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The Role of Federal Courts in Assisting International Arbitration

*National Broadcasting Co. v. Bear Stearns & Co.*¹

I. INTRODUCTION

Private arbitration has become a valuable tool for businesses that deal in the global marketplace. In the event of a dispute arising from an international contract, arbitration can provide an unbiased and cost-effective adjudication process that prevents any party from having to appear before a foreign court. As a result of international arbitration's recent popularity, United States federal courts are now deciding cases that will define how the American legal system treats international arbitration vis-à-vis other international judicial bodies. One central issue in this area is whether federal law affords private, international arbitration some of the same privileges afforded to foreign, governmental tribunals.

This Note examines a Second Circuit decision that determined private, international arbitration proceedings do not qualify for the same discovery assistance as do foreign, governmental proceedings under 28 U.S.C. § 1782 ("§ 1782"). This Note will focus on the Second Circuit's controversial interpretation of § 1782 and its impact on the future of private, international arbitration.

II. FACTS AND HOLDING

In 1994, National Broadcasting Company and NBC Europe (collectively "NBC") contracted to provide programming to the Mexican broadcasting company TV Azteca S.A. de C.V. ("Azteca").² As part of the compensation package, NBC was given the option to buy up to ten percent of Azteca's stock before May 1997 according to a predetermined pricing formula.³ Under the terms of the contract, NBC and Azteca agreed that any disputes arising out of the deal would be arbitrated by the International Chamber of Commerce ("ICC").⁴

On April 3, 1997, NBC attempted to exercise its option by purchasing one percent of Azteca's stock.⁵ However, Azteca challenged NBC's right to the stock option based on the allegation that NBC had failed to perform under the terms of the 1994 contract.⁶ As a result of the dispute, Azteca initiated arbitration proceedings through the ICC.⁷

1. 165 F.3d 184 (2d Cir. 1999).

2. *Id.* at 186.

3. *Id.*

4. *Id.* The ICC is a private organization headquartered in France. *Id.*

5. *Id.*

6. *Id.* The case does not list Azteca's specific allegations against NBC.

7. *Id.*

As part of the initial ICC arbitration process, NBC filed a counterclaim alleging that Azteca had misstated its financial position.⁸ According to the facts of the case as related in the district court decision, this was NBC's reason for not exercising its full option to purchase ten percent of the company's stock.⁹ Specifically, NBC alleged that: 1) Azteca masked its plans to conduct an initial public offering ("IPO"); 2) Azteca misstated the value of the stock during the option period; 3) Azteca erroneously projected low earnings; and 4) Azteca stated that it would not be in NBC's interest to exercise the option.¹⁰ All of these allegations were denied by Azteca.¹¹

Before the ICC arbitration proceedings began, NBC sought and gained authorization from the United States District Court for the Southern District of New York to serve subpoenas on six, third-party financial institutions ("Third Parties") which assisted Azteca in its IPO plans.¹² The district court issued the subpoenas pursuant to 28 U.S.C. § 1782(a),¹³ which gives district courts the authority to compel discovery on behalf of foreign or international tribunals.¹⁴ After the subpoenas were served, Azteca and four of the Third Parties moved to have the subpoenas quashed.¹⁵ In response, NBC filed a cross-motion to have the subpoenas enforced.¹⁶

Based on a determination by the district court that 28 U.S.C. § 1782(a) did not apply to private international commercial arbitration, the motion to quash the subpoenas by Azteca and the Third Parties was granted, and NBC's cross-motion to

8. *Id.*

9. *In re: NBC*, No. M-77, 1998 WL 19994, at *2 (S.D.N.Y. Jan. 21, 1998).

10. *Id.*

11. *Id.*

12. *NBC*, 165 F.3d at 186.

13. 28 U.S.C. § 1782 states:

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

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1782 (1994 & Supp. III 1997).

14. *NBC*, 165 F.3d at 186.

15. *Id.* at 185-86.

16. *Id.* at 186.

enforce the subpoenas was denied.¹⁷ As a result, NBC appealed to the United States Court of Appeals for the Second Circuit.¹⁸

After reviewing the legislative and scholarly history of 28 U.S.C. § 1782(a), the Second Circuit Court of Appeals held that an international, commercial arbitration proceeding does not qualify as a foreign or international tribunal proceeding and, therefore, affirmed the district court's order that quashed the subpoenas and denied the cross-motion to enforce.¹⁹

III. LEGAL BACKGROUND

In 1958, Congress created the Commission on International Rules of Judicial Procedure ("Commission") to study ways of improving the interaction between U.S. federal courts and foreign judicial bodies.²⁰ The Commission's final report recommended that federal courts provide greater accommodations to foreign courts and tribunals, thereby encouraging other countries to enact similar judicial reforms which would benefit the United States.²¹ Based on the Commission's recommendations, Congress enacted 28 U.S.C. § 1782 in 1964.²²

The current version of § 1782 replaced the previous version of the section,²³ which was enacted in 1948, and 22 U.S.C. §§ 270-270g,²⁴ which was enacted in 1930 and 1933.²⁵ As a result, the current version of § 1782 contains much of the same terminology as found in its precursors.²⁶ One of the key differences between the old and new versions of § 1782 was the inclusion of the phrase "foreign or international tribunal," which replaced the old language of "court in a foreign country."²⁷ The term "international tribunal" was one of the elements which came

17. *Id.*

18. *Id.*

19. *Id.* at 191.

20. *Id.* at 188-89. See Commission on International Rules of Judicial Procedure of 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743; S. REP. NO. 85-2392 (1958), reprinted in 1958 U.S.C.C.A.N. 5201, 5201, 5203.

21. *NBC*, 165 F.3d at 189. See H.R. DOC. NO. 88-88, at 20 (1963).

22. *NBC*, 165 F.3d at 189. See 28 U.S.C. § 1782 (1994 & Supp. II 1996).

23. The version of 28 U.S.C. § 1782 before the 1964 amendment read as follows:

The deposition of any witness within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

28 U.S.C. § 1782 (1958) (amended 1964), quoted in *NBC*, 165 F.3d at 189 & n.4.

24. The repealed version of 22 U.S.C. §§ 270-270g applied to international judicial proceedings involving the United States or its citizens and pursuant to an agreement between the foreign government and the United States. 22 U.S.C. §§ 270-270g (1958) (repealed 1964), quoted in *NBC*, 165 F.3d at 191-93. The statute granted the members of international tribunals the power to administer oaths, issue subpoenas and hold persons in contempt. *Id.*

25. *NBC*, 165 F.3d at 189.

26. *Id.*

27. Compare 28 U.S.C. § 1782 (1994 & Supp. II 1996), with 28 U.S.C. § 1782 (1958) (amended 1964).

directly from the old 22 U.S.C. §§ 270-270g, and the reason for its inclusion was explained in the House and Senate reports, which accompanied the release of the current version of § 1782.²⁸ These congressional reports stated that “the word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts.”²⁹

Since the enactment of § 1782, and in light of the commentary provided in the congressional reports, federal courts have been given the responsibility of determining which international bodies should or should not be considered “tribunals” under the statute.³⁰ One recent development in this area has been the proliferation of private commercial arbitration and whether it can be considered a “foreign or international tribunal” under the language of § 1782.³¹ Prior to the decision in *NBC v. Bear Stearns & Co.*,³² and its predecessor *In re: NBC*,³³ federal district courts were split on how to define private, international arbitration under § 1782, and a federal appeals court had not yet addressed the issue.³⁴

The first of these cases was *In re Technostroyexport*, which involved a contract dispute between a Russian company and an American company over the sale of minerals.³⁵ Under the terms of the contract, the parties had agreed to settle any disputes through a private arbitration panel located in Sweden.³⁶ Prior to the arbitration proceedings, the Russian company sought to compel discovery from the American company pursuant to 28 U.S.C. § 1782.³⁷ In the district court’s ruling on the discovery motion, it said that the Russian company was not allowed to seek discovery from the district court under § 1782 because the discovery requests had to come from the arbitration panel.³⁸ However, the court said that if the request had been properly made by the private arbitrator, the district court would have the discretion to compel discovery under § 1782.³⁹

The interpretation of § 1782 espoused in *Technostroyexport* was not new at the time. In 1990, Walter Stahr published an article in which he commented that “discovery under [§] 1782 would complement, not interfere with, arbitration, and the mere fact that the place selected for an international arbitration is the United States should not render [§] 1782 inapplicable.”⁴⁰ Also in 1990, Peter Schlosser agreed

28. *NBC*, 165 F.3d at 189.

29. *Id.* See S. REP. NO. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782; H.R. REP. NO. 88-1052, at 9 (1963), reprinted in 1964 U.S.C.C.A.N. 1130.

30. See *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967). This case was the first federal appeals court decision to interpret the term “tribunal” under the 1964 version of § 1782. The court held that an Indian tax official was not a tribunal under the statute but instead a prosecutor. *Id.* at 1022.

31. See *In re: NBC*, No. M-77, 1998 WL 19994 (S.D.N.Y. Jan. 21, 1998).

32. 165 F.3d 184 (2d Cir. 1999).

33. No. M-77, 1998 WL 19994 (S.D.N.Y. Jan. 21, 1998).

34. See *In re Medaway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997); *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994).

35. *Technostroyexport*, 853 F. Supp. at 696.

36. *Id.*

37. *Id.* at 697.

38. *Id.* at 698.

39. *Id.* at 697.

40. Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT’L L. 597, 620 (1990).

with an unpublished ruling by a federal magistrate in Florida, which allowed an international arbitration panel to conduct discovery in a private fishing dispute under § 1782.⁴¹ After the *Technostroyexport* decision, the idea of § 1782 applying to private arbitration seemed to be well accepted. Jonathan Clark Green wrote in 1996 that it was not surprising that the court in *Technostroyexport* held that an arbitration panel was an international tribunal under § 1782.⁴² He stated that “it is hard to think of an international tribunal other than a court or an arbitration panel.” In contrast to *Technostroyexport*, the case of *In re Medaway Power Ltd.* held that a private arbitration proceeding was not a tribunal under the language of § 1782.⁴³ In this case, a British corporation, which was involved in an arbitration proceeding, sought to subpoena documents from an American corporation, which was not a party to the arbitration, pursuant to § 1782.⁴⁴ Although the *Medaway* court distinguished itself from *Technostroyexport* by noting that the American corporation was not a party in the arbitration, it stated that § 1782 only applies to governmental tribunals.⁴⁵

The district court, in *In re: NBC*, noted the split between *Technostroyexport* and *Medaway* and determined that the issue can only be decided by looking at the text, legislative history, and purpose of § 1782.⁴⁶ In the district court’s analysis, it primarily focused on the legislative history and statutory purpose of § 1782.⁴⁷ As part of the court’s analysis, it studied the work of Professor Hans Smit, who was instrumental in the formulation of § 1782.⁴⁸ After reviewing Smit’s articles and the legislative history of § 1782, the district court concluded that the statute was not intended to apply to private, international arbitration.⁴⁹ The court concluded that since private arbitration was not mentioned in any of the legislative history or in any of the contemporaneous academic work which accompanied the statute, Congress did not intend for § 1782 to apply to private arbitration.⁵⁰

Soon after the district court’s decision in *In re: NBC*, Professor Hans Smit responded to the court’s analysis of his early work with an article that stated his own interpretation of 28 U.S.C. § 1782.⁵¹ In his response, Smit concluded that the statutory language of § 1782 does apply to private, international arbitration, and that

41. Peter F. Schlosser, *Coordinated Transnational Interaction in Civil Litigation and Arbitration*, 12 MICH. J. INT’L L. 150, 170-71 (1990).

42. Jonathan Clark Green, *International Litigation: Trends and Developments*, 90 AM. SOC’Y INT’L L. PROC. 62, 70 (1996).

43. 985 F. Supp. 402, 403 (S.D.N.Y. 1997).

44. *Id.*

45. *Id.* at 404.

46. *In re: NBC*, No. M-77, 1998 WL 19994, at *4 (S.D.N.Y. Jan. 21, 1998).

47. *Id.*

48. *Id.* at *4-6. Smit served in 1960 as director of the Columbia University School of Law’s Project on International Procedure, which assisted the Commission and Advisory Committee on International Rules of Judicial Procedure, the drafters of the 1964 version of § 1782. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1, 1 (1998) [hereinafter Smit, *American Assistance*]. See Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264 (1962) [hereinafter Smit, *Assistance Rendered*]; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965) [hereinafter Smit, *International Litigation*].

49. *In re: NBC*, 1998 WL 19994, at *6.

50. *Id.*

51. Smit, *American Assistance*, *supra* note 48. This article was published 37 years after his first article on this subject.

courts have been unwilling to properly interpret the statute.⁵² Smit stated that the unwillingness of courts to correctly apply the statute stems from a fear that the statute may lead to an overburdening of the federal judiciary.⁵³ He also said that federal courts do not have a good understanding of international tribunals and, therefore, mistrust many of these forums.⁵⁴

To support his conclusion that the statute has been misinterpreted, Smit looked at the plain meaning and legislative history that led to 28 U.S.C. § 1782.⁵⁵ His first contention was that the statute should be read in a straightforward manner, which would result in an interpretation that includes private, international arbitration.⁵⁶ Next, he stated that the old 22 U.S.C. §§ 270-270c was the statutory ancestor of § 1782, and that it provided for international arbitration tribunals only when the United States was a party.⁵⁷ However, he noted that when § 1782 replaced 22 U.S.C. §§ 270-270c, the statute no longer required the United States to be a party to the dispute.⁵⁸ Smit concluded that this omission was a clear indication that the drafters did not intend for the statute to solely apply to governmental arbitration.⁵⁹ Smit specifically cites *Medaway* and *In re: NBC* as “regrettable” examples of courts ignoring the plain meaning and legislative history of § 1782.⁶⁰ However, despite Smit’s vocal critique and commentary, the Second Circuit did not agree with his analysis.

IV. INSTANT DECISION

The issue before the Second Circuit Court of Appeals in *NBC*, was whether a private, commercial arbitration proceeding conducted by an international organization could be considered a “foreign or international tribunal” under the meaning of 28 U.S.C. § 1782.⁶¹

The court began its analysis of the issue by looking directly at the language in § 1782. Due to the fact that the phrase “foreign or international tribunal” was not defined by the statute, the court applied the plain meanings to these terms.⁶² In response to the court’s plain meaning analysis, *NBC* cited several authorities which referred to private arbitration panels as “tribunals.”⁶³ The court, however, responded by stating that the term “foreign and international tribunal” could refer to private or public tribunals; therefore, it was impossible to determine which meaning applied

52. *Id.* at 2.

53. *Id.*

54. *Id.*

55. *Id.* at 2-6.

56. *Id.* at 5.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 5-6.

61. *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999).

62. *Id.* at 188.

63. *Id.* The court only stated that *NBC* cited “court cases, international treaties, congressional statements, academic writings, and even the Commentaries of Blackstone and Story.” *Id.*

to the language of the statute.⁶⁴

After failing to interpret § 1782 through a textual analysis, the court examined the legislative history of the statute.⁶⁵ The court carefully analyzed the Congressional reports which stated that “the word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts.”⁶⁶ The court concluded that the authors of these reports were only referring to governmental entities and not private arbitration panels.⁶⁷ The court based this conclusion on the fact that later in the report the committee referred to investigation magistrates, which could be considered non-conventional courts, while it never mentioned private dispute resolution.⁶⁸

Next, the court traced the term “international tribunal” back to the language of 22 U.S.C. §§ 270-270g, which was replaced by the current version of § 1782.⁶⁹ The court stated that the term “international tribunal” in 22 U.S.C. §§ 270-270g came directly from language used in an intergovernmental arbitration proceeding between the United States and Canada in 1930.⁷⁰ The court, therefore, admitted that the drafters of § 1782 intended for the statute to apply to arbitration but only to arbitration proceedings between the United States and a foreign government.⁷¹

The court faced a dilemma in its historical analysis of § 1782. In order to uphold the decision in *In re: NBC*, the court cited the 1962 article by Hans Smit, which was the basis of the district court’s historical analysis.⁷² In reaction to the *In re: NBC* court’s interpretation of his earlier work, Hans Smit published a 1998 article, which criticized the district court’s historical interpretation of his earlier work.⁷³ In the court of appeals’ decision, it discredited Smit’s 1998 article by stating the following:

Professor Smit’s recent article does not purport to rely upon any special knowledge concerning legislative intent, and we find its reasoning unpersuasive. By contrast, statements in the 1962 article, which was specifically relied upon in the House and Senate reports, are probative of Congress’s contemporaneous interpretation of the statutory language.⁷⁴

Finally, the court said that the purpose of arbitration is efficiency and cost effectiveness and, therefore, if § 1782 applied to private commercial arbitration, those arbitration proceedings would become entangled in the same inefficiencies that have plagued the formal judicial system.⁷⁵ The court concluded this point by

64. *Id.*

65. *Id.* at 188-91.

66. *Id.* at 189. See S. REP. NO. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782; H.R. REP. NO. 88-1052, at 9 (1963), reprinted in 1964 U.S.C.C.A.N. 1130.

67. *NBC*, 165 F.3d at 189.

68. *Id.*

69. *Id.* See *supra* note 24.

70. *NBC*, 165 F.3d at 189. See Smit, *Assistance Rendered*, *supra* note 48, at 1264.

71. *NBC*, 165 F.3d at 190.

72. *Id.* at 189-90.

73. Smit, *American Assistance*, *supra* note 48, at 6.

74. *NBC*, 165 F.3d at 190 & n.6.

75. *Id.* at 190-91.

suggesting that parties should negotiate discovery procedures in their arbitration agreement and leave the courts out of the process.⁷⁶

Therefore, due to the fact that 28 U.S.C. § 1782 does not consider private commercial arbitration to be a “foreign or international tribunal” within the text or history of the statute, and due to the courts unwillingness to place the inefficiencies of the court system on the arbitration process, the Second Circuit Court of Appeals affirmed the orders quashing NBC’s subpoenas and denying NBC’s motion to enforce the subpoenas.⁷⁷

V. COMMENT

Despite the concerns expressed by Professor Hans Smit, the current trend in the interpretation of § 1782 has followed the precedent set by the Second Circuit Court of Appeals in *NBC*.⁷⁸ In March 1999, the Fifth Circuit Court of Appeals, in *In re Republic of Kazakhstan v. Biedermann International*, reversed a district court in Texas and determined that § 1782 did not allow discovery of an individual who was not a party to private, international arbitration.⁷⁹ In reaching its decision in *Republic of Kazakhstan*, the Fifth Circuit followed the same legislative history analysis established by the Second Circuit in *NBC*.⁸⁰ As a result of these two decisions, the Second and Fifth Circuits have effectively sounded the death of § 1782 as a tool for private, international arbitration.

These interpretations of § 1782 are unfortunate obstacles for the field of international arbitration. The decisions in *NBC* and *Republic of Kazakhstan* contradict an established trend among federal courts to support international arbitration as a mechanism for resolving disputes.⁸¹ In *Scherk v. Alberto-Culver Co.*, the United States Supreme Court held that an American company could not circumvent the mandatory arbitration clause in its contract to purchase European business entities from a German citizen.⁸² In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court held that an antitrust issue between a Japanese automobile manufacturer and a Puerto Rican automobile dealer should be decided in accordance with the two parties’ international arbitration agreement, even though the antitrust issue could have otherwise come before a United States federal court.⁸³ Both of these cases state a clear willingness by the Supreme Court to support the institution of private, international arbitration.

This notion of the historical approval of arbitration by the federal government was one of the points cited by the district court in *Republic of Kazakhstan*, the case which was eventually overruled by the Fifth Circuit.⁸⁴ The district court in *Republic*

76. *Id.* at 191.

77. *Id.* at 191-92.

78. See 165 F.3d 184 (2d Cir. 1999); Smit, *American Assistance*, *supra* note 48.

79. *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

80. *Id.* at 882-83.

81. See *id.* at 880; *NBC*, 165 F.3d at 184; Smit, *American Assistance*, *supra* note 48.

82. 417 U.S. 506, 515 (1974).

83. 473 U.S. 614, 640 (1985).

84. 33 F. Supp. 2d 567, 569 (S.D. Tex. 1998).

of *Kazakhstan* noted that Congress must have intended to include private arbitration under the language of § 1782 since it has traditionally passed legislation in support of the arbitration process.⁸⁵ The district court also concluded that a narrow interpretation of § 1782 would prohibit U.S. federal courts from providing discovery assistance to a variety of foreign judicial bodies, which are not traditional courts but are nonetheless important in their international significance (e.g. ecclesiastical courts, courts martial and merchant guilds).⁸⁶ Finally, the district court cites the example of Taiwan as its best evidence that § 1782 cannot be limited to governmental judicial entities.⁸⁷ The United States does not currently recognize Taiwan as an independent nation; therefore, instead of dealing with Taiwan through traditional diplomatic avenues, the United States interacts with Taiwan through private "trade offices."⁸⁸ As a result of this arrangement, § 1782 could never apply to arbitration proceedings with Taiwan, if the statute was restricted to only governmental tribunals.⁸⁹

The above mentioned arguments by the district court in *Republic of Kazakhstan* present a practical rationale for interpreting § 1782 in favor of international arbitration, an analysis that is missing in the Second Circuit's decision in *NBC*. The Second Circuit based its decision on the fact that the legislative history of § 1782 did not specifically provide for private, international arbitration.⁹⁰ However, an equally worthwhile analysis of § 1782 could have been based on the benefits of private, international arbitration and the fact that the legislative history did not expressly limit the statute to governmental judicial bodies.

It is apparent that private arbitration is a desirable method of dispute resolution between international parties, otherwise, provisions for arbitration would not be included in contracts. Therefore, the application of § 1782 to private, international arbitration would only facilitate a process that the parties had already determined to be worthwhile and valuable. Without the possibility of court-assisted discovery, international arbitrators would be powerless in their ability to receive testimony or other evidence from third parties in the United States. Furthermore, if the United States does not recognize and assist private, international arbitration, then it may eliminate the incentives for other countries to use their courts to assist arbitration proceedings. Ultimately, a lack of discovery power by arbitrators could result in inconclusive and inefficient arbitration proceedings that could eventually cause international arbitration to become disfavored method of dispute resolution. If international arbitration was not a viable option for corporations that do business internationally, then those businesses would probably have to curtail their dealings in countries that have corrupt, biased or undeveloped judicial systems.

An argument against allowing § 1782 to apply to private, international arbitration is that it would provide a foreign entity with power over a United States entity that is not a party to the arbitration proceedings. This is a valid point, but § 1782 already protects against abusive or inappropriate requests from foreign judicial

85. *Id.* at 569.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *NBC*, 165 F.3d at 188-89.

bodies by making any discovery request subject to the discretion of a federal district court. Furthermore, the court in *Technostroyexport* stated that only an arbitration panel could authorize a discovery request pursuant to § 1782, not the parties to the arbitration.⁹¹

A last criticism of allowing § 1782 to apply to private, international tribunals is the fact that there is no statute which allows discovery assistance for private, domestic tribunals.⁹² If this discrepancy was allowed to exist, then a party involved in an international arbitration proceeding would have greater discovery powers than would a domestic party involved in arbitration. This could result in complicated disputes over the interpretation of the terms “international” and “domestic.” This could lead to parties intentionally seeking foreign arbitrators for domestic disputes just because of their desire to subpoena certain evidence from the other side. Hans Smit addressed this issue in his 1998 article and stated that Congress should provide a means by which domestic parties may seek the assistance of the federal courts in private arbitration.⁹³ However, Smit says that the failure of Congress to properly address private, domestic, arbitration should not result in the failure of courts to properly interpret § 1782.⁹⁴

VI. CONCLUSION

The Second Circuit’s decision in the present case is the product of a narrow interpretation of 28 U.S.C. § 1782. The legislative history of the statute does not expressly allow or forbid its application to private, international arbitration. Therefore, the benefits of international arbitration should be carefully weighed as a determining factor in the analysis of the statute’s potential application. International arbitration is a valuable resource to private parties who wish to avoid the entanglements of foreign courts. A mechanism like § 1782 could further this process and encourage other countries to institute similar judicial supports. If the decisions by the Second and Fifth Circuits stand, a opportunity will have been missed to advance international dispute resolution.

THURSTON K. CROMWELL

91. *In re Technostroyexport*, 853 F. Supp. 695, 698 (S.D.N.Y. 1994).

92. Smit, *American Assistance*, *supra* note 48, at 7.

93. *Id.*

94. *Id.*