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Chapter 17: 28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings

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I INTRODUCTION

Section 1782, "Assistance to foreign and international tribunals and to litigants before such tribunals," of Title 28 of the United States Code (U.S.C.), is a powerful litigation and investigation tool that empowers United States (U.S.) federal courts to assist in discovery for use in a proceeding before "a foreign or international tribunal." In other words, the U.S. makes its discovery process available to any "interested person" through the procedural mechanism set forth under section 1782 to gather evidence in the U.S. to use in a proceeding abroad.

In recent years, there has been much debate as to whether section 1782 applies to international arbitration; specifically, whether U.S. federal courts can provide discovery assistance by compelling the testimony of witnesses or the production of documents located in the U.S. to be used in a proceeding before a private arbitral tribunal. Because the term, *foreign or international tribunal*, as used in section 1782, was not clearly defined by Congress to include international arbitral tribunals, (1) the majority of U.S. federal courts have determined that the discovery assistance provided for in section 1782, *does not* apply to international arbitration. (2) However, that notion was revisited after 2004, when the U.S. Supreme Court, in *dicta* in the *Intel Corp. v. Advanced Micro Devices, Inc.* case, (3) cited an article authored by Professor Hans Smit wherein he stated that the term "tribunal," embedded in section 1782, also covered "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies ... ." (4)

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This chapter explores several aspects of section 1782, including: (i) the notion of discovery in the U.S.; (ii) legislative history of section 1782; (iii) statutory components of section 1782; (iv) discretionary power of U.S. courts in granting application under section 1782; (v) some practical matters to consider when filing an application pursuant to section 1782; (vi) section 1782 and its availability in aid of international arbitration proceedings; and (vii) conclusion.

For the purposes of this chapter, the terms U.S. district court and U.S. federal court are used interchangeably.

II THE TEXT OF 28 U.S.C. 1782

Under U.S. law, any statutory analysis must begin with the language of the statute itself. Section 1782 of the U.S.C. provides in full 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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.

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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.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him. (5)

III THE NOTION OF DISCOVERY IN THE U.S.

Section 1782 of the U.S.C. permits any interested party to obtain evidence found in the U.S. so long as it is done "in accordance with the Federal Rules of Civil Procedure." (6) In the U.S., evidence is gathered through the mechanism of discovery. Discovery is the process whereby one party requests that a witness produce or turn over relevant documents or information, or that a witness sit for a deposition, during which her testimony is collected under oath, but outside of court. The discovery process is regulated under Rule 26 of the Federal Rules of Civil

Procedure (the "FRCP"). (7) Under Rule 26, civil discovery is permitted into any evidence that is "relevant to any party's claim or defense and proportional to the needs of the case." (8) This standard "explicitly imposes a responsibility on litigants to tailor their discovery requests to account for the significance of the information requested, and the cost of gathering responsive information." (9) In the U.S., discovery is mostly performed by the litigating parties themselves, with little judicial intervention.

IV LEGISLATIVE HISTORY OF SECTION 1782

Historically, the U.S. has made substantial efforts to assist foreign courts in discovery procedures. In an 1855 statute (the "1855 Act") Congress authorized U.S. federal courts to effect letters rogatory from a foreign court by designating a commissioner to compel witnesses to appear and testify. (10)

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Congress enacted section 1782 in 1948 (11) and amended it to its current form in 1964. (12) Because the question of whether section 1782 permits discovery in aid of international arbitration turns on the construction of the statutory text, it is useful to consider the origin of the statutory language "foreign and international tribunals." In 1964, the drafters of section 1782 combined two strands of then-existing statutes to create the current phrase "foreign and international tribunals." (13) The first strand, which resulted in the "international tribunal" text, originated in a 1930 law which arose in the context of an arbitration proceeding between the U.S. and Canada to resolve a dispute over the U.S. sinking of a Canadian ship. (14) The second statutory strand, which resulted in the "foreign ... tribunal" text, originated in the 1855 statute authorizing federal courts to assist in gathering evidence for foreign courts. (15) While Congress left the term "tribunal" undefined, the commission tasked with drafting the statute purposely replaced the restrictive word "court," found in an earlier version of section 1782, with the phrase "foreign or international tribunal" in order "to make it clear that assistance is not confined to proceedings before conventional courts." (16)

V CORE COMPONENTS OF SECTION 1782 OF THE U.S.C.

Section 1782 contains three core components or statutory thresholds that an applicant must demonstrate when filing a 1782 application, in the respective U.S. federal court. *First*, the request must be made by "an interested person;" *second*, the target of the discovery request must "reside" or must be "found" in the district of the U.S. federal court in which the 1782 application is filed; and *third*, the requested evidence must be for use in a proceeding before a "foreign or international tribunal."

When presented with a 1782 application, a U.S. federal court will review it in two parts. It will first determine whether the 1782 application adheres to the requirements set forth under section 1782. Once the court concludes that the application does in fact satisfy those requirements, it will proceed to exercise its discretionary power to grant or deny the application. (17)

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[A] Any Interested Person Can Make an Application under Section 1782: A Broadly Construed Standard

Under section 1782, an "interested person" must file a 1782 application in the appropriate U.S. district court. (18) In *Intel*, the Supreme Court held that the term "[i]nterested person, plainly reaches beyond the universe of persons designated 'litigant'," (19) and includes anyone with a reasonable interest in obtaining the evidence. (20) Accordingly, the term encompasses many different categories of persons that would not necessarily be limited to an actual party to a foreign litigation. For example, the Second Circuit has noted that "[an] agent of a party to a foreign litigation may qualify as an 'interested person' under §1782." (21) In *In re Roz Trading Ltd.*, the U.S. District Court for the Northern District of Georgia held that a foreign or international tribunal itself is also considered an interested person. (22) Thus, courts have been liberal, and generally accommodating, when it comes to defining what encompasses an "interested person" under section 1782 of the U.S.C.

[B] Who Is the Target of Section 1782?

According to section 1782, evidence can be taken from "a person" who "resides" or "is found" in the district of the U.S. district court where the application is made, and who may or may not be a party to the proceeding. (23) In other words, section 1782 authorizes U.S. federal courts to compel the testimony or the collection of documents in "possession, custody, or control" (24) of a party, or entity, (25) or non-party to the foreign proceedings, who resides or is found in the respective district. However, for the purposes of section 1782, "a person" does not include the U.S. Government. (26)

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The interested person filing a 1782 application must show that the person or entity from whom evidence is sought "resides in or is found in the district" where the application is made. (27) Further, if an entity is incorporated or headquartered outside the district, the applicant seeking discovery "must establish that the corporation undertakes 'systematic and continuous local activities' in order ... to be found" within the district where the application is made; (28)

that is, that the entity would be subject to the district court's personal jurisdiction if the entity was sued in domestic litigation. (29)

[1] When the Evidence Is Testimonial

For the purposes of section 1782, documentary evidence and testimonial evidence are treated differently. (30) A person is found and can be compelled to provide testimony, pursuant to an order granting a 1782 application, when the person is present in the district, even if temporarily. (31) Thus, it is not prejudicial to subpoena and depose a potential witness who happens to travel to the U.S., even when the subpoena was ordered while the individual was outside the U.S. (32)

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[2] When the Evidence Is Documentary

Documentary evidence must be located in the U.S. in order to comply with the statutory threshold set forth in section 1782. (33)

Although U.S. courts have been reluctant to clearly state that documents located outside the U.S. are not covered under section 1782, the courts have exercised their discretion—albeit creating some disparity in their holdings (34) —to refuse to compel U.S. affiliates to produce documents in the possession, custody or control of their non-U.S. affiliate, parent or at their headquarters located outside the U.S. (35)

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[3] What Type of Evidence Is Available under Section 1782?

On its face, section 1782 allows the request of evidence in the form of documents and testimony from a person who resides or is found in the district where a 1782 application is filed. Further, the statute itself provides that discovery pursuant to a section 1782 application is determined by the FRCP, (36) and that these rules apply even when the foreign proceeding is criminal in nature. (37) Consequently, this could yield to a "US-style discovery" in wholly foreign actions. (38)

However, not all the discovery tools contemplated under the FRCP are available. For example, the District Court for the Eastern District of New York held that discovery pursuant to section 1782 does not include interrogatories or requests for admission. The District Court reasoned that "Congress could hardly have intended to subject its citizens to broader discovery demands in foreign litigation than in domestic litigation." (39)

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[C] What Is 'a Foreign or International Tribunal' under Section 1782?

Section 1782 of the U.S.C. states, in relevant part, that the evidence sought is "for use in a proceeding *in a foreign or international* tribunal … ." (40) As stated above, (41) there has been ample debate as to what constitutes a foreign or international tribunal under section 1782. Specifically, there have been conflicting arguments as to whether section 1782 applies to private international arbitration.

This matter will be addressed later in this chapter.

VI DISCRETIONARY POWER OF U.S. COURTS IN GRANTING APPLICATION UNDER SECTION 1782

As previously stated, (42) under section 1782, a U.S. federal court is authorized to assist a foreign or international tribunal with discovery when it determines that a section 1782 application complies with the statutory requirements. However, this finding does not compel a U.S. federal court to grant the 1782 application. In *Intel* the Supreme Court held that "a district court is not required to grant a § 1782 discovery application simply because it has the authority to do so," (43) because "[o]nce the statutory requirements are met, a district court is free to grant discovery in its discretion." (44)

The discretionary factors U.S. federal courts will consider are: *first*, whether the person from whom discovery is sought is a participant in the foreign proceeding; *second*, the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; *third*, whether the section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.; and *fourth*, whether the subpoena contains unduly intrusive or burdensome requests. (45)

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[A] Whether the Person from Whom Discovery Is Sought Is a Participant in the Foreign Proceeding

The first discretionary factor that U.S. federal courts will consider is whether the person targeted by a section 1782 request is a participant in the foreign proceedings.

The Supreme Court has held that "[a] foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce the evidence." (46) "In contrast, 'nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.'" (47)

Because section 1782 allows for a wide range of applicants to file a discovery request, it is plausible that when examining whether the person from whom the applicant requests a section 1782 discovery is a party or a non-party to the foreign proceeding, the U.S. district court will treat more favorably an application targeting a person who is not a party to the foreign proceeding. (48)

This is best explained with an example. A Panamanian company is the claimant in a dispute with a French company. If the Panamanian company files a 1782 application concerning the French company's subsidiaries, affiliates, officers, or individual employees who live or are found in the U.S., the U.S. federal court will treat the 1782 application more favorably, precisely because the French company is itself a party to the foreign dispute and that dispute is already being adjudicated by the foreign or international tribunal.

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[B] Whether There Is a Discoverability Requirement under Section 1782

"[A] district court presented with a discovery request under § 1782 should consider the 'receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.'" (49)

Prior to the holding in *Intel*, parties opposing section 1782 applications would argue that the evidence sought pursuant to the section would not be admissible or discoverable in the foreign proceeding. This is known as "discoverability." (50) However, *Intel* made it clear that the evidence's admissibility by the foreign or international tribunal is not a requirement under section 1782. (51)

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Still, U.S. federal courts should deny a 1782 request when the foreign or international tribunal has expressly objected to the discovery. (52) As a practical matter, the fact that the foreign or international tribunal is amiable to receive evidence obtained pursuant to a section 1782 request "generally weighs in favor of granting such petitions;" (53) thus, U.S. federal courts need only inquire whether the foreign or international tribunal will reject the evidence obtained through the aid of section 1782. (54)

While section 1782 does not set forth a requirement that the 1782 applicant should agree to reciprocal discovery, U.S. federal courts can subject their 1782 orders to discover limitations and conditions granting a 1782 application on a reciprocal exchange of evidence. (55)

The discretion granted to U.S. federal courts under this prong is broad, and applicants must consider it as an important factor when filing a 1782 application before the respective U.S. federal court.

[C] Whether a Section 1782 Request Conceals an Attempt to Circumvent Foreign Poof-Gathering Restrictions or Other Policies of a Foreign Country or the U.S.

As it has been previously discussed, (56) the presumption is that the foreign or international tribunal will be receptive to the evidence gathered pursuant to a 1782 application. Nonetheless, the presumption may be overcome when a U.S. federal court exercises its discretion to examine a 1782 request. Thus, under its discretionary power, when a U.S. federal court determines that a 1782 request has been filed with the purpose of circumventing the foreign or international tribunal, it will deny the 1782 application.

Under this discretionary factor, U.S. federal courts will consider various factors to determine whether the applicant's 1782 request circumvents foreign discovery restrictions. For example,

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U.S. federal courts will examine whether a party has first attempted discovery measures in the foreign jurisdiction. (57) The court may request that the applicant demonstrate that her 1782 request is "appropriate [and not] an attempt to circumvent proof-gathering mechanisms." (58) Further, it may also request that the applicant demonstrate whether the evidence sought can be obtained through discovery mechanisms available in the foreign proceedings. (59) If the court finds evidence suggesting that an interested person is improperly using section 1782 to gather evidence, this factor will weigh against granting the 1782 application. (60)

For example, in *In re Kreke Immobilien KG*, although the German court had not made an adverse decision concerning discovery, the District Court for the Southern District of New York reasoned that Kreke sought to justify circumventing the German court's discovery process, because the "German court[] ... simply lack[ed] the legal authority to order document production *of the type requested in the Application*," (61) rendering Kreke's discovery application no more than a disguise for forum shopping. (62) Thus, the District Court for the Southern District of New York denied Kreke's 1782 request.

[D] Whether the Subpoena Contains Unduly Intrusive or Burdensome Requests

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Because the FRCP apply to the discovery process set forth in section 1782, (63) the production of documents and the taking of testimony or declaration from any person who resides or is found in the U.S., must be "proportional to the needs of the case," (64) and must not violate any legally applicable privilege. (65)

While U.S. federal courts will deny a 1782 discovery request that is unduly intrusive or burdensome, (66) this concern can be overcome in some circumstances with a confidentiality agreement. (67) Additionally, the District Court for the Southern District of New York held that a

1782 discovery request is not unduly burdensome just because the applicant requests that documents be translated into a language that can be reviewed by its U.S. counsel. (68) U.S. federal courts will deny section 1782 discovery if they determine that the application was filed for "the purposes of harassment," (69) "made in bad faith, [or it] unreasonably seek[s] cumulative or irrelevant materials." (70) U.S. federal courts also have discretion to trim the discovery demands made in a section 1782 application. (71)

VII SOME PRACTICAL MATTERS TO CONSIDER WHEN FILING AN APPLICATION PURSUANT TO SECTION 1782

[A] Should a 1782 Application Be Made after Exhausting All Discovery Remedies?

Section 1782 does not contain a requirement that an applicant must exhaust any discovery process available in the foreign proceedings, or that an applicant request approval from the foreign or international tribunal, before filing a 1782 application in the respective U.S. federal court.

Strategically, for reasons explained previously, (72) it is recommended to file a 1782 application in the respective U.S. federal court first to avoid the possibility that the U.S. federal court will deny the discovery request, in the event the foreign or international tribunal decided that it will not examine evidence obtained pursuant to section 1782.

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Similarly, parties opposing a 1782 application will argue that the foreign or international tribunal will not consider evidence obtained through 1782 aid, or that the foreign or international tribunal has already ruled adversely on the issue.

However, because U.S. federal courts have broad discretionary power when examining a 1782 application, even when the foreign or international tribunal may have ruled that it will not entertain 1782 evidence, the U.S. federal court can still decide to grant the 1782 application. However, caution is necessary when the foreign or international tribunal has already ruled on the subject.

[B] Must the Applicant Notify Opposing Party That a 1782 Request Has Been Filed?

Section 1782 provides, in pertinent part, that a request for discovery "may be made ... by a foreign or international tribunal or upon the application of any interested person" (73) to the respective U.S. district court. In other words, the tribunal or any interested person can apply directly to the respective U.S. federal court and request evidence pursuant to section 1782, and the opposing party need not be notified in the application. (74)

[C] Must the Matter Be Pending in a Foreign Court or Foreign or International Tribunal in Order to Make a 1782 Application?

Section 1782 does not require that an action has been filed or is pending before the foreign or international tribunal. If the U.S. federal court determines that a reasonable contemplated claim (75) will be filed before the foreign tribunal, the discovery request pursuant to section 1782 will be granted. However, the U.S. federal court will deny the 1782 application if it determines that the applicant filed the request with the purpose of engaging in a fishing expedition, thereby abusing the use of section 1782. (76)

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[D] In General: How to Oppose a 1782 Application?

A request for discovery pursuant to section 1782 will generally request that certain documents or witnesses be made available to the applicant. Parties opposing a 1782 application could strike it down by making assurances and guarantees to the U.S. federal court that the documentary evidence and/or the witnesses will be available to the foreign or international tribunal, and thus, that it is unnecessary to compel testimony or production of documents pursuant to section 1782. However, parties opposing a 1782 application must always consider the broad discretion U.S. federal courts have when deciding whether to deny or grant the discovery request.

VIII SECTION 1782 AND ITS AVAILABILITY IN AID OF INTERNATIONAL ARBITRATION PROCEEDINGS

In 1964, section 1782 underwent an overhaul that ultimately struck out the word "court" and replaced it with the word "tribunal" to make it "clear that assistance [was] not confined to proceedings before conventional courts." (77) However, in light of the absence of any definition some courts have held that the term *foreign or international tribunal* is rather "ambiguous." (78) This ambiguity has led to conflicting decisions by U.S. federal courts on the issue of whether discovery under section 1782 is available to arbitral tribunals in international arbitration.

For example, in 1999, the Second Circuit (which exercises federal jurisdiction over the states of Connecticut, New York, and Vermont) and the Fifth Circuit (which exercises federal jurisdiction over the states of Louisiana, Mississippi, and Texas) held that section 1782 discovery was not available to parties to foreign arbitral proceedings. (79) What is more, the Second Circuit held that section 1782 only applied to "governmental or intergovernmental arbitral tribunals," and

did not cover private tribunals. (80)

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Arguably, this construction clearly contradicts the plain text of section 1782 and the U.S.'s policy favoring arbitration. (81) Indeed, Professor Smit—who was the Reporter to the Commission and Advisory Committee tasked with the revision of section 1782 in 1958 (82) —"consistently maintained" that section 1782 of the U.S.C. should apply to international arbitral tribunals. (83)

In 2004, the U.S. Supreme Court, in the *Intel* case, tried to shed some light on the issue. In its opinion—*in dicta*—the U.S. Supreme Court cited an article authored by Professor Smit where he stated that the term "tribunal," embedded in section 1782, also covered "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies." (84)

The 2004 Supreme Court's opinion exposed the issue to further contrasting interpretations. In the years to follow, the U.S. federal courts have rendered conflicting decisions as to whether a 1782 application can be used to obtain evidence for a private international arbitration. (85) Soon after the U.S. Supreme Court's decision in *Intel*, the District Court for the Northern District of Georgia granted a 1782 application for the production of all responsive documents to be used before an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna. The District Court found that the Centre was indeed a tribunal under section 1782, and that the previous decisions rendered by the Second and Fifth District Courts were not persuasive. (86) Other courts similarly followed suit. (87)

In contrast, other U.S. federal courts have found that the decision in *Intel* does not lead to the conclusion that a private arbitral tribunal is a foreign or international tribunal under section 1782. For example, in 2008 the U.S. District Court for the Southern District of Texas held that the *Intel* decision did not give U.S. district courts a "green light to ... grant discovery requests to parties before foreign or international tribunals under § 1782." (88) The following year, the

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District Court for the Northern District of Illinois held that a private arbitral tribunal is not within the scope of section 1782, and that the Supreme Court in *Intel* "stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statute." (89) The same year, the U.S. District Court for the Middle District of Florida reasoned that "[t]he *Intel* Court was not faced with—and did not address—the question of whether a private arbitral tribunal is a foreign or international tribunal under § 1782," (90) and it further found "that Congress did not clearly intend to include private arbitral proceedings within the ambit of 'foreign or international tribunals'." (91) The Florida court reached the conclusion "that when Congress used the word 'tribunal,' it referred only to governmental entities." (92)

Recently, in a decision from November 16, 2016, the U.S. District Court for the Southern District of New York—which is a U.S. federal court in the Second Circuit—found that "[w]hile the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying section 1782 proceedings, dictum of the Supreme Court in *Intel Corp v. Advanced Miro Devices. Inc.*, 542 U.S. 241, 258 (2004), suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of section 1782." (93) Thus, the New York federal court found that section 1782 was available to applicants involved in a series of arbitrations before the London Maritime Arbitration Association.

Commentators have suggested that if the term foreign or international tribunal includes private arbitral tribunals, an argument could be made that, under section 1782, a private arbitration taking place in the U.S. should be considered a proceeding before a foreign or international tribunal when the parties involved, or the arbitrators constituting the arbitral panel, are from countries other than the U.S. (94) It is also worth noting that courts have held that section 7 of the FAA—which gives a tribunal located in the U.S. the authority to subpoena a

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third party witness to bring documents and provide testimony at an arbitral hearing—does not permit prehearing discovery in aid of arbitration. (95) It would be an odd result if U.S. law were construed to permit greater access to U.S. discovery devices in aid of an arbitration located abroad than is permitted in aid of an arbitration located in the U.S.

IX CONCLUSION

Section 1782 of the U.S.C. is a powerful discovery tool that allows parties in foreign proceedings to obtain evidence located in the U.S., which would not be, otherwise, available to them through the discovery mechanisms existing in the foreign proceeding.

Although the Statute is clear on the statutory requirements a 1782 application must contain, the U.S. Supreme Court has vested U.S. federal courts with broad discretion to grant or deny these discovery requests. In this sense, U.S. federal courts will pay special attention to the receptivity the foreign or international tribunal will offer the evidence obtained pursuant to a section 1782 request. To the extent a court grants discovery in aid of arbitration under section 1782, it is well within its power to limit the scope of discovery in furtherance of the goals of efficiency in arbitration.

References

1) *See* Amy Jeanne Conway, *In Re Request For Judicial Assistance From The Federative Republic of Brazil: A Blow to International Judicial Assistance*, 41 Cath. U. L. Rev. 545, 558 (1991) ("Unfortunately, Congress' failure to define the meaning of 'tribunal' has caused considerable confusion among litigants and the courts.").
2) *See NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999) ("In sum, the legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies. The legislative history's silence with respect to private tribunals is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."); *see also In re NBC, Inc.*, No. M-77 (RWS), 1998 WL 19994, at *8 (S.D.N.Y. Jan. 21, 1998), *aff'd sub nom. NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999); *In re Medway Power Ltd.*, 985 F. Supp. 402, 403-04 (S.D.N.Y. 1997); John Fellas, *Using Section 1782 in International Arbitration*, 23 J. London Ct. Intl. Arb. 379, 380 (2007); *see generallyIn re Operadora DB Mexico, S.A. De C.V.*, No. 6:09-CV-383-ORL-22GJK, 2009 WL 2423138, at *4 (M.D. Fla. Aug. 4, 2009) (In *NBC*, "[t]he court found that when Congress used the word "tribunal," it intended to refer to governmental entities.").
3) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
4) *Id.* at 258 (citing Hans Smit, *International Litigation under the United Sates Code*, 65 Colum. L. Rev. 1015, 1026 note 71, 1027 note 73 (1965)) (emphasis added); *see also* Fellas, *supra*note 2, at 380.
5) 28 U.S.C. § 1782.
6) 28 U.S.C. § 1782(a).
7) Fed. R. Civ. P. 26.
8) *Id.* at (b)(1).
9) Gregory Brown, *Amended Rule 26's Proportionality Standard: The First 60 Days*, https://www.law360.com/medical-malpractice/articles/758189/amended-rule-26-s-proportionality-standar... (Feb. 12, 2016).
10) *See* Act of March 2, 1855, ch. 140, §2, 10 Stat. 630 (1855); *see also* Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953); Jeffrey M. Butler, *Obtaining evidence by means of US discovery for use in proceedings and tribunals outside the US*, http://www.buildingipvalue.com/05_NA/103_106.htm ("Under that 1855 Act, US federal courts could respond to letters rogatory by causing the examination of a witness in the US for use in a matter in a court outside the US. (Letters rogatory are also known as letters of request. According to *Black's Law Dictionary*, they are essentially documents 'issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case'.)").
11) Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (1948); *see generally* N.Y.C. B. Comm. Intl. Commercial Disputes, *28 U.S.C. §1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices*, http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/28-usc-17... (February 29, 2008) [hereinafter N.Y.C. Bar Report], at 3 note 7.
12) Section 1782 has not substantially changed since. In 1996, it underwent a minor modification to clarify that this section also included discovery assistance to criminal proceedings.
13) *SeeIn re NBC*, 1998 WL 19994, at *4-5.
14) Act of June 3, 1930, ch. 851, § 1, 46 Stat. 1005 (1930).
15) *See* Act of March 2, 1855, ch. 140, §2, 10 Stat. 630 (1855).
16) *See*H.R.Rep. No. 1052, 88th Cong., 1st Sess., at 9 (Dec. 17, 1963); *see* Conway, *supra*note 1, at 558.
17) *See Lazaridis v. Int'l Ctr. for Missing & Exploited Children, Inc.*, 760 F. Supp. 2d 109, 112 (D.D.C. 2011), *aff'd sub nom.In re Application for an Order Pursuant to 28 U.S.C. |1782*, 473 F. App'x 2 (D.C. Cir. 2012); *see alsoIn re Thai-Lao Lignite (Thailand) Co., Ltd.*, 821 F. Supp. 2d 289, 293 (D.D.C. 2011).
18) *See* 28 U.S.C. § 1782.
19) *Intel Corp.*, 542 U.S. at 256.
20) *Id.*; *see also* Smit, *supra*note 4, at 1027 ("[I]nterested person ... is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance."); *see also* Fellas, *supra*note 2, at 382.
21) *RTI Ltd. v. Aldi MarineLtd.*, 523 F. App'x 750, 752 (2d Cir. 2013).
22) *See In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1223 (N.D. Ga. 2006) ("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.").

23) *SeeIn re Ishihara Chem. Co., Ltd.*, 121 F. Supp. 2d 209, 218 (E.D.N.Y. 2000) ("Professor Smit … opines that '[t]he purpose of Section 1782 is to provide American judicial assistance in procuring evidence in the United States from a third party, not from a party, in the foreign proceedings,' reasoning that 'assistance is needed only if the person who is to produce the evidence is not subject to the jurisdiction of the foreign or international tribunal.'").
24) *See*Fed. R. Civ. P. 45(a)(1)(A)(iii).
25) *See* Fellas, *supra*note 2, at 382 note 12 ("A 'person' … includes a corporation, company and partnership, as well as an individual …".) (referring to 1 U.S.C. § 1: "'unless the context indicates otherwise,' the word 'person' includes 'corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals'.").
26) *See Al Fayed v. C.I.A.*, 229 F.3d 272, 274 (D.C. Cir. 2000) ("The Supreme Court has construed prior similar language to exclude the United States, and to find that 'person' excludes states, but does include municipalities … .") (citations omitted).
27) *See In re Thai-Lao Lignite*, 821 F. Supp. 2d at 293; *see alsoIn re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007) ("Professor Hans Smit, the drafter of § 1782, has explained that insofar as the word 'found' is applied to corporations, 'it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence.'") (citation omitted).
28) *In re Inversiones y Gasolinera Petroleos Vanezuela, S. de R.L.*, No. 08-20378-MC, 2011 WL 181311, at *7 (S.D. Fla. Jan. 19, 2011); *see alsoIn re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 515 (S.D.N.Y. 2015) ("It is not disputed, however, that the two entities 'operate as a single law firm' and all the New York-based partners in Clyde & Co. U.S. LLP are also partners in Clyde & Co. LLP. Clyde & Co. LLP's partners' daily practice of law in this jurisdiction gives it the requisite 'systematic and continuous' presence to be 'found' here for purposes of section 1782."); *see also In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1035 (N.D. Cal. 2016).
29) *Compare In re Inversiones y Gasolinera Petroleos Vanezuela, S. de R.L.*, 2011 WL 181311, at *8 ("In the case at bar, Exxon does not contest the fact that it conducts systematic and continuous activities in this District such that, if it were sued as a defendant in an ordinary civil lawsuit, the Court would have personal jurisdiction over Exxon."), *with In re Godfrey*, 526 F. Supp. 2d at 422 (Russian entity that had one employee temporarily relocate to New York for medical reasons, but had no permanent offices nor any other personnel in the district, was not "found" within the district for purposes of § 1782).
30) *See In re Edelman*, 295 F.3d 171, 177 (2d Cir. 2002) ("Notwithstanding the seemingly broad rule announced in *Sarrio I* that § 1782(a) only applies to evidence located in the United States, there may be reason to treat documentary evidence … different from testimonial evidence … ".); *see also Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 51 (D.D.C. 2005) ("Although these cases dealing with documentary evidence suggest that documents held outside the United States might be beyond the scope of § 1782, the Second Circuit has found that testimonial evidence is subject to its own standard.").
31) *See In re Edelman*, 295 F.3d at 178, 180 ("Yet, as petitioner points out, such a temporal limitation on the district court's authority would be a novel procedural requirement. Edelman asserts that the phrase 'resides or is found' instead relates to the service of the subpoena—*i.e.*, a subpoena issued pursuant to a discovery order may be served on a district resident or a nonresident who is physically present in the district when served. Under both readings, the phrase 'resides or is found' simply constitutes a geographic limitation … Further, the 1949 amendment explicitly broadened the class of people subject to discovery beyond United States residents. Congress made this change expressly so that people temporarily in a district may be ordered to give testimony pursuant to § 1782(a)'.").
32) *Id.* at 179, 180 ("[W]hen a potential witness comes to the United States it is neither unfair nor inappropriate under the statute to undertake his discovery here … Consequently, regardless of any implicit limits on the location of documentary evidence, we hold that if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for the purposes of § 1782(a), he is 'found' in that district. As a matter of law, a person who lives and works in a foreign country is not necessarily beyond the reach of § 1782(a) simply because the district judge signed the discovery order at a time when that prospective deponent was not physically present in the district."); *see also In re Yukos Hydrocarbons Inv. Ltd.*, No. 5:09-MC-0078 NAM DEP, 2009 WL 5216951, at *3-4 (N.D.N.Y. Dec. 30, 2009).
33) *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) ("[D]espite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States."); *see alsoIn re Edelman*, 295 F.3d at 176 ("Indeed, one district court in our circuit has concluded, at least with respect to documentary evidence, that § 1782(a) only applies to evidence located in the United States."). This is further supported by Professor Smit when he stated that section 1782 does not apply to material located abroad. *See In re Godfrey*, 526 F. Supp. 2d at 423 ("Professor Smit has made it clear that the drafters of § 1782 did not intend that the statute be used to compel documents located in a foreign country for use in a foreign proceeding and that there are 'potent reasons' why this is so.").
34) *Pinchuk v. Chemstar Prods. LLC*, No. 13-MC-306-RGA, 2014 WL 2990416, at *3 (D. Del. Jun. 26, 2014) ("There remains the inquiry of whether a § 1782 application is appropriate when, as is the case here, the documents sought are located abroad. As briefs from the Petitioner and Respondents indicate, courts in the United States have not reached a consensus on this issue.").

35) *See, e.g.*, *In re Thai-Lao Lignite*, 821 F. Supp. 2d at 297 ("Although there appears to be no indication that petitioners are trying to circumvent foreign proof-gathering restrictions by applying for, and being barred from similar assistance in France, they also do not dispute that most, if not all, of the relevant documents lie outside this jurisdiction and indeed outside this country … [and] the Court … find[s] that the location of the information militates against granting the petition."); *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) ("[A]lthough § 1782(a) does not say whether the evidence must be present in the United States, one commentator has written: [a] harmonious scheme is established: evidence in Spain is obtained through proceedings in Spain, evidence in Great Britain is obtained through proceedings in Great Britain, and evidence in the United States is obtained through proceedings in the United States. … Section 1782 was not intended to enable litigants to obtain in Spain evidence located in Spain that could not be obtained through proceedings in Spain. Section 1782 should not be used to interfere with the regular court processes in another country."); *Four Pillars Enterprises v. Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002) ("We need not rule, however, on the question whether § 1782 can ever support discovery of materials outside the United States. In this case the responsive materials in issue were in China, where Four Pillars was pursuing civil litigation against Avery Dennison. The Chinese courts are well situated to determine whether such material is subject to discovery, and in what manner."); *In re Kreke Immobilien KG*, No. 13 Misc. 110 (NRB), 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) ("This Court finds … that a § 1782 respondent cannot be compelled to produce documents located abroad. Given that this case arose out of conduct that took place in Germany, that the parties are all located in Germany, that all physical documents are in Germany, and that all electronic documents are accessible just as easily from Germany as from Deutsche Bank's offices in New York, 'the connection to the United States is slight at best and the likelihood of interfering with [foreign] discovery policy is substantial.' Thus, this Court finds that it would be inappropriate to compel Deutsche Bank, pursuant to § 1782, to produce the documents sought by Kreke, and the petitioner's application is therefore denied.") (citing *In re Godfrey*, 526 F. Supp. 2d at 423); *In re Nokia Corp.*, No. 1:07-MC-47, 2007 WL 1729664 (W.D. Mich. Jun. 13, 2007) ("[T]he Court assigns some weight to the fact that the documents are apparently located in Germany, which obviates the need for this Court's assistance in compelling production of documents. This fact tips the scales against granting Nokia the requested relief."); *In re Veiga*, 746 F. Supp. 2d 8, 23 (D.D.C. 2010) ("Even assuming there is no absolute bar to the discovery of documents located outside the United States, there is no doubt that courts may exercise their discretion to decline to order the production of documents abroad, and the Court will do so here."); *Norex Petroleum Ltd. v. Chubb Insurance Co. of Canada*, 384 F. Supp. 2d at 55 ("[E]xtraterritorial application of § 1782 would not be in keeping with the aims of the statute, and indeed that documents held outside the United States are beyond the statute's intended reach. Nothing in the Supreme Court's *Intel* decision addresses this issue or suggests otherwise."); *but see, e.g.*, *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. CIV.M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) ("Section 1782 requires only that the *party* from whom discovery is sought be 'found' here; not that the *documents* be found here. For this Court to read an implicit document-locale requirement into § 1782 would be squarely at odds with the Supreme Court's instruction that § 1782 should not be construed to include requirements that are not plainly provided for in the text of the statute. While the issue in *Intel* was whether § 1782 should be construed to categorically bar a district court from ordering production of a document that was non-discoverable abroad, the Supreme Court's reasoning in rejecting such an implied requirement applies with equal force here.") (citations omitted); *Sergeeva v. Tripleton Int'l Ltd*, 834 F.3d 1194 (11th Cir. 2016) (The Eleventh Circuit affirmed an order pursuant to a 1782 application, granting the discovery of documents located outside the United States).

36) *See* 28 U.S.C. § 1782(a); *see alsosupra* s. III; *see also Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011); *Weber v. Finker*, 554 F.3d 1379, 1384 (11th Cir. 2009).
37) *Medeiros v. Int'l Game Tech.*, No. 2:16-cv-00877-JAD-NJK, 2016 WL 1611591, at *3 & note 2 (D. Nev. Apr. 22, 2016).
38) *See* Fellas, *supra*note 2, at 384.
39) *In re Ishihara Chem. Co., Ltd.*, 121 F. Supp. 2d at 224; *see alsoIn re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 466 F. Supp. 2d 1020, 1033 (N.D. Ill. 2006) ("The statute authorizes the court to order a person 'to give his testimony or statement or to produce a document or other thing.' This court interprets this language to include depositions and document production, but not interrogatories.") (citations omitted).
40) 28 U.S.C. § 1782(a) (emphasis added).
41) *See supra* s. I.
42) *See supra* s. V.
43) *Intel Corp.*, 542 U.S. at 264; *see also In re Consorcio Ecuatoriano De Telecomunicaciones S.A.*, 685 F.3d 987, 998 (11th Cir. 2012); *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001) ("[A] district court's compliance with a § 1782 request is not mandatory.").

44) *See In re Metallgesellschaft AG*, 121 F.3d 77, 78 (2d Cir. 1997); *see also In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557 (9th Cir. 2011) ("Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782."); *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83-84 (2d Cir. 2004); *Al Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000); *In re LG Elecs. Deutschland GmbH*, No. 12cv1197-LAB (MDD), 2012 WL 1836283, at *1 (S.D. Cal. May. 21, 2012) ("Even if [the statutory] requirements are met, a district court retains the discretion to deny the request.").
45) *Intel Corp.*, 542 U.S. at 264-65.
46) *Id.* at 244; *see alsoIn re Microsoft Corporation*, 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006).
47) *In re Microsoft Corporation*, 428 F. Supp. 2d at 193-94 (quoting *Intel Corp.*, 542 U.S. at 264).
48) *In re Chevron Corp.*, 633 F.3d 153, 162 (3d Cir. 2011) ("The first *Intel* factor favors allowing Chevron to obtain the discovery it seeks because UBR is not a participant in the Lago Agrio litigation and, so far as we can determine from the record before us, is not subject to the jurisdiction of the Lago Agrio Court."); *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 105 (D.D.C. 2010) ("Here, none of the respondents to Caratube's petition is a party to the ICSID arbitration. This factor, then, weighs in favor of granting the petition."); *see also In re Ryanair Ltd.*, No. 5:14-mc-80270-BLF-PSG, 2014 WL 5583852, at *2 (N.D. Cal. Oct. 31, 2014) ("In the instant case, LinkedIn [which is the target of the 1782 application] is not a party in the foreign proceeding. Further, LinkedIn is not a company resident in Ireland and, the requested information therefore does not appear to be within the immediate reach of the Dublin Circuit Court. This factor weighs in … favor [of the applicant].").
49) *In re Microsoft Corp.*, 428 F. Supp. 2d at 194 (quoting *Intel Corp.*, 542 U.S. at 264).
50) *See generally* Fellas, *supra*note 2, at 386 ("In order to understand the notion of a 'discoverability requirement,' it is important to emphasize that the United States permits far more extensive pre-trial discovery than do other countries. The difference between US pre-trial discovery practices and those of civil law countries is particularly marked. In civil law countries, the gathering of evidence is generally overseen by the court and not the parties. Because US pre-trial discovery practices are broader than those of other jurisdictions, US courts were confronted with section 1782 applications for material that would not be discoverable under the rules of the foreign jurisdiction in which it was to be used. Section 1782 does not, on its face, preclude the discovery of such material. However, the courts divided on the question of whether section 1782 implicitly requires that the material sought should be discoverable under the rules of the foreign jurisdiction. This was labelled the 'discoverability requirement'.") (citations omitted).
51) *See Intel Corp.*, 542 U.S. at 253; *see e.g.*, *In re O'Keeffe*, 650 F. App'x 83, 85 (2d Cir. 2016) ("But … our precedents expressly forbid district courts from considering the discoverability of evidence in a foreign proceeding when ruling on a §1782 application."); *see also In re Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993) ("The language [in Section 1782] makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction."); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 137 (3d Cir. 1985) ("We have also held that a district court is not to predict the admissibility of discovered evidence in foreign tribunals."); *In re Imanagement Servs., Ltd.*, No. Misc. 05-89(FB), 2005 WL 1959702, at *3 (E.D.N.Y. Aug. 16, 2005) ("While the admissibility of evidence is not a statutory barrier to the authorization of discovery assistance under §1782, it may appropriately be considered by the district court in determining whether to exercise its discretion."); *In re Proctor & Gamble Co.*, 334 F. Supp. 2d 1112, 1115 (E.D. Wis. 2004) ("In considering a §1782(a) application, a district court need not determine whether the requested discovery is admissible in a foreign proceeding because admissibility generally goes beyond the threshold question of discoverability.").
52) *SeeIn re Microsoft Corp.*, 428 F. Supp. 2d at 194 ("Indeed … this Court has not found, a single case where a court has granted § 1782 discovery in the face of express objection by the foreign court …'.); *see also Schmitz*, 376 F.3d at 84 (2d Cir. 2004) ("In this case, the German government was obviously unreceptive to the judicial assistance of an American federal court. Judge Stein was faced with specific requests from the German Ministry of Justice and the Bonn Prosecutor to deny petitioners the discovery they sought at this time. The German authorities expressed concerns that granting discovery would jeopardize the ongoing German criminal investigation … and 'jeopardize German sovereign rights.' … Faced with these submissions, the district court found that granting petitioners' request would not promote the twin aims of § 1782 … We cannot say that the court abused that discretion in concluding that the 'the twin aims of the statute … would not be furthered if the petition were granted.'"); *In re Imanagement Services Ltd*, 2005 WL 1959702, at *3 ("[I]n exercising its discretion, 'a district court's inquiry into the discoverability of requested materials should consider only *authoritative proof* that a foreign tribunal would reject evidence obtained with the aid of § 1782.'") (citing *In re Euromepa, S.A.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (emphasis added); *In re Owl Shipping, LLC*, No. 14-5655 (AET)(DEA), 2014 WL 5320192, at *3 (D.N.J. Oct. 17, 2014) ("[p]arties that apply for discovery under § 1782 enjoy a presumption in favor of foreign tribunal receptivity that can be offset by reliable evidence that the tribunal would reject the evidence.") (citing *Gov't of Ghana v. ProEnergy Servs., LLC*, No. 11-9002-MC-SOW, 2011 WL 2652755, at *4 (W.D. Mo. Jun. 6, 2011)).

53) *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d at 105; *see also In re LG Elecs. Deutschland GmbH*, 2012 WL 1836283, at *2 ("LG has made a sufficient showing that the German and Japanese courts would be receptive to the introduction of evidence obtained pursuant to § 1782. Consequently, this Court views this factor as favoring the Applicant."); *In re OOO Promnefstroy,* Misc. No. M 19-99, 2009 WL 3335608, at *7 (S.D.N.Y. 2009).
54) *See In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d at 106 ("[A] district court's inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782.") (citing *In re Euromepa, S.A.*, 51 F.3d 1095, 1100 (2d Cir. 1995)); *see also In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 ("It would be improper for this Court to deny assistance to Kreke based only on Deutsche Bank's suggestion that the German court may prove unreceptive to admitting the evidence ... [therefore,] when the district court has no evidence suggesting opposition from the foreign tribunal, the second *Intel* prong should count as 'neutral or slightly favor[ing]' the petitioner.").
55) *See In re Euromepa, S.A.*, 51 F.3d at 1102; *see alsoIn reMinatec Fin. S.A.R.L. v. SI Grp. Inc.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *9 (N.D.N.Y Aug. 18, 2008).
56) *See supra* s. VI[B].
57) *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d at 107.
58) *In re Chevron Corp.*, 762 F. Supp. 2d 242, 252 (D. Mass. 2010); *see also In re Ryanair Ltd.*, 2014 WL 5583852, at *2 ("Although Section 1782 does not require the documents sought to be discoverable in the foreign courts, a district court may consider whether an applicant seeks in bad faith 'to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.' Here, Ryanair represents that the subpoena application is 'a good-faith effort to secure relevant evidence that is beyond the jurisdiction of the Dublin Circuit Court.' The court finds this factor to be neutral.").
59) *SeeIn re LG Elecs. Deutschland GmbH*, 2012 WL 1836283, at *2 (Granting the 1782 application and reasoning that even though the "Applicant claim[ed] to be 'unaware of any restrictions on proof-gathering that would prohibit obtaining the discovery it seeks through Section 1782,' [the Applicant failed to] address[] the availability of [the evidence sought] from Mitsubishi utilizing the discovery procedures of the host courts. So, while there is no evidence that [the Applicant] is seeking to circumvent restrictions that may exist in the host courts, this factor does not help to convince the Court to exercise its discretion in favor of the Applicant."); *but see In re O'Keeffe*, 650 F. App'x at 85 ("[T]he mere fact that the discovery sought here might not be obtainable under Hong Kong law does not, by itself, suggest that O'Keeffe's application is an 'attempt to circumvent foreign proof-gathering restrictions'.") (citing *Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015)).
60) *See e.g.*, *In re Grupo Unidos Por El Canal*, No. 14-mc-00226-MSK-KMT, 2015 WL 1810135 (D. Colo. Apr. 17, 2015) ("[I]t is worth noting that this court would have declined to order production in any event under *Intel*'s discretionary factors, because it would circumvent the arbitration panel's discovery restrictions ...").
61) *In re Kreke Immobilien KG*, No. 13 Misc. 110 (NRB), 2013 WL 5966916, at *6 (S.D.N.Y. Nov. 8, 2013) (emphasis added).
62) *Id.* at *6 ("In light of the overwhelmingly German character of Kreke's discovery application, we are loath to sanction forum shopping under the guise of § 1782.").
63) 28 U.S.C. § 1782(a); *see e.g.*, *also In re Consorcio Ecuatoriano De Telecomunicaciones S.A.*, 685 F.3d at 999 ("This Circuit has held that once the section 1782 factors are met and the district court is therefore authorized to grant the application, 'the federal discovery rules, Fed. R. Civ. P. 26-36, contain the relevant practices and procedures for the taking of testimony and the production of documents.'") (citing *Weber v. Finker*, 554 F.3d 1379, 1384-85 (11th Cir. 2009)).
64) Fed. R. Civ. P. 26(b)(1).
65) *See* 28 U.S.C. § 1782(a); *see also*Fed .R. Civ. P. 26(b)(1) ("[P]arties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense–including the existence, description, nature, custody, condition, and location of any documents ...".) (emphasis added); *IntelCorp.*, 542 U.S. at 243 ("[Section] 1782(a) expressly shields from discovery matters protected by legally applicable privileges."); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *In re Finserve Grp. Ltd.,* No. 4:11-mc-2044-RBH, 2011 WL 5024264, at *1 (D.S.C. Oct. 20, 2011) ("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.").
66) *See Intel Corp.*, 542 U.S. at 265.
67) *See In re Imanagement Servs. Ltd.*, 2005 WL 1959702, *6.
68) *See In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *8.

69) *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012).
70) *Id.* at 81.
71) *In re Clerici*, 481 F.3d 1324, 1334 (11th Cir. 2007) ("[U]nduly intrusive or burdensome requests may be rejected or trimmed."); *In re Pimenta*, 942 F. Supp. 2d 1282, 1288 (S.D. Fla. 2013) ("Moreover, unduly intrusive or burdensome requests may be rejected or trimmed by the Court.").
72) *See supra* s. VI[B].
73) *See* 28 U.S.C. § 1782(a) (2012).

74) *See* Daniel A. Losk, *Section 1782(A) After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 Cardozo L. Rev. 1035, 1042-43 and note 51 (2005); *see also In re Merck & Co., Inc.*, 197 F.R.D. 267, 270-71 (M.D.N.C. 2000) ("Nothing in Section 1782 states that the application is to be made *ex parte*, much less that the Court *must* entertain the application *ex parte*."); *In re Supreme Court of Hong Kong*, 138 F.R.D. 27, 32 note 6 (S.D.N.Y. 1991); *but see* Hans 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 L. & Com. 1, 16 (1998) ("*[E]x parte* applications are improper, and adequate notice of the application should be given both to the person who is to produce the evidence and to adverse parties.").
75) *See Intel Corp.*, 542 U.S. at 223; *see also In re Consorcio Ecuatoriano De Telecomunicaciones S.A.*, 685 F.3d at 992 ("The court observed that, as interpreted by the Supreme Court, section 1782 does not require that the foreign proceeding be pending or imminent, but rather only that the proceeding 'be within reasonable contemplation.'") (citing *Intel Corp.*, 542 U.S. at 259).
76) *In re O2CNI Co., Ltd.*, No. C 13-80125 CRB (LB), 2013 WL 5826730 (N.D. Cal. Oct. 29, 2013).
77) H.R.Rep. No. 1052 at 9; *see also* Scott R. Boesel, *Arbitration Bodies Should Be Considered Tribunals Under §1782: An Analysis of NBC v. Bear Stearns & Co.*, 63 Alb. L. Rev. 637, 651 (1999), at 651 ("Prior to his involvement with the Commission, Professor Smit wrote an article encouraging Congress to include 'international tribunals' in the language of § 1782.").
78) *See NBC v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 188 (2d Cir. 1999) ("In our view, the term 'foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here.").
79) *See id.*; *In re Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).
80) *NBC v. Bear Stearns & Co., Inc.*, 165 F.3d at 190; *see e.g.*, *In re Wilander*, No. Civ. A.96 Misc 98, 1996 WL 421938, at *2 (E.D. Pa. Jul. 24, 1996).
81) Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 Am. Rev. Int'l Arb. 153, 155 (1997) ("Discriminating against private international tribunals not only does violence to the plain and clear text of Section 1782, it also fails to give consequence to the repeatedly re-affirmed public policy favoring arbitration."); *see alsoMitsubishi Motors Corp. v. Soler Chrysler-Plymount, Inc.*, 473 U.S. 614, 614 (1985); *see e.g.*, *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("The Arbitration Act thus establishes a 'federal policy' favoring arbitration, requiring that 'we rigorously enforce agreements to arbitrate.'") (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).
82) *See* Hans Smit, *American Judicial Assistance to International Arbitral Tribunals*, 8 Am. Rev. Int'l Arb. 153, 154 (1997).
83) *Id.* at 153.
84) *Intel Corp.*, 542 U.S. at 258 (2004) (citing Hans Smit, *International Litigation under the United Sates Code*, 65 Colum. L. Rev. 1015, 1026 note 73 (1965) (emphasis added); *see also* Fellas, *supra*note 2, at 380.
85) *See In re Grupo Unidos Por El Canal*, 2015 WL 1810135, at *5 ("In recent years courts have split over whether purely private, contractually bargained for arbitrations, are qualified as 'foreign or international tribunals' allowing for § 1782 assistance in the United States.").
86) *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1226-28 (N.D. Ga. 2006).
87) *SeeIn re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007) (Finding that an Israeli arbitration proceeding was a foreign or international tribunal under section 1782); *see alsoIn re Babcock Borsig AG,* 583 F. Supp. 2d 233, 239-40 (D. Mass. 2008) (Where the Federal Judge found that the International Chambers of Commerce Arbitration Court was a foreign or international arbitral tribunal pursuant to section 1782. "I do not find the reasoning in *National Broadcasting Co.* and *Republic of Kazakhstan* to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*. As described above, the Court in *Intel* emphasized Congress's intent to expand the applicable scope of § 1782(a). The Court noted Congress's use of the broad term 'tribunal,' and it favorably quoted Professor Smit's definition of the term, which expressly included 'arbitral tribunals.' There is no textual basis upon which to draw a distinction between public and private arbitral tribunals ... .").
88) *La Comisión Ejecutiva Hidroeléctrica Del Rio Lempa v. El Paso*, 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008).
89) *In re Arbitration Between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).
90) *In re Operadora DB Mexico, S.A. De C.V.*, No. 609-CV-383-ORL-22GJK, 2009 WL 2423138, at *6 (M.D. Fla. Aug. 4, 2009).
91) *Id.* at *9.
92) *Id.*
93) *See In re Kleimar N.V.*, 220 F. Supp. 3d 521 (S.D.N.Y. Nov. 16, 2016).

94) *See* Fellas, *supra*note 2, at 383; *but see In re Grupo Unidos Por El Canal*, 2015 WL 1810135, at *9 ("The parties also dispute whether the arbitration here is 'international' for purposes of § 1782. *This court is also not convinced that it is*, at least as that term is understood in the context of a § 1782 discovery request. Petitioner argues that the matter, although being conducted in Miami, Florida, is foreign and international. In support, GUPC argues *that none of the parties to the ICC Arbitration are U.S. citizens and the subject matter of the proceeding concerns a dispute over a project located in Panama, involving construction on Panamanian land, pursuant to a contract governed by Panamanian law, with performance in Panama*. ... Because the court finds that this private arbitration is not a 'tribunal' under § 1782, it is not necessary to reach the question of whether the private arbitration here is 'international' within the meaning of § 1782. However, the court notes that all of the cases discussed in the previous section, whether finding for or against inclusion of private arbitration within § 1782, addressed arbitration held in a foreign country.") (emphasis added).

95) 9 U.S.C. §7.

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