if the non-complying witness is in the district where the arbitration occurs.¹³⁵ In contrast, § 1782(a) allows parties to compel discovery from any entity or individual in the United States in any district court “in which a person resides or is found.”¹³⁶

Nonetheless, the Supreme Court would likely disagree that the broader discovery rights under § 1782(a) are cause for concern. In *Intel*, the Court rejected the argument that the district courts’ authority to grant discovery orders in international arbitration could not exceed their authority to grant such orders in domestic litigation.¹³⁷ The Court expressly prohibited district courts from engaging in a “comparative analysis” between domestic and foreign proceedings, positing that such an analysis would “be fraught with danger.”¹³⁸ Comparisons of that order would be “slippery business” given the range of foreign proceedings that have “no direct analogue” in the United States.¹³⁹ Further, the text of § 1782(a) does not require courts to conduct this analysis.¹⁴⁰ If anything, Professor Smit argues that Congress should amend the FAA to provide *more* judicial assistance, rather than allowing § 1782(a) to be read as providing less.¹⁴¹

134. See Conley, *supra* note 113, at 66 (comparing discovery standards under § 7 of the FAA and § 1782(a)).

135. 9 U.S.C. § 7.

136. See 28 U.S.C. § 1782(a); see also Conley, *supra* note 113, at 67 (comparing courts’ power to compel testimony or evidence from third parties under § 7 of the FAA and § 1782(a)).

137. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 263 (2004).

138. *Id.* at 263; see *Consortio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 997 n.7 (11th Cir. 2012), *vacated*, No. 11-12897, 2014 WL 104132, at *1 (11th Cir. Jan. 10, 2014) (minimizing the Second and Fifth Circuits’ concerns regarding the disparate scopes of discovery in domestic and international arbitration because the district court has discretion to amend or reject discovery requests based on the *Intel* factors).

139. *Intel*, 542 U.S. at 263 n.15 (noting that while the Court rejected categorical rules determining what is a foreign or international tribunal, district courts would have the discretion to determine appropriate limits on discovery).

140. *Id.* at 263.

141. See Hans Smit, *Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT’L ARB. 295, 311 (2003) (“The fact that [§] 1782 . . . does not deal with the domestic arena cannot be seriously considered as an argument for limiting its intended purpose in the international arena. On the contrary, if anything, it should move the legislature dealing with domestic adjudication to emulate the reform achieved on the international level.”); Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT’L ARB. 153, 160 (1997) (“Section 7 should be amended to provide the same assistance to domestic arbitral tribunals.”).

Moreover, Congress specifically intended § 1782(a) to create broader discovery rights for international arbitration: “The assistance thus made available replaces, and eliminates the undesirable limitations of, the assistance extended by [§ 270–270(g)] which are proposed to be repealed.”¹⁴² The 1964 amendments were necessary to make procedures in the United States “more efficient, more effective, and more economical” to “improve practices of international cooperation.”¹⁴³ The hope was that these changes would be an invitation to other nations to likewise modify their procedures.¹⁴⁴

To balance the burdens of American-style discovery against the parties’ need for information in proceedings under § 1782(a), the Supreme Court provided district courts with guidance on how to limit the scope of (and when to entirely reject) discovery requests for international tribunals.¹⁴⁵ For instance, district courts can maintain parity between the parties by conditioning relief upon a “reciprocal exchange of information.”¹⁴⁶

In light of the policy implications for international commercial arbitration and the district courts’ discretion to amend, limit, or reject discovery orders, private arbitral tribunals should be considered “foreign or international tribunals” within the ambit of § 1782(a). Drawing upon this conclusion, Part V of this Note proposes a framework for determining how district courts should apply their discretion in determining whether to grant discovery requests, which can potentially make or break these multi-billion dollar cases.

142. *See, e.g.*, S. REP. NO. 88-1580, at 8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

143. H.R. REP. NO. 88-1052, at 2 (1963).

144. *Id.* at 3.

145. *See Intel*, 542 U.S. at 260, 263 n.15 (suggesting “guides for the exercise of district-court discretion”); *see also* *Consorcio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 997 n.7 (11th Cir. 2012) (discussing competing precedents in other circuits and *Intel*), *vacated*, No. 11-12897, 2014 WL 104132, at *1 (11th Cir. Jan. 10, 2014).

146. *Intel*, 542 U.S. at 262 (citing as support for its position Professor Smit’s 1994 article, which stated the “drafters of [§ 1782(a)] deliberately gave the American court discretion in granting the assistance for which it provides” (quoting Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 237 (1994))); *see also* *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995) (holding where MEPA could obtain information about Esmerian in the United States but Esmerian could not obtain MEPA’s documents in Europe, district court could make reciprocal exchange of information a prerequisite to relief).

V. MAKING OR BREAKING THE CASE: A FOUR-STEP FRAMEWORK FOR
§ 1782(a) DISCOVERY REQUESTS

District courts should apply the following four-step framework to determine whether a discovery request under § 1782(a) should be granted. This framework would help parties with billions of dollars at stake obtain access to important evidence and witnesses located in the United States. It takes into account the functional definition of “foreign or international tribunal” from *Intel*, the discretionary factors the Supreme Court found pertinent in *Intel*, the Supreme Court’s long history of respecting and upholding private contracts, and the aims of Congress in amending § 1782(a).

Under Step One of this proposed framework, the district court should determine whether the arbitral body is a “foreign or international tribunal” under § 1782(a) according to *Intel*’s functional definition of tribunal. Under Step Two, assuming the arbitral body is a “foreign or international tribunal,” the district court should analyze both who requested the § 1782(a) discovery and, per *Intel*, from whom the discovery is requested. Under Step Three, the district court should apply the Court’s guidance in *Intel* to determine which procedures to apply and, accordingly, the scope of discoverable information under them. Specifically, Step Three focuses on the parties’ contract provisions, the *Intel* factors, and the Supreme Court’s emphasis on upholding forum selection clauses. Finally, under Step Four, the district court should, per *Intel*, conduct a high-level assessment of whether the discovery request is unduly burdensome or intrusive.

A. Step 1: Determine Whether the Arbitral Body Qualifies as a “Foreign or International Tribunal”

To qualify as a “foreign or international tribunal” under § 1782(a), the entity must meet the functional definition of tribunal, as set out in *Intel*.¹⁴⁷ In other words, the arbitral entity must be a proof-taking body¹⁴⁸ and a first-instance decisionmaker.¹⁴⁹ The arbitrators must provide a final decision reviewable in court and have the authority to determine liability and impose penalties.¹⁵⁰

147. See *supra* Part II explaining how the Commission in *Intel* met these factors.

148. *Intel*, 542 U.S. at 243; *Consortio*, 2014 WL 104132, at *5 n.4.

149. *Intel*, 542 U.S. at 258; *Consortio*, 2014 WL 104132, at *5 n.4.

150. *Intel*, 542 U.S. at 255; *Consortio*, 2014 WL 104132, at *5 n.4.

In addition to looking at the functional definition of tribunal under *Intel*, the district court under Step One should look at the nationalities of the parties, not merely the arbitrators.¹⁵¹ This would preclude the Second Circuit's concern in *National Broadcasting* that two U.S. parties could circumvent more limited FAA discovery rules by simply appointing one foreign arbitrator, thereby ensuring broader § 1782(a) discovery rights. This focus on the parties closely aligns with the Supreme Court's instruction to district courts to analyze whether discovery requests are merely attempts to circumvent foreign or U.S. discovery rules.¹⁵²

Of the criteria in *Intel*, the judicial reviewability factor has spawned the most criticism and even led the Southern District of Texas in *El Paso* to conclude that private arbitral tribunals are not "foreign or international tribunals" under § 1782(a). The district court claimed that a private arbitral body "exists as a parallel source of decision-making to, and is entirely separate from, the judiciary."¹⁵³ This, the court asserted, was in contrast to the Commission in *Intel*, which was subject to judicial review.¹⁵⁴ However, the district court's analysis is contrary to Supreme Court precedent, which recognizes that arbitral bodies are the "functional equivalent" of, not entirely separate from, the judiciary¹⁵⁵ and that arbitration awards are subject to "judicial review" under the FAA.¹⁵⁶ As such, like domestic arbitrations under the FAA, international arbitrations are subject to judicial review under § 1782(a) because a court has the discretion to overturn the arbitral award on the basis of defects in the proceeding or other limited circumstances.¹⁵⁷

The judicial reviewability factor is an element of determining whether an arbitral body is a "foreign or international tribunal." It is

151. See Daniel 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, 1073 (2005).

152. *Intel*, 542 U.S. at 256; *Consorcio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 998 (11th Cir. 2012), *vacated*, 2014 WL 104132, at *5 n.4.

153. *La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485–86 (S.D. Tex. 2008).

154. *Id.* at 486; see *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) (describing private arbitrations as "alternatives to, rather than precursors to, formal litigation").

155. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 257 n.14 (1987); see *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (explaining it is a "parochial" concept to hold that all disputes must be settled in courts especially in light of overloaded courts).

156. *Hall St. Assoc. v. Mattel, Inc.*, 552 U.S. 576, 576 (2008).

157. For example, U.S. district courts are permitted to overturn arbitration awards where there was corruption, fraud, arbitrator prejudice, or where arbitrators exceeded their powers. 9 U.S.C. § 10(a) (2012).

not a part of the district court's discretionary analysis of whether to grant the discovery order. Thus, a comparison between domestic and international proceedings regarding judicial reviewability is not "fraught with danger"¹⁵⁸ or otherwise contrary to the Supreme Court's warning in *Intel* to avoid comparisons between the two proceedings, as this prohibition only applies in the *discretionary* analysis of whether to grant the discovery order. Domestic arbitrations are considered subject to judicial review even though the scope of review is limited, so international arbitrations should be classified in the same manner.

Once the court concludes that an arbitral body qualifies as an international or foreign tribunal, it should proceed to Step Two.

B. Step 2: Determine Whether Discovery is Available Based on Who Requested § 1782(a) Aid and From Whom Discovery Is Sought

The second step starts by determining who is requesting the discovery order from the district court. Under § 1782(a), the district court may grant a discovery order "pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or* upon the application of any interested person."¹⁵⁹ One commentator recommends that district courts should only grant § 1782(a) aid to an "interested person" in exceptional circumstances.¹⁶⁰ This commentator appears to limit the term "interested person" to the litigants themselves.¹⁶¹ However, this interpretation is inaccurate given that the Supreme Court in *Intel* specifically rejected it.¹⁶² An interested person includes litigants, but it also includes anyone who plays a "significant role in the process" or "possesses a reasonable interest in obtaining judicial assistance."¹⁶³ Hence, district courts should confirm that the interested person requesting assistance satisfies one of these descriptions. Courts should not limit assistance to the parties to the arbitration.

158. *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241, 263 (2004).

159. 28 U.S.C. § 1782(a) (emphasis added).

160. Losk, *supra* note 151, at 1075.

161. *See id.* (describing as the sole example of interested persons, "the parties," and arguing it is a necessity that interested persons only be granted § 1782(a) aid in exceptional circumstances because of the statute's aim to assist arbitral tribunals, not because of the "parties' own rights").

162. *Intel*, 542 U.S. at 256.

163. *Id.* (citing Smit, *supra* note 59, at 1027 (giving as examples of interested parties, international or foreign officials)).

After looking at who requested the discovery, Step Two instructs courts to look at the individual or entity from whom discovery is sought. In *Intel*, the Supreme Court stated that a district court, in applying its discretion to grant or deny a discovery request, should determine whether the “person from whom the discovery is sought is a party to the proceeding.”¹⁶⁴ Indeed, when evidence is requested from a nonparty, the need for § 1782(a) assistance is greater because nonparties are more likely to be outside the tribunal’s jurisdiction.¹⁶⁵ Hence, district courts should be more lenient in granting orders when discovery is requested from nonparties as opposed to parties.

Furthermore, courts should more freely grant discovery requests for nonparties to be consistent with Congress’s purpose in enacting § 1782(a) and the Supreme Court’s broad interpretation of it. Permitting U.S. district courts greater latitude to order the gathering of evidence from nonparticipants for a foreign arbitration furthers Congress’s express purpose of providing “equitable and efficacious” discovery procedures in U.S. courts “to facilitate the conduct of such litigation.”¹⁶⁶ Without recourse to § 1782(a), the foreign arbitral tribunal may not otherwise have the authority to gather evidence in the United States from nonparties.¹⁶⁷

In addition, providing courts the leniency to grant discovery orders directed at gathering evidence from nonparties mitigates the Second Circuit’s concern that applying § 1782(a) to private arbitrations will result in widespread use of American-style discovery. The fear is that extensive and expensive discovery efforts will undermine the U.S. public policy favoring arbitration.¹⁶⁸ Under this proposed framework, however, district courts will mostly refuse to grant U.S.-style discovery unless a nonparty (as opposed to the opposing party) is the subject of discovery efforts.

Once the court determines that the person requesting § 1782(a) discovery is an interested person and considers whether the person

164. *Id.* at 264; *Consortio Equatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 998 (11th Cir. 2012), *vacated*, No. 11-12897, 2014 WL 104132, at *5 n.4 (11th Cir. Jan. 10, 2014) (applying *Intel* factor).

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

166. S. REP. NO. 88-1580, at 2 (1964) (explaining statute is meant to “benefit [] tribunals and litigants involved in litigation with international aspects”). *But see Intel*, 542 U.S. at 256 (holding that the text of § 1782(a) does not constrain interested persons to “litigants”).

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

168. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999).

from whom discovery is sought is a nonparty to the arbitration, it should proceed to Step Three.

C. Step 3: Determine Which Procedures Should Apply to Determine the Scope of Discoverable Documents

Having determined that an arbitral entity is a tribunal, that the party requesting discovery is an interested person, and that it is appropriate to permit discovery from the requested person, Step Three requires district courts to decide which procedures should apply in determining what documents are discoverable. This step consists of a four-pronged analysis based on the parties' contract provisions. This analysis is consistent with § 1782(a), which allows the district court to do the following:

[P]rescribe the practice and procedure, which may be . . . [that] of the foreign country or the international tribunal. . . . 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.¹⁶⁹

Under the first prong of Step Three, if the parties specify in their contract that the rules of a specific arbitral tribunal should apply, the district court should follow that tribunal's rules in deciding whether to grant the discovery request. This approach respects the desires of the parties, as reflected in their contract. If the chosen tribunal's rules specifically discuss what evidence is permissible, the district court should first seek approval from the arbitral tribunal. This is consistent with Professor Smit's comment that district courts should not grant discovery assistance without permission from the arbitral tribunal.¹⁷⁰

If the arbitral tribunal rejects the request, the inquiry should end. The United States has met its goals of providing assistance to foreign tribunals while also respecting the parties' contract provisions. On the other hand, if the arbitral tribunal accepts the district court's assistance, then the United States furthers its interest in international comity by permitting evidence to be gathered according to the rules of the parties' chosen tribunal. This emphasis on the foreign arbitral body's discovery rules is consistent with the Supreme Court's guidance in *Intel* that district courts should look at "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or

169. 28 U.S.C § 1782(a).

170. Smit, *supra* note 102, at 9.

agency abroad to U.S. federal-court judicial assistance.”¹⁷¹ This proposal would also thwart a party’s attempt to circumvent foreign rules or U.S. policies regarding evidence gathering, a concern that the Supreme Court in *Intel* warned courts to guard against.¹⁷²

Under the second prong of Step Three, if the parties’ contract only identified the country where they would arbitrate (rather than a specific arbitral tribunal), the district court should apply the discovery rules of that country. This process best balances the parties’ freedom to contract with Congress’s goals of promoting international comity and aiding tribunals with international litigation. It is also consistent with Supreme Court precedent emphasizing the deference courts should give to forum selection clauses in arbitration agreements.¹⁷³

Under the third prong of Step Three, if the parties’ contract merely agreed to arbitrate, but did not specify the arbitral body or the location of the arbitration, the district court should apply the Federal Rules of Civil Procedure. Specifically, Federal Rules 26–36 contain the relevant procedures for evidence gathering in such situations.¹⁷⁴

Finally, notwithstanding these guidelines, under the fourth prong of Step Three, the district court should comply with any contract provision that explicitly denies application of the discovery provisions of § 1782(a) to the arbitration proceedings.

Having determined the appropriate procedures to apply, and therefore, what documents are discoverable, the district court should take a comprehensive look at the degree of intrusion and burden imposed by the discovery request.

D. Step 4: Determine Whether the Request Is Unduly Intrusive or Burdensome

In the last step of the analysis, the district court should analyze the discovery request holistically to ascertain whether the

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

172. *Id.* at 265.

173. *See Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (“[I]n the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985):

[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

174. *Weber v. Finker*, 554 F.3d 1379, 1384–85 (11th Cir. 2009).

request is unduly burdensome or intrusive, a discretionary factor discussed in *Intel*.¹⁷⁵ For example, if the discovery request merely attempts to sidestep restrictions on foreign evidence gathering, the court may consider the order unduly intrusive and therefore limit or refuse to grant the request.¹⁷⁶ Further, if the discovery request is duplicative or risks the release of confidential materials, the order may be limited or denied.¹⁷⁷

In sum, the district court can grant a discovery request under § 1782(a) once the district court has determined that (1) the arbitral entity is a tribunal; (2a) the requesting party is an interested person; (2b) it is appropriate to permit discovery from the requested person; (3) the procedure and the permitted evidence to be gathered in compliance with that procedure have been determined; and (4) the request is not unduly intrusive or burdensome.

Although the benefits of such a framework are clear, there are some possible criticisms. For example, Step Two mitigates the risk of widespread use of American-style discovery by cautioning restraint in granting judicial aid. However, as the volume of requests for judicial assistance under § 1782(a) increases, so too will the number of challenges to the district courts' decisions. More litigation will increase delays in the arbitral proceedings, undercutting the federal policy favoring arbitration over litigation.

In addition, under the first prong of Step Three, the district court must look to the rules of the arbitral tribunal that the parties specified in their contract (if the arbitral tribunal agrees to accept the district court's assistance) to determine what evidence is discoverable. District courts may find it difficult and time-consuming to determine how to apply foreign arbitral procedural rules because they are likely unfamiliar and complex.

Yet, the proposed framework takes into account Congress's explicit goal of "bringing the United States to the forefront of nations adjusting their procedures to those of sister nations."¹⁷⁸ As such, concerns about the increased use of federal courts to aid private foreign arbitration tribunals should be subordinate to the policy of promoting international cooperation at the root of the § 1782(a)

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

176. *Id.* (discussing a concern delineated in the Brief for the United States as Amicus Curiae Supporting Affirmance at *27, *Intel*, 542 U.S. 249 (2004) (No. 02-572), 2004 WL 214306).

177. *Id.* (citing two appellate court decisions consistent with these evidence-gathering limitations).

178. S. REP. NO. 88-1580, at 2 (1964).

amendments. In addition, despite the difficulties in applying foreign procedural rules, Congress specifically stated that it sought to “adjust [U.S.] procedures to the requirements of foreign practice and procedure.”¹⁷⁹ Congress thus anticipated the need for federal courts to study foreign practices and procedures, including those of private international arbitral entities, in order to promote international comity. Further, the Supreme Court has recognized that the freedom to contract trumps any efficiency concerns.¹⁸⁰

As such, the four-step framework advocated in this Note would help district courts determine whether discovery requests under § 1782(a) should be granted. The framework prevents parties to private international arbitrations from losing high-stakes cases simply because dispositive evidence is located in the United States.

VI. CONCLUSION

This Note has demonstrated why private international arbitration tribunals are “foreign or international tribunals” within the ambit of 28 U.S.C. § 1782(a). In 1964, when § 1782 was amended, Congress foresaw a modern world where economic globalization would be the norm: “The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements”¹⁸¹ Anticipating the magnitude of international trade, Congress intended § 1782(a) to be broad, encompassing all adjudicatory means through which international trade disputes are mediated. The Supreme Court recognized the breadth of Congress’s intent in *Intel* and therefore refused to place categorical limitations on the definition of tribunal. Further, the Court recognized the broad discretion of district courts to tailor discovery requests under § 1782(a), which eliminates (or at least mitigates) the Second Circuit’s concerns in *National Broadcasting*.

This Note’s solution would guide district courts in determining whether a discovery request pursuant to § 1782(a) should be granted. The proposed four-step framework is grounded in an understanding of congressional intent, the public policy favoring arbitration over

179. *Id.*

180. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (repudiating the notion that “the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter”).

181. S. REP. NO. 88-1580, at 2 (1964).

litigation, and the judiciary's respect for forum selection clauses. In the end, it is American judicial assistance to private international arbitration that may make or break a party's case. With billions of dollars at stake, justice requires that international parties have a fair and equitable chance to obtain the evidence necessary to vindicate their claims.

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