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## Discovering Discretion: Applying *Intel* to Sec. 1782 Requests for Discovery in Arbitration

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## COMMENTS

### DISCOVERING DISCRETION: APPLYING INTEL TO § 1782 REQUESTS FOR DISCOVERY IN ARBITRATION

Arbitration is an increasingly popular way for litigants to resolve commercial disputes, both in the United States and abroad. With the rise in the use of arbitration, issues related to international arbitration are likely to appear in American courts with increasing frequency. It is unclear whether American courts will assist in discovery proceedings for foreign tribunals, as they often do for other adjudicatory bodies, by compelling discovery from American entities beyond the foreign body's jurisdiction. The primary statute dealing with discovery for foreign courts is 28 U.S.C. § 1782. The Supreme Court recently clarified the meaning of this statute in *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>1</sup> However, courts deciding recent cases have not consistently applied the Court's holdings to cases involving arbitral panels.

Under 28 U.S.C. § 1782, a federal court has authority to compel discovery for many types of proceedings conducted outside the United 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*, including criminal investigations conducted before formal accusation.<sup>2</sup>

The statute does not define the term “foreign or international tribunal,” which Congress inserted in place of the phrase “any court in a foreign country” when it revised the statute in 1964.<sup>3</sup> Before the

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<sup>1</sup> 542 U.S. 241 (2004).

<sup>2</sup> 28 U.S.C. § 1782(a) (2000) (emphasis added).

<sup>3</sup> See 28 U.S.C. § 1782 (1958) (amended 1964); see also *Nat'l Broad. Co. v. Bear Stearns*

Court's 2004 decision in *Intel*, two circuit courts held that "foreign or international tribunals" did not include private arbitral panels.<sup>4</sup> Since *Intel*, three courts have used § 1782 to compel discovery for use in arbitral panels, although these courts did not follow uniform reasoning.<sup>5</sup> Furthermore, the extent to which these cases followed the reasoning of *Intel* is not clear.

*Intel* gave the lower courts guidance for interpreting and applying § 1782, but did not explicitly define a "foreign or international tribunal." The Court emphasized that courts should be restrained by their own discretion rather than a narrow interpretation of the statute. To make sure that discretion is applied in a way that furthers § 1782's goal of international comity, the *Intel* Court provided factors to be considered in the lower courts' exercise of discretion. However, when a court considers a tribunal that is very different from the one at issue in *Intel*, considerations beyond the explicitly named *Intel* factors may be relevant. Consequently, a court considering a § 1782 request for an arbitral panel should consider the policies underlying arbitration generally in addition to the policies of the panel's jurisdiction.

Recent cases demonstrate that courts are uncertain about how to apply the *Intel* holding to requests for discovery in foreign or international arbitration. However, *Intel* does provide sufficient guidance; by following its reasoning and holdings more precisely, courts may arrive at well-reasoned and predictable outcomes. This Comment analyzes the relevant cases to determine how courts can best follow *Intel* in deciding § 1782 requests for private arbitral panels.

#### I. DECISIONS PRECEDING *INTEL*: § 1782(A) DOES NOT APPLY TO PRIVATE ARBITRAL PANELS

The first case to address the application of § 1782 to discovery requests for arbitral panels was *National Broadcasting Co. v. Bear Stearns & Co.* ("*NBC*").<sup>6</sup> The plaintiff, National Broadcasting Company, requested discovery in anticipation of an arbitration proceeding between private litigants before the International Chamber

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& Co., 165 F.3d 184, 188–89 (2d Cir. 1999).

<sup>4</sup> *Nat'l Broad. Co.*, 165 F.3d at 191; *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

<sup>5</sup> See *In re Oxus Gold PLC (Oxus Gold II)*, No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007); *In re ROZ Trading, Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); *In re Hallmark Capital Corp.*, 534 F.Supp. 2d 951 (D. Minn. 2007).

<sup>6</sup> 165 F.3d 184.

of Commerce, a private organization.<sup>7</sup> The Court of Appeals for the Second Circuit held that it could not grant the request because § 1782 did not apply to such private arbitral proceedings.<sup>8</sup>

In coming to its conclusion, the *NBC* court first noted that arbitration in the United States is governed primarily by the Federal Arbitration Act<sup>9</sup> (“FAA”), which provides for more limited discovery than § 1782.<sup>10</sup> The court expressed concern that the discovery procedure in the FAA might be exclusive, meaning that § 1782 would conflict with the FAA to the extent that it broadened the discovery available in arbitral proceedings beyond what the FAA would otherwise permit.<sup>11</sup> While the court discussed this concern at length, it ultimately based its holding on the text of § 1782.<sup>12</sup>

The court considered the plain meaning of the term “foreign or international tribunal” and found it to be ambiguous.<sup>13</sup> It then looked to the legislative history of the current text of § 1782. Specifically, the court referred to the report of the Commission on International Rules of Judicial Procedure (the “Commission”) that Congress had relied on when it replaced the phrase “any court in a foreign country” with “foreign or international tribunal.”<sup>14</sup> The report stated that the Commission chose the word “tribunal . . . to make it clear that assistance is not confined to proceedings before conventional courts.”<sup>15</sup> The report explicitly stated that the proposed changes to the statute’s language would include investigating magistrates in foreign countries, but also stated more broadly:

In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative

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<sup>7</sup> *Id.* at 186.

<sup>8</sup> *Id.* at 185.

<sup>9</sup> 9 U.S.C. §§ 1–307 (2006).

<sup>10</sup> *Nat’l Broad. Co.*, 165 F.3d at 187–89. Specifically, the FAA does not (1) allow for non-arbitrators to request discovery, (2) confer enforcement authority outside of the district where the arbitrators are sitting, or (3) provide for pre-hearing depositions or document discovery. *Id.*

<sup>11</sup> *Id.* at 188 (“If the broader evidence-gathering mechanisms provided for in § 1782 were applicable to proceedings before non-governmental tribunals such as private arbitral panels, we would need to decide whether 9 U.S.C. § 7 is exclusive, in which case the two statutes would conflict.”).

<sup>12</sup> *Id.* at 187–88.

<sup>13</sup> *Id.* at 188.

<sup>14</sup> *Id.* at 189 (citing H.R. Rep. No. 88-1052, at 9 (1963); S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788).

<sup>15</sup> S. Rep. No. 88-1580, at 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.<sup>16</sup>

Based on the report, the *NBC* court determined that the Commission had in mind only governmental entities. The court concluded that Congress had not considered private dispute resolution to be within the scope of § 1782 because there was no reference to such proceedings in the report.<sup>17</sup>

As a final point, the court noted that litigants often choose arbitration because it typically involves limited discovery, making arbitration more efficient and less costly than traditional litigation.<sup>18</sup> The discovery allowed under § 1782 is broader than that permitted by the FAA as well as most foreign or international arbitration rules. The *NBC* court reasoned that to allow broad discovery in these proceedings would “create an entirely new category of disputes concerning the . . . characterization of arbitral panels as domestic, foreign, or international.”<sup>19</sup> The court held that this distinction was not grounded in policy and would not serve to advance the purpose of § 1782, which was passed as part of an effort to further “practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.”<sup>20</sup>

Shortly after the *NBC* case, the same question came before the Fifth Circuit in *Kazakhstan v. Biedermann International* (“*Biedermann*”).<sup>21</sup> That court followed *NBC*, holding that § 1782 does not include private international arbitration.<sup>22</sup> The *Biedermann* court determined that although § 1782 could be read to include arbitration, “not every conceivable fact-finding or adjudicative body is covered, even when the body operates under the imprimatur of a foreign government”<sup>23</sup>—thus suggesting that even government-sponsored arbitration may not be eligible for § 1782 requests. The *Biedermann* court also emphasized, as had the *NBC* court, that the broad discovery of § 1782 did not seem to accord with the general policies and goals behind arbitration and could easily undermine many of arbitration’s perceived benefits.<sup>24</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Nat’l Broad. Co.*, 165 F.3d at 189.

<sup>18</sup> *Id.* at 190–91.

<sup>19</sup> *Id.* at 191.

<sup>20</sup> *Id.* at 188–89.

<sup>21</sup> 168 F.3d 880 (5th Cir. 1999).

<sup>22</sup> *Id.* at 883.

<sup>23</sup> *Id.* at 882.

<sup>24</sup> *Id.* at 882–83.

After *Biedermann*, no court addressed this question *de novo* for several years. By the time the issue arose again, the Supreme Court had handed down an important decision interpreting the language of § 1782. As later cases show, it is unclear how important *NBC* and *Biedermann* remain in light of the Supreme Court's decision.<sup>25</sup>

## II. THE SUPREME COURT'S *INTEL* HOLDINGS: SUBSTANTIAL GUIDANCE WITHOUT SPECIFICALLY ADDRESSING ARBITRAL PANELS

The Supreme Court interpreted the language of § 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*, but did not reach the question of arbitral panels.<sup>26</sup> The Court did, however, describe the policy grounds behind § 1782 in great detail and list a number of considerations for courts to use in considering any request for discovery under § 1782.<sup>27</sup>

Plaintiff Advanced Micro Devices, Inc. ("AMD") filed an antitrust action against Intel Corp. with the Directorate-General for Competition of the Commission of the European Communities ("CEC"), an international arbitration panel.<sup>28</sup> AMD then made a request for discovery under § 1782, but the district court determined that § 1782 did not empower it to grant the request.<sup>29</sup> The Ninth Circuit reversed and the Supreme Court affirmed, providing guidance for the district court's subsequent ruling on the merits of the request.<sup>30</sup>

Intel argued that the CEC was not a "foreign or international tribunal" for the purposes of § 1782 because the matter was still under investigation only and had not come before an adjudicative body.<sup>31</sup> However, the Court noted that the results of the CEC's investigation would be reviewable by two courts that are undoubtedly tribunals for the purposes of § 1782.<sup>32</sup> Because these higher courts' review was confined to the record before the CEC, § 1782 discovery would come before them only if ordered for use by the CEC.<sup>33</sup> The Court therefore held that the CEC is included in the scope of § 1782 "to the extent

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<sup>25</sup> Compare *In re Oxus Gold PLC (Oxus Gold II)*, No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007) (adhering to the standards articulated in *NBC* and *Biedermann* by holding that an arbitral panel might be a tribunal within the scope of § 1782 because it was a governmental rather than private panel), with *In re ROZ Trading, Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (holding, based on *Intel*, that a private arbitral panel might be a tribunal within the scope of § 1782).

<sup>26</sup> 542 U.S. 241 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 246.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 258.

<sup>32</sup> *Id.* at 257.

<sup>33</sup> *Id.*

that it acts as a first-instance decisionmaker.”<sup>34</sup> Additionally, the Court cited the Commission’s 1964 report recommending the current language as evidence of legislative intent that the phrase “foreign or international tribunal” be interpreted broadly.<sup>35</sup> The Court parenthetically quoted a commentator who stated that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies.”<sup>36</sup>

The Court also rejected a “foreign-discoverability rule” on which lower courts had been divided.<sup>37</sup> Such a rule would allow § 1782 requests only for evidence that would be discoverable if located in the jurisdiction of the proceedings for which it is sought, i.e., within the jurisdiction of the foreign or international tribunal.<sup>38</sup> In declining to adopt this rule, the Court noted that the comparison of different legal systems is not necessarily a useful exercise.<sup>39</sup> It also emphasized that while § 1782 allows courts to grant discovery requests, it does not require them to do so. The Court held that courts should use discretion to deny or alter discovery requests in ways that best serve the policy goals of § 1782.<sup>40</sup> The Court used similar logic to dispense with the domestic-discoverability argument, which would not allow courts to order discovery pursuant to § 1782 requests in circumstances where United States law would not allow discovery in analogous domestic circumstances.<sup>41</sup>

Finally, the Court listed factors for lower courts to consider in determining whether to grant § 1782 requests. The first factor the Court found relevant was whether discovery was sought from a participant in the foreign proceeding or from a non-participant. The Court found that § 1782 is less valuable when discovery is sought from a participant in the foreign proceeding because the foreign tribunal itself may order discovery from participants. Consequently, the Court indicated that the need for § 1782 discovery should generally be viewed as greater when sought from nonparticipants.<sup>42</sup> Another factor the Court instructed lower courts to consider was the foreign court or government’s likely response to the discovery order.

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<sup>34</sup> *Id.* at 258.

<sup>35</sup> *Id.* at 257–58.

<sup>36</sup> *Id.* at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965)) (emphasis added).

<sup>37</sup> *Id.* at 259–62.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 260–62.

<sup>41</sup> *Id.* at 262–64. Justice Breyer argued, in his dissent, that discovery requests should be denied in most cases where the evidence met neither a domestic nor foreign discoverability test. *Id.* at 270 (Breyer, J., dissenting).

<sup>42</sup> *Id.* at 264 (majority opinion).

Courts “may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U. S. federal-court judicial assistance.”<sup>43</sup> The third factor is the motives of the parties making the request. Courts should consider whether the § 1782 request is an attempt to circumvent the policies of the United States or a foreign country.<sup>44</sup> For example, a party might use a § 1782 request to avoid the discovery requirements of the foreign court. The Court also indicated that discovery requests may be trimmed when they are overly burdensome<sup>45</sup> or consider other factors unique to a particular case.<sup>46</sup>

As a whole, the Court’s opinion demonstrates a preference for court-exercised discretion rather than categorical limitations on § 1782’s scope. This discretion is to be guided by a consideration of (1) who is making the request,<sup>47</sup> (2) individual characteristics of the tribunal and any governments involved,<sup>48</sup> (3) whether the request is overly burdensome,<sup>49</sup> and (4) policy concerns or other factors the court deems relevant to the request.<sup>50</sup> *Intel* generally suggests that the categorical limitations that would arise from otherwise limited or narrow readings of the statute are not flexible and do not allow courts to handle the nuance and complexity that may be involved in a § 1782 request.

### III. HAS *INTEL* DECISIVELY OVERRULED *NBC* AND *BIEDERMANN*?

Since the Court announced its decision in *Intel*, three district courts have addressed the issue of § 1782 requests for evidence to be used in arbitration. In each case, the district court granted the request. Two cases, *In re ROZ Trading Ltd.* (“*ROZ Trading*”)<sup>51</sup> and *In re Hallmark Capital Corp.* (“*Hallmark*”),<sup>52</sup> held that *Intel* had overruled *NBC* and *Biedermann*. The third, *In re Oxus Gold, PLC (Oxus Gold II)*,<sup>53</sup> did

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 264–65.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 266 (noting that other issues in the case remain “unexplored” and should be evaluated on remand.).

<sup>47</sup> *Id.* at 264 (holding that courts should consider whether the discovery is sought from a participant or a non-participant).

<sup>48</sup> *Id.*; see *supra* text accompanying note 43.

<sup>49</sup> *Id.* at 265 (“[U]nduly intrusive or burdensome requests may be rejected or trimmed.”).

<sup>50</sup> *Id.* at 266 (suggesting that the lower court should consider issues such as the risk that granting the request will disclose confidential information).

<sup>51</sup> 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

<sup>52</sup> 534 F. Supp. 2d 951 (D. Minn. 2007).

<sup>53</sup> No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007); see also *In re Oxus Gold, PLC (Oxus Gold I)*, No. 06-82, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006).



not consider *Intel* relevant. Instead, the court determined that *NBC* and *Biedermann* could be distinguished based on the facts and therefore did not control. These three district court cases show that *Intel* may have muddied the waters for courts dealing with these § 1782 requests. Furthermore, *Intel* itself did not discuss *NBC* or *Biedermann*, leaving ambiguity about how the Court would have resolved the primary question in those cases. The three post-*Intel* cases represent the lower courts' unsuccessful attempts to resolve that ambiguity.

*A. Intel & Arbitral Panels: Negating the Impact of NBC and Biedermann*

The district court deciding *ROZ Trading* found *Intel* to be instructive, even though the *Intel* Court had not specifically discussed private arbitral panels.<sup>54</sup> The *ROZ Trading* court first noted that *Intel* quoted language naming arbitral panels as tribunals.<sup>55</sup> Second, it pointed out that the arbitral panels in question (those convened by the International Arbitral Centre of the Austrian Federal Economic Chamber) were ““first-instance decisionmaker[s]’ that issue decisions ‘both responsive to the complaint and reviewable in court.’”<sup>56</sup> The court did not, however, discuss whether reviewing courts would be able to take their own evidence or, as in *Intel*, would be limited to the evidence before the first-instance decisionmaker.

Most importantly, the *ROZ Trading* court found that the language of § 1782 is not ambiguous because the term tribunal is widely understood to include arbitral panels.<sup>57</sup> The absence of ambiguity made it unnecessary for the court to interpret the legislative history on which the *NBC* and *Biedermann* courts relied.<sup>58</sup> Nevertheless, the *ROZ Trading* court noted that because the general purpose of the changes to § 1782 had been to broaden the range of proceedings eligible for § 1782 requests, the court's decision did not conflict with

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<sup>54</sup> *ROZ Trading*, 469 F. Supp. at 1224 (“Although the Supreme Court in *Intel* did not address the precise issue of whether private arbitral panels are ‘tribunals’ within the meaning of the statute, it provided sufficient guidance for the Court to determine that arbitral panels convened by the [International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna] are ‘tribunals’ within the statute’s scope.”).

<sup>55</sup> *Id.* at 1225; see *supra* note 36 and accompanying text.

<sup>56</sup> *ROZ Trading*, 469 F. Supp. at 1225 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004)).

<sup>57</sup> *Id.* at 1226.

<sup>58</sup> *Id.* at 1225 (“Unless there is a ‘clearly expressed legislative intent to the contrary, [unambiguous] language must ordinarily be regarded as conclusive.’” (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981))).

the legislative history.<sup>59</sup> Finally, *ROZ Trading* also held that *Intel*, taken as a whole, undermined the holdings of *NBC* and *Biedermann* by following reasoning that directly contradicted those decisions.<sup>60</sup>

The *Hallmark* court reached a similar conclusion regarding *NBC* and *Biedermann*, although it emphasized different considerations.<sup>61</sup> The *ROZ Trading* court had engaged in a textual analysis of the phrase “foreign or international tribunal,” as had the *NBC* and *Biedermann* courts. In contrast, the *Hallmark* court focused on *Intel*’s broad interpretation of § 1782(a).<sup>62</sup> The court cited *Intel*’s rejection of categorical limitations as well as its emphasis on the courts’ discretion to deny any § 1782 request.<sup>63</sup>

The *Hallmark* court also addressed the argument that use of § 1782(a) in arbitrations would create a conflict with the FAA by allowing discovery broader than permitted under the FAA. The court noted that the “foreign-discoverability” question posed an analogous problem.<sup>64</sup> In *Intel*, the Supreme Court had found that a proper exercise of discretion on the part of the lower courts would sufficiently address any difficulties arising from a lack of foreign-discoverability. The *Hallmark* court reasoned that courts should similarly consider the discovery allowed under the FAA when deciding § 1782 requests for arbitration.<sup>65</sup>

#### *B. Not All Courts Have Considered Intel Relevant to Arbitral Panels*

*Oxus Gold II*<sup>66</sup> breaks with the other two district courts in interpreting *Intel*’s application to § 1782. *Oxus Gold II* involved a request for discovery to assist in the proceedings of an arbitral panel conducted pursuant to a treaty between Kyrgyzstan and the United Kingdom.<sup>67</sup> The treaty provided that the arbitration was governed by the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>68</sup> The arbitration was not, however, formally overseen or conducted by the United Kingdom, Kyrgyzstan, or the United Nations.<sup>69</sup> The arbitrators were private

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<sup>59</sup> *Id.* at 1226.

<sup>60</sup> *Id.* at 1226–27 (“The reasoning in *Intel* demonstrates the structural and analytical flaws in the Second and Fifth Circuits’ interpretations of § 1782(a).”).

<sup>61</sup> *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007).

<sup>62</sup> *Id.* at 956.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007). In *Oxus Gold II*, the magistrate’s decision in *Oxus Gold I* was appealed to the district court.

<sup>67</sup> *Id.* at \*3–4.

<sup>68</sup> *Id.* at \*14.

<sup>69</sup> *Id.* at \*11–14.

individuals resolving a commercial dispute between private parties.<sup>70</sup> Rather than turn to *Intel*, the *Oxus Gold II* court relied on the *NBC* and *Biedermann* precedent. Although the *NBC* and *Biedermann* courts clearly stated that “foreign or international tribunals” do not include private arbitral panels, *Oxus Gold II* highlighted these courts’ failure to define private arbitral panels.<sup>71</sup>

The *Oxus Gold II* court, however, did not find it necessary to define a “private arbitral panel.” The magistrate judge had decided that the arbitral panel at issue was included in the scope of § 1782.<sup>72</sup> The district court confined its inquiry to whether the magistrate’s holding was “clearly erroneous or contrary to law.”<sup>73</sup> Finding that it was not, the court affirmed § 1782’s application to the arbitral panel at issue.<sup>74</sup> This holding implies that arbitral panels that enjoy some sort of government endorsement may be included within § 1782 even when they do not act as official state courts. Furthermore, it hints that courts should have discretion in determining whether a panel is private or government-sponsored.

The *Oxus Gold I* court mentioned the factors from *Intel* and ordered that the request be trimmed to be less burdensome.<sup>75</sup> However, neither *Oxus Gold I* nor *Oxus Gold II* contained an analysis of the *Intel* factors to determine whether the court should grant a discovery request for an arbitral panel. Having determined that an arbitral panel is a tribunal for the purposes of § 1782, the court did not consider the relevance of the *Intel* factors to an arbitration.

#### IV. MAKING SENSE OF THE EXPANDING AMBIGUITY IN § 1782

The holding in *Oxus Gold II* was based on the premise that *Intel* was not relevant to discovery requests for arbitration panels, or to the *NBC* and *Biedermann* precedents, because it had not specifically discussed arbitral panels. Although *ROZ Trading* also followed *NBC* and *Biedermann* in that it relied on a textual analysis of § 1782, *ROZ Trading* found that *Intel*’s guidance mandated a different conclusion. *Hallmark*, in contrast, did not rely heavily on text, but instead went directly to the arguments addressed in *Intel*. As a result, *Hallmark* may have followed *Intel* more closely than the other courts. However,

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<sup>70</sup> *Id.* \*2–5.

<sup>71</sup> *Id.* at \*12–13.

<sup>72</sup> *In re Oxus Gold, PLC (Oxus Gold I)*, No. 06-82, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006).

<sup>73</sup> *Oxus Gold II*, 2007 U.S. Dist. LEXIS 24061, at \*14.

<sup>74</sup> *Id.* at \*22.

<sup>75</sup> *Oxus Gold I*, 2006 U.S. Dist. LEXIS 74118, at \*20–21.

the division between these cases shows the lack of clarity available to guide future courts called upon to decide similar cases.

The policy concerns regarding § 1782 requests for arbitral panels do not clearly support a single interpretation. Scholars have long argued that allowing § 1782 to include arbitration would best serve the policies of international legal cooperation underlying the 1964 revisions to the statute.<sup>76</sup> Others have criticized this argument for ignoring the underlying policies of the FAA and arbitration more generally.<sup>77</sup> Recent cases demonstrate that *Intel* has not definitively resolved this dispute, which will inevitably arise again as international arbitration grows in popularity.

Opponents of encompassing arbitration within the scope of § 1782 mirror the logic of the *NBC* and *Biedermann* courts. Specifically, they argue that the purposes and benefits of arbitration, including efficiency and economy, are undermined by extensive discovery.<sup>78</sup> This issue is not directly addressed in *Intel*, nor have the post-*Intel* cases refuted this argument. However, the wording of the statute, the Supreme Court's interpretation of the statute, and the broader goals of comity and cooperation support a broad reading of the term "tribunal." None of the policy concerns, either supporting or opposing a broad interpretation of § 1782, is to be dismissed lightly. Each argument may weigh differently depending on the particular facts of a case. As suggested by the Supreme Court's rejection of categorical limitations on § 1782, the resolution of § 1782 requests should not be formulaic. Instead, courts should use their discretion to carefully weigh the factors relevant to specific facts.

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<sup>76</sup> See generally Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L. L. 597, 615–19 (1990) ("[F]ederal courts . . . should interpret the term 'tribunal' in section 1782 to include not only courts and other adjudicative entities, but also other reasonably impartial official decisionmakers."); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 ("The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes . . . arbitral tribunals . . .").

<sup>77</sup> See Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*, 17 AM. REV. INT'L. ARB. 45, 64, 68 (2006) ("Filling the FAA's discovery gaps with § 1782 is a far inferior solution to amending the FAA or enacting a new arbitration statute . . . . Applying § 1782 to arbitral tribunals further blurs the line between litigation and arbitration.").

<sup>78</sup> See, e.g., *id.* at 69 ("[Compelling discovery that does not meet a foreign discoverability test] would certainly run counter to arbitration as a 'creature of contract' by which parties can control the scope and extent of discovery, thereby keeping costs down and expediting a decision.").

*A. Intel Overrules the Reasoning of NBC and Biedermann*

The *Intel* Court fully considered the conflicting policy goals relevant to the interpretation of § 1782. The Court rejected the assumption that policy concerns relevant to individual § 1782 petitions must inform the interpretation of the statute's text. In response to the argument for a foreign-discoverability requirement, the Court concluded that although "comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a)."<sup>79</sup> Comity and parity must be weighed in each individual petition. A district court should consider the potential effects (like increased costs) that grants of discovery may have on arbitration as a dispute resolution mechanism. However, these valid concerns do not alter the text of § 1782. This policy issue is more properly considered in the Court's exercise of discretion in each individual case rather than in the interpretation of the statutory language.

The legislative history of § 1782 supports the Court's conclusions in *Intel*. While the *Biedermann* court was accurate in observing that it is unlikely that Congress specifically contemplated the application of § 1782 to "the then-novel arena of international commercial arbitration,"<sup>80</sup> this only indicates that Congress did not form a specific intent with regard to private arbitration. This does not preclude the statute's application to arbitral panels. The statute, in both its precise language and general intent, suggests that arbitral panels are tribunals. After all, the Commission recommended changes in the language of § 1782 "[i]n view of the constant growth of administrative and quasi-judicial proceedings all over the world."<sup>81</sup> This language suggests an awareness of the ongoing process through which proceedings and adjudicative bodies may change form without abandoning those characteristics that make § 1782 useful. This is arguably the precise reason that Congress did not define "tribunal" with a specific list of adjudicatory bodies. The phrase "foreign or international tribunal," like the other changes implemented in the 1964 revision,<sup>82</sup> offers courts broad discretionary power to compel discovery. The Commission's report suggests that Congress intended for the new

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<sup>79</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004).

<sup>80</sup> *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999).

<sup>81</sup> S. Rep. No. 88-1580, at 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

<sup>82</sup> For a discussion of the changes to § 1782, see S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782. For example, § 1782 was changed to no longer require that the United States be party to the treaty that had created the international tribunal at issue. *Id.* at 3784-85.

language to include adjudicative bodies, like private arbitral panels, that had not yet come into widespread use.

To reiterate, the history of § 1782 and the Court's interpretation of the statute both strongly suggest that courts have discretion to grant discovery requests for arbitral panels. This cannot, however, override the policy concerns that led the *NBC* and *Biedermann* courts to conclude that granting such requests would be problematic in most, if not all, cases. Based on the policy concerns associated with compelling discovery in arbitration, courts following *Intel*'s guidance should typically use their discretion to deny § 1782 requests for arbitral panels. All three post-*Intel* cases have granted at least some portion of the requested discovery, leading to the inference that the courts have failed to apply *Intel* appropriately.

*B. The Post-Intel Cases Have Not Exercised Discretion in the Manner Intel Encouraged*

In light of the broad discretion strongly supported by the *Intel* Court, it is not immediately clear that the post-*Intel* decisions fail to follow the Court's direction. After all, these courts engaged in independent analysis and did not strictly follow the categorical limitations from prior cases. However, these decisions share the same faults as *NBC* and *Biedermann*—they fail to truly isolate their interpretation of the statute from their exercise of the discretion granted by the statute. The *NBC* and *Biedermann* courts applied policy concerns appropriate to the exercise of discretion, but did so during their interpretation of the statute. These courts found that the language of the statute could not be interpreted to include arbitral panels because there was a possibility of conflict with the FAA. It would have been more appropriate for the courts to recognize that such panels are included in the statute's language, but to use their discretion to deny requests that conflicted with the policies underlying the FAA.

In contrast, the post-*Intel* courts properly removed these concerns from the interpretation of the statutory language, but then failed to consider the relevant policy when exercising their discretion under *Intel*. After finding that it was in their discretion to grant these requests, all three courts *did* compel discovery—without discussing the potential policy ramifications. This is problematic because the policy concerns raised in *NBC* and *Biedermann* suggest that, in most instances, courts should use their discretion to deny § 1782 requests for arbitral proceedings. Because the post-*Intel* courts may have failed to properly scrutinize the requests in light of all relevant policy

concerns, these cases do no more than *NBC* or *Biedermann* to follow *Intel* or to reach a conclusion consistent with the plain language and legislative history of § 1782.

### I. Oxus Gold II

Each of the three cases followed different reasoning. *Oxus Gold II*, for example, adhered to the holdings in *NBC* and *Biedermann*.<sup>83</sup> The court relied heavily on the distinction between government-sponsored and private arbitral panels.<sup>84</sup> Rather than discussing this distinction in the context of the *Intel* factors, the court relied on *NBC* and *Biedermann* to determine that requests may be granted for government panels and not private ones.<sup>85</sup> While it is undoubtedly important for the court to note the nature of the tribunal for which discovery is requested this is properly analyzed with the second *Intel* factor (considering the individual characteristics of the tribunal and any governments involved) rather than as a “categorical limitation” on § 1782.<sup>86</sup> Having determined that § 1782 authorized the court to grant the request, the *Oxus Gold II* court did not consider the possibility of discretionary denial.

The magistrate determined that “[s]ection 1782 is applicable to the present case and that Petitioner has satisfied the requirements of the statute. Therefore, there is no basis to [deny the request].”<sup>87</sup> The court did not consider the *Intel* factors.<sup>88</sup> Most importantly, it did not consider whether granting the request would, in fact, further the policies of comity and cooperation underlying § 1782. Instead, the court merely noted that because *Intel* determined that there is no foreign-discoverability requirement, “a district court need not consider [foreign-discoverability] before it decides whether to grant a Section 1782 request.”<sup>89</sup> This characterization of *Intel*’s holding, while technically correct, is too general and ignores the Court’s detailed instruction:

[The foreign-discoverability requirement] may be relevant in determining whether a discovery order should be granted in a

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<sup>83</sup> *In re Oxus Gold, PLC (Oxus Gold II)*, No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061, at \*11–14 (D.N.J. Apr. 2, 2007).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*13.

<sup>86</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004).

<sup>87</sup> *In re Oxus Gold, PLC (Oxus Gold I)*, No. 06-82, 2006 U.S. Dist. LEXIS 74118, at \*20 (D.N.J. Oct. 10, 2006).

<sup>88</sup> The court inserted boilerplate language reciting *Intel*’s holding, but did not discuss how any of the *Intel* factors applied to the facts at hand. *Id.* at \*18–20.

<sup>89</sup> *Id.* at \*20–21.

particular case.... Specifically, a district court could consider whether the § 1782 request conceals an attempt to circumvent . . . policies of a foreign country or the United States.<sup>90</sup>

The *Oxus Gold II* court should have considered whether the requested evidence was discoverable in foreign or domestic proceedings because it is an important, but not determinative, part of deciding whether the request should be granted. If the foreign procedure in *Oxus Gold II* was designed to facilitate quick dispute resolution at low cost to the parties—as is often the purpose of arbitration in the United States—the court should have denied the request because it would frustrate those policies. Like *NBC* and *Biedermann*, *Oxus Gold II* assumes that the statutory language, rather than the court’s discretion, is the primary tool by which requests should be denied. It concludes that if the statute does not prohibit a request, the court should grant the request in most cases. This assumption cannot be reconciled with the *Intel* Court’s broad description of courts’ discretionary powers under § 1782.

## 2. ROZ Trading, Ltd.

Unlike the *Oxus Gold II* court, the *ROZ Trading* court did consider the *Intel* factors. The discovery request in that case pertained to an international arbitration at the International Arbitral Centre (the “Centre”) in Austria, which arranges dispute resolution for litigants from a variety of jurisdictions.<sup>91</sup> Citing *Intel*, the court placed great weight on the Centre’s “likely receptivity” to the evidence requested.<sup>92</sup> The Centre’s procedural rules made specific reference to discovery requests in foreign courts, as the court quoted:

“Those judicial acts considered necessary by the arbitrators but which they have no jurisdiction to undertake will be carried out by the State Court which has jurisdiction *on the application of the arbitrators*. In case of doubt the application is to be made to the District Court in whose district the act is to be carried out or the evidence to be taken.”<sup>93</sup>

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<sup>90</sup> *Intel*, 542 U.S. at 264.

<sup>91</sup> *In re ROZ Trading, Ltd.*, 469 F. Supp. 2d 1221, 1223 (N.D. Ga. 2006); see *supra* text accompanying notes 52–58.

<sup>92</sup> *ROZ Trading*, 469 F. Supp. 2d at 1228–29.

<sup>93</sup> *Id.* at 1229 (emphasis added). For the Centre’s current rules, see INTERNATIONAL ARBITRAL CENTRE OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER, RULES OF ARBITRATION AND CONCILIATION (VIENNA RULES), available at [http://portal.wko.at/wk/format\\_detail.wk?AngID=1&StID=327905&DstID=0&BrID=0](http://portal.wko.at/wk/format_detail.wk?AngID=1&StID=327905&DstID=0&BrID=0).



The court concluded that “[t]he Centre is fundamentally international in nature. It must rely on the aid of courts beyond its jurisdiction—such as United States District Courts acting pursuant to § 1782(a)—to enforce its demands and to aid its inquiries.”<sup>94</sup> The court ignored, however, that the Centre’s rules refer only to “applications of the arbitrators.” *ROZ Trading* dealt with a petition by one of the *parties*,<sup>95</sup> and therefore was not contemplated in the Centre’s rules. The court assumed that the cited rule indicated the Centre’s receptivity to evidence sought by anyone and not only evidence specifically requested by the arbitrators. However, if the arbitrators wished to consider that evidence, the Centre’s rules specifically encourage them to make the application directly, rather than relying on the parties to do so. The arbitrators’ failure to make the application may indicate that they were not, in fact, receptive to the evidence.

While the *ROZ Trading* court did consider *Intel*, it failed to incorporate the *NBC* and *Biedermann* concerns into the *Intel* framework. As the earlier cases noted, the FAA allows courts to grant discovery requests made by arbitrators but not those made by the parties.<sup>96</sup> Noting this, the court should have considered whether the facts of *ROZ Trading* justified some departure from this rule, which would ordinarily apply to arbitration in the United States. Although the Centre’s rules may support granting certain requests, the request made in *ROZ Trading* is not one of these. Furthermore, because the Centre’s arbitration policies are similar to the FAA, the § 1782 request at issue may have been an attempt to circumvent the rule allowing only arbitrators to make discovery requests. As *Intel* suggests, courts should not grant requests that represent the petitioner’s attempt to bypass an arbitration proceeding’s discovery rules. In *ROZ Trading*, the court did not explain why it granted a request that failed to comply with the arbitration policies of the United States or the international tribunal.

### 3. Hallmark

The *Hallmark* decision best applies the principles laid out in *Intel*. *Hallmark* involved a party’s request for discovery from a non-party to assist in a private arbitration in Israel.<sup>97</sup> The court expressly noted that it might use its discretion to deny requests for “excessive or

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<sup>94</sup> *ROZ Trading*, 469 F. Supp. 2d at 1229.

<sup>95</sup> *Id.* at 1223.

<sup>96</sup> See *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 186–87 (2d. Cir. 1999); *Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999).

<sup>97</sup> *In re Hallmark Capital Corp.*, 534 F. Supp. 2d. 951, 953 (D. Minn. 2007); see also *supra* text accompanying notes 59–63.

burdensome discovery that would undermine the otherwise streamlined procedures of arbitration,”<sup>98</sup> showing that the court was aware of the concerns raised in *NBC* and *Biedermann*. The Israeli arbitrator had apparently indicated to the court his or her “receptivity” to the requested evidence, though the court did not describe the nature or extent of this receptivity.<sup>99</sup> Citing *Intel*, the *Hallmark* court determined that any comity concerns were put to rest by the Israeli arbitrator’s willingness to accept the evidence.<sup>100</sup> In this, the court accurately summarized the *Intel* holdings and applied them to the facts at hand.

The court also appropriately analogized between the foreign-discoverability requirement rejected in *Intel* and a categorical prohibition on discovery in arbitration. The court held that although there may be policy reasons for denying discovery in arbitration, § 1782 leaves this up to the court’s discretion.<sup>101</sup> However, the court did not consider whether the request at issue would undermine the purposes of arbitration, but treated the arbitrator’s willingness to accept the evidence as dispositive.

While *Intel* did place great weight on the foreign tribunal’s receptivity, it also instructed courts to consider the “receptivity of the foreign government or the court or agency abroad.”<sup>102</sup> In many cases, government, court, or agency views will be the same because the tribunal will represent the foreign government, court, or agency. Arbitration is an exception to this general rule. The arbitrator is a private individual often selected by the parties. He or she is not part of a foreign government and may not always represent its views or policies. In arbitration, courts should be wary of giving too much weight to the arbitrators’ opinions, which may not be as valuable as those of a judge or other individual authorized to speak on behalf of the foreign government.

However, there is nothing in the *Hallmark* facts to suggest that the arbitrator was wrong or that Israel had a contradictory arbitration policy. Assuming that the arbitrator accurately represented Israeli policy, it is worth noting that the request—made by a party rather than an arbitrator—would have been denied if governed by the FAA. However, if there is no conflict with the policies of the Israeli

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<sup>98</sup> *In re Hallmark*, 534 F. Supp. 2d at 957.

<sup>99</sup> *Id.* at 957.

<sup>100</sup> *Id.* at 958 (“When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless.”) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 (2004)).

<sup>101</sup> *Id.* at 956–57.

<sup>102</sup> *Intel*, 542 U.S. at 264.

government, the policies underlying the FAA do not justify denying the request. The reasons that the request was made by a party rather than an arbitrator may be unrelated to the policy concerns discussed in *NBC* and *Biedermann*. For example, the Israeli arbitrator may have perhaps not known enough about § 1782 to understand that the petition would have greater merit if filed by the arbitrator. Indeed, it is not clear that the American courts have yet reached that conclusion. Situations like this demonstrate how a broad interpretation of the statutory language, complemented by a thorough exercise of the court's discretion, may advance § 1782's underlying purposes of international comity and cooperation.

### CONCLUSION

Although *Intel* did not explicitly determine whether a private arbitral panel is a "foreign or international tribunal," it provided guidance for courts interpreting and applying § 1782. The Court's reasoning strongly suggests that § 1782 should be understood as broadly as possible, even though this will mean that courts will often have the authority to grant unwarranted discovery requests that do not further the statute's goal of international comity. The language and policy of § 1782 mandate that courts should be restrained by their own discretion rather than a narrow interpretation of the statute.

To assist the lower courts in their exercise of discretion, *Intel* provides a list of factors to consider. The list is not necessarily exclusive and other considerations may be relevant, especially where the tribunal at issue has notably different characteristics than the tribunal in *Intel*. In arbitration proceedings, courts should therefore consider arbitration's general purpose as well as the policies of the jurisdiction controlling the panel.

Unfortunately, the recent three cases considering §1782 requests for arbitral panels have not consistently followed the *Intel* guidance. *Oxus Gold II* does not consider the factors at all, while *ROZ Trading* misapplies them. *Hallmark*, however, follows *Intel*'s four-factor test well. Although the value of the arbitrator's opinions is unclear, it otherwise applies *Intel*'s holdings and reasoning well. Future courts would do well to examine the *Hallmark* analysis and not to place excessive weight on the other cases. An accurate and faithful application of the *Intel* guidance will ensure that orders for discovery under § 1782 serve to further the underlying purposes of the statute.

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