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DISCOVERY UNDER 28 U.S.C. § 1782:  
DISTINGUISHING INTERNATIONAL  
COMMERCIAL ARBITRATION AND  
INTERNATIONAL INVESTMENT ARBITRATION

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INTRODUCTION .....	296
I. ARBITRATION AND 28 U.S.C. § 1782 .....	301
A. <i>Historic Developments</i> .....	301
B. <i>Post-Intel Jurisprudence Regarding Investment Arbitration</i> .....	306
1. <i>Cases rendered prior to the Chevron-Ecuador dispute</i> .....	307
2. <i>The Chevron-Ecuador dispute</i> .....	311
C. <i>Post-Intel Jurisprudence Regarding International Commercial Arbitration</i> .....	315
1. <i>Reasons to disallow Section 1782 requests</i> .....	315
2. <i>Reasons to allow Section 1782 requests</i> .....	319
II. DISTINGUISHING INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITRATION IN SECTION 1782 ANALYSES .....	322
A. <i>Grant of Jurisdiction</i> .....	323
1. <i>Grants of jurisdiction in litigation and first-generation international tribunals</i> .....	323
2. <i>Investment arbitration</i> .....	331
3. <i>International commercial arbitration</i> .....	337
a. <i>Private grants of jurisdiction</i> .....	339
b. <i>Public grants of jurisdiction</i> .....	346
B. <i>State Interests</i> .....	350
1. <i>Investment arbitration</i> .....	352
2. <i>International commercial arbitration</i> .....	360

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C. Interpretive Canons .....	367
CONCLUSION .....	370

## INTRODUCTION

One of the more compelling legal dramas to arise in recent history involves the ongoing dispute between Chevron, Ecuador and various indigenous peoples who lived in or near certain oil fields developed by Texaco Petroleum in the Amazon rainforest in the 1960s and 1970s.<sup>1</sup> Not only has the matter appeared in U.S. courts on various occasions over the last twenty years,<sup>2</sup> it has also generated a US\$18 billion judgment in the Ecuadorian national courts.<sup>3</sup> That judgment, which is now final, has been subject to enforcement actions in several countries where Chevron has assets, including Argentina, Brazil and Canada.<sup>4</sup>

The parties have not limited themselves to judicial fora. Several different arbitral actions have also been pursued, including an international commercial arbitration that was to be heard in New York under the rules of the American

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1. See Theodore J. Boutros, Jr., *Ten Lessons From the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 219 (2013); Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151 (2012); Michael D. Goldhaber, *The Rise of Arbitral Power Over Domestic Courts*, 1 STAN. J. COMPLEX LITIG. 373 (2013); Manuel A. Gómez, *The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside Ecuador*, 1 STAN. J. COMPLEX LITIG. 429 (2013); Judith Kimerling, *Lessons From the Chevron Ecuador Litigation: The Proposed Intervenors' Perspective*, 1 STAN. J. COMPLEX LITIG. 241 (2013); Judith Kimerling, *Oil, Contact, and Conservation in the Amazon: Indigenous Huaorani, Chevron, and Yasuni*, 24 COLO. J. INT'L ENVTL. L. & POL'Y 43 (2013) [hereinafter Kimerling, *Oil*]; Burt Neuborne, *A Plague on Both Their Houses: A Modest Proposal for Ending the Ecuadorian Rainforest Wars*, 1 STAN. J. COMPLEX LITIG. 487 (2013); Robert V. Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579 (2011); Christopher A. Whytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467 (2013); see also Paul Barrett, *Chevron-Ecuador Fight Comes to Canada*, BUSINESSWEEK (May 31, 2012), <http://www.businessweek.com/articles/2012-05-31/chevron-ecuador-fight-comes-to-canada>; Braden Reddall, *Chevron's Ecuador Pollution Arbitration to Stretch Into 2014*, REUTERS, Aug. 2, 2012, available at <http://www.reuters.com/article/2012/08/02/us-chevron-ecuador-idUSBRE8711C120120802>.

2. The Ecuadorian plaintiffs twice attempted to bring a case on the merits in the United States, but the actions were dismissed for forum non conveniens. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002); *Sequihua v. Texaco, Inc.* 847 F. Supp. 61, 65 (S.D. Tex. 1994); Kimerling, *Oil*, *supra* note 1, at 63, 71.

3. See Cause No. 2011-0106 (Jan. 3, 2012), available at <http://tinyurl.com/ant37du>; Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 133, 147 (2012).

4. Similar actions may also be brought in a number of other jurisdictions. See Alford, *supra* note 3, at 147 (noting the Ecuadorian plaintiffs have identified twenty-seven countries where Chevron has assets).

Arbitration Association (AAA)<sup>5</sup> and two unrelated investment arbitrations administered by the Permanent Court of Arbitration (PCA) pursuant to the bilateral investment treaty (BIT) between Ecuador and the United States.<sup>6</sup> The second of the investment arbitrations is still in progress and focuses on whether Ecuador violated the BIT by allowing an allegedly corrupt judicial proceeding to proceed in the Ecuadorian courts, thereby constituting a denial of justice for Chevron.<sup>7</sup>

This second BIT arbitration is remarkable in several ways. First, the tribunal has made the somewhat unusual decision to render an interim award ordering the Republic of Ecuador to prevent enforcement or recognition of the US\$18 billion Ecuadorian court judgment either within or without Ecuador.<sup>8</sup>

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5. This arbitration was permanently stayed on the grounds that Ecuador was “not a party to or otherwise contractually bound by the agreement” containing the arbitration clause. *In re Chevron Corp.*, 762 F. Supp. 2d 242, 247 (D. Mass. 2010) (noting the AAA arbitration was brought by Chevron against Ecuador’s state-owned oil company, PetroEcuador); see also *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 452 (S.D.N.Y. 2007), *aff’d*, 296 F. App’x 124 (2d Cir. 2008).

6. See Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993) (entered into force May 11, 1997) [hereinafter U.S.-Ecuador BIT], available at <http://www.state.gov/documents/organization/43558.pdf>; *In re Chevron Corp.*, 762 F. Supp. 2d at 247 (noting Chevron filed the first BIT arbitration against Ecuador in December 2006, “alleging that it had been ‘denied justice’ by the Ecuadorian judiciary through long delays in the resolution of certain contract disputes unrelated to the Lago Agrio Litigation” and that Chevron filed the second BIT arbitration in September 2009 claiming that Ecuador “had violated the BIT by ‘allowing’ the Lago Agrio Litigation to proceed”); *Republic of Ecuador*, 499 F. Supp. 452 (S.D.N.Y. 2007), *aff’d*, 296 F. App’x 124 (2d Cir. 2008); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case 2009-23 [hereinafter 2009 Chevron-Ecuador Arbitration], available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1408](http://www.pca-cpa.org/showpage.asp?pag_id=1408); *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case 2007-2, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1432](http://www.pca-cpa.org/showpage.asp?pag_id=1432).

7. See *Republic of Ecuador*, 499 F. Supp. 452 (S.D.N.Y. 2007), *aff’d*, 296 F. App’x 124 (2d Cir. 2008); Alford, *supra* note 3, at 137; see also CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶¶ 7.80-7.98 (2008) (discussing denial of justice under investment law); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) (same).

8. See *Chevron Corp. v. Republic of Ecuador*, UNCITRAL Arb., PCA Case No. 2009-23, Second Interim Award on Interim Measures at ¶ 3(i), (Feb. 16, 2012), available at <http://www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf>. The form of the order is somewhat similar to that of a U.S.-style anti-suit injunction, in that it forbids one of the parties that is subject to the jurisdiction of the tribunal to take certain actions in other fora on at least an interim basis, on the grounds that there is both a “risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties’ dispute by any final award” as well as “a sufficient likelihood that such harm to the Claimants may be irreparable in the form of monetary compensation payable by the Respondent in the event that the Claimants’ case on jurisdiction, admissibility and the merits should prevail before this Tribunal.” *Id.* ¶ 2. Interestingly, the District Court for the Southern District of New York had at one point also granted a “worldwide preliminary injunction barring the Ecuadorian plaintiffs from enforcing the Lago Agrio judgment,” although that

The legal community will doubtless debate the propriety of the arbitrators' actions in the months and years to come.<sup>9</sup> However, the second and perhaps more noteworthy issue, at least for the purposes of this Article, relates to the fact that most of the evidence used to support the claimant's allegations was generated through requests made for discovery under 28 U.S.C. § 1782.<sup>10</sup>

Section 1782 is a somewhat unusual statute, in that it authorizes U.S. courts to order a person who is resident or found in the United States to provide information or documents "for use in a proceeding in a foreign or international tribunal."<sup>11</sup> While it is undisputed that section 1782 may be used in cases involving litigation in a foreign court, numerous questions exist as to whether and to what extent the statute could or should be used in situations involving international arbitration.<sup>12</sup>

Although the relationship between section 1782 and arbitration may be in many ways unclear, that did not stop the parties involved in the Chevron-Ecuador dispute from filing section 1782 requests in unprecedented numbers.<sup>13</sup> In fact, matters relating to the Chevron-Ecuador dispute now constitute a significant proportion of the jurisprudence concerning section 1782.<sup>14</sup>

If a single hard case can make bad law, then a multitude of decisions rendered in quick succession and relating to the same difficult legal and factual scenario can be disastrous for the development of a particular legal proposition. As it turns out, the complex factual and procedural posture of the Chevron-Ecuador dispute has allowed courts to avoid difficult questions regarding the

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injunction was later overturned. *In re Chevron Corp.*, 650 F.3d 276, 282 (3d Cir. 2011) (citing *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011)), *vacated by* *Chevron Corp. v. Naranjo*, No. 11-1150-CV L, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012).

9. Although U.S. courts have cautioned against the use of international anti-suit injunctions on the grounds that they interfere with the sovereignty of foreign nations and thus run the risk of offending international comity, commentators have suggested that such injunctions are considered less problematic in cases involving interdictory actions, since those types of anti-suit injunctions preserve the jurisdiction of the court to hear the merits of the dispute. See Walter W. Heiser, *Using Anti-Suit Injunctions to Prevent Interdictory Actions and to Enforce Choice of Court Agreements*, 2011 UTAH L. REV. 855, 861. While the situation in the Chevron-Ecuador arbitration is not entirely analogous to anti-suit injunctions involving interdictory actions, the issue bears further analysis, although such discussions are beyond the scope of the current Article. See S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 12-18 [hereinafter Strong, *Borders*] (discussing the propriety of anti-suit injunctions in arbitration).

10. See 28 U.S.C. § 1782 (2012); *In re Chevron*, 650 F.3d at 282 n.7.

11. 28 U.S.C. § 1782(a); see also Alford, *supra* note 3, at 155.

12. See *infra* notes 156-438 and accompanying text.

13. Alford, *supra* note 3, at 128 (noting there are now "at least fifty orders and opinions from federal courts across the country" relating to section 1782 requests in the context of the Chevron-Ecuador dispute); see also 28 U.S.C. § 1782; *In re Chevron Corp.*, 762 F. Supp. 2d 242, 244 (D. Mass. 2010); Alford, *supra* note 3, at 155.

14. See 28 U.S.C. § 1782; Alford, *supra* note 3, at 155.

scope of 28 U.S.C. § 1782 while nevertheless setting potentially problematic precedent.<sup>15</sup> As a result, it is well past time to analyze the jurisprudential propriety of section 1782 in the context of international arbitration.<sup>16</sup> Since the parties to the Chevron-Ecuador dispute only started making a significant number of requests under section 1782 in 2010, there is still time for courts to reverse what may be an ill-advised jurisprudential course.<sup>17</sup>

Although a number of commentators have considered the nuances of section 1782 in the context of international arbitration, very few detailed analysis have been conducted in the wake of the Chevron-Ecuador dispute.<sup>18</sup> This Article attempts to fill this gap in the literature by providing a reasoned analysis of section 1782 requests in the context of international investment

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15. See 28 U.S.C. § 1782.

16. See *id.*

17. See *id.*; *infra* note 58.

18. See 28 U.S.C. § 1782; American Arbitration Association, *Federal Appeals Court Finds a Private Arbitral Tribunal Qualifies Under § 1782*, 67 DISP. RESOL. J. 10, 10 (Aug.-Oct. 2012); Alford, *supra* note 3, at 127; Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 56-98 (2011); Oekzie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV. 649, 654-60 (2005); Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*, 17 AM. REV. INT'L ARB. 45, 46 (2006); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 334-41 (2008); John Fellas, *Using Section 1782 in International Arbitration*, 23 ARB. INT'L 379, 385-99 (2007); Gustavo J. Lamelas, *The Evolving Standards for Extending U.S. Discovery Assistance to International Arbitrations*, 16 IBA ARB. NEWS 154, 154-56 (Mar. 2011); Pedro J. Martinez-Fraga, *The Future of 28 U.S.C. § 1782: The Continued Advance of American-Style Discovery in International Commercial Arbitration*, 64 U. MIAMI L. REV. 89, 90-93 (2009); Marat A. Massen, *Discovery for Foreign Proceedings After Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875 (2010); Lawrence W. Newman & Rafael Castilla, *Production of Evidence Through U.S. Courts for Use in International Arbitration*, 9 J. INT'L ARB. 61, 69 (1992); Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of "Third Parties,"* 19 AM. REV. INT'L ARB. 1, 28-39 (2008) [hereinafter Rau, *Third Parties*]; Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT'L ARB. 61, 68-79 (2008); Peter B. Rutledge, *Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving U.S. Entities?*, 25 J. INT'L ARB. 171 (2008) [hereinafter Rutledge, *Discovery*]; Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 153-61 (1997) [hereinafter Smit, *Judicial Assistance*]; Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, 296-332 (2003) [hereinafter Smit, *Supreme Court*]; Quinn Smith, *Redefining International Arbitration in the United States: The Application of 1782 to International Arbitration Proceedings Located in the United States*, 2009 SPAIN ARB. REV. / REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 93, 105; Maurice M. Suh & Diana L. Trembly, *Section 1782 Discovery in International Arbitration: Factors to Consider in Light of U.S. Case Law*, 66 DISP. RESOL. J. 72, 74-79 (Feb.-Apr. 2011).

arbitration (also referred to as “public,” “treaty-based” or “investor-state” arbitration), which is the type of arbitral proceeding currently at issue in the Chevron-Ecuador dispute.<sup>19</sup> However, this Article also addresses section 1782 requests in the context of international commercial arbitration (also referred to as “private” or “contract-based” arbitration), since the two procedures are occasionally mistaken for one another, despite several key differences.<sup>20</sup>

Given the potential for confusion in this area of law, it is best to begin with a few brief definitions. First, this Article limits use of the term “investment arbitration” to arbitral proceedings that arise out of an international investment treaty or interstate agreement, rather than those that arise solely out of an investment contract between a private party and a state.<sup>21</sup> Second, this Article uses the term “international commercial arbitration” to refer to proceedings arising entirely between private parties as well as to those arising between a private party and a state behaving as a private commercial actor.<sup>22</sup> Although some debate exists as to whether an arbitration between a state and a private party arising out of a foreign investment contract constitutes an investment arbitration or an international commercial arbitration, that issue is beyond the scope of the current discussion.<sup>23</sup>

The structure of the Article is as follows. The analysis begins in Part I with a brief description of the historic development of section 1782 and the various rationales regarding its use in cases involving both international commercial and investment arbitration.<sup>24</sup> Next, Part II discusses section 1782 requests in the context of both types of international arbitration, considering not only the propriety of such requests in each circumstance and distinguishing between international commercial and investment proceedings but also introducing the possibility that some of these issues could be resolved through use of various interpretive canons intended to minimize or avoid conflicts between domestic

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19. See 28 U.S.C. § 1782.

20. See *id.* Numerous misunderstandings exist about the nature of the various types of domestic and international arbitration. See S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 123-28.

21. Investment arbitrations arise from a variety of sources, including bilateral investment treaties (BITs), multilateral investment treaties (MITs), investment protection agreements (IPAs), free trade agreements (FTAs) and foreign investment laws. See MCLACHLAN ET AL., *supra* note 7, at 25-43; see also LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* (2010); CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001).

22. See JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 27-3 to 27-83 (2003).

23. See Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 374 (2007); see also Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 826-31 (2012) [hereinafter Born, *Adjudication*].

24. See 28 U.S.C. § 1782.

and international law.<sup>25</sup> The Article concludes by drawing the various strands of argument together and providing some final proposals.

## I. ARBITRATION AND 28 U.S.C. § 1782

### A. *Historic Developments*

Before addressing the current crisis concerning the use of 28 U.S.C. § 1782, it is helpful to summarize briefly some key historical developments in this area of law.<sup>26</sup> Discussion begins with the text of the statute, which states:

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.

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. . . . 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.<sup>27</sup>

Although this language appears relatively clear on its face, certain ambiguities exist, particularly with respect to whether the term “foreign or international tribunal” includes arbitral tribunals and if so, which types.<sup>28</sup> Three different forms of arbitration could ostensibly fall within the terms of the statute: interstate arbitration (i.e., arbitration between two different nations), investor-state arbitration and international commercial arbitration. Most of the theoretical and practical debate to date has involved international commercial and investment arbitration since interstate arbitration is relatively rare despite its ancient roots.<sup>29</sup>

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25. *See id.*

26. Additional reading regarding the legislative and judicial history of section 1782 in cases involving international arbitration is available. *See id.*; Beale et al., *supra* note 18, at 56-98; Chukwumerije, *supra* note 18, at 654-60; Dubinsky, *supra* note 18, at 334-41; Fellas, *supra* note 18, at 385-99; Lamelas, *supra* note 18, at 154-56; Martinez-Fraga, *supra* note 18, at 90-93; Rothstein, *supra* note 18, at 68-79; Smit, *Judicial Assistance*, *supra* note 18, at 153-61; Smit, *Supreme Court*, *supra* note 18, at 296-332.

27. 28 U.S.C. § 1782.

28. *Id.*

29. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 8-20 (2009);

Initially, U.S. courts opposed the use of section 1782 in arbitration-related matters, with the Second Circuit stating authoritatively that “the fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in section 1782, does include both.”<sup>30</sup> Although the Second Circuit based its decision on both the text of the statute and its legislative history, the court was also influenced by the fact that “the popularity of arbitration ‘rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.’”<sup>31</sup>

Although the Second Circuit was speaking in 1999, the U.S. Supreme Court has recently reiterated its support for the twin rationales of efficiency and cost-effectiveness in arbitration in several different opinions.<sup>32</sup> While the Court was not considering issues relating to section 1782, these decisions suggest that the Second Circuit’s approach is consistent with current Supreme Court jurisprudence regarding arbitration.<sup>33</sup>

The judicial prohibition on using section 1782 in connection with arbitral proceedings was absolute and largely unquestioned until 2004, when the U.S. Supreme Court adopted a more expansive interpretation of the term “foreign or international tribunal” than had previously been seen in the lower courts.<sup>34</sup>

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Born, Adjudication, *supra* note 23, at 797-99.

30. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999); *see also* 28 U.S.C. § 1782; *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 882-83 (5th Cir. 1999); Beale et al., *supra* note 18, at 60.

31. Beale et al., *supra* note 18, at 63 (quoting *Nat’l Broad. Co.*, 165 F.3d at 190-91); *see also Biedermann*, 168 F.3d at 882-83; *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485-87 (S.D. Tex. 2008) (noting that the Supreme Court “may find it determinative that ‘[a]rbitration is intended as a speedy, economical, and effective means of dispute resolution,’ and, thus, that extensive discovery through federal courts would harm, rather than benefit, international comity”), *aff’d*, 341 F. App’x 31 (5th Cir. 2009).

32. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-53 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010). The Court has recently considered a case that may shed further light on this issue. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013). Some commentators have suggested that the Supreme Court badly misunderstood the nature of arbitration in some of these decisions. *See Gary Born & Claudio Salas, The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 22; S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 246-68 (2012) [hereinafter Strong, *First Principles*].

33. *See* 28 U.S.C. § 1782; *see also Conley, supra* note 18, at 46 (“Giving parties to international arbitrations access to judicial assistance pursuant to § 1782 will undermine many of the policies underlying arbitration, including freedom to contract, reduced cost, efficiency and the arbitrator’s ability to control discovery.”).

34. 28 U.S.C. § 1782; *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S.



Notably, the case in question, *Intel Corp. v. Advanced Micro Devices, Inc.*, did not involve arbitration.<sup>35</sup> Instead, the underlying dispute involved an investigation by the Directorate-General for Competition (part of the Commission of the European Communities) into certain potential violations of European competition law.<sup>36</sup> Although the Directorate-General and the European Commission normally do not operate in an adjudicatory fashion, the Directorate-General was in this instance acting as what was effectively the taker of proof for the Court of First Instance and the European Court of Justice (ECJ).<sup>37</sup> Since neither of the two courts would be allowed to accept new evidence if the matter were ever made subject to judicial review, the U.S. Supreme Court decided that the Directorate-General was acting as a “foreign or international tribunal” within the meaning of section 1782.<sup>38</sup>

In reaching this conclusion, the Supreme Court interpreted the term “foreign or international tribunal” in section 1782 as including “first-instance decision-makers” that render “dispositive rulings” that are subject to some form of judicial review.<sup>39</sup> The Court suggested that the range of “first-instance decision-makers” could be read quite broadly, thereby allowing U.S. courts to make discovery orders in situations involving “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”<sup>40</sup>

Subsequent courts and commentators have read much into the Supreme Court’s use of the term “arbitral tribunal,” even though the reference was technically made *obiter dicta*.<sup>41</sup> In many ways, the weight given to this phrase is somewhat surprising, given that the language does not come from the statute’s legislative history but from a law review article written in 1965, one year after the statute was revised to reflect its current form.<sup>42</sup> Although the article cited by the Court was written by Professor Hans Smit, one of the drafters of the revisions to section 1782, another article that was written by Professor Smit and explicitly cited in the Senate reports as justifying the proposed revisions fails to

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241, 258 (2004).

35. See *Intel*, 542 U.S. at 241.

36. See *id.*; see also *Directorate General for Competition*, EUROPEAN COMMISSION, <http://ec.europa.eu/dgs/competition>.

37. See *Intel*, 542 U.S. at 242-43.

38. 28 U.S.C. § 1782; *Intel*, 542 U.S. at 257-58.

39. See *Intel*, 542 U.S. at 258-59 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965) [hereinafter Smit, *United States Code*]); Alford, *supra* note 3, at 134.

40. See *Intel*, 542 U.S. at 258 (citing legislative history and Smit, *United States Code*, *supra* note 40, at 1026 n.71); Alford, *supra* note 3, at 134.

41. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 258; Suh & Trembly, *supra* note 18, at 77.

42. See *Intel*, 542 U.S. at 258; Smit, *United States Code*, *supra* note 40, at 1026 n.71; see also Smit, Supreme Court, *supra* note 18, at 298; Suh & Trembly, *supra* note 18, at 77.

mention arbitration at all.<sup>43</sup>

Furthermore, some courts have noted that although the Supreme Court cited Professor Smit's expansive language "with approval," the Court deleted that aspect of Smit's definition "that included 'all bodies exercising adjudicatory powers,'" a move that "could be interpreted to support a finding that private arbitration organizations are not 'foreign tribunals.'"<sup>44</sup> Other courts have suggested that it would be strange for the Supreme Court to have overruled existing precedent (which was at that time universally against the use of section 1782 in the context of all types of international arbitration) without explicitly mentioning that intention.<sup>45</sup> As a result, the statute's legislative history appears to be inconclusive regarding whether and to what extent section 1782 might be applied to arbitration.<sup>46</sup>

Even if Congress could be supposed to have meant to include arbitral tribunals as a type of "foreign or international tribunal," it is entirely unclear whether that intent should be considered to include all types of arbitration currently in existence, since only one form of international arbitration—interstate arbitration—was well-known in 1964, when the statute was revised.<sup>47</sup> Indeed, in 1964, none of the multilateral treaties regarding international commercial or investment arbitration had yet been ratified by the United States,<sup>48</sup> and the era of bilateral investment arbitration was still decades

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43. See 28 U.S.C. § 1782; S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782; *Intel*, 542 U.S. at 258; Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961).

44. *In re Finserve Grp. Ltd.*, No. 4:11-mc-2044-RBH, 2011 WL 5024264, at \*2 (D.S.C. Oct 20, 2011) (citing *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009)); see also *In re Rhodiansyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*47-48 (D. Kan. Mar. 25, 2011). Thus, some courts have interpreted the ellipses in *Intel*'s quote of Professor Smit's article as "including state-sponsored arbitral bodies but excluding purely private arbitrations." *In re Norfolk S.*, 626 F. Supp. 2d at 885 (citing *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999)).

45. See *In re Rhodiansyl*, 2011 U.S. Dist. LEXIS 72918, at \*35.

46. See 28 U.S.C. § 1782; S. REP. NO. 88-1580, (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782. Indeed, the Senate report refers almost entirely to "litigants," with only one reference to a "party to the foreign or international litigation." S. REP. NO. 88-1580, (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782. These terms are not typically used to describe parties in arbitration.

47. 28 U.S.C. § 1782; see also Born, *Adjudication*, *supra* note 23, at 797-98.

48. See Beale et al., *supra* note 18, at 58; Rothstein, *supra* note 18, at 73-74. The United States has ratified two major international treaties concerning international commercial arbitration. See *Inter-American Convention on International Commercial Arbitration*, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975) [hereinafter *Panama Convention*]; *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 3 [hereinafter *New York Convention*]; BORN, *supra* note 29, at 92. The first of these instruments was ratified in 1970. See *United Nations Commission on International Trade Law, New York Convention, Status* [hereinafter *New York Convention Status*], *available at*

away.<sup>49</sup>

One of the more prominent features of *Intel* is the relatively comprehensive discussion of the various discretionary factors that should be considered in connection with a request for discovery under section 1782.<sup>50</sup> These factors focus on “the nature and character of the foreign or international proceedings, the foreign or international court’s receptivity to the discovery, and whether the discovery will circumvent restrictions imposed by the foreign or international court.”<sup>51</sup> Lower courts are also advised to “consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”<sup>52</sup> Notably, however, these discretionary factors only come into play once the court has determined that the underlying proceeding involves a “foreign or international tribunal” under the statute.<sup>53</sup>

Most of the recent jurisprudence relating to the confluence of section 1782 and arbitration has focused on *Intel*’s discretionary factors rather than on the statutory prerequisites relating to the definition of a “foreign or international tribunal.”<sup>54</sup> This phenomenon is somewhat problematic, since it is not entirely

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[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html); BORN, *supra* note 29, at 98. The second was ratified in 1990. See Organization of American States, Inter-American Convention on International Commercial Arbitration, Status, available at <http://www.oas.org/juridico/english/treaties/b-35.html>; John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT’L ARB. 1, 2 (2000). The United States signed the primary multilateral convention on investment law, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965, although the Convention was not ratified until 1966. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090 [hereinafter ICSID Convention]; ICSID, List of Contracting States and Other Signatories, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> [hereinafter ICSID Status].

49. Most bilateral investment treaties did not begin to include arbitration provisions until the mid-1980s. See Born, Adjudication, *supra* note 23, at 833.

50. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004); see also 28 U.S.C. § 1782.

51. Alford, *supra* note 3, at 138; see also *Intel*, 542 U.S. at 264.

52. *Intel*, 542 U.S. at 264-65; see also 28 U.S.C. § 1782.

53. See *Intel*, 542 U.S. at 264.

54. This phenomenon has been most prevalent in the context of cases associated with the Chevron-Ecuador dispute. See 28 U.S.C. § 1782; see also Alford, *supra* note 3, at 137-38. However, some courts have also considered the discretionary factors in cases involving international commercial arbitration. See *In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*17-20 (C.D. Cal. June 7, 2013); *In re Finserve Group Ltd.*, No. 4:11-mc-2044-RBH, 2011 WL 5024264, at \*3 (D.S.C. Oct 20, 2011); *In re Rhodianyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*50-53 (D. Kan. Mar. 25, 2011); *Ex rel Winning (HK) Int’l Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at \*9 (S.D. Fla. Apr. 30, 2010); *OJSC Ukrnafta v. Carpatsky Petrol. Corp.*, No. 3:09 MC

clear that tribunals in international commercial and investment arbitration fall within the statutory definition of a “foreign or international tribunal” in the first place.<sup>55</sup> If arbitration does not fall within the terms of the statute, then there is no need to consider the applicability of the discretionary factors outlined in *Intel*.<sup>56</sup> Therefore, this Article focuses on issues relating to the definition of a “foreign or international tribunal” and leaves discussion of *Intel*’s discretionary factors for another day.<sup>57</sup>

### B. *Post-Intel Jurisprudence Regarding Investment Arbitration*

One commentator has suggested that the post-*Intel* jurisprudence indicates that “federal courts uniformly agree that an arbitral tribunal established pursuant to a bilateral investment treaty constitutes an ‘international tribunal’ within the meaning of the statute.”<sup>58</sup> However, existing judicial analysis of this

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265(JBA), 2009 WL 2877156, at \*2–5 (D. Conn. Aug. 27, 2009); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240-41 (D. Mass. 2008).

55. 28 U.S.C. § 1782; *see also infra* notes 156-454 and accompanying text.

56. *See Intel*, 542 U.S. at 264-65; *see also In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at \*17-20.

57. 28 U.S.C. § 1782; *see also Intel*, 542 U.S. at 264-65.

58. Alford, *supra* note 3, at 136 (noting that there have been “over twenty” federal court decisions concerning section 1782 requests in the investment treaty contest since *Intel* and suggesting that all such proceedings meet the statutory requirement for a “foreign or international tribunal”); *see also* 28 U.S.C. § 1782; *Republic of Ecuador v. Connor*, 708 F.3d 651, 657 (5th Cir. 2013); *In re Application of Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011); *In re Application of Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011); *In re Application of Ecuador*, Nos. C. 11-80171 CRB, 11-80172 CRB, 2011 WL 4434816, at \*2 (N.D. Cal. Sept. 23, 2011); *In re Application of Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189, at \*2 (E.D. Cal. Sept. 13, 2011); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1124 (D. Colo. 2011), *aff’d* 2011 WL 5439681 (D. Colo. Nov. 9, 2011); *In re Republic of Ecuador*, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868, at \*1-3 (N.D. Cal. Feb. 22, 2011); *In re Application of Chevron Corp.*, 762 F. Supp. 2d 242, 250-52 (D. Mass. 2010); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010); *In re Republic of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492, at \*6-8 (N.D. Cal. Dec. 1, 2010); *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff’d sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *In re Application of Caratube Int’l Oil Co.*, 730 F. Supp. 2d 101, 104-05 (D.D.C. 2010); *In re Application of Chevron Corp.*, 749 F. Supp. 2d 141, 159-60 (S.D.N.Y. 2010); *In re Application of Ricardo Veiga*, 746 F. Supp. 2d 8, 22–23 (D.D.C. 2010); *In re Chevron Corp.*, 753 F. Supp. 2d 536, 539 (D. Md. Nov. 24, 2010); *In re Chevron Corp.*, No. 7:10-mc-00067, 2010 WL 4883111, at \*2 n.2 (W.D. Va. Nov. 24, 2010); *In re Republic of Ecuador*, No. 1:10-mc-00040 GSA, 2010 WL 4027740, at \*2 (E.D. Cal. Oct. 14, 2010); *In re Republic of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427, at \*3 (N.D. Cal. Sept. 15, 2010); *Chevron Corp. v. Camp*, Nos. 1:10mc27, 1:10mc28, 2010 WL 3418394, at \*4 (W.D.N.C. Aug. 30, 2010); *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047-MSK-MEH, 2010 WL 2135217 (D. Colo. May 25, 2010); *Chevron Corp. v. Stratus Consulting, Inc.*, No. 10-cv-00047-MSK-MEH, 2010 WL 1488010 (D. Colo. Apr. 13, 2010); *Order, In re Chevron*, No. 1:10-MI-0076-TWT-GGB, 2010 WL 8767265 (N.D. Ga. Mar. 2,

issue is troubling for a number of reasons.<sup>59</sup> Furthermore, a stark difference can be seen in the analytical framework used before and after the initiation of the various requests in the Chevron-Ecuador dispute.<sup>60</sup>

### 1. Cases rendered prior to the Chevron-Ecuador dispute

The discussion begins with decisions rendered prior to the Chevron-Ecuador dispute. Only a few such cases exist, since relatively little time transpired between the U.S. Supreme Court decision in *Intel* and the advent of the section 1782 requests in the Chevron-Ecuador dispute.<sup>61</sup> Nevertheless, one decision—*In re Oxus Gold PLC*—became highly influential during this time period and is representative of the type of approach used by courts considering the interplay between section 1782 and investment arbitration.<sup>62</sup>

The precedential value of *In re Oxus Gold* is somewhat surprising, given the extremely cursory nature of the relevant discussion.<sup>63</sup> Indeed, the entirety of the court's analysis is summed up in the statement that

[t]he international arbitration at issue is being conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member states. The arbitration is not the result of a contract or agreement between private parties as in *National Broadcasting*. The proceedings in issue has [sic] been authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic for the purpose of adjudicating disputes under the Bilateral Investment Treaty. Therefore, it appears to the Court as if the international arbitration proceeding in the present case is included as a “foreign or international tribunal” in Section 1782.<sup>64</sup>

Although this approach may be attractive to the extent it enunciates a clear, bright-line rule, the court's analysis actually contains a number of legal and factual errors.<sup>65</sup> First, the suggestion that the United Nations Commission on International Law (UNCITRAL), “a body operating under the United Nations and established by its member states,” is somehow involved in the

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2010); *In re Application of Oxus Gold PLC*, No. MISC 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); see also *In re Mesa Power Grp., LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at \*5 (D.N.J. Nov. 20, 2012).

59. See *infra* notes 86-110 and accompanying text.

60. See *infra* notes 61-85 and accompanying text.

61. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; *In re Chevron*, 753 F. Supp. 2d at 536; *In re Oxus Gold*, 2006 WL 2927615. There is also a dearth of scholarly analysis of section 1782 in the context of investment arbitration. See Alford, *supra* note 3, at 155.

62. See *In re Oxus Gold*, 2006 WL 2927615; see also *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) (citing *In re Oxus Gold* with approval).

63. See *In re Oxus Gold*, 2006 WL 2927615 at \*6.

64. *Id.* (citations omitted).

65. See *In re Norfolk*, 626 F. Supp. 2d at 886; *OJSC Ukrnafta v. Carpathy Petrol. Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at \*4 (D. Conn. Aug. 27, 2009).

administration of bilateral and other investment arbitrations is incorrect.<sup>66</sup> Although UNCITRAL has promulgated certain arbitral rules that are often used in investment arbitration, neither the United Nations nor UNCITRAL plays any role in administering the arbitrations that proceed under those rules.<sup>67</sup> Indeed, UNCITRAL developed its arbitration rules (UNCITRAL Arbitration Rules) specifically for use in ad hoc (i.e., non-administered) proceedings.<sup>68</sup> Although the UNCITRAL Arbitration Rules can be used in administered proceedings, UNCITRAL is not the administering body in those cases.<sup>69</sup>

Second, the court in *In re Oxus Gold* appears to assume that only treaty-based arbitrations proceed under the UNCITRAL Arbitration Rules.<sup>70</sup> Again, this assumption is incorrect, since the UNCITRAL Arbitration Rules can be used in both public (i.e., treaty-based) and private (i.e., contract-based) proceedings.<sup>71</sup> Indeed, UNCITRAL initially developed its arbitration rules in 1976 for use in private commercial proceedings (at that point, investment arbitration was largely non-existent).<sup>72</sup> Although the UNCITRAL Arbitration Rules were revised in 2010 to include a number of provisions designed to facilitate treaty-based arbitrations, the revised rules are nevertheless still available for use in private commercial proceedings.<sup>73</sup>

Third, some courts following *In re Oxus Gold* have suggested that the

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66. *Ukrnafta*, 2009 WL 2877156 at \*4 (citing *In re Arbitration in London*, No. 09 C 3092, 2009 WL 1665936, at \*3 (N.D. Ill. June 15, 2009), and *In re Oxus Gold*, 2006 WL 1037387 at \*5).

67. See UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) [hereinafter UNCITRAL 2010 Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; UNCITRAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at 34, U.N. Doc. A/31/17 (Apr. 28, 1976) [hereinafter UNCITRAL 1976 Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 9 (2013).

68. See UNCITRAL 2010 Rules, *supra* note 67; UNCITRAL 1976 Rules, *supra* note 67; LEW ET AL., *supra* note 22, ¶¶ 3-4 to 3-11.

69. See LEW ET AL., *supra* note 22, ¶ 3-11. Some courts have properly recognized this distinction and have suggested that a BIT arbitration was “private” because it was “governed by the Arbitration Rules of the United Nations Commission on International Trade Law (‘UNCITRAL’), not officially sanctioned by the United Nations Commission on International Trade Law or any other official authority.” *In re Chevron Corp.*, No. 7:10-mc-00067, 2010 WL 4883111, at \*2 n.2 (W.D. Va. Nov. 24, 2010); see also *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010).

70. See *In re Oxus Gold*, 2006 WL 2927615 at \*6; see also *Ukrnafta*, 2009 WL 2877156 at \*4; UNCITRAL 2010 Rules, *supra* note 67; UNCITRAL 1976 Rules, *supra* note 67.

71. See UNCITRAL 2010 Rules, *supra* note 67; UNCITRAL 1976 Rules, *supra* note 67; LEW ET AL., *supra* note 22, ¶¶ 21-10, 28-6.

72. See UNCITRAL 1976 Rules, *supra* note 67; LEW ET AL., *supra* note 22, ¶ 3-11.

73. See UNCITRAL 2010 Rules, *supra* note 67; Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1289-90 (2009).

UNCITRAL Arbitration Rules constitute a type of “international law” that can transform a tribunal into a “foreign or international tribunal” for purposes of section 1782.<sup>74</sup> This statement reflects a fundamental misunderstanding of both international arbitration and international law, in that procedural rules such as the UNCITRAL Arbitration Rules do not constitute “international law” any more than the rules of a private arbitral institution do.<sup>75</sup> This approach also suggests that the nature of the underlying substantive or procedural law should determine the nature of the tribunal.<sup>76</sup> However, that conclusion cannot be correct, since an arbitration or litigation located outside the United States cannot be considered a U.S. proceeding simply because the dispute is governed by U.S. substantive law or by the arbitral rules of a U.S.-based arbitral institution such as the AAA.<sup>77</sup> Similarly, an arbitration or litigation governed by non-U.S. law but situated in the United States cannot be transformed into a “foreign or international tribunal” simply as a function of the parties’ choice of procedural or substantive law.<sup>78</sup>

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74. See 28 U.S.C. § 1782 (2012); *Ukrnafta*, 2009 WL 2877156 at \*4 (citing *In re Oxus Gold*, 2006 WL 2927615 at \*6, for the proposition that “an arbitration panel governed by international law, namely, the UNCITRAL rules of arbitration, constitutes a ‘foreign tribunal’ for the purposes of Section 1782” (citation omitted)).

75. The confusion may relate to the fact that UNCITRAL promulgates a number of model laws (such as those concerning arbitration, insolvency and electronic commerce) and international conventions (such as those regarding the carriage of goods by sea or the international sales of goods) that can be subsequently adopted by states. See UNCITRAL, Publications, <http://www.uncitral.org/uncitral/publications/publications.html>; see also UNCITRAL, Texts and Status, [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html); Susan Block-Lieb & Terence C. Halliday, *Incrementalism in Global Lawmaking*, 23 BROOK. J. INT’L L. 851, 864-86 (2007) (discussing UNCITRAL’s work in arbitration and other subject matter areas). However, the UNCITRAL Arbitration Rules do not fall into this category of instruments and are instead adopted by individual parties, be they private parties or state parties. See UNCITRAL 2010 Rules, *supra* note 67; UNCITRAL 1976 Rules, *supra* note 67; LEW ET AL., *supra* note 22, ¶¶ 3-4, 28-6.

76. This approach is problematic. See *infra* notes 390-394 and accompanying text.

77. See American Arbitration Association, Rules & Procedures, <http://www.adr.org>.

78. Section 1782 is generally considered not to apply to proceedings within the United States, although at least one attempt has been made to use section 1782 in an arbitration seated in the U.S. See 28 U.S.C. § 1782; *In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*2, 15-17 (C.D. Cal. June 7, 2013) (declining to address the issue of whether a U.S.-based arbitration proceeding under the AAA’s rules for international disputes involved an “international tribunal”); Rau, *Third Parties*, *supra* note 18, at 35. However, allowing section 1782 requests in arbitrations seated abroad could open the door to arguments that section 1782 could or should also apply to some proceedings seated within the United States on the grounds that such arbitrations are “non-domestic.” See 28 U.S.C. § 1782; Rothstein, *supra* note 18, at 78 (noting that “after holding that a foreign private arbitration is a § 1782 ‘foreign tribunal,’ it would be difficult to explain why a private international arbitration in the United States is not a § 1782 ‘international tribunal’”); see also *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999) (declining to extend section 1782 to arbitration since to do so “not only would be devoid of principle, but also would create an entirely new category of dispute concerning . . . the characterization of

*In re Oxus Gold* is not the only judicial decision to misunderstand the nature of investment arbitration.<sup>79</sup> For example, one court took the view that “[t]he *Intel* court’s reference to ‘arbitral tribunals,’ at minimum, would include international-government sanctioned tribunals” because “[r]eferences in the United States Code to ‘arbitral tribunals’ almost uniformly concern an adjunct of a foreign government or international agency.”<sup>80</sup> However, the investment arbitration regime does not arise as a result of the efforts of a single political actor or international agency, but is instead the product of a “patchwork quilt of interlocking but separate bilateral treaties.”<sup>81</sup> As a result, investment arbitration cannot constitute “an adjunct of a foreign government or international agency” within the meaning of the court’s analysis.<sup>82</sup>

These examples demonstrate how problematic early analysis of section 1782 was.<sup>83</sup> Although there was a chance that the errors reflected in these early decisions could have been corrected in the mass of opinions arising out of the Chevron-Ecuador dispute, the legal and factual complexity of the Chevron-Ecuador controversy<sup>84</sup> seems to have made courts even less inclined to delve into difficult questions relating to the propriety of section 1782 requests in cases involving investment arbitration.<sup>85</sup> Indeed, decisions arising out of the Chevron-Ecuador dispute reflect a new series of problems.

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arbitral panels as domestic, foreign or international”); STRONG, *supra* note 67, at 27-29 (discussing foreign, domestic and non-domestic awards in international commercial arbitration).

79. See *In re Oxus Gold*, 2006 WL 2927615 at \*6.

80. OJSC *Ukrnafta v. Carpatsky Petrol. Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at \*4 (D. Conn. Aug. 27, 2009); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004); *infra* notes 452-454 and accompanying text.

81. MCLACHLAN ET AL., *supra* note 7, at 5.

82. See *Ukrnafta*, 2009 WL 2877196 at \*4.

83. See 28 U.S.C. § 1782; Alford, *supra* note 3, at 138-39.

84. A detailed history of the dispute is available from several sources. See *In re Chevron Corp.*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010), *aff'd sub nom. Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010); see also *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300-06 (2d Cir. 2011); *In re Chevron Corp.*, 650 F.3d 276, 279-86 (3d Cir. 2011); *In re Chevron Corp.*, 633 F.3d 153, 156-60 (3d Cir. 2011); *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 440-43 (S.D.N.Y. 2011) (identifying several decisions with more detailed procedural histories); *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 597-626 (S.D.N.Y. 2011), *vacated*, *Chevron Corp. v. Naranjo*, No. 11-1150-CV L, 2011 WL 4375022 (2d Cir. Sept. 19, 2011), *rev'd*, *Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012); Alford, *supra* note 3, at 138-39; Kimerling, *Oil*, *supra* note 1, at 63-98; History of Texaco and Chevron in Ecuador, available at <http://www.texaco.com/sitelets/ecuador/en/history/chronologyofevents.aspx>; see also *supra* notes 1-8 and accompanying text.

85. See 28 U.S.C. § 1782.



## 2. *The Chevron-Ecuador dispute*

At this point, the Chevron-Ecuador dispute has generated the “vast majority” of section 1782 requests in the context of investment arbitration, even though tactical use of section 1782 in that matter did not begin until 2010.<sup>86</sup> Unfortunately, most of the decisions in this line of cases have reflected one or more of the following four problems.

First, courts considering section 1782 requests in the context of the Chevron-Ecuador dispute typically do not take into account the fact that there are usually several different conflict resolution processes (including both litigation and arbitration) that are ongoing at the same time.<sup>87</sup> Thus, for example, a court may be asked to consider the propriety of a discovery request intended for “use in the Lago Agrio litigation itself, criminal proceedings . . . that have been instituted . . . in Ecuador, and an arbitration . . . with the United Nations Commission on International Trade Law (UNCITRAL) pursuant to the United States-Ecuador Bilateral Investment Treaty (BIT).”<sup>88</sup> Rather than parsing through the statute to determine whether a BIT arbitration constitutes a “foreign or international tribunal” under 28 U.S.C. § 1782, courts often conclude that the existence of a foreign litigation is sufficient to meet the statutory requirements.<sup>89</sup> While this strategy has merit (since it is certainly true that the existence of litigation in a foreign court is enough to meet the statutory test for a “foreign or international tribunal”), the decisions often do not make it

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86. Alford, *supra* note 3, at 137; *see also* 28 U.S.C. § 1782; Alford, *supra* note 3, at 128, 155. Chevron initiated the tactical use of section 1782 requests, although the Republic of Ecuador and the Ecuadorian plaintiffs eventually adopted a similar strategy. *See In re Chevron*, 650 F.3d at 282 n.7; *In re Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925, at \*11 (S.D. Fla. June 12, 2012); Alford, *supra* note 3, at 145, 155; *see also* Beale et al., *supra* note 18, at 84-85, 87-89.

87. *See In re Chevron*, 650 F.3d at 279-86; *Berlinger*, 629 F.3d at 305; *In re Chevron*, 2012 WL 3636925 at \*4, 7, 11; *In re Republic of Ecuador*, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868, at \*2-3, 6 (N.D. Cal. Feb. 22, 2011); *In re Republic of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492, at \*8 (N.D. Cal. Dec. 1, 2010), *reconsideration denied*, 2011 WL 736868 (N.D. Cal. Feb. 22, 2011); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010); *In re Chevron Corp.*, 762 F. Supp. 2d 242, 247-48 (D. Mass. 2010); *Chevron Corp.*, No. 7:10-mc-00067, 2010 WL 4883111, at \*3 (W.D. Va. Nov. 24, 2010); *In re Veiga*, 746 F. Supp. 2d 8, 18, 20 (D.C.D.C.), *appeal dismissed*, 2010 WL 5140467 (D.C. Cir. Dec. 17, 2010), *appeal dismissed*, 2011 WL 1765213 (D.C. Cir. Apr. 18, 2011); *Chevron Corp.*, Nos. 10-MC-21JH/LFG, 20-MC-22 JH/LFG, 2010 WL 8786279, at \*6 (D.N.M. Sept. 1, 2010), *objections overruled*, 2010 WL 8786202 (D.N.M. Sept. 13, 2010); *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd*, 629 F. 3d 297 (2d Cir. 2011); *In re Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB, 2010 WL 8767265, at \*4 (N.D. Ga. Mar. 2, 2010).

88. *In re Chevron*, 650 F.3d at 279; *see also In re Chevron*, 633 F.3d at 163. Indeed, Chevron has explicitly stated that it intended to use the fruits of the Section 1782 requests in both the Ecuadorian courts and the BIT arbitration. *See id.* at 159.

89. *See* 28 U.S.C. § 1782; *Berlinger*, 629 F.3d at 310-11; *Chevron Corp.*, 2010 WL 4883111 at \*2 n.2.

clear that they are not addressing the question of whether an investment arbitration falls within the terms of the statute.<sup>90</sup> As such, the cases can be somewhat misleading.

Second, even when courts do consider whether a tribunal in an investment arbitration constitutes a “foreign or international tribunal” under section 1782, they typically do so in a highly formal and conclusory manner.<sup>91</sup> Thus, for example, at one point the Third Circuit simply stated, without any supporting analysis or authority, that “use of the evidence uncovered in a section 1782 application in the BIT arbitration to ‘attack’ the Lago Agrio Court unquestionably would be ‘for a use in a proceeding in a foreign or international tribunal.’”<sup>92</sup> Although this kind of analytical deficiency may sometimes be the result of faulty briefing by the parties,<sup>93</sup> it is disturbing to see so many courts undertaking such a mechanical approach to important questions of statutory interpretation.

Third, many decisions in the Chevron-Ecuador line of cases simply rely on precedents arising out of the same factual dispute without noticing that those earlier decisions are themselves largely unanalyzed.<sup>94</sup> Although some courts at least indicate that they are relying on theories such as judicial estoppel to avoid relitigating certain facts, not every court makes that distinction.<sup>95</sup> As a result, an ever-growing number of cases allow discovery under section 1782 based on very sparsely reasoned precedent.<sup>96</sup> The problem is further compounded when courts outside the Chevron-Ecuador line of authority rely on these precedents without any sort of independent analysis of the propriety of a section 1782 request in a situation involving investment arbitration.<sup>97</sup>

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90. 28 U.S.C. § 1782.

91. See Alford, *supra* note 3, at 136, 138. But see *In re Chevron*, 762 F. Supp. 2d at 250; *In re Veiga*, 746 F. Supp. 2d at 23.

92. *In re Chevron*, 633 F.3d at 161; see also *Republic of Ecuador v. Connor*, 708 F.3d 651, 657 (5th Cir. 2013); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1124 (D. Colo. 2011), *order aff'd*, 2011 WL 5439681 (D. Colo. Nov. 9, 2011); *In re Republic of Ecuador*, 280 F.R.D. 506, 508 (N.D. Cal. 2012); *Chevron Corp.*, Nos. 1:10MC27, 1:10MC28, 2010 WL 3418394, at \*4 (W.D.N.C. Aug. 30, 2010).

93. Parties sometimes fail to object to the use of a section 1782 request in the context of an investment arbitration. See 28 U.S.C. §1782; *Republic of Ecuador v. Stratus Consulting, Inc.*, No. 13-cv-01112-REB-KLM, 2013 WL 2352425, at \*1 (D. Colo. May 29, 2013); *In re Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296, 1302 (S.D. Fla. 2012); *Bjorkman*, 801 F. Supp. 2d at 1124.

94. See *In re Chevron Corp.*, No. 11-24599-CV, 2012 WL 3636925, at \*7 (S.D. Fla. June 12, 2012); *Bjorkman*, 801 F. Supp. 2d at 1124 n.1; *In re Republic of Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189, at \*3 (E.D. Cal. Sept. 13, 2011); *In re Veiga*, 746 F. Supp. 2d at 22-23; *In re Republic of Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 3702427, at \*4 (E.D. Cal. Sept. 15, 2010).

95. See *Connor*, 708 F.3d at 657.

96. See 28 U.S.C. § 1782.

97. See *id.*; *In re Mesa Power Grp., LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at

Fourth, many of the decisions involving section 1782 requests in the context of the Chevron-Ecuador dispute were made by magistrate judges rather than district judges.<sup>98</sup> This phenomenon is potentially problematic because the scope of authority given to magistrate judges is limited by statute and falls somewhat short of the power given to district judges under the U.S. Constitution.<sup>99</sup> These differences can lead to a number of difficulties in cases involving section 1782.<sup>100</sup>

For example, several courts have rejected the view that a section 1782 request can “be characterized as a ‘discovery dispute’ and, as such, . . . referred to a magistrate judge without the [other party’s] consent . . . under a blanket referral order assigning to magistrate judges all ‘discovery disputes in cases pending in other federal courts.’”<sup>101</sup> Indeed, something of a circuit split has arisen on this issue.<sup>102</sup> Therefore, it is possible that a section 1782 request may only properly be heard by a magistrate judge if the district court enters a special

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\*5 (D.N.J. Nov. 20, 2012) (involving a section 1782 request in the context of a NAFTA arbitration); *In re Mesa Power*, 878 F. Supp. 2d at 1302 (listing section 1782 requests in other NAFTA and investment arbitrations).

98. See 28 U.S.C. §1782; *Phillips v. Beierwaltes*, 466 F.3d 1217, 1222 (10th Cir. 2006); *Chevron Corp. v. Salazar*, 275 F.R.D. 437 (S.D.N.Y. 2011); *In re Chevron*, 2012 WL 3636925, at \*1; *In re Republic of Ecuador*, 280 F.R.D. at 508; *In re Republic of Ecuador*, 2011 WL 4089189 at \*1; *Bjorkman*, 801 F. Supp. 2d at 1122; *In re Republic of Ecuador*, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868, at \*1 (N.D. Cal. Feb. 22, 2011); *In re Chevron Corp.*, 762 F. Supp. 2d 242, 244 (D. Mass. 2010); *In re Republic of Ecuador*, 2010 WL 4973492, at \*8 (N.D. Cal. Dec. 1, 2010), *reconsideration denied*, 2011 WL 736868 (N.D. Cal. Feb. 22, 2011); *In re Republic of Ecuador*, No. 1:10-mc-00040 GSA, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010); *In re Republic of Ecuador*, 2010 WL 3702427, at \*1; *In re Chevron Corp.*, Nos. 10-MC-21JH/LFG, 20-MC-22 JH/LFG, 2010 WL 8786279, at \*1 (D.N.M. Sept. 1, 2010), *objections overruled*, 2010 WL 8786202 (D.N.M. Sept. 13, 2010); *Chevron Corp.*, Nos. 1:10MC27, 1:10MC28, 2010 WL 3418394, at \*1 (W.D.N.C. Aug. 30, 2010); *In re Chevron Corp.*, No. 3:10-cv-00686, 2010 WL 8767266, at \*1 (M.D. Tenn. Aug. 17, 2010); *In re Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB, 2010 WL 8767265, at \*1 (N.D. Ga. Mar. 2, 2010); see also *In re Mesa Power*, 2012 WL 6060941, at \*1; *In re Mesa Power*, 878 F. Supp. 2d at 1299.

99. See U.S. CONST., art. III, §§1-2; 28 U.S.C. § 636 (2012); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 765-66 (2004); Judith Resnik, “Uncle Sam Modernizes His Justice:” *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 609, 614, 622, 627 (2002).

100. See 28 U.S.C. § 1782.

101. *Phillips*, 466 F.3d at 1222; see also *In re Qwest Commc’ns Int’l Inc.*, 3:08mc93, 2008 WL 2741111, at \*1-2 (W.D.N.C. July 10, 2008).

102. See *Chevron Corp.*, Nos. 10mc21, 10mc22, 2010 WL 8786202, at \*2-3 (D.N.M. Sept. 13, 2010); *Chevron Corp. v. E-Tech Int’l*, No. 10cv1146-IEG(WMc), 2010 WL 3584520, at \*3 (S.D. Cal. Sept. 10, 2010) (noting authority suggesting that “although discovery disputes generally are viewed as non-dispositive, motions under §1782 are dispositive matters” and discussing split of authority); see also *Phillips*, 466 F. 3d at 1222; *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002); *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

direction under 28 U.S.C. § 636(b)(1)(B) rather than relying solely on a standing order under 28 U.S.C. § 636(b)(1)(A).<sup>103</sup>

Questions about the proper characterization of a magistrate's authority to hear a section 1782 request also give rise to concerns about the appropriate standard of review of any order that results from such a request.<sup>104</sup> For example, if a magistrate is considering a pretrial matter that is subject to a standing order under 28 U.S.C. § 636(b)(1)(A), then the magistrate's decision may only be reconsidered by the district court if the decision is "clearly erroneous or contrary to law."<sup>105</sup> However, some parties have argued that de novo review of the magistrate's order is necessary, given that "applications for discovery under 28 U.S.C. § 1782 are inherently dispositive, and may not be ruled on by magistrate judges" absent a special direction under 28 U.S.C. § 636(b)(1)(B).<sup>106</sup>

Although these matters involve the niceties of statutory interpretation, the issue can also be placed in the context of a larger discussion about whether the excessive use of magistrate judges "erode[s] Article III values."<sup>107</sup> Indeed, there are serious questions about whether and to what extent magistrate judges can or should be involved in decisions (such as section 1782 determinations) that have the potential to affect foreign affairs.<sup>108</sup> Given that "legal

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103. See 28 U.S.C. § 636(b)(1).

104. See 28 U.S.C. § 1782.

105. 28 U.S.C. § 636(b)(1)(A); *Chevron Corp.*, 2010 WL 8786202 at \*2 (quoting 28 U.S.C. § 636(b)(1)(A) and referring to *First Union Mortgage Corp. v. Smith*, 229 F.3d 992, 995 (10th Cir. 2000)); see also 28 U.S.C. § 1782.

106. *Chevron Corp.*, 2010 WL 8786202 at \*2-3 (deciding "out of an abundance of caution" to review the magistrate judge's order de novo); see also 28 U.S.C. § 636(b)(1)(b); *Phillips*, 466 F.3d at 122; *E-Tech Int'l*, 2010 WL 3584520 at \*3.

107. Pfander, *supra* note 99, at 766; see also 28 U.S.C. § 636; 28 U.S.C. § 1782; Resnik, *supra* note 99, at 609, 614, 622, 627.

108. See 28 U.S.C. § 1782; see also Neil Motenko & Rebecca Shuffain, *Intel v. Advanced Micro Devices: The Court's Permissive Approach to U.S. Discovery in Aid of Foreign Proceedings*, 19 ANTITRUST 66, 69 (2004); Catherine Piché, *Discovery in International Litigation*, 38 INT'L LAW. 329, 330 (2004). This issue comes up most frequently in the context of extradition. See, e.g., *Prasoprat v. Benov*, 421 F.3d 1009, 1017 (9th Cir. 2005) (noting "[t]he extradition magistrate simply does not have the authority to consider foreign policy concerns and other issues that may affect the executive branch's decision whether to extradite"). But see John T. Parry, *International Extradition, The Rule of Non-Inquiry, and The Problem of Sovereignty*, 90 B.U. L. REV. 1973, 1974-75 (2010). However, concerns have also been raised in the context of foreign sovereign immunity disputes. See *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 791 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012) (noting in the context of a case where the district court adopted the magistrate judge's positions in toto that "[q]uestions of foreign-sovereign immunity are sensitive, and lower-court mistakes about the availability of immunity can have foreign-policy implications"). Although no known example exists where a party has attempted to use section 1782 to obtain evidence held by foreign state or state parties within the United States, such a possibility exists. See *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 776, 782-83, 796-97 (S.D.N.Y. 2012); see also *infra* notes 372, 374 and

inconsistencies in the area of investment arbitration affect foreign investment decisions, economic development, and foreign relations,”<sup>109</sup> U.S. district judges should be hesitant about allowing section 1782 requests to be heard by magistrate judges.

These four analytical shortcomings make the Chevron-Ecuador line of cases extremely troubling from a jurisprudential perspective. Furthermore, the vast number of decisions arising out of this particular dispute threatens to move the law in a particular direction without any real discussion about the propriety of judicially mandated U.S.-style discovery in investment arbitration. This phenomenon is somewhat different from the situation involving section 1782 requests relating to international commercial arbitration.<sup>110</sup>

### C. *Post-Intel Jurisprudence Regarding International Commercial Arbitration*

Section 1782 requests in the context of international commercial arbitration do not involve the same kind of clear demarcation line that is seen in the investment context as a result of the Chevron-Ecuador line of cases.<sup>111</sup> Instead, jurisprudence in the commercial realm has developed somewhat more organically. Nevertheless, there is a growing circuit split concerning whether the statute can or should be applied to matters involving international commercial arbitration.<sup>112</sup> This phenomenon suggests that the best way to introduce the existing case law in this field is to contrast arguments for and against the use of section 1782 requests in the commercial context.<sup>113</sup>

#### 1. *Reasons to disallow Section 1782 requests*

At this point, courts have enunciated a number of reasons why requests for discovery under section 1782 should be denied in cases involving international commercial arbitration.<sup>114</sup> For example, some courts have found that tribunals

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accompanying text.

109. Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. DAVIS J. INT’L L. & POL’Y 47, 57 (2005).

110. See Alford, *supra* note 3, at 138.

111. See 28 U.S.C. § 1782.

112. See *id.*; *In re* Consorcio Ecuatoriano de Telecomunicaciones S.A., 685 F.3d 987, 997-98 (11th Cir. 2012); *In re* Dubey, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*3-20 (C.D. Cal. June 7, 2013); *Ex rel* Winning (HK) Int’l Shipping Co., No. 09-22659-MC, 2010 WL 1796579, at \*6-7 (S.D. Fla. Apr. 30, 2010); AAA, *supra* note 18, at 10; Alford, *supra* note 3, at 135; Beale et al., *supra* note 18, at 89.

113. See 28 U.S.C. § 1782.

114. See *id.*; *In re* Finserve Grp. Ltd., No. 4:11-mc-2044-RBH, 2011 WL 5024264 (D. S.C. Oct 20, 2011); *In re* Rhodianyl S.A.S., No. 11-1026-JTM, 2011 U.S. Dist. LEXIS

in international commercial arbitration do not generate decisions that are judicially reviewable under the criteria described by the Supreme Court in *Intel*.<sup>115</sup> This approach is based on the recognition that it is not only “common for arbitration provisions in private contracts to include a waiver of review by courts,”<sup>116</sup> but that a number of arbitration rules “provide that decisions by the arbitrators are to be treated as administrative, and appeals to any judicial authority are generally taken to have been waived.”<sup>117</sup> Thus, “the emphasis in *Intel* on judicial reviewability—not simply enforceability—prevent[s] application of §1782 in the case of purely private arbitrations.”<sup>118</sup>

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72918, at \*43 (D. Kan. Mar. 25, 2011); *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 883–86 (N.D. Ill. 2009); *In re Operadora DB Mex., S.A.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at \*8-12 (M.D. Fla. Aug. 4, 2009); *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485-87 (S.D. Tex. 2008), *aff’d*, 341 F. App’x 31 (5th Cir. 2009); Alford, *supra* note 3, at 135. As this Article was going to print, the District Court for the Central District of California handed down a decision that considered the propriety of a section 1782 request in the context of international commercial arbitration in depth. *See* 28 U.S.C. § 1782; *In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*3-17 (C.D. Cal. June 7, 2013). Although it is impossible to incorporate every aspect of *Dubey* into the current discussion, the decision provides a number of useful insights into the relevant issues and merits further analysis. *See id.*

115. *See* 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *In re Operadora*, 2009 WL 2423138 at \*12 (involving an arbitral award rendered in an arbitration with the International Chamber of Commerce); *see also* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2001).

116. *In re Finserve*, 2011 WL 5024264 at \*3; *see also Ex rel Winning*, 2010 WL 1796579 at \*9; *In re Norfolk*, 626 F. Supp. 2d at 886.

117. *In re Finserve*, 2011 WL 5024264, at \*3 (referring to the Arbitration Rules of the London Court of International Arbitration (LCIA)); *In re Norfolk*, 626 F. Supp. 2d at 886. However, if the governing law permits review on the merits or the governing arbitral rules permit disclosure of the type contemplated by section 1782, then the arbitral tribunal may be considered to fall within the scope of the statute. *See* 28 U.S.C. § 1782; *In re Finserve*, 2011 WL 5024264, at \*10.

118. *In re Rhodianyl*, 2011 U.S. Dist. LEXIS 72918 at \*30; *see also In re Norfolk*, 626 F. Supp. 2d at 886. Interestingly, the focus on judicial reviewability could perhaps allow section 1782 requests to proceed if an arbitration is seated in a country that allows judicial review of the merits of an arbitral award. *See In re Rhodianyl*, 2011 U.S. Dist. LEXIS 72918 at \*41-42 (discussing *Ex rel Winning*, 2010 WL 1796579 at \*6-7, which was based in England, where full judicial review of arbitral awards is allowed). A number of jurisdictions still permit merits-based review of an arbitral award arising out of an international arbitration, despite a trend away from such measures. *See* Arbitration Act 1996 § 69 (Engl.); BORN, *supra* note 29, at 2639. However, even in those cases where there is a right to judicial review on the merits, the parties might have waived that right. *See Ex rel Winning*, 2010 WL 1796579 at \*9. A related argument might be that the parties have implicitly agreed not to allow independent recourse to the courts if a proceeding is seated in a jurisdiction (such as France) that takes a very strict view of negative competence-competence, since that demonstrates an implicit decision to disallow any sort of judicial intervention during the pendency of the arbitration. *See* BORN, *supra* note 29, at 1776; LEW ET AL., *supra* note 22, ¶¶ 14-55 to 14-56; Stavros Brekoulakis, *The Arbitrator and the Arbitration Procedure—the Negative Effect of Compétence-Compétence: The Verdict Has to Be Negative*, 2009 AUSTRIAN ARB. Y.B. 237, 239-41.

Other courts have noted that “the crucial requirement [under *Intel*] is that the foreign body exercise adjudicative power, and have an adjudicative purpose.”<sup>119</sup> This approach requires courts considering requests under section 1782 to determine whether arbitration is an alternative to or the equivalent of litigation.<sup>120</sup> This is a relatively thorny issue that has not yet been fully resolved even outside the context of section 1782.<sup>121</sup>

Although further research on the theoretical nature of arbitration is warranted, courts facing discovery requests under section 1782 have nevertheless had to address the issue as a practical manner.<sup>122</sup> Those courts that disallow requests under section 1782 tend to characterize international commercial arbitration as “function[ing] as a contractual alternative to state-sponsored courts, administrative agencies, arbitral tribunals, and quasi-judicial bodies.”<sup>123</sup> This approach allows courts to distinguish international commercial arbitration from the type of procedure discussed in *Intel* on the grounds

that the D-G Commission acted as a quasi-adjudicative proceeding before review by true judiciary powers[, which] makes it an animal of a very different stripe from an arbitral tribunal. An arbitral tribunal exists as a parallel source of decision-making to, and is entirely separate from, the judiciary, which was not the case with the D-G Competition as the Court was at pains to

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119. *In re Letters to Examine Witnesses From Court of Queen’s Bench for Manitoba, Canada*, 59 F.R.D. 625, 629 (N.D. Cal. 1973) (footnote omitted), *aff’d*, 488 F.2d 511, 512 (9th Cir. 1973); *see also Intel*, 542 U.S. at 241.

120. *See* 28 U.S.C. § 1782.

121. *See id.*; LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:1, 1-3 (2010) (noting arbitration coexists with litigation as “part of the American system of administering justice”); *id.* § 1:3, at 1-8 to 1-9 (indicating that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply); Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59, 93-94 (2005) (noting differences between arbitration and litigation); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, ICCA CONG. SER. NO. 7, 24, 26 (1996) (noting arbitration is sometimes considered “a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends”); Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting “arbitration is a substitute for adjudication by litigation”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (concluding arbitration is not the same as litigation); Strong, *First Principles*, *supra* note 32, at 241-45 (discussing the nature of arbitration).

122. *See* 28 U.S.C. § 1782.

123. *In re Operadora DB Mex., S.A.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at \*12 (M.D. Fla. Aug. 4, 2009); *see also* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241 *In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*14-15 (C.D. Cal. June 7, 2013). However, the holding in *Operadora* is somewhat suspect, given the Eleventh Circuit’s recent decision in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 997-98 (11th Cir. 2012). *See Operadora*, 2009 WL 2423138 at \*3 (noting the Eleventh Circuit had not yet addressed the issue).

point out in *Intel*.<sup>124</sup>

Under this analysis, international commercial arbitration does not constitute a “foreign or international tribunal” within the meaning of section 1782.<sup>125</sup>

The emphasis on the contractual aspects of international commercial arbitration is important not only as a means of distinguishing litigation and arbitration on what might be called jurisdictional grounds,<sup>126</sup> but also as a way of identifying the parties’ procedural expectations. Thus, “in a private arbitral proceeding, a party’s ‘tactical use of discovery devices’ such as § 1782 may deprive the other party of ‘its bargained-for efficient process.’”<sup>127</sup> Indeed, it has been

generally accepted that the rules and procedures in arbitration are intended to be radically different from the rules and procedures in the courts. Arbitrators govern their own proceedings, generally without assistance or intervention by a court. Whether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrators decide. . . . [A] Federal District Court has no power to order discovery under court rules where the matter is being litigated in an arbitration.<sup>128</sup>

Another way of analyzing the propriety of section 1782 in cases involving international commercial arbitration involves a direct attack on *Intel*’s precedential power.<sup>129</sup> Indeed,

as conceded by almost all of the post-*Intel* rulings, the Supreme Court in *Intel* never addressed the issue of whether a private arbitration forum qualified as a tribunal under section 1782. In addition, the tribunal in *Intel* was not chosen pursuant to a written agreement between the parties to settle their disputes through private arbitration, but rather was initiated by the unilateral submission of a complaint by a competitor of one of the parties. Finally, the entity in *Intel* in which the complaint was filed was a quasi-governmental body charged with enforcing and investigating violations of certain European Union anti-trust laws.<sup>130</sup>

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124. *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485-86 (S.D. Tex. 2008), *aff’d*, 341 F. App’x 31 (5th Cir. 2009); *see also infra* notes 315-323 and accompanying text.

125. *See* 28 U.S.C. § 1782.

126. *See infra* notes 156-323 and accompanying text..

127. *In re Rhodiansyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*36 (D. Kan. Mar. 25, 2011) (quoting *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1998)); *see also* 28 U.S.C. § 1782; *Operadora*, 2009 WL 2423138, at \*12.

128. *In re Technostroyexport*, 853 F. Supp. 695, 697-98 (S.D.N.Y. 1994) (citations omitted).

129. *See* 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

130. *Ex rel Winning (HK) Int’l Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at \*7 (S.D. Fla. Apr. 30, 2010); *see also In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S.



As a result, “the Supreme Court in *Intel* did not have cause to address any distinctions between private or quasi-governmental entities for purposes of section 1782, because there was no non-governmental or nonstate-sponsored body at issue in that case.”<sup>131</sup> Jurisdictions adopting this line of analysis typically follow the approach to section 1782 used in that circuit prior to *Intel*.<sup>132</sup>

When considering whether to extend section 1782 to situations involving international commercial arbitration, courts sometimes find it useful to think about the effect that decision might have.<sup>133</sup> The Fifth Circuit has expressly addressed this issue, noting

that §1782 authorizes broader discovery than what is authorized for domestic arbitrations by Federal Arbitration Act §7. If §1782 were to apply to private international arbitrations, “the differences in available discovery could ‘create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitration disputes as domestic, foreign, or international.’” . . . [E]mpowering parties in international arbitrations to seek ancillary discovery through federal courts could [also] destroy arbitration’s principal advantage as “a speedy, economical, and effective means of dispute resolution” if the parties “succumb to fighting over burdensome discovery requests far from the place of arbitration.” Neither private arbitration nor these questions were at issue in *Intel*.<sup>134</sup>

## 2. *Reasons to allow Section 1782 requests*

Although a variety of courts have decided not to allow discovery under section 1782 in cases involving international commercial arbitration, some

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Dist. LEXIS 83972, at \*9-10 (C.D. Cal. June 7, 2013) (noting the Court in *Intel* “stopped short of declaring that any foreign body exercising adjudicatory power falls within the purview of the statute”) (citation omitted); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006).

131. *Ex rel Winning*, 2010 WL 1796579 at \*7.

132. *See* 28 U.S.C. § 1782; *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 34 (5th Cir. 2009) (affirming continued relevance of *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880 (5th Cir. 2009)); *In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at \*14-15 (noting continued relevance of *Biedermann Int’l*, 168 F.3d at 880, and *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999)).

133. *See* 28 U.S.C. § 1782.

134. *El Paso Corp.*, 341 F. App’x at 34 (citations omitted); *see also* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; *In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at \*14-15 (“Construing § 1782 to apply to private contractual arbitrations would defeat the timeliness and cost-effectiveness of arbitration, and would place a heavy burden on the federal courts to determine discovery requests.”); *In re Rhodiansyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*31 (D. Kan. Mar. 25, 2011) (“Interpreting §1782 to apply to voluntary, private international arbitrations would be a body blow to such arbitration, since it would create a tremendous disincentive to engage in such arbitration . . .”); *In re Application of Caratube Int’l Oil Co.*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010); Alford, *supra* note 3, at 136.

authorities take the opposite view.<sup>135</sup> Unfortunately, in-depth discussion of a number of these decisions is virtually impossible, since the opinions either exhibit the same kind of conclusory analysis that was evident in the investment context<sup>136</sup> or reflect a fundamental misunderstanding of the relationship between courts and arbitration.<sup>137</sup> These types of precedents are problematic not only for those who are involved in the proceeding at bar but also for parties to subsequent disputes, since other courts may unwittingly rely on inadequate or incorrect propositions of law.

For the most part, courts that consider section 1782 requests to be appropriate in the context of international commercial arbitration base their decisions on *Intel*.<sup>138</sup> While some decisions in this line of cases are unhelpfully superficial,<sup>139</sup> the more rigorous analyses focus on the so-called “functionality test,” which “involves an analytical framework pursuant to which courts look beyond the narrow categorisation of whether an international arbitration proceeding is ‘private’ (eg, unrelated to treaties) and assess the specific character or function of the arbitration in the broader legal system in which the arbitration is seated.”<sup>140</sup> Under this approach, courts “consider the origin of

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135. See 28 U.S.C. § 1782; *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 997-98 (11th Cir. 2012); *OJSC Ukrnafta v. Carpatsky Petrol. Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at \*2-5 (D. Conn. Aug. 27, 2009); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 237-40 (D. Mass. 2008); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 953-57 (D. Minn. 2007); *In re Roz*, 469 F. Supp. 2d at 1223-28; Alford, *supra* note 3, at 135; Beale et al., *supra* note 18, at 69-89.

136. See 28 U.S.C. § 1782.

137. For example, at least one court has confused the issue of a separate jurisdictional challenge to arbitration with the concept of judicial review of the arbitral award. See *Ukrnafta*, 2009 WL 2877156 at \*4. Although the parties may challenge the jurisdiction of the arbitral tribunal during post-hearing enforcement proceedings, the issue in *Ukrnafta* was raised at the initial stage of the dispute and therefore reflects a very different procedural posture. See *id.*; STRONG, *supra* note 67, at 31-32 (noting courts may become involved before, during and after an arbitral proceeding).

138. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; *Ex rel Winning (HK) Shipping Co. Ltd.*, No. 09-22659, 2010 WL 1796579, at \*7 (S.D. Fla. Apr. 30, 2010); *In re Roz*, 469 F. Supp. 2d at 1228.

139. For example, a number of courts move immediately to the discretionary analysis without undertaking any real discussion of the meaning of a “foreign or international tribunal” under the statute. See 28 U.S.C. § 1782; *In re Broadsheet L.L.C.*, No. 11-cv-02436-PAB-KMT, 2011 WL 4949864, at \*2 (D. Colo. Oct. 18, 2011); *Government of Ghana v. ProEnergy Servs., L.L.C.*, No. 11-9002-MC-SOW, 2011 WL 2652755, at \*3 (W.D. Mo. June 6, 2011). But see *In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at \*17-21 (C.D. Cal. June 7, 2013) (concluding that discovery under section 1782 is improper in cases involving international commercial arbitration, even under the discretionary factors). Other courts simply rely on the broad language of *Intel* to justify extension of section 1782 to international commercial arbitration. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; *In re Babcock Borsig*, 583 F. Supp. 2d at 237-40; *In re Hallmark*, 534 F. Supp. 2d at 953-57; *In re Roz*, 469 F. Supp. 2d at 1226.

140. Lamelas, *supra* note 18, at 155; see also *Intel*, 542 U.S. at 241; *Ex rel Winning*,

[the tribunal's] decisionmaking authority and its purpose"<sup>141</sup> and may "extend[] §1782 to private arbitrations where the arbitrations function as first-instance decision making proceedings that are subject to substantive court review, analogous to the Directorate General in the *Intel* case."<sup>142</sup>

There are some problems with this approach. For example,

the criteria adopted by Supreme Court for its functional analysis in *Intel* were based, in part, on the particular characteristics of the DG-Competition and the European Commission. The Supreme Court did not consider whether additional criteria would be relevant if it were to consider a different kind of proceeding. For example, . . . the DG-Competition and European Commission were, without question, state-sponsored. Thus, the Supreme Court did not consider whether the source of the proceeding's authority to issue binding decisions or its purpose are relevant criteria.<sup>143</sup>

Furthermore, one of the major elements of the functionality test is the reviewability of the decision rendered by the purported foreign or international tribunal.<sup>144</sup> However, courts that allow section 1782 requests in cases involving international commercial arbitration do not require judicial review in arbitration to operate in precisely the same manner as appellate review in litigation.<sup>145</sup> Instead, courts reject the view "that the functional requirement of being subject to judicial review is only satisfied when the sum and substance of the arbitral body's decision is subject to full judicial reconsideration on the merits," claiming that that standard is "far too stringent."<sup>146</sup> Instead, the functionality test is said to involve "the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances."<sup>147</sup> This conclusion is based on the notion that "[o]ne could not

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2010 WL 1796579 at \*7; *In re Roz*, 469 F. Supp. 2d at 1228. At least one court has found the functionality test to be insufficient justification for discovery under section 1782 in cases involving international commercial arbitration. See 28 U.S.C. §1782; *In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at \*11-14.

141. *In re Rhodiansyl* S.A.S., No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*38 (D. Kan. Mar. 25, 2011) (quoting *In re Operadora DB Mex.*, S.A., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at \*12 (M.D. Fla. Aug. 4, 2009)).

142. Lamelas, *supra* note 18, at 155; see also *Intel*, 542 U.S. at 264; *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987 (11th Cir. 2012); *Ex rel Winning*, 2010 WL 1796579 at \*7; *In re Operadora*, 2009 WL 2423138 at \*11-12; AAA, *supra* note 18, at 10; Alford, *supra* note 3, at 135; Lamelas, *supra* note 18, at 155-56.

143. *In re Rhodiansyl*, 2011 U.S. Dist. LEXIS 72918 at \*38-39 (quoting *In re Operadora*, 2009 WL 2423138 at \*12).

144. See *Intel*, 542 U.S. at 255.

145. See *In re Consorcio Ecuatoriano*, 685 F.3d at 996-97.

146. *Id.*

147. *Id.*; *In re Roz*, 469 F. Supp. 2d at 1228 ("Where a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of 'tribunal,' the reasoning of *Intel*, and the scope of § 1782(a), regardless of whether the body is governmental or private.").

seriously argue that, because domestic arbitration awards are only reviewable in court for limited reasons (notably excluding a second look at the substance of the arbitral determination), this amounts to no judicial review at all.”<sup>148</sup>

## II. DISTINGUISHING INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL INVESTMENT ARBITRATION IN SECTION 1782 ANALYSES

Functional analyses (such as those purportedly required by *Intel*) can be quite useful in overcoming superficial differences between different legal systems.<sup>149</sup> However, proper application of a functional methodology requires a profound understanding of the various legal systems at issue.<sup>150</sup> This requirement can create some problems in cases involving international arbitration, since people who do not specialize in the field often experience difficulties in distinguishing between the various types of procedures.<sup>151</sup> Particular problems arise in situations involving international commercial and investment arbitration, since

[t]he two forms of arbitration are similar in that both allow a private party to bring a claim before a tribunal, the members of which are appointed by the disputing parties rather than a public authority. Also, the proceedings are governed by rules originating in private arbitration, and the professional backgrounds of many arbitrators are in the area of commercial law. . . . Finally, rules of arbitration and domestic law typically call for courts to show deference to arbitration awards in order to promote stability and predictability in the use of arbitration in international commerce.<sup>152</sup>

However, these similarities have been said to focus more on form than on substance, thereby leaving room for a more rigorous analysis of certain functional concerns.<sup>153</sup> The following subsections attempt to fill the analytical lacuna by considering two issues—grants of jurisdiction and state interests—that have been largely ignored by both courts and commentators, even though

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148. *In re Consorcio Ecuatoriano*, 685 F.3d at 996.

149. See *Intel*, 542 U.S. at 241; Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

150. See Michaels, *supra* note 149, at 342.

151. See LEW ET AL., *supra* note 22, ¶¶ 28-8 to 28-13; MCLACHLAN ET AL., *supra* note 7, ¶¶ 1.10-1.15; STRONG, *supra* note 67, at 2-7.

152. Van Harten, *supra* note 23, at 377-78; see also Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 69 INT'L & COMP. L.Q. 373, 373 (2010) (describing investment arbitration as a “‘hybrid,’ because while the jurisdiction of tribunals and the standards of protection are based on investment treaties between States, it incorporates or uses the procedural rules of international commercial arbitration”).

153. See van Harten, *supra* note 23, at 377-78. Further reading is available regarding the differences between international commercial and investment arbitration. See LEW ET AL., *supra* note 22, ¶¶ 28-8 to 28-13; MCLACHLAN ET AL., *supra* note 7, ¶¶ 1.10-1.15.

such matters have been said to be central to *Intel*'s functionality test.<sup>154</sup> This section also addresses a third issue that has never apparently been considered in section 1782 proceedings, namely the use of various interpretive canons relating to potential conflicts between domestic and international law.<sup>155</sup>

#### A. Grant of Jurisdiction

According to *Intel*, U.S. courts are to “consider the origin of [the tribunal’s] decisionmaking authority and its purpose” when considering whether the entity in question constitutes a “foreign or international tribunal” under section 1782.<sup>156</sup> However, the Supreme Court did not discuss issues relating to the source of the tribunal’s adjudicatory capability in any detail in *Intel* since the entities in question were all clearly associated with the European Union, a quasi-state entity.<sup>157</sup> This analytical gap has created some problems for courts considering section 1782 in cases involving international commercial and investment arbitration, thereby making further study of issues relating to grants of jurisdiction both necessary and appropriate.<sup>158</sup> Before considering grants of jurisdiction in these two forms of arbitration, however, it is useful to consider grants of jurisdiction in other types of national and international proceedings so as to set the foundation for further analysis.

##### 1. Grants of jurisdiction in litigation and first-generation international tribunals

Most judges, having spent most, if not all, of their careers in a litigation environment, consider litigation to constitute the paradigmatic model for dispute resolution.<sup>159</sup> As a result, most courts considering jurisdictional grants in section 1782 proceedings will probably analyze matters from a litigation

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154. See 28 U.S.C. § 1782 (2012); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004); see also *infra* notes 156-438 and accompanying text.

155. See 28 U.S.C. § 1782; see also *supra* notes 439-454 and accompanying text.

156. *In re Rhodanyl, S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*38 (D. Kan. Mar. 25, 2011); see also 28 U.S.C. § 1782; *Intel*, 542 U.S. at 258. Lower courts are also sometimes admonished to look past the public-private distinction. See Lamelas, *supra* note 18, at 155; see also *Intel*, 542 U.S. at 241; *Ex rel Winning*, 2010 WL 1796579, at \*7; *In re Roz*, 469 F. Supp. 2d at 1228.

157. See *In re Rhodanyl*, 2011 U.S. Dist. LEXIS 72918, at \*38-39; *In re Operadora DB Mexico, S.A.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at \*12 (M.D. Fla. Aug. 4, 2009); Tom Ginsburg & Eric Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1595 (2010); see also *Intel*, 542 U.S. at 258.

158. See 28 U.S.C. § 1782; see *supra* notes 26-148 and accompanying text.

159. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1343 (1978). Hence, other methods of resolving disputes—be they arbitration, mediation or something else—are typically labeled as “alternative” in nature.

perspective.<sup>160</sup> At this point, this approach does not appear to be unduly problematic, since there is no question that litigation in a foreign court falls within the definition of a “proceeding in a foreign or international tribunal” under section 1782.<sup>161</sup> However, the judicial predisposition toward litigation as the default norm suggests the need to establish the parameters of jurisdictional grants in litigation so as to better understand the dynamics involved in international commercial and investment arbitration.

The first thing to note is that grants of jurisdiction to national courts arise as a matter of constitutional law and are considered to be quintessentially sovereign acts.<sup>162</sup> However, a state’s right to grant jurisdiction over legal disputes to its national courts is not inconsistent with the ability of private actors to accept jurisdiction over certain matters in both arbitration and mediation.<sup>163</sup> Indeed, private arbitration has long been considered a legitimate dispute resolution device in the United States, dating back to the time when the Constitution was first adopted.<sup>164</sup>

Grants of jurisdiction in arbitration differ somewhat from grants of jurisdiction in litigation. Some aspects of a jurisdictional grant in arbitration are state-initiated and therefore sovereign in nature, even though the matter may not necessarily rise to the constitutional level.<sup>165</sup> Instead, state authorization of arbitration is typically found in legislation identifying whether and to what

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160. See 28 U.S.C. § 1782.

161. *Id.*; see also Alford, *supra* note 3, at 132.

162. See U.S. CONST., art. III, §§ 1-2; J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (noting “jurisdiction is in the first instance a question of authority rather than fairness”); Born, Adjudication, *supra* note 23, at 871; John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 861-63 (2012); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1872-76 (2012); van Harten, *supra* note 23, at 373, 376.

163. See van Harten, *supra* note 23, at 373-75. One way of considering this phenomenon is to conclude that arbitration and litigation hold concurrent jurisdiction over certain matters, similar to the arrangement between U.S. state and federal courts. See *infra* notes 315-323 and accompanying text.

164. See Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 29 OHIO ST. J. ON DISP. RESOL. 581 (2013); Carli N. Conklin, *Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 AM. J. LEGAL HIST. 39 (2006); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1035 (2012) (noting George Washington himself used an arbitration provision in his will).

165. However, some legal systems view arbitration as a constitutional right. See COLOM. CONST., art. 116; LEW ET AL., *supra* note 22, ¶¶ 5-2 to 5-5; PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 2 (2013); S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*, 22 DUKE J. COMP. & INT’L L. 47, 62 (2011). Furthermore, any legislative grant of authority to arbitration must comply with any applicable constitutional principles. See RUTLEDGE, *supra*, at 4-5.

extent arbitration is permitted within the territory of the state.<sup>166</sup>

Although the state must provide some sort of formal authority for arbitration, arbitral proceedings cannot arise only as a result of sovereign acts.<sup>167</sup> Instead, individual parties must also agree to refer a particular matter to arbitration.<sup>168</sup> Jurisdictional grants in arbitration therefore involve two separate but equally necessary elements: public (state) authority as well as private (individual) consent.<sup>169</sup> Thus, it has been said that

[w]here parties agree to submit their differences for decision by a third party, the decision maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings are brought and results in a judgment or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.<sup>170</sup>

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166. See David C. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 114-15 (1990); see also W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT'L ARB. 5, 5-6 (2010). Many jurisdictions describe what constitutes an arbitrable dispute in their arbitration statute. See BORN, *supra* note 29, at 775-89. Although the United States does not include such provisions in its national arbitration statute (the Federal Arbitration Act, or FAA), the boundaries of arbitrability are well-defined as a matter of statutory and common law. See 9 U.S.C. §§ 1-307 (2012); BORN, *supra* note 29, at 789. Furthermore, the FAA reflects a strong pro-arbitration policy that is used to guide courts considering the outer boundaries of arbitrability. See 9 U.S.C. §§ 1-307; BORN, *supra* note 29, at 781-85.

167. Even so-called "court mandated" arbitration is voluntary. See ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS* 4 (1996). Delaware has recently run afoul of the constitutional distinction between arbitration and litigation. See *Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 499-503 (D. Del. 2012) (distinguishing the two processes); John W. Joyce, *Private Arbitrations Ruled Unconstitutional: Delaware Chancery Court Procedure Violates First Amendment*, 38 LIT. NEWS 12, 12 (Spring 2013). The case is on appeal to the Third Circuit. See *Del. Coal. for Open Gov't, Inc. v. Strine*, No. 12-3859 (3d Cir. 2012).

168. See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (noting the "fundamental principle that arbitration is a matter of contract"); *Strine*, 2012 WL 3744718 at \*6-10; BORN, *supra* note 29, at 90. The voluntariness of arbitration has become somewhat suspect in recent years, at least in some contexts. See Thomas J. Stipanowich, *Arbitration: The "New" Litigation*, 2010 U. ILL. L. REV. 1, 3 n.5, 49 (2010) [hereinafter Stipanowich, *Litigation*]; see also STRONG, *supra* note 67, at 2-7 (distinguishing international commercial arbitration from other types of arbitration).

169. This approach has been considered constitutional in the United States and elsewhere. See *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Fed. Court of Austl.*, [2013] HCA 5, ¶ 29 (2013); RUTLEDGE, *supra* note 165, at 9-11; S.I. Strong, *Constitutional Conundrums in Arbitration*, 15 CARDOZO J. CONFLICT RESOL. (forthcoming 2013) [hereinafter Strong, *Constitutional Conundrums*].

170. *TCL Air Conditioner*, [2013] HCA 5, ¶ 29 (citation omitted).

Although the ability to provide and control litigation is exclusively associated with the sovereign, a state's adjudicatory powers are not limitless.<sup>171</sup> For example, a court's authority over a particular matter may be curtailed by other fundamental values, such as liberty interests.<sup>172</sup>

Full exercise of a court's adjudicative powers may also be constrained by the litigants themselves. Indeed, states give parties a considerable amount of latitude in procedural matters, even if the parties' decisions would exclude the jurisdiction or authority of the court in some manner.<sup>173</sup> For example, parties may choose the court in which a dispute is to be heard or the law which is to govern resolution of that dispute.<sup>174</sup> Parties may also waive litigation of a particular substantive matter through a release or covenant not to sue, or waive certain procedural rights, including their constitutional right to a jury.<sup>175</sup>

States may also limit their sovereign power voluntarily, as through contract, waiver or other means.<sup>176</sup> Although treaties and other interstate agreements are perhaps the most well-known means by which a state relinquishes its ability to act autonomously, other types of agreements will also suffice.<sup>177</sup> Thus, for example, a state can lose its sovereign immunity through adherence to an arbitration agreement, either in the commercial realm<sup>178</sup> or in

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171. See Sachs, *supra* note 162, at 1872-76.

172. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (noting "[p]ersonal jurisdiction . . . restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty'" (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982))).

173. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1362-67 (2012); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 520-64 (2011); Jaime Dodge, *The Limits of Private Procedural Ordering*, 97 VA. L. REV. 723, 776-83 (2011); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609-22 (2009); S.I. Strong, *Limits of Procedural Choice of Law: Arbitration Versus Litigation*, 39 BROOK. J. INT'L L. (forthcoming 2014). While the scope of personal autonomy in litigation is not as wide as it is in arbitration, there are still a number of actions that individual parties may take. For example, it is unclear whether a waiver of class proceedings would be sustainable in litigation, although such waivers have been held enforceable in arbitration. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); Hans Smit, *Class Actions and Their Waiver in Arbitration*, 15 AM. REV. INT'L ARB. 199, 203 (2004).

174. Such choices are, of course, subject to certain mandatory principles of law. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

175. See U.S. CONST., art. III, § 2, cl. 3; *Town of Newton v. Rumery*, 480 U.S. 386, 391-98 (1987).

176. See 28 U.S.C. § 1605(a) (2012); 28 U.S.C. § 1605A (2012).

177. See Maya Ganguly, *Tribunals and Taxation: An Investigation of Arbitration in Recent Tax Conventions*, 29 WIS. INT'L L.J. 735, 752 (2012); Michael Rosenfeld, *Constitutional Versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 CARDOZO L. REV. 2339, 2354 (2011).

178. See 28 U.S.C. § 1605(a)(6); *Creighton Ltd. v. State of Qatar*, 181 F.3d 118, 124



the investment realm.<sup>179</sup> States can also agree to waive their sovereign immunity in disputes heard by international bodies such as the International Court of Justice (ICJ), the International Criminal Court (ICC) and the ECJ.<sup>180</sup>

Although treaties establishing “first generation international tribunals” such as the ICJ, the ICC and the ECJ are often viewed as primarily involving a surrender of sovereign immunity,<sup>181</sup> the more important aspect of these types of international agreements for the purposes of this Article involves principles relating to jurisdictional grants. Essentially, these agreements remove a certain subset of issues and concerns from the jurisdiction of the national courts of the signatory states and give those matters to the international tribunal.<sup>182</sup> In some cases the jurisdiction of the international tribunal is exclusive, while in other instances it is overlapping with that of the national courts.<sup>183</sup> This phenomenon is intriguing, since it suggests that grants of jurisdiction need not be tied to an assertion of physical power over a particular territory (as is the case with national courts) but can instead be established by the voluntary agreement of two or more sovereign states.<sup>184</sup> Furthermore, the existence of concurrent jurisdiction between first-generation tribunals and national courts suggests that jurisdiction need not be exclusive to be legitimate.<sup>185</sup>

Although first-generation international tribunals are created through certain sovereign acts and therefore obtain their grant of jurisdiction from the same source as national courts, international tribunals are unlike national courts in that the tribunals’ jurisdiction is created by international agreements rather than through constitutional means. First-generation international tribunals also differ

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(D.C. Cir. 1999).

179. See 22 U.S.C. § 1650a (2012); ICSID Convention, *supra* note 48, art. 54(1).

180. See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011); see also Consolidated Version of the Treaty on the Functioning of the European Union, Sept. 5, 2008, 2010 O.J. (C 83) 47, 157, 159-67 [hereinafter ECJ Statute]; Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 38544 (July 17, 1998) [hereinafter ICC Statute]; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153 [hereinafter ICJ Statute]; U.N. Charter.

181. See Hathaway & Shapiro, *supra* note 180, at 239.

182. See ECJ Statute, *supra* note 180, arts. 251, 256-81; ICC Statute, *supra* note 180, arts. 5-8; ICJ Statute, *supra* note 180, arts. 1, 34-38; U.N. Charter, arts. 92-96; Born, *Adjudication*, *supra* note 23, at 794, 803-08, 871.

183. See Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Impossible) Solutions*, 42 CORNELL INT’L L. J. 77, 80 (2009).

184. See 28 U.S.C. § 1782 (2012); Born, *Adjudication*, *supra* note 23, at 794-818; Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT’L L. 981, 1003-15 (2009); Pauwelyn & Salles, *supra* note 183, at 84.

185. See Pauwelyn & Salles, *supra* note 183, at 84. The way that U.S. state and federal courts share concurrent jurisdiction also supports this notion. See *Haywood v. Drown*, 556 U.S. 729, 735-36 (2009) (discussing presumption of concurrent jurisdiction).

from national courts with respect to the substantive law that is applied in that particular venue. For example, while both types of adjudicatory bodies can determine issues arising under international law, only national courts can provide binding determinations of matters of national law.<sup>186</sup>

Despite these distinctions, first-generation international tribunals such as the ICJ, the ICC and the ECJ nevertheless resemble national litigation in several potentially important ways. For example, first-generation international tribunals feature a standing set of judges<sup>187</sup> and adhere to a pre-existing set of procedural rules that are not amenable to amendment by the parties.<sup>188</sup> Both features are also typical of litigation in national courts.<sup>189</sup>

Furthermore, first-generation tribunals also physically resemble national courts to the extent that the international tribunals are based in a single location and are formally housed in particular buildings that often convey the majesty of the law.<sup>190</sup> Although this phenomenon could be dismissed as “mere” symbolism, there may be something more substantive at work. For example, “[t]he common law defines a court to be a ‘place where justice is judicially administered,’ and therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place, must be used for that purpose.”<sup>191</sup> Indeed, it has been said that “manifold mischiefs . . . might arise from permitting a court to assume a migratory character and travel from place to place in the same locality or even in the same town.”<sup>192</sup>

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186. *See, e.g.*, U.S. CONST. art. III, § 2. Although most first-generation international tribunals focus on matters of public international law, some bodies (such as the ECJ) may also consider certain matters of private international law. *See* Born, Adjudication, *supra* note 23, at 782; Robert C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT’L L. 559, 566 (1993); *see also infra* notes 390-394 and accompanying text.

187. *See* Born, Adjudication, *supra* note 23, at 794-818.

188. *See* ICC Statute, *supra* note 180, arts. 62-76; ICJ Statute, *supra* note 180, arts. 39-64; International Court of Justice Rules of Court (adopted 1978, amended 2005), *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>; Rules of Procedure of the [European] Court of Justice, *available at* [http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5\\_2008-09-25\\_17-33-27\\_904.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf).

189. *See, e.g.*, FED. R. CIV. P.

190. Although the use of a courthouse may seem to be a somewhat superficial element, such techniques symbolize the formal power of the law as well as its public nature. *See* Rhessa Hawkins Barksdale, *The Role of Civility in Appellate Advocacy*, 50 S.C. L. REV. 573, 580 (1999); John Gill, *County Seat of Justice*, 33 ARK. LAW. 24, 24-27 (Spring 1998).

191. *Mell v. State*, 202 S.W. 33, 33 (Ark. 1918) (citation omitted).

192. *Id.* *But see* *Parsons v. The Canadian Red Cross*, [2013] O.N.S.C. 3053, ¶4 (Ont. Super. Ct. Just., 2013) (“[A] judge of the Superior Court of Justice in Ontario may preside over a hearing that is conducted outside Ontario where the Ontario court has personal and subject-matter jurisdiction over the parties and the issues in the proceeding. This jurisdiction is not lost simply because the court presides over a motion in a location that is outside the

By adopting certain attributes of national courts, first-generation international tribunals are consciously choosing to present themselves as a type of judicial mechanism in both name and deed.<sup>193</sup> As a result, first-generation international tribunals such as the ICJ, the ICC and the ECJ would likely fall within the statutory parameters of section 1782.<sup>194</sup> This conclusion is warranted not only as a result of the many similarities between national courts and first-generation international tribunals, particularly with respect to the source of authority for the relevant grant of jurisdiction, but also because most of these first-generation international tribunals were in existence at the time section 1782 was revised to include its broad statutory reference to “foreign or international tribunals.”<sup>195</sup>

However, there is one other type of first-generation international tribunal that needs to be considered, namely interstate arbitration.<sup>196</sup> Interstate arbitration has been in existence for centuries and was indeed the primary means by which states resolved international disputes prior to the advent of institutions such as the ICJ, the ECJ and the ICC.<sup>197</sup> Grants of jurisdiction in interstate arbitration are similar to grants of jurisdiction in other types of first-generation international tribunals, in that the arbitrators obtain their adjudicatory power as a result of an international agreement between the states parties to the dispute.<sup>198</sup> However, arbitral tribunals differ from other sorts of first-generation international tribunals in that arbitrators’ grants of jurisdiction typically relate to a single existing dispute rather than to a category of claims that may arise in the future.<sup>199</sup>

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court’s regular territorial limits.”). Arbitration has precisely this type of “migratory character,” in that the seat of the arbitration may be chosen by the parties. *See Mell*, 202 S.W. at 33; *see also* LEW ET AL., *supra* note 22, ¶¶ 8-24 to 8-27.

193. These tribunals may serve other roles as well. *See* Anna Spain, *Examining the International Judicial Function: International Courts as Dispute Resolvers*, 34 LOY. L.A. INT’L & COMP. L. REV. 5, 6 (2011).

194. *See* 28 U.S.C. § 1782 (2012).

195. *See* ECJ Statute, *supra* note 180, art. 1 (noting the European Union replaced the European Community, which was established in 1945); U.N. Charter, arts. 92-96 (establishing the ICJ in 1945, when the United Nations was established); *see also* 28 U.S.C. § 1782.

196. *See* Born, Adjudication, *supra* note 23, at 795-800. In the context of this discussion, “interstate arbitration” excludes arbitration arising out of investment or trade disputes. *See infra* note 204 and accompanying text.

197. *See* BORN, *supra* note 29, at 8-15; Born, Adjudication, *supra* note 23, at 800-18; *see also* Hague Convention for the Pacific Settlement of International Disputes, arts. 37-90, 36 Stat. 2199, Treaty Ser. No. 536 (1907) [hereinafter 1907 Hague Convention]; Convention for the Pacific Settlement of International Disputes, arts. 15-57, July 29, 1899, 32 Stat. 1779, 1788, 1 Bevans 230, 237 [hereinafter 1899 Hague Convention].

198. *See* Born, Adjudication, *supra* note 23, at 795-800; *see also* 1907 Hague Convention, *supra* note 197, arts. 37-90; 1899 Hague Convention, *supra* note 197, arts. 15-57.

199. *See* 1907 Hague Convention, *supra* note 197, arts. 42-46; 1899 Hague Convention,

Interstate arbitration also differs from other types of first-generation international tribunals with respect to some of the indicia of litigation. For example, arbitrators in interstate proceedings are selected on an individualized, *ad hoc* basis, while judges in national courts and other first-generation international tribunals are permanently empanelled at the institution in question.<sup>200</sup> Furthermore, interstate arbitrations do not need to be held in a particular place or even in a public venue, unlike proceedings in national courts and other first-generation international tribunals.<sup>201</sup> Finally, parties to an interstate arbitration are free to adopt their own arbitral rules of procedure rather than being bound by standardized, pre-existing rules.<sup>202</sup>

Interstate arbitration therefore presents something of a dilemma for section 1782 analyses, since interstate arbitration is only partially analogous to litigation.<sup>203</sup> No U.S. court has yet faced a section 1782 request in the context of an interstate arbitration, but commentators writing in this field have suggested that interstate arbitration should be considered to fall within the terms of the statute because this type of proceeding was in existence in 1964, when section 1782 was revised to include language relating to a “foreign or international tribunal.”<sup>204</sup>

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*supra* note 197, art. 31; Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1290-91, 1328 (2004); Eric Posner, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 30-31 (2005); see also Permanent Court of Arbitration (PCA), Model Clauses, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1189](http://www.pca-cpa.org/showpage.asp?pag_id=1189).

200. However, the PCA has a standing list of Members of the Court who are available to be named to an interstate proceeding, if the parties choose to use the services of the PCA. See 1907 Hague Convention, *supra* note 197, arts. 45-46; 1899 Hague Convention, *supra* note 197, arts. 32-35; PCA, Arbitration Services [hereinafter PCA Services], available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1048](http://www.pca-cpa.org/showpage.asp?pag_id=1048).

201. However, the PCA does offer its facilities free of charge to states proceeding in arbitration. See PCA Services, *supra* note 200. Although arbitration at the PCA does promote the concept of the majesty of the law (indeed, the facilities at the PCA are extremely impressive), there is no requirement that an interstate arbitration be made public, in whole or in part. However, the PCA will provide public access to the proceedings and awards to the extent agreed by the parties. See PCA, Cases, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029).

202. However, the PCA offers a number of pre-existing rules appropriate to interstate arbitration. See PCA, Rules of Procedure, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1188](http://www.pca-cpa.org/showpage.asp?pag_id=1188). Tribunals in interstate arbitration, like other first-generation international tribunals, are governed by international law rather than national law. See Caron, *supra* note 166, at 115 (noting international law may be modified by the states parties); John E. Noyes, *William Howard Taft and the Taft Arbitration Treaties*, 56 VILL. L. REV. 535, 541 (2011).

203. See 28 U.S.C. § 1782 (2012).

204. *Id.*; see also Rothstein, *supra* note 18, at 70. Although no court has yet considered a section 1782 request in the context of interstate arbitration, such an issue could arise under an investment treaty, since interstate arbitrations are contemplated under most international investment agreements. See United Nations Conference on Trade and Development

Although this approach has some merit, it is somewhat formalistic and fails to take into account language in *Intel* indicating that courts are to “consider the origin of [the tribunal’s] decisionmaking authority and its purpose” when considering whether the body in question constitutes a “foreign or international tribunal” under section 1782.<sup>205</sup> Thus, the better argument may be that interstate arbitration falls within the terms of the statute because such proceedings involve an international agreement containing a grant of jurisdiction from the sovereign states to the arbitral tribunal.<sup>206</sup>

The Supreme Court’s emphasis on jurisdictional grants is enlightening, since it minimizes the importance of the various indicia of litigation (such as a standing set of procedural rules, a pre-existing set of adjudicators and a formal venue for hearing the dispute) that might otherwise be considered relevant to a section 1782 analysis.<sup>207</sup> While these features may help formalize and legitimize an international proceeding, choices regarding procedural rules, selection of arbitrators and the place of the hearing are always subject to the initial grant of jurisdiction by the sovereign parties and therefore should be considered to hold a position of only secondary importance.<sup>208</sup> This observation may be useful in other types of section 1782 determinations, including those involving international commercial and investment arbitration.<sup>209</sup>

## 2. Investment arbitration

Having considered grants of jurisdiction to national courts and first-

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(UNCTAD), *World Investment Report 2012: Toward a New Generation of Investment Policies*, 152, U.N. Doc. UNCTAD/WIR/2012 (May 7, 2012); John R. Crook, *U.S. Senate Approves Investment Treaty With Rwanda and Mutual Legal Assistance Treaty With Bermuda, Addressing Both Treaties’ Domestic Implementation*, 106 AM. J. INT’L L. 141, 143 (2012) (noting no such proceeding has yet been initiated under a BIT involving the United States); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT’L L. J. 427, 455 (2010).

205. *In re Rhodiaryl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*38 (D. Kan. Mar. 25, 2011); *see also* 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

206. *See* Born, Adjudication, *supra* note 23, at 795-800; *see also* 1907 Hague Convention, *supra* note 197, arts. 37-90; 1899 Hague Convention, *supra* note 197, arts. 15-57. Grants of jurisdiction in interstate arbitration involve a number of unique issues, although these matters are not fully developed in this Article due to space constraints.

207. *See* 28 U.S.C. § 1782.

208. *See* Caron, *supra* note 166, at 114-15.

209. *See* Born, Adjudication, *supra* note 23, at 871 (noting that “the jurisdiction of international commercial—and investment—arbitration tribunals is defined narrowly and with considerable specificity by the arbitration provisions of either a commercial agreement, a bilateral treaty, or another document,” whereas national courts or supranational entities such as the ECJ feature “sweeping aspirations and broad compulsory jurisdiction.”); *see also infra* notes 210-323 and accompanying text.

generation international tribunals, it is now time to consider jurisdictional grants in investment arbitration so as to determine whether investment proceedings can or should fall within section 1782's reference to a "foreign or international tribunal."<sup>210</sup> From the outset, somewhat different results are to be expected, since investment arbitration is typically characterized as a "second generation international tribunal" due to certain dissimilarities between it and the various types of international adjudication discussed up until this point.<sup>211</sup>

Initially, investment arbitration looks very much like first-generation international tribunals, since investment arbitration also requires a sovereign grant of jurisdiction through either a bilateral<sup>212</sup> or multilateral<sup>213</sup> treaty.<sup>214</sup> This feature has led some courts to suggest that the mere fact that an arbitral tribunal is convened pursuant to a treaty is sufficient to make that body a "foreign or international tribunal" for purposes of a request for discovery under section 1782.<sup>215</sup> However, that approach does not take into account the full nature of jurisdictional grants in investment arbitration.

Certainly it is true that the decision to enter into an investment treaty requires a state to act "in a uniquely sovereign capacity."<sup>216</sup> In so doing, a state not only agrees to make itself subject to the adjudicative powers of an external tribunal, it also relinquishes its sovereignty over a certain category of claims.<sup>217</sup> However, the jurisdictional grant in investment arbitration is somewhat unique in that it involves the notion of a standing "offer to arbitrate."<sup>218</sup>

Under an offer to arbitrate, the scope of the state's consent to arbitration

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210. See 28 U.S.C. § 1782.

211. See Born, Adjudication, *supra* note 23, at 819, 831-43; see also LEW ET AL., *supra* note 22, ¶¶ 28-1 to 28-119.

212. The precise number of BITs currently in existence is unknown, but approximately 2,600 to 3,000 such treaties are believed to exist. See Alford, *supra* note 3, at 132; José E. Alvarez, *A BIT on Custom*, 2 N.Y.U. J. INT'L L. & POL. 17, 17 (2012); Born, Adjudication, *supra* note 23, at 844; see also Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.-FOREIGN INVEST. L.J. 232, 236 (1995) (estimating the number at 5,000).

213. See ICSID Convention, *supra* note 48; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. The ICSID Convention now has over 145 states parties. See ICSID Status, *supra* note 48.

214. See Born, Adjudication, *supra* note 23, at 831-43; see also ECJ Statute, *supra* note 180, arts. 251, 256-81; ICC Statute, *supra* note 180, arts. 5-8; ICJ Statute, *supra* note 180, arts. 1, 34-38; U.N. Charter, arts. 92-96; BORN, *supra* note 29, at 8-15.

215. See 28 U.S.C. § 1782; *In re Chevron Corp.*, 753 F. Supp. 2d 536, 539 (D. Md. 2010).

216. Van Harten, *supra* note 23, at 379.

217. Most investment treaties include a variety of dispute resolution options, including but not limited to arbitration. See *In re Caratube Int'l Oil Co.*, 730 F. Supp. 2d 101, 106 (D.D.C. 2010); MCLACHLAN ET AL., *supra* note 7, ¶ 3.30. Some courts have considered this range of options to be relevant to the decision whether to allow section 1782 requests. See 28 U.S.C. § 1782; *In re Caratube*, 730 F. Supp. 2d at 106.

218. See LEW ET AL., *supra* note 22, ¶¶ 28-12 to 28-13.

is not limited, as in commercial arbitration, to an existing dispute that is known in advance to the consenting party or to disputes arising from a particular relationship between juridical equals. Rather, the State is unilaterally exposed to claims by a broad class of potential claimants in relation to governmental acts that affect the assets of foreign investors. The disputes that lead to individual claims under investment treaties typically arise from acts that entail the exercise of authority that is unique to the State, such as the passage of legislation, the adoption of mandatory regulations, or the issuance of judicial decisions. The “general consent” is uniquely sovereign, therefore, because it is a prospective consent to the compulsory arbitration of regulatory disputes with investors as a group.<sup>219</sup>

In some ways, this type of jurisdictional grant is similar to that seen in cases involving the ICC, the ICJ and the ECJ (but not interstate arbitration) in that the scope of consent involves future disputes, rather than those that are currently in existence.<sup>220</sup> However, state consent to arbitration is not the only factor that is necessary for investment arbitration to arise. Individual investors must also choose to proceed in the arbitral forum.<sup>221</sup> Indeed, the investor’s decision to arbitrate a dispute is critical, since, under an offer to arbitrate, “[t]he State will always be the respondent, never a claimant.”<sup>222</sup>

Pursuing a claim in investment arbitration is not the type of decision that is undertaken lightly, since it requires an investor to consider a number of important tactical issues. For example, the decision to proceed in investment arbitration often requires the claimant to surrender the right to proceed in other fora, including the national courts.<sup>223</sup> This phenomenon distinguishes investment arbitration from the “broad compulsory jurisdiction” that exists in first-generation international tribunals and national courts.<sup>224</sup>

The decision to proceed in investment arbitration not only removes the merits of the dispute from judicial consideration, it can also eliminate the possibility of any sort of procedural review by a national court.<sup>225</sup> This attribute

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219. Van Harten, *supra* note 23, at 379.

220. *See supra* note 199 and accompanying text.

221. *See In re Caratube*, 730 F. Supp. 2d at 106; MCLACHLAN ET AL., *supra* note 7, ¶ 3.30.

222. MCLACHLAN ET AL., *supra* note 7, ¶ 1.06.

223. *See In re Caratube*, 730 F. Supp. 2d at 106; MCLACHLAN ET AL., *supra* note 7, ¶ 3.30.

224. Born, *Adjudication*, *supra* note 23, at 871. However, second generation international tribunals are often seen being compulsory vis-à-vis states parties. *See id.* at 779.

225. Investment arbitrations that proceed under the auspices of the ICSID Convention are not eligible for procedural review in the national courts and are instead entitled only to procedural review from within the investment regime itself. *See ICSID Convention*, *supra* note 48, art. 52; REED ET AL., *supra* note 21, at 182-90; LEW ET AL., *supra* note 22, ¶¶ 28-92 to 28-119. Other investment arbitrations, such as those proceeding under the ICSID Additional Facility, may be subject to limited review in the national courts pursuant to the procedures established by the New York Convention. *See New York Convention*, *supra* note 48, art. V; LEW ET AL., *supra* note 22, ¶¶ 28-37, 28-117 to 28-118; MCLACHLAN ET AL., *supra*

may be particularly important to section 1782 determinations, since the Supreme Court in *Intel* indicated that a decision must be ultimately reviewable (or, in some authorities' minds, enforceable) by a national court (or the equivalent) for the decision-maker at issue to constitute a "foreign or international tribunal" under section 1782.<sup>226</sup>

Some observers may find the issue of non-reviewability to be decisive in matters relating to section 1782 and may therefore conclude their analyses at this point.<sup>227</sup> However, it is useful to continue the discussion, not only because a certain subset of investment awards remain subject to procedural review by national courts<sup>228</sup> but also because there are additional insights to be gained from this particular analytical paradigm.

First among these points is the fact that grants of jurisdiction in investment arbitration include both a public element (i.e., the state's decision to cede certain sovereign powers to the arbitral tribunal) and a private element (i.e., the individual investor's decision to waive the right to a public forum and to instead proceed in arbitration). As a result, jurisdictional grants in investment arbitration do not arise solely as a result of certain sovereign acts, as is the case with first-generation international tribunals and national courts.<sup>229</sup> Instead, private parties must affirmatively choose to proceed in investment arbitration and forego their right to litigation and its attendant procedural protections.<sup>230</sup>

When viewed in this light, investment arbitration is easily distinguishable from both litigation and first-generation international tribunals. Furthermore, this approach also applies a more sophisticated (and thus informative) functional analysis by focusing on the role of each mechanism within the national and international legal order rather than emphasizing more superficial attributes (such as the selection of adjudicators, procedural rules, location of the

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note 7, at 48-49; REED ET AL., *supra* note 21, at 181; Born, Adjudication, *supra* note 23, at 835-36.

226. 28 U.S.C. § 1782 (2012); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004); *see also supra* note 118 and accompanying text.

227. *See* 28 U.S.C. § 1782.

228. For example, approximately one-third of the investment arbitrations filed in 2012 would appear to be subject to the New York Convention. *See* New York Convention, *supra* note 48; UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, 1 IIA ISSUES NOTE 2 (Mar. 2013) (noting that of the sixty-two new investment arbitrations that were filed in 2012, thirty-nine were filed with ICSID (including seven disputes filed under the ICSID Additional Facility), five were filed under the UNCITRAL Arbitration Rules and five were filed with the Stockholm Chamber of Commerce); *see also supra* note 226 and accompanying text.

229. *See supra* notes 159-209 and accompanying text.

230. This decision is critical for the investor, since investment arbitration not only includes certain advantages (such as neutrality of the decision-makers and the ability to select members of the tribunal) but also certain disadvantages (such as the limitation on substantive review and appeal). *See* LEW ET AL., *supra* note 22, ¶¶ 28-1 to 28-119.



hearing, etc.) that actually arise out of the initial grant of jurisdiction.<sup>231</sup>

The emphasis on the claimant's choice of arbitration in the face of other procedural alternatives also offsets commentators' claims that "an arbitrator who is given comprehensive jurisdiction over a claim filed under an investment treaty is as much an official of the State as judges who are appointed for life by a government or directly elected by voters."<sup>232</sup> While arbitrators in investment proceedings do enjoy a broad range of powers, it is the means by which the tribunal obtains its jurisdiction that is important, not the scope of jurisdiction once granted. Thus, U.S. courts have recognized that "[a]rbitration differs critically from litigation in that arbitrators are not officials of foreign sovereign governments, but private persons tested with their decision-making authority most commonly as a result of private parties' entering into contractual arrangements for the private resolution of disputes."<sup>233</sup>

Focusing on issues relating to the source of the relevant jurisdictional grant facilitates section 1782 analyses in two other ways.<sup>234</sup> First, this approach minimizes the importance of recent efforts to introduce certain litigation-oriented procedures into investment arbitration. For example, there is an increasing movement towards transparency in investment proceedings, with many investment awards now being published in their original or denatured (anonymized) form.<sup>235</sup> Many tribunals also now allow the submission of what

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231. See Michaels, *supra* note 149, at 342, 357 (discussing functional methodology); see also *supra* note 208 and accompanying text. This methodology is particularly useful in overcoming certain facial similarities between interstate arbitration and investment arbitration. For example, both proceedings involve the selection of arbitrators on an ad hoc basis, although there are a growing number of repeat players in both fields, thus making both procedures seem more akin to other types of first-generation international tribunals. See Born, *Adjudication*, *supra* note 23, at 835, 872-73; see also Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 90 (2010); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 356-73, 379 (2007). The procedural rules used in investment arbitration are often amenable to some degree of individualization, as is also the case in interstate arbitration. See LEW ET AL., *supra* note 22, ¶¶ 28-64 to 28-119; Born, *Adjudication*, *supra* note 23, at 831-43; see also *supra* note 202 and accompanying text. Finally, the location of an investment arbitration is not tied to a particular place or venue, although a number of proceedings take advantage of the facilities at the PCA, as is also the case with interstate arbitration. See REED ET AL., *supra* note 21, at 14; Born, *Adjudication*, *supra* note 23, at 798 n.70, 831-43; Anna T. Katselas, *Do Investment Treaties Prescribe a Deferential Standard of Review?*, 34 MICH. J. INT'L L. 87, 102-03 (2012); see also *supra* notes 191-192 and accompanying text. ICSID arbitrations are seated in Washington, D.C., unless the parties agree otherwise. See REED ET AL., *supra* note 21, at 137.

232. Van Harten, *supra* note 23, at 379-80 (noting "[b]oth exercise the ultimate decision-making authority of the juridical sovereign in public law")

233. *In re Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997) (quoting Newman & Castilla, *supra* note 18, at 69).

234. See 28 U.S.C. § 1782 (2012).

235. See ICSID Arbitration Rules, arts. 32, 37(2), effective April 2006, available at [www.icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp](http://www.icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp) (amended in 2006); UNCTAD,

are essentially amicus briefs so as to ensure that the voices of other interested individuals and groups can and will be heard during the arbitral process.<sup>236</sup> While these measures could be interpreted as making investment arbitration more like litigation (and hence more likely to fall within the definition of a “foreign or international tribunal” under section 1782), efforts to increase the transparency of investment arbitration do not affect issues relating to the grant of jurisdiction.<sup>237</sup> As a result, such initiatives fall outside the type of functional analysis being conducted herein.<sup>238</sup>

Second, the emphasis on the source of jurisdictional grants avoids difficulties relating to the common understanding of a treaty as being analogous to a contract between states.<sup>239</sup> For example, at least one court has indicated that it was “reluctant . . . to interfere with the parties’ bargained-for expectations concerning the arbitration process” in the context of a bilateral investment arbitration.<sup>240</sup> Although contract analyses have their place,<sup>241</sup> they can inadvertently minimize the role played by claimants in the grant of jurisdiction in an investment arbitration and can therefore be somewhat misleading in this context.

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Transparency: UNCTAD Series on Issues in International Investment Agreements II (2012), available at [http://unctad.org/en/PublicationsLibrary/unctadaddiaeia2011d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/unctadaddiaeia2011d6_en.pdf); NAFTA Free Trade Commission Statement on Non-Disputing Party Participation, available at <http://www.naftaclaims.com/Papers/Nondisputing-en.pdf>; International Centre for Settlement of Investment Disputes, ICSID Cases, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) (last visited Aug. 1, 2012); see also MARIEL DIMSEY, THE RESOLUTION OF INTERNATIONAL INVESTMENT DISPUTES 223-24 (2008); Born, Adjudication, *supra* note 23, at 842-44; Ishikawa, *supra* note 152, at 375-78, 384-85.

236. See Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 FORDHAM INT’L L.J. 510, 543-63 (2012); Ishikawa, *supra* note 152, at 388.

237. See 28 U.S.C. § 1782.

238. See Michaels, *supra* note 149, at 342, 357 (discussing functional analyses).

239. This approach is relatively common in the United States. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 533 (1987); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984); *McKevitt v. Mueller*, 689 F. Supp. 2d 661, 668 (S.D.N.Y. 2010). However, other authorities have noted the limitation of this particular analogy, particularly in the context of multilateral treaties. See Samantha Besson, *The Authority of International Law—Lifting the State Veil*, 31 SYDNEY L. REV. 343, 361 (2009) (noting multilateral treaties may be more akin to legislation); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of Human Rights Law*, 38 STAN. J. INT’L L. 241, 244-45 (2002).

240. *In re Caratube Int’l Oil Co.*, 730 F. Supp. 2d 101, 106 (D.D.C. 2010). That court also noted that the BIT in question offered the parties a range of dispute resolution options, which made the selection of arbitration more important. See *id.*; see also MCLACHLAN ET AL., *supra* note 7, ¶ 3.30 (discussing “fork in the road” provisions).

241. See *infra* notes 256-296 and accompanying text.

### 3. *International commercial arbitration*

Investment arbitration is not the only type of proceeding that can be characterized as a second-generation international tribunal.<sup>242</sup> International commercial arbitration can also be placed within this category, even though international commercial arbitration is sometimes overlooked in scholarly debates about methods of international adjudication due to the belief that international commercial arbitration is a private international device and therefore distinguishable from procedures arising as a matter of public international law.<sup>243</sup> However, international commercial arbitration is heavily influenced by a number of international treaties, which means that international commercial arbitration can and should be considered from the perspective of public international law as well as private international law.<sup>244</sup>

At this point, courts and commentators are split as to the propriety of section 1782 requests in cases involving international commercial arbitration, with much of the debate focusing on what is perceived to be the private nature of consent to commercial arbitration.<sup>245</sup> For example, some commentators have suggested that because “the disputing parties—acting in a private capacity—have agreed to use a particular method of dispute resolution in disputes arising between themselves,” they have essentially “agreed, in a manner endorsed by the State, to insulate the adjudication of their dispute from the courts and subject it instead to arbitration.”<sup>246</sup> Under this view, “private arbitrations are generally considered alternatives to, rather than precursors to, formal litigation.”<sup>247</sup>

As useful as this approach may be, it does not fully explain the process by

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242. See Born, Adjudication, *supra* note 23, at 831-43.

243. See *id.* at 829; S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499 (2013) [hereinafter Strong, Interpretation].

244. See Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), May 14, 1979, 1439 U.N.T.S. 87; European Convention on International Commercial Arbitration, Apr. 21, 1964, 484 U.N.T.S. 364; New York Convention, *supra* note 48; Panama Convention, *supra* note 48; BORN, *supra* note 29, at 91-109; Strong, Interpretation, *supra* note 243.

245. See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (noting the “fundamental principle that arbitration is a matter of contract”); BORN, *supra* note 29, at 90; Fellas, *supra* note 18, at 387-88; Rutledge, *Discovery*, *supra* note 18, at 171; van Harten, *supra* note 23, at 374; see also *supra* notes 111-148, 166 and accompanying text.

246. Van Harten, *supra* note 23, at 376-77; see also Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 470 (2001) (suggesting that arbitration “is not a mirror image of litigation but rather a method for applying norms and resolving nonjusticiable disputes that arise within a self-regulating, normative community”); *supra* notes 111-148, 166 and accompanying text.

247. *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009).

which international commercial arbitration arises.<sup>248</sup> Furthermore, this perspective is based, at least to some extent, on the view that arbitration is an alternative to litigation, a principle that is still somewhat controversial, both in general terms and in the context of section 1782 requests.<sup>249</sup>

Interestingly, a number of the problems that arise in an analysis based solely on private consent may be resolved by characterizing the issue in terms of jurisdictional grants. Framing the issue in terms of jurisdictional grants also falls more firmly in line with the analytic criteria suggested by *Intel*.<sup>250</sup>

Under the theory posited here, jurisdictional grants in arbitration include two separate elements: a public grant of jurisdiction, which is reflected by the state's authorization of arbitration, and a private grant of jurisdiction, which is reflected by the consent of the parties.<sup>251</sup> Both types of jurisdictional grants include substantive<sup>252</sup> and procedural elements.<sup>253</sup>

Private grants of jurisdiction are outlined in the arbitration agreement between the parties, while public grants of jurisdiction are found in national statutes regarding international commercial arbitration (such as the Federal Arbitration Act (FAA))<sup>254</sup> and international treaties (such as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

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248. See *supra* notes 111-148, 166 and accompanying text.

249. See *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 236-37 (D. Mass. 2008) (concluding a release did not constitute a bar to discovery under section 1782, but noting a split in authority); see also *supra* note 121 and accompanying text.

250. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); *In re Rhodiantyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*38 (D. Kan. Mar. 25, 2011).

251. See Caron, *supra* note 166, at 114-15; see also *supra* notes 165-169 and accompanying text.

252. Parties may agree to send only certain substantive disputes to arbitration while reserving the right to litigate other concerns. See LEW ET AL., *supra* note 22, ¶ 8-13. States also retain the right to only allow certain subject matters to be made subject to arbitration. See New York Convention, *supra* note 48, arts. II(1), V(2)(a); LEW ET AL., *supra* note 22, ¶ 9-2.

253. Parties may dictate the terms of the arbitral procedure in both positive terms (i.e., by choosing a particular procedure) and negative terms (i.e., by disallowing a particular procedure). See BORN, *supra* note 29, at 1749-51; LEW ET AL., *supra* note 22, ¶¶ 6-2 to 6-3, 8-35 to 8-36. States also retain the right to permit only certain types of procedures. See BORN, *supra* note 29, at 1751-52; S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 ARB. INT'L 591, 614-18 (2012) (discussing the concept of procedural non-arbitrability); S.I. Strong, *Mass Procedures as a Form of 'Regulatory Arbitration'—Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. COPR. L. 259, 290-94 (2013) [hereinafter Strong, *Regulatory Arbitration*].

254. See 9 U.S.C. §§ 1-307 (2012); STRONG, *supra* note 67, at 24-30. Several U.S. states have also enacted statutes relating to international commercial arbitration. See Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 101; see also Strong, *Interpretation*, *supra* note 243 (discussing role of state courts in international commercial arbitration).

Awards, more commonly known as the New York Convention).<sup>255</sup> Each of the two types of jurisdictional grants will be considered separately.

a. *Private grants of jurisdiction*

Private grants of jurisdiction are reflected in the parties' arbitration agreement and typically exist as a matter of contract.<sup>256</sup> Most debate concerning the interplay between section 1782 and international commercial arbitration has focused on whether and to what extent section 1782 upsets the parties' contractual expectations regarding the scope of arbitral disclosure.<sup>257</sup> Up until this point, courts and commentators have analyzed these matters pursuant to the discretionary analysis outlined in *Intel*.<sup>258</sup> However, this sort of approach bypasses the preliminary question of whether international commercial arbitration even constitutes a "foreign or international tribunal"

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255. See New York Convention, *supra* note 48. The United States has also ratified the Inter-American Convention on International Commercial Arbitration, more commonly known as the Panama Convention. See Panama Convention, *supra* note 48. Although there are a number of important differences between the Panama and New York Conventions, Congress has indicated that the two are to be construed in a similar manner. See H.R. REP. NO. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678; *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011); *Emp'rs Ins. of Wausau v. Banco Seguros Del Estado*, 34 F. Supp. 2d 1115, 1120 (E.D. Wis.), *aff'd*, 199 F.3d 937 (7th Cir. 1999); BORN, *supra* note 29, at 104; Bowman, *supra* note 48, at 1-2, 19-20. Therefore, this Article will focus solely on the New York Convention. See New York Convention, *supra* note 48.

256. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-53 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-76 (2010). Not all states require arbitration agreements to be contractual in nature. See Gerardo J. Bosques-Hernández, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, INDRET, no. 3, 2008 at 1, 10, available at [http://www.indret.com/pdf/559\\_en.pdf](http://www.indret.com/pdf/559_en.pdf) (noting some states, such as Spain, have "abandon[ed] the traditional strictly contractual or bilateral approach of the arbitration"); Christopher P. Koch, *A Tale of Two Cities!—Arbitrating Trust Disputes and the ICC's Arbitration Clause for Trust Disputes*, 2 Y.B. INT'L ARB. 178, 196 (2012).

257. See 28 U.S.C. § 1782 (2012). Although an in-depth of discussion of the differences between U.S.-style discovery and arbitral disclosure is beyond the scope of this Article, various authorities have discussed how radically the two procedures differ and how the adoption of U.S. discovery devices in arbitration would upset the parties' contractual expectations. See Jalal El Ahdab & Amal Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, in ARBITRATION ADVOCACY IN CHANGING TIMES, XV ICCA CONG. SER. (2010 Rio) 65 (2011); Alford, *supra* note 3, at 139; Javier Rubenstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304 (2004).

258. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004) (noting "a district court could consider whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"); see *supra* note 54 and accompanying text. See *Intel*, 542 U.S. at 241.

under section 1782.<sup>259</sup> Framing international commercial arbitration as involving both public and private jurisdictional grants not only brings the analysis forward to the time when the initial determination about the applicability of the statute to the underlying proceeding is made, it also considers an important issue (i.e., contractual grants of jurisdiction) that was overlooked in *Intel* due to the public nature of the European bodies involved in that dispute.<sup>260</sup>

When evaluating the scope and nature of private grants of jurisdiction in arbitration, it is useful to consider a number of U.S. Supreme Court precedents that describe the need to enforce arbitration agreements according to their terms, a goal that is said to be particularly vital in cases involving international disputes.<sup>261</sup> Although interpretive difficulties can arise if a particular procedure (such as discovery under section 1782) is not explicitly addressed by the parties, the Court has suggested that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”<sup>262</sup> Furthermore, procedures that “include[] absent parties, necessitating additional and different procedures and involving higher stakes,” and that threaten arbitral confidentiality are considered to violate the text and purpose of the FAA.<sup>263</sup>

This line of cases suggests that discovery under section 1782 should be considered inappropriate in international commercial arbitration, since such requests impose “additional and different procedures” and change the stakes of the arbitration.<sup>264</sup> Section 1782 can also be seen as threatening arbitral confidentiality, particularly when conducted prior to or during the proceeding itself,<sup>265</sup> and can affect third parties to the arbitration.<sup>266</sup> Thus, existing

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259. See 28 U.S.C. § 1782.

260. See *Intel*, 542 U.S. at 241.

261. See *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

262. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); see also 28 U.S.C. § 1782 (2012); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010); see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013). Commentators have at times disagreed with this characterization of the nature and purpose of arbitration. See S.I. STRONG, CLASS, MASS AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW ¶3.75 (2013) [hereinafter STRONG, CLASS]; Born & Salas, *supra* note 32, at 22; Strong, *First Principles*, *supra* note 32, at 246-68.

263. *AT&T Mobility*, 131 S. Ct. at 1749-50; see also 9 U.S.C. §§ 1-307 (2012).

264. *AT&T Mobility*, 131 S. Ct. at 1749-50; see also 28 U.S.C. § 1782. The differences between arbitral disclosure and U.S.-style discovery are significant. See *El Ahdab & Bouchenaki*, *supra* note 257, at 65; *Alford*, *supra* note 3, at 139; *Rubenstein*, *supra* note 257, at 304.

265. See 28 U.S.C. § 1782. A different result may obtain if discovery under section 1782 is sought after the conclusion of the arbitral proceedings, when the award is being

Supreme Court precedent strongly suggests that requests for discovery under section 1782 should not be permitted in cases involving international commercial arbitration.<sup>267</sup>

Some commentators have suggested that the easiest way to avoid any difficulties relating to the interpretation of an arbitration agreement that is silent as to the possibility of discovery under section 1782 would be simply to include a provision explicitly barring recourse to the statute.<sup>268</sup> Although that approach would of course be effective, it is also highly unrealistic, since it would require parties to an arbitration that is seated in any country in the world other than the United States and that may not even involve a U.S. disputant to anticipate and exclude requests under section 1782.<sup>269</sup> This technique may also be largely ineffective (since such provisions would only bind parties to the arbitration agreement)<sup>270</sup> and can be seen as violating the conventional understanding of the appropriate structure of default rules.<sup>271</sup>

When considering private grants of jurisdiction, it is helpful to distinguish

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enforced. *See also infra* note 285 and accompanying text.

266. *See* 28 U.S.C. § 1782 (referring to requests by “any interested person” and allowing discovery of any person who “resides or is found” in the United States); Alford, *supra* note 3, at 140-41.

267. *See* 28 U.S.C. § 1782.

268. *See id.*; Alford, *supra* note 3, at 151; Rothstein, *supra* note 18, at 88.

269. *See* 28 U.S.C. § 1782.

270. *See id.* (allowing “any interested person” to make a request under the statute, not just a party to the underlying proceeding). It is possible that a court could rely on the law of non-signatories to extend the effect of provision relating to section 1782 to non-parties to the arbitration. *See id.*; *Invista S.A.R.L. v. Rhodia, Ltd.*, 625 F.3d 75, 85 (3rd Cir. 2010); *InterGen NV v. Grina*, 344 F.3d 134, 145-50 (1st Cir. 2003); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (describing circumstances in which a non-signatory may be bound by an arbitration agreement); BORN, *supra* note 29, at 1137-38, 1142-1211. Of course, if the arbitral proceedings do not fall under the statutory definition of a “foreign or international tribunal,” non-litigants would have no ability to seek discovery under section 1782 in the first place. *See* 28 U.S.C. § 1782.

271. Default rules typically adopt the approach that most closely mirrors “the ‘hypothetical bargain’ that the parties themselves would have chosen in a completely spelled-out agreement – or, perhaps, the bargain that most similarly situated parties would have chosen, or that it would be rational for such parties to have chosen *ex ante*.” Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT’L L.J. 89, 115 (1995). There is a considerable body of literature concerning default rules, although the discussion is outside the scope of the current Article. *See, e.g.*, Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881 (2003); Ian Ayres, *Ya-huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 589-90 (2006); Ian Ayres & Robert Gernter, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Ian Ayres & Robert Gernter, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999); Ian Ayres & Robert Gernter, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

between the parties' positive grant of jurisdiction to the arbitral tribunal and the parties' negative grant of jurisdiction to the courts.<sup>272</sup> Most scholarly and judicial analysis focuses on the first of these elements, which relates to the parties' positive right to choose the venue in which a dispute is heard through use of an arbitration agreement or forum selection clause.<sup>273</sup> However, U.S. law also recognizes the concept of a negative grant of jurisdiction. Parties can make their intention to deny jurisdiction to a particular court known through a variety of means, ranging from forum selection clauses to releases, advance waivers of litigation and covenants not to sue.<sup>274</sup> Each of these agreements essentially denies a court that would otherwise have proper jurisdiction over a matter the opportunity to hear a particular dispute as a matter of party autonomy. Arbitration agreements also contain a negative grant of jurisdiction, although the parties' intent to exclude the jurisdictional power of the courts in those circumstances may be implicit rather than explicit.<sup>275</sup>

The fact that a negative grant of jurisdiction is implicit rather than explicit should not create any conceptual problems, since parties have long been considered capable of signifying their consent to certain procedures in arbitration through implicit means.<sup>276</sup> However, it can often be difficult to ascertain both the existence and scope of an implicit agreement regarding a procedural matter. Therefore, it may be beneficial to consider how an implied negative grant of jurisdiction operates in other contexts and how a section 1782 request might be received in those other scenarios.<sup>277</sup>

Some useful analogies may be drawn to other forms of alternative dispute resolution, such as mediation or conciliation. Indeed, it is altogether possible that a court may shortly be asked to consider a section 1782 request in the context of an agreement to mediate or conciliate a dispute either on a standalone basis or as part of a multi-tier dispute resolution provision (also

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272. See New York Convention, *supra* note 48, art. II; BORN, *supra* note 29, at 1004-48; LEW ET AL., *supra* note 22, ¶15-1.

273. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

274. See *Newton v. Rumery*, 480 U.S. 386, 391-98 (1987); Bradford P. Anderson, *Please Release Me, Let Me Go! Releases of Unknown Claims in the Penumbra of California Civil Code 1542*, 9 U.C. DAVIS BUS. L.J. 1, 7 (2008) (noting such agreements might require mutual consideration, depending on the governing law and the circumstances in which the agreement was made).

275. But see *In re Finserve Grp. Ltd.*, No. 4:11-mc-2044-RBH, 2011 WL 5024264, at \*3 (D. S.C. Oct 20, 2011); *Ex rel Winning (HK) Int'l Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at \*9 (S.D. Fla. Apr. 30, 2010); *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009).

276. See Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of "Consent,"* 24 ARB. INT'L 199, 203 (2004); S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1055-83 (2009).

277. See 28 U.S.C. § 1782 (2012).



known as a “step” clause).<sup>278</sup>

Significant questions exist as to whether a mediation could support a request for discovery under section 1782.<sup>279</sup> On the one hand, some people might find the link between mediation and litigation to be too attenuated to permit a request for discovery under the statute.<sup>280</sup> However, *Intel* denied the need to establish that “adjudicative proceedings are ‘pending’ or ‘imminent’”<sup>281</sup> and instead indicated that “a proceeding in a foreign or international tribunal” need only be “within reasonable contemplation” of the parties at the time the request for discovery under section 1782 was made.<sup>282</sup> Since litigation is at least as likely to arise in a mediated dispute as in an arbitrated dispute, any argument based on attenuation would appear to be unavailing in the mediation context.<sup>283</sup>

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278. *See id.* No known cases address this question. However, mediation is becoming increasingly popular in private commercial disputes, both as a standalone mechanism and as a condition precedent to arbitration. *See* Beale et al., *supra* note 18, at 94; Fellas, *supra* note 18, at 388; Thomas J. Stipanowich & J. Ryan Lamare, *Living With ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Companies*, HARV. NEGOT. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2221471>. Conciliation is provided for in ICSID disputes, although such procedures are not often utilized. *See* REED ET AL., *supra* note 21, at 22 (noting only six ICSID conciliation cases to date); Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into International Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. (forthcoming 2013). Formal conciliation is not well used in the interstate context, either. *See* Permanent Court of Arbitration, 111th Annual Report, annex 4 (2011), available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1069](http://www.pca-cpa.org/showpage.asp?pag_id=1069) (noting three such conciliations).

279. *See* 28 U.S.C. § 1782.

280. *See id.*

281. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004) (citation omitted).

282. *See* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 247; *see also In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 236 (D. Mass. 2008); Beale et al., *supra* note 18, at 94; Fellas, *supra* note 18, at 388. Questions about when a legal dispute is “within reasonable contemplation” may echo analyses regarding litigation holds for discovery purposes. *See* *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012); *In re Babcock*, 583 F. Supp. 2d at 236; *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612-13 (S.D. Tex. 2010); *Phillip M. Adams & Assocs., LLC v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1190 (D. Utah 2009); Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715, 717-21 (2010); A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006 (2011) (discussing when a litigation hold arises).

283. Litigation in the mediation context could arise either as a result of an unsuccessful mediation or as a result of noncompliance with a settlement agreement arising out of a successful mediation. Litigation in the arbitration context could arise as a result of a motion to enforce the arbitral award. However, most parties voluntarily comply with arbitral awards in the context of both international commercial and investment arbitration. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.02 (2009); REED ET AL., *supra* note 21, at 17; Born, *Adjudication*, *supra* note 23, at 835 n.238.

However, use of section 1782 in a mediation appears inherently inappropriate, since parties to a mediation clearly want to avoid judicial proceedings.<sup>284</sup> Allowing a request for discovery under section 1782 would obviously violate the purpose, intention and effectiveness of the parties' private agreement to mediate while also contravening state policies encouraging the use of alternative means of dispute resolution.<sup>285</sup> As a result, most people would likely conclude that discovery under section 1782 should not be permitted in cases involving mediation or conciliation.<sup>286</sup>

Supporters of section 1782 might try to distinguish arbitration from mediation and conciliation based on various functional attributes.<sup>287</sup> However, the pro-arbitration policy embedded within the FAA (particularly in its international chapters) and espoused by the Supreme Court<sup>288</sup> appears to be far stronger than any pro-mediation policy that might be in the process of developing,<sup>289</sup> which suggests that requests under section 1782 are even less

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284. See 28 U.S.C. § 1782.

285. See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609-22 (2009). Of course, a different analysis would be appropriate if the mediation broke down and one of the parties filed suit, or if the settlement agreement arising out of the mediation were to be breached, causing one of the parties to proceed to litigation. At that stage, any agreement not to seek judicial assistance would be considered to have been superseded by subsequent events and could no longer bar efforts to obtain discovery via section 1782. See 28 U.S.C. § 1782. Interestingly, this analysis suggests a possible analogy in the arbitration context, in that section 1782 requests might be appropriate if and when an arbitral matter is subject to a motion to enforce or vacate an arbitral award. See *id.*; STRONG, *supra* note 67, at 63-85. Not only would it be appropriate to consider judicial enforcement or annulment proceedings to involve a "foreign or international tribunal" under the statute, but such measures would appropriately trigger the discretionary analysis under *Intel* to determine whether the litigation was initiated simply in order to circumvent the standard disclosure mechanisms. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 265; Alford, *supra* note 3, at 138. Furthermore, the scope of discovery would likely only refer to issues raised in the enforcement proceedings and therefore be less wide-ranging (and inherently problematic) than discovery on the merits. Motions to compel arbitration appear in a very different light and would not justify a section 1782 request, since the presumption at that point is that the parties have agreed to have their dispute resolved in a single forum, i.e., arbitration. See Strong, *Borders*, *supra* note 9, at 14-16.

286. See 28 U.S.C. § 1782.

287. See *id.* For example, mediation is typically framed as a consensual dispute resolution mechanism while arbitration is seen as inherently adjudicative. See Stipanowich, *Litigation*, *supra* note 168, at 4, 24; see also Jacqueline Nolan-Haley, *Mediation: The "New" Arbitration*, 17 HARV. NEGOT. L. REV. 61, 64-65 (2012).

288. See 9 U.S.C. §§ 1-307 (2012); 28 U.S.C. § 1782; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-53 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-76 (2010); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518-19 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); BORN, *supra* note 29, at 137.

289. Though such a policy appears to exist, it is in many ways less developed than the longstanding policy in favor of arbitration. See Alternative Dispute Resolution Act of 1998,

appropriate in arbitration than in mediation.<sup>290</sup> Since discovery under section 1782 is not warranted in mediation, such practices are equally (if not more) disfavored in arbitration.<sup>291</sup>

Another way to consider negative grants of jurisdiction involves what might be called the parties' "individual participatory rights."<sup>292</sup> Although the precise content of these rights may vary somewhat according to the dictates of each particular legal system, the core attributes appear to involve the claimant's ability to choose whether, when and where to bring a legal claim.<sup>293</sup> This principle is protected as a matter of both national and international law and can in some jurisdictions rise to the level of a constitutional right.<sup>294</sup>

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Pub. L. No. 105-315, § 2, 112 Stat. 2993 (1998) (codified as amended at 28 U.S.C.A. §§ 651-58 (2013)); *Leppind v. Mukasey*, 530 F.3d 862, 863 (9th Cir. 2008); *Holick v. Cellular Sales of N.Y., LLC*, F. Supp. 2d, 2013 WL 1336608, at \*5-6 (N.D.N.Y., Mar. 29 2013); Donna Stienstra, *ADR in the Federal District Courts: An Initial Report* 2-3 (Nov. 16, 2011), available at <http://www.fjc.gov>.

290. See 28 U.S.C. § 1782.

291. See *id.*

292. See S.I. Strong, *Cross-Border Collective Redress and Individual Participatory Rights: Quo Vadis?*, 32 CIV. JUST. Q. (forthcoming 2013) [hereinafter Strong, *Quo Vadis*]; S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 ARIZ. ST. L.J. 233, 245-48 (2013) [hereinafter Strong, *Brussels I*].

293. See Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 38-39 (2011); Strong, *Brussels I*, *supra* note 292, at 245-48; Strong, *Quo Vadis*, *supra* note 292.

294. See Monestier, *supra* note 293, at 38-39; Strong, *Brussels I*, *supra* note 292, at 245-48; Strong, *Quo Vadis*, *supra* note 292; see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); European Convention on Human Rights, as amended by protocols nos. 11 and 14, arts. 6, 13, effective 1 June 2010 [hereinafter ECHR]; Charter of Fundamental Rights of the European Union, 2000/C 364/1, art. 47, 18 December 2000; Alford, *supra* note 3, at 129; Laura Carballo Piñero, *Collective Redress in the Proposal for a Brussels I bis Regulation: A Coherent Approach?*, 2 ZEITSCHRIFT FÜR EUROPÄISCHES UNTERNEHMENS—UND VERBRAUCHERRECHT—J. EUR. CONSUMER & MARKET L. 81, 82 (2012); Burkhard Hess, *Cross-border Collective Litigation and the Regulation Brussels I*, 2 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS (IPRAX) 54 (2010); Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. H.R. L. REV. 457, 457-58 (2000); Horatia Muir Watt, *Brussels I and Aggregate Litigation*, 2 PRAXIS DES INTERNATIONALEN PRIVAT—UND VERFAHRENSRECHTS (IPRAX) 111 (2010). Although these rights are discussed most cogently in the context of litigation, authority exists suggesting that various fundamental rights, including Article 6 of the European Convention on Human Rights, apply equally to disputes arising in arbitration. See ECHR, *supra*, art. 6; LEW ET AL., *supra* note 22, ¶ 5-57; Vasil Ye. Marmazov & Pavlo V. Pushkar, *Is There a Right to Fair Settlement of a Case by Means of Arbitration, As Guaranteed by the European Convention on Human Rights?*, 2 L. UKR. 52, 52-64 (2001), available at <http://eurolaw.org.ua/publications/ukrainian-journal-of-european-studies/5-2011/42-is-there-a-right-to-fair-settlement-of-a-case-by-means-of-arbitration-as-guaranteed-by-the-european-convention-on-human-rights>). But see Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View*, 21 J. INT'L ARB. 413, 416-19, 426-47 (2004) (stating that parties

The concept of individual participatory rights may also protect a claimant's ability to choose the manner in which a suit is asserted.<sup>295</sup> Although the scope of this element is only now being fully considered, recognition of such a right would be highly relevant to Section 1782 analyses, since it would underscore the importance of both positive and negative grants of jurisdiction and make the decision to exclude all forms of litigation, including discovery under Section 1782, fundamental and perhaps even constitutional in nature.<sup>296</sup>

b. *Public grants of jurisdiction*

Most analyses involving section 1782 and international commercial arbitration have focused on matters relating to private grants of jurisdiction (i.e., party consent).<sup>297</sup> However, arbitration also involves a public grant of jurisdiction, as described in the FAA and the relevant treaties on arbitration.<sup>298</sup> Although public grants of jurisdiction are often characterized as reflecting the various limits that the state places on the parties' exercise of procedural autonomy, statutes and treaties relating to arbitration also identify the limits that the state places on itself.<sup>299</sup>

Public grants of jurisdiction, like private grants of jurisdiction, have both a negative and positive quality.<sup>300</sup> The positive aspects of the public grant of jurisdiction are quite broad and basically allow the parties to adopt any procedure that does not contravene certain fundamental principles of due process.<sup>301</sup> Principles of procedural fairness are more general in arbitration than in litigation, and arbitral due process focuses primarily on concepts such as reasonable notice, equal treatment and the opportunity to present one's case.<sup>302</sup>

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consenting to arbitration waive their rights under Article 6(1) of the ECHR).

295. See Strong, *Quo Vadis*, *supra* note 292.

296. See 28 U.S.C. § 1782; see also *supra* note 165.

297. See *supra* notes 256-296 and accompanying text.

298. See 9 U.S.C. §§ 1-307 (2012); New York Convention, *supra* note 48; Panama Convention, *supra* note 48; Caron, *supra* note 166, at 114-15; Reisman & Irvani, *supra* note 166, at 5-6.

299. See van Harten, *supra* note 23, at 392 (noting that in international commercial arbitration, "the State . . . retains its control over the recognition of party autonomy and of the right of individuals to eschew the courts in favour of arbitration"); see also *supra* notes 165-209 and accompanying text.

300. See BORN, *supra* note 29, at 1004-48; LEW ET AL., *supra* note 22, ¶ 15-1.

301. See 9 U.S.C. §§ 1-307; New York Convention, *supra* note 48; Panama Convention, *supra* note 48; BORN, *supra* note 29, at 1765.

302. See New York Convention, *supra* note 48, art. V; Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1322-21 (2003) [hereinafter Kaufmann-Kohler, *Globalization*] (suggesting "the term 'due process' . . . refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called *principle de la contradiction* and equal treatment"); Maureen A. Weston, *Universes Colliding: The*

Parties may not contract out of these basic precepts, which “may be applied *ex officio*,”<sup>303</sup> and the failure to adhere to these principles results in an award that is unenforceable under both the New York Convention and the FAA.<sup>304</sup>

Some of these fundamental principles of procedural fairness could be implicated in a section 1782 analysis.<sup>305</sup> For example, some parties could argue that the inability to seek discovery under section 1782 hinders their opportunity to present their case.<sup>306</sup> However, that argument would in many ways be difficult to make, since the absence of discovery under section 1782 has never violated the principle of procedural fairness in the past.<sup>307</sup> Furthermore, principles relating to the negative grant of jurisdiction suggest that the state does not have the ability to intervene in the arbitration in this manner.

Negative aspects of the public grant of jurisdiction are typically described pursuant to the principle of judicial noninterference.<sup>308</sup> According to this notion, courts are to avoid becoming involved in an arbitration except at appropriate times and in appropriate ways.<sup>309</sup> Although experts disagree about what constitutes an “appropriate” form of judicial intervention,<sup>310</sup> it is clear that both the FAA and the New York Convention contemplate limited judicial review of arbitral awards to protect both the parties and the state from certain types of procedural error.<sup>311</sup>

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*Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1770 (2006).

303. MATTI S. KURKELA & HANNES SNELLMAN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 4 (2005).

304. See New York Convention, *supra* note 48, art. V; 9 U.S.C. § 10(a)(3); BORN, *supra* note 29, at 1765-75; Alford, *supra* note 3, at 130-31.

305. See 28 U.S.C. § 1782 (2012).

306. See New York Convention, *supra* note 48, art. V(1)(b); 28 U.S.C. § 1782. Some jurisdictions require parties to be given a “full opportunity” to present their cases, while other states require only a “reasonable opportunity” to do so. LEW ET AL., *supra* note 22, ¶ 26-87.

307. See 28 U.S.C. § 1782.

308. See BORN, *supra* note 29, at 1776-82; Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. PA. J. INT’L L. 999, 1025-33 (2009) [hereinafter Born, Non-Interference]; Smit, *Judicial Assistance*, *supra* note 18, at 157 (“[S]pecial caution is appropriate in regards to requests for assistance in adjudication by arbitral tribunals . . . because of the special concern courts should show for not interfering with the arbitral process.”); see also *In re Chevron Corp.*, 762 F. Supp. 2d 242, 251 (D. Mass. 2010) (“[S]ince international arbitrators usually control the discovery process, this court believes it should exercise at least some restraint before granting the instant Section 1782 application.”).

309. See BORN, *supra* note 29, at 1776-82; LEW ET AL., *supra* note 22, ¶15-1.

310. See Strong, *Borders*, *supra* note 9, at 12, 17-18.

311. See 9 U.S.C. §§ 10, 201-02, 208, 301-02, 307 (2012); New York Convention, *supra* note 48, art. V. The state interest in arbitration is particularly apparent in Article V(2) of the New York Convention, which allows courts to raise certain concerns *sua sponte*. See New York Convention, *supra* note 48, art. V(2).

A number of authorities have suggested that the courts' ability to conduct this type of limited judicial review destroys the procedural independence of international arbitration and brings arbitral proceedings within the definition of a "foreign or international tribunal" under section 1782.<sup>312</sup> Essentially, the argument is that requests for discovery under section 1782 are appropriate because the court retains some sort of residual jurisdiction over the arbitral dispute as a result of the procedural review process.<sup>313</sup>

However, there are some problems with this approach, most notably in the way in which it views jurisdiction as either existing in its entirety or not at all. Under this type of exclusive jurisdictional model, the exercise of judicial control over any aspect of arbitration makes the dispute justiciable and therefore subject to *Intel's* edict about judicial reviewability.<sup>314</sup> However, it may not be necessary to ask whether arbitration constitutes a complete or only partial divestment of judicial jurisdiction. Instead, it may be more useful as well as more accurate to consider litigation and arbitration as reflecting a type of shared or concurrent jurisdiction.<sup>315</sup>

The concept of concurrent jurisdiction exists in both national<sup>316</sup> and international legal systems,<sup>317</sup> thereby making it a sufficiently well-known model to consider in the current context. One of the key elements of concurrent jurisdiction is the way in which the decision to proceed in one forum can foreclose the opportunity for both adjudication in and intervention from other fora. This principle is perhaps most apparent in cases involving investment arbitration, where certain "fork in the road" decisions can preclude other

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312. See 9 U.S.C. §§ 10, 201-02, 208, 301-02, 307; 28 U.S.C. § 1782; BORN, *supra* note 29, at 1933-36; see also *supra* notes 144-148 and accompanying text. This type of argument is reminiscent of the debates that were once waged about the constitutionality of arbitration and whether arbitration impermissibly ousts courts of their jurisdiction. See LEW ET AL., *supra* note 22, ¶¶ 5-35 to 5-40; RUTLEDGE, *supra* note 165, at 16. One of the more prevalent theories generated in response to that debate is that arbitration is not constitutionally improper because any ouster of the courts is not complete, due to the availability of limited procedural review. See *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 56 (1st Cir. 2007); *Windward Agency, Inc. v. Cologne Life Reins. Co.*, 123 F. App'x 481, at \*1 (3d Cir. 2005) (noting arbitration does not completely oust the court of jurisdiction, since the court retains some oversight capacity); see also RUTLEDGE, *supra* note 165, at 15-54.

313. See 28 U.S.C. § 1782; RUTLEDGE, *supra* note 165, at 16.

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

315. Another alternative would be to view arbitral tribunals as a form of inferior federal court. See Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 226 n.118 (2012).

316. See *Haywood v. Drown*, 556 U.S. 729, 735-36 (2009) (discussing presumption of concurrent jurisdiction under U.S. law).

317. See *Pauwelyn & Salles*, *supra* note 183, at 84.

jurisdictional options.<sup>318</sup> However, the analogy can be extended to other situations in which parties must bear the burdens of their jurisdictional choices.<sup>319</sup>

Concurrent jurisdiction therefore explains the way in which the filing of a claim in arbitration precludes litigation on the same cause of action.<sup>320</sup> However, the notion of concurrent jurisdiction also provides insights relating to limited procedural review of arbitral awards. Here, the U.S. federal system provides an excellent analytical model.

Longstanding legal authority indicates that the U.S. Supreme Court is constitutionally entitled to review U.S. state court decisions for error on matters of constitutional or federal law.<sup>321</sup> Questions of state law are immune from this limited form of Supreme Court review.<sup>322</sup> Furthermore, the right of limited review of questions of constitutional or federal law does not entitle either the U.S. Supreme Court or the lower federal courts to intervene in or “assist” state court proceedings in any way.

The Supreme Court’s power of review relating to state court decisions appears largely analogous to procedural reviews of arbitral awards. In both cases, the reviewing entity is strictly limited in what issues it can consider. Furthermore, the review process is restricted in both cases to one time period following the determination on the merits. Given these similarities, it appears appropriate to extend the Supreme Court’s inability to interfere with ongoing state court proceedings to the arbitral context by analogy and thereby conclude

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318. See REED ET AL., *supra* note 21, at 99-101; Valentina Sara Vadi, *Cultural Diversity Disputes and the Judicial Function in International Investment Law*, 39 SYRACUSE J. INT’L L. & COM. 89, 104 (2011) (“Investor state arbitration . . . transfers adjudicative authority from national courts to arbitral tribunals.”).

319. While the decision to proceed in U.S. state court does not necessarily preclude a similar case from being brought in federal court, federal courts can and will abstain from hearing certain matters in appropriate circumstances. See *Moore v. Sims*, 442 U.S. 415 (1979) (expanding *Younger* abstention to civil contexts); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (regarding *Colorado River* abstention); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (regarding *Burford* abstention); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (regarding *Pullman* abstention); *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518-23 (11th Cir. 2004) (regarding international abstention); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 4247 (2013); Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 18 (2012); Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 247-51 (2010); Pauwelyn & Salles, *supra* note 183, at 85-86, 92-93.

320. See New York Convention, *supra* note 48, art. II(3); see also *supra* notes 308-311 and accompanying text.

321. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415-16 (1821); Cynthia L. Fontaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1065 n.90 (1999).

322. See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1874); Fontaine, *supra* note 321, at 1057.

that the decision to proceed in arbitration can and should be considered to cut off any ability to seek judicially mandated discovery under section 1782.<sup>323</sup>

### B. *State Interests*

Considering requests under section 1782 in the context of jurisdictional grants may prove a useful and persuasive framework for analysis for some courts and commentators.<sup>324</sup> However, other people may take the view that, simply by enacting section 1782, the United States has indicated a state interest in the provision of discovery in cases involving foreign and international tribunals and that such interests must be respected to the extent possible.<sup>325</sup>

Certainly it is true that states have asserted a longstanding interest in the full and fair adjudication of legal disputes, regardless of whether the underlying dispute is heard in litigation or arbitration.<sup>326</sup> Requests for discovery under section 1782 might be considered legitimate to the extent they can be located within that line of authority.<sup>327</sup> However, doing so would require courts to conclude both that U.S.-style discovery was somehow necessary to provide parties with the information needed to adjudicate their claims and defenses in a full and fair manner<sup>328</sup> and that the United States had both the right and the

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323. See 28 U.S.C. § 1782 (2012).

324. See *id.*

325. See *id.*; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”); see also Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 175 (2012) (discussing judicial review when legislation is no longer in harmony with social interests). One issue that courts have not yet considered is the fact that U.S. parties will bear the brunt of discovery under section 1782, since the procedure relates only to persons and documents found here. See 28 U.S.C. § 1782; Beale et al., *supra* note 18, at 54; Rothstein, *supra* note 18, at 90. Although Congress may have taken this concern into account when passing section 1782 and decided that the state interest in protecting U.S. nationals should be subordinated to the alleged state interest in U.S.-style discovery, the courts do not appear to have considered this issue at length. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004) (indicating that Section 1782 had the “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts’”); Alford, *supra* note 3, at 129.

326. See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*, 12 ARB. INT’L 137, 138-40 (1996) [hereinafter Park, *Arbitrability Dicta*]; see also Marmazov & Pushkar, *supra* note 294, at 52-64. Some commentators have suggested that the state interest in promoting commerce is the primary driving force in international commercial arbitration. See Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri,”* 17 AM. REV. INT’L L. 155, 178 (2006) (suggesting commercial interests overcome state interests in “subjecting arbitration proceedings to national law”).

327. See 28 U.S.C. § 1782.

328. Some commentators have suggested that section 1782 was central to Chevron’s ability to assert its claim in arbitration under the U.S.-Ecuador BIT, since nearly all of the



ability to provide this kind of judicial assistance.

Initially, it would appear that the United States has the ability to provide this sort of assistance, since states are entitled to regulate behavior within their own territorial borders.<sup>329</sup> However, demonstrating a right to provide this kind of judicially mandated discovery is highly problematic, given that national courts have only a limited grant of jurisdiction in matters relating to arbitration.<sup>330</sup> Furthermore, the international legal community holds deeply divergent opinions about whether involuntary disclosure of information and documents is necessary to establish a cause of action as a general concern. While U.S.-trained lawyers are often acculturated to believe that broad, sweeping discovery is the best, if not only, way to allow parties to prove their claims and defenses,<sup>331</sup> lawyers from other legal systems disagree strongly, often finding it strange (if not offensive) that the United States would attempt to provide this type of “assistance” to foreign and international tribunals.<sup>332</sup> Indeed, most “parties and counsel outside the United States view the prospect of American-style discovery” with “horror,” including in situations involving section 1782.<sup>333</sup>

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evidence to support Chevron’s allegations of corruption in the Ecuadorian national courts was said to have been obtained via section 1782 requests. *See id.*; Alford, *supra* note 3, at 128, 146.

329. Section 1782 is usually understood to be limited to discovery of persons and documents located within the United States. *See* 28 U.S.C. § 1782; *In re Application of Ecuador*, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868, at \*10 (N.D. Cal. Feb. 22, 2011) (questioning whether information was located within the district); Tyler B. Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 in Aid of Foreign and International Litigation and Arbitration*, 22 AM. REV. INT’L ARB. 135, 143-62 (2011); Smith, *supra* note 18, at 93.

330. *See supra* notes 156-323 and accompanying text.

331. *See* Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 797; Brazil, *supra* note 159, at 1343; Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 475 (2006). Section 1782 is based on the principle, commonly enunciated in the United States, that litigants are entitled to obtain involuntary discovery not only from other parties to a dispute but also from third parties who are not directly involved in the matter at bar. *See* 28 U.S.C. § 1782; FED. R. CIV. P. 26(b)(1); *United States v. Nixon*, 418 U.S. 683, 709-10 (1974) (noting “that ‘the public has the right to every man’s evidence’” with some narrow exceptions (citations omitted)); *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252 (2004) (indicating that section 1782 had the “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts’”). Conversely, U.S. law considers it every person’s duty to provide evidence to an ongoing litigation, even if that person is not a litigant. *See* FED. R. CIV. P. 26(b)(1); *Nixon*, 418 U.S. at 709-10.

332. *See* Cedric Ryngaert, *Assessing International Discovery After Intel v. AMD (US Supreme Court, 2004): Expanded US Discovery Opportunities for Foreign Litigants?*, 7 EUR. BUS. ORG. L. REV. 675, 679 (2006).

333. Rubenstein, *supra* note 257, at 304; *see also* 28 U.S.C. § 1782; Alford, *supra* note 3, at 139.

The U.S. Supreme Court attempted to assuage the concerns of foreign parties, courts and counsel about the scope and nature of U.S.-style discovery by claiming in *Intel* that district courts could control the excessive use of section 1782 through the use of judicial discretion.<sup>334</sup> However, that approach actually “make[s] district courts’ decisions all the more difficult and . . . unpredictable for applicants.”<sup>335</sup> Furthermore, “the United States system works somewhat unilaterally under the assumption that United States-style discovery is good in itself, whatever the proceedings may be, even if they take place in a country [or in a process, such as arbitration] where no such discovery is known.”<sup>336</sup> Requests under section 1782 could also be made simply to harass other parties.<sup>337</sup>

Thus, it is necessary to determine whether the United States can assert any sort of defensible state interest in section 1782 in the context of arbitration.<sup>338</sup> This task is somewhat challenging, given the scarcity of research relating to state interests in a particular procedural device even outside the section 1782 analysis.<sup>339</sup> Nevertheless, some useful observations may be made relating to both international commercial and investment arbitration.

### 1. *Investment arbitration*

Although states have an interest in the proper conduct of an arbitration, concerns about procedural fairness may be particularly heightened in the investment context, since investment disputes often involve matters of a public or regulatory nature.<sup>340</sup> For example, investment arbitration not only carries

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334. See 28 U.S.C. § 1782; *Intel*, 542 U.S. at 264-65.

335. Catherine Kessedjian, *Dispute Resolution in a Complex International Society*, 29 MELB. U. L. REV. 765, 806 (2005) (citation omitted).

336. *Id.*

337. *Id.*; see also 28 U.S.C. § 1782; *In re Rhodiantyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at \*31 (D. Kan. Mar. 25, 2011); Alford, *supra* note 3, at 129.

338. See 28 U.S.C. § 1782.

339. See *id.*; see also *Cunningham v. Peters*, 941 F.2d 535, 538 (7th Cir. 1991) (regarding state interest in criminal procedure); Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 U. PITT. J. TECH. L. & POL’Y 5, III.C (2008) (regarding state interest in discovery).

340. See William B. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration*, 35 YALE J. INT’L L. 283, 287 (2010); Ishikawa, *supra* note 152, at 376; van Harten, *supra* note 23, at 376. This concern has led to calls to increase transparency in investment arbitration and make the process more subject to democratic values. See *supra* notes 235-237 and accompanying text. Although that debate focuses on procedural concerns to some extent, the issue does not involve the taking of evidence but rather the presentation of alternative viewpoints from other members of the affected community through the use of *amicus* briefs. See *supra* notes 235-237 and accompanying text. At this point, “*amicus* submissions are generally not considered as evidence” in investment arbitration. Murray Smith, *Third Parties in*

“implications for the ‘public purse’ (ie awards against the host State or State entity are funded through taxes levied on citizens),” it also “involves other important public interests” to the extent the disputes “arise in public service sectors that affect the daily life of citizens[,] . . . challenge regulatory measures intended by States to protect the public welfare, . . . [and] have a ‘chilling effect’ on States adopting public welfare regulations.”<sup>341</sup> Investment arbitration is also said to provide “an effective means to redress grievances arising from government misconduct” and empower arbitral tribunals “to sit in judgment on the acts of government, including acts of the judiciary.”<sup>342</sup>

These attributes suggest that discovery under section 1782 might be warranted as a means of protecting the public interest in the substance of an investment dispute.<sup>343</sup> However, any special concerns relating to an investment dispute, be they substantive or procedural, must be specifically identified in the underlying treaty if they are to be considered protectable.<sup>344</sup> The question, therefore, is whether discovery under section 1782 is protected under the relevant investment treaties.<sup>345</sup>

In considering this issue, it is important to distinguish between two different scenarios. First, a section 1782 request could be made in a situation where the underlying investment treaty was signed or ratified by the United States.<sup>346</sup> In these cases, the United States has at least a facial interest in arbitral procedures, since the United States is a party to the underlying agreement. Second, a section 1782 request could be made in a situation where

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*Arbitration: What are the Limits?*, 16 IBA ARB. NEWS 18, 18 (2011). Therefore, issues relating to transparency and the democratic deficit do not affect analysis of the propriety of section 1782. *See* 28 U.S.C. § 1782.

341. Ishikawa, *supra* note 152, at 394.

342. Alford, *supra* note 3, at 132; *see also* MCLACHLAN ET AL., *supra* note 7, ¶¶ 1.06-1.07; REED ET AL., *supra* note 21, at 17; van Harten, *supra* note 23, at 393.

343. *See* 28 U.S.C. § 1782; Alford, *supra* note 3, at 139.

344. *See* Vienna Convention on the Law of Treaties, arts. 19-23, *done* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Some commentators believe that investment treaties have become more protective of state interests over time, although other observers believe that the balance has occasionally swung against state interests. *See* MCLACHLAN ET AL., *supra* note 7, ¶ 1.62; Born, *Adjudication*, *supra* note 23, at 827 n.202; Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U.J. INT'L L. & POL. 1109, 1188 n.265 (2012).

345. *See* 28 U.S.C. § 1782. This discussion is necessarily general, given the number of investment treaties currently in existence. *See* Alvarez, *supra* note 212, at 17; Born, *Adjudication*, *supra* note 23, at 844; Paulsson, *supra* note 212, at 236.

346. *See* 28 U.S.C. § 1782. The vast majority of section 1782 requests that have arisen in the context of investment arbitration have involved the dispute between Chevron and Ecuador, which arose under the U.S.-Ecuador BIT. *See id.*; U.S.-Ecuador BIT, *supra* note 6; 2009 Chevron-Ecuador Arbitration, *supra* note 6; Alford, *supra* note 3, at 137. Section 1782 requests have also been made under NAFTA. *See* NAFTA, *supra* note 213; *In re Mesa Power Grp., LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at \*5 (D.N.J. Nov. 20, 2012); *In re Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296, 1302 (S.D. Fla. 2012).

the underlying investment treaty was not signed or ratified by the United States.<sup>347</sup> In these cases, the connection between the arbitration and the United States is much more attenuated. Although a court may be able to identify some type of freestanding state interest in providing discovery under section 1782 (such as an interest in upholding the international investment regime as a general proposition), the analytical approach will be quite different than in the first scenario.<sup>348</sup>

Determining whether discovery under section 1782 is protected under a particular treaty can be a complicated process.<sup>349</sup> Although states parties to an investment treaty can and sometimes do outline the particular procedures to be followed in an arbitration in the treaty itself,<sup>350</sup> it is more common for states parties to indicate that any arbitration arising under the treaty will be governed by a pre-existing set of arbitration rules.<sup>351</sup> Some of the more popular options are the ICSID Arbitration Rules, the ICSID Additional Facility, the UNCITRAL Arbitration Rules and the arbitration rules promulgated by the International Chamber of Commerce (ICC Arbitration Rules) and the Stockholm Chamber of Commerce (SCC Arbitration Rules).<sup>352</sup>

What is perhaps most striking about these procedural rules is that they do not give national courts any independent power to intervene in procedural matters.<sup>353</sup> At the most, the courts are permitted to assist the arbitral tribunal upon the arbitrators' request.<sup>354</sup>

This interpretation of the various procedural rules is consistent with treaty provisions indicating that an investor's decision to pursue treaty-based arbitration results in the exclusion of any recourse to the national courts.<sup>355</sup>

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347. See 28 U.S.C. § 1782.

348. See *id.*

349. See *id.*

350. See NAFTA, *supra* note 213, ch. 11.

351. See LEW ET AL., *supra* note 22, ¶ 28-6.

352. See UNCTAD, *supra* note 204, at 2; LEW ET AL., *supra* note 22, ¶¶ 28-28. These rule sets are somewhat general in nature and typically provide the arbitral tribunal with a great deal of discretion in how to organize any necessary exchange of documents and information. See BORN, *supra* note 29, at 1758; FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1251, 1272-76 (Emmanuel Gaillard & John Savage eds., 1999); REED ET AL., *supra* note 21, at 123 (noting parties may modify the ICISD Arbitration Rules to some extent).

353. See BORN, *supra* note 29, at 1761-62, 1776-82; Susan D. Frank, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, IV.B.2 (2007) (noting national courts' role may vary according to the type of investment arbitration).

354. See BORN, *supra* note 29, at 1921-22; Ernst-Ulrich Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*, 16 IND. J. GLOBAL LEGAL STUD. 513, 527 (2009).

355. See MCLACHLAN ET AL., *supra* note 7, ¶¶ 3.33-3.39; Vadi, *supra* note 318, at 104.

Although each treaty must be analyzed on its own merits,<sup>356</sup> these two phenomena, taken together, suggest that states parties have surrendered any interest they might otherwise have had in domestic procedural mechanisms (such as discovery under section 1782) in disputes arising out of an international investment treaty.<sup>357</sup> Furthermore, if the states parties to a particular treaty-related dispute have no defensible interest in such procedures, then third party states (such as the United States in any dispute arising under a treaty that has not been signed by the United States) cannot have any such interest, either.

The most obvious response to this initial conclusion would be that section 1782 lies entirely outside the terms of the treaty and therefore does not conflict with the provisions of the treaty or the rules of arbitration.<sup>358</sup> Furthermore, section 1782 does not require any actions to be taken in the arbitration itself, nor does the statute oblige the arbitral tribunal to accept the fruits of the section 1782 request.<sup>359</sup> However, the silence of a treaty or rule set on this particular issue cannot constitute a license to allow judicial intervention.<sup>360</sup> Instead, a more nuanced analysis is necessary.

Investment treaties are interpreted pursuant to the Vienna Convention on the Law of Treaties (Vienna Convention), which indicates that courts should adopt an interpretive methodology based on “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>361</sup> To the extent that an investment treaty explicitly incorporates an arbitral rule set by reference, then those rules should also be interpreted pursuant to Vienna Convention norms, since the rules have become part of the interstate agreement.<sup>362</sup>

The benefit of the Vienna Convention methodology is that it can be used to

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356. There are thousands of bilateral investment treaties, although most tend to follow a relatively standard model. *See Alvarez, supra* note 212, at 17; Born, *Adjudication, supra* note 23, at 844; Paulsson, *supra* note 212, at 236.

357. *See* 28 U.S.C. § 1782 (2012).

358. *See id.*

359. *See id.*; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261-62 (2004).

360. This principle has been recognized in other contexts. *See Lance McMillan, The Proper Role of Courts: The Mistakes of the Supreme Court in Leegin*, 2008 WIS. L. REV. 405, 457 (discussing antitrust law); Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1500, 1539 (“If an ambiguity, let alone a statutory silence, is sufficient to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed.”).

361. *See* Vienna Convention, *supra* note 334, art. 31(1); MCLACHLAN ET AL., *supra* note 7, ¶¶ 3.66-3.103.

362. *See* Vienna Convention, *supra* note 334.

address matters (such as section 1782) on which the treaty is silent.<sup>363</sup> Although the task of interpretation is made somewhat more challenging due to the lack of consensus about the substantive or procedural purpose of the investment regime,<sup>364</sup> some useful observations may be nevertheless made.<sup>365</sup>

For example, when considering whether section 1782 is consistent with the purpose and object of a particular treaty or rule set, it may be possible to draw on certain fundamental principles of arbitration law.<sup>366</sup> Interestingly, the U.S. Supreme Court has recently suggested that “rules requiring judicially monitored discovery” would likely violate “[t]he overarching purpose of the FAA.”<sup>367</sup> Although domestic law typically plays a very limited role in the interpretation of treaties<sup>368</sup> and most investment arbitrations do not fall within the scope of the FAA,<sup>369</sup> U.S. courts could easily conclude that judicially

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363. *See id.*; 28 U.S.C. § 1782.

364. *See* Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT’L ECON. L. 469, 501-02 (2011); Strong, *Regulatory Arbitration*, *supra* note 253, at 300-03; Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 124-27, 148 (2006). Experience shows that silence on procedural matters can lead to extensive interpretive debates in the investment context. *See* *Ambiente Ufficio S.P.A. (formerly Alpi) v. Argentine Republic*, ICSID Case No. ARB/08/0, Decision on Jurisdiction and Admissibility, ¶¶ 75, 97, 126, (Feb. 8, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf>; *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility ¶¶ 297, 517, (Aug. 4, 2011), <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf> [hereinafter *Abaclat Award*]; *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion, ¶¶ 154-75, (Oct. 28, 2011), [http://italaw.com/documents/Abaclat\\_Dissenting\\_Opinion.pdf](http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf) [hereinafter *Abaclat Dissent*]; S.I. Strong, *Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent With the International Investment Regime?*, 3 Y.B. INT’L ARB. 261 (2013); Strong, *Regulatory Arbitration*, *supra* note 364, at 316-21.

365. A full-fledged analysis of each of the various treaties and arbitral rules is beyond the scope of the current Article, so the current discussion is necessarily general in nature. *See* Alvarez, *supra* note 212, at 17; Born, *Adjudication*, *supra* note 23, at 844; Paulsson, *supra* note 212, at 236.

366. *See* 28 U.S.C. § 1782.

367. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011); *see also* 9 U.S.C. §§ 1-16 (2012).

368. *See* MCLACHLAN ET AL., *supra* note 7, ¶¶ 3.34, 3.79 (noting that the role of domestic law in treaty interpretation is largely limited to “defining the scope of the investment protected”).

369. *See* 9 U.S.C. §§ 1-16. Some investment awards are enforceable under the New York Convention and therefore technically fall within Chapter 2 of the FAA, although the fit is far from perfect and a number of tensions exist. *See* *New York Convention*, *supra* note 48; 9 U.S.C. § 201; *Republic of Argentina v. BG Grp., PLC*, 665 F.3d 1363, 1368 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3070 (June 10, 2013); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391-92 (2d Cir. 2011); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 374

monitored discovery is as inappropriate in the context of international investment arbitration as in cases falling under the FAA.<sup>370</sup>

Courts considering section 1782 requests in the context of investment arbitration might also find some useful analogies in the law relating to foreign sovereign immunity.<sup>371</sup> For example, courts in the United States have often limited certain types of discovery against foreign sovereigns on the basis that discovery is inherently burdensome and intrusive, and that such procedures are therefore improper in light of the special status accorded to foreign sovereigns.<sup>372</sup> Requests under section 1782 could be viewed in a similar light, in that the primary injury in section 1782 actions occurs not as a result of the use of the information in the investment arbitration itself (indeed, tribunals can simply refuse to receive such information) but as a result of the discovery process itself.<sup>373</sup>

Although no section 1782 request has yet been aimed at a foreign state, state agency or instrumentality,<sup>374</sup> the analogy to the law relating to foreign sovereigns is appropriate because requests under section 1782 necessarily implicate the rights and expectations of states parties to an investment treaty.<sup>375</sup> Since discovery under section 1782 is both exceptional<sup>376</sup> and extremely

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n.40 (2003); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT'L L. 39, 57-58 (2006); see also *supra* note 225 and accompanying text (noting some investment awards may be enforced under the New York Convention).

370. See 9 U.S.C. §§ 1-307 (2012).

371. See 28 U.S.C. §§ 1602-11; 28 U.S.C. § 1782.

372. See *Hansen v. PT Bank Negara Indon. (Persero)*, TBK, 601 F.3d 1059, 1063 (10th Cir. 2010); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 779 (S.D.N.Y. 2012); S.I. Strong, *Jurisdictional Discovery in Transnational Litigation: Extraterritorial Effects of United States Federal Practice*, 7 J. PRIV. INT'L L. 1, 15-16 (2011) [hereinafter Strong, *Jurisdictional Discovery*].

373. See 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261-62 (2004).

374. While no known example exists where a party has attempted to use section 1782 to obtain evidence held by foreign state or state party within the United States, such a possibility exists. See *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 776, 782-83, 796-97 (S.D.N.Y. 2012). Interestingly, several courts have held that section 1782 may not be asserted against the United States on the grounds that the United States is not a "person" within the meaning of section 1782. See *Al Fayed v. Cent. Intelligence Agency*, 229 F.3d 272, 276-77 (D.C. Cir. 2000); *McKevitt v. Mueller*, 689 F. Supp. 2d 661, 668 (S.D.N.Y. 2010). Foreign states could also assert non-personage as a means of defending against a section 1782 request. See 28 U.S.C. § 1782; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 339-401 (2d Cir. 2009); Strong, *Constitutional Conundrums*, *supra* note 169. At this point, foreign states are entitled to make a request under section 1782. See *In re Ecuador*, No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492, at \*3-6 (N.D. Cal. Dec. 1, 2010).

375. See 28 U.S.C. § 1782.

376. See LEW ET AL., *supra* note 22, ¶¶ 22-49 to 22-52 (discussing disclosure or

burdensome,<sup>377</sup> U.S. courts could very easily find discovery under section 1782 to be as problematic in matters relating to investment arbitration as standard discovery is in litigation involving foreign sovereigns.<sup>378</sup>

Another way of considering U.S. state interests in investment arbitration is to focus on whether the United States is a party to the instrument in question. The purpose of an investment treaty is to create a set of rules and regulations relating to the treatment of investors from one jurisdiction (the home country) in a second jurisdiction (the host country).<sup>379</sup> As a result, these agreements only concern the relationship between the states parties and their nationals.<sup>380</sup> Consequently, it is difficult, if not impossible, for the United States to assert any treaty-based justification for involving itself in an arbitration arising out of a treaty that the United States did not sign, since neither the United States nor any U.S. parties are at risk of losing any substantive or procedural rights as a

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discovery in international commercial arbitration). Although England allows judicial assistance to be given to a foreign arbitral proceeding, that mechanism is only available with the consent of the tribunal or of all parties to the dispute. *See* Arbitration Act 1996, §§ 43-44; LEW ET AL., *supra* note 22, ¶¶ 22-95 to 22-106. Furthermore, disclosure in the English legal system is much narrower than in the U.S. legal system. *See* LEW ET AL., *supra* note 22, ¶ 22-49; Strong, *Jurisdictional Discovery*, *supra* note 372, at 2.

377. *See* Alford, *supra* note 3, at 140-41 (noting a section 1782 request may include (1) requests for evidence that would not be admissible in the foreign or international tribunal; (2) requests for evidence from parties who are not named in the foreign or international proceeding (i.e., third parties), even if those persons are only temporarily found in the United States; and (3) requests for evidence made by any “any interested party,” who may or may not be a litigant in the foreign or international proceeding). For example, one section 1782 request generated over 200,000 pages of documents and an eight-day deposition. *See* Alford, *supra* note 3, at 146; *see also In re Chevron Corp.*, No. 11-24599, 2012 WL 3636925, at \*2, 4-5 (S.D. Fla. June 12, 2012) (referring to “mounds of evidence” produced pursuant to multiple section 1782 requests); *In re Veiga*, 746 F. Supp. 2d 8, 16 (D.D.C.), *appeal dismissed*, 2010 WL 5140467 (D.C. Cir. Dec. 17, 2010), *appeal dismissed*, 2011 WL 1765213 (D.C. Cir. Apr. 18, 2011). Similarly broad requests have been made in other section 1782 disputes. *See In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987, 992 (11th Cir. 2012); *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002); *Fonesca v. Regan*, 734 F.2d 944, 947 (2d Cir. 1984); *In re Mesa Power Group, LLC*, No. 2:11-mc-280-ES, 2012 WL 6060941, at \*8-9 (D.N.J. Nov. 20, 2012).

378. In enacting the Foreign Sovereign Immunities Act (FSIA), Congress had two goals: “to reduce the interference with the conduct of foreign relations caused by litigation in United States courts against foreign sovereigns and to delegate foreign sovereign immunity decisions to the judicial branch.” Michael A. Granne, *Defining “Organ of a Foreign State” Under the Foreign Sovereign Immunities Act of 1976*, 42 U.C. DAVIS L. REV. 1, 5 (2008); *see also* 28 U.S.C. §§ 1602-11 (2012). It is not inconceivable that excessive use of section 1782 in cases involving investment arbitration could create difficulties in foreign relations, since U.S.-style discovery can be used to expand the scope of certain regulations. *See* Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1622 (2011); STRONG, CLASS, *supra* note 262, ¶¶ 5.76, 6.33.

379. *See* MCLACHLAN ET AL., *supra* note 7, ¶ 1.57; Salacuse, *supra* note 204, at 434-35, 449-50.

380. *See* MCLACHLAN ET AL., *supra* note 7, ¶ 5.01.



result of an arbitration arising out of that treaty.

This is not to say that some creative arguments could not be raised. For example, the United States could attempt to claim a general interest in the overall functioning of the international investment regime, based on a concern about various procedural asymmetries inherent in investment arbitration.<sup>381</sup> However, many people would find it deeply disturbing if the one country whose procedural mechanisms are most out of line with contemporary legal practice were able to impose those procedures unilaterally on a proceeding in which the state had no treaty-based interest under the guise of supporting the international treaty regime.<sup>382</sup> This outcome is particularly problematic given that there is no consensus as to whether a singular “investment regime” actually exists and what its practices and purposes might be.<sup>383</sup> As a result, it does not appear as if the United States can claim any protectable state interest in providing discovery under section 1782 to an investment arbitration proceeding under a treaty not involving the United States.<sup>384</sup>

Treaties involving the United States require a slightly different analysis, since the arbitration in question could involve either the United States or a U.S. party. Even in those cases where neither the United States nor a U.S. party is involved, the United States might nevertheless be entitled to assert an interest in the procedure or outcome of a dispute arising under a multilateral treaty.<sup>385</sup>

The problem with this argument is that regardless of how the United States frames its arguments, state interests are only protectable to the extent they are reflected in the treaty.<sup>386</sup> While it is true that some authorities take the view

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381. See Thomas Wälde, *Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Proactively, the Equality of Arms*, 26 *ARB. INT'L* 3, 11-39 (2010) (suggesting that host states have both the ability and the incentive to make it difficult for investors to prevail in international arbitration).

382. See Alford, *supra* note 3, at 139 (noting the “horror” with which other countries view U.S.-style discovery); Kessedjian, *supra* note 335, at 806; Rubenstein, *supra* note 257, at 304; see also *supra* note 376 and accompanying text.

383. See Mills, *supra* note 364, at 501-02; Strong, *Regulatory Arbitration*, *supra* note 253, at 300-03; van Harten & Loughlin, *supra* note 364, at 148.

384. See 28 U.S.C. § 1782 (2012).

385. The United States is party to a number of multilateral investment treaties that could lead to an arbitration in which no U.S. entity is involved. See ICSID Convention, *supra* note 48; NAFTA, *supra* note 213. For example, these disputes could give rise to concerns about the creation of potentially problematic soft precedent that could be applied to a future dispute involving the United States or a U.S. party. See Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 *ARB. INT'L* 357, 361-78 (2007).

386. One party cannot impose its own subjective interpretation of a treaty on the other parties. See Vienna Convention, *supra* note 334, art. 31(3) (focusing on the parties' shared understandings); see also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 *VA. J. INT'L L.* 431, 435, 461-63 (2004); David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 *VAND. J. TRANSNAT'L L.* 565, 581 (2010); Daniella Strik, *Investment Protection of Sovereign*

that any rights or interests not specifically described in a treaty remain with the state (a perspective that would support the United States' belief that procedures under section 1782 are unaffected by investment treaties), that approach is by no means universally accepted.<sup>387</sup> Furthermore, most investment treaties explicitly incorporate certain arbitration rules into the treaty by reference, thereby incorporating various longstanding principles about the dubious propriety of judicial intervention in arbitration into the investment context.<sup>388</sup> As the next subsection shows, these principles bode against the conclusion that the United States has retained any state interest in judicially mandated discovery under section 1782.<sup>389</sup>

## 2. *International commercial arbitration*

The discussion of section 1782 requests in the context of international commercial arbitration begins by setting aside an issue that is largely illusory.<sup>390</sup> Some authorities have attempted to distinguish state interests in investment arbitration from those in international commercial arbitration on the basis of the underlying substantive law, claiming that the state interest in investment arbitration is or should be more pronounced because investment disputes involve important issues of public or regulatory law.<sup>391</sup> While investment arbitration does indeed concentrate on these types of concerns, international commercial arbitration is also capable of addressing matters of a public or regulatory nature.<sup>392</sup> Furthermore, national courts (which are

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*Debt and its Implications on the Future of Investment Law in the EU*, 29 J. INT'L ARB. 183, 189-90 (2012). Subsequent state practice that is inconsistent with the treaty cannot provide grounds for a new understanding of an international agreement. See ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 194 (2000); IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138 (2d ed. 1984).

387. See 28 U.S.C. § 1782; Ibranke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 272 (2007); Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 399 (2012).

388. The arbitration rules most commonly used in investment arbitration were either created initially for use in commercial arbitration or were based on principles developed in commercial arbitration. See Born, *Adjudication*, *supra* note 23, at 781, 834-35; see also *infra* notes 72-73 and accompanying text.

389. See *id.* § 1782.

390. See *id.*

391. See *id.*; OJSC *Ukrnafta v. Carpatsky Petrol. Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at \*4 (D. Conn. Aug. 27, 2009) (suggesting the UNCITRAL Arbitration Rules constitute international law); *In re Application of Oxus Gold PLC*, No. MISC 06-82, 2006 WL 2927615, at \*6 (D.N.J. Oct. 11, 2006).

392. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1985); *Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055, *reprinted in* 14(b) Int'l Arb. Rep., B-1 (June 1999), 1999 REV. ART. 631; BORN, *supra* note 29, at 781-85; SCHREUER, *supra* note 21, at xii; Mills, *supra* note 364, at 502.

undoubtedly included in the definition of a “foreign or international tribunal” under section 1782) have long been considered capable of handling public and regulatory concerns as well as matters relating to international law.<sup>393</sup> As a result, the nature of the underlying dispute as involving public, regulatory and/or international law appears irrelevant to the question of whether discovery under section 1782 is appropriate.<sup>394</sup>

Procedural concerns give rise to a somewhat more complicated analysis. As it turns out, international commercial and investment arbitration share numerous procedural similarities.<sup>395</sup> This phenomenon is no accident. Instead, states parties intentionally adopted the procedural model developed by international commercial arbitration when they created the international investment regime.<sup>396</sup> Many of the rule sets used in the investment context continue to be available for use in commercial proceedings.<sup>397</sup>

When considering state interests in arbitral procedures, the initial presumption is that existing procedures are sufficient to meet any concerns about the full and fair adjudication of legal disputes, at least as a general matter (individual circumstances may, of course, lead to different conclusions).<sup>398</sup> This conclusion is as true of investment arbitration as it is of international commercial proceedings.<sup>399</sup>

Arbitration does not need to offer all of the procedural protections that are available in litigation for the arbitral process to be considered fair.<sup>400</sup> Instead, arbitration only needs to provide certain basic principles of due process, such as reasonable notice, equal treatment and the opportunity to present one’s case.<sup>401</sup> Because these principles, which are outlined in Article V of the New York Convention, are non-derogable, they can be considered to describe the content

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393. 28 U.S.C. § 1782.

394. *See id.*

395. *See* Born, Adjudication, *supra* note 23, at 834; Ishikawa, *supra* note 152, at 373; van Harten, *supra* note 23, at 377-78.

396. *See* Born, Adjudication, *supra* note 23, at 834-35.

397. *See id.*

398. *See* BORN, *supra* note 29, at 1878, 1886, 1893, 1897-98, 1921-22; Park, *Arbitrability Dicta*, *supra* note 326, at 138-40.

399. *See In re Chevron Corp.*, 762 F. Supp. 2d 242, 251 (D. Mass. 2010) (noting that Chevron chose to initiate a BIT arbitration and “there is nothing to indicate that the international tribunal’s processes are inadequate to obtain the discovery sought here”); BORN, *supra* note 29, at 1878, 1886, 1893, 1897-98, 1921-22.

400. Indeed, arbitral awards are give a high degree of deference despite the absence of a number of litigation-style procedural protections and devices. *See* Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1196 (2008).

401. *See* New York Convention, *supra* note 48, at art. V; WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES* 7 (2012); Kaufmann-Kohler, *Globalization*, *supra* note 302, at 1321-22; Weston, *supra* note 302, at 1770.

of the state interest in international arbitral procedures.<sup>402</sup>

Parties attempting to establish a state interest in discovery under section 1782 will most likely rely on Article V(1)(b) of the New York Convention, which states that a court may refuse enforcement of an arbitral award if “[t]he party against whom the award is invoked was . . . unable to present his case.”<sup>403</sup> The claim here is similar to that considered in the context of the discussion on grants of jurisdiction, namely that some parties might not be able to establish certain claims or defenses without the benefit of discovery under section 1782.<sup>404</sup> As indicated previously, parties seeking to rely on Article V(1)(b) must overcome the fact that arbitration has long been determined to be sufficient to meet the standards established by the New York Convention, even without the kind of discovery provided by section 1782.<sup>405</sup>

However, the state interest analysis is not restricted to issues relating to procedural fairness alone.<sup>406</sup> Instead, the New York Convention reflects several other state interests, such as an interest in protecting party autonomy regarding the shape of arbitral procedure<sup>407</sup> and an interest in having courts remain largely outside the arbitral process pursuant to the principle of judicial non-interference.<sup>408</sup> Interestingly, this latter interest can be described as both an

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402. KURKELA & SNELLMAN, *supra* note 303, at 4; *see also* New York Convention, *supra* note 48, art. V. Similar principles are described in the FAA in provisions relating to vacatur, but the only awards that are subject to vacation are those that arise out of arbitrations seated in the United States. *See* 9 U.S.C. §§ 10, 208 (2012). Since section 1782 only applies to proceedings taking place outside of the United States, the question of vacation or annulment does not arise. *See* 28 U.S.C. § 1782 (2012).

403. New York Convention, *supra* note 48, art. V(1)(b); 28 U.S.C. § 1782; Martinez-Fraga, *supra* note 18, at 93; Rothstein, *supra* note 18, at 64-67. The New York Convention is to be construed pursuant to the principles outlined in the Vienna Convention and therefore should be considered in light of its text, object and purpose. *See* New York Convention, *supra* note 48; Vienna Convention, *supra* note 334; INT’L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION 12 (2011) [hereinafter ICCA GUIDE]; Strong, Interpretation, *supra* note 243.

404. *See* 28 U.S.C. § 1782.

405. *See* New York Convention, *supra* note 48, at art. V(1)(b); 28 U.S.C. § 1782; Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 172-76 (2011); *see also supra* note 307 and accompanying text.

406. *See* New York Convention, *supra* note 48, at art. V(1)(b).

407. Respect for party autonomy is reflected in provisions requiring the enforcement of arbitral procedures pursuant either to the terms agreed to by the parties “or, failing such agreement, . . . in accordance with the law of the country where the arbitration took place.” New York Convention, *supra* note 48, at art. V(1)(d). There is, of course, a state interest in upholding parties’ contractual rights. *See* U.S. CONST., art. I, § 10, cl. 1; *Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 88-89 (2d Cir. 2007) (Meskill, J., dissenting); *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 309 (6th Cir. 2007).

408. *See* BORN, *supra* note 29, at 1776-82; Born, Non-Interference, *supra* note 308, at 1025-33; Smit, *Judicial Assistance*, *supra* note 18, at 157. Courts may become involved with

independent state interest as well as a derivative interest held by the parties pursuant to their right to control the arbitral procedure.<sup>409</sup>

Although there is no language in the New York Convention explicitly describing the concept of judicial non-interference (indeed, the text of the Convention appears to focus primarily on the positive duty to enforce arbitration agreements and awards), the treaty has long been interpreted as including a negative duty not to litigate matters that are subject to an arbitration agreement.<sup>410</sup> This obligation, which is described in mandatory terms and directed specifically at the courts of the various states parties,<sup>411</sup> is found in Article II(3) of the Convention, which indicates that

[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>412</sup>

Most analysis of this provision has taken place in the context of merits-based disputes. However, the negative effect of Article II(3) can also be considered with respect to various procedures that do not reach the substance of the parties' dispute.<sup>413</sup> Perhaps the most useful analogy for section 1782 analyses involves the anti-suit injunction, another type of non-merits-based proceeding that is considered problematic under the New York Convention.<sup>414</sup>

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an arbitrable dispute before, during and after an arbitral proceeding, but the type of interventions are narrowly circumscribed. *See* STRONG, *supra* note 67, at 49; Strong, Borders, *supra* note 9, at 9-17.

409. *See* New York Convention, *supra* note 48, at arts. II(1), II(3), V(1)(b); *see also* Born, Non-Interference, *supra* note 308, at 1025; Reisman & Iravani, *supra* note 166, at 35. The state interest in staying out of arbitration can be based on issues relating to judicial efficiency and docket control as well as concerns involving party autonomy and contract-related rights. *See* Born, Non-Interference, *supra* note 308, at 1026-33; Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1127-28 (2009).

410. *See* BORN, *supra* note 29, at 1003, 1021; Born, Non-Interference, *supra* note 308, at 1026-27; *see also* New York Convention, *supra* note 48, at arts. II(1), II(3). Interestingly, some commentators view the negative duty not to litigate arbitral matters as clearer under the New York Convention than the positive duty to arbitrate an arbitral dispute. *See* BORN, *supra* note 29, at 1014.

411. The structure of this provision has led some U.S. courts to conclude that this section of the Convention is self-executing. *See* New York Convention, *supra* note 48, at art. II(3); *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 736-37 (5th Cir. 2009) (Clement, J., concurring in the judgment), *cert. denied sub nom. La. Safety Ass'n of Timbermen-Self Ins. Fund v. Certain Underwriters at Lloyd's London*, 131 S. Ct. 65 (2010); Strong, Interpretation, *supra* note 243.

412. New York Convention, *supra* note 48, at art. II(3); BORN, *supra* note 29, at 1021. This negative duty is also found in national legislation. *See id.* at 1021-24.

413. *See* New York Convention, *supra* note 48, at art. II(3).

414. *See id.*; 28 U.S.C. § 1782 (2012).

At this point, no consensus exists regarding whether and to what extent anti-suit injunctions should be available in international commercial arbitration.<sup>415</sup> However, some commentators have suggested that anti-suit injunctions are only appropriate in cases where the injunction upholds the purpose of arbitration and thereby gives effect to the agreement of the parties.<sup>416</sup> Under this approach, an anti-suit injunction might be considered acceptable during or prior to an arbitration, since such measures would typically protect the single arbitral forum contemplated by the New York Convention.<sup>417</sup> However, an anti-suit injunction would be considered far less suitable after the conclusion of the arbitration, since the New York Convention permits parties to pursue enforcement in multiple jurisdictions during that time period.<sup>418</sup>

These conclusions are based on the view that joining the New York Convention causes states parties to cede any interest they might otherwise have had in domestic judicial procedures that conflict with the terms of the treaty.<sup>419</sup> Applying this analytical paradigm to requests under section 1782 suggests that a U.S. court may only order discovery under the statute if those efforts uphold the purposes of the New York Convention.<sup>420</sup> If section 1782 does not comport with the principles and practices of international commercial arbitration, then the mere act of hearing a request for discovery under the statute would constitute a breach of the court's negative duty under the Convention to refer all arbitrable matters to arbitration.<sup>421</sup>

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415. See BORN, *supra* note 29, at 1036-41; Charles Falconer & Amal Bouchenaki, *Protective Measures in International Arbitration*, 11 BUS. L. INT'L 183, 183-84 (2010); Robert Force, *The Position in the United States on Foreign Forum Selection Clauses and Arbitration Clauses, Forum Non Conveniens, and Antisuit Injunctions*, 35 TUL. MAR. L.J. 401, 441-64 (2011); Emmanuel Gaillard, *Anti-Suit Injunctions Issued by Arbitrators*, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? XIII ICCA CONG. SER. 235, 235-66 (Albert Jan van den Berg ed., 2006); Dominique T. Hascher, *Injunctions in Favor of and Against Arbitration*, 21 AM. REV. INT'L ARB. 189, 190-97 (2006); Gabrielle Kaufmann-Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions*, 1 DISP. RESOL. INT'L 110, 113 (2008); Julian D.M. Lew, *Does National Court Involvement Undermine the International Arbitration Process?* 24 AM. REV. INT'L ARB. 489, 499-519 (2009); Chetan Phull, *U.S. Anti-Suit Injunctions in Support of International Arbitration: Five Questions American Courts Ask*, 28 J. INT'L ARB. 21 (2011); Alan Scott Rau, *Understanding (and Misunderstanding) of "Primary Jurisdiction,"* 21 AM. REV. INT'L ARB. 47, 131-36 (2010); Reisman & Iravani, *supra* note 166, at 30-36.

416. See BORN, *supra* note 29, at 1044-45; Reisman & Iravani, *supra* note 166, at 30-36; Strong, *Borders*, *supra* note 9, at 9-17.

417. See New York Convention, *supra* note 48; Strong, *Borders*, *supra* note 9, at 14.

418. See New York Convention, *supra* note 48; Strong, *Borders*, *supra* note 9, at 15.

419. See New York Convention, *supra* note 48; Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 84; see also Reisman & Iravani, *supra* note 166, at 15.

420. See 28 U.S.C. § 1782 (2012); New York Convention, *supra* note 48.

421. See 28 U.S.C. § 1782; New York Convention, *supra* note 48. A breach of the New

As a general matter, states that have opted into the international commercial arbitration regime created by the New York Convention are viewed as having surrendered virtually any interest they might otherwise have in the particularities of their national procedural law and to have instead acceded to international commercial arbitration's unique blend of common and civil law procedures.<sup>422</sup> Thus, U.S. courts have explicitly recognized that "the right to due process protected by the New York Convention does not encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure," including the right to discovery.<sup>423</sup>

Arbitration overcomes any practical problems associated with the absence of compelled disclosure through the adoption of various procedural techniques (such as negative inferences and shifting the burden of proof) that are routinely used by judges sitting in civil law jurisdictions.<sup>424</sup> As a result, the international arbitral regime consciously forgoes the common law approach to the production of documents and information (which focuses on "[w]hat evidence should be heard to understand the *whole* case") and instead adopts the philosophy reflected in civil law jurisdictions (which asks "[w]hat evidence is required to reach a justifiable decision").<sup>425</sup>

Focusing on state interests is useful because it forces courts to consider U.S. obligations under the New York Convention and thereby puts section 1782 in its proper light.<sup>426</sup> If a particular practice falls outside the range of protectable procedures, then need alone cannot be sufficient to elevate that device to protected status.<sup>427</sup> Thus, for example, if a party claims that discovery

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York Convention arises whenever a court in a state that is bound by the Convention "does not apply the Convention, misapplies it or finds questionable reasons to refuse recognition or enforcement that are not covered by the Convention." ICCA GUIDE, *supra* note 403, at 30.

422. See BORN, *supra* note 29, at 1893-95 (noting states retain an interest in certain mandatory provisions of law); LEW ET AL., *supra* note 22, ¶¶ 22-8, 22-48 to 22-58; STRONG, *supra* note 67, at 6, 49-55; Bachand, *supra* note 419, at 84 (noting that "judges sitting in states that have signaled their willingness to support the international arbitration system must consider the relevant international normative context while answering questions of international arbitration law to which local sources offer no obvious answer").

423. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara, 190 F. Supp. 2d 936, 952 (S.D. Tex. 2001), *aff'd*, 364 F.3d 274 (5th Cir. 2004); Empresa Constructora Contex Ltda. v. Iseki, Inc., 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000).

424. See El Ahdab & Bouchenaki, *supra* note 257, at 78-80; Rothstein, *supra* note 18, at 62-63; see also Alford, *supra* note 3, at 139.

425. LEW ET AL., *supra* note 22, ¶¶ 22-49 to 22-52; El Ahdab & Bouchenaki, *supra* note 257, at 73. Of course, parties can choose to adopt U.S.-style discovery in whole or in part, but that approach is seldom embraced. See BORN, *supra* note 29, at 1921-22.

426. See 28 U.S.C. § 1782; New York Convention, *supra* note 48.

427. When considering whether a particular practice falls within the realm of standard arbitral procedures, courts should consider the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (IBA Rules), which reflect the arbitral community's contemporary understanding of disclosure practices. See IBA, Rules on the Taking of Evidence in International Arbitration, May 29, 2010,

under section 1782 is necessary because “non-parties are usually outside the forum courts’ jurisdiction, and are not susceptible to pressure that arbitrators can apply to parties, such as negative inferences for failing to provide evidence,”<sup>428</sup> the relevant analysis should not focus on the need for such information per se<sup>429</sup> but instead on whether the United States has retained an interest in providing the underlying procedural device under the New York Convention.<sup>430</sup>

One argument that could be asserted in favor of a retained state interest in section 1782 procedures arises out of Article V(2)(b) of the New York Convention, which allows a national court to refuse recognition and enforcement of an arbitral award on the grounds of public policy.<sup>431</sup> Although this argument would be contrary to longstanding case law indicating that the United States has not retained an interest in domestic discovery procedures in situations involving international commercial arbitration,<sup>432</sup> there have been instances where a state has elevated a procedural concern to the level of public policy.<sup>433</sup>

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[http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx); see also BORN, *supra* note 29, at 1897-98; STRONG, *supra* note 67, at 51. Interestingly, one court has pointed to the IBA Rules as supporting the notion that parties may be able to seek discovery under section 1782 on the grounds that the Rules “premis[e] involvement by the Tribunal on a party’s not being able to obtain documents on its own.” *In re Ecuador*, Nos. C 11-80171 CRB, C 11-80172 CRB, 2011 WL 4434816, at \*4 (N.D. Cal. Sept. 23, 2011). However, other authorities have concluded that any effort to obtain disclosure without the tribunal’s consent constitutes an attempt to circumvent foreign proof-gathering restrictions under *Intel’s* discretionary analysis. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004); *In re Chevron*, 633 F.3d 153, 162 (3d Cir. 2011); *In re Ecuador*, Nos. C 11-80171 CRB, C 11-80172 CRB, 2011 WL 4434816, at \*4 (N.D. Cal. Sept. 23, 2011); *In re Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189, at \*3 (E.D. Cal. Sept. 13, 2011).

428. Rothstein, *supra* note 18, at 62-63; see also 28 U.S.C. § 1782; Alford, *supra* note 3, at 150.

429. Notably, arbitral tribunals can sometimes compel production of evidence from outside the arbitral forum through reliance on existing procedures, such as the Hague Convention on the Taking Abroad of Evidence in Civil or Commercial Matters, suggesting that there is little or no need to rely on procedures such as section 1782. See The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 23, 18 Mar. 1970, 23 U.S.T. 255; see also 28 U.S.C. § 1782; STRONG, *supra* note 67, at 52-53 (discussing the Hague Evidence Convention); Rothstein, *supra* note 18, at 63, 74-75.

430. See New York Convention, *supra* note 48.

431. See *id.*, art. V(2)(b); 28 U.S.C. § 1782.

432. See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 952 (S.D. Tex. 2001), *aff’d*, 364 F.3d 274 (5th Cir. 2004); *Empresa Constructora Context Ltda. v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000).

433. See *Seller (Russ.) v. Buyer (Ger.)*, Case Law on UNCITRAL Texts Case 402: Bayerisches Oberstes Landesgericht, XXVII Y.B. COM. ARB. 445 (2002) and 263 (2002); S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 59-60 (2008).



As appealing as this argument may initially appear, objections based on public policy are narrowly interpreted in international commercial arbitration, and “only violations of the enforcement state’s public policy with respect to international relations (international public policy or *ordre public international*) [are] a valid defense” to enforcement.<sup>434</sup> International public policy includes concerns about “biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law” and therefore does not appear to encompass the kinds of issues raised by section 1782.<sup>435</sup>

Other problems also exist with respect to any kind of public policy argument. For example, section 1782 is a highly exceptional procedure that does not give rise to the type of shared consensus that is necessary to make a particular procedure eligible for consideration as an international public policy.<sup>436</sup> Furthermore, policy considerations only come into play at the time of enforcement, not at any intermediate stage, as would likely be the case with most section 1782 proceedings.<sup>437</sup> Thus, Article V(2)(b) of the New York Convention does not appear sufficient to support an argument that the United States has retained a defensible state interest in discovery under section 1782.<sup>438</sup>

### C. Interpretive Canons

The preceding discussion demonstrates how difficult it can be to conceptualize the interaction between domestic and international law.<sup>439</sup>

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434. LEW ET AL., *supra* note 22, ¶ 26-114; *see also* International Law Association, Final Report on Public Policy as a Bar to Enforcement of Foreign Arbitral Awards ¶¶ 10–11 (2002) [hereinafter ILA Final Report], <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

435. LEW ET AL., *supra* note 22, ¶ 26-118; *see also* 28 U.S.C. § 1782.

436. *See* 28 U.S.C. § 1782. Domestic public policies are not enough to bar enforcement of an arbitral award. *See* LEW ET AL., *supra* note 22, ¶ 26-114; ILA Final Report, *supra* note 434, ¶¶ 10–11.

437. *See* New York Convention, *supra* note 48, art. V(2)(b); *see also supra* note 285.

438. *See* 28 U.S.C. § 1782.

439. These types of concerns are becoming increasingly prevalent in arbitration. *See* Strong, Interpretation, *supra* note 243. One of the biggest issues is whether and to what extent the New York Convention can be considered self-executing. *See* New York Convention, *supra* note 48; *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 736-37 (5th Cir. 2009) (Clement, J., concurring in the judgment), *cert. denied sub nom. La. Safety Ass’n of Timbermen-Self Ins. Fund v. Certain Underwriters at Lloyd’s, London*, 131 S. Ct. 65 (2010); Strong, Interpretation, *supra* note 243. If the New York Convention is self-executing, then it may be considered to trump any conflicting provisions of domestic law, including section 1782. *See* 28 U.S.C. § 1782; New York Convention, *supra* note 48; Strong, Interpretation, *supra* note 243.

However, this type of analytical problem is not in any way unique to arbitration. U.S. courts have long had to consider the interplay between national and international law and have in fact developed a number of interpretive canons to help rationalize judicial determinations in this regard.<sup>440</sup>

One of the best known means of resolving potential conflicts between international and domestic law is the *Charming Betsy* canon, which states that ambiguous domestic statutes “ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>441</sup> Because section 1782 is ambiguous as to its applicability to both international commercial and investment arbitration, courts can and should consider using the *Charming Betsy* canon to resolve interpretive difficulties.<sup>442</sup>

Courts seeking to rely on the *Charming Betsy* canon must first identify the content of the international law at issue and then determine whether and to what extent a conflict exists with domestic law.<sup>443</sup> If a particular interpretation of a domestic statute would lead to a violation of international law, then the *Charming Betsy* canon should be applied to avoid that particular outcome.<sup>444</sup> Given the various difficulties that arise when the term “foreign or international tribunal” is interpreted as including tribunals sitting in either international commercial or investment arbitration, it would appear appropriate for U.S. courts to apply the *Charming Betsy* canon to exclude arbitral tribunals from section 1782’s statutory scope so as to avoid creating a situation where the United States is in breach of its obligations under the New York Convention or another treaty.<sup>445</sup>

Another interpretive canon that is often used in cases involving a conflict

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440. See Strong, Interpretation, *supra* note 243.

441. See William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994); Strong, Interpretation, *supra* note 243. This longstanding interpretive device arose out of a case known as *Murray v. Schooner Charming Betsy*, which involved a ship (the *Charming Betsy*) that was seized by the U.S. Navy on the grounds that the ship was operating in violation of a domestic statute prohibiting U.S. citizens from trading with France. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64-65 (1804). The *Charming Betsy* canon has been considered by commentators in a variety of contexts, including international commercial arbitration, although most references are somewhat cursory. See Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 700-04, 731-35 (2003); William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 253 (2008); Strong, Interpretation, *supra* note 243.

442. See 28 U.S.C. § 1782; *Charming Betsy*, 6 U.S. (2 Cranch) at 64-65; see also Strong, Interpretation, *supra* note 243.

443. See 28 U.S.C. § 1782; *Charming Betsy*, 6 U.S. (2 Cranch) at 64-65.

444. See 28 U.S.C. § 1782; *Charming Betsy*, 6 U.S. (2 Cranch) at 64-65.

445. See New York Convention, *supra* note 48; *Charming Betsy*, 6 U.S. (2 Cranch) at 64-65; see also *supra* notes 156-438 and accompanying text.

between a federal statute and an international treaty is the last-in-time rule.<sup>446</sup> Under this approach, courts apply whichever of the two provisions—the statute or the treaty—that was enacted more recently.<sup>447</sup> Although this canon also requires a court to recognize the existence of a conflict between domestic and international law, that prerequisite appears to be met in cases involving section 1782 requests in the context of both investment arbitration and international commercial arbitration.<sup>448</sup>

Application of the last-in-time rule would appear to require denial of section 1782 requests in the context of international commercial and investment arbitration, since section 1782 was enacted in its current form in 1964, well in advance of U.S. accession to most, if not all, of the relevant treaties in this field.<sup>449</sup> For example, the United States ratified the ICSID Convention in 1966, the New York Convention in 1970 and most bilateral investment treaties in the 1980s and 1990s.<sup>450</sup> Although some argument could be made that courts should consider 2004 (the year that *Intel* was decided) to be the start date for entry into force of the expanded reading of section 1782, the last-in-time rule does not consider judicial glosses on statutes but instead focuses on the date on which the legislation itself was enacted.<sup>451</sup>

The third and final interpretive canon to consider involves construing section 1782 *in pari materia*.<sup>452</sup> At least one commentator has suggested that “in U.S. federal legislation currently in force, whether enacted before or after the 1964 amendments to section 1782, ‘tribunal’ without elaboration means a U.S. government body, a ‘foreign’ tribunal is governmental, and an

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446. See Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 160; David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2233 (2010); Strong, Interpretation, *supra* note 243; Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 574 (2007).

447. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson*, 112 U.S. 580, 599-600 (1884) (the “Head Money Cases”); *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 722 n.32, 725 n.47 (5th Cir. 2009), *cert. denied sub nom. La. Safety Ass’n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd’s, London*, 131 S. Ct. 65 (2010); Bradley, *supra* note 446, at 160; Moore, *supra* note 446, at 2233; Wu, *supra* note 446, at 574.

448. See 28 U.S.C. § 1782 *see also supra* notes 156-438 and accompanying text.

449. See 28 U.S.C. § 1782.

450. See New York Convention Status, *supra* note 48; ICSID Status, *supra* note 48; Born, Adjudication, *supra* note 23, at 833; *see also supra* note 48 (noting the United States acceded to the Panama Convention in 1990).

451. See 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); Elizabeth M. Glazer, *Seeing It, Knowing It*, 104 NW. U. L. REV. COLLOQUY 217, 232 (2009); *see also supra* note 47 and accompanying text.

452. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 374-75 (2010) (discussing construction of statutes *in pari materia*); *see also Suter v. Munich Reins. Co.*, 223 F.3d 150, 160 (3d Cir. 2000) (construing the FAA and the New York Convention *in pari materia*).

'international tribunal' is inter-governmental."<sup>453</sup> This observation again leads to difficulties for proponents of section 1782 in the context of international commercial or investment arbitration, since none of those terms appear to apply to arbitral tribunals sitting in either scenario.<sup>454</sup>

#### CONCLUSION

As the preceding discussion has shown, section 1782 requests create numerous problems in the context of international commercial and investment arbitration.<sup>455</sup> For example, "the Americanization"<sup>456</sup> of international arbitration . . . through section 1782 discovery could threaten to undermine many of the perceived advantages" of both international commercial and investment proceedings.<sup>457</sup> Alternatively, use of section 1782 in either international commercial or investment arbitration could result in a violation of international law.<sup>458</sup>

Most of the difficulties arise as a result of ambiguity in the term "foreign or

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453. Rothstein, *supra* note 18, at 71 (citations omitted). There has been some suggestion that the term "arbitral 'tribunal' in federal legislation refers to a governmental or inter-governmental body, almost without exception," although that conclusion is somewhat disputed. *Id.* at 71-72 (citation omitted). *But see* Nat'l Broad. Co., Inc. v. Bear Stearns & Co., 165 F.3d 184, 188-90 (2d Cir. 1999); *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006); Chukwumerije, *supra* note 18, at 676-77.

454. *See* 28 U.S.C. § 1782. Although an "international tribunal" might be construed under this approach to include tribunals in investment arbitration, that conclusion is not clear. Indeed, the term "inter-governmental" might be better construed as applying to various first-generation international tribunals rather than second-generation tribunals. *See supra* notes 159-240 and accompanying text.

455. *See* 28 U.S.C. § 1782.

456. Efforts to make arbitration look more like litigation are often referred to as the "Americanization" of arbitration and are typically not cast in a very favorable light. *See* Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 69 (2003); Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289, 294, 301 (2006); Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 365-70 (2008); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 677-79 (2009); Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?* 16 MEALEY'S INT'L ARB. REP. 36 (2001). *But see* Susan L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19 OHIO ST. J. ON DISP. RESOL. 5 (2003).

457. Alford, *supra* note 3, at 153; *see also* Beale et al., *supra* note 18, at 94; El Ahdab & Bouchenaki, *supra* note 257, at 100-01; Fellas, *supra* note 18, at 388. Indeed, retaining the comparative differences between litigation and arbitration provides numerous benefits to parties and society as a whole. *See* Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 52-61 (adopting a law and economics approach to international commercial arbitration).

458. *See* 28 U.S.C. § 1782.

international tribunal,” which has led some commentators to suggest use of an explicit prohibition on section 1782 so as to avoid any sort of interpretive issues.<sup>459</sup> While such measures are technically possible, that approach would require parties from all over the world to exclude application of section 1782 even in cases where there is no apparent or immediate connection to the United States.<sup>460</sup> That sort of default rule gives rise to numerous practical and conceptual problems, suggesting the need for a better and more effective means of addressing the ambiguities inherent in section 1782.<sup>461</sup>

This Article has considered issues relating to definition of the term “foreign or international tribunal” from several different perspectives, including grants of jurisdiction, state interests and interpretive canons. Each of the three methodologies suggests that section 1782 is improper in the case of both international commercial and investment arbitration.<sup>462</sup>

On one level, these conclusions are somewhat surprising since emerging case law and commentary has suggested that a distinction could be developing between the two types of arbitration, with section 1782 requests appearing to be more likely to be granted in cases involving investment arbitration.<sup>463</sup> On another level, however, the findings are not entirely unexpected since much of the case law relating to the interaction between section 1782 and arbitration has come out of the Chevron-Ecuador dispute, a notoriously difficult and novel matter on both the facts and the law.<sup>464</sup>

Although section 1782 requests in the context of international commercial and investment arbitration have increased significantly over the last few years, the case law and commentary are nowhere near developed enough to foreclose new avenues of analysis.<sup>465</sup> It is critical that U.S. courts get this issue right, since requests under section 1782 have the potential to affect both international commerce and international perception of the United States.<sup>466</sup> Therefore, it is

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459. *Id.*; see also *supra* notes 268-271 and accompanying text. Although parties to a private arbitration agreement could prohibit recourse to section 1782, those efforts may not be applicable to third parties. See 28 U.S.C. § 1782; see also *supra* notes 268-271 and accompanying text. It is unclear whether a waiver of section 1782 is possible in the context of investment arbitration, since very little research has been conducted on whether and to what extent parties and states can contractually limit or exclude certain procedures in investment arbitration. See 28 U.S.C. § 1782; S.I. Strong, *Limits of Autonomy in International Investment Arbitration: Are Contractual Waivers of Mass Procedures Enforceable?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2013 (Arthur W. Rovine ed., forthcoming 2014).

460. See 28 U.S.C. § 1782; see also *supra* notes 268-271 and accompanying text.

461. See 28 U.S.C. § 1782.

462. See *id.*

463. See *supra* notes 26-155 and accompanying text.

464. See *supra* notes 86-110 and accompanying text.

465. See 28 U.S.C. § 1782; see also *supra* notes 26-155 and accompanying text.

466. See 28 U.S.C. § 1782.

hoped that this Article will prove useful to judicial and scholarly authorities as they consider the ramifications of section 1782 requests in international commercial and investment arbitration in the coming years.<sup>467</sup>

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467. *See id.*