

U.S. Discovery in Aid of Investor-State Arbitrations: A Blessing or a Curse?

Melissa Stear Gorsline

Maria Pradilla Picas

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Melissa S. Gorsline, & Maria P. Picas, *U.S. Discovery in Aid of Investor-State Arbitrations: A Blessing or a Curse?*, 30 Md. J. Int'l L. 14 (2015).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol30/iss1/4>

This Articles & Essays is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

ARTICLE

U.S. Discovery in Aid of Investor-State Arbitrations: A Blessing or a Curse?

MELISSA STEAR GORSLINE[†] & MARIA PRADILLA PICAS^{††}

I. INTRODUCTION

Many U.S. lawyers and their clients, and even the U.S. Supreme Court, believe that arbitration is a faster, cheaper alternative to traditional litigation.¹ And, in general, they are correct in that belief; a typical arbitration lacks the lengthy and costly motions and discovery processes one finds in U.S. litigation.² But not all

[†] Ms. Gorsline is a partner in Jones Day's Global Disputes practice, resident in Washington, D.C. She is also an adjunct professor at the University of Maryland Carey School of Law, and Vice Chair of the Board of Governors of the International Practice Section of the Virginia State Bar. Ms. Gorsline holds a B.A. from Duke University and a J.D. from the George Washington University School of Law. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated.

^{††} Ms. Pradilla Picas is an associate in the Washington, D.C. office of Jones Day, and holds a J.D. from Georgetown University Law Center and a MIB from Florida International University. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated.

1. S. I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 302 (2013); Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

2. See *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999) (explaining that efficiency and cost-effectiveness are characteristics of arbitration which are "at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil

arbitrations can be said to follow the “faster and cheaper” model. In particular, international Investor-State arbitrations (ISAs), which are decided by international tribunals governed by bilateral investment treaties (BITs) or similar instruments, have long been the exception to the general rule.³ One reason is that the stakes are usually higher in these arbitrations than in typical commercial arbitrations. For example, according to 2014 data, the average amount claimed in ISAs is nearly USD \$500,000,000.⁴ Another reason is that ISA disputes generally involve complicated issues of law, applied to highly contentious, technical and factual scenarios.⁵ As one commentator has noted, these are “high-profile, bet-the-company and bet-the-country issues,” and their legal and factual complexities have led them to be dubbed “the brain surgery of international arbitration.”⁶

With these factors rendering ISA disputes longer and costlier, they were already more akin to litigation than to traditional commercial arbitration.⁷ The expected cost and time associated with ISA disputes increases still further when one considers that U.S. discovery is increasingly being sought in aid of such arbitrations. In 2004, the Supreme Court’s ruling in *Intel Corp. v. Advanced Micro Devices, Inc.*⁸ expanded the scope of 28 U.S.C. § 1782, paving the way for U.S. discovery in aid of ISAs, thereby potentially increasing

Procedure.”).

3. See Lindsay Fortado, *Arbitration’s Glamorous Side; Investment Treaty Arbitration Rises*, NAT’L L. J., Mar. 27, 2006, at 2 (“Investor-state arbitrations are disputes governed by investment treaties (BITs), treaties created by two countries to govern investments between them.”).

4. Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 Global Arb. Rev., no. 2, Mar. 24, 2014, at 4–6. These figures have increased in the last seven years, when the average amount claimed was USD \$343,400,000. Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 57–58 (2007).

5. See Charles T. Kotuby & Luke A. Sobota, *Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration*, 28 ICSID REV. 454, 454–55 (2013) (describing investor-state arbitrations as “complex international disputes” involving “billions of dollars and the legitimacy of sovereign acts” where the aggrieved investor may have “bet the company” on the panel’s decision.”).

6. See Fortado, *supra* note 3, at 2 (quoting Robert Volterra, global co-chairman of the international dispute resolution group and head of the public international law group in the London office of Latham & Watkins).

7. See Kotuby, *supra* note 5, at 458 n.20 (criticizing the parties’ voluminous submissions to the tribunal, totaling 5,291 pages (citing *Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 Oct. 2012) ¶ 103)).

8. 542 U.S. 241 (2004).

the complexity, length, and expense of these arbitrations. In *Intel*'s wake, U.S. courts have routinely allowed Section 1782 discovery in aid of BIT arbitrations,⁹ proving that the statute can be used broadly in the ISA context, potentially affecting the outcome of such arbitrations. And now, with its ruling in *Republic of Argentina v. NML Capital, Ltd.*,¹⁰ the Supreme Court has opened the door to broad discovery relating to the execution of judgments against foreign sovereigns, rejecting application of the Foreign Sovereign Immunities Act (FSIA). It seems possible that this decision will once again increase the amount of discovery sought (and received) in aid of ISA disputes, potentially increasing the length and cost of ISA proceedings.

The increasing likelihood of U.S. discovery (through Section 1782 and otherwise) in aid of ISA disputes raises a question for practitioners and their clients: is this development a blessing or a curse? On the positive side, U.S. discovery allows for a more fulsome vetting of the important issues of investor rights and state sovereignty associated with ISA claims. Yet, it is often one-sided, raising concerns about the fairness of the process. Moreover, extensive discovery can be quite costly and inefficient, thereby eliminating many of the benefits associated with arbitration.

Below, in Section I, we discuss the history and development of Section 1782, culminating in the *Intel* decision. In Section II, we address the developments arising out of *Intel*, namely the application of Section 1782 to ISA disputes. In Section III, we discuss the *NML Capital* ruling and its likely consequences. In Section IV, we examine the benefits and disadvantages associated with the use of Section 1782 discovery in ISA disputes. Finally, in Section V, we propose ways that U.S. discovery can be used in ISA disputes in a fair and positive manner.

II. 28 U.S.C. § 1782: THE *INTEL* REVOLUTION

28 U.S.C. § 1782(a) reads, in relevant part:

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

9. Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 128 (2012).

10. 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014).

2015] U.S. DISCOVERY IN ISAS: A BLESSING OR A CURSE 17

international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a . . . request made[] by a foreign or international tribunal or upon the application of any interested person 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.¹¹

The long history of Section 1782 traces back to 1855, when Congress first enacted a statute empowering courts to appoint commissioners to respond to letters rogatory and, thus, authorizing courts to provide judicial assistance to foreign courts and litigants.¹² The 1855 Act, however, did not succeed in providing greater assistance to foreign courts, as the statute was indexed under “mistrials,” and, as such, the Act was “lost” and disregarded by the courts.¹³ In 1863, and seemingly unaware of the 1855 Act, Congress passed significantly more restrictive legislation regarding discovery in foreign cases, which essentially frustrated the effect of the 1855 Act.¹⁴

After World War II, and in light of the growth of international commerce and foreign litigation, Congress enacted the Act of 1948, which “adopted the ‘general’ approach of the 1855 Act and rejected

11. 28 U.S.C. § 1782(a) (2012).

12. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630. (“That where letters rogatory shall have be[en] addressed from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.”).

13. Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT’L L. 597, 601 & n.18 (1989); Michael Campion Miller et al., *28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in the United States Courts*, 59-MAY FED. L. 44, 1 (2012); Steven M. Saraisky, *How to Construe Section 1782: A Textual Prescription to Restore the Judge’s Discretion*, 61 U. CHI. L. REV. 1127, 1130 & n.12 (1994).

14. Stahr, *supra* note 13, at 601; Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and Program for Reform*, 62 YALE L. J. 515, 540 (1953).

the ‘limitations’ of the 1863 Act.”¹⁵ Still, this approach was perceived by critics as “unduly narrow” and not sufficiently broad to address the “new era of international cooperation and litigation.”¹⁶ So, in 1964, Congress passed further amendments intended to liberalize the statute and to entice other countries to broaden their judicial assistance to foreign tribunals.¹⁷ The latest amendment to Section 1782 was enacted in 1996, at which time Congress expanded the statute’s reach once again.¹⁸ Since 1996, federal courts have heard numerous Section 1782 applications and have differed significantly on the interpretation of the statute in various ways.¹⁹

In 2004, with its seminal decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, the U.S. Supreme Court resolved many of the differences that had developed among the courts with respect to the interpretation of Section 1782. The *Intel* dispute arose out of a complaint filed by Advanced Micro Devices, Inc. (AMD), one of Intel’s archrivals, with the Directorate General for Competition of the Commission of the European Communities (DG-Competition), alleging that Intel violated European Union antitrust law.²⁰ After the DG-Competition declined to seek judicial assistance in the United

15. Stahr, *supra* note 13, at 602–03 (suggesting Congress found the misplaced 1855 Act).

16. *Id.* at 603–04; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965).

17. S. REP. NO. 88-1580, at 8–9 (1964).

18. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, § 1342(b), 110 Stat. 486 (1996).

19. For example, the courts disagreed on whether Section 1782 imposed a foreign discoverability requirement, *compare* *In re Asta Medica, S. A.*, 981 F.2d 1, 7 (1st Cir. 1992), *and* *In re Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (finding that Section 1782 imposed a foreign discoverability requirement), *with* *In re Gianoli Aldunate*, 3 F.3d 54, 59–60 (2d Cir. 1993), *and* *In re Bayer AG*, 146 F.3d 188, 193–94 (3d Cir. 1998) (rejecting the foreign discoverability requirement); whether the foreign proceeding had to be pending or imminent, *compare* *In re Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 691 (D.C. Cir. 1989) (concluding that the proceeding must be “within reasonable contemplation”), *with* *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (holding that the foreign proceeding must be “imminent—very likely to occur and very soon to occur”); and the type of foreign or international tribunal that qualifies for assistance under Section 1782, *compare* *In re Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997) (finding that “arbitration is not a tribunal for the purpose of Section 1782” because “Congress intended to assist official, governmental bodies” and not unofficial, private arbitrations), *with* *In re Technostroyexport*, 853 F. Supp. 695, 697–98 (S.D.N.Y. 1994) (holding that a private arbitral tribunal is a foreign tribunal under § 1782, but denying the request because Technostroy did not obtain a ruling from the arbitral tribunal that discovery should take place).

20. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246 (2004).

2015] U.S. DISCOVERY IN ISAS: A BLESSING OR A CURSE 19

States, AMD filed a Section 1782 petition in the Northern District of California seeking discovery from Intel for use in the antitrust proceeding.²¹

The Court had to determine whether these facts met the statutory requirements for Section 1782 discovery, which are: (1) that the target of the discovery request must reside or be “found” in the district court where the Section 1782 petition was filed; (2) that the purpose of the discovery must be for use in a “proceeding”; (3) that the “proceeding” in question must take place before a foreign or international tribunal; and (4) that the Section 1782 discovery request must be made by the foreign or international tribunal itself, or by an “interested person.”²² The Court noted, however, that Section 1782 “authorizes, but does not require, . . . discovery assistance” for use in a foreign proceeding.²³ Thus, once the required elements of the statute are met, a court deciding a Section 1782 application still has discretion on whether to grant judicial assistance.

The *Intel* Court therefore provided a list of non-exclusive factors that a court should consider in exercising its discretion, such as whether “the person from whom discovery is sought is a participant in a foreign proceeding”; “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government . . . to U.S. federal-court judicial assistance”; whether “the [Section] 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and whether the request is “unduly intrusive or burdensome.”²⁴

This mix of statutory and discretionary factors has become known as the *Intel* test. In addition to setting the modern standard for Section 1782 discovery, *Intel* is also known for expanding the scope and use of the statute.

The *Intel* Court ruled upon four important points that were subject to disagreement among the Circuits: (1) whether Section 1782 imposes a foreign discoverability requirement; (2) the parties to whom the court’s assistance is available; (3) whether the proceeding must be pending or otherwise imminent before a foreign or

21. *Id.* at 250–51.

22. *See id.* at 249 (determining whether these facts met the 1782 requirements); 28 U.S.C. § 1782(a).

23. *Intel*, 542 U.S. at 266.

24. *Id.* at 264–65.

international tribunal; and (4) whether DG-Competition investigations (and other “quasi-judicial” functions) qualify as proceedings under the statute.²⁵

The Court answered each of these questions in a manner that favored expanded discovery under Section 1782. As to the proposed “foreign discoverability requirement,” the Court held that “[b]eyond shielding material safeguarded by an applicable privilege, . . . nothing in the text of §1782 limits a district court’s production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there.”²⁶ Next, the Court held that the text of the statute, “‘upon the application of any interested person,’ plainly reaches beyond the universe of persons designated ‘litigant’” to include a person who “possess[es] a reasonable interest in obtaining [judicial] assistance.”²⁷ The *Intel* Court rejected the notion that the foreign proceeding in question must be pending, or even “imminent.” Rather, the court found that the test was whether “a dispositive ruling . . . [was] within reasonable contemplation.”²⁸

Finally, relying on the legislative history of Section 1782, the Court held that the DG-Competition was a “foreign or international tribunal” under the statute, which extends to administrative and quasi-judicial agencies.²⁹ Importantly for our purposes, the Court noted that, according to at least one source, “the term ‘tribunal’ . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”³⁰

III. POST-*INTEL*: THE U.S. COURTS EXPAND SECTION 1782 TO BIT ARBITRATION

In the wake of *Intel*, the Courts began to apply Section 1782 much more broadly and in a number of different contexts. For our purposes, however, only one is truly important: the U.S. Courts—which had previously opposed the use of Section 1782 in

25. *Id.* at 246–47; Roger J. Johns & Anne Keaty, *The New and Improved Section 1782: Supercharging Federal District Court Discovery Assistance to Foreign and International Tribunals*, 29 AM. J. TRIAL ADVOC. 649, 650–51 (2006).

26. *Intel*, 542 U.S. at 260.

27. *Id.* at 256.

28. *Id.* at 259.

29. *Id.* at 243, 257–58 (quoting 63 Stat. 1743; S. REP. NO. 88–1580, at 7–8).

30. *Id.* at 258 (quoting Smit, *supra* note 16, at 1026 n.71, 1027 n.73 (emphasis added)).

“arbitration-related matters”³¹—began to authorize its use in the arbitration context. In the words of one jurist: “The judicial prohibition on using Section 1782 in connection with arbitral proceedings was absolute and largely unquestioned until 2004, when the U.S. Supreme Court adopted a more expansive interpretation of the term ‘foreign or international tribunal’ than had previously been seen in the lower courts.”³² After *Intel*, at least with respect to Investor-State (treaty-based) arbitrations,³³ the U.S. federal courts committed a complete reversal. Virtually all federal courts that have addressed the question now “agree that an arbitral tribunal established pursuant to a bilateral investment treaty constitutes an ‘international tribunal’ within the meaning of the statute.”³⁴

Interestingly, many of these Section 1782 actions arise out of a single (yet long-running and massive) dispute between Chevron Corporation and the Republic of Ecuador.³⁵ This cross-border dispute has spawned not only multiple lawsuits in the U.S. and in Ecuador, but also an investor-state arbitration under the U.S.-Ecuador BIT and numerous enforcement proceedings around the globe.³⁶ Both sides to

31. Strong, *supra* note 1, at 302; *see also* Alford, *supra* note 9, at 133–34 (“Before 2004 it was widely assumed that Section 1782 discovery orders were unavailable in aid of international arbitration.”); *NBC v. Bear Stearns*, 165 F.3d 184, 190–91 (concluding that Section 1782 does not cover international arbitration because arbitration is a creature of contract where the parties could have set up discovery procedures; therefore, opening the door to broad discovery would undermine significantly the advantages of arbitration); *Rep. of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (reversing the lower court and finding that “the term ‘foreign and international tribunals’ in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations”); *In re Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997) (Section 1782 does not apply to international arbitration).

32. Strong, *supra* note 1, at 302.

33. The courts are split on whether private international commercial arbitration qualifies under the statute. *See* Alford, *supra* note 9, at 135–36 nn.47 & 51; *see also* Strong, *supra* note 1, at 315 n.112.

34. Alford, *supra* note 9, at 136; *see, e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011) (Investor-State UNCITRAL arbitration qualifies as a foreign tribunal under 1782); *In re Mesa Power Grp., LLC*, 878 F. Supp. 1296, 1302–03 (S.D. Fla. 2012) (same); *Rep. of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121, 1124 (D. Col. 2011) (same); *In re Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) *aff’d* 629 F.3d 297 (2d Cir. 2011) (same); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010) (same); *In re Veiga*, 746 F. Supp. 2d 8, 22 (D.D.C. 2010) (same); *In re Chevron Corp., No. 1:10-MI-0076-TWT-GGB*, 2010 WL 8767265, *4 (N.D. Ga. Mar. 2, 2010) (same). *But see* *Rep. of Ecuador v. Connor*, 708 F.3d 651, 658 (5th Cir. 2013) (ruling on grounds of estoppel and thereby circumventing the issue, leaving unaltered existing precedent that an international arbitration tribunal is *not* a tribunal under Section 1782).

35. Alford, *supra* note 9, at 137.

36. *See, e.g.*, Patrick Radden Keefe, *Reversal of Fortune*, *NEW YORKER* (Jan. 9,

the dispute (Chevron and Ecuador) have filed numerous Section 1782 proceedings seeking U.S. discovery from non-party witnesses.³⁷

The evidence collected through the Section 1782 proceedings has enabled Chevron and Ecuador to introduce evidence in the BIT proceedings that they otherwise likely would not have been able to obtain.³⁸ This is because discovery in BIT arbitrations generally is governed by the IBA Rules on the Taking of Evidence, under which depositions are very rare (witness testimony is provided in written statements),³⁹ interrogatories are uncommon, and only “narrow and specific” requests for documents are allowed.⁴⁰ Fishing expeditions are simply not permitted.⁴¹ And, perhaps most importantly, BIT

2012), <http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-2?currentPage=all> (initial suit commenced by the Lago Agrio Plaintiffs in the town of Lago Agrio, Ecuador in May 2003 and resulted in a judgment against Chevron for USD \$18 billion); *Chevron Corp. and Texaco Petroleum Corp. v. The Rep. of Ecuador*, PCA Case No. 2009-23, Claimants’ Notice of Arbitration, ¶ 3 (UNCITRAL arbitration initiated by Chevron alleging that Ecuador breached the Ecuador-U.S. BIT and investment agreements); *Yaiguaje v Chevron Corp.*, [2013] ONSC 2527 (Can.) (enforcement action related to litigation in Ecuador).

37. Alford, *supra* note 9, at 143–45; *see, e.g.*, *Rep. of Ecuador v. Connor*, 708 F.3d 651 (5th Cir. 2013); *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011); *Rep. of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121 (D. Col. 2011); *In re Rep. of Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189 (E.D. Cal. Sept. 13, 2011); *In re Rep. of Ecuador*, Nos. C 11-80171 CRB, C 11-80172 CRB, 2011 WL 4434816 (N.D. Cal. Sept. 23, 2011); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254 (D. Mass. 2010); *In re Chevron Corp., et al.*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010); *In re Veiga*, F. Supp. 2d 8 (D.D.C. 2010); *In re Chevron Corp.*, 753 F. Supp. 2d 536 (D. Md. 2010); *In re Chevron Corp.*, No. 2:10-cv-02675(SRC), 2010 WL 8767338 (D.N.J. June 15, 2010); *Chevron Corp. v. Champ*, Nos. 1:10mc 27, 1:10mc 28, 2010 WL 3418394 (W.D.N.C. Aug. 30, 2010); *In re Chevron Corp.*, No. 3:10-cv-00686, 2010 L 8767266 (M.D. Tenn. Aug. 17, 2010); *In re Rep. of Ecuador*, No. C-10-80225 MISC., 2010 WL 3702427 (N.D. Cal. Sept. 15, 2010); *In re Rep. of Ecuador*, No. 1:10-mc-00040 GSA, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010); *In re Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB, 2010 WL 8767265 (N.D. Ga. Mar. 2, 2010); *In re Rep. of Ecuador*, No. 4:11mc73-RH/WCS, 2011 WL 10618727 (N.D. Fla. Aug. 24, 2011).

38. Alford, *supra* note 9, at 146–47.

39. *See* IBA Rules on the Taking of Evidence in International Arbitration, *International Bar Association* (29 May 2010) art. 4 [hereinafter “IBA Rules”] (providing that “each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony” and “[t]he Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness”).

40. *See* IBA Rules art. 3(3)(a) (“A Request to Produce [documents] shall contain: . . . (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist.”).

41. Alford, *supra* note 9, at 142; *compare* IBA Rules arts. 2(3), 3(3)(b) (where the standard applied to evidence requests is that the information must be “relevant

2015] U.S. DISCOVERY IN ISAS: A BLESSING OR A CURSE 23

tribunals generally “have no authority to request documents or oral testimony” from non-parties.⁴² It is in this last regard—non-party discovery—where Section 1782 is able to fill the biggest gap.

Chevron’s denial-of-justice BIT claim is still pending, but Chevron has received several favorable interim orders and awards that may not have been rendered in the absence of the evidence collected using Section 1782.⁴³ For instance, on January 25, 2012, the tribunal issued an interim award directing Ecuador to “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador against any judgment against [Chevron] in the Lago Agrio Case” and to inform the tribunal as to the measures taken for the implementation of the Interim Award.⁴⁴ Less than a month later, the tribunal restated this order and added that Ecuador should institute “measures to preclude any certification by [Ecuador] that would cause the said judgments to be enforceable against [Chevron].”⁴⁵ Although the interim awards do not provide the tribunal’s reasoning for reaching its decisions, Claimants’ Request for Interim Measures shows that Chevron provided the tribunal with evidence—in the form of depositions and emails—obtained through discovery requests in the U.S.⁴⁶ This shows that Section 1782 has at least the potential to be a game-changer in certain BIT arbitrations.

IV. WILL *ARGENTINA V. NML CAPITAL* FURTHER INCREASE DISCOVERY IN ISA DISPUTES?

In 2014, the Supreme Court rendered its decision in *Republic of Argentina v. NML Capital Ltd.*, which allowed broad discovery relating to the execution of judgments against a sovereign state, rejecting application of the Foreign Sovereign Immunities Act (FSIA)

to the case and material to its outcome”), with FED. R. CIV. P. 26(b)(1) (which allows discovery of any information that “appears reasonably calculated to lead to the discovery of admissible evidence,” even if the information sought is itself inadmissible).

42. Alford, *supra* note 9, at 142.

43. *Id.* at 146–47.

44. Chevron Corp. and Texaco Petroleum Corp. v. The Rep. of Ecuador, PCA Case No. 2009-23, First Interim Award on Interim Measures, 16 (Jan. 25, 2012).

45. Chevron Corp. and Texaco Petroleum Corp. v. The Rep. of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures, ¶ 3 (Feb. 16, 2012).

46. Chevron Corp. and Texaco Petroleum Corp. v. The Rep. of Ecuador, PCA Case No. 2009-23, Claimants’ Request for Interim Measures dated, ¶¶ 51, 58, 157–58 (Apr. 1, 2010).

in that context and effectively limiting the FSIA to its express terms.⁴⁷ The dispute arose out of Argentina's 2001 default on its external debt and its subsequent offer to restructure its outstanding bonds.⁴⁸ Although most of the bondholders agreed with the restructuring plan, NML did not.⁴⁹ Instead, "NML brought 11 actions against Argentina in the Southern District of New York to collect on its debt, and prevailed in every one."⁵⁰ The problem for NML, however, is that it has not been able to execute any of the judgments.

In an attempt to locate Argentina's property, NML requested discovery from two banks (Bank of America and Banco de la Nación Argentina) seeking documents relating to Argentina's assets, their location, records, history, *etc.*⁵¹ Argentina opposed this discovery request on the ground that the FSIA prohibits a court from ordering discovery of assets owned by a foreign sovereign because those assets are immune.⁵² The narrow issue for the Court was whether the FSIA "imposes a limit on a United States court's authority to order blanket post-judgment execution discovery on the assets of a foreign state used for any activity anywhere in the world."⁵³ The Court held—in a 7-1 decision—that the FSIA provides jurisdictional and execution immunity to a foreign sovereign, but that it does not provide immunity from discovery of the sovereign's assets in the U.S. or abroad.⁵⁴

Of particular note is the Court's statement that: "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fail."⁵⁵ Applying this rule, the Court found that "[t]here is no . . . provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets" in the FSIA,⁵⁶ and therefore rejected Argentina's arguments under the FSIA.

47. See *NML Capital*, 134 S. Ct. at 2256 (discussing the FSIA's silence on limiting discovery against sovereign states).

48. *Id.* at 2253.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 2254.

53. *NML Capital*, 134 S. Ct., at 2255.

54. *Id.* at 2253–59.

55. *Id.* at 2256.

56. *Id.* ("The Act speaks of discovery only once, in a subsection requiring courts to stay discovery requests directed to the United States that would interfere with criminal or national-security matters.")

2015] U.S. DISCOVERY IN ISAS: A BLESSING OR A CURSE 25

Does this open the door to Section 1782 discovery directly against a sovereign respondent or its agents or instrumentalities in a BIT case? To the best of our knowledge, no such Section 1782 petition has ever been attempted. However, a few months ago, in *Mare Shipping, Inc. v. Squire Sanders, LLP*,⁵⁷ one litigant came close. There, Mare filed a Section 1782 application seeking discovery from Spain's U.S. attorneys (Squire Sanders).⁵⁸ The court found, based on *NML Capital* and a textual reading of the FSIA, that a foreign sovereign's U.S. counsel is excluded from the definition of "sovereign, or its 'agency or instrumentality'" under the FSIA.⁵⁹ Therefore, Section 1782 discovery would be permitted.⁶⁰ In adhering to a textual reading of the FSIA, the Supreme Court and the Second Circuit seemed to agree with the proposition that a discovery order directed at a third party does not infringe a sovereign's immunity under the FSIA because compliance will cause the sovereign "no burden and no expense" so long as the subpoenas do not reveal sensitive information.⁶¹

As demonstrated by the *Mare* case, the *NML Capital* decision makes it more likely that investor-state claimants may soon try to seek Section 1782 discovery directly against a sovereign opponent in an ISA dispute. Whether or not they would succeed is a complicated question for another day. In particular, pursuant to the FSIA, foreign states are immune from "the jurisdiction" of the United States courts.⁶² As a result, any attempt to seek discovery *directly* from a foreign sovereign through Section 1782 would presumably have to satisfy one of the exceptions to the FSIA,⁶³ making for a complicated analysis. Nonetheless, given what seems to be an ever-expanding scope of U.S. discovery in aid of international investor-state arbitration, we all should be asking: is this shift a blessing or a curse?

57. *Mare Shipping, Inc. v. Squire Sanders, LLP*, 574 F. App'x. 6 (2d Cir. 2014).

58. *Id.* at 6–7.

59. *Id.* at 9.

60. *Id.*

61. *Id.* (citing *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012), *aff'd*, *NML Capital*, 134 S. Ct. 2250).

62. 28 U.S.C. § 1604 (2006).

63. *See* 28 U.S.C. § 1605(a)(1)-(6) (2008) (providing exceptions to jurisdictional immunity of a foreign state).

V. IS DISCOVERY IN AID OF INVESTOR-STATE ARBITRATION A BLESSING OR A CURSE?

There are several arguments in favor of U.S. discovery in aid of Investor-State arbitrations. *First*, as Justice Brandeis once famously said, “sunlight is said to be the best of disinfectants.”⁶⁴ In other words, the idea that a full vetting of the facts of each case leads to the truth is what drives the U.S. system of discovery. In the case of Investor-State arbitrations, where the sovereign functions of a state are alleged to have violated international law, important questions related to public policy and the global investment climate are at issue.⁶⁵ One could certainly argue that this is a space in which maximum “sunlight” is desirable.

Second, sovereign respondents are considered favored by certain “procedural asymmetries” in investment arbitrations, giving States an ability (and an incentive) to make it difficult for investors to prove their case.⁶⁶ Take, for example, a typical denial-of-justice case, where evidence of judicial bias, *ex parte* communications, and even bribe-taking could easily be hidden by the State and therefore would be unavailable to the claimant-investor absent Section 1782 discovery (or another type of discovery) from non-party witnesses.⁶⁷ In this light, one can argue that Section 1782 may be essential to seeing justice done in certain ISA disputes.

Third, and relatedly, Section 1782 discovery allows for an examination of evidence held by non-parties, who (as noted above) are usually outside the scope of discovery in international arbitration matters.⁶⁸ This is important, because (as noted above) parties that are inclined to violate principles of law and rules of conduct are often not opposed to hiding evidence in the context of a dispute arising out of their wrongdoing. If an arbitration party’s only source of evidence is her opponent, she may never receive the materials needed to prove

64. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY – AND HOW BANKERS USE IT* 92 (1914).

65. See Kotuby, *supra* note 5, at 455–56 (citing Toby T. Landau, *Reasons for Reasons: The Tribunal’s Duty in Investor-State Arbitration*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES 195, 202 (Albert Jan van den Berg ed., 2009)). See also *Critical Case Studies*, THE REASONS REQUIREMENT IN INTERNATIONAL ARBITRATION 2 (Guillermo Aguilar Alvarez & W. Michael Reisman eds. 2008) (concluding that “the reasons requirement . . . acquires a greater importance in international investment arbitration” than commercial arbitration)).

66. Strong, *supra* note 1, at 359 & n.381.

67. See Alford, *supra* note 9, at 146.

68. *Id.* at 150.

her case. However, if she can access evidence in the hands of non-parties, through the compulsory discovery process of the U.S. federal courts, her chances of prevailing increase dramatically. In this regard, Section 1782 could increase the likelihood that the truth will emerge.⁶⁹

Finally, Section 1782 discovery has the potential to alter a Host State's incentives and force the state to "reconcile[] international obligations with domestic political preferences."⁷⁰ In other words, expanded discovery may have a positive deterrent effect in favor of the Rule of Law. Many states (and their leaders) face a domestic political climate in which foreign investors are negatively viewed as outsiders intent on stripping the country of its wealth and resources for export. When faced only with such a domestic political landscape, the sovereign is easily tempted to take expropriatory action against foreign investors, to the satisfaction of the local constituency. When currying favor with the local populace comes at the potential cost of being forced by a BIT tribunal to pay millions of dollars in damages to the foreign investor, however, the calculus changes. And satisfying domestic political whims becomes even less appealing if it is likely that the damaged investor can use Section 1782 to discover concrete evidence against the expropriating state.

But the foregoing benefits come at a cost—one that some would argue is too steep to pay. The most obvious disadvantage of Section 1782 discovery in ISA disputes is the one that started off our discussion: arbitration generally is supposed to be—and usually is expected to be—a faster, cheaper, more efficient alternative to litigation. That is one reason why parties choose to enter into arbitration agreements and investment treaties. But the introduction of U.S. discovery into the mix certainly has at least the potential to eliminate those benefits.⁷¹ This is especially true when one considers that some federal courts have found that Section 1782 and the Federal

69. An additional benefit may be the ability to verify the veracity of a claim before going to the expense of bringing an investor-state dispute. Because Section 1782 can be used in cases where the foreign or international proceeding is not imminent, but only within reasonable contemplation, *see Intel*, 542 U.S. at 259, at least one court has held that Section 1782 can be used with respect to an anticipated, but as yet unnoticed, arbitration. *See In re Application of Winning (HK) Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *10 (S.D. Fla. Apr. 30, 2010) (denying motion to quash discovery for use in an unfiled, anticipated arbitration). One can argue that, in this way, Section 1782 could be used to investigate and further meritorious claims, while weeding out the weak or frivolous ones.

70. Alford, *supra* note 9, at 129.

71. Strong, *supra* note 1, at 302 & n.33, 319; Alford, *supra* note 9, at 153.

Rules of Civil Procedure authorize discovery of any materials within the possession, custody, or control of the person “found” in the U.S., even if that material is located all over the globe.⁷² As noted above, however, Investor-State arbitration has never truly fit into the “faster, cheaper” mold of arbitration, and it seems unlikely that the parties to such cases are focused on efficiency and cost. Rather, they are probably focused on having a neutral, expert panel of public international jurists to decide complex and weighty issues of international law. Nonetheless, there are other, even stronger criticisms of using Section 1782 discovery in ISA disputes.

As Professor Strong has noted, while U.S. lawyers are familiar, and therefore comfortable, with American-style discovery, most non-U.S. lawyers and clients view it with absolute “horror,” as it is so much more invasive and expensive than their own legal systems would permit.⁷³ The fact that U.S. courts have so much “discretion” in granting Section 1782 petitions does nothing to alleviate that fear, as it opens the door for judicially-sanctioned harassment in cases gone wrong.⁷⁴

Another common criticism of Section 1782 discovery is that it is “one-sided” and therefore inherently unfair. It will be the rare investor-state case (like the Chevron-Ecuador dispute) where discovery supportive of both sides is available from a person “found” in the United States. This means that one party to an ISA dispute would have access to broad Section 1782 discovery, while the other side would be limited to the much more modest discovery available under the IBA Rules (or another state’s applicable domestic procedures).⁷⁵ The unfairness inherent in such a scenario is obvious.

VI. SUGGESTIONS FOR IMPROVING THE USE OF SECTION 1782 IN INVESTOR-STATE ARBITRATIONS GOING FORWARD

Given the valid concerns listed above, how can the U.S. Courts ensure that Section 1782 is used to benefit, and not abuse, the evidence-gathering process in Investor-State arbitrations? One

72. In re Chevron, No. 11-24599-CV, 2012 WL 3636925, at *9 (S.D. Fla. June 12, 2012); In re Veiga, 746 F. Supp. 2d 8, 25 (D.D.C. 2010) (exercising discretion to grant discovery of documents in possession, custody or control of the person from whom the documents were requested even though the documents were located abroad).

73. Strong, *supra* note 1, at 351; Alford, *supra* note 9, at 139, 141.

74. Strong, *supra* note 1, at 351–52; Alford, *supra* note 9, at 150 (noting the potential for “abuse” of Section 1782 discovery).

75. *Cf.* Alford, *supra* note 9, at 142.

suggestion for capitalizing on the benefits of Section 1782 discovery while minimizing the harms would be to order that any discovery sought be “reciprocal.” This approach would eliminate one of the major criticisms of expanded discovery—its inherent one-sidedness. Reciprocal discovery would also counsel in favor of more modest Section 1782 applications if the applicant knows he could be ordered to produce discovery of a similar scope. That a district court would have discretion to order reciprocal discovery is clear from the *Intel* decision itself, where the Court explicitly stated that “a district court could condition relief [under the statute] upon [the applicant’s] reciprocal exchange of information.”⁷⁶

Another suggestion, trumpeted by Professor Alford, is that federal courts use their statutory discretion to “limit discovery to that which is available in international arbitration or foreign proceedings.”⁷⁷ This would eliminate concerns about one-sidedness, while also mitigating non-U.S. fears about the horrors of American discovery. That said, such a restriction would seemingly prevent parties to BIT arbitrations from getting access to otherwise inaccessible—yet necessary—materials in support of their public international law claims.⁷⁸ Thus, this type of limitation on Section 1782 discovery would have to be approached with care, probably by granting any reasonable discovery requests that would technically be allowed under the IBA Rules, no matter how unlikely such discovery might be in the practice of ISA cases.

Finally, we suggest that U.S. Courts faced with Section 1782 petitions should exercise their broad discretion in other ways to ensure that the statute is used fairly and properly. Indeed, the Courts have already done so, exercising their discretion to: (i) disallow

76. *Intel*, 542 U.S. at 262.

77. Alford, *supra* note 9, at 153.

78. For instance, in the *Chevron* cases much of the evidence was obtained in the form of non-party deposition testimony, *see Chevron Corp. v. Donziger*, 1:11-cv-00691-LAK-JCF (S.D.N.Y. Mar. 4, 2014) (Docket No. 1874) (noting that “[m]uch of the evidence in this case,” which came in the form of depositions, emails and a trove of documents, was obtained through a Section 1782 proceeding in *In re Chevron Corp.*, 749 F. Supp. 2d 141, 170 (S.D.N.Y. 2010), *aff’d sub nom. Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App’x 393 (2d Cir. 2010)), which is generally disallowed under the IBA Rules. *See* R. Doak Bishop, James Crawford & W. Michael Reisman, *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 15, § 1.10 (2005) (explaining that, although international arbitrations do not have formal rules of taking evidence, tribunals often refer to the IBA Rules, under which voluminous discovery involving broad-category document requests and oral depositions are usually not permitted, unless the parties agree).

discovery that is otherwise authorized by the statute;⁷⁹ (ii) limit the type or amount of discovery that is ultimately authorized;⁸⁰ and (iii) place conditions on the use of that discovery, such as subjecting the materials produced to a confidentiality agreement or protective order.⁸¹

By implementing such limiting principles on the use of Section 1782 discovery, the statute can be used to benefit ISA disputes without harming the process.

79. *See, e.g.*, In re Application of Inversiones y Gasolinera Petroleos Valenzuela, 2011 WL 181211, at *16-17 (finding that the statutory prerequisites for Section 1782 are present, but nonetheless denying petitioner's motion to compel pursuant to Fed. R. Civ. P. 45).

80. *See, e.g.*, In re Veiga, 746 F. Supp. 2d at 25 (refusing to hold that Section 1782 limits discovery to documents physically located in the United States, but nevertheless exercising its discretion to so limit the discovery ordered in this case).

81. In re HydroDive Nigeria Ltd., No 13-MC-0477, slip op. at 10 (S.D. Tex. May 29, 2013) (subjecting all discovery ordered to the provisions of an attorney's eyes only confidentiality agreement, to mitigate the concerns of the Respondent corporation).