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Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving U.S. Entities?

Peter B. RUTLEDGE*

Limited discovery is one of the regularly cited advantages of international arbitration, as opposed to international litigation, particularly in contrast to litigation in the U.S. courts. Recent decisions by U.S. courts, however, have threatened to upend this comparative advantage. Invoking a little known U.S. law, 28 U.S.C. section 1782, these courts have permitted parties in an arbitration to petition for subpoenas issued by U.S. courts against their adversaries or third parties. Bucking the trend in the academic literature, which largely supports this development, this article opposes reading section 1782 to authorize subpoenas in support of an arbitration. Not only does this undermine the sensible limits on discovery in arbitration, it risks undermining the entire arbitral process by creating an asymmetrical tactical device that systematically disfavors U.S. companies: foreign parties can use section 1782 petitions as a tool both to extract information from their U.S. adversaries and to bolster their settlement position. To avoid these deleterious results, section 1782 should be interpreted not to encompass international arbitral tribunals.

Discovery, the compulsory pre-hearing exchange of relevant documents between parties or from a third party, is a controversial practice in international dispute resolution. Many countries find such techniques anathema.¹ Under the Hague Evidence Convention, several signatories have expressly stated their intention not to provide assistance in support of pre-trial discovery requests from a central authority.²

As with international litigation, so too does the controversy over discovery affect international arbitration. Most arbitral rules are silent on the matter.³ Consequently, unless the parties have regulated the matter in their arbitration clause or by prior agreement, the decision whether to order discovery is largely left to the tribunal's discretion. How the tribunal exercises that discretion may be a function of a variety of factors such as the arbitrator's legal culture and the exigencies of the case.

A recent decision of a U.S. court, *In Re Roz Trading*,⁴ could alter the dynamics of discovery in arbitration, at least in cases where some of the relevant information is located in the United States. *Roz Trading* involved a federal statute which authorizes an "interested person" to petition a U.S. court to order a person residing in its district to provide documents or testimony for use "in a proceeding in a foreign or international tribunal."⁵

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¹ Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* 4 (4th ed. 2006).

² *Id.* at 966.

³ *Id.* at 965 (noting that the status of arbitration is "unclear" under the Hague Evidence Convention); see also 28 U.S.C. s. 1782, which permits judicial assistance pursuant to requests made "by a foreign or international tribunal," but does not explicitly discuss arbitration proceedings.

⁴ 469 F.Supp.2d 1221 (D. Ga. 2006) [hereinafter *Roz Trading*].

⁵ 28 U.S.C. sec. 1782.

Departing from the views of several federal appellate courts, the court in *Roz Trading* interpreted the term “foreign or international tribunal” to encompass a private international arbitral tribunal (specifically the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna). Notably, the petition does not—and need not—come from the tribunal itself but can be initiated by a party. Consequently, if upheld, *Roz Trading* has the potential to alter dramatically the discovery dynamics of an international arbitration and provide a powerful tool where one of the parties seeks information from an opponent (or a third party) located in the United States.

This article addresses the issues implicated in *Roz Trading*. Initially, it provides the essential background on the relevant statute. It then summarizes the extant jurisprudence interpreting the question at issue in *Roz Trading*. It concludes with an analysis of the issue, rejecting the view expressed in *Roz Trading* and arguing that a private international tribunal does not constitute a “foreign or international tribunal” under the statute.

I. BACKGROUND

The federal statute at issue in *Roz Trading*, 28 U.S.C. section 1782(a), provides, in relevant part, as follows:

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

Such judicial assistance for foreign tribunals has, in some form, been part of the law of the United States for nearly 150 years. Originally, in the middle of the nineteenth century, U.S. law authorized judicial assistance in response to letters rogatory, formal requests sent by another country’s courts.⁶ Among other things, courts could appoint commissioners to examine witnesses and could compel witnesses to provide testimony for use in certain foreign lawsuits.⁷ A series of amendments adopted in the middle of the twentieth century expanded the scope of judicial assistance.⁸ In 1949, Congress authorized courts

⁶ Act of March 2, 1855, Ch. 140, sec. 2, 10 Stat. 630; Act of March 3, 1863, Ch. 95, sec. 1, 12 Stat. 769.

⁷ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–48 (2004) [hereinafter “*Intel*”].

⁸ *Id.* at 248–49.

to appoint persons to preside at depositions in any “judicial proceeding pending in any court in a foreign country with which the United States is at peace.”⁹

In 1964, Congress made the critical changes that gave rise to the interpretive question in *Roz Trading*. That year, acting in response to a multi-year study of the congressionally created Commission on International Rules of Judicial Procedure, Congress revised the law governing judicial assistance. Specifically, it amended the description of proceedings to which judicial assistance could be offered. Removing the language that limited assistance to pending “judicial proceeding[s],” the new law authorized assistance “in a proceeding in a foreign or international tribunal.”¹⁰ The legislative history accompanying these amendments is sparse. It is silent on the question whether Congress intended to include arbitral bodies within the definition of “foreign or international tribunal.” Rather, it simply suggests that Congress did not want to limit the assistance to court proceedings but, instead, wanted to extend it to “administrative and quasi-judicial proceedings” as well.¹¹

Thus, the term “foreign or international tribunal,” the key phrase at issue in *Roz Trading*, resulted from a comprehensive overhaul in 1964 of the federal statute governing international judicial assistance. That overhaul continued a tradition of steadily expanding the extent to which Congress would authorize U.S. courts to provide judicial assistance to foreign proceedings. Having canvassed the statutory background, this article now turns to the extant jurisprudence.

II. JURISPRUDENCE

The Supreme Court, of course, has not squarely addressed the question.¹² It has, however, interpreted the term in another context, and that interpretation sheds light on whether an international arbitral panel falls within section 1782’s ambit. Additionally, several lower court decisions have considered the issue in *Roz Trading* and reached conflicting conclusions. This section reviews that jurisprudence.

⁹ Act of May 24, 1949, Ch. 139, sec. 93, 63 Stat. 103, discussed in *Intel*, *supra* note 7, 542 U.S. at 248.

¹⁰ Act of October 3, 1964, Pub. L. 88-619, sec. 9, 78 Stat. 997.

¹¹ S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964); H. R. Rep. 1052, 88th Cong., 1st Sess., 9 (1963), both discussed in *Intel*, *supra* note 7, 542 U.S. at 249. In 1996, Congress elaborated on the term “foreign or international tribunal” to include “criminal investigations conducted before formal accusation.” See *Intel*, 542 U.S. at 249.

¹² For commentary on the issue, see Barry H. Garfinkel & Timothy G. Nelson, *Sweet Georgia: Roz Trading Upholds the Use of Section 1782 in Aid of Foreign Private Arbitration*, 22 MEALEY’S INT’L ARB. REP. 1 (No. 1, 2007); Daniel A. Losk, Note, *Section 1782A After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035 (2005); 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 (2003); *Discovery Assistance and “Private Foreign Arbitrations,”* 10 WORLD ARB. & MED. REP. 119 (1999); Bruce I. McDaniel, *What is Foreign “Tribunal” Within 28 U.S.C.A. §1782 (as Amended in 1964) for Use in Which District Court May Issue Discovery Orders in Response to Letters Rogatory*, 46 A.L.R. FED. 956 (2007); Scott R. Boesel, Note, *Arbitration Bodies Should be Considered Tribunals under §1782*, 63 ALB. L. REV. 637 (1999); Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 SYRACUSE J. INT’L L. & COM. 1 (1998); Jonathan Clark Green, *Are International Institutions Doing Their Job?*, 90 AM. SOC’Y INT’L L. PROC. 62 (1996); Walter B. Stahr, *Discovery Under 28 U.S.C. §1782 for Foreign and International Proceedings*, 30 VA. J. INT’L L. 597 (1990); Peter F. Schlosser, *Coordinated Transnational Interaction in Civil Litigation and Arbitration*, 12 MICH. J. INT’L L. 150 (1990).

The Supreme Court offered its first authoritative interpretation of section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*, a 2004 decision. *Intel* involved a section 1782 petition filed by Advanced Micro Devices (AMD) with a federal court in California, where Intel was headquartered. AMD sought documents from Intel to support an anti-trust investigation by the European Commission. Interestingly, the European Commission's Directorate-General for competition had declined to seek judicial assistance in the United States, prompting AMD to file its own petition. Intel resisted the petition on various grounds, and the Supreme Court ultimately rejected most of them.¹³

Of most relevance to this article, the Court held that the European Commission qualified as a "foreign or international tribunal." The Court noted that the Commission developed the record which would eventually be used by the European Court of First Instance and European Court of Justice. But the Court made it abundantly clear that the Commission's status as a "tribunal" under section 1782 did not turn on the eventual use of its findings by the European courts. Instead, relying on the above-cited legislative history, the Court found that the Commission constituted the sort of "administrative or quasi-judicial agency" whom Congress intended to cover in the 1964 amendments. Immediately after citing this legislative history, the Court gave one small clue, perhaps unintended, as to its view on the question whether the term "tribunal" also included arbitral panels. The Court quoted, presumably with approval, from a passage from Professor Smit's treatise on international litigation in which Professor Smit states that "[t]he term tribunal ... includes investigating magistrates, administrative and *arbitral tribunals*."¹⁴ Thus, *Intel* arguably offers conflicting clues to the question presented by *Roz Trading*—its emphasis on administrative and quasi-judicial bodies does not easily encompass private arbitral tribunals, but its favorable citation to Professor Smit's treatise suggests the opposite result.

Decisions from the lower federal courts divide over the question. Two reported appellate decisions, both pre-dating *Intel*, hold that private arbitral bodies do not constitute "tribunals" within the meaning of section 1782.¹⁵ Generally speaking, this line of authority ("the *NBC-Biedermann* position") finds the term "tribunal" sufficiently ambiguous to justify a resort to legislative history and policy.¹⁶ After justifying that move, they then advance three main lines of argument. First, they note that while the legislative history behind the 1964 amendments is replete with references to governmental entities, it lacks any explicit reference to private dispute resolution proceedings.¹⁷ From this lacuna in the legislative history, these courts draw the conclusion that Congress did not intend section 1782 to cover private arbitral proceedings. Secondly, they note that another statutory predecessor to the 1964 amendments used the term "international tribunals"

¹³ The Court did not order the discovery to occur. Instead, it said that this decision rested with the trial court's discretion and articulated a series of factors that the trial court should consider. It then remanded the case so the trial court could exercise its discretion by applying those factors.

¹⁴ *Intel*, *supra* note 7, 542 U.S. at 258 (emphasis added).

¹⁵ See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) [hereinafter "*NBC*"]; *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir., 1999) [hereinafter "*Biedermann*"].

¹⁶ *NBC*, *supra* note 15, 165 F.3d at 188; *Biedermann*, *supra* note 15, 168 F.3d at 882.

¹⁷ *NBC*, *supra* note 15, 165 F.3d at 188–90; *Biedermann*, *supra* note 15, 168 F.3d at 881–82.

and, in that context, clearly meant only governmental entities, not private ones.¹⁸ Thirdly, these courts appeal to considerations of policy, specifically the “efficiency and cost-effectiveness” that underpin arbitration.¹⁹ In their view, permitting judicially managed discovery under section 1782 would be expensive and time-consuming, undermining some of the key advantages of arbitration over ordinary civil litigation.

In contrast, *Roz Trading* holds that private arbitral bodies do constitute a “tribunal” under section 1782.²⁰ This case stresses the “plain meaning” of tribunal which in their view clearly includes private arbitral bodies.²¹ It also invokes the legislative history but gives it a different interpretation from the cases described in the preceding paragraph: the purpose behind the 1964 amendments was to expand the scope of section 1782, and interpreting “tribunal” to encompass arbitral bodies is consistent with that purpose; had Congress intended to limit the scope of section 1782 to governmental bodies, it would have included the term “governmental” in the relevant statutory phrase.²² Finally, *Roz Trading* analogizes private arbitral tribunals to the EC Competition Directorate at issue in *Intel*: both bodies are “first-instance decisionmakers” whose decisions are ultimately reviewable in court.²³ Courts rejecting section 1782’s application concluded too hastily that the term “tribunal” was ambiguous and read the legislative history in a manner inconsistent with *Intel*. Their reliance on the statutory predecessors to the 1964 amendments was misguided—while some of the statutory predecessors clearly were designed exclusively for governmental bodies, the statutes expressly used language marking that limitation, language missing in the current version of section 1782.²⁴

III. COMMENTARY

While most commentators like the court in *Roz Trading* have taken the view that section 1782 does include international tribunals, I believe that the contrary reading—the one adopted in *NBC* and *Biedermann*—is the better reading of the statute. In this final section, I lay out my reasons for that position.

Begin with the text of the statute. Admittedly, this is probably the strongest argument for the *Roz Trading* apologists. Several authorities do support the position that “tribunal” includes a private arbitral tribunal, and if that textual meaning is unambiguous, then the Supreme Court has instructed, the inquiry is at an end.²⁵

¹⁸ *NBC*, *supra* note 15, 165 F.3d at 189. That statutory predecessor, 22 U.S.C. sec. 270–270g, authorized certain commissioners or international tribunals to administer oaths and subpoena witnesses and records. Enacted in response to an arbitration between the United States and Canada, this law left no doubt that Congress meant governmental, not private, entities.

¹⁹ *NBC*, *supra* note 15, 165 F.3d at 190; *Biedermann*, *supra* note 15, 168 F.3d at 883.

²⁰ *Roz Trading*, *supra* note 4, 449 F.Supp.2d at 1221. Another case holds that an arbitral body organized pursuant to a bilateral investment treaty constitutes a “foreign” tribunal pursuant to sec. 1782. In re *Oxus Gold*, Misc. No. 06-82-GEB, 2007 WL 1037387 (D.N.J. April 2, 2007).

²¹ *Roz Trading*, *supra* note 4, 469 F.Supp.2d at 1225–26.

²² *Id.* at 1226.

²³ *Id.* at 1224–25.

²⁴ *Id.* at 1227 n.5.

²⁵ *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992).

There are, however, at least three problems with the textual argument. The first problem is that the statute does not actually define “tribunal” so any interpretation of the term must, at most, be inferred from the statutory structure, its use in other laws and judicial interpretation of the term. This leads to the second problem: while supporters of the *Roz Trading* position cite several instances where “tribunal” was used to mean arbitral panel, many of those instances postdated the enactment of the 1964 amendments and, *a fortiori*, could not have been within Congress’s contemplation when it enacted the statute. To be sure, some of the sources do predate the 1964 amendments, but, once the after-enacted authority is stripped out, the “traditional” meaning of “tribunal” is not so well established.

A third and final problem with the textual argument is that it over-emphasizes the term “tribunal” to the exclusion of its surrounding terms. Recall that the statute permits discovery for use in a “foreign or international” tribunal. The quoted term implies that the statute covers two types of tribunals: “foreign” ones and “international” ones. The two do not overlap entirely (as suggested by the use of the conjunction “or”). Foreign likely refers to a foreign state, as that term commonly was understood at the time.²⁶ International, to have independent meaning, must cover some other set of entities. It could mean transnational entities, like the interstate tribunals set up to resolve property disputes between nations. Alternatively, it could mean any entity not attached to a particular state, which then might encompass private arbitral bodies. At best, therefore, one can conclude that the text is inconclusive or, perhaps, tips slightly in favor of the *Roz Trading* camp. But the textual hints are not sufficient enough to make a compelling case for an unambiguous interpretation.

What about the statutory structure? Here the critical issue seems to be the interplay between section 1782 and section 7 of the Federal Arbitration Act (which authorizes arbitrators sitting in the United States to issue subpoenas). Defenders of the *Roz Trading* position disparage any claim of “discrimination” between domestic arbitration (where there is no functional equivalent to section 1782) and international arbitration (where section 1782 could be available). In my view, that straw-man argument misses the point. Rather, section 7 reveals something about how Congress sought to regulate discovery and subpoena power in arbitration. The telling feature of section 7 is that the arbitrator serves as the gatekeeper to the exercise of the subpoena power; unlike in civil litigation where parties easily can complete a subpoena without the need for judicial oversight at the issuance stage.²⁷ Under the *Roz Trading* view of section 1782, arbitrators exercise no such oversight. So the question becomes: why would Congress accord greater power to parties in an arbitration taking place abroad than they do the parties in an arbitration taking place in the United States and subject to U.S. judicial oversight? Defenders of the *Roz Trading* view offer no meaningful explanation for this anomaly created by their reading.

²⁶ See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. sec. 1603(a), in which “foreign state” is defined to encompass “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.”

²⁷ Of course, courts later evaluate the propriety of the subpoena when ruling on a motion to compel or motion for a protective order.

Now consider legislative history. Unfortunately, both sides agree that it too does not shed much light on the matter. It appears that Congress at least did not contemplate one way or another whether to include arbitral tribunals within the ambit of section 1782. The *NBC-Biedermann* position sees this silence as inconclusive. While the *Roz Trading* position teases out of the legislative history a desire to broaden the statute's ambit, that argument proves too much. If Congress simply intended to broaden section 1782, then it would not include any words of limitation within the statute itself. Terms such as "interested person," "for use" or "foreign or international tribunal" would have been wholly unnecessary. It simply could have provided for any person to request a subpoena from a district court. That example might seem extreme, but it proves the point: that Congress clearly made a measured, but not limitless, expansion of a district court's subpoena power when it amended section 1782, and one would have expected to see some reference to arbitral tribunals if they had been intended to be part of this measured expansion.

If text, history and structure do not answer the question, then one must resort to policy considerations. (Of course, one principled view would be that such policy considerations are better left to the legislature in which case the *NBC-Biedermann* position would set an appropriate default rule to spark that legislative weighing of policy.) But even assuming the legitimacy of policy considerations to the question of statutory interpretation, the picture is not as rosy as defenders of the *Roz Trading* position would suggest.

Defenders of the *Roz Trading* position will argue that interpreting section 1782 will "support" the arbitral process because it will provide tribunals access to relevant information (and who can be opposed to the search for the truth?!). Contrary to their suggestions, interpreting section 1782 to encompass arbitration could be quite destructive, undercutting two hallmarks of arbitration—consent and procedural flexibility. Consent refers to the parties' mutual agreement to submit to arbitration and to be bound by the arbitrator's procedural and substantive decisions, a hallmark of most arbitrations. Procedural flexibility refers to the fact that most procedural aspects of the arbitration are left to the arbitrator's discretion unless the parties have specified the procedural norms in their arbitration agreement. Interpreting section 1782 to allow parties to compel the production of witnesses or documents in support of an international arbitration undermines these principles. As the *Roz Trading* case illustrates, the language of section 1782 is not limited to the parties themselves but supports compulsory discovery against non-parties as well. Compelling such discovery in support of arbitration against entities that are not parties to the arbitration undermines the principle of consent. Allowing courts to manage such discovery undermines the procedural flexibility underpinning arbitration.

Even where section 1782 is simply being invoked against a party to the arbitration, problems remain. Most centrally, the *Roz Trading* position creates a system of non-reciprocal discovery rights. The foreign party can obtain compulsory access to the documents and witnesses of the U.S. party. Yet the U.S. party cannot obtain comparable discovery against the foreign party unless, by chance, the foreign party happens to reside in a jurisdiction with an analogue to section 1782 or the arbitrator orders such discovery (a dicey proposition

if the parties have not authorized it as it might call into doubt the enforceability of any award). The upshot is that interpreting section 1782 to encompass arbitration creates asymmetrical discovery rights that the foreign party can use as leverage (either through a subpoena on its U.S. opponent or a related third party of the U.S. opponent) and then exploit that leverage for settlement purposes.

Defenders of the *Roz Trading* position also argue that it promotes principles of comity, that it somehow might inspire foreign courts to extend similar assistance to an arbitration taking place in the United States. This argument suffers from several problems. For one thing, there is no empirical evidence bearing it out. For another thing, the experience in related fields suggests that foreign countries may be reluctant to follow the "example" set by the United States. The Hague Evidence Convention similarly provides a mechanism by which courts of one country can permit evidence to be taken in their territory, thereby supporting judicial proceedings in another country.²⁸ While the United States has liberal rules permitting pre-trial discovery, most countries do not, and Article 24 of the Convention permits countries to declare an exception under which they will not provide pre-trial discovery in support of a proceeding in the United States. Perhaps unsurprisingly, most signatories to the Hague Evidence Convention have deposited declarations under Article 24, thereby precluding pre-trial discovery in their territories. Apparently, they were not inspired by the United States' more liberal example, and there is no reason to believe that the liberal interpretation of section 1782 offered by *Roz Trading* will receive any warmer a reception.

In short then, most of the interpretive tools counsel against the *Roz Trading* position. Yet, the analysis cannot end here. *Intel* opens another avenue of defense for *Roz Trading*, one advanced forcefully by Professor Smit in an article that he wrote shortly before *Intel's* release.²⁹ That argument rests on the substantial discretion accorded to the district court to decide whether to issue the section 1782 subpoena. According to this argument, the district court's discretion will enable it to ferret out the valid exercises of section 1782 power from the oppressive ones and, thereby, realize the information-yielding advantage of the section 1782 subpoena while hedging against some of the above-described risks.

At first, I confess that this argument stopped me in my tracks. Who can be opposed to district courts' exercising their discretion? So long as they are the gatekeepers, courts can check reckless parties from abusing the section 1782 power to oppress their opponents or unwitting third parties. As I reflected further on the idea, though, I ultimately concluded that the argument from discretion does not rescue the *Roz Trading* position for three main reasons.

First, a discretionary system can be time-consuming and expensive. While a discretionary system might weed out the unjustified section 1782 requests, that will not be a costless undertaking. For one thing, the party opposing the section 1782 request will bear the burden of attorneys' fees trying to persuade the judge to quash the subpoena. Since

²⁸ Born & Rutledge, *supra* note 1.

²⁹ Smit, *supra* note 12.

the U.S. rule will apply to attorneys' fees, the target will bear those fees itself and, except in the most frivolous cases, will not be entitled to reimbursement. For another thing, regardless of the trial judge's decision, the parties will bear the added costs of an appeal, again with any fee shifting highly unlikely. Finally, apart from the monetary expense, the discovery dispute runs the risk of slowing down the arbitration, as the arbitrators may be reluctant to complete their hearings until the party seeking the discovery has had a full opportunity to obtain it.

Secondly, the discretionary system envisioned by *Intel* does not map easily onto arbitration. *Intel* identified several criteria to guide a district court's decision whether to grant the section 1782 petition: (1) whether the subpoena target is a party to the proceeding (in the Supreme Court's view, assistance is more proper when the target is a non-party); (2) the nature of the foreign tribunal; (3) the character of the proceedings abroad and (4) the receptivity of the foreign entity to the assistance sought from the U.S. court. At least two of these factors—the first and the fourth—are problematic in the context of arbitration. The first factor is problematic for reasons already described: an arbitration is generally a consensual undertaking so forcing a non-participant to provide information in support of the arbitration is fundamentally at odds with its consensual nature. The fourth factor is also problematic. It presupposes that the entity itself (such as the European Commission) will express its view in the section 1782 proceeding. How would this work in arbitration? While a government agency routinely takes litigating positions, tribunals virtually never do; it would seemingly be entirely at odds with their role of remaining neutral between the parties. That adversarial nature could also jeopardize the enforceability of an eventual award.

Thirdly, even if *Intel's* discretionary model could be adapted to arbitration, it is too unpredictable.³⁰ Here the other *Intel* factors become relevant. *Intel* does not shed a great deal of light on how the nature of the tribunal or the character of the proceedings affects the availability of section 1782 relief. Nor, like any multifactor balancing test, does it provide a great deal of guidance about how a court is supposed to balance the factors, particularly where they do not all cut in the same direction. This unpredictability is bound to exacerbate protracted litigation over the section 1782 subpoenas and, thereby, further bogs down the arbitration in parallel proceedings.

This is not to say, of course, that the discretionary system is irreparably flawed. As I mentioned at the outset, I think it is a compelling argument for why we might be willing to allow arbitrations within the ambit of section 1782 and then permit the district judges to serve as gatekeepers filtering out the requests. However, my point is simply that the argument from discretion is not a panacea and, despite its appeal, cannot overcome the significant textual, historical and policy-based problems with the *Roz Trading* position.

³⁰ Daniel A. Losk, *Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035 (2005).

IV. CONCLUSION

In sum, the question whether an arbitral tribunal falls within the ambit of section 1782 is one of growing importance, particularly after the *Intel* decision. While there may well be appealing arguments for interpreting the term “foreign or international tribunal” so broadly, closer examination of those arguments reveals deep flaws. The better reading of the statute is the one offered by the courts in *NBC* and *Biedermann*: that the term does not encompass private arbitral tribunals. Such expansion of the statute is better left to the considered judgment of Congress, not to the courts.