

AMERICAN DISCOVERY FOR FOREIGN LITIGATION UNDER 28 USC § 1782

By
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It is by now almost a cliché that the American legal system permits far more extensive pretrial discovery than most other countries' legal systems. As a result, parties embroiled in litigation overseas may sometimes be tempted to try to use the United States legal system to obtain discovery that otherwise might be unavailable to them. Even apart from the more liberal American discovery rules, litigants in foreign countries sometimes may need or want to seek evidence in the United States to assist them in pursuing their cases in foreign courts. American law permits a person with an interest in a foreign litigation to seek discovery in the United States, even without the involvement of the foreign court. This article explores the procedure for doing so.

I. BACKGROUND: *INTEL V. AMD* AND 28 USC § 1782

It is a simple matter for a litigant in a foreign case to *seek* discovery in the United States without involvement of the foreign tribunal. Actually *getting* the discovery is less simple, but only somewhat. The governing statute is 28 USC § 1782. Under § 1782, an “interested person” may request that the district court authorize discovery in the United States “for use in” foreign litigation even without the foreign tribunal’s knowledge or involvement.¹ As business has globalized over the

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¹ Section 1782 provides in relevant part as follows:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the

past several years, and more transnational disputes have arisen, the courts have been wrestling with the question of how district courts should handle these requests. Section 1782 gained special attention in 2004, when the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S.Ct. 2466 (2004). In *Intel*, the Court held that § 1782 conferred broad discretion on district judges to permit foreign litigants to obtain discovery in the United States, though subject to certain statutory and prudential guidelines.

In *Intel*, AMD had filed a complaint in Europe with the European Commission's Directorate-General for Competition ("D-G"), claiming that Intel was engaging in various kinds of anti-competitive activity. The D-G enforces the European antitrust laws; it investigates and provides a recommendation to the European Commission ("EC"), whose decisions as to liability are then reviewable in the European court system. In those proceedings, complainants like AMD have certain rights, including the right to seek judicial review of certain decisions of the D-G. In the *Intel* case, AMD suggested to the D-G that, in the course of its investigation, the D-G should seek certain documents produced in litigation against Intel in the United States. The D-G declined to do so.

AMD decided that if the D-G wouldn't ask for the documents, AMD would. AMD applied for an order under § 1782, claiming it was an "interested person" entitled to seek discovery in the United States in aid of the antitrust proceeding in Europe. The district court held that § 1782 did not authorize the discovery and denied the application. The Ninth Circuit reversed, holding that the statute did authorize the discovery. It instructed the district court on remand to exercise its discretion as to whether to permit the discovery AMD was seeking. The Supreme Court granted certiorari.

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.

Before the Supreme Court were a number of issues. First, whether a person seeking discovery under § 1782 could seek only discovery that would be permitted in the foreign jurisdiction. The circuits had split on that issue.² The Supreme Court also addressed whether there had to be an actual legal proceeding pending before § 1782 could be invoked (circuits had split on this issue as well),³ what kinds of foreign tribunal proceedings could be the subject of proper § 1782 applications, and whether a complainant in an administrative proceeding could be an “interested person” entitled to invoke § 1782. On each of these issues the Supreme Court came down in favor of permitting the district court discretion to allow discovery. It held that, under § 1782: (a) AMD was an “interested person” even though not a formal party litigant; (b) a D-G investigation is a “proceeding” in a “foreign or international tribunal” for which discovery can be sought under § 1782, even at the investigative, pre-decisional stage, so long as decisional proceedings are “within reasonable contemplation;” and (c) § 1782 does not require that the discovery materials sought in the United States also be discoverable in the foreign proceeding.

The Supreme Court’s reasoning was driven to a great extent by the statutory language.⁴ Thus, it noted that the 1964 amendments removed the requirement that the foreign proceeding be “judicial,” which meant that investigative or regulatory tribunals were covered as well.⁵ Similarly, in rejecting the contention that § 1782 permits production only of documents that would be discover-

² Compare *Application of Gianoli Adulante*, 3 F.3d 54 (2d Cir. 1993) (no foreign discoverability requirement); *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998) (same), with *In re Asta Medica*, 981 F.2d 1 (1st Cir. 1992) (evidence sought under § 1782 must be discoverable in forum of underlying dispute); *Lo Ka Chun v. Lo TO*, 858 F.2d 1564 (11th Cir. 1988); *In re Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988) (same).

³ Compare *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (foreign case must be imminent) with *In re Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 691 (D.C. Cir. 1989) (foreign case must be “within reasonable contemplation”).

⁴ See *Intel*, 542 U.S. at 255.

⁵ *Intel*, 542 U.S. at 248, 257-58.

able in the foreign forum, the Court stressed that Congress had liberalized the statute in 1964, so that if it meant to impose a restriction on the scope of discovery, it would have so provided.⁶ In the Court's view, any concerns about public policy or fairness between litigants could be addressed by the district courts on a case by case basis in the exercise of their discretion.⁷

Intel thus clarified that the statutory limits on discovery under § 1782 are actually quite narrow. As a result, much of the litigation about whether to permit discovery under § 1782 necessarily focuses on the discretionary factors. The Court in *Intel* identified several factors to guide the district courts' discretion:⁸

First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .

Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . . . Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.

[Third], unduly intrusive or burdensome requests may be rejected or trimmed.

⁶ *Intel*, 542 U.S. at 260.

⁷ *See Intel*, 542 U.S. at 262-63.

⁸ *Intel*, 542 U.S. at 264-65.

These factors should be applied in support of § 1782’s “twin aims of ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.’”⁹

This article examines in detail the issues that must be addressed on a § 1782 application, both the statutory requirements and the discretionary factors.

II. STATUTORY PREREQUISITES

A district court has power to order § 1782 discovery:

where “(1) . . . the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) . . . the discovery [is] for use in a proceeding before a foreign tribunal, and (3) . . . the application [is] made by a foreign or international tribunal or ‘any interested person.’”¹⁰

Each of these elements must be shown in a § 1782 application. Each raises unique issues.

A. *District where a “person resides or is found”*

The statutory language provides that a § 1782 discovery order may be issued by “[t]he district court of the district in which a person resides or is found.” The movant has the burden of establishing that the witness-to-be resides or is found in the district.¹¹ Being “found” in the district is a lower level of contact than residence,¹² and can be satisfied even if the person from whom the

⁹ *Intel*, 542 U.S. at 254, quoting *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002). Accord, e.g., *Schmitz v. Bernstein Liebhard & Lifshitz*, 376 F.3d 79, 84 (2d Cir. 2004); *al-Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000); *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992); *Application of Gemeinschaftspraxis R. Med. Schottdorf*, 2006 WL 384464, no. M19-88 (S.D.N.Y. Dec. 29, 2006); *In re Grupo Qumma*, 2005 WL 937486, slip op. at 1 (S.D.N.Y. Apr. 22, 2005).

¹⁰ *Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79, 83 (2nd Cir. 2004) (quoting *In re Application of Esses*, 101 F.3d 873, 875 (2d Cir.1996)). Accord, e.g. *In re Bayer AG*, 146 F.3d 188, 1931 (3d Cir. 1998).

¹¹ *In re Kolomoisky*, 2006 WL 2404332 (S.D.N.Y. Aug. 18, 2006).

¹² See *In re Oxus Gold PLC*, 2006 WL 297615 (D.N.J. Oct. 11, 2006).

discovery is to be taken (the “target”) is served with the subpoena while he is traveling through the district.¹³

It is important to identify carefully the “person” from whom the discovery is sought, particularly in the case of related corporations of which only some might be “found” in the district. On the one hand, a parent corporation cannot be compelled to produce documents from a subsidiary merely because of their ownership affiliation.¹⁴ Similarly, an applicant under § 1782 cannot obtain discovery from a parent corporation simply by serving a demand on the subsidiary.¹⁵ On the other hand, the Federal Rules of Civil Procedure do apply in § 1782 cases by default, which means that the recipient of a subpoena must produce documents within its “possession, custody or control.”¹⁶ “Control” includes the “legal right to obtain documents on demand,”¹⁷ which means that, depending on the particular relationships and arrangements among corporate affiliates, it might be possible to obtain discovery from one by serving another. The burden of proving “control” in § 1782 cases, as in any discovery dispute, is on the person seeking discovery.¹⁸

The requirement that the target of a § 1782 subpoena be a “person” precludes using § 1782 to obtain discovery from the United States or other sovereign government.¹⁹

¹³ *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002).

¹⁴ *Kestrel Coal Pty. Ltd. V. Joy Global Inc.*, 362 F.3d 401, 404-05 (7th Cir. 2004) (corporate entities must be considered separate for purposes of § 1782 discovery absent some reason to pierce the corporate veil).

¹⁵ *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F.Supp. 2d 45, 56 (D.D.C. 2005).

¹⁶ Fed. R. Civ. P. 45(a)(1)(C).

¹⁷ *Norex, supra*, 284 F.Supp. 2d at 56, *quoting Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).

¹⁸ *Norex, supra*, 384 F.Supp. 2d at 56.

¹⁹ *al-Fayed v. Central Intelligence Agency*, 229 F.3d 272, 275 (D.C. Cir. 2000).

B. Court may order target to “give his testimony or statement or to produce a document or other thing”

Nothing in the language of § 1782 suggests that the evidence obtained using that statute must be located in this country. The statute says only that a person who is found in the district can be required to give testimony or produce documents.

There is no dispute that a person who resides abroad can be served with a subpoena under § 1782. The court must acquire jurisdiction over him in accordance with due process – and mere service within the district suffices for this purpose.²⁰ Any concerns about whether such a deposition would be unduly burdensome for the target can be addressed under the normal provisions the Federal Rules of Civil Procedure. Under Rule 45 and Rule 26(c), the district court may quash or modify the subpoena, or issue such orders as are necessary to protect the interests of the non-party, which is sufficient protection against abuse.²¹ Indeed, the Second Circuit has observed that, even if a witness resident abroad has been served properly with a subpoena under § 1782, actually taking the deposition might not be possible because of Rule 45’s strictures against inconveniencing witnesses by forcing them to travel far from their homes.²²

Whether § 1782 authorizes discovery of **documents** located outside the United States, however, remains an open question. The lower courts have split on the issue of whether a person served with a § 1782 subpoena can be required to produced documents maintained abroad. Although all the circuit courts that have considered the issue have expressed doubt as to whether a target can be compelled to produce documents located in other countries,²³ none of those courts has

²⁰ *Edelman, supra*, 295 F.3d at 175.

²¹ *Id.* at 179.

²² *Id.* at 181.

²³ *See, e.g., Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004); *Four Pillars Enters. Co., Ltd. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079-80 (9th Cir. 2002); *Edelman, supra*, 295 F.3d at 176-77; *In re Sarrio*, 119 F.3d 143, 147 (2d Cir. 1997).

squarely so held, and indeed several have taken pains to make clear that their decisions denying such discovery were based on other grounds.²⁴ Some of the legislative history for the 1964 amendments to § 1782 indicates that the statute was aimed at obtaining evidence in the United States.²⁵ One of the main drafters of the statutory language, Professor Hans Smit of Columbia Law School, has suggested that § 1782 should be limited to evidence in the United States, so that the American court system will not become an alternative discovery forum for litigation in other countries.²⁶ The courts that have questioned whether § 1782 can reach documents kept in other countries have relied on this legislative history and on Professor Smit's statements.²⁷ Nevertheless, the fact remains that § 1782 on its face does not require that the *documents* to be produced be located in the United States; it requires only that the *person* from whom the testimony or documents are sought must reside or be found in the United States.

The district courts have been wrestling with the issue inconclusively. Thus, for example, the district court in *Application of Gemeinschaftspraxis R. Med. Schotttdorf*,²⁸ refused to quash a § 1782 subpoena served on the American consulting firm McKinsey. McKinsey had created an economic report in Germany for the Bavarian Physicians Association. A medical laboratory that had sued the Bavarian Physicians Association in Germany brought on a § 1782 application to compel McKinsey to produce the report. The court refused to quash the subpoena served on McKinsey, and rejected

²⁴ See, e.g., *Kestrel*, *supra*, 362 F.3d at 404; *Four Pillars*, *supra*, 308 F.3d at 1080; *Sarrío*, *supra*, 119 F.3d at 147. See also *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp.2d 45, 50-55 (D.D.C. 2005).

²⁵ See S. Rep. No. 88-1580 (1964), *reprinted in* 1964 USCCAN 3782, 3788. See also the discussion in *In re Sarrío*, 119 F.3d 143, 146 (2d Cir. 1997); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp.2d 45, 50-53 (D.D.C. 2005).

²⁶ Smit, *American Assistance to Litigation in Foreign and International Tribunals: § 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l & Com. 1, 10-12 (1998).

²⁷ See cases cited *supra*, note 23.

²⁸ 2006 WL 3844464, no. M19-88 (S.D.N.Y. Dec. 29, 2006)

McKinsey's argument that § 1782 does not permit the district court to order production of material located overseas. The court reasoned that § 1782 on its face requires only that the person served with the subpoena be found in the United States, not that the items to be discovered also be located here.²⁹

A different judge in the Southern District of New York had held in *In re Sarrio*³⁰ in 1995 that § 1782 could not reach documents kept abroad. Although the Second Circuit disposed of the appeal in *Sarrio* on other grounds, its opinion expressed doubt that § 1782 could require production of documents located outside the United States.³¹ The district court in the District of Columbia in *Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*³² discussed the issue at length and seemed to express agreement with the district court in *Sarrio*, but ultimately denied the § 1782 application before it on other grounds. Yet another judge in the Southern District of New York denied on discretionary grounds § 1782 discovery of overseas documents, but noted in a conclusory footnote his belief that “§ 1782 does not authorize discovery of documents held abroad.”³³

But *Intel* may have changed things. The reasoning of *Intel* about the scope of the district court's power relies almost entirely on the language of § 1782.³⁴ The Court refused to infer limitations on the district court's power that were not required by the statute. Instead it left most questions about the proper scope of discovery in any particular case to the district courts' discretion.

²⁹ *Schottdorf*, 2006 WL 384464 at 5 & n.13.

³⁰ *In re Sarrio*, 1995 WL 598988 at 2-3 (S.D.N.Y. Oct. 11, 1995), *remanded on other grounds*, 119 F.3d 143 (2d Cir. 1997).

³¹ *In re Sarrio*, 19 F.3d 143, 147 (2d Cir. 1997).

³² 384 F. Supp.2d 45, 50-53 (D.D.C. 2005).

³³ *In re Microsoft Corp.*, 428 F. Supp.2d 188, 194 n.5 (S.D.N.Y. 2006).

³⁴ “The language of § 1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion” that the statute permits but does not require the discovery at issue in that case. *Intel*, 542 U.S. at 257.

This suggests that, because § 1782 on its face does not prohibit district courts from ordering targets to produce documents kept abroad, no such limitation can be inferred. Instead, the district court in any particular case may limit or prohibit such discovery consistent with the applicable discretionary factors. Of course, the answer will ultimately become clear as case law continues to develop.

As noted, § 1782 says that the Federal Rules of Civil Procedure provide the default rules for § 1782 discovery. But not all the discovery tools of the Federal Rules of Civil Procedure can be used. The express terms of § 1782 permit the district court only to require a person to “give his testimony or statement or to produce a document or other thing.” As a result, one court has held that § 1782 does not permit service of interrogatories.³⁵ By the same logic, § 1782 should not authorize requests for admissions, either.

C. *Discovery should be “for use in a proceeding in a foreign or international tribunal”*

1. *“Proceeding in a foreign or international tribunal”*

Intel established that § 1782 permits discovery in the United States not only in connection with court cases but also in connection with regulatory and administrative proceedings.³⁶ Before *Intel*, the Second Circuit held in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* that § 1782 did not permit discovery in aid of proceedings in a privately sponsored arbitral tribunal. According to the Second Circuit, § 1782 was designed to aid only governmentally sponsored tribunals, irrespective of whether they were courts, agencies, government-sponsored arbitration forums or arbitral forums created by intergovernmental agreement.³⁷ *Intel*, however, cited with approval Professor Smit’s

³⁵ *Fleischmann v. McDonald’s Corp.*, ___ F. Supp.2d ___, 2006 WL 3530582, slip op. at 10 (N.D. Ill. Dec. 6, 2006).

³⁶ *Intel*, 542 U.S. at 257-58.

³⁷ *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999).

statement that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative *and* *arbitral* tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”³⁸ Does this reference to “arbitral tribunals” include privately-created arbitration panels?

It is not clear. In *In re Oxus Gold PLC*,³⁹ a post-*Intel* case, the District of New Jersey granted a § 1782 application seeking to obtain evidence for use in an arbitration pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”). In granting the application, the court held that because the arbitration was pursuant to UNCITRAL – that is, an intergovernmental agreement – an order under § 1782 could issue under the rule of *National Broadcasting*. The Northern District of Georgia, however, rejected this reasoning in its December 2006 decision in *In re Roç Trading Ltd.*⁴⁰ In that court’s view, *Intel* fatally undermined *National Broadcasting*. According to the *Roç* court, the issue under § 1782 is whether the proceeding in question is before a “tribunal,” not whether the tribunal has government sponsorship. Thus, “[w]here a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of ‘tribunal,’ the reasoning of *Intel*, and the scope of § 1782(a), regardless of whether the body is governmental or private.”⁴¹

³⁸ *Intel*, 542 U.S. at 257, quoting Smit, *International Litigation under the United States Code*, 65 Colum. L.Rev. 1015, 1026-1027 & nn. 71, 73 (1965) (emphasis added).

³⁹ 2006 WL 2927615 (D.N.J. Oct. 11, 2006).

⁴⁰ 2006 WL 3741078 (N.D. Ga. Dec. 19, 2006).

⁴¹ *Id.*, slip op. at 6.

Before the Second Circuit decision in *National Broadcasting, supra*, one case in the Southern District of New York had held that § 1782 requests could be made in support of private arbitration overseas, but only with the approval of the arbitrators.⁴² This is also Professor Smit's position.⁴³

A foreign insolvency proceeding can be a "proceeding" for § 1782 purposes if it serves an adjudicative function such as ruling on allowance of claims.⁴⁴ But if adjudication is finished already and the insolvency proceeding merely is enforcing a judgment, there is no "proceeding" for § 1782 purposes.⁴⁵

2. "For use in" foreign tribunal

Intel established that discovery under § 1782 is permissible even if a dispute is not pending or imminent, so long as it is within "reasonable contemplation."⁴⁶ *Intel* established as well that evidence is discoverable under § 1782 even if it would not be discoverable in the foreign tribunal.⁴⁷ But *Intel* did not address the degree to which the evidence sought must be connected to the foreign proceeding.⁴⁸ At what point is evidence sought too remote to be deemed "for use in" the foreign tribunal?

⁴² *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994).

⁴³ Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l & Com. 1 (1998).

⁴⁴ *In re Hill*, 2005 WL 1330769, slip op. at 4 (S.D.N.Y. June 3, 2005). *Accord In re Lancaster Factoring, Ltd.*, 90 F.3d 38 (2d Cir. 1996)

⁴⁵ *Euromepa, S.A. v. R. Esmerian*, 154 F.3d 24 (2d Cir. 1998).

⁴⁶ *Intel*, 542 U.S. at 259.

⁴⁷ *Id.* at 259-62.

⁴⁸ Before *Intel*, the Second Circuit rule was that § 1782 discovery could be taken only for a proceeding that was pending or imminent. In 1998, the Second Circuit held in *Euromepa, S.A. v. R. Esmerian*, 154 F.3d 24 (2d Cir. 1998) that § 1782 discovery could not be authorized where the movant was seeking the discovery to obtain evidence for a motion to reopen a foreign case based on newly discovered

The key is not admissibility: evidence may be sought “for use in” a foreign proceeding whether or not the evidence would ultimately be admissible in the foreign tribunal.⁴⁹ Admissibility and “use” are not coterminous concepts for purposes of § 1782.

Although “for use in” does not require that the evidence sought be either discoverable or admissible in the foreign tribunal, it is not precisely clear how to tell when discovery is “for use in” a foreign legal dispute under § 1782. One recent case looked to § 1782’s incorporation of the Federal Rules of Civil Procedure to supply the definition: “[T]he reference to the Federal Rules signals to the courts that discovery may be as broad and liberal as the Federal Rules allow. . . . ‘[F]or use in’ mirrors the requirements in Federal Rule of Civil Procedure 26(b)(1) and means discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action.”⁵⁰

Some cases have held that discovery is for use in the foreign proceeding if the requesting party intends to offer it, whether or not the foreign tribunal ultimately accepts it into evidence.⁵¹ In one case that sought evidence for use in France, the target expressed concern that the movant would examine documents it might not offer into evidence, which would be contrary to French discovery

evidence. It is unclear whether this remains good law after *Intel*, or whether the courts would instead hold that a motion to reopen a case based on newly discovered evidence is a proceeding “within reasonable contemplation” under *Intel*.

⁴⁹ See, e.g., *Fleischmann v. McDonald’s Corp.*, ___ F. Supp.2d ___, 2006 WL 3530582, slip op. at 6 (N.D. Ill. Dec. 6, 2006); *In re Imanagement Servs., Inc.*, 2006 WL 547949, slip op. at 3 (D.N.J. March 3, 2006); *In re Imanagement Servs., Inc.*, 2005 WL 1959702, slip op. at 2 (E.D.N.Y. Aug. 16, 2005); *In re Grupo Qumma*, 2005 WL 937486 (S.D.N.Y. April 22, 2005).

⁵⁰ *Fleischmann v. McDonald’s Corp.*, ___ F. Supp.2d ___, 2006 WL 3530582, slip op. at 7 (N.D. Ill. Dec. 6, 2006). See also *In re Bayer AG*, 146 F.3d 188, 195 (3d Cir.1998) (“Consistent with the statute’s modest prima facie elements and Congress’s goal of providing equitable and efficacious discovery procedures, district courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.”).

⁵¹ *In re Imanagement Servs., Inc.*, 2006 WL 547949, slip op. at 3 (D.N.J. March 3, 2006); *In re Grupo Qumma*, 2005 WL 937486 (S.D.N.Y. Apr. 22, 2005).

rules. The Second Circuit held that this concern was no reason to deny § 1782 discovery, because any problems with § 1782 discovery could be addressed by tailoring the discovery to the particular situation. In that case, the Second Circuit observed that the district court retained the power to order the movant to submit to the French court all the evidence it obtained in the United States, whether it helped the movant's case or hindered it.⁵²

The thrust of § 1782 thus is strongly in favor of granting discovery. As the Third Circuit put it in *In re Bayer AG*:⁵³

The reference in § 1782 to the Federal Rules suggests that under ordinary circumstances the standards for discovery under those rules should also apply when discovery is sought under the statute. Consistent with the statute's modest prima facie elements and Congress's goal of providing equitable and efficacious discovery procedures, district courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.

The foreign tribunal remains free, of course, to decline any evidence it deems inappropriate, so § 1782 discovery is unlikely to cause serious disruption to foreign legal proceedings.⁵⁴ For that reason, § 1782 discoverability standards are not overly restrictive. To the extent there may be comity concerns involving public policies of jurisdictions, those would be addressed in the case by case exercise of the district court's discretion rather than by reading restrictions into the statute.

⁵² *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101-02 (2d Cir. 1995).

⁵³ 146 F.3d 188, 195 (3d Cir.1998).

⁵⁴ *See Euromepa, supra*, 51 F.3d at 1101 (“France can quite easily protect itself from the effects of any discovery order by the district court that inadvertently offended French practice.”).

D. Request made by foreign tribunal pursuant to a letter rogatory, “or upon the application of any interested person”

Section 1782 gives standing to foreign tribunals and to “any interested person” to seek discovery in the United States. When a foreign tribunal seeks discovery by letters rogatory, there isn’t much dispute about their standing to seek the assistance of the federal court. “Interested persons” are a different story.

There is no dispute that a party to a foreign litigation is an “interested person.” And *Intel* clarified that an “interested person” entitled to apply for § 1782 discovery need not be a formal party to the foreign case.⁵⁵ But if a § 1782 applicant need not be a party, what relationship must the applicant have to the foreign dispute in order to have standing under § 1782? The criterion suggested by Professor Smit -- a person with “a reasonable interest in obtaining the assistance”⁵⁶ -- is too vague to be useful.

In *Intel*, AMD was held to have standing because it had the ability under EC law to submit evidence to the D-G and to seek judicial review if the EC dismissed the complaint against Intel or dropped the investigation.⁵⁷ In certain countries, relatives of accident or crime victims have the ability to appeal certain court decisions concerning their family members and to offer new evidence on the appeal. That is enough to confer standing on the relative.⁵⁸ A person seeking to be appointed administrator of an estate overseas is an “interested person.”⁵⁹ Prosecutor’s offices

⁵⁵ *Intel, supra*, 542 U.S. at 255-57.

⁵⁶ *See Intel, supra*, 542 U.S. at 256-57 (*quoting Smit, supra* note 26, at 1027).

⁵⁷ *Intel*, 542 U.S. at 256.

⁵⁸ *See, e.g., al-Fayed v. Central Intelligence Agency*, 229 F.3d 272 (D.C. Cir. 2000) and *al-Fayed v. United States*, 210 F.3d 421 (4th Cir. 2000), both of which assumed without discussion that Mohammed al-Fayed had standing to seek § 1782 discovery to assist in his appeal from the French investigation of his son’s death in the Paris car accident in which Diana, former Princess of Wales, was also killed.

⁵⁹ *Application of Esses*, 101 F.3d 873, 875-76 (2d Cir. 1996).

conducting criminal investigations are “interested persons” under § 1782.⁶⁰ It appears, therefore, that a person who has some right to participate in submitting evidence to the overseas tribunal is an “interested person” with standing to apply for § 1782 discovery.

Interestingly, one recent case held that, because the parent company of a party to an international arbitration had an economic interest in the outcome of the arbitration, the parent company was an “interested person” with standing to seek discovery under § 1782.⁶¹

III. DISCRETIONARY CONSIDERATIONS

If the statutory prerequisites for a § 1782 application are met, then the district court “may” order discovery. The Supreme Court in *Intel* identified several factors to guide a district court’s discretion in deciding whether to authorize the discovery. Many were already in wide currency in the lower courts even before *Intel*.

A. Whether the target is before the foreign tribunal

The first *Intel* factor is whether the person from whom the § 1782 discovery is sought is already before the overseas tribunal. In such a case, *Intel* reasoned, the overseas tribunal is able to compel the target to produce evidence in accordance with the tribunal’s own discoverability and evidentiary rules, so there is less need for § 1782 discovery.⁶²

⁶⁰ *In re Letters Rogatory from Tokyo Dist. Prosecutor’s Office, Tokyo, Japan*, 16 F.3d 1016 (9th Cir. 1994); *In re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989)

⁶¹ *In re Oxus Gold PLC*, 2006 WL 2927615, slip op. at 7 (D.N.J. Oct. 11, 2006).

⁶² As *Intel* put it:

First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .

1. *Who is the “real” target?*

To apply this factor it is necessary to identify carefully which person is before the foreign forum and from which person discovery is sought. One court seems to have reformulated this factor in a recent case: “[t]he relevant issue is whether the evidence is available to the foreign tribunal” rather than whether the person from whom it was sought is before the foreign tribunal.⁶³ Strictly speaking this is *not* accurate: as noted, *Intel* focused specifically on whether the *target* was before the foreign court, not whether the foreign court had the ability to obtain the evidence.⁶⁴ (It appears that this court was peeved at what it perceived as overreaching by the applicant, Microsoft Corporation. This opinion is discussed in further detail below.) This is not to say that the foreign tribunal’s ability to obtain evidence is not relevant. Part of the district court’s role in supervising discovery under Rules 26(b) and 26(c) is to fashion procedures for reducing duplication, expenses and annoyance. In issuing such supervisory orders, the court may consider whether the evidence is available in the overseas forum.⁶⁵

Other case law that applies the first *Intel* factor holds that discovery of a party’s bank records from the bank is not the same as discovery of the party.⁶⁶ Although a party presumably is in possession of its own bank records, so that the records are available to the foreign tribunal, that does not trigger the first *Intel* factor. Similarly, where a subsidiary is a party to the foreign proceeding, the parent corporation is deemed a separate person for purposes of the discretionary

Intel, 542 U.S. at 264.

⁶³ *In re Microsoft Corp.*, 428 F. Supp.2d 188, 194 (S.D.N.Y. 2006).

⁶⁴ See footnote 62, *supra*.

⁶⁵ See, e.g., *Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992).

⁶⁶ *Lopes v. Lopes*, 180 Fed. Appx. 874, 2006 WL 1308542 (11th Cir. May 12, 2006)

analysis under the first *Intel* factor.⁶⁷ On the other hand, seeking § 1782 discovery from a party's American lawyers can be tantamount to seeking the discovery from the party itself.⁶⁸

2. *Flexible application of the first factor*

A number of appellate decisions before *Intel* permitted § 1782 discovery of a party to the foreign dispute.⁶⁹ Some of these cases were not concerned about the fact that discovery would also be proceeding in the foreign courts. Instead, they relied on the district courts to supervise the § 1782 discovery to prevent abuses.⁷⁰

Even in the time since *Intel*, the first *Intel* factor has not been applied as an inflexible rule. There may be good reasons to permit § 1782 discovery even if the person from whom the evidence is sought is participating in the foreign litigation. Two recent cases illustrate the point. In *Application of the Procter & Gamble Company* (“P&G”)⁷¹, Kimberly-Clark (“KC”) sued P&G in five countries to redress alleged infringement of KC’s disposable diaper patent. P&G’s defense was based on res judicata in one country and invalidity of KC’s patent in all five. P&G sought § 1782 discovery from KC in the United States to help establish its defenses in the UK, France, Netherlands, Germany and Japan.

⁶⁷ *Kestrel Coal Pty. Ltd. v. Joy Global Inc.*, 362 F.3d 401, 404-05 (7th Cir. 2004); *Fleischmann v. McDonald's Corp.*, ___ F. Supp.2d ___, 2006 WL 3530582, slip op. at 8 (N.D. Ill. Dec. 6, 2006).

⁶⁸ *Schmitz v. Bernstein Liebhard & Lifshitz*, 376 F.3d 79, 85 (2d Cir. 2004) (although § 1782 discovery was sought from law firm, “for all intents and purposes petitioners are seeking discovery from . . . their opponent in the German litigation.”)

⁶⁹ E.g., *Application of Metallgesellschaft AG*, 121 F.3d 77 (2d Cir. 1997); *Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985).

⁷⁰ See *Metallgesellschaft*, *supra*, 121 F.3d at 79-80; *Malev*, *supra*, 964 F.2d at 102.

⁷¹ 334 F. Supp.2d 1112 (E.D. Wis. 2004)

Relying on *Intel*, KC argued that because it and P&G were parties in each of the five foreign actions, there is no reason to use § 1782 discovery. Instead, KC said, discovery in each of the five cases should be supervised by the five courts in accordance with each country's respective procedures and laws. The district court granted the discovery even though KC was a party to each of the foreign litigations, primarily so that discovery could be done once rather than five times. The court was confident that relevance, discoverability and public policy issues could be adequately addressed in each of the foreign courts as necessary. The court was also confident that it could adequately protect KC's confidential material even in the face of doubts as to whether French or German courts would respect confidentiality agreements. The court believed it had adequate tools available under Rule 26 of the Federal Rules of Civil Procedure to provide whatever protection was necessary. So *P&G* shows that efficiency considerations may counsel in favor of a § 1782 order even when sought against a party to the overseas dispute.

In *Application of Servicio Pan Americano de Proteccion*,⁷² HSBC Bank sued Pan Americano in Venezuela for the loss of \$5.6 million in American funds that Pan Americano was hired to transport from HSBC to several banks in Venezuela. Under Venezuelan law, HSBC could not sue for its loss to the extent it recovered for the loss from its insurance. But Venezuelan civil procedure rules did not allow Pan Americano to obtain the insurance documents unless it had evidence that specific documents existed. That meant Pan Americano could not establish its defense in Venezuela under Venezuelan procedural rules. So Pan Americano sought a § 1782 order in the United States to discover HSBC's insurance claims in connection with the loss.

Even though both Pan Americano and HSBC were before the Venezuelan courts, the district court viewed the very unavailability of the insurance-related documents under Venezuelan procedural rules as a factor in favor of allowing the § 1782 discovery. The court seemed to apply a

⁷² 354 F. Supp.2d 269 (S.D.N.Y. 2004).

“need” standard: since Pan Americano said it needs the HSBC insurance documents to establish its defense and cannot get those documents elsewhere, the discovery is appropriate. The court did not view this as a circumvention of the Venezuelan courts. In the court’s view, the evidence would be helpful to the Venezuelan courts, and it was only “for purely technical reasons” that the discovery could not be ordered there. This case seems to imply that “need plus unavailability in the primary forum” suffices to warrant § 1782 discovery even though the target is subject to foreign court supervision. If that were so, the first *Intel* factor would have little force.

B. *Nature of foreign tribunal and proceedings; receptivity to US help*

The Supreme Court explained the second discretionary factor as follows:

Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.⁷³

This factor breaks into two sets of considerations. The first – “nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance” -- speaks to the institutional and policy concerns of the foreign court. The second – “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States” – speaks to the specific case.

⁷³ *Intel*, 542 U.S. at 264-65.

a. Institutional and policy considerations

Gauging the foreign court's receptivity to evidence gathered in an American court under § 1782 does not require an analysis of foreign law. To the contrary, the Second Circuit decried "battle-by-affidavit of international legal experts," and has cautioned, "it is unwise – as well as in tension with the aim of § 1782 – for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law."⁷⁴

Instead, courts should err on the side of allowing discovery, and refuse to order § 1782 discovery only where there is "authoritative proof" that § 1782 assistance will be unwelcome.⁷⁵ Such proof should be "embodied in a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures."⁷⁶ It should be obvious that this sort of proof -- such as "explicit pronouncements by courts allowing or enjoining discovery in foreign jurisdictions"⁷⁷ -- will usually not be forthcoming. Indeed, a foreign country's receptiveness to U.S. assistance in obtaining evidence can be inferred from its having entered into "treaties facilitating such cooperation."⁷⁸

⁷⁴ *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995). See also *Application of Gemeinschaftspraxis R. Med. Schottdorf*, 2006 WL 384464, no. M19-88, slip op. at 6 (S.D.N.Y. Dec. 29, 2006); *In re Imanagement Servs. Ltd.*, 2005 WL 1959702, slip op. at 3-4 (E.D.N.Y. Aug. 16, 2005).

⁷⁵ *Id.* at 1100. Accord *Application of Gemeinschaftspraxis R. Med. Schottdorf*, 2006 WL 384464, no. M19-88, slip op. at (S.D.N.Y. Dec. 29, 2006); *In re Grupo Qumma*, 2005 WL 937486, slip op. at 3 (S.D.N.Y. Apr. 22, 2005); *In re Imanagement Servs. Ltd.*, 2005 WL 1959702, slip op. at 3, 4 (E.D.N.Y. Aug. 16, 2005);

⁷⁶ *Euromepa, supra*, 51 F.3d at 1100.

⁷⁷ *In re Esses, supra*, 101 F.3d at 377, citing *Euromepa, supra*, 51 F.3d at 1100n.3.

⁷⁸ *Application of Servicio Pan Americano de Proteccion*, 354 F. Supp.2d 269, 274 (S.D.N.Y. 2004). Accord *In re Imanagement Servs. Ltd.*, 2006 WL 547949, slip op. at 4 (D.N.J. Mar. 3, 2006).

This rule makes some sense because the parties to the foreign dispute remain subject to the foreign tribunal's supervision. That forum may make such orders as it deems necessary to protect its interests and policies. If it wishes to exclude evidence it can do so, and if it wishes to discipline a party for seeking evidence abroad, it can do that, too. On the other hand, as *Intel* noted, even if the evidence produced in the United States would not be discoverable in the foreign forum, that forum might nonetheless welcome the evidence. As an example, *Intel* cited to a decision of the House of Lords that accepted evidence gathered under § 1782 that would not have been discoverable in the United Kingdom. The Supreme Court observed:

A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts. A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a).⁷⁹

Thus, any questions about whether § 1782 discovery may be inappropriate due to foreign institutional or policy concerns should generally be resolved in favor of allowing the discovery, subject to district court supervision.⁸⁰

Presuming that a foreign court is receptive to federal court help relieves the federal court of having to immerse itself in foreign law and procedure. This is further consistent with the rule that materials can be discovered under § 1782 whether or not they would be admissible or discoverable in the foreign tribunal. Basically, the federal court in applying § 1782 only facilitates *getting* the evidence; it defers to the foreign tribunal to decide on whether and how the evidence can be *used*.

⁷⁹ *Intel*, 542 U.S. at 261-62. *Accord Bayer, supra*, 146 F.3d at 194 (“[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use.”); *Smit, supra* note 26, 235-236. *See also Eurompea, supra*, 51 F.3d at 1100 n.3.

⁸⁰ *See, e.g., Metallgesellschaft, supra*, 121 F.3d at 80.

b. Factors relevant to the particular case

Although the presumption is that the foreign court will be receptive to American court assistance, that presumption can be overcome in any particular case. A court presented with a § 1782 application can and should consider the context in which the request is being made. A person who tries to use § 1782 to circumvent the foreign court or engage in some form of sharp practice may find his application rejected. The court also should consider what the foreign court or government has to say about the particular § 1782 application.

i. Foreign tribunal or governmental input. In *Intel* itself, after remand the district court denied the discovery AMD was seeking for use in the antitrust investigation of Intel. The EC's position was that it neither wanted nor needed the evidence AMD was seeking and, moreover, that "granting the AMD's § 1782(a) request would jeopardize 'vital Commission interests.'"⁸¹

The Second Circuit upheld denial of a § 1782 application in *Schmitz v. Bernstein Liebhard & Lifshitz*.⁸² In that case, allegations of securities fraud had led to class actions against Deutsche Telekom ("DT") in both Germany and the United States, as well as to a criminal investigation by the public prosecutor in Bonn, Germany. The German plaintiffs then applied to the district court in the United States for an order under § 1782, to compel the attorneys in the American class action to turn over the DT documents that had been produced subject to a protective order in the American class action.

DT's attorneys had filed with the district court letters from the German prosecutors and the German federal government, which advised the district court that in their view, making the documents available to the German plaintiffs would interfere with German rules on access to evidence in

⁸¹ *Advanced Micro Devices, Inc. v. Intel Corp.*, 2004-2 Trade Cas. ¶ 74,569, 2004 WL 2282320 (N.D. Cal. 2004).

⁸² 376 F.3d 79 (2d Cir. 2004)

criminal cases and would jeopardize German sovereign rights. Moreover, the German plaintiffs had already once asked the German court for access to the documents and been denied (though the German authorities did say that access might be granted at some future date). Therefore, in the Second Circuit's view, the "twin aims" of the statute -- to assist courts and litigants, and to encourage other countries to provide similar assistance to American courts and litigants -- would not have been promoted by granting the § 1782 motion, because the German justice system considered the discovery request to be neither helpful nor conducive to comity.⁸³ The evidence presented as to the German authorities' position was the sort of "authoritative proof" that would overcome the presumption that foreign courts would be receptive to the evidence being sought.

ii. ***Conduct of applicant.*** Courts also deny § 1782 applications where it is clear that the applicant is trying to circumvent actual or potential adverse rulings of the foreign tribunal. That was certainly the case in *Intel*. It was also true in *Schmitz*. In another example, three different courts denied § 1782 applications by Microsoft Corporation that sought to discover evidence that the European antitrust authorities had obtained or were seeking from IBM, Novell, Sun Microsystems, Oracle and others.⁸⁴ Microsoft's requests to the antitrust authorities for much of those materials were still pending in Europe. In one of the cases, the EC had specifically advised the district court that it was not receptive to § 1782 assistance and that such "assistance" would interfere with Commission policy and confidentiality rules.⁸⁵ All three § 1782 applications were denied.

⁸³ *Id.* at 384-85.

⁸⁴ *In re Microsoft Corp.*, 428 F. Supp.2d 188 (S.D.N.Y. 2006); *In re Microsoft Corp.*, 2006-1 Trade Cas. ¶ 75,208, 2006 WL 1344091 (D. Mass. April 17, 2006); *In re Microsoft Corp.*, 2006 WL 825250 (N.D. Cal. March 29, 2006).

⁸⁵ *In re Microsoft Corp.*, 2006-1 Trade Cas. ¶ 75,208, 2006 WL 1344091, slip op. at 2 (D. Mass. April 17, 2006).

Asking the foreign court for discovery and being refused can be fatal to a subsequent § 1782 application. Thus, in *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*,⁸⁶ the Australian judge before whom the underlying case was pending had ruled that, on the state of the record then before him, Kestrel did not need certain documents to establish its case. When Kestrel's subsequent § 1782 application for discovery of the same documents came before the Seventh Circuit, the court denied it: "If, as Justice Muir concluded, Kestrel does not need these documents to make out its claim, then no purpose would be served by their production in the United States under § 1782. If, however, the documents become important later, the most sensible recourse is a renewed application to the Australian court, just as Justice Muir contemplated."⁸⁷ Successive § 1782 applications in different US courts fare no better.⁸⁸

A prior denial has less force if the reason the foreign court declined to order the requested discovery was doubts about its power to do so. Thus, in *John Deere Ltd. v. Sperry Corp.*,⁸⁹ the Third Circuit permitted § 1782 depositions of two witnesses for use in a Canadian lawsuit. The Canadian court had actually permitted the deposition of one and declined to order the deposition of the second because he was not high enough in the corporate hierarchy to warrant a deposition under Canadian discovery rules. Nevertheless, the Third Circuit held a § 1782 deposition was appropriate.

Interestingly, there had been litigation before *Intel* in which targets argued that the § 1782 applicant should be required first to seek the discovery in the forum before seeking discovery under

⁸⁶ 362 F.3d 401 (7th Cir. 2004).

⁸⁷ *Id.* at 406.

⁸⁸ *Four Pillars Enters. Co., Ltd. v. Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002)

⁸⁹ 754 F.2d 132, 138 (2^d Cir. 1985)

§ 1782. This “exhaustion” requirement was rejected.⁹⁰ As matters turn out, an applicant for § 1782 relief is actually better off asking for § 1782 assistance *before* seeking the evidence in discovery in the forum court: were it to make such a request or, worse, make such a request and be denied, a subsequent § 1782 application would be vulnerable to attack on the grounds that it was an attempt to circumvent proceedings abroad, as in *Kestrel* and *Microsoft*.

Although *Intel* rejected any requirement that discovery sought under § 1782 *must* be permissible under the law of the foreign forum, discoverability in the foreign forum is not irrelevant to § 1782. One of the factors a district court may consider in tailoring a § 1782 order is the extent to which the § 1782 discovery would otherwise be permissible in the foreign tribunal. The district court may craft an order that will prevent duplication or harassment. Similarly, the district court can limit or deny discovery if the court concludes that the applicant is on a fishing expedition or otherwise is behaving vexatiously.⁹¹

C. Overbreadth and burden

Because discovery under § 1782 is governed by the Federal Rules of Civil Procedure unless the court orders otherwise, the district court retains all of its power under Rules 26 and 37 to control the scope of discovery and to prevent abuse. Thus, courts will scrutinize § 1782 subpoenas for relevance by applying the normal Rule 26 relevance standards, and will narrow them if need be.⁹² Courts also may impose confidentiality on documents produced,⁹³ or may require papers (including

⁹⁰ See, e.g., *Bayer*, *supra*, 143 F.3d at 196; *Euromepa*, *supra*, 51 F.3d at 1098; *Application of Metallgesellschaft AG*, 121 F.3d 77, 79 (2nd Cir. 1997) *Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2nd Cir. 1992).

⁹¹ See *Metallgesellschaft*, *supra*, 121 F.3d at 79; *Trinidad and Tobago*, *supra*, 848 F.2d at 1156.

⁹² See, e.g., *In re Roç Trading Ltd.*, 2006 WL 3741078, slip op. at 9 (N.D. Ga. Dec. 19, 2006); *In re Hill*, 2005 WL 1330769, slip op. at 5 (S.D.N.Y. June 3, 2005).

the § 1782 petition) to be filed under seal.⁹⁴ By the same token, the court may reject proposed limits on the scope of discovery where such limits are not called for.⁹⁵

In one case, a target requested that the district court prohibit the applicant from using the proposed § 1782 discovery as a basis for making claims against the target unless there was independent evidence of wrongdoing. The district court refused to impose such a limitation.⁹⁶ In other cases, § 1782 motions were opposed on the theory that the § 1782 applicant would be able to obtain broader discovery than the other party to the foreign litigation. Of course, if the other party could seek discovery under § 1782 as well, this is not an issue.⁹⁷ But even where it is an issue, if the district court is concerned about a discovery imbalance between the litigants in the foreign dispute, it has the ability, if need be, to condition its grant of § 1782 discovery on a reciprocal exchange of information.⁹⁸ The court need not insist on reciprocal discovery, though -- the case law is quite clear that § 1782 is a one-way street, in which American federal courts assist foreign tribunals while asking nothing in return⁹⁹ -- and it is quite legitimate for the district court to decline the burden of supervising reciprocal discovery.¹⁰⁰

⁹³ See, e.g., *Bayer*, *supra*, 146 F.3d at 196 (district court on remand should consider “appropriate measures, if needed, to protect the confidentiality of materials”); *Application of Gemeinschaftspraxis R. Med. Schottdorf*, 2006 WL 3844464, no. M19-88, slip op. at 8 (S.D.N.Y. Dec. 29, 2006); *Application of the Procter & Gamble Company*, 334 F. Supp.2d 1112, 1117 (E.D. Wis. 2004).

⁹⁴ See, e.g., *In re Kolomoisky*, 2006 WL 2404332, slip op. at 4 (S.D.N.Y. Aug. 18, 2006).

⁹⁵ See, e.g., *Application of Guy*, 2004 WL 1857580, slip op at 3 (S.D.N.Y. Aug. 19, 2004).

⁹⁶ *Id.*

⁹⁷ *Procter & Gamble*, *supra*, 334 F. Supp.2d at 1117.

⁹⁸ *Intel*, *supra*, 542 U.S. at 262; *Bayer*, *supra*, 146 F.3d at 193; *Metallgesellschaft*, *supra*, 121 F.3d at 80; *In re Esses*, *supra*, 101 F.3d at 876; *Euromepa*, *supra*, 51 F.3d at 1102.

⁹⁹ See, e.g., *Euromepa*, *supra*, 51 F.3d at 1097; *Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2nd Cir. 1993).

¹⁰⁰ *Gianoli Aldunate*, *supra*, 3 F.3d at 59.

IV. OTHER ISSUES

By the express terms of § 1782, “[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.” Thus, privilege is a legitimate basis for objecting to § 1782 discovery. Because § 1782 proceedings are federal question cases, a “legally applicable privilege” is one protected by federal law.¹⁰¹ That means state statutes such as “reporter’s shield laws” do not apply, though related First Amendment considerations might come into play.¹⁰² Attorney-client privilege does apply.¹⁰³

Where the applicant previously sought the same documents under the Freedom of Information Act and production was denied, a district court may reasonably refuse a later § 1782 application.¹⁰⁴ National security also may be a legitimate basis for denying § 1782 discovery.¹⁰⁵

An order granting or denying a § 1782 application is final for purposes of appeal.¹⁰⁶

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¹⁰¹ See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

¹⁰² *Id.* at 533; *In re Oric*, 2004 WL 2980648 (N.D. Ill. Dec. 23, 2004).

¹⁰³ See, e.g., *In re Sarrio*, 119 F.3d 143 (2d Cir. 1997).

¹⁰⁴ *al-Fayed v. United States*, 210 F.3d 421, 424-25 (4th Cir. 2000).

¹⁰⁵ *Id.* at 425.

¹⁰⁶ *Kestrel Coal, supra*, 362 F.3d at 403.

AMERICAN DISCOVERY FOR FOREIGN LITIGATION UNDER 28 USC § 1782

By
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