

## US Court of Appeals Revises Opinion: Section 1782's Use in Arbitration Ambiguous

***With the Eleventh Circuit's revision, using Section 1782 to request the production of evidence in private international commercial arbitrations remains uncertain.***

On January 10, the US Court of Appeals for the Eleventh Circuit vacated its 2012 decision allowing an Ecuadorean telecoms operator to use Section 1782 of the Federal Rules of Judicial Procedure to compel discovery against an air freight carrier in support of commercial arbitration proceedings taking place in Ecuador.<sup>1</sup> Though the appeals court reaffirmed the district court's order to compel the production of documents and deposing of witnesses, it did so under alternative grounds, leading to increased uncertainty regarding Section 1782's application to private international commercial arbitration.

### US Legal Background

Title 28 U.S.C. § 1782 (Section 1782) is a federal US law permitting "any interested person" involved in proceedings before "a foreign or international tribunal" to seek evidence, including documents and testimony, from a person or entity located in the United States.<sup>2</sup> To obtain such evidence, the interested person must apply for an order compelling its production in the US federal district court for the district in which the person or entity possessing the desired information "resides or is found."<sup>3</sup> Section 1782 therefore offers parties engaged in foreign commercial arbitrations in which US entities have custody or control of relevant information a potentially powerful tool because US discovery tends to be much broader than discovery permitted in other legal systems. However, some disagreement remains among US courts over whether Section 1782 is available to parties in private international arbitration. The issue pivots on whether an arbitral tribunal overseeing a private arbitration in another country constitutes a "foreign or international tribunal" under Section 1782.

In 1999, the US Courts of Appeals for the Second and Fifth Circuits held that arbitration tribunals do not qualify as Section 1782 tribunals, thus foreclosing private arbitration parties from taking advantage of the statute in those circuits.<sup>4</sup> These decisions were brought into question by the 2004 Supreme Court decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, which held that a non-judicial body of the European Commission qualified as a "a foreign or international tribunal" under Section 1782.<sup>5</sup> Prior to 1964, Section 1782 could only be invoked by interested persons involved in foreign "judicial proceedings" — in other words, the statute could only be applied in relation to proceedings before foreign courts of law. Noting that 1964 Congressional amendments to Section 1782 expanded the statute's scope to include "quasi-judicial proceedings" in addition to judicial proceedings before foreign courts, the Supreme Court's *Intel* decision held that a non-judicial body qualified as a Section 1782 tribunal because it was a "first-instance decisionmaker" — an entity that permits the gathering and submission of evidence in resolving a dispute and with the authority to issue a binding order subject to judicial review.<sup>6</sup> The Court also quoted the broad definition of "tribunal" espoused by "the dominant drafter of, and commentator on, the 1964 revision of [Section] 1782," Professor Hans Smit.<sup>7</sup> According to Professor Smit, the term "tribunal," as

used in the 1964 revisions to Section 1782, “includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”<sup>8</sup>

## Post-*Intel* Developments

Since *Intel*, the only circuit courts to revisit the question of whether a private arbitral tribunal constitutes a “tribunal” within the meaning of Section 1782 have been the Fifth and Eleventh Circuits. In 2009, the Fifth Circuit considered whether *Intel* overruled the Circuit’s 1999 holding that Section 1782 was not applicable to private international arbitrations.<sup>9</sup> The Fifth Circuit held that “[it could] not overrule the decision of a prior panel unless such overruling is unequivocally directed by controlling Supreme Court precedent.”<sup>10</sup> Therefore, because *Intel* did not involve a private international arbitration, and the language from *Intel* that arbitral tribunals are Section 1782 tribunals was merely dicta, the Fifth Circuit upheld its previous decision excluding international arbitrations from the application of Section 1782.<sup>11</sup>

The Eleventh Circuit, which had not previously ruled on the issue, initially proved more receptive to broadly applying Section 1782 to international arbitration. Relying heavily on *Intel*, the Eleventh Circuit in *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc. (CONECEL I)* held that Section 1782 may be used for private international arbitration.<sup>12</sup> The case arose out of a foreign shipping contract billing dispute between Consortio Ecuatoriano (CONECEL), an Ecuadorean wireless telecoms operator, and Jet Air Service Ecuador S.A. (JASE), an affiliate of an Italian air freight carrier. JASE had commenced an arbitration in Ecuador alleging that CONECEL was in breach of a shipping contract for failing to make payments under the contract.<sup>13</sup> CONECEL countered that it had halted payments because an internal investigation had revealed JASE was responsible for millions of dollars in erroneous overbillings.<sup>14</sup> Separate from the pending arbitration, CONECEL was contemplating civil and criminal actions for collusion in the alleged overbilling against two of its former employees in the Ecuadorian courts.<sup>15</sup>

On July 14, 2010, CONECEL filed an ex parte application pursuant to Section 1782, seeking document production and depositions related to the overbilling from a US affiliate of JASE located in Miami.<sup>16</sup> The US District Court for the Southern District of Florida granted the Section 1782 application and authorized CONECEL to issue a subpoena to the Miami affiliate seeking the requested discovery.<sup>17</sup> The primary disputed issue in the district court was “whether the subpoenaed documents will be used in a proceeding in a foreign or international tribunal.”<sup>18</sup> In granting the ex parte application, the district court held that Section 1782 does not require that a foreign proceeding be “pending or imminent,” but rather only that the proceeding “be within reasonable contemplation.”<sup>19</sup> The court held that CONECEL’s contemplated civil and criminal actions against its two former employees fit this standard.<sup>20</sup> The court also noted that “upon a review of the case law, the Court finds that the arbitral tribunal, in this action, is likely within the purview of section 1782.”<sup>21</sup>

On June 25, 2012, the Eleventh Circuit affirmed the district court’s grant of judicial assistance, but did so on the grounds that the parties’ arbitration proceeding before the Ecuadorian arbitral tribunal qualified as a “proceeding in a foreign or international tribunal” under Section 1782.<sup>22</sup> In its decision, the Eleventh Circuit stated that *Intel* provided “substantial guidance” in favor of adopting an expansive definition of “tribunal” that includes arbitration proceedings.<sup>23</sup> The court concluded that the Ecuadorian arbitral tribunal qualified as a Section 1782 ‘foreign tribunal’ because, like the non-judicial body considered in *Intel*, “it acts as a first-instance decisionmaker; it permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order is subject to judicial review.”<sup>24</sup> Because the Ecuadorian arbitral tribunal qualified as a foreign tribunal, CONECEL was permitted to use Section 1782 to seek discovery, and the court need not address the second theory — whether CONECEL’s potential civil and

criminal proceedings were “within reasonable contemplation” so as to provide alternative grounds for approving the ex parte Section 1782 application.<sup>25</sup>

Upon further consideration, however, the same Eleventh Circuit panel recently took the unusual step of vacating its 2012 opinion in the case sua sponte, and substituting a new opinion in its place more than a year and a half later.<sup>26</sup> The revised decision, issued on January 10, 2014, arrived at the same final outcome, but changed the rationale upon which the outcome relied. The Eleventh Circuit’s new holding reaffirmed the district court’s decision to grant CONECEL’s discovery request, but did so under the same grounds originally supporting the district court’s decision — that the subpoenaed documents are relevant to civil and criminal proceedings that are “within reasonable contemplation” before a foreign court.<sup>27</sup> Thus, because the contemplated civil and criminal proceedings justified the district court’s grant of CONECEL’s Section 1782 request, the Eleventh Circuit need not reach the issue of whether a foreign arbitral tribunal qualifies as a Section 1782 tribunal, allowing “the resolution of the matter [to be left] for another day.”<sup>28</sup>

## Conclusions / Strategic Considerations

As a result of the Eleventh Circuit’s decision, Section 1782’s utility, as it relates to international commercial arbitration, is once again in flux. While the court’s new decision has left open the question of whether parties to international arbitration proceedings may seek Section 1782 discovery from a person or entity based in an Eleventh Circuit district, notably the court did not rule out this possibility. Moreover, the original decision’s analysis that the Supreme Court’s “first-instance decisionmaker” reasoning in *Intel* clearly applies to foreign arbitral tribunals may provide a roadmap to other courts considering this question. Outside Louisiana, Mississippi, and Texas, where the Fifth Circuit’s decision to exclude international arbitrations from Section 1782 assistance is binding authority, a Section 1782 action may be an option where parties to an international arbitration wish to obtain evidence within the US.

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## Endnotes

<sup>1</sup> *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 2014 U.S. App. LEXIS 531; 2014 WL 104132 (11th Cir. 2014) (hereinafter, *CONECEL I*).

<sup>2</sup> 28 U.S.C. sec 1782(a).

<sup>3</sup> *Id.*

<sup>4</sup> *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

<sup>5</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 159 L. Ed. 2d 355 (U.S. 2004).

<sup>6</sup> *Id.* at 364; 372 & n.9; 373-74.

<sup>7</sup> *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 689 (D.C. Cir. 1989) (opinion of then-D.C. Circuit Judge Ruth Bader Ginsburg, who also wrote the Supreme Court's *Intel* opinion.)

<sup>8</sup> *Intel*, 159 L. Ed. 2d at 373 (quoting Hans Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965)).

<sup>9</sup> *El Paso Corp. v. La Comisión Ejecutiva, Hidroeléctrica Del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009) (unreported opinion).

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *Id.*

<sup>12</sup> *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11<sup>th</sup> Cir. 2012) (hereinafter *CONECEL I*).

<sup>13</sup> *Id.* at 991.

<sup>14</sup> *Id.* at 990.

<sup>15</sup> *Id.* at 990-91.

<sup>16</sup> *Id.* at 991-92.

<sup>17</sup> *Id.* at 992.

<sup>18</sup> *Id.* (internal brackets omitted).

<sup>19</sup> *Id.* at 992 (citing *Intel*, 159 L. Ed. 2d at 364).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 994.

<sup>23</sup> *Id.* at 990.

<sup>24</sup> *Id.* at 995.

<sup>25</sup> *Id.* at 994.

<sup>26</sup> *CONECEL II*, 2014 U.S. App. LEXIS 531 at \*1.

<sup>27</sup> *Id.* at \*20-21.

<sup>28</sup> *Id.* at \*16-17 n.4. Interestingly, the Eleventh Circuit's revised opinion "declin[e]d to answer th[e] substantial question [of whether an arbitral tribunal qualifies as a Section 1782 tribunal] on the sparse record found in this case." *Id.* Comparatively, in response to an argument by JASE that CONECEL's accusations against its former employees were baseless, negating CONECEL's claim that proceedings against them were "reasonably contemplated," the original opinion stated that "we are in no position to assess the merits of either CONECEL's potential suit against [one of the former employees] or [the former employee's] retaliatory suit for slander." *CONECEL I*, 685 F.3d at 1001. This suggests there must be a reason other than the availability of sufficient evidence on the record for the court's substitution of reasonably contemplated judicial proceedings for actual arbitral proceedings in support of a Section 1782 subpoena.