In In re Petrobras Sec. Litig., 2019 WL 3403281 (S.D.N.Y. July 29, 2019), Judge Jed S. Rakoff denied a Section 1782 request for discovery in a foreign proceeding in part because a private Brazilian arbitration was not a "foreign or international tribunal" for purposes of Section 1782 but ordered the unsealing of various documents attached to the parties' summary judgment papers in a settled class action based on the presumption of public access to judicial documents.

Cornell University was a member of a class of plaintiffs that sued Petrobras in the Southern District of New York, alleging that Petrobras violated securities laws by making materially misleading statements in connection with sales made on the New York Stock Exchange. The Southern District of New York entered a final judgment approving a settlement in the class action on July 2, 2018. Id. at *1.

Cornell University had also purchased Petrobras securities on a Sao Paolo stock exchange called the Bovespa and was involved in an ongoing arbitration before the Bovespa Market Arbitration Chamber (the CAM). The issues in the arbitration concerned the same fraudulent misstatements underlying the U.S. class action. Cornell had originally brought these claims in the New York class action, but the court dismissed them in 2015 based on a clause in Petrobras' bylaws mandating that the specific claims be arbitrated in Brazil.

Believing that certain documents produced under seal by Petrobras in the New York class action's discovery phase would strengthen its case before the CAM, Cornell moved the court to grant it access to these documents for use in the CAM proceeding by entering an order compelling discovery for use in a foreign proceeding under 28 U.S.C. § 1782 or, in the alternative, entering an order unsealing the documents.

Under 28 U.S.C. § 1782, a court has discretion to authorize discovery for use in a foreign proceeding if the following requirements are met: (1) the person or entity from whom the moving party seeks to compel discovery resides or is found in the district in which the court sits, (2) the discovery is "for use in a foreign proceeding before a foreign or international tribunal" and (3) the moving party is the foreign or international tribunal, itself, or "any interested person." The court determined that Cornell failed to satisfy the first and second requirements. Id. at *2.

As to the first requirement, the court's threshold question was whether the "resides or is found" language required the court to have personal jurisdiction over the party. Despite no binding precedent on the issue, the court concluded that based on "the great weight of authority" and instructive Second Circuit case law, it should apply a personal jurisdiction analysis to determine whether Petrobras was "found" in the district for purposes of § 1782. Id. at *3-*4. The court determined that the only ties Petrobras had to New York were far from sufficient to subject Petrobras to the court's general jurisdiction. The court also found that Petrobras had not purposefully directed its activities relevant to the CAM arbitration in the forum, and therefore the court lacked specific jurisdiction. Accordingly, Petrobras was not "found" in the district under § 1782. Id. at *4-*5.

Cornell also failed to satisfy the third requirement, as the CAM was not a "foreign or international tribunal" under the terms of Section 1782. Second Circuit precedent provides that "an arbitral body established by private parties" is not a "foreign tribunal" for purposes of Section 1782. Id. at *6

(citing NBC v. Bear Stearns, 164 F.3d 184, 191 (2d Cir. 1999)). Cornell argued that other decisions and even Supreme Court dicta abrogated the Second Circuit's decision in NBC, but Judge Rakoff ruled that NBC was still good law, and it was "implausible" to read the Supreme Court's opinion as an abrogation of this precedent. Therefore, he denied the § 1782 motion. Id. at *6.

Judge Rakoff then addressed Cornell's motion to unseal the documents submitted by Petrobras during discovery. During the litigation in the Southern District of New York, the parties had submitted the court's standard form protective order allowing the parties to keep confidential for purposes of the litigation discovery items that either party believed contained secret or sensitive information. The court had also issued a second protective order allowing the parties to file under seal any discovery materials supporting the summary judgment motions that the parties had previously marked as confidential. "However, none of this sealing was intended to be forever, and the parties knew as much." Id. at *8. Furthermore, the Second Circuit had recently stated that summary judgment papers are judicial documents as a matter of law. Id. (citing Giuffre v. Maxwell, 2019 WL 1150037 (2d Cir. Mar. 11, 2019)). Therefore, "they were judicial documents, and there is a strong presumption in favor of public disclosure of judicial documents." Nonetheless, the court recognized that small portions of a few documents contained "business information that might harm a litigant's competitive standing." Thus the court granted Cornell's motion to unseal in part. The court ordered the parties to identify the documents that could be unsealed in their entirety, those that must be redacted in part prior to unsealing, and those that should remain sealed. Petrobras could then submit any outstanding objections, and the court would review these documents in camera. After the final unsealing order was entered, "Cornell will then be free to use the unsealed documents as it sees fit."