Chapter III.D

DISCOVERY IN AID OF FOREIGN PROCEEDINGS: 28 U.S.C. § 1782

Eric Sherby*

Discovery under 28 U.S.C. § 1782[1] is counterintuitive. It is common knowledge that the federal judiciary is extremely busy, yet through § 1782, Congress has essentially invited litigants before non-American tribunals (most, but not all, of whom are non-American citizens) to come into the courts of the United States to seek evidence for use before foreign tribunals. Given this paradox, it is worth exploring, at the outset of this chapter, the *raison d'être* of § 1782.

Most courts that have addressed the issue recognize that there are "twin" purposes for § 1782 discovery: (1) Congress wanted to lead the way, by example, for other nations to make international evidence-taking available, and (2) Congress wanted to ensure that American litigants before non-U.S.

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1. 28 U.S.C. § 1782, titled "Assistance to foreign and international tribunals and to litigants before such tribunals," provides the following:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

courts would have the ability to obtain evidence *in the United States*, to the extent needed, to present before those non-U.S. courts.[2]

Because Congress wanted the United States to lead by example, there is no requirement und § 1782 that the country of the party requesting discovery—or the country of the court in which evidence would be used—be one that has any kind of reciprocal arrangement with the United S

Part I of this chapter discusses the statutory prerequisites to the issuance of an order pur § 1782. Part II discusses the seminal Supreme Court case construing § 1782, *Intel Corp. v. Micro Devices, Inc.*,[4] which both refined those prerequisites and set forth discretionary f considered before a court grants § 1782 discovery. Part III discusses the issue that, in era, has been probably the most controversial one concerning the statute—namely, ery under the section may be available in connection with non-American arbitra cusses the geographical reach of § 1782. Part V discusses miscellaneous practical litigant considering bringing a § 1782 application.

I. STATUTORY REQUIREMENTS

The requirements of § 1782 are relatively straightforward. The statut a district court may order relief thereunder:

> (1) the request must be made by a foreign or international trib (2) the request must seek evidence, whether it be the testimony duction of a document or other thing; (3) the evidence must b international tribunal; and (4) the person from whom disco the district of the district court ruling on the application fo

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2. *See* Texas Keystone, Inc. v. Prime Natural Resources, Inc., 6 Co. v Mangone, 90 F.3d 38, 41 (2d Cir. 1996) ("twin goals" c procedures for the benefit of tribunals and litigants involved ir countries by example to provide similar means of assistanc 99–100 (2d Cir. 1992), *cert denied*, 506 U.S. 861 (1992); s Civil Matters, 42 F.3d 308, 310 (5th Cir. 1995) (Congre

In what might have been a tongue-in-cheek obser aim of the statute was to increase the business of A 591, 594 (7th Cir. 2011).

3. *See In re* Malev Hungarian Airlines, 964 F but demands nothing in return").

The lack of reciprocity raises a fundam the Convention of 18 March 1970 on the Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N before a non-American court? As dis whenever a § 1782 application is cc the Hague Evidence Convention.

4. 542 U.S. 241 (2004).

5. The text of the statute

6. *In re* Clerici, 481 F Nordeste, LTDA, 2012 Fleischmann v. McDon

Despite the enum of three:

> We have discovery i the disco interna

Schmitz IPCO a list

Litigation under § 1782 has generally been focused on three issues: (1) who is an "interested person"; (2) what is a "proceeding in a foreign or international tribunal"; and (3) where is a person "found in" a U.S. judicial district such that he or she might be required to provide discovery?[7]

A. "Interested Person"

The legislative history to § 1782 makes clear that the term "interested person" includ the non-U.S. litigation,[8] and, not surprisingly, numerous cases have so held.[9] In *Intel* Court expanded that rule by holding that one who has significant "participation ceeding "possesses a reasonable interest in obtaining judicial assistance, and there interested person" within the section.[10] Before *Intel*, the Second Circuit held that person" may include an agent of a party to the non-U.S. litigation.[11] That sa held (post-*Intel*) that such rule has its limits—a sister corporation generally person" concerning non-U.S. litigation in which its sister is a party.[12]

A relative of a person who had died intestate in a foreign country ested person in connection with proceedings to adjudicate the decede

There is *no* requirement upon a § 1782 applicant to request court.[14]

B. "International or Foreign Trib

As described in greater detail in Parts II and III, the Supr one within the meaning of the section when it acts as a ous (and common) "tribunal" within the meaning of § outside the United States.

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7. *See infra* text accompanying notes 90–94

8. *See* Lancaster Factoring Co. v. Mangor (1964), reprinted in 1964 U.S.C.C.A.N. 378

9. *Lancaster*, 90 F.3d at 42; *see also* (Tanzanian public officials of villages th real property were "interested persons the fact that those officials directe Kreke Immobile KG, 2013 WL qualifies as an 'interested perso Oct. 23, 2013) ("[a]pplicants Futurecorp Int'l, 2012 U.S. 'interested person' under

10. *Intel*, 542 U.S.

11. *See Lancaster*

12. RTI Ltd. v *see also* German (when the par U.S. tribuna ested pers contrary

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It has been held that a specialized or subject-matter court outside the United States, such as a labor court, is a tribunal,[15] as is a patent office, so long as its proceedings are adversarial.[16]

The Second Circuit has held (pre-*Intel*) that a non-U.S. bankruptcy (insolvency) cour which the value of the debtor's estate is adjudicated qualifies as a tribunal within the mean the section.[17] Subsequently (also pre-*Intel*), that same court held that, if the case outside the States is merely an "enforcement proceeding"—albeit before a court with bankruptcy juris the non-U.S. case is not a "proceeding" within the meaning of § 1782.[18]

As described in Part III, in the post-*Intel* era, the greatest controversy concernir centered on whether an arbitrator is to be considered a *tribunal* within the meaning o

C. "Found in the District"

Under § 1782, in order for a person or a business entity to be "found" in a dis that such person be subject to personal jurisdiction in that state. If a person i while physically present in the district of the court that issued the discov "found" in that district for the purposes of § 1782.[20]

It is common for an order pursuant to § 1782 to be issued on an e

However, even though a person or business entity may be "fo does not mean that, for § 1782 purposes, that district is the appro person or business entity. Rule 45 of the Federal Rules of Civ if a subpoena "requires a person who is neither a party nor a

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15. Fleischmann v. McDonald's Corp. (*In re* Application for Order f Court of Braz.), 466 F. Supp. 2d 1020 (N.D. Ill. 2006).

16. *In re* Ishihara Chem. Co., 121 F. Supp. 2d 209, 215–18 (E.I Cir. 2001).

A number of courts have held (or assumed) that a family Risenhoover, 2012 U.S. Dist. LEXIS 162605, at *4 (W.D. C a proceeding within the meaning of § 1782, but denying a circumvent foreign proof-gathering restrictions); *see als* 2008) (affirming denial of motion to quash subpoena Lopes v. Lopes, 180 Fed. Appx. 874, 875, 878, 2006 U § 1782 order in connection with divorce proceedin 290459, at *2 (N.D. Cal. Feb. 5, 2009) (in conne ship by husband of assets).

17. Lancaster Factoring Co. v. Mangone.

18. *In re* Euromepa, 154 F.3d 24, 28 (2 Vehicles, 2014 WL 3404955, at *7–8 (S.I liquidation proceeding, when a liquidat person" within the section).

19. It has been held that § 17 Syndicate, 2014 U.S. Dist. LEXIS

20. *In re* Edelman, 295 F.3 tion, it is acceptable for purp at *8 (S.D. Fla. Jan. 19, 20 may be "found" in that d Aug. 21, 2014) ("mere for Section 1782 pur July 8, 2014) (a "c

21. *E.g.*, *In r* granted *ex par* 117191, at * LEXIS 84 Cal. Apr then h Nov

miles from where that person resides, is employed, or regularly transacts business in person," the court "must quash or modify" the subpoena.[22] Therefore, even when a person or business entity "found" in a specific district for purposes of § 1782, if service in that district does not comply with 100-mile rule, a subpoena issued pursuant to § 1782 is likely to be quashed or modified.[23]

II. THE *INTEL* DECISION—MANY (BUT NOT ALL) ISSUES RESOLVED

Although § 1782 has been on the books, in one form or another, for over 100 y largely overlooked until 2004, when the U.S. Supreme Court addressed the sta *Advanced Micro Devices, Inc.*[25] This part discusses the *Intel* decision and brief issues concerning § 1782 that were not resolved in that decision.

In *Intel*, Advanced Micro Devices, Inc. (AMD) had filed an antitru Corporation with the European Community's Directorate General for C European Commission), which is an administrative body that exercis areas covered by the European Treaty governing competition.[26] AM a federal court in California, requesting that Intel Corporation be connection with ADM's complaint before the DG.[27] After the d tion's objection to the requested discovery, on the grounds tha ing before the DG, the Court of Appeals for the Ninth Circuit district court to rule on the merits of AMD's application.[28]

The issue as to which the Supreme Court granted foreign-discoverability" requirement—namely, wheth when the party seeking it could show that the request law of the country of the foreign tribunal.[29] But the C the *minimum* that an applicant must prove in or discovery under the section is available to perso and (2) whether a foreign proceeding must b to be available.[30] Yet the Supreme Court in *discretionary* factors that a district court sh

Before addressing the issue of "fore the "catalog" of "interested person[s] their agents.[31] The Court concluded gant" and that, therefore, ADM, a is an "interested person" within

In the context of const the DG qualifies as a "tribu

22. *See* FED R. CIV. P. 45(
23. *In re* Inversiones Y C
24. *See Intel*, 542 U.S. 1948 and 1964); *see also* ment was to broaden pr
25. 542 U.S. 24
26. *Id.* at 250.
27. *Id.* at 25
28. *Id.* at
29. *Id.* a
30. *Id*
31.
32

Also, although it is clear that, with respect to the statutory requirements (described in Part I above), the burden of proof is upon the § 1782 applicant, there was little in *Intel* to suggest whether the burden of proof concerning these five discretionary factors is upon the applicant or the party opposing the § 1782 discovery.

In this context, the Seventh Circuit has held that, once a § 1782 applicant demonstrates for discovery, the burden shifts to the opposing litigant to demonstrate "by more than angry that allowing the requested discovery would disserve the statutory objectives.[46]

The discretionary factors are discussed in greater detail below.

A. Factor A (Target of the Application Is a Litigant Abroad)

Although the "general rule" seems clear enough, the application of this fac uniform.

One of the first cases to recognize an exception to the general rule was Eleventh Circuit held that, even though § 1782 discovery was sought fr ama, the application could still be granted. The court so held because application had left Panama and was residing in Florida, rendering i court to enforce its order(s) against that party.[48]

At least two courts have taken an approach to Factor A that is of the view that (1) the applicant has a strong need for Amer indication of a lack of receptivity. In *In re Heraeus Kulzer, G* denial of a § 1782 application that was brought by a Ger ery from an American company, Biomet.[50] Heraeus ha secrets, and a month later Heraeus filed a § 1782 app ery from the "Biomet corporate family" in the Unite corporate family) of the application was clearly a the analysis of the district court, the Seventh Cir and to Factor A, analyzing the issue as follows

> The importance of American-style disco trade secrets by Biomet is undeniable. B

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46. *In re* Heraeus Kulzer, GmbH, 633 F.
At least one district court has taken th
1308546 (D. Nev. Mar. 24, 2015), the co
party can move to quash . . . but bears t
47. 81 F.3d 1324 (11th Cir. 200
48. *Id.* at 1334–35. *See also In*
(when the application sought di
adequate grounds for granting
WL 3711924, at *2 (M.D. Fl
a party to the foreign proc
a factor that favors grant
2009) (when defenda
that court, Factor A
2011) (partially d
also a resident o
49. 633 F
50. *Id.*
51. *I*
52.
id. at
wer

§ 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[58] The phrase "not as apparent" is a far cry from a rule of automat denial of a § 1782 application whenever the target of the discovery request is a litigant in the non- case. It is possible that the Supreme Court did not want to create a rule (even as to only one of s factors) under which § 1782 relief could never be sought from an American party to non-U. tion, and perhaps Factor A was fashioned accordingly.

At the other end of the spectrum concerning Factor A, some cases have held that, wh application seeks evidence from an American resident or corporation that is technicall in the non-U.S. proceeding but is an affiliate of (or closely associated with) the non- that for all intents and purposes the target and the litigant outside the United State factor weighs against granting § 1782 discovery.[59]

In this context, the issue of control over the requested evidence is par *Fleischmann v. McDonald's Corporation*[60] involved a lawsuit in the Brazilia mer senior employee of McDonald's Corporation's Brazilian subsidiary.[61] objected to a § 1782 application, filed by the Brazilian plaintiff, for the of documents.[62] McDonald's argued that the district court should tre Labor Court"[63] and that, under Factor A, the merely "nominal" diffe poration and its Brazilian subsidiary supports denying the § 178 rejected that contention, focusing on the fact that McDonald's C Labor Court can order it to respond to discovery."[65] Absent support granting the § 1782 application.[66]

The "nature of the foreign tribunal" and the "charac and C) are rarely cited by courts as a sufficient grounds f

B. Factor D (Receptivity Al Factor E (Attempt to C

On the issue of receptivity, it could be argued as to how lower courts should resolve it. Af sidered, the Supreme Court in *Intel* obser European Commission—had been far l federal court:

> [The European Commission] stat the District Court's assistance. .

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

59. *See* Schmitz v. Bernstein Li legal counsel; de facto target held 152337, *11–12 (S.D.N.Y. Oct 2013) (*citing Schmitz*; applic uments concerning subsidi (M.D. Fla. June 26, 2013 though the non-Ameri the non-U.S. procee application).

60. 466 F. S

61. *Id.* at

62. *Id.*

63. *Id*

64.

65

p

before the foreign tribunal is not a grounds for finding that the "for use in" element of the statute has not been established.[94]

In a case that shows that the lines between the discretionary factors overlap, the Fifth Circuit has held that, absent a "clear directive" from the non-American tribunal that it would reject evidence produced in the United States, a district court generally should not assume that an applicant for § 1 discovery seeks to evade restrictions on discovery abroad.[95]

C. Factor E (Concealed Attempt to Circumvent)

Just as some courts have held that "authoritative proof" is needed in order to prove a l tivity,[96] the Third Circuit has held that a district court should not conclude that a § seeks to circumvent[97] a restriction on discovery by the foreign court absent "a defi tion" that the non-U.S. court has (in substance) denied the request that is the su application.[98]

However, other courts have found an attempt to circumvent foreign § 1782 applicant has not sought the requested discovery from the foreign to the statute. A good example is *Via Vadis Controlling GmbH v. Skype, In* corporation brought a patent infringement action in Germany against va same plaintiff contemporaneously requested similar relief from a cour the two non-U.S. courts required Skype to produce its source code, y German plaintiff requested the disclosure of Skype's source cod the application: "Despite their jurisdiction over [Skype], the for to produce the requested materials. Discovery under § 1782 w the foreign courts' rules and enforcement procedures."[102]

When the § 1782 applicant has sought the requ nal before resorting to § 1782 but has not waited for a that such conduct indicates that the applicant is atte ruling by the foreign court.[103] The (perceived) lat

94. *Id.* at 82–84. *See also* IPCom GmbH v. Ar 2014) (even when there is only a "low probabilit conclude that the applicant has no current need 1796579, at *10 (S.D. Fla. Apr. 30, 2010) (the be obtainable before the foreign tribunal onl cumventing foreign proof-gathering restric 2009) (no need for § 1782 applicant to e

95. Ecuadorian Plaintiffs v. Ch record evidence that the applicant tive" from the foreign court that (2d Cir. 1995)).

96. *See supra* text accom

97. Several cases discu

98. *In re* Chevron C June 26, 2013) (the bur

99. 2013 WL 64

100. *Id.* at *1.

101. *Id.* at *1

102. *Id.* at * applicant "has telling" and

103.

interpreted by courts as evidence of a desire on the part of the § 1782 applicant to circumvent the foreign court.[104]

1. Overly Broad § 1782 Applications

As noted above, in *Intel*, in addition to setting forth several discretionary factors that are un international disputes, the Supreme Court stated that unduly oppressive or burdensome pursuant to § 1782 may be rejected or trimmed down.[105] The difference between the two a § 1782 request in its entirety or trimming it down—is obviously significant.

Several courts have held that, when dealing with an overly broad § 1782 applic eral matter, a court should not reject the application in its entirety but should trim *Hereaus Kulzer, GmbH*,[106] the Seventh Circuit held that, when an applicant ma need for extensive discovery in aid of a foreign case—even if the applicant's r densome—the district court should use the same criteria that it would use in the Federal Rules, to trim the request down. The court further held that, in s request in its entirety would constitute reversible error.[107]

In reviewing the import of the *Intel* decision, there were four signifi that the Supreme Court did not expressly address in *Intel*: (1) wheth bility" requirement under the statute, (2) the burden of proof wit tors, (3) the applicability of § 1782 to arbitrations, and (4) whe reach documents (or things) located outside of the United Sta case law has supplied a relatively uniform answer—there is n the burden of proof with respect to the discretionary fact burden, is a relatively light one. As to the third and four those issues are the subjects of the next two parts.

III. THE APPLICABILITY TO NON-U.S. ARBI

In the post-*Intel* era, no issue regarding whether a non-U.S. arbitrator (or arbitr the section.

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104. *E.g.*, *In re* Samsung Electronics, 2 to seek discovery earlier in the foreign tri ments of the Japanese court"); *In re* D current eleventh-hour discovery appl attempt on [applicant]'s part").

In two related cases, courts h invokes his or her rights under 2015 U.S. Dist. LEXIS 16000

105. *Intel*, 542 U.S. at

106. 633 F.3d 591 (

107. *Id.* at 596–9 affirming denial by d discovery is autho ing of testimon Keystone, Inc

In re M the unusu the cou appli at *

Although *Intel* eliminated some of the restrictions that lower courts had previously read into § 1782, *Intel* did not directly address whether a non-U.S. arbitrator is to be considered a "tribunal" within the section.

In the more than ten years since *Intel*, the case law has not provided a clear answer. Although issue of the applicability of § 1782 to arbitration—however that term is defined—has been liti extensively in district courts, it has not been addressed comprehensively by the courts of appe

The cases that have addressed this issue can be grouped roughly into three categories: holding that a private arbitrator is not to be considered a tribunal within the meaning of ' (b) those holding that a private arbitrator *is* a tribunal, and (c) those holding that, in o vate arbitrator to be considered a tribunal, the arbitral proceeding must have certair *beyond* those of a "traditional" (commercial) arbitration.[109]

Even before *Intel*, cases grappled with whether a private, non-U.S. arbitrator the meaning of § 1782. These cases are discussed (more or less) in chronologic

A. Pre-*Intel* Cases Holding That an Arbit Is Not a Tribunal

As described below, both the Second Circuit and the Fifth Circuit ad both ruled that an arbitrator is not a tribunal within the meaning of § 1782 discovery is not available in connection with a non-U.S. arb

The Second Circuit addressed the issue in *NBC v. Bear S* found that, because the term "tribunal" does not plainly incl nals, the term "foreign or international tribunal" is ambiguo ity, the Second Circuit examined the legislative history a (1964) Senate Report on the draft amendment. The co that, when the statute was amended in 1964, Congr tribunals.[112] The court in *NBC* observed that the S sor Hans Smit[113] expressing the view that "an inte powers to an international agreement."[114] The guage suggests that "when Congress in 1964 to cover governmental or intergovernmenta state-sponsored adjudicatory bodies."[115] Th erence to private dispute resolution proc

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108. The Fifth Circuit is the only appell reaffirmed its pre-*Intel* holding. *See infra* te

The Seventh Circuit stated in *GEA* ("might" apply to arbitrations. The Th Del Rio Lempa v. Nejapa Power C (although resolving the case on m Chevron Corp., 633 F.3d 153, 1

109. There appears to be statute. *See* NBC v. Bear Ste

110. *Id.*

111. *Id.* at 188.

112. *Id.* at 188–9

113. The decisi that aided the Cor 165 F.3d at 190 the Commissi

114. *Id*

115.

did not consider them in drafting the statute"[116] but rather intended to cover "state-sponsored adjudicatory bodies."[117]

The *NBC* court affirmed the order of the district court quashing the subpoenas.[118]

Less than two months later, in *Republic of Kazakhstan v. Biedermann International*,[119] Fifth Circuit came to the same conclusion as the Second Circuit in *NBC*, finding that the ter eign or international tribunal" is ambiguous.[120] Although the Fifth Circuit acknowledged C intention to expand the scope of § 1782 when it added the term "foreign or international t 1964, the court found "no contemporaneous evidence that Congress contemplated exte to . . . international commercial arbitration."[121]

The Fifth Circuit in *Biedermann* held that an arbitrator is not a tribunal withir § 1782.[122]

Thus, in the pre-*Intel* era, the only two appellate courts to have addressed t arbitrator is not a tribunal within the meaning of the section.

B. The *Intel* Seeds

Although *Intel* did not directly address the issue of an arbitrator as a trib for several courts to conclude that a non-U.S. arbitrator is (or may be The first of those seeds was a reference by the Supreme Court in *In* by Professor Hans Smit. In discussing the history of the 1964 am stated as follows:

> The Rules Commission's draft, which Congress adopted, r ceeding"] with "a proceeding in a foreign or international t change to "provid[e] the possibility of U.S. judicial assis and quasi-judicial proceedings abroad]." S.Rep. No. 158 1964, pp. 3782, 3788; see Smit, International Litigat 'tribunal' . . . includes investigating magistrates, admir agencies, as well as conventional civil, commercial, affording assistance in cases before the European the rendition of proper aid in proceedings befo sion exercises quasi-judicial powers").[123]

By citing to Professor Smit's law revie Supreme Court arguably adopted the p meaning of § 1782.

But that was not the only seed § 1782 in connection with non-U.S as to a tribunal into one question

As described below, seve first-instance decisionmaker tribunals within the meanir

116. *Id.* at 189.
117. *Id.* at 190.
118. *Id.* at 185, 1
119. 168 F.3d
120. *Id.* at 8
121. *Id.* at
122. *Id.*
123. *I*
124.

C. Post-*Intel* Cases

One of the first post-*Intel* cases to address whether § 1782 could be used in connection with a non-U.S. arbitration was *In re Oxus Gold*.[125] In *Oxus Gold*, a UK company that was involved in an arbitration taking place under the United Nations Commission on International Law (UNCITRAL) Rules filed a § 1782 application with a federal district court in New Jersey.[126] On the issue of whether non-U.S. arbitral panel was a tribunal within the meaning of the section, the district court treated Second Circuit's decision in *NBC* as controlling,[127] specifically as to whether an arbitral panel by private parties could qualify as a tribunal.[128] Nonetheless, the district court in New Jersey guished *NBC* on the grounds that "[t]he international arbitration at issue is being conducted United Nations Commission on International Law, a body operating under the United established by its member states."[129]

Although the UNCITRAL Rules were established by the United Nations, they are used (administered) in arbitrations that have nothing to do with the United the reference in *Oxus Gold* to "a body operating under the United Nations" was theless, the case did indicate that *NBC* and *Biedermann* were not the last word

Not long after *Oxus Gold*, the issue of whether private arbitrators arose before a district court in Georgia. *In re Roz Trading Ltd.*[131] involved for use before an arbitral panel of the International Arbitral Centre of the Chamber in Vienna.[132] The American company from which discovery that the Austrian panel is not a tribunal within the meaning of § 1 analysis by observing that the teachings of the Supreme Court in the applicability of § 1782 discovery to arbitrations.[134]

The district court referred to the Smit article, which in noting that the Supreme Court quoted such language "appr ceeded to examine whether an arbitral panel is a first-ins

> The Centre's arbitral panels are similarly "first-instan responsive to the complaint and reviewable in cou "is constituted to hear disputes, weigh evidence, accordance with its Rules. . . ." . . . Responden enforceable in Austrian courts. . . ." (*Id.*) The with which the Supreme Court in *Intel* exa ered a "tribunal" under § 1782(a).[136]

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125. 2006 WL 2927615 (D.N.J. Oct. 11, 2
126. *Id.* at *2.
127. *Id.* at *6.
128. *Id.*
129. *Id.* The *Oxus Gold* court ref mary *Intel*-based grounds for holdin first-instance decisionmaker, and
130. In *OJSC Ukrnafta v. C* arguably made the same mist court was whether § 1782 tute of the Stockholm Ch stating that *Intel*'s refere *Id.* at 4.
131. 469 F. Su
132. *Id.* at 12
133. *Id.* at
134. *Id.*
135. *Id*
136.

thus made the Eleventh Circuit the first appellate court to expressly hold that a non-U.S. arbitrator is a tribunal within the meaning of § 1782.

However, in January 2014, the Eleventh Circuit decided *sua sponte* to vacate its June 2012 op ion in the case.[198] The court observed,

> [The applicant] advances two independent theories for why [there is a proceeding before a tribu within the meaning of § 1782]: that [the applicant] wants the evidence for use in reasonably co plated civil collusion proceedings that it may file against two of its former employees; and arbitration between the parties is a proceeding already pending in a foreign tribunal. Becaus that a proceeding exists under the former theory, we need not address the latter.[199]

In a footnote, the court acknowledged that the issue of whether an arbitrat "substantial question,"[200] but one that the court declined to answer "on the sparse case."[201] In other words, whereas in June 2012, in its initial ruling, the Eleventh able in reaching its conclusion "[b]ased on the undisputed record before th 2014, the record had turned "sparse."

In any event, in the same footnote, the Eleventh Circuit seemed to on the issue, it would find that the term "tribunal" includes an arbitr portion of its January 2014 decision with "we leave the resolution of

In 2015, in *In re Grupo Unidos Por El Canal, S.A.*,[204] the dist lowed the analysis of *In re Operadora DB Mexico*,[205] holding that nal" within the meaning of § 1782.[206]

IV. THE SCOPE OF § 1782 D

Courts throughout the United States have rendered to produce documents may include documents pl cases that have held that there is no geographic marily on the penultimate sentence of subsect

198. 747 F.3d 1262 (11th Cir. 2014).
199. *Id.* at 1269–70.
200. *Id.* at 1270 n.4.
201. *Id.*
202. 685 F.3d at 997.
203. 747 F.3d at 1270 n.4.
One of the district court cases that c
Group, LLC, 878 F. Supp. 2d 1296 (S
American Free Trade Agreement
than did the Eleventh Circuit in
scope of 1782 if (1) it's a first-
(3) it has authority to determ
Arguably *Mesa Power* v
governmental one.
Despite its reliance
NAFTA arbitral pan
Several month
Consorcio, a dist
tional arbitrati
204. 20
205.
206
sorcio
ove

restriction of the foreign tribunal or (2) that an order of production would interfere with the foreign proceedings.[256]

V. PRACTICAL CONSIDERATIONS

To an American lawyer, whenever there is a need to obtain evidence in the United Sta
before a non-American tribunal, the possibility of obtaining such evidence via an applic
ant to § 1782 would almost always seem to be an attractive option. However, there ar
which resort to the Hague Evidence Convention (HEC) could be a preferred meth
evidence in the United States.

The most obvious advantage of using § 1782 over the HEC is the freed
application *without* the involvement of the non-American tribunal.[257] Under t
evidence must emanate from the court before which the legal proceeding is p
tion (called a "letter of request) is transmitted from that court to a "Centra
ing state.[258] The Central Authority reviews the letter of request to ensu
requirements of the HEC, and only at that stage does the Central Auth
to a court in that state, for that court to subpoena or otherwise con
residence of that state.[259]

In the United States, the Central Authority is the Departmer

From the above description, it is clear that the HEC appli
court and then the Justice Department) before it makes its w
pel the giving of evidence. In contrast, a § 1782 applicatic
court of the district wherein the witness is found. In ot
party saves two steps in the process.

But in many cases there is a cost associated with
the HEC. That cost is the risk that the evidence rec
sible before the non-U.S. court. More specifically
in the process of issuance of a letter of request
obtained will be objectionable on hearsay gro

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256. In *In re Hallmark Capital Corp.*, 534 F. Sup
for (*inter alia*) the production by a Minnesota re
factors cited by the court in granting the applic
obtained pursuant to § 1782. *Id.* at 957. Alth
United States are beyond the reach of § 17
either the possession, custody, or control
his obligation to produce those over wh

257. *E.g.*, Fleischmann v. McDon
United States for use in a case in B
letter rogatory process is slow, par

258. HEC, *supra* note 3, art

259. *Id.* (duty of Central
(Central Authority require
HEC); art. 12 (setting for

260. Hague Conf
/index_en.php?act=

261. In *In re O*
court was asked t
eral District Co
the requested
the Mexica
testimon
at *6–7
recep
to t