13

Discovery, Arbitration, and 28 USC §1782

Rules or Standards?

Linda Silberman[*]

A. Introduction

I am honoured to participate in this Festschrift for my close friend and colleague, Lawrence Collins. I am indebted to my late colleague Andy Lowenfeld, who first connected me with Lawrence when Andy and I worked together with Lawrence on a US judgment recognition matter that Lawrence was handling when he was a partner in Herbert Smith. Because Lawrence and I shared common interests in so many aspects of private international law, our initial professional relationship deepened and grew. Even more importantly, we developed a close and rewarding friendship over the years, which came to include our entire families. Together we have enjoyed dinners, theatre, jazz, movies, and conversations on both sides of the Atlantic. Additionally, NYU Law School and I were able to persuade Lawrence to become an NYU Global Professor, and for a number of years Lawrence and I co-taught the International Litigation/Arbitration course that Andy had first developed at the Law School many years before.

In choosing a topic for this Festschrift, I have selected one that builds on Lawrence's extensive experience and interest in international arbitration. It also draws on my own present preoccupation with the tension between 'rules' and 'standards', which was the theme of my General Course on Private International Law at the Hague Academy given remotely this past summer. Also, the precise issue—whether 28 USC §1782, which provides for US judicial assistance to obtain evidence for use in foreign or international proceedings, extends to investor-State and/or private commercial arbitral tribunals—is awaiting decision by the Supreme Court. In writing about this issue for this Festschrift in honour of Lawrence, I will also draw some comparisons with practice in the UK, an aspect of my teaching and scholarship that has been greatly enriched by my work and teaching with Lawrence.

[*] I am grateful to and thank my research assistants, Jeremy Jacobson, JD New York University School of Law (May 2021) and Kateryna Shokalo, LLM New York University School of Law (January 2022) for their valuable help on this chapter.

Linda Silberman, *Discovery, Arbitration, and 28 USC §1782* In: *Essays in International Litigation for Lord Collins*. Edited by: Jonathan Harris and Campbell McLachlan, Oxford University Press. © Oxford University Press 2022.
DOI: 10.1093/oso/9780192867988.003.0014

B. Access to US Information in Foreign Proceedings under 28 USC §1782 and the Supreme Court Decision in *Intel*

The need to obtain evidence for use in a foreign proceeding, whether for trial or pre-trial, was traditionally viewed as a matter of international cooperation. Such cross-border cooperation began with letters rogatory[1] and was greatly improved by the adoption of a multilateral international treaty, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the 'Hague Evidence Convention').[2] However, when information is sought from a person subject to jurisdiction in the US, a more direct route is available on the basis of a US statute, 28 USC §1782. Section 1782 provides that a district court of the district in which a person resides or can be found may order testimony or the production of documents for use in a proceeding in a foreign or international tribunal. The Senate Report on the statute explained its purpose as follows: to provide 'equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects … [and to] invite foreign countries similarly to adjust their procedures'.[3] Applications under §1782 can be made pursuant to a letter rogatory or by a foreign or international tribunal, or by any interested person. Once the statute is held to apply, the traditional balancing of factors to resolve discovery disputes comes into play, including concerns relating to comity.[4]

The origins of 28 USC §1782 can be traced back to 1855, with many of its present elements appearing in several different statutes over the years.[5] The modern evolution came as the result of a Congressional Commission on International Rules of Judicial Procedure, created in 1958 to study and recommend improvements to the existing framework for judicial cooperation with foreign countries and to draft legislation to streamline the procedures necessary for rendering assistance to foreign tribunals.[6] Specifically, Congress expanded the scope of judicial assistance to reach a 'proceeding in a foreign or international tribunal' instead of 'any judicial proceeding pending in any court in a foreign country'.[7] As the Commission Report explained:

[1] See generally Harry Leroy Jones, 'International Judicial Assistance: Procedural Chaos and a Program for Reform' (1953) 62 Yale LJ 515, 529–34.

[2] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (opened for signature 18 March 1970, entered into force 7 October 1972) 847 UNTS 231 (hereafter 'Hague Evidence Convention').

[3] S Rep No 88-1580 (1964), reprinted in 1964 USCCAN 3782, 3793 (hereafter 'Senate Report').

[4] See *Intel Corp v Adv Micro Devices, Inc* 542 US 241 (2004), which is discussed in the text accompanying nn 10–23.

[5] For a detailed account, see Report of the New York City Bar Committee on International Commercial Disputes, 28 USC §1782 As a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices (February 2008), <www.nycbar.org/pdf/report/1782_Report.pdf> accessed 4 April 2022 (hereafter 'Bar Committee Report').

[6] See Act of 2 September 1958, Pub L No 85-906, §2, 72 Stat 995, 997, 1743.

[7] ibid 11.

> The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.[8]

In both the 1963 Commission Report and the final revision of §1782 in 1964, it was clear that district courts would be given substantial discretion in its application. On that point, the Senate Report stated: 'In exercising its discretionary power, the court may take into account … the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.'[9]

The first (and only) Supreme Court interpretation of §1782 came in 2004 in *Intel Corp v Advanced Micro Devices, Inc*.[10] *Intel* involved an application by AMD, a US company, seeking discovery from Intel, another US company, in connection with a complaint that AMD had filed against Intel in the European Commission, alleging a violation of European competition law. An initial question before the district court was whether the Directorate General for Competition that was undertaking the initial investigation was a 'tribunal' at all so as to fall within §1782. A second question, which had divided the appeals courts in the US, was whether a 'foreign-discoverability or admissibility' rule should be imposed as a prerequisite to issuing an order to obtain information. The argument in favour of such a requirement was that to the extent that the foreign jurisdiction would not allow for such discovery or the admissibility of such evidence, a court in the US should not interfere with the procedures and laws that the foreign jurisdiction has chosen for litigation in its own proceedings.[11]

On the first question—the definition of 'tribunal'—the Supreme Court rejected the views of the European Commission set forth in an amicus brief, contending that the DG-Competition was itself not a 'tribunal'.[12] The Court described the structure and operation of DG-Competition, which it characterized as the investigatory arm of the European Commission to which it makes a recommendation.[13] The European Commission issues a final, binding decision that is enforceable

[8] Historical and Explanatory Notes to the Proposed Bill 'To Improve Judicial Procedures for Servicing Documents, Obtaining Evidence and Proving Documents in Litigation with International Aspects' (note to subs (a)), 45.

[9] Senate Report (n 3) 3788.

[10] *Intel* (n 4).

[11] Two other questions were raised in the case: whether the foreign proceeding had to be currently 'pending' and whether 'interested persons' must be litigants in the foreign proceeding. The answers to both questions were 'no'. See ibid 247, 256, 259.

[12] See Brief for Commission of the European Communities as Amicus Curiae at 2, *Intel Corp v Advanced Micro Devices, Inc* 542 US 241 (2004) (No 02-572).

[13] *Intel* (n 4) 254.

through fines and penalties, and its action is subject to review in the Court of First Instance and the European Court of Justice. The Supreme Court explained that the Court of First Instance and the European Court of Justice would clearly qualify as 'tribunals', and that the Commission should also be regarded as a §1782 tribunal because it 'acts as a first-instance decisionmaker' for those tribunals.[14]

With respect to the second question as to whether the information must be discoverable or admissible under the rules of the foreign jurisdiction where the case was proceeding, the Supreme Court refused to impose any such categorical restriction, reasoning that neither the text of the statute nor the legislative history indicated that such limitations were intended. The Court noted: 'If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect.'[15] The Court also referred to the Senate Report, which had observed that §1782(a) 'leaves the issuance of an appropriate order to the discretion of the court, which in proper cases, may refuse to issue an order or may impose conditions it deems desirable'.[16]

Notwithstanding its reluctance to impose categorical limitations with respect to the interpretation of §1782, including the meaning of 'tribunal' or 'foreign discoverability', the Supreme Court did not dismiss concerns about interference with foreign proceedings or the need to maintain parity between the litigants. Rather, it emphasized that such concerns may be relevant in determining whether an application should be granted and an order issued in a particular case. Accordingly, the Court identified four specific factors that 'bear consideration' when a court rules on a §1782 request: (i) whether the person from whom the information is sought is a party in the foreign proceeding; (ii) the nature of the foreign tribunal, the character of the proceeding abroad, and the receptivity of the foreign court or agency to federal-court judicial assistance; (iii) whether the request is an attempt to circumvent foreign proof-gathering restrictions or other policies of the foreign country; and (iv) whether the request is unduly intrusive or burdensome.[17] But the Court specifically declined to exercise its supervisory authority to adopt presumptive 'rules' that would provide further guidance.[18]

Justice Breyer, in dissent, explained his objections to this case-by-case approach. He pointed out that discovery matters 'take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes'.[19] He also observed that expensive and time-consuming battles

[14] ibid 258.
[15] ibid 260.
[16] ibid 260–61 (citing S Rep No 1580 at 7, US Code Cong & Admin News 1964, pp 3782, 3788).
[17] ibid 264–65.
[18] ibid 265 ('We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts.').
[19] ibid 268 (Breyer J, dissenting).

about discovery take up domestic judicial resources, crowd dockets, and potentially interfere with foreign proceedings.[20] Accordingly, he urged that the Supreme Court impose categorical limits on the use of §1782, particularly with respect to discovery. First, he advised that when the entity had few tribunal-like characteristics that left its status in doubt, a US court should pay close attention to the foreign country's view of whether or not it should be considered a 'tribunal'.[21] Second, he indicated that a court should not permit discovery where the foreign law would not permit discovery and where US law would not authorize discovery in similar circumstances.[22]

The actual holding in *Intel* did not involve the issue of whether an arbitral panel is a 'tribunal' within the meaning of 28 USC §1782. However, in discussing the meaning of 'tribunal' in *Intel*, Justice Ginsburg, writing for the majority, referenced the Senate Report indicating the congressional purpose of §1782 to provide the possibility of US judicial assistance in connection with administrative and quasi-judicial proceedings abroad. She cited to an article by Professor Hans Smit, which itself contained a footnote with a parenthetical stating 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'.[23] Because the Smit article explicitly mentioned 'arbitral tribunals' (even though the Senate Report did not) and the parenthetical in a footnote in the Smit article was quoted in the reference by Justice Ginsburg, a number of courts have held that the Court implicitly endorsed the Smit view that 'arbitral tribunals' are included within the scope of §1782.[24]

The more difficult question, however, is whether the term was meant to encompass anything other than governmental or intergovernmental arbitral tribunals. It had been generally accepted that some types of arbitral tribunals were within the ambit of §1782. Indeed, when the language of the 1964 version of the statute was changed from 'courts' to 'tribunals', the clear intention was to extend judicial assistance to reach 'governmental or intergovernmental arbitral tribunals … and other state-sponsored adjudicatory bodies'.[25] Indeed, prior statutes (now subsumed

[20] ibid 269.

[21] ibid 269–70.

[22] ibid 270.

[23] ibid 258 (citing S Rep No 1580, 7–8, US Code Cong & Admin News 1964, pp 3782, 3788, and Hans Smit, 'International Litigation under the United States Code' (1965) 65 Colum L Rev 115, 1026–27, nn 71, 73).

[24] *In re Application of Babcock Borsig AG*, 583 F Supp 2d 233, 238–39 (D Mass 2008) (acknowledging that *Intel*'s reference to arbitral tribunals was dicta, but noting that it provided 'meaningful insight' nonetheless); *In re Roz Trading Ltd*, 469 F Supp 2d 1221, 1225 (ND Ga 2006) (relying on *Intel*'s quotation as one of the reasons for its finding that the arbitral tribunal was within the §1782 scope and consistent with *Intel*); *In re Hallmark Capital Corp*, 534 F Supp 2d 951, 955 (D Minn 2007) (concluding that the Supreme Court in *Intel* cited Smit's article approvingly). But see Stacie I Strong, 'Discovery under 28 USC § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration' (2013) 1 Stan J Complex Litig 295, 11–12.

[25] *Abdul Latif Jameel Transp Co v FedEx Corp* 939 F3d 710, 726 (6th Cir 2019) (quoting *NBC v Bear Sterns & Co* 165 F3d 184, 190 (2d Cir 1999)).

within §1782) used the term 'international tribunal' expressly to be able to include governmental and intergovernmental arbitral tribunals.[26] The Commission itself cited to an earlier article by Professor Smit, where he explained that an international tribunal is one created by an international agreement.[27]

Because the legislative history gave no indication of extending judicial assistance to international arbitral panels created exclusively by private parties, two Courts of Appeals, prior to *Intel*, held that private arbitral panels were not a 'foreign or international tribunal' within the meaning of §1782.[28] In *National Broadcasting Co v Bear Stearns*,[29] the Second Circuit traced the legislative history of §1782 and concluded that such an expansion of US 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'.[30] The Court of Appeals also observed that private arbitration did not generally include the broad discovery characteristic of US litigation and that discovery under the US Federal Arbitration Act, whether domestic or international, was substantially more limited than pursuant to §1782.[31] The Court of Appeals pointed out that under §7 of the Federal Arbitration Act, only the arbitrators have authority to summon a witness to appear before the arbitrators and to produce materials.[32] In addition, although §7 gives district courts authority to enforce the summons or cite a person in contempt for failure to appear,[33] an order directed to a non-party is generally for attendance or production at the arbitral hearing and not for pre-trial discovery.[34]

[26] See 22 USC §§270–270g (repealed) (providing for judicial assistance in a proceeding 'before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments'). Originally, 22 USC §§270–270c was confined to assistance to a tribunal established by a treaty to which the US was a party and then only in proceeding involving a claim in which the US or one of its nationals was interested. Later provisions, contained in §§270d–270g extended that assistance to international tribunals even if the US was not a party. Section 1782 eliminated the restriction that the evidence should relate to a matter in which the US or one of its nationals was involved. See Senate Report (n 3) 3784–89. See also *NBC* (n 25) (recounting the history of §§270–270g and the various amendments and purposes behind those amendments).

[27] See Commission Report (n 8) (citing Hans Smit, 'Assistance Rendered by the United States in Proceedings before International Tribunals' (1962) 62 Colum L Rev 1264, 1267 ('Since an international tribunal owes both its existence and its powers to an international agreement, its powers can be extended only by such an agreement and not by a unilateral act.')).

[28] See *NBC* (n 25); *Republic of Kazakhstan v Biedermann International* 168 F3d 880, 881–83 (5th Cir 1999).

[29] *NBC* (n 25).

[30] ibid 190.

[31] ibid 187–88. The application in *NBC* (n 25) was clearly an attempt to obtain information for discovery purposes since it was made in anticipation of an ICC arbitration in Mexico but prior to the appointment of the panel.

[32] See 9 USC §7.

[33] Section 7 provides that if any person refuses or neglects to obey such summons, upon petition, the district court can enforce the summons or punish said person for contempt.

[34] Courts in the US are divided on whether an arbitral tribunal may order a non-party to produce documents other than at an evidentiary hearing, but courts consistently refuse to enforce arbitral subpoenas for pre-trial deposition testimony. See eg *Life Receivables Trust v Syndicate 102 at Lloyd's of London* 549 F3d 210 (2d Cir 2008) (holding arbitrators may not compel pre-hearing discovery from non-parties); *Hay Group, Inc v EBS Acquisition Corp* 360 F3d 404, 410 (3d Cir 2004) (same). But see *Sec Life Ins Co of Am v Duncanson & Holt, Inc* 228 F3d 865, 870 (8th Cir 2000) (ruling that §7 may apply to

The Court of Appeals concluded that Congress would not have conferred broader evidence-gathering mechanisms that could create a conflict between the two statutes.

The Fifth Circuit in *Republic of Kazakhstan v Biedermann International* reached the same conclusion.[35] Echoing themes similar to those of the Second Circuit in *NBC* and citing its reasoning, the Fifth Circuit viewed the statutory language as ambiguous, thus requiring an examination of the legislative history. It found that §1782 was drafted to incorporate the predecessor statute which 'facilitated discovery for international government-sanctioned "tribunals"' and that Congress gave no indication of 'extending § 1782 to the then novel-arena of international commercial arbitration'.[36] The Fifth Circuit also expressed concern that permitting discovery in this context would frustrate the 'speedy, economical and effective means' of dispute resolution that are private arbitration's greatest benefits.[37]

C. Post-*Intel* Case Law

In the aftermath of the Supreme Court's decision in *Intel*, numerous commentators read the Court's opinion to suggest that private arbitral tribunals are indeed within the scope of §1782.[38] That same position is taken by the American

pre-hearings). See generally: Report of the International Disputes Committee of the Association of the Bar of the City of New York, Obtaining Evidence from Non-Parties in International Arbitration in the United States (2009) 20 Am Rev Intl Arb 421, 422, 426–28; Alan Scott Rau, 'Evidence and Discovery in American Arbitration: The Problem of "Third Parties"' (2008) 19 Am Rev Intl Arb 1, 9. See Restatement of the US Law of International Commercial and Investor-State Arbitration, §3.4 cmt b(i) and Reporters' Note b(i) (Am Law Inst, Proposed Final Draft, 24 April 2019) (hereafter 'Arbitration Restatement').

[35] *Biedermann* (n 28).

[36] ibid 882. Notwithstanding the language used by the court, *Biedermann* appears to be an investor-State arbitration based on the US–Kazakhstan bilateral investment treaty. See Jarrod Hepburn, 'Looking Back: In First Treaty Claim under SCC Rules, Arbitrators in the Long-Opaque Biedermann Case Held Kazakhstan Liable for Breaching US–Kazak BIT, and Rejected Counterclaim on Merits', IAReporter (1 November 2017), <www.iareporter.com/articles/looking-back-in-first-treaty-claim-under-scc-rules-arbitrators-in-the-long-opaque-biedermann-case-held-kazakhstan-liable-for-breaching-us-kazak-bit-and-rejected-counterclaim-on-merits/> accessed 4 April 2022.

[37] ibid 883.

[38] See eg Arthur Rovine, 'Section 1782 and International Arbitral Tribunals: Some Key Considerations in Key Cases' (2012) 23 Am Rev Intl Arb 461, 466–67 (reading the *Intel* decision to support Professor Smit's stated intent that §1782 apply to private arbitral tribunals); Kenneth Beale, Justin Lugar, and Franz Schwarz, 'Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 USC § 1782's Application to International Arbitration' (2011) 47 Stan J Intl L 51; Pedro Martinez-Fraga, 'The Future of 28 USC § 1782: The Continued Advance of American-Style Discovery in International Commercial Arbitration' (2009) 64 U Miami L Rev 89, 90 (stating that post-*Intel*, international commercial arbitrations constitute a 'foreign or international tribunal' under §1782 as a matter of law); Okezie Chukwumerije, 'International Judicial Assistance: Revitalizing Section 1782' (2005) 37 Geo Wash Intl L Rev 647, 676–80 . However, not all commentators were in agreement that §1782, as it was written, encompassed private arbitral tribunals. See eg Daniel Rothstein, 'A Proposal to Clarify US Law on Judicial Assistance in Taking Evidence for International Arbitration' (2008) 19 Am Rev Intl Arb 61; Martin Davies, 'Court-Ordered Interim Measures in Aid of International Commercial Arbitration' (2006) 17 Am Rev Intl Arb 299, 313–14.

Law Institute in the Proposed Final Draft of its new Restatement of the US Law of International Commercial and Investor-State Arbitration.[39] Several appellate courts also reached that conclusion. In *Abdul Latif Jameel Transportation Co Ltd v FedEx Corp*, the Court of Appeals for the Sixth Circuit reversed a district court's refusal to order discovery pursuant to a §1782 application for use in a dispute to be arbitrated in Dubai under the rules of the Dubai International Financial Centre–London Court of International Arbitration.[40] The district court had held that the arbitration panel did not constitute a 'foreign or international' tribunal within the meaning of §1782(a). On appeal, the Sixth Circuit reversed. It first explored the 'dictionary definition' of 'tribunal', but failed to find any consensus as to whether private arbitrations were included.[41] The appellate court then examined the term 'tribunal' in legal writing, concluding that 'American lawyers and judges understood and use the word "tribunal" to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties'.[42] Nor did the Sixth Circuit find any indication that Congress intended to give the term 'tribunal' in §1782 a narrower understanding than its linguistic meaning in legal writing. In addition, the Court of Appeals relied on the Supreme Court's decision in *Intel* as support for its conclusion that arbitrations qualified as 'tribunals' in that they act as 'first-instance decisionmakers'.[43]

As to the argument that only State-sponsored and international governmental tribunals were included within §1782—as the Second Circuit (prior to *Intel*) held in *NBC*, and as the Fifth Circuit (prior to *Intel*) concluded in *Biedermann* to which it cited (post-*Intel*) in *ElPaso Corp v La Comisión Ejecutiva Hidroeléctrica Del Rio Lempa*[44]—the Sixth Circuit rejected the reasoning in those decisions. The Sixth Circuit found the resort to legislative history by those courts unwarranted, and in any event, read the legislative history differently. It noted that the 1964 amendment broadened the scope of §1782 and that the repeal of §§270–270g removed the requirement that the US be a party to an international agreement under which a proceeding takes place.[45] In considering the policy objections to an interpretation that brought private commercial arbitration within §1782, the Sixth Circuit pointed

[39] See Arbitration Restatement (n 34) §3.5(a), cmt b ('The Restatement takes the position that the plain language of §1782 should prevail and that the statute should be interpreted as applying to international arbitral tribunals.'). Although the Restatement provision acknowledged that the lower courts were divided with respect to the issue, the Proposed Draft was approved in April 2019, prior to later appellate decisions, discussed below, creating the post-*Intel* circuit split.

[40] *Latif* (n 25).

[41] ibid 719–20.

[42] ibid 722. As one example, the Court of Appeals observed that the US Supreme Court, in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* 473 US 614, 636 (1985), used the phrase 'international arbitral tribunal' to describe a private arbitration.

[43] *Latif* (n 25) 724.

[44] 341 F Appx 31 (5th Cir 2009). The Fifth Circuit concluded that *Intel* did not unequivocally overrule its holding in *Biedermann* and thus it was bound by the earlier precedent.

[45] *Latif* (n 25) 729.

again to the Supreme Court's decision in *Intel*. It noted first that the Supreme Court in *Intel* itself rejected the imposition of categorical limitations on the statute. The Sixth Circuit emphasized the Supreme Court's focus in *Intel* on the broad discretion courts have to shape discovery under §1782 and the specific factors that a district court should take into account in considering a discovery request pursuant to the statute. Specifically, the Court of Appeals indicated that this discretion 'presumably extends to consideration of any agreements between the availability and scope of discovery in arbitration'.[46]

A subsequent decision of the Court of Appeals for the Fourth Circuit, *Servotronics, Inc v The Boeing Co*,[47] also reversed a district court decision that had relied on *NBC* and *Biedermann* to hold that a UK arbitration panel was not a 'foreign or international tribunal' within the meaning of §1782.[48] Citing the post-*Intel* Sixth Circuit decision in the *Latif* case, the Fourth Circuit observed that there was now a split of authority among the circuits and noted that the Fourth Circuit had never addressed the issue, either before or after *Intel*.[49] Assuming that certain types of arbitral tribunals were intended to fall within the §1782 definition of 'tribunal', the Court of Appeals in *Servotronics* focused its attention on whether the tribunal must be one that exercised 'government-conferred authority'.[50] Referencing the position taken by the appellate courts in *NBC* and *Biedermann* that the term 'foreign or international tribunal' referred only to 'entities acting with the authority of the State', the Fourth Circuit concluded that even under that definition, the UK arbitral panel satisfied the criteria.[51] The Court pointed to the English Arbitration Act, which it characterized as providing governmental regulation of arbitration, referencing various provisions of the Act that address, among other matters, stays of legal proceedings, schedules, summoning witnesses, the composition of the tribunals, the power to appoint experts, the review of awards, and the enforcement of awards.[52] As to arguments that the application of §1782 to private arbitration proceedings would undermine the parties' bargained-for method of dispute resolution by introducing US discovery into foreign proceedings, the Fourth Circuit underscored the point that §1782 is not only about discovery—indeed that statute does not use the term 'discovery'—but about judicial assistance by a US court to obtain information 'for use' in the proceeding before the foreign tribunal.[53] In addition, unlike discovery in a US litigation which initially is in the control of the parties, the ability to obtain any information under §1782 is within the discretion of the district court.[54]

[46] ibid 730.
[47] 954 F3d 209 (4th Cir 2020).
[48] ibid 214.
[49] ibid 212.
[50] ibid 214.
[51] ibid 214–15.
[52] ibid.
[53] ibid 215.
[54] ibid.

Other appellate courts took a different view. Notwithstanding the decisions of the Fourth and Sixth Circuit Courts of Appeals, the Second Circuit, in *Hanwei Guo v Deutsche Bank Securities Inc*,[55] reaffirmed its pre-*Intel* precedent in *NBC* excluding private commercial arbitration from §1782 judicial assistance. Guo was seeking discovery of documents from four investment banks for use in an arbitration in China in which he claimed that an individual and several companies had defrauded him in an investment. In rejecting the §1782 application, the Court of Appeals adhered to its decision in *NBC*, holding that a private commercial arbitral tribunal was not a 'foreign or international tribunal' within the meaning of §1782.[56] The Court of Appeals acknowledged that the Sixth and Fourth Circuits had reached a different conclusion on that point after the Supreme Court's decision in *Intel*, but concluded that *Intel* itself did not cast 'sufficient doubt' on its earlier precedent to justify departing from it.[57] The Second Circuit pointed out that these recent appellate cases did not suggest that *Intel* had overruled *NBC*, but rather read *Intel* to contain 'no limiting principle' that the word 'tribunal' excluded arbitration.[58] In reaffirming *NBC* in *Hanwei Guo*, the Court of Appeals for the Second Circuit emphasized that its prior *NBC* decision found that private commercial arbitration was excluded because §1782 only had in mind 'State-sponsored' arbitrations, and nothing the Supreme Court said in *Intel* was inconsistent with such a finding. The Second Circuit observed that even if the Supreme Court's indirect reference in *Intel* to 'arbitral tribunals' in the parenthetical quotation in Professor Smit's article is given weight, it would have no bearing on whether non-governmental private commercial arbitrations were included in §1782.[59]

In *Hanwei Gou*, the Second Circuit then turned its attention to the particular tribunal that was at issue—a tribunal established under the auspices of the Chinese International Economic and Trade Arbitration Commission (CIETAC). Guo contended that even if private arbitrations are not within §1782, a CIETAC arbitration is in fact a State-sponsored adjudicatory body because it was originally founded by the Chinese Government. Even if so, the Court reasoned that CIETAC had evolved to the point that it presently functions independently of the Chinese Government and maintains a high degree of independence and autonomy.[60] Moreover, the Court viewed the provisions of Chinese arbitration law that cover the enforcement of agreements and awards as no different from the provisions of the Federal Arbitration Law and 'do not convert CIETAC arbitrations into state-sponsored endeavors'.[61]

[55] 965 F3d 96 (2d Cir 2020).
[56] ibid 105–07.
[57] ibid 103–04.
[58] ibid 104 (referencing *Latif* (n 25) 725–26). In addition, the Second Circuit viewed the Fourth Circuit's decision in *Servotronics* as resting on its finding that the English Arbitration Act was the 'product of government-conferred authority'. Ibid.
[59] ibid 105.
[60] ibid 107.
[61] ibid 108.

A subsequent Court of Appeals decision in the Seventh Circuit, *Servotronics, Inc v Rolls-Royce plc*,[62] involved a different discovery application by the same party in the same arbitration that generated the decision in the earlier Fourth Circuit *Servotronics* decision.[63] The Seventh Circuit, unlike the Fourth Circuit, held that private foreign arbitrations were not included within §1782. The Court of Appeals considered the split of authority in the other Circuits, siding with the decisions of the Fifth and Second Circuits excluding private arbitrations from §1782.[64] In reaching its decision, the Court reviewed dictionary definitions of 'tribunal', but found them inconclusive.[65] It then examined the 1964 overall statutory revisions that had adopted recommendations by the earlier Rules Commission to related statutes. The Court found that the term 'foreign and international tribunal' appeared in these other provisions and referred to 'state-sponsored, public, or quasi-governmental' tribunals and not private arbitration tribunals, noting that '[i]dentical words or phrases' used in related statutes 'are presumed to have the same meaning'.[66] The Court also emphasized that this 'narrow understanding' of the word 'tribunal' avoided a 'serious conflict with the Federal Arbitration Act',[67] which authorizes the arbitrators but not the parties to order testimony or the production of documents.[68] Also, the language of §7 of the FAA—to attend before [the arbitrators] or any of them as a witness and to bring any 'book, record, document, or paper'—has been interpreted by most US courts not to extend to discovery.[69] Finally, the Court rejected the argument that the Supreme Court in *Intel* had signalled its view that §1782 authorized district courts to provide discovery assistance in private foreign arbitrations. As it explained, a 'law-review article in a passing parenthetical' which itself did not reference *private* arbitral tribunals could not tip the scales.[70] The well-established Circuit split resulted in an initial grant of certiorari by *Servotronics*, but the Supreme Court subsequently dismissed the case pursuant to the joint stipulation of the parties.

Nonetheless, the Supreme Court may have an opportunity to address the question of the availability of 28 USC §1782 discovery in arbitration, this time in *Application of the Fund for Protection of Investor Rights v AlixPartners*,[71] in the

[62] 975 F3d 689 (7th Cir 2020), *dismissed* 142 S Ct 54 (2021).

[63] In the Fourth Circuit case, Servotronics sought discovery of documents from three Boeing employees in South Carolina. In the Seventh Circuit case, Servotronics sought documents from the Boeing Corporation itself.

[64] *Servotronics* (n 62) 692–93.

[65] ibid 693.

[66] ibid 694–95. In a footnote, the Seventh Circuit characterized the Fourth Circuit's position that the UK arbitral panel was the 'product of government-conferred authority' as 'mistaken'. Ibid 693, n 2.

[67] ibid 695.

[68] See nn 32–34 and accompanying text, discussing Federal Arbitration Act, §7.

[69] See Practical Law Arbitration, Compelling Evidence from Non-Parties in Arbitration in the US 6–8 (2021). See also n 34 and accompanying text.

[70] *Servotronics* (n 62) 696.

[71] 5 F4th 216 (2d Cir 2021).

context of investor-State arbitration. Notwithstanding its prior decision in *Hanwei Guo*, the Court of Appeals for the Second Circuit in *Fund* held that an investment treaty arbitration, unlike a private commercial arbitration, may constitute a 'foreign international tribunal' for purposes of the statute. *Fund* involved an arbitration proceeding brought by a Russian investment entity (as the assignee of claims of a shareholder of a failed Lithuanian Bank) against Lithuania pursuant to a Russia–Lithuania bilateral investment treaty. A New York federal district court granted the Fund's §1782 discovery application seeking documentary materials and testimony from two non-parties relating to their role in the alleged expropriation of the bank. In affirming the district court order, the Second Circuit engaged in what it characterized as a 'functional approach' to determine whether this arbitral proceeding between an investor and a foreign State pursuant to a bilateral investment treaty constituted a 'proceeding in a foreign or international tribunal'.[72] Although the Court of Appeals acknowledged that this arbitral panel, made up of private parties, functioned independently from any government, it nonetheless concluded that because the panel was convened pursuant to a bilateral investment treaty that is considered important to international relations, it constitutes a foreign or international tribunal 'consistent with § 1782's modern expansion to include intergovernmental tribunals'.[73] The Second Circuit maintained that it was not creating a 'bright-line rule' that all arbitrations conducted pursuant to a bilateral investment treaty would qualify as a 'foreign or international tribunal',[74] but it is difficult to fathom from this opinion as to when they would not. A petition for certiorari was filed by the non-parties in *Fund*,[75] presenting the question of whether an 'ad hoc arbitration to resolve a commercial dispute between two parties is a foreign or international tribunal under 28 USC § 1782(a) where the arbitral panel does not exercise any governmental or quasi-governmental authority'. The petition pointed out that the US Government, in a Supreme Court amicus brief filed in the now-dismissed *Servotronics* case, had argued that neither private commercial arbitration nor investor-State arbitration qualified as a 'foreign or international tribunal' within the meaning of §1782. Along with another petition involving commercial arbitration, the Supreme Court granted certiorari to both petitions to consider whether private commercial and/or investor-State tribunals come within §1782.[76]

[72] ibid 225–26.
[73] ibid 229.
[74] ibid 233.
[75] See Petition for a writ of certiorari, *AlixPartners, LLP v The Fund for Protection of Investor Rights in Foreign States* 2021 WL 4705742 (2021) (No 21–518).
[76] See *ZF Automotive US Inc v Luxshare Ltd,* Petition for certiorari filed 10 September 2021, 142 S Ct 637 (2021). That petition came after a district court had ordered discovery, presumably on the authority of the earlier Sixth Circuit decision in *Latif*, discussed at nn 40–43, 45–46. Petitioners in *Fund* argue that its petition is a better vehicle to clarify the entire landscape. Both cases were argued in the Supreme Court on 23 March 2022.

D. Wherefore of Rules and Standards

In one sense, the issue of whether private commercial arbitration and investor-State arbitration fit within the definition of 'foreign or international tribunals' for purposes of §1782 is a straightforward question of statutory interpretation. Resolution of such questions employs the traditional tools of statutory interpretation—plain text, legislative history, legal commentary, purpose, and policy. How the circuit split is resolved will also have implications for the ongoing tension in private international law about the desirability of rules over standards.

The Supreme Court has various options for resolving the statutory issue. The Court could exclude both private commercial and investor-State arbitration from the scope of the statute, thereby adopting a clear rule. Alternatively, it might find that all such tribunals come within §1782 and then offer only an 'approach' to address concerns about the use of discovery in these different contexts.[77] Or the Court could draw a distinction between investor-State arbitration and private commercial arbitration and include investor-State tribunals[78] and exclude private arbitral tribunals from the scope of the statute. Even then, investor-State arbitration may present its own complication since it can take different forms.[79] Finally, the Court could adopt the 'functional approach' used by the Second Circuit in

[77] In *Intel*, the Court adopted such an 'approach' and declined to provide 'supervisory rules' to guide the process.

[78] Lower courts appear to permit §1782 assistance in arbitrations conducted pursuant to a bilateral investment treaty. See eg *Fund* (n 71); *In re Chevron* 633 F3d 153 (3d Cir 2011); *In re Veiga* 746 F Supp 2d 8 (DDC 2010); *In re Application of Oxus Gold PLC,* No Misc 06–82, 2006 WL 2927615 (DNJ 11 October 2006). See generally Strong (n 24) 322; see also Roger Alford, 'Ancillary Discovery to Prove Denial of Justice' (2012) 53 Va J Intl L 127, 136–37, n 56 (asserting that after *Intel* lower courts unanimously apply §1782 to arbitrations brought under BITs, and compiling such cases).

[79] Investor-State arbitration may be treaty-based via bilateral or multilateral investment treaties, contract-based, or statute-based. For a further explanation, see Chapter 5, Investor-State Arbitration, Introductory Note, Arbitration Restatement (n 34). Critically, however, a tribunal in an investor-State arbitration derives its authority from the consent of both parties, ie a host State and an investor, and in that sense can be said to be 'private'. Another distinction might be drawn between investment arbitration conducted pursuant to the self-contained regime established by the ICSID Convention and other rules. Specifically, art 26 of the ICSID Convention which excludes remedies outside of ICSID could be read to preclude a party's access to a national court for assistance in evidence taking. See Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) art 26, 162–78; Gabrielle Kaufmann-Kohler and Michele Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer 2020) 118–21, 137–40. In *In re Application of Caratube International Oil Co, LLP* 730 F Supp 2d 101 (DDC 2010), the Court declined to order discretionary discovery in ICSID arbitration based on the US–Kazakhstan bilateral investment treaty, but refused to decide conclusively whether that tribunal was 'a foreign or international tribunal' for the purpose of §1782. Subsequently, lower courts have tended to include treaty-based ICSID tribunals within §1782. See eg *In re ex parte Eni SpA,* No 20-mc-334-MN, 2021 WL 1063390 (D Del 19 March 2021) (granting §1782 discovery in support of ICSID arbitration pursuant to the Netherlands–Nigeria BIT); *Islamic Republic of Pak v Arnold & Porter Kaye Scholer LLP* 2019 WL 1559433 (DDC 10 April 2019) (denying discovery in support of ICSID annulment proceedings, but agreeing that ICSID tribunals conducted pursuant to bilateral investment treaties 'regularly' qualify as international tribunals under §1782); *In re Republic of Turkey* Civil Action No 19-20107 (ES) (SCM), 2020 WL 4035499 (DNJ 17 July 2020) (holding that an ICSID tribunal in arbitration pursuant to a multilateral treaty falls within §1782, but denying discovery on a discretionary basis).

Fund and *Hanwei Gou* and attempt to identify those characteristics that define a 'State-sponsored' or 'governmental' tribunal that would bring a tribunal within §1782. However, that choice inevitably involves the application of 'standards' and is likely to produce inconsistency in the lower courts, as the case law already indicates. The Fifth Circuit in the pre-*Intel Biedermann* case concluded that arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, apparently based on a claim pursuant to the US–Kazakhstan bilateral investment treaty, was private arbitration outside §1782,[80] although the opinion in *Biedermann* did not identify the investment-treaty nature of the claim. The Fourth Circuit in *Servotronics* held that the UK private commercial arbitration panel in question was a 'State-sponsored' or 'governmental' tribunal because it had 'government-conferred authority' pursuant to the English Arbitration Act.[81] The Seventh Circuit in its *Servotronics* opinion rejected that characterization of the same arbitral tribunal out of hand.[82] The Second Circuit in *Hanwei Guo* had reached a similar conclusion as regards CIETAC, but a different Second Circuit panel viewed *Fund*'s UNCITRAL tribunal in a dispute under the Russia–Lithuania bilateral investment treaty as an intergovernmental tribunal.[83] Should the Supreme Court endorse such a 'functional approach', lower courts will be tasked with determining when a particular tribunal can be characterized as 'private' or some type of governmental tribunal.

And even if the Supreme Court interprets §1782 to encompass both commercial and investor-State arbitration, lower courts will still need to exercise their discretion in deciding whether or not to order judicial assistance. In such a regime, is the only option a 'fuzzy multi-factor' test of *Intel* to guide their decision-making?[84] Perhaps not. The Supreme Court itself could offer a set of guidelines, such as those suggested by a New York City Bar Association Report,[85] as to when an order of judicial assistance is appropriate for use in support of arbitration.[86] One possible presumptive rule would be to authorize discovery only if the arbitrator(s) made or approved the request. Although such a rule may be in tension with the §1782 statutory language of 'any interested person', it would provide greater guidance than the mere recitation of the *Intel* factors. It is also consistent with two of the *Intel* discretionary factors: receptivity of the foreign tribunal to US assistance and

[80] *Biedermann* (n 28) 883. However, the investment-treaty nature of the case is not referenced in the opinion. See n 36.

[81] *Servotronics* (n 47) 214.

[82] See *Servotronics* (n 62) 693, n 2.

[83] See *Hanwei Guo* (n 55) 107.

[84] That characterization of the *Intel* factors comes from Gary Born and Peter Rutledge, *International Civil Litigation in US Courts* (Wolters Kluwer 2018) 1062.

[85] Bar Committee Report (n 5).

[86] See David Zaslowsky, '3 Ways to Let Arbitrations Control International Discovery', Law360.com (21 May 2020), <www.law360.com/articles/1275559/3-ways-to-let-arbitrators-control-int-l-arbitration-discovery> accessed 4 April 2022.

concern about circumventing truth-gathering restrictions.[87] Indeed, courts have themselves indicated that they first want to hear from the arbitrators as to whether the arbitrators desire the information being sought under §1782.[88] However, the Supreme Court has been reluctant to impose such prophylactic rules when the text of a statute does not include restrictions, as evidenced by the *Intel* decision itself.

E. A Comparison with UK Practice under the 1996 Arbitration Act

As noted above, a ruling by the US Supreme Court that §1782 extends to private commercial and/or investor-State arbitration would leave numerous other details about the statute still unanswered.[89] Even a negative decision with respect to both types of arbitral tribunals would not necessarily mean a conclusive end to the broader debate. If the availability of US judicial assistance for use in arbitration were to be strongly favoured by the international arbitration community, legislative action by Congress to broaden §1782 is always possible. Indeed, the legislative option might be the preferable one. Specific limitations appropriate to the unique setting of private commercial and investor-State arbitration could be included in such legislation. Recall that judicial assistance under §1782 generally enables a party to obtain evidence from non-parties for use at a trial or hearing and thus is not only about pre-trial discovery.[90] A request for judicial assistance by a party to an arbitration to obtain information from a non-party might be more palatable if its use were confined to the presentation of evidence in a hearing before the arbitrators rather than for pre-trial discovery that is disfavoured by many arbitration regimes. Such a distinction is drawn to some extent in §7 of the Federal Arbitration Act, as well as in the 1996 English Arbitration Act.

[87] *Intel* (n 4) 264–65.

[88] See eg *InterGlobe Enters Private Ltd v Khanna,* 19-mc-595-PWG (D Md 3 February 2020); *Jankovska v PKB Privatbank SA,* No 19-mc-80208-VKD, 2019 WL 4040552 (ND Cal 26 August 2019) (weighing the fact the tribunal requested the discovery itself in favour of issuing a subpoena under §1782); *In re Finserve Group Ltd,* CA No 4:11-mc-2044-RBH, 2011 WL 5024264 (DSC 20 October 2011) (raising concerns over §1782 discovery when there was no indication the arbitrators would be receptive of it); *Babcock Borsig* (n 24) 241 (requiring proof the tribunal would make use of the discovery prior to issuing an order under §1782); *Hallmark* (n 24) 957 (finding the arbitrator's stated 'receptivity' to the discovery weighed in favour of applying §1782 to arbitration). As noted in *Hallmark*, the Supreme Court's opinion in *Intel* listed as one of its factors the 'reciprocity of the foreign government or the court or agency abroad to US federal-court judicial assistance' (*Intel* (n 4) 264). Professor Smit, in arguing that §1782 does extend to private international tribunals, also asserted 'that judicial assistance should not be rendered until and unless the arbitral tribunal had authorized or made the request for such assistance'. See Hans Smit, 'American Judicial Assistance to International Arbitral Tribunals' (1997) 8 Am Rev Int'l Arb 153, 153.

[89] See nn 77–89 and accompanying text.

[90] See nn 33–34 and accompanying text.

That English Arbitration Act includes detailed provisions directed to 'evidence gathering' by English courts for use in arbitration. Section 44 of the Act lists 'court powers exercisable in support of arbitral proceedings'[91] and states that, unless otherwise agreed by the parties, with respect to a list of specific matters, the court has the same power to make orders in relation to arbitral proceedings as it has for legal proceedings.[92] Two express limitations are operative. First, the opening words in section 44(1) are 'unless otherwise agreed by the parties'. Second, section 44(4) states that, except in a case of urgency, the court shall act only on the application of a party made with the permission of the tribunal or the agreement in writing of the parties. Notice of the application must be given to the parties and to the tribunal.

The specific powers that a court can order with respect to an arbitration are listed in section 44(2)(a) through (e); one of those matters is 'the taking of the evidence of witnesses'.[93] It should be noted that this judicial power is limited to obtaining evidence or documents for *use at trial* and does not include pre-trial discovery. That said, there is not always a clear line between the two in arbitration, but the distinction is important in understanding what assistance an English court is willing to provide. Notwithstanding such circumscribed use, the reach of section 44 to obtain information from a non-party located in England for use in a foreign-seated arbitration was not always clear. However, in a recent case, *A and B v C, D, and E (taking evidence for a foreign seated arbitration)*,[94] the English Court of Appeal held that section 44 applied in that situation.[95] The first instance judge had determined that the powers identified in section 44 did not extend to orders against non-parties, and therefore the judge did not reach the issue of the propriety of issuing an order in aid of a foreign arbitration. The Court of Appeal reversed and held that at least with respect to the matter of 'taking of evidence', the court's authority extended to non-party witnesses.[96] The Court of Appeal went on to consider whether such evidence-gathering pursuant to section 44 was permitted if the statement was for use in aid of a foreign-seated arbitration. In answering that question in the affirmative, the Court relied on section 2(3) of the Arbitration Act,[97] which provides that the powers conferred under sections 43 and 44 apply 'even if the seat of the arbitration is outside England and Wales or northern Ireland'.[98]

[91] English Arbitration Act, 1996, ch 23, s 44.
[92] ibid §44(1).
[93] ibid §44(2)(a).
[94] [2020] EWCA Civ 409, [2020] 1 WLR 3504.
[95] The purpose of obtaining the information was for use in the foreign-seated arbitration because the witness was not amenable to service in the New York arbitration. The court permitted the 'deposition' of the non-party, but bear in mind that under English law a deposition is only aimed at securing evidence for trial and is not appropriate as the kind of 'discovery' device used in US law. CPR 34.8 authorizes a court to order evidence to be given by deposition.
[96] *A* (n 94) [49]. The Court of Appeal did not express a view as to whether a court can make orders against third parties with respect to the other powers listed in s 44(2).
[97] ibid [36]–[39].
[98] English Arbitration Act, 1996, ch 23, s 2(3).

That section also states that a court may refuse to exercise any such power if, when the seat is outside of the UK, it would be inappropriate to do so.[99] The Court of Appeal rejected the argument that because an English court could not, at the request of the parties, order a witness statement in aid of foreign proceedings, it also could not issue such an order in aid of foreign arbitral proceedings.[100] The Court of Appeal explained that with respect to foreign court proceedings, the 1975 Act implementing the Hague Evidence Convention authorizes only a court or tribunal (and not the parties) to make a request for information via a letter of request.[101] But an arbitral tribunal cannot make such a request because it is not considered a 'tribunal' within the meaning of the English Act,[102] which states that an application for a letter of request must be made 'by or on behalf of a court or tribunal'.[103] The Court viewed section 44(2) of the English Arbitration Act as the only available mechanism through which a witness statement of a non-party located in England could be obtained for use in the foreign arbitral proceeding and accordingly held it to apply.

Other countries have similar legislation that authorizes judicial assistance in foreign arbitrations.[104] The German Arbitration Law provides that an arbitral tribunal, or a party, with the consent of the arbitral tribunal, may request a court to provide assistance in taking evidence where the arbitral tribunal is not authorized to act.[105] Such an application is authorized even if the seat of the arbitration in located outside of Germany.[106] However, as in England, the 'taking of evidence' is for use in the main proceeding and not for discovery purposes. Thus, any analogy to present 28 USC §1782 is imperfect, but perhaps offers insights for developing an alternative regime.

F. A US Legislative Solution?

Addressing Arbitration Specifically

This comparative look at modern arbitration statutes offers a possible model for the US to follow by enacting comprehensive federal legislation for international

[99] ibid.
[100] *A* (n 94) [39].
[101] ibid [38].
[102] *Commerce and Industry Insurance Co of Canada v Certain Underwriters of Lloyd's of London* [2002] 1 WLR 1323. The Act provides that an application for a letter of request must be made 'by or on behalf of a court or tribunal'.
[103] Evidence (Proceedings in Other Jurisdictions) Act of 1975, s 1(a).
[104] See generally Oliver Knöfel, 'Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration: A German Perspective' (2009) 5 J Priv Intl L 281.
[105] Code of Civil Procedure (*Zivilprozessordnung*) 2005 (Germany), §1050, translation at <www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> accessed 4 April 2022.
[106] Ibid §1025(2).

arbitration. The 1925 Federal Arbitration Act (Chapter 1) is severely outdated and its interface with both Chapters 2 and 3, implementing the New York and Panama Conventions, is complex and unclear. A legislative revision and overhaul of Chapters 1, 2, and 3 of the Federal Arbitration Act could address not only the very limited issue of US discovery for use in international arbitrations, but a variety of other complex issues in US international arbitration law. Many of those questions are discussed in the recent ALI Project to restate US international arbitration law in the Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration.[107] Although it is possible that the US Supreme Court could resolve some of those questions within the present statutory scheme,[108] a comprehensive Federal International Arbitration law—in the model of the 1996 English Arbitration Act—would be a better option. A more modest suggestion would be to amend 28 USC §1782 to legislatively answer the question of whether US judicial assistance, and specifically pre-hearing discovery, should be made available to international arbitral tribunals, and if so, at whose request. In addition, several other controversial issues in the application of §1782, discussed below, as well as other management techniques,[109] could be addressed in this more limited legislation.

Additional Issues under 28 USC §1782

An amendment to 28 USC §1782 could clarify other points of statutory interpretation of §1782 in its application to foreign proceedings of any type, whether that proceeding is a court, administrative agency, or arbitral tribunal. Two important issues have arisen with respect to the application of §1782 in aid of both judicial and arbitral proceedings: (i) whether the document(s) that a §1782 petitioner seeks must be physically located inside the US; and (ii) whether a person subject to a §1782 application 'resides' or is 'found' within the district. In some cases, but not all, these issues may overlap. For example, if the person asked to produce the information is a US corporation with its principal place of business in the district, such corporation would definitely be said to 'reside' in the district.[110] Nonetheless, if the information sought were not located in the US but abroad, the question would

[107] See Arbitration Restatement (n 34).

[108] Among the more significant unresolved issues involving international arbitration are: (i) whether the grounds for annulment of a Convention award *made in the US* are those in Chapter 1 of the FAA or the grounds listed in the Convention; (ii) whether an arbitrator or a court decides whether an arbitration clause authorizes class arbitration; (iii) what country or State's law is law applicable to the validity of an arbitration agreement; (iv) what bases of jurisdiction are necessary to bring an action to recognize and enforce a foreign arbitral award; (v) whether *forum non conveniens* can be invoked to dismiss an action for recognition and enforcement of an award.

[109] See Yanbai Andrea Wang, 'Exporting American Discovery' (2020) 87 Chi L Rev 2089, 2146–54.

[110] Cf *Daimler AG v Bauman* 571 US 117, 137 (2014).

still arise as to whether the statute extended to reach such information. On the other hand, if a foreign party possesses information located abroad but has only an office or limited contacts in the district, a determination that the corporation is not subject to jurisdiction in the district would eliminate the need to answer the question of whether information located abroad is within the scope of the statute.[111] However, neither of these issues—the extraterritorial scope of §1782 or the requirements for obtaining jurisdiction over a person to obtain an order under §1782—has found a conclusive answer in the courts.

Recently, two Courts of Appeals have held that documents, even if located abroad, are within the scope of §1782. The Eleventh Circuit in *Sergeeva v Tripleton Intern, Ltd*[112] rejected the argument that a request for documents located in the Bahamas was impermissibly extraterritorial. The Court emphasized that the statutory text of §1782 authorizes production of documents 'in accordance with the Federal Rules of Civil Procedure' and that Federal Rule 45 requires subpoenaed parties to produce documents and electronically stored information in the parties' possession, custody, or control.[113] Because the target of the subpoena, Trident Atlanta, was one of a group of companies that offered clients international financial planning through 'production and client liaison companies' around the world, the Court held that Trident had control of documents even though they were in the physical possession or custody of a related liaison Bahamian company.[114] The Court of Appeals for the Second Circuit, in *In re del Valle Ruiz*,[115] citing *Sergeeva*, also held that documents located abroad were within the scope of §1782. *Ruiz* involved an application for discovery directed to both the Spanish bank, Santander and its New York-based affiliate, Santander Investment Securities Inc; the documents sought were located abroad. Although the Court of Appeals determined that it could not exercise jurisdiction over the Spanish Bank Santander itself, the New York-based Santander Investment Securities Inc was clearly 'found' within the district.[116] The Court of Appeals then proceeded to analyse the question of whether information located abroad is within the scope of §1782. In holding that it is, the Court of Appeals first responded to Santander Investment Securities Inc's argument that the presumption of extraterritoriality operates as a per se bar against §1782 discovery. Citing the recent Restatement (Fourth) of Foreign Relations,[117] the Court of Appeals viewed the presumption as pertaining primarily to the

[111] See eg *In re Petrobras Securities Litigation* 393 F Supp 3d 376 (SDNY 2019) ('it may be the case that in the post-*Daimler* context, personal jurisdiction provides the simpler doctrinal tool' to address the concern as to whether §1782 authorizes courts to order the production of evidence located outside US territory).

[112] 834 F3d 1194 (11th Cir 2016).

[113] Ibid 1200.

[114] Ibid 1201.

[115] 939 F3d 520 (2d Cir 2019).

[116] Ibid 531.

[117] Restatement (Fourth) of the Foreign Relations Law of the United States, §404 cmt a and n 3 (Am Law Inst 2019).

regulation of conduct or providing a cause of action, and thus not applicable in this context.[118] Even if the presumption did apply, the Court noted that it would view the presumption as having been rebutted by the provision in the statute that the order should issue 'in accordance with the Federal Rules of Civil Procedure',[119] thereby reaching documents abroad if in the 'possession, custody or control' of the person to whom a discovery order is directed.[120] The Court of Appeals in *Ruiz* acknowledged that lower courts in the Circuit were divided on whether §1782 can be used to reach documents stored overseas.[121] Indeed, a pre-*Intel* decision of the Second Circuit, *In re Sarrio*,[122] had indicated in dicta that §1782 did not reach documents located abroad.[123] However, the Court of Appeals in *Ruiz* rejected that dicta and discounted language in the Senate Report that referred to 'oral and documentary evidence *in the United States*'[124] on which *Sarrio* had relied. Nor was the Court of Appeals persuaded by a 1998 article by Professor Hans Smit who wrote that §1782 was not intended to become a clearing house for information from courts and litigants all over the world.[125] The Court of Appeals explained that 'given the plain meaning of the statute … these considerations were insufficient to win the day'.[126]

A final limiting factor for obtaining a discovery order pursuant to §1782 is the requirement that the person against whom the order is sought 'resides' or is 'found' within the district. Like so many other issues of interpretation involving this statute, there is no clear answer as to the meaning of those terms. The best understanding of the requirement is that the object of the discovery request must be amenable to jurisdiction in the district. The language of 'resides' or 'found' traditionally referred to the grounds for general jurisdiction.[127] An individual would be subject to jurisdiction if he resided in the district or was served with process while physically there.[128] A corporation pre-*Daimler* would 'reside' or be 'found' in the district if it

[118] *Ruiz* (n 115) 532.

[119] Ibid 532, n 14.

[120] See *Société Internationale pour Participations Industrielles et Commerciales, SA v Rogers* 357 US 197, 199–200 (1958); *Shcherbakovskiy v Da Capo Al Fine, Ltd* 490 F3d 130, 138 (2d Cir 2007). See also *In re Plygon Global Partners*, No 21-mc-007 WES, 2021 WL 1894733 (DRI 11 May 2021); *In the Matter of Application of De Leon*, No 1:19-mc-15, 2020 WL 1180729 (SD Ohio 12 March 2020); *Illumina Cambridge Ltd v Complete Gnomics, Inc*, No 19-mc-80215-WHO(TSH), 2020 WL 820327 (ND Cal 19 February 2020); *In re Hulley Enters,* 358 F Supp 3d 331, 344 (SDNY 2019); *In re Ferrer*, No 18-20226-CIV-O'SULLIVAN, 2018 WL 3240010 (SD Fla 3 July 2018).

[121] Cf *In re Godfrey* 526 F Supp 2d 417, 423 (SDNY 2007) and *In re Microsoft Corp* 428 F Supp 2d 188, 194 n 5 (SDNY 2006) (no extraterritorial application) with *In re Accent Delight International Ltd*, No 16-MC-125 (JMF), 2018 WL 2849724 (SDNY 11 June 2018) (location of documents abroad does not establish a per se bar to discovery).

[122] 119 F3d 143 (2d Cir 1997).

[123] ibid 147 ('there is reason to think that Congress intended [the statute] to reach only evidence located within the United States').

[124] Sen Rep No 88-1580 (1964), reprinted in 1964 USCCAN 3782, 3788 (emphasis added).

[125] See Hans Smit, 'American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the USC Revisited' (1998) 25 Syracuse L & Com 1, 11.

[126] *In re del Valle Ruiz* 939 F3d 520, 532-33 n 16 (2d Cir 2019).

[127] See *Daimler* (n 110) 137.

[128] See *Burnham v Superior Court of Cal* 495 US 604, 611–12 (1990).

were incorporated there, had its principal place of business there, or had systematic and continuous activities there.[129] As Professor Hans Smit explained in a 1998 article, the statutory purpose of the requirement was to create adjudicatory authority to issue an order under §1782. He explained that in so far as the term applied to legal rather than natural persons, 'it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence'.[130] However, following the Supreme Court's decision in *Daimler*, the assertion of general jurisdiction over a corporation on the basis of its systematic and continuous activities does not satisfy the constitutional standard for due process—at least with respect to a plenary action.[131] Whether the same constitutional test for general jurisdiction applies in a §1782 application to obtain information from a corporation is unclear. As I have argued in earlier writing,[132] the *Daimler* standard should not be a one-size-fits-all constitutional limitation. Because the target of a §1782 application is merely called upon to offer up information or documents rather than to litigate a plenary claim, the burden on that person is significantly less than the burden of litigation would be with respect to a plenary claim.[133] Given the lesser burden, perhaps the pre-*Daimler* 'systematic and continuous activities' standard ought to satisfy the constitutional threshold for adjudicatory authority for a court to make an order to produce information. On the other hand, where foreign parties, in particular, are the object of the request and the information is located abroad, those parties may be subject to the competing laws of another sovereign and subject to prosecution if not relieved of the US order to produce under the doctrine of sovereign compulsion, discussed earlier. But perhaps that issue ought to be separated from the question of jurisdiction and resolved through specific analysis of the propriety of a discovery order issuing.[134]

Most lower courts have reflexively held that the *Daimler* constitutional standard limits the assertion of general jurisdiction when applying the 'resides' or 'is found' requirement in §1782.[135] The Court of Appeals for the Second Circuit addressed

[129] See eg *Godfrey* (n 121) ('Insofar as the word "found" is applied to corporations, "it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence" '); *In re Inversiones y Gasolinera Petroleos Valenzuela S de RL*, No 08–20378–MC, 2011 WL 181311, at *8 (SD Fla 19 January 2011).

[130] See Smit (n 125) 294–96.

[131] *Daimler* (n 110) 137.

[132] See Linda Silberman and Aaron Simowitz, 'Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?' (2016) 91 NYU L Rev 344. The primary emphasis in that article was that the *Daimler* constitutional standard should not apply to actions for recognition and enforcement of foreign arbitral awards and foreign judgments.

[133] See eg *First Am Corp v Price Waterhouse LLP* 154 F3d 16, 20 (2d Cir 1998) ('a person who is subjected to liability by service of process far from home may have better cause to complain of an outrage to fair plan than one similarly situation who is merely called upon to supply documents or testimony').

[134] See eg *Shcherbakovskiy* (n 120) 139 (finding foreign law relevant to compliance with a discovery order).

[135] See eg *Petrobras* (n 111); *In re Fornaciari,* No 17-mc-521, 2018 WL 679884, at *2 (SDNY 29 January 2018) ('Although § 1782 does not define what it means to reside or be found in a district, court in this District—including this one—have held that at minimum, compelling an entity to provide discovery under § 1782 must comport with constitutional due process'). See also *In re Sargeant* 278 F Supp

the issue in the same *Ruiz* case,[136] concluding that the 'resides or is found' language was not limited to acquiring general jurisdiction over the target of the request and that specific jurisdiction could suffice if its requirements were met. However, the Court agreed with the district court that the constitutional due process limits on personal jurisdiction required for both general and specific jurisdiction also applied in the context of §1782.[137] The Court relied on a prior Circuit precedent, *Gucci America, Inc v Weixing Li*,[138] which held that a court must have personal jurisdiction over a non-party in order to compel it to comply with a valid discovery request pursuant to Rule 45 of the Federal Rules.

In the context of ascertaining specific jurisdiction in *Ruiz*, the Court of Appeals rejected the argument that a categorically lower showing of due process could justify jurisdiction to obtain discovery from a non-party, such as the foreign bank in this case.[139] However, it did accept that when applying specific jurisdiction, it was sufficient for purposes of due process that 'the nonparty's contacts with the forum go the actual discovery sought rather than the underlying cause of action'.[140] In the context of a §1782 request for discovery from a non-party, the Court of Appeals stated that 'where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery'.[141] The Court recognized that the terminology of causation was an awkward fit for discovery, but argued that 'the focus on the relationship between a § 1782 respondent's forum contacts and the resulting availability of the evidence is a workable translation of the normal personal-jurisdiction framework'.[142] Applying that analysis, the Court of Appeals found that the in-forum conduct of Bank Santander in finding a buyer did not relate to the bulk of discovery sought that pertained to the forced sale of Banco Popular.[143]

A district court case, *In re Petrobras Securities Litigation*,[144] decided prior to the Second Circuit decision in *Ruiz*, used a similar test to determine whether specific

3d 814, 820 (SDNY 2017); *Australia & New Zealand Banking Grp Ltd v APR Energy Holding Ltd,* No 17-MC-00216 (VEC), 2017 WL 3841874, at *2 (SDNY 1 September 2017). A few district courts post-*Daimler* appear to have issued a discovery order against entities who carried on substantial activities in New York, stating that those entities were 'found' in New York. See eg *Ayyash v Crowe Horwath LLP,* No 17-mc-482(AJN), 2018 WL 1871087, at *2 (SDNY 17 April 2018); *In re Kleimar NV* 220 F Supp 3d 517 (SDNY 2016) (relying on various activities of the company to satisfy the requirement that it is 'found' in the district).

[136] *Ruiz* (n 115).
[137] ibid 528.
[138] 768 F3d 122 (2d Cir 2014).
[139] The Court of Appeal did not consider whether the standard for general jurisdiction over the bank for purposes of discovery was different because the plaintiffs did not make that argument on appeal. See *Ruiz* (n 115) 528, n 9.
[140] ibid 530.
[141] ibid.
[142] ibid 530, n 12.
[143] ibid 531.
[144] *Petrobras* (n 111).

jurisdiction was satisfied with respect to a §1782 request for documents from a Brazilian defendant for use in an arbitration in Brazil. Noting that the Circuit in *Gucci* had embraced specific jurisdiction in the context of subpoenas, the court looked to the purposeful conduct of the party in the forum and whether the discovery requested related to that conduct. The district court ruled that the argument for specific jurisdiction fell short in two ways. The conduct by Petrobras that was the subject of the Brazilian arbitration occurred entirely in Brazil and it was the Brazilian conduct from which the discovery order arises.

G. Conclusion

It is difficult to predict how the Supreme Court will eventually decide the issue of whether judicial assistance pursuant to §1782 extends to investor-State and/or commercial arbitration. The Court's approach is likely to be a purely textual one, or perhaps if the Justices find the statutory language ambiguous, they will engage with the legislative history. But the possibility for nuance, such as drawing a distinction between the use of information for 'discovery' and for a 'hearing' or requiring permission of the arbitral tribunal to make an application, is unlikely. An amendment to §1782 could provide answers to many of the questions that have been raised about §1782 judicial assistance more generally, including the specific issue as to whether and how judicial assistance might be used in arbitration. My thinking on this subject has been influenced by my co-teaching with Lawrence and my many discussions with him about these issues. Whether or not he will agree with my overall observations and conclusions only he can say, and so I look forward to those conversations in the coming years.

H. Postscript

On 13 June 2022, as this chapter went to print, the United States Supreme Court decided the two §1782 cases before it, *ZF Automotive US, Inc v Luxshare* and *AlixPartners, LLP v Fund for Protection of Investors' Rights in Foreign States*. In a unanimous opinion written by Justice Barrett, the Supreme Court held that neither the private commercial tribunal nor the investor-State tribunal involved in the cases came within the meaning of a 'foreign or international tribunal' pursuant to §1782. The Supreme Court found that §1782 was intended to reach only governmental or intergovernmental bodies. The private commercial arbitration panel (DIS) seated in Germany could not be said to be 'governmental' merely because it was subject to German Arbitration Law. The ad hoc arbitration panel established pursuant to a bilateral investment treaty did not possess governmental authority merely because nations have agreed in such a treaty to offer investors

the option of bringing the dispute to a private arbitration panel; the relevant question was whether the nations intended that the ad hoc panel exercise governmental authority, and the Supreme Court found that they did not. The Supreme Court viewed the question with respect to investor-State arbitration as a harder question but nevertheless opted for a clear rule that excludes all arbitral tribunals without governmental authority from the scope of §1782. As I have suggested in my discussion of the developments leading up to this case, the Supreme Court's decision has the benefit of leaving further action on this issue to Congress.