

# A PROPOSAL TO CLARIFY U.S. LAW ON JUDICIAL ASSISTANCE IN TAKING EVIDENCE FOR INTERNATIONAL ARBITRATION

*Daniel J. Rothstein\**

## I. INTRODUCTION

Since at least 1989, courts and commentators have debated whether 28 U.S.C. § 1782, which allows parties to a proceeding before a “foreign or international tribunal” to request assistance from U.S. district courts in obtaining evidence, is available in a private arbitration.<sup>1</sup> The main disputed questions have been (a) whether assistance for private arbitration is contemplated by the term “foreign or international tribunal” and § 1782’s legislative history; and (b) whether § 1782 helps or hinders international arbitration in light of (i) the possibility that parties will apply for assistance without the arbitrators’ approval and (ii) the differences between disclosure in U.S. courts and in international arbitration.

These issues are now before the United States Court of Appeals for the first time since the Supreme Court’s 2004 decision that sparked the latest round of the debate, *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>2</sup> This article attempts to contribute to a resolution of the controversy by arguing as follows:

Judicial assistance in obtaining evidence is needed in order for international arbitration to be effective. Section 1782, as applied by some courts, offers the necessary assistance, but also threatens to disrupt arbitral proceedings by allowing parties to request assistance without the arbitrators’ approval. Also, the unresolved questions about § 1782’s applicability to private arbitration create a risk that if arbitrators prevent assistance under § 1782, enforcement of the arbitral award will be refused on the ground that the party that requested disclosure in the United States was denied the right to present its case in the arbitration. Therefore, the question of § 1782’s applicability to private arbitration needs to be resolved. (Section II)

The language and legislative history of § 1782 suggest that it was not intended to be used for private arbitration. (Section III.A) The absence of such intent is

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\* Attorney at Law, New York, NY. The author thanks Rodger Citron for comments on the concept and a draft of this article.

<sup>1</sup> Early discussions of the issue include Hans Smit, *A-National Arbitration*, 63 TULANE L. REV. 629, 639 (1989); *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994); New York State Bar Association, Commercial and Federal Litigation Section, International Litigation Committee, *The Federal Assistance Statute: 28 U.S.C. Section 1782 and its Application to International Arbitration*, at 2 (1993) (noting absence of reported decisions on the issue), available at [www.nysba.org](http://www.nysba.org) – Sections/Committees – Commercial and Federal Litigation Section – Committee on International Litigation – Reports. As one court noted, “the majority view of commentators” is “that private commercial arbitrations are within § 1782.” *Republic of Kazakhstan v. Biedermann*, 168 F.3d 880, 882 n.5 (5<sup>th</sup> Cir. 1999).

<sup>2</sup> 542 U.S. 241 (2004).

also suggested by evidence, first addressed in this article, of the state of U.S. law on international arbitration when the modern version of § 1782 was enacted in 1964. Most importantly, at that time the United States had declined to join the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) because of fundamental misgivings about international commercial arbitration, as expressed by the U.S. delegation to the 1958 U.N. arbitration conference. (Section III.B) The delegation’s Official Report, previously unpublished, is reproduced in this issue of the *Review*.

Section IV proposes changes to the law on international assistance in taking evidence for arbitration—in federal legislation or court rules, state law, the Hague Evidence Convention, the UNCITRAL Model Law on International Arbitration, arbitration procedure rules and other private agreements.

## II. THE NEED FOR INTERNATIONAL JUDICIAL ASSISTANCE: IS § 1782 A REMEDY?

### A. *The Need for International Judicial Assistance in Arbitration*

In order for arbitration to be effective, there must be compulsory means for obtaining evidence that the arbitrators deem necessary. This need is widely recognized in arbitration legislation. For example, under the U.S. Federal Arbitration Act, arbitrators can summon witnesses to testify and produce documents, and an uncooperative arbitration witness is subject to the same judicial means of compulsion and punishment as an uncooperative court witness.<sup>3</sup> Similarly, the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by over 50 countries and six of the United States,<sup>4</sup> provides: “The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.”<sup>5</sup>

One of the main attractions of international arbitration—that it can be held on neutral territory, in a country where none of the parties are based—creates a problem in gathering evidence. When the parties are not based in the arbitral forum, the courts there have little ability to force them to produce evidence.<sup>6</sup> Also, non-parties are usually outside the forum courts’ jurisdiction, and are not

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<sup>3</sup> Federal Arbitration Act, Pub. L. 401, ch. 213, § 7, 43 Stat. 883, 884 (1925), *codified at* 9 U.S.C. § 7 (2008).

<sup>4</sup> See United Nations Commission on International Trade Law, *Status: 1985 – UNCITRAL Model Law on International Commercial Arbitration*, available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

<sup>5</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Art. 27.

<sup>6</sup> “As the place of arbitration is often chosen because of its neutrality, evidence will normally be ‘located’ outside of that place. However, it will be essential for the tribunal to have access to such evidence in order to ascertain the relevant facts.” JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 580 (2003).

susceptible to pressure that arbitrators can apply to parties, such as negative inferences for failing to provide evidence.<sup>7</sup>

Assistance in taking evidence may be available through an international request by a court in the arbitral forum, but this process is slow. For example, under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the “Hague Evidence Convention”), such a request would take the following route:

- (1) from arbitral proceedings,
- (2) to court in arbitral forum,
- (3) to Central Authority in assisting state,
- (4) to assisting court,
- (5) back to Central Authority in assisting state,
- (6) to court in arbitral forum,
- (7) to arbitral proceedings.

Out of thirty Hague Evidence Convention member countries that answered a question on the subject, only two reported that they had used the Convention to request evidence for arbitral proceedings at any time during 2002-2007.<sup>8</sup> One reason must be that even in non-arbitration contexts, execution of requests under the Convention typically takes up to six months, and often up to a year.<sup>9</sup> In the arbitration scenario outlined above, additional time would be needed for transmittal from the arbitration to the local court and back (steps 2 and 6).<sup>10</sup>

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<sup>7</sup> See, e.g., UNCITRAL ARBITRATION RULES, Art. 28.3: “If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.”

<sup>8</sup> Hague Conference on Private International Law, *Preliminary Document No. 8, Synopsis of Responses to Questionnaire of May 2008 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters (Evidence Convention)* (Jan. 2009), at 40 (concerning question No. 23), available at [www.hcch.net](http://www.hcch.net) – Conventions – No. 20 (Evidence Convention) – Questionnaires & Responses.

<sup>9</sup> Hague Conference, *Preliminary Document No. 12, Summary of Responses to the May 2008 Questionnaire Relating to the Evidence Convention, with Analytical Comments* (Jan. 2009), at 17, Figures 4-6 & ¶¶ 65-68 (concerning questions Nos. 6-8), available at [www.hcch.net](http://www.hcch.net), *supra* note 8.

<sup>10</sup> Almost half of the Hague Evidence Convention member countries require that requests be issued by the Central Authority, creating yet another step. See *id.* at 39-40, ¶¶ 172-73 (concerning question No. 38).

B. *Section 1782: The Conflict between the Arbitrators' Control and the Parties' Right to Present Their Case*

One way to provide faster access to evidence outside the arbitral forum is to allow a direct request from the arbitrators or the parties to the court where the evidence is located. Some courts have held that such assistance to private arbitration is available under § 1782. This view is based on an interpretation of the provision “foreign or international tribunal” that includes private arbitration. Section 1782 provides:

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 . . . 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 . . . .<sup>11</sup>

Applying § 1782 to private arbitration creates certain problems. The main problem, from which most others flow, is that § 1782 allows “any interested person” to make the request to the court.<sup>12</sup> Thus, parties can make a request without the arbitrators’ approval. This is contrary to one of the fundamental rules of arbitration, that the arbitrators decide procedural questions, which is especially important with regard to obtaining evidence.<sup>13</sup> A related problem is that a request under § 1782 can be made before foreign proceedings have begun.<sup>14</sup> If a § 1782 request is made before the arbitrators have decided on the schedule of the arbitration and the evidence to be taken, the parties can usurp control over the arbitral proceedings. Furthermore, under § 1782 the court can grant the full range of discovery under the Federal Rules of Civil Procedure,<sup>15</sup> whereas disclosure in

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<sup>11</sup> Pub. L. 88-619, § 9(a), 78 Stat. 997 (1964), *codified as amended at* 28 U.S.C. § 1782(a) (2008) (emphasis added).

<sup>12</sup> A party is of course an “interested person” under § 1782. *Intel*, 542 U.S. at 256-57.

<sup>13</sup> The explanatory notes to the UNCITRAL Model Law emphasize that the arbitrators’ control over requests for judicial assistance is designed to limit resort to courts:

Recent amendments to arbitration laws reveal a trend in favor of limiting court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

UNCITRAL Secretariat, *Explanatory Note on the 1985 Model Law on International Commercial Arbitration, as amended in 2006*, ¶ 15.

<sup>14</sup> *Intel*, 542 U.S. at 258-59.

<sup>15</sup> “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

international arbitration is usually much narrower.<sup>16</sup> For example, the recently adopted disclosure guidelines of the American Arbitration Association's international division, the International Centre for Dispute Resolution, state: "Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining evidence in international arbitration."<sup>17</sup> Finally, court disputes over § 1782 requests can be costly and delay the arbitration.

Thus, § 1782 presents a dilemma: it offers access to necessary evidence, but it can also lead to the kind of multi-forum battle that international arbitration is supposed to prevent. This conflict between the arbitrators' control over procedure and the parties' right to present their case, which have been called "key" elements of the "Magna Carta of Arbitral Procedure,"<sup>18</sup> is one reason why courts have disagreed over § 1782's applicability to private arbitration.

Approximately ten reported decisions have addressed whether § 1782 assistance is available for private arbitration, including decisions by the Second and Fifth Circuit Courts of Appeals in 1999, both of which held that it is not available.<sup>19</sup> The decisions have focused on the issues mentioned above—efficiency, arbitrators' control of proceedings, and parties' need for evidence—and on the language and legislative history of § 1782, which will be discussed in Section III below.

In 2004, in *Intel*, the only Supreme Court decision focusing on § 1782, the Court ruled that a European Commission competition proceeding was a "proceeding in a foreign . . . tribunal" under § 1782. The Supreme Court quoted

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the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a).

<sup>16</sup> "Expansive American- or English-style discovery is generally inappropriate in international arbitration." International Bar Association Working Group on Arbitration and ADR, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, at 5 [undated], Commentary 2.a to Article 3 (Production of Documents). See also International Centre for Dispute Resolution (ICDR), *Guidelines for Arbitrators Concerning Exchanges of Information*, Introduction (effective May 31, 2008), available at [www.adr.org/si.asp?id=5288](http://www.adr.org/si.asp?id=5288):

[C]ommercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts. While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness in those systems, but which are not appropriate to the conduct of arbitrations in an international context . . . .

<sup>17</sup> ICDR Guidelines, *supra* note 16, Sec. 6(b). Similarly, the IBA Rules on the Taking of Evidence in International Commercial Arbitration do not mention depositions.

<sup>18</sup> HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 550, 564 (1989) [hereinafter MODEL LAW LEGISLATIVE HISTORY].

<sup>19</sup> *National Broadcasting Corp. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann*, 168 F.3d 880 (5<sup>th</sup> Cir. 1999).

an article that the principal drafter of § 1782, Professor Hans Smit, published in the *Columbia Law Review* in 1965, the year after § 1782 was amended. The quoted passage from Professor Smit's article, which discusses the amendments, states: "The term 'tribunal' [in § 1782] . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."<sup>20</sup>

Four trial courts, relying on *Intel's* mention of "arbitral tribunals," have held that § 1782 applies to private arbitration.<sup>21</sup> One court, however, held that *Intel's* mention of "arbitral tribunals" was not a ruling or even *dicta* on the question of assistance to private arbitration.<sup>22</sup> The issue is on appeal in the Third and Fifth Circuits from opposite decisions on applications arising from the same foreign arbitration.<sup>23</sup> Courts have also disagreed as to whether, assuming that § 1782 assistance is available for private arbitration, the request can be made without the arbitrators' approval.<sup>24</sup>

Because of the lack of clarity regarding (i) § 1782's applicability to private arbitration, and (ii) the parties' right to make a § 1782 request without the

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<sup>20</sup> *Intel*, 542 U.S. at 258 (quoting Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n. 71 (1965)) (emphasis added). Cf. Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in The United States of America*, 32 J. BAR ASS'N D.C. 24, 28, 32 (1965) (explaining "tribunal" under § 1782, with no mention of arbitral tribunals; also explaining that in deciding whether to grant assistance, court "may consider the nature and attitudes of the foreign government") (emphasis added). Amram chaired the Advisory Committee to the Congressional Commission that proposed the amendments to § 1782. See *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, 88<sup>th</sup> Cong., 1<sup>st</sup> Sess., H.R. Doc. No. 88, at viii (1963). On the creation and work of the Commission, see *infra* notes 33-37 and accompanying text.

<sup>21</sup> See *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008); *Comisión Ejecutiva Hidroeléctrica del Río Lempa v. Nejapa Power Co.*, 2008 WL 4809035 (D. Del. 2008), *appeal pending*, No. 08-3518 (3d Cir.); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). Cf. *In re Oxus Gold PLC*, 2007 WL 1037387, \*4-5 (D. N.J. 2007) (although parties private, assistance available because arbitration was "conducted within a framework defined by two nations," a bilateral investment treaty).

<sup>22</sup> *La Comisión Ejecutiva Hidroeléctrica del Río Lempa v. El Paso Corp.*, 2008 WL 5070119 (S.D. Tex. 2008), *appeal pending*, No. 08-20771 (5<sup>th</sup> Cir.).

<sup>23</sup> *Id.*; *Nejapa Power Co.*, 2008 WL 4809035 (D. Del. 2008), *appeal pending*, No. 08-3518 (3d Cir.).

<sup>24</sup> See *Nejapa Power*, 2008 WL 4809035 (granting discovery although arbitrators' position on request unclear); *Roz Trading*, 469 F. Supp. 2d at 1229-30 (granting discovery although not first sought through arbitration proceedings, and arbitration rules provided only for application to local court by arbitrators). *Contra Babcock*, 583 F. Supp. 2d at 241 (denying discovery because "neither party has presented 'authoritative proof' regarding the receptivity of the ICC to the discovery materials requested"); *In re Technostroyexport*, 853 F. Supp. at 697 (denying discovery because "Technostroy has made no effort to obtain any ruling from the arbitrators" that the discovery was needed).

arbitrators' approval, an arbitrator's denial of a request to seek discovery in the United States may cause the arbitral award to be unenforceable. The problem can be illustrated by the following situation:

*A Pennsylvania company brings an arbitration under the UNCITRAL Arbitration Rules against a company organized under the laws of the Magical Land of Marsovia,<sup>25</sup> which recently joined the New York Convention. The Marsovian company asks the arbitrators for time to request evidence in Pennsylvania under § 1782. The arbitrators refuse to allow time for U.S. discovery procedures, but the Marsovian company nevertheless makes a request to the Pennsylvania court under § 1782. The arbitrators render an award in favor of the Pennsylvania company, and the Pennsylvania court dismisses the § 1782 request as moot.*

The Marsovian courts would have plausible grounds to deny enforcement of the award: (1) In light of the possibility that the Pennsylvania court would have ordered production of the evidence, the Marsovian party did not have “a full opportunity” to present its case in the arbitration, as guaranteed by the UNCITRAL Rules.<sup>26</sup> (2) In light of this violation of the UNCITRAL Rules, the award is not enforceable under the New York Convention, because “the arbitral procedure was not in accordance with the agreement of the parties.”<sup>27</sup> A similar argument could be made under other widely used international arbitration rules (for example ICC,<sup>28</sup> ICDR,<sup>29</sup> LCIA,<sup>30</sup> or Stockholm<sup>31</sup>), although under those rules the party's right to present its case is not stated as strongly as in the UNCITRAL Rules.

Clarification of the two disputed issues outlined above—§ 1782's applicability to private arbitration, and the need for the arbitrators' approval for a request under § 1782—would help international arbitration. However, as

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<sup>25</sup> “Pontevedro” in the local language

<sup>26</sup> UNCITRAL ARBITRATION RULES, Art. 15 (“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”).

<sup>27</sup> New York Convention, Art. V(1)(d). Similarly, under Article V(1)(b) of the Convention, an award is unenforceable if a party was “unable to present his case” in the arbitration.

<sup>28</sup> INTERNATIONAL CHAMBER OF COMMERCE, RULES OF ARBITRATION, Art. 15.2 (party has “reasonable opportunity to present its case”) (effective Jan. 1, 1998).

<sup>29</sup> INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL ARBITRATION RULES, Art. 16.1 (party has “right to be heard and is given a fair opportunity to present its case”) (effective March 1, 2008).

<sup>30</sup> LONDON COURT OF INTERNATIONAL ARBITRATION, RULES, Art. 14.1 (party has “reasonable opportunity of putting its case and dealing with that of its opponent”) (effective Jan. 1, 1998).

<sup>31</sup> ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES, Art. 19(2) (party has “reasonable opportunity to present its case”) (effective Jan. 1, 2007).

discussed in Section III, the language and legislative history of § 1782 give the courts insufficient guidance to clarify these issues.

### III. INTERPRETING § 1782: LEGISLATIVE MATERIALS AND CONTEXT

This section briefly presents arguments, most of which have been made elsewhere,<sup>32</sup> that the legislative materials do not show an intention to apply § 1782 to private arbitration (Section III.A). This section also suggests additional reasons to doubt that there was such an intention. First, at the time of the 1964 amendments to § 1782, the United States had not yet become a party to the New York Convention (Section III.B.1). Second, the United States' proposals for the Hague Evidence Convention, which were made soon after the 1964 amendments to § 1782, did not include assistance for arbitration (Section III.B.2). Third, around the time of the work on the 1964 amendments, international assistance in taking evidence for private arbitration was not discussed in the professional literature (Section III.B.3).

#### A. *Legislative Materials*

Section 1782 is the product of a comprehensive revision of U.S. legislation governing international judicial assistance. The revision process began in 1958, when Congress created the Commission on International Rules of Judicial Procedure (“International Rules Commission”) in order to address deficiencies in international cooperation in obtaining evidence, serving documents, and proving documents.<sup>33</sup> It was said at the time that “United States courts neither receive adequate assistance from, nor dispense adequate aid to other nations,” and “no other government [besides the United States] permits such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations.”<sup>34</sup> Columbia Law School established a Project on International Procedure to assist the International Rules Commission. Professor Smit was the Columbia Project’s director and served as

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<sup>32</sup> See *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 188-90, 191-93 (2d Cir. 1999). Other detailed descriptions of the legislative history are found in *In re Letter Rogatory*, 523 F.2d 562, 564-65 (6<sup>th</sup> Cir. 1975); Brief for the United States as *Amicus Curiae* in *Intel*, 2004 WL 214306, at \*\*3-7; New York City Bar Association, Committee on International Commercial Disputes, *28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Litigation—Applicability and Best Practices*, at 2-14 [undated], [www.abcny.org/pdf/report/1782\\_Report.pdf](http://www.abcny.org/pdf/report/1782_Report.pdf).

<sup>33</sup> Pub. L. No. 85-906, 72 Stat. 1743 (1958); S. Rep. No. 85-2392, 85<sup>th</sup> Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 5201, 5201.

<sup>34</sup> Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 516, 538 (1953). When the Commission was created, Jones became its Director. Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 217-18 (1994).

Reporter to the Commission.<sup>35</sup> Ruth Bader Ginsburg, who later wrote the Supreme Court's *Intel* decision, was an associate director of the Project.<sup>36</sup> In 1964, Congress adopted the International Rules Commission's proposals "without change."<sup>37</sup>

Before the 1964 amendments, under various laws in force at various times starting in 1854, federal courts could require that evidence be provided for proceedings (a) in a foreign court, or (b) in an inter-governmental "international tribunal" that arbitrated disputes involving the United States or its nationals.<sup>38</sup> As a result of the 1964 amendments, § 1782 allows the federal courts to require the production of evidence for any "proceeding in a foreign or international tribunal." Section 1782 does not define the terms "foreign . . . tribunal" or "international tribunal." However, the Senate Report that introduced the amendments explains that a "foreign tribunal" refers not only to "conventional courts," but also to other governmental bodies: "investigating magistrates" or a "foreign administrative tribunal or quasi-judicial agency."<sup>39</sup>

As for the term "international tribunal," the Senate Report cites a 1962 article by Professor Smit, which advocated broadening U.S. assistance to inter-governmental "international tribunals":

At the present time, thirty-eight countries, including the United States, have accepted the compulsory competence of the International Court of Justice and a great many more countries are signatories to treaties in some form or other provide for adjudication of disputes with other countries before an international tribunal. The availability of United States assistance in the administration of justice before such tribunals would stress the generally favorable disposition of the United States toward peaceful settlement of international disputes . . . .<sup>40</sup>

In addition to citing Professor Smit's 1962 article, the Senate Report adopted the article's reason for broadening assistance:

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<sup>35</sup> In re Letter of Request from the Crown Prosecution Service of the United Kingdom, 870 F.2d 686, 689-90 (D.C. Cir. 1989) (Ginsburg, J.); Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 AM. REV. INT'L ARB. 153, 154-55 (1997).

<sup>36</sup> Smit, *supra* note 35, at 154; Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 397 (2004).

<sup>37</sup> In re Letter of Request from the Crown Prosecution Service, 870 F.2d at 690 n. 2. On the relationship between Congress and the International Rules Commission, see Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 107-11 (1994).

<sup>38</sup> *NBC*, 165 F.3d at 191-93.

<sup>39</sup> S. Rep. No. 1580, 88<sup>th</sup> Cong., 2<sup>d</sup> Sess., explanatory notes to § 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

<sup>40</sup> Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 COLUM. L. REV. 1264, 1276 (1962), cited in S. Rep. No. 1580, explanatory notes to §§ 3, 9, at 1964 U.S.C.C.A.N. 3784, 3789.

[T]he availability of assistance to international tribunals should not depend on whether the United States has been a party to their establishment or on whether it is involved in proceedings before them. . . . Clearly, the interest of the United States in peaceful settlement of international disputes is not limited to controversies to which it is a formal party.<sup>41</sup>

Thus, the term “international tribunal” in § 1782 still means an inter-governmental tribunal, as it did before the 1964 amendments.

The use of the term “international tribunal” to describe an inter-governmental arbitral body is consistent with the early understanding of international arbitration as dispute resolution by governments. Inter-governmental arbitration accompanied the birth of the United States. After the separation from the United Kingdom, the two countries created *ad hoc* arbitral bodies to hear a number of inter-governmental disputes remaining after the war, as well as certain private disputes that resulted from the separation of their legal systems.<sup>42</sup> In the early twentieth century, when U.S. law first provided for judicial assistance to “international tribunals,”<sup>43</sup> the term “international arbitration” generally referred to inter-governmental disputes. For example, the 1907 Convention for the Pacific Settlement of International Disputes, which the United States signed, provides in Article 37: “International arbitration has for its object the settlement of disputes between States . . . .”<sup>44</sup>

The rather extensive legislative history materials for § 1782 do not mention private arbitration.<sup>45</sup> Nor is it mentioned in the Columbia Project’s publications

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<sup>41</sup> S. Rep. No. 1580, 1964 U.S.C.C.A.N. at 3784-85 (citing Smit, *supra* note 40, at 1267).

<sup>42</sup> J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 1-2, 7-8 (1959).

<sup>43</sup> Smit, *Assistance to International Tribunals*, *supra* note 40, at 1264-67.

<sup>44</sup> Even during the time of the work of the International Rules Commission, “international arbitration” without further description could refer to inter-governmental arbitration. Thus, the 1959 book *International Arbitration - Law and Practice* was devoted solely to “international tribunals,” *i.e.*, inter-governmental tribunals, and observed that “only states have access to international tribunals,” except where that rule was “modified or set aside by treaty.” SIMPSON & FOX, *supra* note 42, at 94. Similarly, a 1960 article entitled *Enforcement of International Judicial and Arbitral Decisions*, by Oscar Schachter, discussed only disputes between countries. 54 AM. J. INT’L L. 1.

<sup>45</sup> The International Rules Commission’s final report includes explanatory notes to the proposed legislation, which were incorporated almost verbatim in the Senate Report introducing the 1964 amendments. *See Fourth Annual Report, International Rules Commission*, *supra* note 20, at 43-47 (notes to proposed amended § 1782). None of the Commission’s annual reports mentioned the possibility of providing assistance for private arbitration. *See id.*; *First Annual Report*, pp. 14-15, 19-20 (1960); *Second Annual Report*, pp. 5-6 (1961); *Third Annual Report*, p. 7 (1962).

on U.S. judicial assistance in connection with its work for the International Rules Commission, either after<sup>46</sup> or before<sup>47</sup> the 1964 amendments were passed.

Of course, “tribunal” in common legal parlance can mean a private arbitral body. But in U.S. federal legislation currently in force, whether enacted before or after the 1964 amendments to § 1782, “tribunal” without elaboration means a U.S. government body,<sup>48</sup> a “foreign” tribunal is governmental,<sup>49</sup> and an “international tribunal” is inter-governmental.<sup>50</sup> Even an arbitral “tribunal” in federal legislation refers to a governmental<sup>51</sup> or inter-governmental body,<sup>52</sup> almost without

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<sup>46</sup> See Hans Smit, *Introduction*, in INTERNATIONAL CO-OPERATION IN EUROPE 1, 6-8 (Hans Smit ed., 1965) (describing amended § 1782).

<sup>47</sup> See HANS SMIT & ARTHUR R. MILLER, INTERNATIONAL CO-OPERATION IN CIVIL LITIGATION – A REPORT ON PRACTICES AND PROCEDURES PREVAILING IN THE UNITED STATES 9-26 (1961); HANS SMIT & ARTHUR R. MILLER, REPORT ON UNITED STATES PRACTICES AND PROCEDURES OF INTERNATIONAL CO-OPERATION RELATING TO SERVICE OF PROCESS AND OBTAINING EVIDENCE ABROAD 6-30 (1961).

<sup>48</sup> See U.S. CONST., Art. 1, § 8 (“Congress shall have power . . . to constitute tribunals inferior to the Supreme Court”); Pub. L. 278, ch. 388, § 204, 61 Stat. 633, 638 (1947), *codified at* 1 U.S.C. § 204 (2008) (use of United States Code in “courts, tribunals, and public offices of the United States”).

<sup>49</sup> See Pub. L. 772, ch. 645, § 3190, 62 Stat. 683, 824 (1948), *codified at* 18 U.S.C. § 3190 (2008) (authentication of documents to be used “by the tribunals of the foreign country”); Pub. L. 94-70, § 5(b), 89 Stat. 385, 387 (1975), *codified at* 16 U.S.C. § 971c (2008) (penalties imposed by a “court or tribunal of a foreign country”). See also Pub. L. 87-187, 75 Stat. 415 (1961), *codified at* 28 U.S.C. § 2414 (2008) (procedure for “payment of final judgments rendered by a State or foreign court or tribunal against the United States”). Since this law concerns claims against the United States, it presumably does not contemplate private arbitral proceedings. See S. Rep. No. 6835, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess., (1961), *reprinted in* 1961 U.S.C.C.A.N. 2439 (describing law’s application to judgments issued by state and foreign governmental bodies).

<sup>50</sup> See Pub. L. 103-236, § 123, 108 Stat. 382, 392 (1994), *codified at* 22 U.S.C. § 2710(c) (2008) (Secretary of State’s procurement of services for proceedings in “international tribunal”).

<sup>51</sup> See Pub. L. 103-198, § 2(a)(2)(a), 107 Stat. 2304 (1993) (“copyright arbitration royalty panels” appointed by Librarian of Congress), *codified as amended at* 17 U.S.C. § 801 (2008) (“copyright royalty judges”).

<sup>52</sup> See UNICEF Convention, Nov. 16, 1945, Art. XIV (disputes over interpretation of Convention referred to International Court of Justice or “arbitral tribunal”), *U.S. accession authorized by* Pub. L. 565, ch. 700, § 1, 60 Stat. 712 (1946), *codified at* 22 U.S.C. § 287m (2008); 2 Pub. L. 89-532, § 3(a), 80 Stat. 344 (1966), *codified at* 2 U.S.C. § 1650a (2008) (enforcement of award of “arbitral tribunal” under Convention for Settlement of Investment Disputes); Pub. L. 96-283, § 102(b)(4), 94 Stat. 553, 559 (1980), *codified at* 30 U.S.C. § 1412(b)(4) (2008) (peaceful resolution of controversies over seabed use, including “arbitration, or resort to agreed tribunals”). See also Pub. L. 94-409, § 3(a), 90 Stat. 1241, 1242 (1976), *codified at* 5 U.S.C. § 552b(c)(10) (2008) (distinguishing between proceedings before “arbitration” and “foreign court or international tribunal” in which U.S. agency participates) (cited in *Application of Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997)).

exception.<sup>53</sup> A private arbitral body, on the other hand, is referred to as “the arbitrators” under the Federal Arbitration Act.<sup>54</sup> Therefore, even if Professor Smit’s 1965 *Columbia Law Review* article were considered part of the legislative materials, the more likely interpretation of his reference to “arbitral tribunals” would be that it meant the same “international tribunals” discussed in his 1962 article that was cited in the Senate Report introducing the 1964 amendments, *i.e.*, inter-governmental tribunals treated in § 1782’s antecedents.

The context of U.S. arbitration law also suggests that § 1782 was not intended to apply to private arbitration. Section 1782 allows requests to be made in any district and, as noted earlier, does not limit the scope or form of discovery that the court can order. Disclosure under the Federal Arbitration Act, which governs arbitration conducted in the United States, is much narrower. For example, under the FAA arbitrators may summon witnesses and documents only in a district where they hold hearings.<sup>55</sup> Pre-hearing depositions are generally not available under the FAA, and the courts are divided over whether arbitrators can compel non-parties to produce documents before a hearing.<sup>56</sup> As the Second Circuit Court of Appeals pointed out, if § 1782 were applied to private arbitration, the inconsistency in disclosure available under the FAA and § 1782 “not only would be devoid of principle, but also would create an entirely new category of dispute concerning . . . the characterization of arbitral panels as domestic, foreign, or international.”<sup>57</sup>

## B. *The State of International Arbitration Law When § 1782 Was Amended*

### 1. *The United States’ Non-Accession to the New York Convention*

The state of development of international arbitration law at the time of the 1964 amendments to § 1782 also suggests that it was not intended to apply to private arbitration. At that time, U.S. federal law and most of the states did not provide for summary enforcement of foreign arbitral awards.<sup>58</sup> The United States

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<sup>53</sup> For a possible exception that refers to a labor arbitration “tribunal,” see Pub. L. 86-257, § 203(c), 73 Stat. 519, 522 (1959), *codified at* 29 U.S.C. § 433(c) (2008). Perhaps this usage reflects government’s extensive involvement in labor arbitration. See William B. Gould IV, *Judicial Review of Labor Arbitration Awards*, 64 NOTRE DAME L. REV. 464, 467-68 (1989) (American labor law is “schizoid,” with labor arbitration “autonomous” but “interfered with by public bodies”).

<sup>54</sup> 9 U.S.C. § 7 (2008).

<sup>55</sup> *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89, 94-96 (2d Cir. 2006).

<sup>56</sup> Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas under U.S. Law and Practice*, 14 AM. REV. INT’L ARB. 197, 205-16, 220-24 (2003).

<sup>57</sup> *NBC*, 165 F.3d at 191.

<sup>58</sup> Martin Domke, *Enforcement of Foreign Arbitral Awards in the United States*, 13 ARB. J. 91, 92 (1958); Martin Domke, *United States*, in INTERNATIONAL COMMERCIAL ARBITRATION, Vol. 1, at 197 (Pieter Sanders ed., 1956), and *id.*, Vol. 3, at 174 (Pieter Sanders ed., 1965). However, agreements to arbitrate abroad were generally enforceable. See Domke, *supra*, 13 ARB. J. at 93.

had several bilateral treaties that prohibited discrimination in the enforcement of arbitral awards issued in the respective countries, but those treaties did not add to state-law enforcement mechanisms; thus, awards from treaty countries were unenforceable in most states.<sup>59</sup>

Most importantly, the United States was not among the twenty-four countries that signed the New York Convention in 1958 or the eleven additional countries that had joined it by the time of the 1964 amendments to § 1782.<sup>60</sup> The U.S. delegation to the U.N. Conference on International Commercial Arbitration “recommend[ed] strongly that the United States not sign or adhere to the convention.” One of the reasons that the delegation gave for its recommendation was doubt as to whether the United States “cares to endorse some of the principles written into the convention,” including its key provisions that “countenance separation of the arbitration process from contact with national laws and more immediately from supervision by the national courts.”<sup>61</sup> The delegation also cited reasons of federal-state relations: the lack of legislation that would provide a jurisdictional basis for the federal courts to enforce foreign awards, and fear that use of the federal government’s treaty power to require the states to enforce foreign awards would be seen as an infringement of states’ rights.<sup>62</sup>

During the period between the Convention’s completion in 1958 and the 1964 amendments to § 1782, it did not appear obvious that the United States would join the Convention, either imminently or ever.<sup>63</sup> When the United States joined the

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<sup>59</sup> Domke, *Enforcement of Foreign Arbitral Awards*, *supra* note 58, at 97; Herman Walker, Jr., *United States Treaty Policy on Commercial Arbitration-1946-1957*, in INTERNATIONAL TRADE ARBITRATION 49, 57-58 (Martin Domke ed., 1958); Herman Walker, Jr., *Commercial Arbitration in United States Treaties*, 11 ARB. J. 68, 79-81 (1956).

<sup>60</sup> New York Convention Status Table, [www.uncitral.org](http://www.uncitral.org), – UNCITRAL Texts & Status.

<sup>61</sup> Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration, May 20 – June 10, 1958 [hereinafter U.S. Delegation Report], reproduced in this issue of the *Review* at 91, 117. See H.R. Rep. No. 91-1181, 91<sup>st</sup> Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 3601, 3601-2 (“Although the United States participated in the Conference, the Convention was not signed on behalf of our government at that time because the American delegation felt that certain provisions were in conflict with some of our domestic laws”). Portions of the Delegation’s report are summarized in Leonard V. Quigley, *Accession by the United States to the United Nations Conference on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1060 *et seq.* (1961).

<sup>62</sup> U.S. Delegation Report, *supra* note 61, at 115-18.

<sup>63</sup> See Allen Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT’L L. 807, 807 (1959) (“considerable doubt seems to exist as to whether the United States will participate in the completed convention”); Martin Domke [editor-in-chief of AAA’s *Arbitration Journal*], *International Commercial Arbitration in the International Cooperation Year*, 20 ARB. J. 226, *passim* (1965) (reporting bar and industry support for accession, but no mention of expectation of accession); Domke, *United States* [report on developments in U.S. law on international arbitration], in INTERNATIONAL COMMERCIAL ARBITRATION, Vol. 3, at 173-75 (Pieter Sanders ed., 1965), (no mention of Convention). For early expressions of support for accession, see S. Exec.

Convention in 1970, Congress employed a simple solution to the jurisdictional problem: the federal courts were given jurisdiction over any case that presented an issue under the Convention.<sup>64</sup> Nothing would have prevented Congress from employing this or other solutions earlier.<sup>65</sup>

The Supreme Court has suggested that the United States' accession to the New York Convention was an acceptance of private international arbitration in the same way that the Federal Arbitration Act "revers[ed] centuries of judicial hostility" toward private domestic arbitration.<sup>66</sup> In 1964, when the modern version of § 1782 was enacted, it would have been inconsistent for the United States to introduce evidentiary assistance for private foreign arbitration, having declined until then to provide the most basic assistance: joining the New York Convention. Had such an inconsistency been intended, the intention should have been stated clearly in the legislation or legislative history. The inconsistency would have been obvious to the International Rules Commission, whose work was part of an unprecedented surge in the United States' participation in making private international law. For example, in 1958, when the International Rules Commission was created, the United States participated in the U.N. arbitration conference after having abstained from previous work on multilateral arbitration conventions.<sup>67</sup> And in 1964, when Congress adopted the International Rules Commission's proposals, the United States joined the Hague Conference on International Private Law, seventy years after it was founded, as well as UNIDROIT (the International Institute for Unification of Private Law), almost forty years after it was founded.<sup>68</sup>

## 2. *The United States' Proposals for the Hague Evidence Convention*

In the work on drafting the Hague Evidence Convention in 1968, the United States did not propose that the Convention include a provision on assistance in taking evidence for arbitration. This is especially noteworthy because the United

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Doc. E., 90<sup>th</sup> Cong., 2d Sess., at 27-41 (April 24, 1968) (transmitting Convention to Senate for advice and consent).

<sup>64</sup> Pub. L. 91-368, § 1, 84 Stat. 692 (1970), *codified at* 9 U.S.C. § 203.

<sup>65</sup> *See* Sultan, *supra* note 63, at 818-19 (proposing accession through use of treaty power or Convention's provisions for non-unitary states).

<sup>66</sup> Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, 520 n.15 (1974). *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (federal policy favoring international arbitration dates back "at least" to accession to New York Convention).

<sup>67</sup> Charles H. Sullivan, *United States Treaty Policy on Commercial Arbitration-1920-46*, in INTERNATIONAL TRADE ARBITRATION 35, 40-48 (Martin Domke ed., 1958).

<sup>68</sup> Kurt H. Nadellmann, *The United States Joins the Hague Conference on Private International Law, A "History" with Comments*, 30 LAW & CONTEMP. PROBS. 291, 291 (1965); Peter H. Pfund, *United States Participation in Transnational Lawmaking*, in LEX MERCATORIA AND ARBITRATION 167, 167-68 (Thomas E. Carbonneau ed., 1990).

States took a leading role in initiating and drafting the Convention,<sup>69</sup> and the United States' submissions for the Hague working sessions included prominent discussion of the International Rules Commission's work, in particular § 1782.<sup>70</sup> Thus, for the United States, the Evidence Convention was a continuation of the work that began with the creation of the International Rules Commission.

During the work on the Hague Evidence Convention, the possibility of applying it to arbitral proceedings was raised, but the United States did not express a view on the subject, several countries were against the proposal, and it was rejected.<sup>71</sup> By contrast, the Inter-American Convention on Letters Rogatory, which was completed in 1975 with the United States' participation,<sup>72</sup> explicitly provides for the possibility of obtaining evidence for arbitral proceedings.<sup>73</sup>

### 3. *Professional Literature from 1958 to 1970*

The issue of international assistance in taking evidence for private arbitration was not discussed in the relevant professional literature during approximately 1958 – 1970 (*i.e.*, from creation of the International Rules Commission and adoption of the New York Convention until the United States' accession to the

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<sup>69</sup> Burbank, *supra* note 37, at 131.

<sup>70</sup> Hague Conference Permanent Bureau, ACTES ET DOCUMENTS, 11<sup>th</sup> Session, Oct. 7-26, 1968, Vol. IV, at 16-18, 30-31 (1970).

<sup>71</sup> *Id.* at 97-99. Article 1 of the Convention provides that letters of request are issued by a "judicial authority," and that the requested evidence must be "for use in judicial proceedings." Philip W. Amram, the U.S. representative, who served as Reporter to the Special Commission that prepared the Convention, ACTES ET DOCUMENTS at 47, wrote in his Report on the Convention: "Commission III decided that all courts of arbitration were excluded from the definition of 'judicial' authority." *Id.* at 216 (discussing "proceedings before administrative tribunals"; *see also id.* at 203 (discussing "judicial" authorities under Art. 1(1) of Convention). As noted above (note 20), Amram had served as Chairman of the Advisory Committee to the International Rules Commission.

In 2003, the Hague Conference "stressed that a request for the taking of evidence under the Convention would have to be presented by the relevant judicial authority of the State where the arbitration proceedings take place." *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions (28 October to 4 November 2003)*, at 9, point 38.

<sup>72</sup> Richard D. Kearney, *Developments in International Private Law*, 81 AM. J. INT'L L. 724, 737 (1987); Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAWYER 505, 506-07 (1985). The Convention on Letters Rogatory was prepared at the same time as the Inter-American Convention on International Commercial Arbitration. *See* Convention texts at [www.oas.org](http://www.oas.org).

<sup>73</sup> Inter-American Convention on Letters Rogatory, Panama, Jan. 30, 1975, Art. 16 ("The States Parties to this Convention may declare that its provisions cover the execution of letters rogatory in criminal, labor, and 'contentious-administrative' cases, as well as in arbitrations and other matters within the jurisdiction of special courts"). Neither the United States nor other member countries have made this declaration. *See* Status Table at [www.oas.org](http://www.oas.org).

New York Convention and signing of the Hague Evidence Convention). This observation is based on a review of the following English-language sources from approximately 1958-1970, none of which mentions international assistance in taking evidence for private arbitration:

- A draft international convention on arbitral procedure<sup>74</sup>
- A multi-country, multi-year survey of national laws on commercial arbitration<sup>75</sup>
- Discussions of measures to increase the effectiveness of the New York Convention<sup>76</sup>
- A draft European uniform law on international arbitration<sup>77</sup>
- Books, symposia, and other material on international arbitration<sup>78</sup>
- The 1958 to 1970 volumes of the main English-language journals in the field of international arbitration.<sup>79</sup>

The absence of discussion in these sources of international assistance in taking evidence for private arbitration suggests that it was not on the agenda of the drafters of § 1782.

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<sup>74</sup> United Nations, *Report of the International Law Commission, Covering the Work of its Fifth Session, June 1 – Aug. 14, 1953*, 48 AM. J. INT'L L., Supplement, at 1, 19-26 (1954). *See id.* at 23 (Art. 15.2: “The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.”).

<sup>75</sup> INTERNATIONAL COMMERCIAL ARBITRATION in three volumes (Pieter Sanders ed., 1956, updated 1960 and 1965).

<sup>76</sup> *Final Act of the United Nations Conference on International Commercial Arbitration, adopted by the Conference at its 24<sup>th</sup> Meeting, June 10, 1958*, Art. 16, reprinted in 8 INT'L & COMP. L.Q. 225, 227-28 (1959); Martin Domke, *Possible Measures for Increasing the Effectiveness of International Commercial Arbitration*, in INT'L COMM. ARB., *supra* note 75, Vol. 2, at 350 (1960).

<sup>77</sup> Paul Jenard, *Draft European Convention Providing a Uniform Law on Arbitration*, in INT'L COMM. ARB., *supra* note 75, Vol. 3, at 370 *et seq.* (1965). On arbitral procedures, *see id.* at 409 (Arts. 15-16).

<sup>78</sup> Harry L. Jones, *International Judicial Assistance: Report of the Inter-American Juridical Committee*, 2 AM. J. INT'L L. 365 (1953); INTERNATIONAL TRADE ARBITRATION (Martin Domke ed., 1958); Martin Domke, *The Bangkok Conference on International Arbitration*, 17 ARB. J. 23, 33 (1962) (conference discussed need of arbitrators to have “[p]ower to compel the attendance of witnesses who are within their jurisdiction”); *Arbitration: A Symposium*, 15 INT'L & COMP. L.Q. 718 (1966); INTERNATIONAL ARBITRATION – LIBER AMICORUM FOR MARTIN DOMKE (Pieter Sanders ed., 1967).

<sup>79</sup> *See, e.g.*, ARBITRATION JOURNAL, AMERICAN JOURNAL OF INTERNATIONAL LAW, AMERICAN JOURNAL OF COMPARATIVE LAW, and INTERNATIONAL & COMPARATIVE LAW QUARTERLY.

#### 4. *The Importance of Clear Evidence of Specific Legislative Intent*

Some commentators have advocated applying § 1782 to private arbitration by “dynamic” statutory interpretation, *i.e.*, by taking into account post-enactment developments that reflect a “pro-arbitration policy,” such as the United States’ signature and prompt ratification of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and conclusion of many bilateral investment treaties with arbitration clauses.<sup>80</sup> Assuming it were proper for courts to use dynamic interpretation,<sup>81</sup> using it to apply § 1782 to private arbitration would present two problems. First, the existence of a pro-arbitration policy is not the same thing as creating disclosure procedures for arbitration. Rather, imposing disclosure procedures that are not clearly provided in law or the arbitration agreement infringes on the parties’ right to define arbitral procedures.<sup>82</sup> If parties understand that they may be subject to court-compelled

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<sup>80</sup> Martin Illmer & Ben Steinbrück, *U.S. Discovery and Foreign Private Arbitration: The Foreign Lawyer’s Perspective*, 25 J. INT’L ARB. 329, 333, 335 (2008). Accord 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, 308-10 (2003). See also Smit, *American Judicial Assistance*, 8 AM. REV. INT’L ARB. at 153, 157-58 (asserting “desirability of promoting international arbitration” by applying § 1782, because “[l]eading decisions by the U.S. Supreme Court, like those in *Scherk* [1974] and *Mitsubishi* [1985] leave no doubt that international arbitration is a specially favored institution”).

The United States signed the Convention on the Settlement of Investment Disputes in 1965 and ratified it in 1966. *List of Contracting States*, [www.icsid.worldbank.org](http://www.icsid.worldbank.org). Arbitration under the Convention leaves the issue of court-ordered discovery up to the parties. See International Centre for Settlement of Investment Disputes, Arbitration Rules, Rule 39 (1, 5) (party may request court order for “provisional measures for the preservation of its rights” if parties “have so stipulated in the agreement”).

The United States has concluded approximately forty-five bilateral investment treaties, starting in 1982. *List of U.S. Bilateral Investment Treaties*, [www.state.gov/www/issues/economic/bit\\_treaty.html](http://www.state.gov/www/issues/economic/bit_treaty.html). The U.S. Model Bilateral Investment Treaty allows for an application to a court for interim measures to preserve evidence. U.S. Model BIT (revised as of 2004), Arts. 26.3, 28.8. [www.state.gov/documents/organization/38710.pdf](http://www.state.gov/documents/organization/38710.pdf).

<sup>81</sup> “[I]t might be a good idea if . . . courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one. . . . But whatever the merits of such an arrangement in the abstract, it is simply not a part of our legal system.” *Hayden v. Pataki*, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting).

<sup>82</sup> In deference to the parties’ right to define arbitral procedures, some courts have refused to find implied authority in the Federal Arbitration Act to require non-parties to produce documents before a hearing, even while recognizing that denying such disclosure might sacrifice efficiency. See *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216-17 (2d Cir. 2008). See also UNCITRAL Secretariat, *Explanatory Note on the 1985 Model Law on International Commercial Arbitration*, as amended in 2006, ¶ 35:

disclosure, they may negotiate for reciprocal disclosure by other parties or for a waiver of court-compelled disclosure, or they may choose litigation over arbitration. However, in the absence of clear evidence of legislative intent to apply § 1782 to private arbitration, parties in international arbitration should not be deemed to implicitly consent to disclosure in the United States.

Second, because dynamic statutory interpretation is not done explicitly,<sup>83</sup> using it to apply § 1782 to foreign arbitration (the situation presented in the reported cases to date) would create confusion on at least one issue: whether § 1782 or the FAA governs disclosure in international arbitration conducted in the United States.<sup>84</sup> In the absence of clear evidence that § 1782 was intended to apply to private arbitration, the courts would probably not hold that § 1782 supersedes such a central institution of U.S. dispute resolution as the FAA. However, 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.”

Some commentators have argued that application of § 1782 to private arbitration is suggested by pronouncements in the legislative history of an intention to “liberalize” the taking of evidence for foreign proceedings, to remedy the fact that the United States had not previously “engaged itself fully in efforts to improve practices of international litigation,” to bring the United States “to the forefront of nations adjusting their procedures to those of sister nations,” and to “invite foreign countries similarly to adjust their procedures.”<sup>85</sup> These statements do not address the issue, discussed above, of notice to parties that they can be required to undergo discovery in the United States. Also, the statement is that the United States should be “in the forefront of nations adjusting their procedures *to those of other nations.*” This is not the same as being alone, in front of other nations, which the United States apparently would have been in 1964, had it provided for international evidentiary assistance to private arbitration.<sup>86</sup>

In light of Justice Ginsburg’s work on the Columbia Project, she is certainly aware of the possible meanings of Professor Smit’s 1965 reference to “arbitral

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Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the . . . risk of frustration or surprise . . . .

<sup>83</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 246 (2d ed. 2005) (“Dynamic theories have proliferated in the last 20 years, mainly in academe. They may explain the cases, but judges are reluctant to endorse such theories without more evidence that the theories are sufficiently constraining on judges or agencies interpreting statutes or, relatedly, offer sufficient guidance to the citizenry.”).

<sup>84</sup> The differences between § 1782 and FAA disclosure are outlined above in Section III.A.

<sup>85</sup> See N.Y. City Bar Association, *supra* note 32, at 10-11 (quoting S. Rep. No. 1580).

<sup>86</sup> See *supra* Section III.B.3. Even today, such assistance is not widespread. See *infra* notes 90, 116, and accompanying text.

tribunals.” Therefore, *Intel*’s reference to “arbitral tribunals,” without explanation, could include private arbitration, as in common legal parlance. On the other hand, § 1782’s applicability to private arbitration was irrelevant to *Intel*’s inquiry into § 1782’s application to European Commission competition proceedings. Thus, it is difficult to discern the meaning of the *Intel* reference to “arbitral tribunals.” Stronger guidance on the interpretation of § 1782 is in the legislative context and history discussed above, which show little evidence of an intention to apply § 1782 to private international arbitration. Whatever the Supreme Court’s view, it would be helpful if the Court were to clarify the issue.

Assuming that the Supreme Court will hold that § 1782 does not apply to private arbitration, the following section of this article recommends changes to § 1782 and other law to provide clearly for international assistance in taking evidence for private arbitration. If the Court holds that § 1782 does apply to private arbitration, the Court could use its supervisory power to implement most of the recommendations below for a better use of § 1782. Any decision to apply § 1782 to private arbitration should apply only to arbitration agreements concluded after the decision.

#### IV. PROPOSALS FOR SOLUTIONS THROUGH LEGISLATION, COURT RULES, TREATY, AND PRIVATE AGREEMENTS

A new legal framework for international judicial assistance in taking evidence for private arbitration can be introduced in the United States through amendments to § 1782 or through the Federal Rules of Civil Procedure, as well as through state law. Expansion of assistance from other countries can be achieved through the Hague Conference and UNCITRAL. Finally, much of the proposed framework can be implemented in arbitration procedure rules and other private agreements.

##### A. *Basic Provisions for New Legislation*

An amended § 1782 should include the following basic rules:

1. *Arbitrators’ approval.* The parties may submit a request for assistance, but only if the arbitrators have approved that the request be made, except in an emergency—for example, if the arbitrators have not yet been appointed and the evidence will be lost before the arbitrators can consider the matter.
2. *Arbitrators’ discretion.* The court must defer to the arbitrators’ decision in weighing discretionary factors concerning disclosure by parties—for example, the need for the disclosure, the burden of providing it, considerations of equality between the parties, and the delay that the disclosure proceedings will cause to the arbitration. However, if a non-party has not had the opportunity to argue to the arbitrators that the disclosure is unduly burdensome, the court may consider such arguments in the first instance.

3. *Legal questions.* The court may overturn the arbitrators' decision on non-discretionary legal questions—for example, privilege (as already provided in § 1782)<sup>87</sup> and certain jurisdictional issues, discussed below.<sup>88</sup>

By requiring the arbitrators' approval for requests and limiting judicial oversight to non-discretionary legal issues, the amendments should minimize court disputes over taking evidence in the United States. Adoption of such amendments requires consideration of a few other issues:

*Scope and form of disclosure.* The proposal retains § 1782's approach of not limiting the scope or form of disclosure. An objection against applying § 1782 to arbitration has been that U.S. parties may be subjected to greater disclosure obligations than their adversaries,<sup>89</sup> because few countries provide judicial assistance for taking evidence in foreign arbitration,<sup>90</sup> and even if they do, disclosure in other countries is less generous than in the United States.<sup>91</sup> This objection underestimates the arbitrators' ability to minimize inequalities between the parties. As has been noted in non-arbitration contexts, assistance under § 1782 can be conditioned upon "reciprocal exchange of information."<sup>92</sup> Also, if the exchange of evidence remains unequal because of differences in national rules, arbitrators can take the inequality into account when weighing the parties' proof.<sup>93</sup>

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<sup>87</sup> 28 U.S.C. § 1782(a) ("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>88</sup> If the arbitrators think that disclosure is needed, but is unavailable on legal grounds, and that there is doubt about those legal grounds, they can approve the application to the court so that the court can rule on the legal grounds. However, if the arbitrators do not doubt their conclusion on the legal issue, they need not approve an application to court. Thus, Rule No. 1 prevails over Rule No. 3.

<sup>89</sup> Peter B. Rutledge, *Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving U.S. Entities?*, 25 J. INT'L ARB. 171, 177-78 (2008); Eric A. Schwartz & Rolf B. Johnson, *Court-Assisted Discovery in Aid of International Commercial Arbitrations: Two Recent U.S. Cases Regarding the Applicability of 28 U.S.C. § 1782*, 15(3) J. INT'L ARB. 53, 63 (1998).

<sup>90</sup> England, Germany, and Austria provide assistance in taking evidence for foreign arbitrations if the request is approved by the arbitrators. See LEW, MISTELIS & KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 580-82 (England, Germany); Illmer & Steinbrück, *U.S. Discovery and Foreign Private Arbitration*, 25 J. INT'L ARB. at 336-38 (Austria, England, Germany). In Canada, it is unclear whether assistance is available without a request from the forum court. Michael Penny, *Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT'L ARB. 249 (2001).

<sup>91</sup> See, e.g., Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998).

<sup>92</sup> *Intel*, 542 U.S. at 262 (citing *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995)).

<sup>93</sup> Even in the context of international litigation, it has been proposed that when there are unequal disclosure opportunities, courts should have the right "to apply presumptions,

Beyond the interests of the parties in a particular dispute, there might be a national interest in offering judicial assistance in taking evidence for international arbitration, regardless of whether other countries have similar legislation: providing effective remedies against Americans helps to make them attractive business partners. Perhaps this is one reason why the United States recognizes foreign court judgments, regardless of reciprocity with a given country or at a certain moment, in the hope that such “civilized” conduct will inspire reciprocity.<sup>94</sup> The reciprocity issue is further discussed below, in connection with a possible international convention (Section IV.D).

*“International” arbitration.* An amended § 1782 would need to define the arbitral proceedings to which it applies; let us call them “international” for the moment.<sup>95</sup> In order to avoid disputes over whether the arbitration is domestic with disclosure governed by the Federal Arbitration Act, or international with disclosure governed by the new statute, it would be best if the law allowed the same disclosure for domestic and international arbitration. In order to achieve this consistency, disclosure under the FAA would need to be broadened.

However, if § 1782 were made available to private arbitration without changing disclosure under the FAA, the clearest way to distinguish between the two disclosure regimes would be to apply § 1782 to foreign proceedings only.<sup>96</sup> The alternative—allowing only what is available under the FAA—would require arbitrators to move hearings to every location in the United States where evidence is located. For a foreign arbitration, this is not practicable and would be a much greater burden than for a domestic arbitration.

*Arbitral jurisdiction.* Under the rule that a party can resist arbitration on the ground that it is not bound by a valid arbitration agreement,<sup>97</sup> this should also be grounds for a party to resist disclosure in the United States for a foreign

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burdens of proof, and other evidentiary devices to ensure a level litigation field.” Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on its Role in U.S. Civil Procedure*, 57 LAW & CONTEMP. PROBS. 77, 101 (1994). Such techniques are more available to international arbitrators than to judges.

<sup>94</sup> *Hilton v. Guyot*, 113 U.S. 113, 191 (1895) (“If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations and the principles of public and national law in the administration of justice”) (internal citations omitted).

<sup>95</sup> On possible definitions of “international” arbitration, see William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VANDERBILT J. TRANSNAT’L L. 1241, 1309-10 (2003).

<sup>96</sup> That is the solution of the English Arbitration Act 1996: “§ 2(3) expressly extends the ambit of § 44 to arbitrations with a seat outside of England but preserves a discretion such that the court need not exercise the powers if it considers it inappropriate to do so.” Peter Ashford, *Documentary Discovery and International Commercial Arbitration*, 17 AM. REV. INT’L ARB. 89, 110-11 (2006).

<sup>97</sup> New York Convention, Art. II(3). See also *Mitsubishi*, 473 U.S. at 632 (“A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate”).

arbitration.<sup>98</sup> Allowing the parties to make such a challenge to arbitral jurisdiction in a U.S. court might seem to infringe on the forum court's authority, but some countries do not allow such a challenge before the award.<sup>99</sup> In that situation, the arbitrators should not have the power essentially to require a U.S. court to compel disclosure. However, if the party resisting disclosure waived this jurisdictional challenge in the forum court, or lost on it, the party would be estopped from raising it in the U.S. disclosure proceeding.

An argument that the disclosure request concerns non-arbitrable subject matter should not be a basis for challenging disclosure. Such a rule might seem inconsistent with a U.S. court's authority to stop a domestic arbitration on the ground of non-arbitrability, but properly defers to the parties' choice of the forum, with its rules for deciding questions of arbitrability—including the arbitrators' authority to decide their jurisdiction and court review, if available, of the arbitrators' decision.<sup>100</sup> This position is analogous to the rule in the Hague Evidence Convention that a state shall not refuse to execute a request for evidence on the ground that the subject matter of the request is within the exclusive jurisdiction of the courts of the requested state.<sup>101</sup>

These comments on jurisdiction derive from established principles that need not be repeated in § 1782. Another reason for not including them in a statute is that the courts should be free to weigh the difficulty and consequences of litigating the jurisdictional question against the burden of producing the evidence.

### B. *Reform through Court Rules*

Since Congress rarely takes up problems of civil procedure, especially international procedure,<sup>102</sup> it might be more expedient to treat assistance in taking evidence for foreign arbitration in the Federal Rules of Civil Procedure,<sup>103</sup> if Congress were to delegate the necessary authority. However, in international litigation, conflicts occasionally arise between the principle that the Federal Rules of Civil Procedure should apply equally to all litigants and the need to treat

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<sup>98</sup> Non-parties would not be allowed to attack the validity of the arbitration agreement, and would be entitled to challenge the arbitrators' exercise of discretion only with regard to the burden of disclosure (Rule No. 2 above, "arbitrators' discretion").

<sup>99</sup> See LEW, MISTELIS & KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 346-54.

<sup>100</sup> Because arbitrability can be challenged after the award, it is not a basis for stopping a foreign arbitration. *Vimar Seguros y Reaseguros S.S. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995).

<sup>101</sup> Hague Evidence Convention, Art. 12(b).

<sup>102</sup> Burbank, *Reluctant Partner*, 57 *LAW & CONTEMP. PROBS.* at 105-10; Peter H. Pfund, *Remarks*, 57 *LAW & CONTEMP. PROBS.* 159, 161 (1994).

<sup>103</sup> See George K. Walker, *The Federal Rules of Procedure in the Context of Transnational Law*, 57 *LAW & CONTEMP. PROBS.* 183, 206 (1994) (rule-making faster and more flexible than legislation, and "allows for greater involvement on the part of scholars and practitioners who have expertise in civil procedure").

foreign parties differently in order to respect foreign sovereignty or U.S. treaty obligations.<sup>104</sup> It has been argued that only Congress can mediate such conflicts, because the judiciary is responsible for the equal application of the Federal Rules and the executive branch is responsible for foreign relations; thus, it is argued, Congress should make the rules for international litigation.<sup>105</sup>

Such separation-of-powers concerns seem misplaced when the issue is private arbitration. Conflicts in applying the Federal Rules to international litigation arise when U.S. courts assert compulsory jurisdiction over foreign parties.<sup>106</sup> In private arbitration, however, the parties voluntarily submit to the arbitrators' jurisdiction, and the party seeking judicial assistance in the United States also does so voluntarily. Moreover, only the person from whom evidence is sought is under the court's compulsory jurisdiction, and the typical reason for this is that the person is resident or voluntarily present in the United States.<sup>107</sup> Thus, if Congress delegates authority to the rulemakers, assistance in taking evidence for foreign arbitration could be treated in the Federal Rules.

### C. *Reform through State Law*

The individual states can contribute to the development of international arbitration by offering judicial assistance in taking evidence. This would continue a tradition that began with New York's enactment in 1920 of "the first modern arbitration statute in the country,"<sup>108</sup> which led to the adoption of the Federal Arbitration Act in 1925.<sup>109</sup> As noted earlier, six states in the U.S. have shown their interest in developing international arbitration by adopting the UNCITRAL Model Law on International Arbitration.<sup>110</sup> Similarly, New York has shown its

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<sup>104</sup> Born, *Evidence Convention Revisited*, 57 LAW & CONTEMP. PROBS. at 81-90; Walker, *Transnational Law*, 57 LAW & CONTEMP. PROBS. at 189-204.

<sup>105</sup> J. Dickson Phillips & Paul D. Carrington, *Reflections on the Interface of Treaties and Rules of Procedure: Time for Federal "Long-Arm" Legislation*, 57 LAW & CONTEMP. PROBS. 153, 154 (1994); Walker, *Transnational Law*, 57 LAW & CONTEMP. PROBS. at 185. Cf. Burbank, *Reluctant Partner*, 57 LAW & CONTEMP. PROBS. at 143-48 (rule-makers should have authority to initiate rules or amendments; Congress should either be informed of "questionable exercises of authority" or have power to decide whether rule-makers' recommendations will be implemented).

<sup>106</sup> See *supra* note 104.

<sup>107</sup> The problem becomes more difficult when jurisdiction is based on a foreign person's transitory presence in the United States, or when a U.S. company is ordered, under veil-piercing, to produce evidence held by its affiliate abroad. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 122-32, 907-41 (4<sup>th</sup> ed. 2007). This problem is discussed further in Section IV.D. *infra*.

<sup>108</sup> Charles H. Sullivan, *United States Treaty Policy on Commercial Arbitration-1920-1946*, in *INTERNATIONAL TRADE ARBITRATION* 35, 38 (Martin Domke ed., 1958).

<sup>109</sup> Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute").

<sup>110</sup> California, Connecticut, Illinois, Louisiana, Oregon and Texas (see Status Table at [www.uncitral.org](http://www.uncitral.org), *supra* note 4).

interest in offering a forum for resolving international commercial disputes with its statute that accepts parties' agreements to litigate large cases in New York despite the case's lack of a local connection.<sup>111</sup> By offering judicial assistance in taking evidence for foreign arbitral proceedings, the states can fill the gap if federal law does not provide for such assistance, and can accumulate experience that will be helpful to other jurisdictions that consider offering assistance.

#### D. *International Reform through Legislation and Treaty*

International cooperation in the creation of private law occurs through treaty and the harmonization of national laws.<sup>112</sup> A treaty must operate on a foundation of national laws that can ensure performance of treaty obligations.<sup>113</sup> Many countries provide assistance in taking evidence for domestic arbitral proceedings.<sup>114</sup> However, as noted earlier, few countries offer assistance in taking evidence for foreign arbitral proceedings.<sup>115</sup>

The UNCITRAL working group that drafted the Model Law on International Commercial Arbitration considered providing for assistance in taking evidence for foreign proceedings. The idea was abandoned, and assistance was limited to domestic proceedings, as a compromise between those in favor of international assistance and those who considered any court assistance contrary to the private nature of arbitration.<sup>116</sup> The middle ground—those in favor of assistance for domestic but not foreign proceedings—held that “[a]n acceptable system of international court assistance could not be established unilaterally through a model law since the principle of reciprocity and bilaterally or multilaterally accepted procedural rules were essential conditions for the functioning of such a system.”<sup>117</sup>

Before the Model Law was completed, a Hague Conference Special Commission, “in liaison with UNCITRAL,” considered the question of extending

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<sup>111</sup> N.Y. General Obligations Law § 5-1402 (jurisdictional defenses waived if New York law and forum chosen, and matter exceeds one million dollars); N.Y. CIVIL PRACTICE LAW & RULES, Rule 327(b) (inconvenient forum argument unavailable if General Obligations Law § 5-1402 applies).

<sup>112</sup> See generally Kurt H. Nadelmann, *Uniform Laws vs. International Conventions*, in INTERNATIONAL TRADE ARBITRATION 167-80 (Martin Domke ed., 1958).

<sup>113</sup> *Id.* at 174-75. Cf. Kurt H. Nadelmann, *Uniform Legislation versus International Conventions Revisited*, 16 AM. J. INT'L L. 28, 31-32 (1968) (noting use of U.S. treaty power to implement Hague Service Convention); *id.* at 49 (“In matters of international judicial assistance, recourse to binding agreements has been found desirable and feasible”).

<sup>114</sup> As noted above (Section II.A), Article 27 of the UNCITRAL Model on Law on International Commercial Arbitration authorizes the arbitrators to request assistance from the forum court in taking evidence. “[A]rticle 27, thus, was designed to change, for example, a national law which envisaged court assistance to other courts but not to arbitral tribunals.” MODEL LAW LEGISLATIVE HISTORY, *supra* note 18, at 737 (quoting UNCITRAL Working Group report).

<sup>115</sup> See note 90 *supra*.

<sup>116</sup> MODEL LAW LEGISLATIVE HISTORY, *supra* note 18, at 738.

<sup>117</sup> *Id.* at 737.

the Hague Evidence Convention to cover arbitral proceedings.<sup>118</sup> The participants agreed that it would be “technically feasible to use the Convention’s mechanisms in the context of arbitral proceedings,”<sup>119</sup> *i.e.*, the mechanism of the Central Authority created in each member country under the Convention to process requests for assistance. However, some participants doubted the need for extending the Convention, because “arbitrators or litigants in arbitral proceedings might use the Convention as it stood by making their request through the courts in the countries where the arbitral tribunal sat.”<sup>120</sup> The report explains: “In particular, the experts from the Nordic countries and the United States pointed out that under domestic law courts may render assistance for the production of evidence in the context of arbitration proceedings.”<sup>121</sup> The reference to U.S. law must mean § 1782.<sup>122</sup>

When UNCITRAL reviewed the final draft of the Model Law, the observer from the Hague Conference reported that the Special Commission “had confirmed the technical feasibility of the scheme [of extending the Evidence Convention to arbitration], but had expressed doubts about its usefulness.”<sup>123</sup> UNCITRAL did not pose any further questions to the Hague Conference on the issue, and agreed that the Model Law should not provide for international assistance in taking evidence. However, UNCITRAL noted that the Hague Conference “was studying the possibility” of extending the Evidence Convention to arbitral proceedings and “would be interested in the views of arbitration experts whether such a protocol would be desirable.”<sup>124</sup>

UNCITRAL and the Hague Conference did not answer basic questions presented explicitly or implicitly in their work in 1985:

- How should the Model Law or other national legislation provide for assistance in taking evidence for foreign arbitration?
- How are § 1782 or the Nordic countries’ laws better than the Model Law proposals that were rejected?
- In the absence of appropriate provisions in the Model Law or other national legislation, how can a convention be created with the “essential conditions” that the UNCITRAL working group pointed to: the “principle of reciprocity and bilaterally or multilaterally accepted procedural rules”?

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<sup>118</sup> Hague Permanent Bureau, *Report on the Work of the Special Commission of May 1985 on the Operation of the [Evidence] Convention*, § II, at 42(J-K). As discussed earlier, this idea was rejected when the Convention was prepared in 1968 (Section III.B.2 above).

<sup>119</sup> *Id.* at 42(J).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Section III.B.2 on the role of § 1782 in the United States’ work on preparing the original Convention.

<sup>123</sup> MODEL LAW LEGISLATIVE HISTORY 756.

<sup>124</sup> *Id.* at 761.

UNCITRAL and the Hague Conference have recently shown renewed interest in international assistance in taking evidence for arbitration. In 2006, UNCITRAL amended the Model Law to provide that the arbitrators may grant “interim measures” in order to “[p]reserve evidence,”<sup>125</sup> even if the arbitration proceedings are in another country.<sup>126</sup> The Hague Conference, in its 2008 questionnaire about operation of the Evidence Convention, asked member countries whether they use the Convention in connection with arbitral proceedings. As discussed earlier (Section II.A), the overwhelming answer was “no,” probably because of the lengthy normal Convention procedures and the additional time needed for communication between the arbitration and the forum court.

If the main practical problem in § 1782 can be solved (to ensure arbitrators’ control of requests for assistance), the United States should propose (a) to include in the UNCITRAL Model Law a general provision (not only interim measures) for assistance in taking evidence for foreign arbitration, and (b) to again revisit the question of extending the Hague Evidence Convention to arbitral proceedings, so that a request can go directly from the arbitral tribunal to the assisting country. Agreement on the arbitrators’ control of requests for assistance and on bypassing the forum court would be the minimum requirements for an extension of the Evidence Convention. Ideally, the Convention would also require the assisting court to defer to the arbitrators’ discretion on the benefits and burdens of ordering disclosure. If agreement on this issue is not possible under the Convention, it is reasonable to hope that countries will eventually adopt it in national practice.

Some participants in the 1985 Hague Special Commission suggested that requests for assistance to arbitration should be received by the Central Authority of the assisting state and also sent “through a forwarding Central Authority in the State where the arbitral tribunal sat.”<sup>127</sup> If the parties to a private arbitration do not need help from the Central Authority, it is unclear why they should be required to use it. The Central Authority’s usual role in representing sovereign interests and protecting against the unreasonable coercion of a foreign state is superfluous in private arbitration, because the parties are typically not citizens of the forum state, they appear before the arbitrators voluntarily, they ask nothing of the forum state’s courts, the requesting party appears voluntarily in the assisting state, and the assisting court can adequately represent sovereign interests and the rights of the person from whom evidence is sought, who is typically a resident of the assisting country.<sup>128</sup> However, the right to bypass Central Authorities need not

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<sup>125</sup> UNCITRAL MODEL LAW, Art. 17(2)(d).

<sup>126</sup> *Id.*, Art. 17J; *see also id.*, Art. 17H(1) (“interim measure issued by an arbitral tribunal shall be . . . enforced upon application to the competent court, irrespective of the country in which it was issued”).

<sup>127</sup> 1985 Special Commission Report, at 42(J), point 1.

<sup>128</sup> The requirement that requests to courts for evidence be sent through a Central Authority has been criticized. “A system based on the presumption that *every* such request impinges upon national sovereignty appears antiquated in an era of globalization.

be obligatory under an extended Evidence Convention, and it would be sufficient to leave this issue up to the member countries.

An extension of the Evidence Convention for assistance in taking evidence for arbitration could adopt the Convention's approach to the scope and forms of disclosure: the assisting country generally follows its internal practices, but also endeavors to accommodate requests for other disclosure.<sup>129</sup> Therefore, existing disagreements under the Evidence Convention resulting from differences in national laws—for example, the extra-territorial application of U.S. discovery rules and broader disclosure in common-law countries than in civil-law countries—would carry over to use of the Convention for arbitration.<sup>130</sup> However, disagreements over these issues seem to be decreasing, and the national systems may be converging, perhaps thanks in part to the interaction that the Hague conventions facilitate. Signs of this include the 2000 amendments that tightened discovery under the Federal Rules of Civil Procedure,<sup>131</sup> and several countries' reconsideration of their reservations to providing pre-trial discovery under the Evidence Convention.<sup>132</sup> There has also been convergence of disclosure practices in international arbitration, as indicated, for example, by the adoption of the IBA Guidelines on the Taking of Evidence in International Commercial Arbitration, which provide for more pre-hearing disclosure than is usually practiced in civil-law countries but less than in common-law countries.<sup>133</sup>

Adding assistance for arbitration to the Hague Evidence Convention would contribute to the Convention's overall operation and to harmonization of disclosure laws as well as arbitration laws. Arbitrators, with their authority to approve requests for court assistance in taking evidence, can filter out frivolous disputes. Also, with their experience in different national systems, arbitrators can minimize inequalities in disclosure opportunities and burdens. Thus, arbitration can present to the courts the most difficult international procedural disputes and the views of arbitrators who have experience in reconciling them. Finally, cooperation through the Hague Conference and UNCITRAL on assistance in taking evidence for arbitration would facilitate the exchange of information on international conflicts of laws and inconsistencies in internal laws in areas such as

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Provision should be made for direct communication between courts in this regard.” J.J. Spigelman AC (Chief Justice, New South Wales), *International Commercial Litigation: An Asian Perspective*, 2007 HONG KONG L. J. 859, 884 (emphasis in original).

<sup>129</sup> Hague Evidence Convention, Art. 9.

<sup>130</sup> See *supra* notes 104, 106-07 and accompanying text.

<sup>131</sup> On the 2000 amendments, see generally Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396 (2001).

<sup>132</sup> Hague Conference, *Preliminary Document No. 12, Summary of Responses to the May 2008 Questionnaire Relating to the Evidence Convention, with Analytical Comments* (Jan. 2009), at 52-53 (concerning questions Nos. 74-75).

<sup>133</sup> Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VANDERBILT J. TRANSNAT'L L. 1313, 1325-33 (2003).

the definition of international arbitration, and procedures and standards for challenging arbitral jurisdiction.<sup>134</sup>

E. *Minimizing Problems by Private Agreement*

Until the law on § 1782's application to arbitration is clarified, many of the problems in its use can be avoided by including in arbitration agreements, as well as in the UNCITRAL Arbitration Rules and the rules of international arbitration institutions, the basic provisions of the legal framework proposed above in Section IV.A: (1) the arbitrators shall decide whether a request for judicial assistance can be made, except in an emergency when the arbitrators are not available; and (2) the parties shall not seek court review of the arbitrators' decisions on disclosure other than on non-discretionary legal issues.

Furthermore, arbitration rules and parties' agreements can provide that the arbitral award may take into account the costs of judicial assistance proceedings for taking evidence. This rule on costs is a key element of the proposed legal framework. However, costs are better addressed privately than in national law or treaty, because arbitrators, with their ongoing involvement in the case, are better able than courts to assess responsibility for causing unnecessary litigation. Therefore, even if the legislation proposed above is adopted, arbitration procedure rules and arbitration agreements should provide that the arbitral award can take into account costs related to judicial assistance in taking evidence.

## V. CONCLUSION

It would be desirable for U.S. law to allow courts to require the production of evidence for use in a foreign private arbitration. However, because 28 U.S.C. § 1782 does not clearly provide for such assistance, applying it to private arbitration would violate the parties' right to define the arbitral procedures. Furthermore, § 1782 lacks basic elements of a proper statute for assistance in taking evidence for arbitration: deference by the parties and the courts to the arbitrators' decision on whether the evidence should be obtained. These elements should be included in a new law or court rules on the subject,<sup>135</sup> and the Supreme Court should make clear that § 1782 does not provide an adequate framework for assistance to private arbitration. If U.S. law on international assistance in taking evidence for arbitration is clarified, the United States can propose that other

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<sup>134</sup> See comments on jurisdiction and the distinction between domestic and international arbitration, Section IV.A. above.

<sup>135</sup> Support for new legislation providing for control by arbitrators over requests for assistance has been expressed in 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, 65-72 (2006), and Schwartz & Johnson, *supra* note 89, at 62-64.

countries provide for such assistance in their national laws and through the Hague Evidence Convention.

It has been said that “international private lawmaking is ‘no sport for the short-winded.’”<sup>136</sup> It will take time for the United States and other countries to create a network of clear laws on judicial cooperation in taking evidence for international arbitration. But special features of international arbitration call for high standards of clarity in applicable procedural laws:

- Arbitrators’ decisions on substantive law are mostly unpublished and immune from judicial scrutiny. Therefore, international arbitration’s legitimacy depends in large part on the integrity of its procedures.
- Arbitrators’ authority to decide procedures is wide and also mostly immune from judicial scrutiny. On the other hand, the narrow area of procedure that is imposed by law is one of the main grounds for challenging arbitral awards.

Therefore, international arbitration will be best served in the long run not by judicial assistance resting on dubious legislative intent, but by new, thoroughly considered, clear law on the subject.

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<sup>136</sup> Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 203 (2001) (quoting MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (Arthur T. Vanderbilt ed., 1949)).

