

2008

## Expanding the Power of U.S. Courts in Private International Arbitration - Moderation Loses to an Extreme

Amy Moore

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### Recommended Citation

Amy Moore, *Expanding the Power of U.S. Courts in Private International Arbitration - Moderation Loses to an Extreme*, 2008 J. Disp. Resol. (2008)

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# Expanding the Power of U.S. Courts in Private International Arbitration— Moderation Loses to an Extreme

*In re Oxus Gold PLC*<sup>1</sup>

## I. INTRODUCTION

Since its inception, 28 U.S.C. § 1782<sup>2</sup> has been the subject of revisions, amendments, and much debate. This history is symptomatic of the evolving nature of United States presence in the international legal and business world; however, the statutory changes have not always been clear in purpose or application.

In 2004, the Supreme Court granted certiorari for *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>3</sup> in order to solidify interpretation of § 1782's latest rendition, a 1964 congressional revision. Unfortunately, in expanding the accepted scope of § 1782, the Court created new ambiguity, especially in how the statute should relate to private international arbitration, that has since resulted in differing district opinions and conflicting commentary. This note traces the progression of § 1782 interpretation from pre-*Intel* precedent to the most recent post-*Intel* reasoning of *In re Oxus Gold*<sup>4</sup> and answers the question, "How far should § 1782 reach?"

## II. FACTS AND HOLDING

Oxus Gold PLC (Oxus) "is an international mining group based in the United Kingdom."<sup>5</sup> In September 1998, Norox Mining Company Ltd. (Norox), a subsidiary of Oxus, entered into a joint venture with Kyrgyzaltyn Open Joint Stock Company (Kyrgyzaltyn), which is owned by the Republic of Kyrgyzstan.<sup>6</sup> Talas Gold Mining Company (TGMC) was created as a joint venture company to develop the Jerooy gold deposit in the Kyrgyz Republic.<sup>7</sup>

Kyrgyzstan granted TGMC a license to develop the Jerooy gold deposit in 2000.<sup>8</sup> When TGMC failed to meet its obligations under the license, the Kyrgyz government suspended and then annulled the license in 2002.<sup>9</sup> In 2003, TGMC agreed to continue development on an accelerated schedule; and Kyrgyzstan reinstated the license.<sup>10</sup> Finally, in August 2004, when TGMC again failed to meet

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1. No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007).

2. 28 U.S.C. § 1782 (2006).

3. 542 U.S. 241, 241 (2004).

4. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*1.

5. *Id.*

6. *Id.*

7. *Id.* TGMC is majority controlled by Oxus, not Kyrgyzaltyn. *Id.*

8. *Id.*

9. *In re Matter of Application of Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, at \*1 (D.N.J. Oct. 11, 2006).

10. *Id.*

expectations, the Kyrgyz government canceled the license and withdrew Oxus' rights to the mine.<sup>11</sup>

In November 2005, Jack Barbanel, managing director of SIG Overseas Ltd. (SIG), contacted the Kyrgyz government on behalf of Global G.o.l.d. Holding GmbH (Global Gold).<sup>12</sup> Barbanel represented that Global Gold was interested in competing for the license to develop the mine.<sup>13</sup> Barbanel and the Kyrgyz Republic reached no agreements regarding the license<sup>14</sup> before February 2006 when, "[a]fter unsuccessful attempts to have [its] license reinstated, Oxus halted development of the Jerooy Mine," and began the following series of legal proceedings.<sup>15</sup>

In March 2006, TGMC initiated three actions in Kyrgyzstan's Bishkek Inter-Regional Court challenging the legality of the Kyrgyz government's actions with respect to the Jerooy license.<sup>16</sup> Two months later, the Kyrgyz government indicated an intention to file a Claim for Compensation against TGMC for failing to fulfill its obligations under the license.<sup>17</sup> Oxus responded immediately by filing a "Notice of Claim and Request for Arbitration . . . against the Kyrgyz Republic under the United Kingdom-Kyrgyz Bilateral Investment Treaty (the "BIT"), [asserting] that the Kyrgyz government's actions with respect to the Jerooy [license] violated the BIT."<sup>18</sup>

In August 2006, Oxus filed an *ex parte* application with the United States District Court of New Jersey to obtain discovery from Barbanel and SIG for use in all of the above proceedings.<sup>19</sup> The subpoena request was granted pursuant to 28 U.S.C. § 1782 (Section 1782 Order),<sup>20</sup> which enables a district court to order discovery for use in a foreign or international tribunal.<sup>21</sup>

Barbanel promptly answered this ruling with a motion to vacate the Section 1782 Order, but Magistrate Judge Hughes denied the request for vacatur.<sup>22</sup> Relying in part on the Supreme Court's recent interpretation of the § 1782(a) phrase "foreign or international tribunal,"<sup>23</sup> Judge Hughes concluded that the statute encompasses private international arbitration.<sup>24</sup> Barbanel appealed the denial of his motion.<sup>25</sup>

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11. *Id.*

12. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*1.

13. *Id.*

14. *In re Matter of Application of Oxus Gold PLC*, 2006 WL 2927615, at \*2.

15. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*1.

16. *Id.*

17. *Id.*

18. *Id.*

19. *In re Matter of Application of Oxus Gold PLC*, 2006 WL 2927615, at \*2.

20. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*2.

21. 28 U.S.C. § 1782 (2000). Oxus also filed for an order to serve the subpoena abroad, which was granted, pursuant to 28 U.S.C. § 1783 (2006), which reads, "A court of the United States may order the issuance of a subpoena requiring the appearance . . . of a national or resident of the United States who is in a foreign country." *In re Oxus Gold PLC*, 2007 WL 1037387, at \*8 (quoting 28 U.S.C. § 1783(a)).

22. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*2.

23. *In re Matter of Application of Oxus Gold PLC*, 2006 WL 2927615, at \*5 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004)).

24. *Id.* at \*6.

25. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*2.

In the instant case, the District Court rejected this appeal, affirming Judge Hughes' Section 1782 Order.<sup>26</sup> The court upheld Hughes' decision that discovery for private international arbitration is "for use"<sup>27</sup> in a "foreign tribunal"<sup>28</sup> pursuant to 28 U.S.C. § 1782.<sup>29</sup>

### III. LEGAL BACKGROUND

Any examination of a court's interpretation of 28 U.S.C. § 1782, particularly in regards to the phrase "foreign or international tribunal," should begin with Congress' 1964 revision of the statute.<sup>30</sup> Following recommendations of the Commission on International Rules of Judicial Procedure, Congress revised the statute's language to allow a district court to order discovery "for use in a proceeding in a foreign or international tribunal . . . ."<sup>31</sup> This new language replaced the standard established in a 1949 amendment to the statute, which provided for discovery relating to "any judicial proceeding pending in any court in a foreign country."<sup>32</sup>

#### A. "*Foreign or International Tribunal*" Does Not Include Private International Arbitration

In 1999, two District Courts addressed this change, and particularly the scope of the phrase "foreign or international tribunal," in relation to private international commercial arbitration.<sup>33</sup> In *NBC v. Bear Stearns*,<sup>34</sup> the Second Circuit examined the plain meaning of the text in the revised § 1782 and, finding that the ordinary and natural meaning of "foreign or international tribunals" was sufficiently ambiguous to neither include or exclude private arbitration, turned to legislative purpose to determine the meaning of the statute.<sup>35</sup>

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26. *Id.* at \*8.

27. *Id.* at \*7.

28. *Id.* at \*5.

29. *Id.* at \*8. Barbanell also filed a motion to vacate the Section 1783 Order. *Id.* Judge Hughes granted the request because a plain reading of § 1783 unambiguously requires that the request for service abroad be in connection with a legal proceeding in the United States. *Id.* (citing 28 U.S.C. § 1783(a) (2000)) ("the statute requires Petitioner to show that (1) there is a pending proceeding in the United States . . . ."). Oxus cross-appealed the grant of Barbanell's motion to vacate the Section 1783 Order; but the District Court rejected the cross-appeal, affirming Judge Hughes' decision. *Id.* The court held that a subpoena for § 1782 discovery will not qualify for service abroad under 28 U.S.C. § 1783 unless the foreign proceeding is "in connection with a pending proceeding in the United States." *Id.* at \*2-\*8.

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

31. *Id.* (quotation marks omitted).

32. Steven M. Saraisky, Comment, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127, 1131 (1994) (quotation marks and citation omitted).

33. See INT'L LAW FIRM OF FULBRIGHT & JAWORSKI L.L.P., 2007 INTERNATIONAL ARBITRATION REPORT: US COURTS EXPAND DISCOVERY IN INT'L ARBITRATION 1, 1-2 (John Bowman ed., 2007), <http://www.fulbright.com/images/publications/PubIA.pdf>.

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

35. *Id.* at 188.

In examining the congressional reports, the court concluded that congress had in mind only governmental entities acting as representatives of states.<sup>36</sup> The court pointed to § 1782's replacement of the old 22 U.S.C. § 270<sup>37</sup> as the most compelling evidence of congressional intent to exclude private international arbitration from the reach of § 1782.<sup>38</sup> The text of § 270 authorized international tribunals to administer oaths, issue subpoenas, and charge contempt; and the court determined that there was no question that these functions of § 270 applied only to intergovernmental tribunals.<sup>39</sup> Even more importantly, § 270 "applied only to international tribunals 'established pursuant to an agreement between the United States and any foreign government or governments.'"<sup>40</sup> In these changes, the court found clear intention to broaden the scope of the surviving statute to include international tribunals involving countries other than the United States but no intention to extend the reach of § 1782 to private arbitration, which was far beyond the scope of the original statutes.<sup>41</sup>

The second case of 1999 to consider § 1782 was *In re Republic of Kazakhstan v. Biedermann Int'l*.<sup>42</sup> In *Republic of Kazakhstan*, the Fifth Circuit also determined that the revised § 1782 should not be interpreted to encompass private international arbitration.<sup>43</sup> The court referred back to *NBC*'s discussion of § 1782's legislative history and affirmed its conclusions about the congressional intent behind the revisions.<sup>44</sup> In addition, the Fifth Circuit reasoned that arbitration is intended to be a "speedy, economical, and effective means of dispute resolution"; and reading § 1782 as allowing world-wide procedural wrangling—contests for advantage, delaying tactics, etc.—in private international arbitration would subvert the purpose and greatest benefits of arbitration.<sup>45</sup> Thus, the Fifth Circuit joined the Second Circuit in holding that the phrase "foreign and international tribunals" in 28 U.S.C. § 1782 should not be interpreted as authorizing "resort to United States federal courts to assist discovery in private international arbitrations."<sup>46</sup>

### *B. The Supreme Court Weighs In—"Foreign or International Tribunal" May Include Private International Arbitration*

In 2004, the Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>47</sup> a case originating from the Ninth Circuit.<sup>48</sup> The District Court followed the Second and Fifth Circuit precedent and ruled that § 1782 did not authorize domestic discovery for use in private foreign proceedings.<sup>49</sup> However, the Ninth Circuit

36. *Id.* at 189.

37. 22 U.S.C. §§ 270-270(g) (1958).

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

39. *Id.*

40. *Id.* at 189-90 (citing Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1269 (1962)).

41. *Id.* at 190.

42. 168 F.3d 880 (5th Cir. 1999).

43. *Id.* at 883.

44. *Id.* at 881-82.

45. *Id.* at 883.

46. *Id.*

47. 542 U.S. 241 (2004).

48. *Id.*

49. *Id.* at 241.

Court of Appeals reversed this judgment, ruling that the District Court had the authority to allow discovery in this case under § 1782.<sup>50</sup> The Supreme Court granted certiorari to consider, for the first time, the interpretation and application of the revised statute.<sup>51</sup>

The *Intel* case involved a discovery request in a U.S. Court for use in a dispute before the Commission of the European Communities (the European Commission).<sup>52</sup> The Supreme Court ruled that the European Commission was a foreign or international tribunal, at least when acting as “a first-instance decision-maker,” under § 1782(a).<sup>53</sup> Just as in the Second, Fifth, and Ninth Circuit courts, the Supreme Court placed great importance on the revision of § 1782.<sup>54</sup> Again, the phrase “foreign or international tribunal” bore particular relevance to the court’s final decision, since the phrase is open to interpretation and finding such a tribunal in the case is necessary for applying § 1782.<sup>55</sup> So, the court considered whether or not the European Commission qualified as such a tribunal, taking into account the history of the statute’s revision.<sup>56</sup>

The European Commission is the executive and administrative body of the European Communities, established under the European Union Treaty.<sup>57</sup> The Commission is authorized to enforce the Treaty components with “written, binding decisions, enforceable through fines and penalties. . . . [and] appealable to the Court of First Instance and [ultimately,] the European Court of Justice.”<sup>58</sup> As such, the Supreme Court reasoned that the Commission was, at the least, a proceeding leading directly to quasi-judicial proceedings.<sup>59</sup>

Returning to the history of the 1964 revision of § 1782, the Court examined whether such a body falls within the new version of § 1782.<sup>60</sup> They first looked to the congressional record used in *NBC* and *Republic of Kazakhstan*, noting that Congress understood the change in statutory language as providing for the possibility of judicial assistance with foreign administrative and quasi-judicial proceedings.<sup>61</sup> The Court went further by citing Professor Hans Smit, the leader of the 1964 commission that drafted the § 1782 revisions,<sup>62</sup> who wrote that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies . . . .”<sup>63</sup> Based on these combined resources,

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50. *Id.* at 246.

51. *Id.* at 253.

52. *Id.* at 246.

53. *Id.* at 246-47.

54. *Id.* at 248. The court referencing the replacement by Congress of, “in any judicial proceeding pending in any court in a foreign country,” with “in a proceeding in a foreign or international tribunal.” *Id.* at 248-49.

55. *Id.* at 257-58.

56. *Id.*

57. *Id.* at 250.

58. *Id.* at 252.

59. *Id.*

60. *Id.* at 257-58.

61. *Id.* at 258.

62. *In re Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 882 n.4 (5th Cir. 1999).

63. *Intel Corp.*, 542 U.S. at 258 (citing Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965) [hereinafter Smit, *International Litigation*]). Recent commentary has suggested that, although this citation of Professor Smit’s writings was clearly dicta, it is this reference that paves the way for extending the reach of § 1782 far beyond its traditional application. INT’L LAW FIRM OF FULBRIGHT & JAWORSKI L.L.P., 2007 INTERNATIONAL ARBITRATION

the Supreme Court decided that they had no reason to exclude the European Commission, at least as a decision-making body, from the scope of § 1782.<sup>64</sup>

In reaching this decision, the Court considered whether its ruling would negatively affect parity between parties in arbitration.<sup>65</sup> The Court pointed out that U.S. courts are not required, only permitted, to grant discovery requests for private international arbitration.<sup>66</sup> Thus, District courts are free to condition grants on a “reciprocal exchange of information.”<sup>67</sup> At the same time, an international tribunal is entirely free to accept or reject whatever information it deems necessary.<sup>68</sup> Thus, while acknowledging that questions of parity are relevant to a district court’s initial decision whether to order discovery, the Supreme Court decided this policy consideration had no place in its statutory interpretation.<sup>69</sup>

### *C. Extending the Scope of § 1782—“Foreign or International Tribunal” Does Include Private International Arbitration*

In December of 2006, the District Court for the Northern District of Georgia decided *In re Application of Roz Trading Ltd.*,<sup>70</sup> interpreting § 1782 in light of the Supreme Court’s *Intel* decision.<sup>71</sup> The case involved a dispute between partners in a joint venture that was created with a contract that compelled the parties to resolve their disputes before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.<sup>72</sup> The Centre is a private institution that offers voluntary arbitration services.<sup>73</sup> The *Roz* court maintained that *Intel* provided “sufficient guidance . . . to determine that arbitral panels convened by the Centre are ‘tribunals’” within the scope of § 1782.<sup>74</sup>

The respondents in *Roz* argued that the case should be controlled by *NBC and Republic of Kazakhstan*, rather than *Intel*.<sup>75</sup> However, the court noted that those two cases were decided five years before *Intel*; and in addition, *Intel*’s reasoning “demonstrate[d] the structural and analytical flaws in the Second and Fifth Circuits’ interpretations of § 1782(a).”<sup>76</sup> For instance, though *Intel* did not expressly designate private arbitral services as tribunals, it quoted approvingly Professor Smit’s writings that included “arbitral tribunals” within the meaning of § 1782,

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REPORT: US COURTS EXPAND DISCOVERY IN INT’L ARBITRATION 3 (John Bowman ed., 2007). Furthermore, after the Supreme Court granted *certiorari* for *Intel Corp.*, Professor Smit made his opinion clear regarding the reach of § 1782 saying, “I also hope that the Supreme Court may find it appropriate to reject the now unanimous, but clearly incorrect, view of two appellate courts that Section 1782 does not extend its reach to private international arbitral tribunals.” 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, 298 (2004) [hereinafter Smit, *Proper Interpretation*].

64. *Intel Corp.*, 542 U.S. at 258.

65. *Id.* at 261.

66. *Id.* at 264.

67. *Id.* at 262.

68. *Id.*

69. *Id.* at 261.

70. 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

71. *Id.*

72. *Id.* at 1222.

73. *Id.* at 1224.

74. *Id.*

75. *Id.* at 1226.

76. *Id.*

contrary to the findings of *NBC* and *Republic of Kazakhstan*.<sup>77</sup> Also, according to *Intel* and contrary to *NBC* and *Republic of Kazakhstan*, the history of § 1782's amendment, "'reflects Congress' recognition that judicial assistance would be available whether . . . of a criminal, civil, administrative, or other nature.'" <sup>78</sup> Finally, as a matter of common sense, if Congress intended to exclude private arbitration or similar processes, it would have been simple to add "governmental" in front of "tribunal" during the statute's amendment.<sup>79</sup>

According to the *Roz* court, the *Intel* standard was that an arbitral body making adjudicative, reviewable decisions is a tribunal, "regardless of whether the body is governmental or private."<sup>80</sup> Asserting reliance on *Intel*, and expressly rejecting *NBC* and *Republic of Kazakhstan*,<sup>81</sup> *Roz* concluded that discovery under § 1782 had been extended to reach private international commercial arbitrations.<sup>82</sup>

In *re Oxus Gold*<sup>83</sup> was decided almost simultaneously with *Roz*; and while the two cases came to the same basic conclusion, *Oxus* chose a more moderate approach to expanding § 1782, an approach that drew a much more conservative line than that drawn by *Roz*.

#### IV. INSTANT DECISION

The District Court began its analysis of the "foreign or international tribunal" question by citing *Intel*'s review of the 1964 revision of § 1782.<sup>84</sup> The court found particularly relevant the Supreme Court's reference to the inclusion of "administrative and quasi-judicial proceedings" within the reach of the statute, saying that the purpose of the language change was "to ensure that 'assistance is not confined to proceedings before conventional courts.'" <sup>85</sup>

The court then noted the Second and Fifth Circuit precedent that private international arbitration does not fall within § 1782.<sup>86</sup> In particular, the court referenced *NBC*'s conclusion that Congress intended the revised § 1782 to cover only governmental or intergovernmental tribunals, conventional courts, and other state-sponsored tribunals; and therefore, tribunals created by private organizations should not fall within the statute.<sup>87</sup> However, rather than directly accept or reject this precedent, the court distinguished the *Oxus* dispute on the basis of its connection with a Bilateral Investment Treaty.<sup>88</sup>

The BIT between the United Kingdom and Kazakhstan mandated that disputes between nationals (or companies of nationals) of these countries would be

77. *Id.* at 1224-25. Smit, *International Litigation*, *supra* note 63, at 1026-27.

78. *Id.* at 1226 (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004)).

79. *Id.* at 1226 n.3.

80. *Id.* at 1228.

81. *Id.*

82. INT'L LAW FIRM OF FULBRIGHT & JAWORSKI L.L.P., 2007 INTERNATIONAL ARBITRATION REPORT: US COURTS EXPAND DISCOVERY IN INT'L ARBITRATION 3-4 (John Bowman ed., 2007).

83. *In re Oxus Gold PLC*, No. 06-82-GEB, 2007 WL 1037387, at \*1 (D.N.J. Apr. 2, 2007).

84. *In re Matter of Application of Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, at \*5 (D.N.J. Oct. 11, 2006).

85. *Id.* (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249 (2004)).

86. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*5.

87. *Id.*

88. *Id.* See also Roger Alford, *What is a "Foreign or International Tribunal"?*, OPINIO JURIS, April 11, 2007, <http://www.opiniojuris.org/posts/1176252984.shtml>.



resolved by arbitration,<sup>89</sup> which would proceed under arbitration standards of the United Nations.<sup>90</sup> With this in mind, the court reasoned that the arbitration in this case was not simply a proceeding resulting from a contract between two private parties.<sup>91</sup> Rather, it was a proceeding authorized by an agreement between nations<sup>92</sup> and carried out in a forum governed by international law.<sup>93</sup> Based on this interpretation of facts and precedent, the court upheld the Magistrate Judge's holding that the arbitral panel in *Oxus* was a "foreign tribunal" pursuant to § 1782, stating that this holding "was not clearly erroneous or contrary to law."<sup>94</sup>

## V. COMMENT

*Oxus* both expanded and limited the reach § 1782. Springing from *Intel's* ambiguity on the meaning of "foreign or international tribunal," *Oxus* draws a line well short of *Intel's* possible implications. For instance, at the extreme end, *Intel* could conceivably be read as encompassing all private arbitration—criminal, civil, personal, commercial—in any foreign decision making body, whether tied in some way to a government or wholly, entirely independent from all state entities. The question is, does the line of *Oxus* accurately represent the *Intel* standard; or should *Intel* be understood to extend § 1782 farther, as the *Roz* decision demonstrated?

### A. *Roz*—Approaching the Extreme

*Roz* considered *Intel's* review of the § 1782 issue and concluded that the obvious consequence of the Supreme Court's reasoning was to extend § 1782 to private international arbitration. The relevant difference between the facts of *Intel* and those of *Roz* is that the arbitral body in *Roz*, the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna, was a clearly private institution. Unlike the European Commission in *Intel*, the Centre was unaffiliated with a governmental or intergovernmental organization. As such, the court's decision that the Centre constituted a foreign or international tribunal pursuant to § 1782 was significant. It was the first time § 1782 was applied to a wholly private arbitration.

The *Roz* decision represents the farthest stretch of implication that can be drawn from *Intel*. Examining the reasoning in *Intel*, including the dicta that fa-

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89. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*5. "Article 8 of the BIT Agreement provides, in relevant part: Settlement of Disputes Between an Investor and a Host State: (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes." *Id.* at \*5 n.4.

90. *Id.* The arbitration panel itself "consists of three private individuals chosen by the parties" and is governed by the Arbitration Rules of the United Nations Commission on International Trade Law. *Id.* at \*4-\*5.

91. *In re Matter of Application of Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, at \*6 (D.N.J. Oct. 11, 2006).

92. *Id.*

93. *In re Oxus Gold PLC*, 2007 WL 1037387, at \*5.

94. *Id.*

vorably referenced Professor Smit's opinion about the intention of the amendment drafters,<sup>95</sup> § 1782 can be construed as reaching private international commercial arbitration, which is exactly what *Roz* did.

### *B. Objection! Commentary On and Criticisms of Roz*

The idea of extending § 1782 to private international arbitration, though hailed by some as an “exciting development in the arbitration world,” has not been met with unqualified acceptance.<sup>96</sup> One commentator lamented, in reference to *Roz*, that “the road to Hell is paved with good intentions.”<sup>97</sup>

The primary concern is in regards to parity. One of the fundamental principles of any arbitration is that the parties involved will be treated equally.<sup>98</sup> If U.S. courts are open to requests for discovery in private international arbitration, a request that no other country currently entertains without the approval of the arbitral body, then U.S. entities are now vulnerable to an attack that cannot be defended or returned.<sup>99</sup>

The *Intel* court foresaw this concern and tried to allay fears by explaining that U.S. courts are not required to grant § 1782 discovery requests, that district courts are free to place conditions on such grants, and that international tribunals are free to accept or reject information gathered through such discovery.<sup>100</sup> This element of discretion in § 1782 allows an adjudicator to simply say “no” in a variety of circumstances, such as when he or she is “skeptical of the requesting party’s authority, suspects a fishing expedition, or finds that ordering the production of evidence would unduly infringe a person’s privacy rights . . . .”<sup>101</sup> Therefore, the Supreme Court saw no reason to expect detriment to any parties, United States or otherwise, from allowing U.S. district courts the option of assisting foreign tribunals that may or may not accept the assistance, at their discretion.<sup>102</sup>

On the other hand, this approach may implicate a related, secondary concern. Some argue that expanding § 1782, allowing U.S. courts to grant § 1782 discovery requests, is placing foreign countries and international tribunals in a difficult position.<sup>103</sup> In the event that countries or tribunals are faced with U.S. “assistance” that does not fit into their systems, they will be forced to choose between parties, giving or denying advantage.<sup>104</sup> They might also be forced to adjust or waive their

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95. See *supra* note 63.

96. Eric Schwartz & Alan Howard, *International Arbitration Discovery Applications to Rise?*, 5/4/2007 N.Y.L.J. 4 (2007) (citing Global Arbitration Review, weekly e-bulletin, Dec. 20, 2006).

97. *Id.*

98. *Id.*

99. *Id.*

100. See *supra* notes 65-69 and accompanying text.

101. Saraisky, *supra* note 32, at 1149.

102. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 261 (2004).

103. Mousa Zalta, Note, *Recent Interpretation of 28 U.S.C. § 1782(a) by the Supreme Court in Intel Corp. v. Advanced Micro Devices, Inc.: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants*, 17 PACE INT'L L. REV. 413, 441 (2005).

104. *Id.* at 441-42. Tribunals that allow § 1782 evidence may be faced with an opposing party who is unable to request similar evidence in another country. *Id.* at 441 n.222. Alternatively, tribunals that disallow § 1782 evidence may end up with an opposing party who was able to obtain similar evidence in another way. *Id.*

own laws or processes<sup>105</sup>—processes that the parties may have counted on when choosing arbitration in the first place.

### C. *Oxus Gold*—The Moderate Road

In *Oxus*, the Third Circuit side-stepped the obvious questions about including or excluding private international commercial arbitration from the scope of § 1782 by focusing on the treaty aspects of the *Oxus* dispute. The dispute is unquestionably a private, commercial matter, as was the dispute in *Intel*; but unlike the European Commission in *Intel*, the arbitral panel in *Oxus* is not a foreign administrative authority. Though governed by rules of a foreign administrative authority—the United Nations—the panel is still simply the Treaty-designated decision-maker following a Treaty-designated procedure. By ruling that this arbitral panel is an international tribunal under § 1782, the *Oxus* decision quietly extended § 1782 to private international commercial arbitrations proceeding under a Treaty.

The court could have ruled directly on whether § 1782 now encompasses private international arbitration; and instead, the decision neither embraced nor rejected such an interpretation. In fact, the *Oxus* decision does not even mention *Intel* in support of finding a foreign or international tribunal, despite *Intel*'s emphasis on the issue. Instead, the decision skips back to *NBC* for most of its foundational support, bypassing the Supreme Court's treatment of all the same issues.<sup>106</sup>

Side-stepping in this manner is one way to avoid the potential issues of parity, which may have been the *Oxus* court's motivation.<sup>107</sup> Extending § 1782 as *Oxus* did, only to private international arbitration commencing under the umbrella of a treaty, has a built in regulating mechanism. It is possible for drafters of future treaties or of treaty amendments to include language addressing the U.S. discovery rule to which both parties can agree, thus solving the potential problems in a process consistent with arbitration's principles of cooperation and self-determination. This is a small, perhaps unsatisfactory, benefit to *Oxus*' approach; and it falls well short of answering definitively that *Oxus* is the best approach to post-*Intel*.

### D. Time to Toss the Dice

Both the *Oxus* and *Roz* courts considered the Supreme Court's *Intel* decision and concluded that it required extending the reach of § 1782 to private international arbitration. The issue is one of degree. *Roz* demonstrates just how far the extension can go, but how far should it go? It is clear from *Intel* that the Supreme Court intended to decide how far § 1782 should reach when dealing with private

105. *Id.* at 442. Tribunals may be forced to change their rules of evidence, both to incorporate § 1782 and to reconcile § 1782 with other available methods of gathering evidence. *Id.* at 442 n.223.

106. See *supra* note 87 and accompanying text.

107. *In re Matter of Application of Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, at \*7 (D.N.J. Oct. 11, 2006). The court reiterated *Intel*'s discussion of the district court's discretion, suggesting it was concerned about parity. *Id.* See *supra* notes 63-69 and accompanying text.

international arbitration. Yet, *Oxus* and *Roz* have laid the groundwork for a division of opinion among the districts on just what precisely was decided.<sup>108</sup>

If these cases are used as precedent in their districts or in other districts, the logical outcome is two lines of *Intel* interpretation. One line will allow § 1782 discovery in private international arbitration. The other line will resemble pre-*Intel* cases, with a small extension to private international arbitration operating under a Treaty. In practical application, this is a significant split. All the parties under consideration are private entities operating in international commercial relationships. Yet, one group of private parties, those that find they are covered by a Treaty, will have access to U.S. courts. The other group, those in wholly private arbitration, will have access to U.S. courts in some states but not in others. This disconnect should be sorted out before it grows; and, despite *Oxus*' appealing moderation, it should be sorted out according to the *Roz* approach.

In short, the *Roz* decision is simply more in tune with *Intel* and with current international legal reality. For instance, one benefit of *Intel* was that it cleared up judicially-created restrictions on § 1782, "dispos[ing] of virtually all of the limitations the lower courts had read into" the statute.<sup>109</sup> *Oxus*, on the other hand, holds on to the reasoning of those lower courts to conclude that § 1782 does not stretch as far as it can go.<sup>110</sup> It is perhaps the height of counter-productivity to ignore the Supreme Court when it has laid the groundwork for resolving all the issues in question.

*Roz* also mirrors *Intel* in its reliance on Professor Smit's records and commentary, which *Oxus* does not mention. The Supreme Court quoted Smit or referenced his writings over ten times in its opinion. Most relevantly, it quoted favorably Smit's statement that, "[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies . . .".<sup>111</sup> *Roz* refers back to this statement as indicative of the Supreme Court's intent;<sup>112</sup> and, if Professor Smit's writings on this issue are as important to the Supreme Court as they seem to be, it would be well to pay attention to his opinions. On the matter of defining, "foreign or international tribunal," Smit makes his opinion clear, saying, "I also hope that the Supreme Court may find it appropriate to reject the now unanimous, but clearly incorrect, view of two appellate courts that Section 1782 does not extend its reach to private international arbitral tribunals."<sup>113</sup>

Finally, *Roz* seems to be based in the same international legal reality as is *Intel*. The *Intel* decision evidences acceptance of the growing participation of U.S. courts and U.S. businesses in the international legal world. The Supreme Court, when it decided *Intel* in 2004, had to be fully aware of the many varied choices for international adjudication; and just as the original § 1782 drafters could have easily inserted "governmental" in front of "tribunals,"<sup>114</sup> it would have been a simple

108. Since the *Oxus* decision, the *Roz* case has been appealed to the Eleventh Circuit Court of Appeals. Schwartz & Howard, *supra* note 96.

109. Smit, *Proper Interpretation*, *supra* note 63, at 331.

110. See *supra* note 94 and accompanying text.

111. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (citing Smit, *International Litigation*, *supra* note 63, at 1026 n.71 (1965)).

112. *In re Application of Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1225 (N.D. Ga. 2006).

113. Smit, *Proper Interpretation*, *supra* note 63, at 298 (citing *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999)).

114. *In re Application of Roz*, 469 F. Supp. 2d at 1226 n.3.

thing for the Supreme Court to expressly exclude private international arbitration. It did not do so; and in leaving out this exclusion, the Court implies a worldview that contemplates a more internationally-oriented U.S. legal system than *NBC*, *Republic of Kazakhstan*, or *Oxus* allows.

In light of these considerations, it seems clear that *Oxus* does not belong in a post-*Intel* U.S. legal system. Instead, *Roz* was correct in allowing discovery for use in private international commercial arbitration, pursuant to § 1782. However, there is some wiggle room for the Supreme Court. After seeing the full expansion of § 1782 play out, including commentators' discussion of policy concerns, the Court may wish to draw a line somewhere short of *Roz*. If so, the Court can exploit the small window they left in *Intel* by not explicitly rejecting lower courts' exclusion of private international arbitral tribunals from § 1782.<sup>115</sup> However, moving in that direction would be out of sync with the U.S.' steady progression toward a more internationally active legal presence. Such a move would be both unwise and inconsistent.

## VI. CONCLUSION

The Supreme Court's *Intel* decision took up long-standing questions about the reach and scope of § 1782 discovery and ruled that U.S. courts can grant discovery in international arbitration. However, because the decision did not expressly include or exclude private international arbitration, the first two cases to address the issue after *Intel* came to contrary results. *Roz* decided that *Intel* expanded § 1782 to reach all private international arbitration; while *Oxus* only applied § 1782 to private international arbitration conducted under a Treaty, ignoring the more direct route that *Roz* took. These two cases set the stage for a split between circuits.

The Supreme Court should resolve this issue before the split spreads to other circuits, and despite commentators' policy objections, the issue should be settled along the lines of *Roz*. The *Roz* decision is more true to the reasoning and conclusions of *Intel* than is *Oxus*, and *Roz* is also more in line with the reality of the international legal world. Furthermore, the Supreme Court has already acknowledged, discussed, and dismissed the suggestion that the policy concerns should be dispositive for the Court's statutory interpretation. Thus, the Supreme Court should step in and definitively rule that § 1782 does extend to private international commercial arbitration.

AMY MOORE

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115. Smit, *Proper Interpretation*, *supra* note 63, at 332.