

Discovery in the U.S. for Foreign Proceedings Under 28 U.S.C. 1782: Standards, Circuit Split, Procedural Challenges

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Discovery in the U.S. for Foreign Proceedings

Jeffrey I.D. Lewis
April 14, 2020



Proceedings under 28 U.S.C. 1782

- Legal standards applied
- Process to follow

What is § 1782?

- Important U.S. discovery tool
 - Interested party
 - Use US discovery in a foreign tribunal proceeding.
- So ...?
 - Increasing use in complex foreign disputes
 - Atypical procedural aspects
 - Unique strategic and tactical considerations

EXAMPLES:

- European Patent Office (EPO) Opposition – limited discovery allowed in its discretion.
- China – Little to no formal adversarial discovery.
- Civil and Criminal proceedings/investigations

Twin Goals

- **Allow equitable discovery** in US for the benefit of tribunals and litigants involved in international litigation.
- **Encourage foreign discovery**, by example, to provide similar assistance to US courts.

“[T]he statute has,
over the years, been given
increasingly broad applicability.”

See, e.g., Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012)

28 U.S. Code § 1782(a)

Assistance to foreign and international tribunals and to litigants before such tribunals.

- ▮ The district court of the **district in which a person resides or is found** may order ... testimony or ... to produce a document or other thing
- ▮▮ for use in a **proceeding** in a foreign or international **tribunal**....

- ▮▮▮ The order may be made pursuant to a letter rogatory ... or request made, by a foreign or international tribunal or upon the application of **any interested person** and may direct that the testimony or ... thing be produced, before a person appointed by the court. ...”

I. *The District* – General Jurisdiction

Individual:

- “The paradigm forum for the exercise of general jurisdiction **is the individual’s domicile.**”

Corporation:

- “The **place of incorporation** and **principal place of business** are paradigm bases for general jurisdiction” OR
- “**affiliations** with the State are so continuous and systematic as to **render the corporation essentially at home**”

Daimler AG v. Bauman, 571 U.S. 117 (2014)

Available Discovery:

- “... need demonstrate only that the evidence sought would not be available but for the respondent’s forum contacts.”

In re del Valle Ruiz, 939 F.3d 520, 523 (2d Cir. 2019)

I. *The District* - Specific Jurisdiction

Individual or Corporation:

- Respondent **purposefully directed activities at the forum** that have some **connection to the discovery** at issue.
 - Respondent’s “... **contacts with the forum go to the actual discovery sought** rather than the underlying cause of action.”

Available Discovery:

- “Where the **discovery sought proximately resulted from the respondent’s forum contacts**, that would be sufficient to establish specific jurisdiction for ordering discovery.”
- “The respondent’s having **purposefully availed itself of the forum** must be the primary or proximate reason that the evidence sought is available at all.”

In re del Valle Ruiz, 939 F.3d at 530

I. *The District* – “Found”

Synonymous with Personal Jurisdiction (Majority)

- Respondent may be “found” in the district if she **consistently enters** the district.

n re Oxus Gold PLC, 2007 WL1037387 (D.N.J. 2007)

Tag Jurisdiction (Minority)

- If a person is **served with a subpoena** while physically present in the district of the court that issued the discovery order, he or she is found in the district for § 1782 purposes.

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

- “Given that this so-called **tag jurisdiction is consistent with due process** ... we do not think that section 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more.”

In re del Valle Ruiz, 939 F.3d at 527

I. *The District* – Parent / Subsidiary

Respect for Corporate Form

- U.S. **subsidiary not required** to turn over documents from a foreign parent.

Norex Petroleum Ltd v. Chubb Insurance Co. of Canada, 384 F. Supp. 2d 45 (D.D.C. 2005);
In re Nokia Corp., 2007 U.S. Dist. LEXIS 42883, at *8-9 (W.D. Mich. June 13, 2007).

- U.S. **parent not required** to turn over documents from a foreign wholly owned subsidiary.

Kestrel Coal Pty v. Joy Global, Inc., 362 F.3d 401 (7th Cir. 2004);
In re RSM Corp., 195 F. Supp. 3d 899, 904-05 (S.D. Tex. 2016).

- “[Applicant] does not contend ... that the requirements for **piercing the corporate veil** under [applicable] law have been met. [Applicant] does not deny that [discovery target] has adhered fully to the **forms of separation** between investment and management.”

Kestrel, 362 F.3d at 405

I. *The District ... Documents Abroad*

Formerly split of authority

- Discovery under § 1782 should be **limited to documents within the United States.**

In re Godfrey, 526 F.Supp.2d 417 (S.D.N.Y. 2007);
In re Kreke Immobilien KG, 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013)

- Document **location a discretionary consideration.**

In re Schottdorf, 2006 WL 3844464 (S.D.N.Y. Dec. 28, 2006)

Moving toward extraterritorial application

- “[T]he **location of responsive documents and electronically stored information** ... not establish a *per se* bar to discovery under § 1782.”

Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016)

- “The Federal Rules of Civil Procedure in turn authorize [§1782] extraterritorial discovery **so long as** the documents to be produced are **within the subpoenaed party's possession, custody, or control.**”

In re del Valle Ruiz, 939 F.3d at 533

II. “Use In a Proceeding ...”

Qualifying Proceedings:

- Judicial proceedings abroad
- “Tribunal” defined broadly
 - Certain regulatory proceedings (e.g., EU Antitrust Comm.)
 - Certain quasi-governmental proceedings (e.g., EPO)
- Criminal proceedings

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004);
In re Application of Microsoft, 428 F. Supp. 2d 188 (S.D.N.Y. 2006)

II. WHAT “Use In a Proceeding ...”?

Requirements relating to “Use”

- “Practical **ability to inject the requested information** into [the] foreign proceedings.”
Bouvier v. Adelson, 869 F.3d 121, 312 (2d Cir. 2017)
 - Must be for use in the proceedings described in the application; **cannot be a ruse** to obtain discovery in some other action.

“Use” is a minimal showing

- **No requirement** to show discovery will be **admissible** in the foreign proceeding
Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76 (2d Cir. 2012)
- **No requirement** to show discovery is “**necessary**”
Mees v. Buiter, 793 F.3d 291, 295 (2d Cir. 2015)

II. Contemplated “Use In a Proceeding”

- A foreign proceeding does **not need to be pending or imminent**, but within “reasonable contemplation.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)
 - “... must have **more than a subjective intent to undertake some legal action**, ... must provide **some objective indicium** ... cannot be merely speculative ... must [show] **some concrete basis** from which it can determine that the contemplated proceeding is **more than just a twinkle in counsel's eye.**”
Certain Funds, Accounts &/Or Inv. Vehicles Managed By Affiliates Of Fortress Inv. Grp. L.L.C. v. KPMG, L.L.P., 798 F.3d 113, 123-24 (2d Cir. 2015)
- “[E]ven where a foreign proceeding **has not yet begun**, § 1782 **discovery need not be used** at all **in drafting the complaint** in order to satisfy the ‘for use’ requirement.” *Mees*, 793 F.3d at 299
 - Applicants cannot “use § 1782 to investigate whether litigation is possible in the first place, putting the cart before the horse.”
In re Certain Funds, 2014 U.S. Dist. LEXIS 95578, at *18-19 (S.D.N.Y. July 4, 2014), *aff'd*, 2015 U.S. App. LEXIS 14614 (2d Cir. 2015); *Fagan v. J.P. Morgan Chase Bank*, No. 19-mc-00111, 2019 U.S. Dist. LEXIS 32004, at *6-7 (W.D. Tex. Feb. 28, 2019)

II. Use In an Enforcement Proceeding

Proceedings generally need to be “adjudicative” in nature

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

Enforcement/collection proceedings

- Split of authority on whether enforcing a judgment or a collection proceeding is “adjudicative”

–2d Cir.: 

Euromepa; Jiangsu S.S. Co. v. Success Superior Ltd., 2015 U.S. Dist. LEXIS 18388 (S.D.N.Y. Jan. 5, 2015); *In re Gorsoan Ltd.*, 2020 U.S. Dist. LEXIS 13016 (S.D.N.Y. Jan. 24, 2020)

–11th Cir.: 

In re Clerici, 481 F.3d 1324 (11th Cir. 2007)

II. “Use In a Proceeding ...” – Tribunal

Broadly applied ...

Legislative history (SCOTUS):

“Tribunal” – used to “ensure that assistance was **not confined to** proceedings before **conventional courts**, and to permit its extension to other government bodies, including investigating magistrates, administrative bodies, and quasi-judicial agencies.”

Intel, 542 U.S. at 248-49; *Lancaster Factoring Co. Ltd.*, 90 F.3d 38 (2d Cir. 1996)

- SCOTUS: foreign proceeding must lead to a dispositive ruling that is **reviewable in a court**.

Intel, 542 U.S. at 255

- Typically met where “proceeding in a foreign or international tribunal” by administrative agency whose final administrative action is reviewable in court, e.g., Japanese and European Patent Offices.

E.g., *Akebia Therapeutics, Inc. v. FibroGen, Inc.*, 793 F.3d 1108, 1111 (9th Cir. 2015) ; see *Intel*, 542 U.S. at 255

II. Use In an Arbitration Proceeding

- Many jurisdictions now permit 1782 discovery for use in foreign arbitrations
- Point to expansive language in *Intel*

- **Split of Authority**

–2d, 3d, 4th & 6th Circuits ✓

Servotronics, Inc. v. Boeing Co., No. 18-2454 (4th Cir. Mar. 30, 2020);
In re Application to Obtain Discovery, 939 F.3d 710, 723 (6th Cir. 2019);
In re Application of the Children's Inv. Fund Found. (UK), 363 F.
Supp. 3d 361 (S.D.N.Y. 2019); *In re Chevron Corp.*, 709 F. Supp. 2d
283 (S.D.N.Y. 2010); *In re Chevron Corp.*, 633 F.3d 153 (3d Cir.
2011); *In re Oxus Gold PLC*, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007)

–5th Circuit ✗

See Rep. of Kaz. v. Biedermann Intern., 168 F.3d 880 (5th Cir.
1999); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica
Del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009).

- As of May 2020, Supreme Court has granted certiorari to resolve the split

III. “Interested Person...”

- Includes anyone with “a **reasonable interest** in obtaining judicial assistance.”
- Courts willing to interpret this in a broad manner
 - Often is not difficult to establish that they are interested persons

Intel, 542 U.S. at 256

28 U.S. Code § 1782(a) – Discretionary

§ 1782(a): ... The district court of the district in which a person resides or is found may order ...”

- DISCRETIONARY: “... court is **not required to grant** a § 1782(a) discovery application simply because it has authority to do so.”

Intel, 542 U.S. at 264; *In re Certain Funds*, 2014 U.S. Dist. LEXIS 95578, at *9 (S.D.N.Y. July 4, 2014),

- Courts may **take into account** “any **pertinent** issue” presented by the application ... not [a] mechanical application.

Kiobel v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 245 (2d Cir. 2018)

- ... must **exercise discretion** in light of the “**twin aims** of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.”

Mees, 793 F.3d at 297-98

SCOTUS: The four
Intel Factors

Intel #1 – Participant?

Whether the “person from whom discovery is sought is a **participant in the foreign proceeding**;”

- “[T]he need for § 1782(a) aid **generally is not as apparent** [from a participant in the foreign proceeding] because a **foreign tribunal has jurisdiction** over those appearing before it, and can itself order them to produce evidence.”

In re Schlich, 893 F.3d 40, 47 (1st Cir. 2018) ((quoting *Intel*, 542 U.S. at 265) (internal quotation marks omitted)).

- If discovery target is not a participant and the foreign proceeding has no authority over the target, U.S. courts recognize that the **nonparticipating target “may be outside the foreign tribunal’s jurisdictional reach**; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.”

In re Microsoft Corp., 428 F. Supp. 2d 188, 193–94 (S.D.N.Y. 2006) (quoting *Intel*, 542 U.S. at 264) (internal quotation marks omitted); *In re ALB-Gold*, 2020 U.S. Dist. LEXIS 4600 (E.D.N.Y. Jan. 10, 2020); *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007); *In re Letter of Request from Dist. Court Stara Lubrovna*, 2009 U.S. Dist. LEXIS 103126 (M.D. Fla. 2009)

Intel #2 – Nature of Proceeding

“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”

Senate Report:

*In exercising its **discretionary power**, the court may take into account the nature and attitudes of the ... country from which the request emanates and the character of the proceedings in that country, or ... the nature of the tribunal and the character of the proceedings before it.* 1964 U.S.C.C.A.N. 3782, 3788

- If the discovery sought **is not admissible in the foreign proceeding**, still does **not prevent** granting a Section 1782 application
In re O’Keeffe, 650 F. App’x 83, 85 (2d Cir. 2016)
- BUT **if tribunal** expressly excluded 1782 evidence, this factor dictates courts should **deny** the Section 1782 application

See In re Microsoft Corp., 428 F. Supp. 2d at 194;
Euromepa, S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995)

Intel #3 – Improper Work Around?

Whether request “**conceals an attempt to circumvent** foreign proof-gathering restrictions or other policies of a foreign country or the United States”

- To promote **international comity**, requires district courts consider whether applicant is actively seeking to “**circumvent foreign proof-gathering restrictions.**” *Intel*, 542 U.S. at 265; *Mees*, 793 F.3d at 303 n.20 ((e.g., “rules akin to privileges”)
 - Deny application if determined applicant merely attempting to “**avoid or preempt an unfavorable decision**” in the foreign or international tribunal.” *Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 624 (8th Cir. 2016)
- Absent evidence of trying to avoid an unfavorable decision, **courts typically examine** foreign tribunal discovery procedures to see if any restrictions placed on discovery; if none, weighs in favor of granting the application.

Oncology Found. v. Avanza Dev. Servs., LLC, 2017 WL 2376769, at *1 (D. Md. 2017)

Intel #4 – Proportionality

Is request “**unduly intrusive or burdensome**”

- Applicant has discovery tools that are available under the U.S. Federal Rules of Civil Procedure.

See, e.g., Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1272 (11th Cir. 2014)

- Applicants **must adhere** to the requirements of obtaining discovery under those **rules**, including that the discovery must not be privileged and must be “**proportional to the needs of the case.**”

FRCP Rule 26(b)(1)

Intel #4 – Proportionality (cont'd)

- Where application requests discovery that is not proportional, **courts have modified** or rejected unduly **intrusive or burdensome** discovery requests and requiring applicants to revise the discovery requests.

In re Clerici, 481 F.3d 1324, 1334 (11th Cir. 2007) (quoting *Intel*, 542 U.S. at 264)

–Not duplicative discovery

Lufthansa Technik AG v. Astronics Corp., 553 Fed. App'x 22 (2d Cir. 2014);
Sandra Holding Ltd. v. Al Saleh, 2019 U.S. Dist. LEXIS 116920 (D. Mass. 2019).

–Not overbroad / costly / disruptive / sweeping discovery

In re Apotex Inc., 2008 U.S. Dist. LEXIS 109420, at *7 (S.D.N.Y. Mar. 9, 2009)
In re Glob. Energy Horizons Corp., 647 F. App'x 83, 86-87 (3d Cir. 2016);
In re Kreke Immobilien KG, 2013 U.S. Dist. LEXIS 160283, *20-21, (S.D.N.Y. November 8, 2013)

Proceedings under 28 U.S.C. 1782

- Legal standards applied
- Process to follow

How to Obtain 1782 Discovery

Letter rogatory

- Formal request
 - Ask the foreign tribunal
 - Tribunal laws/rules apply
- Timing?
- Then go to US District Court

U.S. District Court

- What **Circuit & District?**
 - Circuits split: case type
 - Docket delays
- More extensive process

How to File a 1782 Request

U.S. District Court

- Initiating new case for limited purpose of obtaining discovery
 - *Ex parte* application for a subpoena pursuant to § 1782
 - Supported by a memorandum of law
 - Discuss **statutory** requirements
 - Address **discretionary** factors (e.g., *Intel*)
 - **Evidence / Affidavit** to satisfy requirements & factors
 - **Legal Affidavit** re applicable foreign law
 - Proposed **subpoena** with discovery requests / topics
 - Strategy for what to ask for
- Can give notice to other side or proceed *ex parte*

How to Respond to 1782 Discovery

- **Comply**

- Easiest
- Most efficient
- Least expensive

- Can **object** to discovery

- Motion to compel?
- Opportunity to oppose
- Looks reasonable
- Deadlines to object

- **Oppose** pending motion

- If have notice
- Meet and confer?

- **Quash / Protective Order**

- Meet and confer?
- Standard discovery motion
- Deadline to file!

Subject to immediate appeal

How to Oppose/Move

- Not meet ...
 - Statutory standards
 - Discretionary *Intel* factors
 - Letter rogatory tougher to oppose
- Affidavits needed?
 - Very fact dependent
 - Evidence
- Standard FRCP grounds
- Protective Order
 - Process for discovery
 - Scope of discovery
 - Privilege



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Discovery for Use in Foreign Proceedings: Examples of Documents and Information Available Under Section 1782

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What is 28 U.S.C. § 1782?

Aims to provide assistance to foreign and international tribunals and to litigants before such tribunals

- Section 1782 governs the production of evidence in the United States for use in a foreign proceeding.
- It grants exclusive subject matter jurisdiction to federal courts to rule on discovery applications submitted under the statute.
- Courts have described the “twin aims” of Section 1782:
 - **To provide equitable and efficient discovery procedures in US courts for the benefit of participants in adjudicative proceedings outside the US; and**
 - **To encourage other countries to provide similar means of assistance to US courts.**

28 U.S.C. § 1782(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. . . . 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. . . . 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**.

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.

When Might Foreign Discovery Be Unavailable?

- ***International Arbitration*** – Most international arbitration rules require parties to exchange the information they intend to rely on but the procedure involves little or no discovery. The availability of third-party discovery is limited and often restricted entirely.
- ***Many foreign jurisdictions have limited discovery***
 - *Civil law jurisdictions* – The judge is responsible for eliciting evidence. Parties submit all their favorable documentary evidence at the outset of the proceeding. Parties are not expected to disclose relevant documents, especially detrimental ones. Document requests cannot be made by category, but instead must specifically identify each document sought.
 - *Commonwealth countries* – Many have limited discovery, with no pretrial depositions and only limited third party discovery.
- ***Located in the U.S.*** – Often the discovery that a party really needs is located in the U.S., not the country where litigation is ongoing. Examples include financial institutions, internet service providers, and US-based subsidiaries or affiliates.

Parent/Subsidiary Relationships

- **Respect for Corporate Form**
 - **U.S. Based subsidiary of foreign parent**
 - U.S. subsidiary **not** required to turn over documents from a foreign parent.
 - *Norex Petroleum Ltd v. Chubb Insurance Co. of Canada*, 384 F. Supp. 2d 45 (D.D.C. 2005); *In re Nokia Corp.*, 2007 U.S. Dist. LEXIS 42883, at *8-9 (W.D. Mich. June 13, 2007).
 - **U.S. Based parent of foreign subsidiary**
 - U.S. parent **not** required to turn over documents from a foreign wholly owned subsidiary.
 - *Kestrel Coal Pty v. Joy Global, Inc.*, 362 F.3d 401 (7th Cir. 2004); *In re RSM Corp.*, 195 F. Supp. 3d 899, 904-05 (S.D. Tex. 2016).
- **Possible Exception for abuse of corporate form**
 - *Cf. Kestrel*, 362 F.3d at 405 (“[Applicant] does not contend ... that the requirements for piercing the corporate veil under [applicable] law have been met. [Applicant] does not deny that [discovery target] has adhered fully to the forms of separation between investment and management.”).

28 U.S.C. § 1782(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.

“For Use” in a “Proceeding”

- **Requirements relating to “Use”**

- “Practical ability to inject the requested information into [the] foreign proceedings.” *Bouvier v. Adelson (In re Accent Delight Int’l Ltd.)*, 869 F.3d 121, 312 (2d Cir. 2017).
- Must be for use in the proceedings described in the application; cannot use Section 1782 as a ruse to obtain discovery in some other action.

- **“Use” is a minimal showing**

- No requirement to show discovery will be admissible in the foreign proceeding
 - *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76 (2d Cir. 2012).
 - *In re Veiga*, 746 F. Supp. 2d 8, 17-18 (D.D.C. 2010) (“[D]istrict courts need not determine that the evidence would actually, or even probably, be admissible in the foreign proceeding.”).
- No requirement to show discovery is “necessary”
 - *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015).

Intel Factor Three - Concealing an Attempt to Circumvent Foreign Proof-Gathering Restrictions

- What are “foreign proof-gathering restrictions”?
 - “Best understood as [rules akin to privileges that prohibit the acquisition or use of certain materials](#), rather than as rules that fail to facilitate investigation of claims by empowering parties to require their adversarial and non-party witnesses to provide information.” *Mees v. Buiter*, 793 F.3d 291, 303 n.20 (2d Cir. 2015).
- ***Need not be discoverable abroad:***
 - The district court need NOT determine whether the requested evidence is “discoverable” in the foreign proceeding as a prerequisite to granting the § 1782 request.
 - “[M]aking the extension of American assistance dependent on foreign law would open a veritable Pandora’s box. . . . It would . . . be wholly inappropriate for an American district court to try to obtain [an understanding of the applicable foreign law] for the purpose of honoring a simple request for assistance.” *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995).
- Thus, opposition unlikely to succeed on grounds that material sought would not be discoverable or admissible in foreign tribunal, or that applicant failed to seek discovery within context of foreign proceeding (i.e., non-exhaustion). *See, e.g., In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992); *Mees v. Buiter*, 793 F.3d 291 (2d Cir. 2015).

Does Section 1782 Have Extra-territorial Reach to Documents Located Abroad?

- **What if Applicant seeks documents that are located abroad, but Respondent (a U.S. resident) controls or can access?**
 - **Formerly a more vibrant split of authority**
 - Discovery under § 1782 should be limited to documents within the United States. *In re Godfrey*, 526 F.Supp. 2d 417 (S.D.N.Y. 2007); *In re Kreke Immobilien KG*, 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013).
 - Location of the documents should at most be a discretionary consideration. *In re Schottdorf*, 2006 WL 3844464 (S.D.N.Y. Dec. 28, 2006).
 - **Burgeoning approval of extraterritorial application**
 - *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016) (“[T]he location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a per se bar to discovery under § 1782. To hold otherwise would categorically restrict the discretion Congress afforded federal courts to allow discovery under § 1782.”).
 - “The Federal Rules of Civil Procedure in turn authorize extraterritorial discovery **so long as the documents to be produced are within the subpoenaed party's possession, custody, or control**. Hence § 1782 likewise allows extraterritorial discovery.” *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019).

28 U.S.C. § 1782(a)

The order may be 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.

To 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.**

What Kind of Discovery Can be Obtained Under Section 1782?

- **Documents and testimony:** The court may order the target to “give his testimony or statement or to produce a document or thing.”
- **Corporate entities:** If the discovery target is a corporation, in addition to being required to produce documents, the target corporation may be required under Rule 30(b)(6) to designate one or more officers, directors or agents to testify on its behalf.
- **Limited discovery tools:** While the Federal Rules of Civil Procedure apply by default, not all of the discovery tools of the FRCP can be used in a Section 1782 proceeding.
 - The express terms of Section 1782 permit the district court only to require a person to produce “documents and testimony.”
 - As a result, one court has held that Section 1782 does not permit service of interrogatories. *Fleischmann v. McDonald’s Corp.*, 2006 WL 3530582, at *10 (N.D. Ill. Dec. 6, 2006).
- **Court’s power to control scope:** The district court retains its power under FRCP Rules 26, 37 and 45 to control the scope of discovery and prevent its abuse.
 - The Second Circuit has observed, for example, that Rule 45(c)(3)(A)(ii), which requires courts to quash or modify a subpoena that forces a person who is not a party or an officer of a party to travel more than 100 miles from where that person “resides,” may prevent the taking of a deposition under Section 1782 even if the “resides or is found” requirement is met. *Edelman*, 295 F.3d 171, 178 (2d Cir. 2002); *In re Microsoft*, 428 F.Supp.2d 188, 193 n.3.

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- **Rule 30. Depositions by Oral Examination**

(a) When Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

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- **Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.**

(a) In General. A Party may serve on any other party a request within the scope of Rule 26(b):

- (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

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- (A) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
- (B) any designated tangible things.

§ 1782 Actions in the Ecuador - Chevron Dispute: An Example

1. All documents relating to your engagement – as an independent contractor, employee or in any other capacity – by Chevron.
2. All documents relating to your engagement or employment by any company retained by, contracted with, or in any way affiliated with Chevron.
3. All documents prepared for or at the direction of, or otherwise provided to, directly or indirectly, Chevron.
4. All documents relating to your wife’s engagement – as an independent contractor, employee or in any other capacity – by Chevron.
5. All documents relating to your wife’s engagement by any company retained by, contracted with, or in any way affiliated with Chevron.
6. All documents relating to compensation, reimbursements, or other forms of payment or remuneration received by you and/or your wife, directly or indirectly, from Chevron.
7. All documents relating to meetings between you and/or your wife and representatives of Chevron.
8. All communications between you and/or your wife and representatives of Chevron, including, but not limited to, all documents provided by you and/or your wife to Chevron.
9. All communications between you and /or your wife and [REDACTED].
10. All scripts prepared by you for use by [REDACTED]

§ 1782 Actions in the Ecuador - Chevron Dispute: An Example (cont.)

11. All communications between you and/or your wife and [REDACTED] from 2009 through the present.
12. A copy of your current passport and any passport used by you during 2009.
13. All drafts of declarations referring or relating to meetings or other communications with Ecuadorian citizens or with representatives of Chevron from 2009 through the present.
14. All note, diaries, journals, or other documents referring or relating to meetings or communications with or actual or potential compensation or remuneration to you from Chevron.
15. All notes, diaries, journals, recordings or other documents referring or relating communications with any of the individuals referred to in your Declarations dated June 27, 2009, October 16, 2009, and/or December 7, 2009.
16. All documents stored on your iPhone or iPod referring or relating to Chevron or TexPet.
17. All documents regarding the environmental remediation credentials and/or capabilities of the company [REDACTED] [REDACTED] or any company in which you have an ownership interest or by which you have been retained as an employee or consultant.
18. All documents referring relating to companies you, directly or indirectly, incorporated in Ecuador or elsewhere during the last ten years.
19. All documents referring or relating to site inspections, the taking of soil, water, or other samples, and/or testing of soil, water, or other samples, conducted in connection with the Lago Agrio Litigation.
20. All documents referring or relating to environmental remediation activities conducted in the Oriente region or Ecuador by TexPet and/or subcontractors of TexPet.

Ecuador - Chevron Dispute

1. All DOCUMENTS RELATING TO YOUR actual or prospective engagement or employment by CHEVRON RELATING TO the LITIGATION.
2. All DOCUMENTS RELATING TO YOUR actual or prospective engagement or employment by any company, retained by, contracted with, or in any way affiliated with CHEVRON RELATING TO the LITIGATION.
3. All DOCUMENTS prepared by YOU for, at the direction of, or otherwise provided (directly or indirectly) to CHEVRON RELATING TO the LITIGATION.
4. All DOCUMENTS RELATING TO actual or prospective compensation, reimbursement, or other forms of payment or remuneration received or to be received by YOU, directly or indirectly, from CHEVRON RELATING TO the LITIGATION.
5. All DOCUMENTS YOU reviewed in preparing YOUR expert report(s) RELATING TO THE LITIGATION.
6. All drafts of any report, affidavit, or other DOCUMENT submitted in the LAGO ARGRIO LITIGATION that YOU authored in whole or in part.
7. YOUR most recent curriculum vitae.
8. Copies of any expert reports (including any appendices or other attachments), declarations, affidavits, deposition transcripts, trial transcripts, hearing transcripts, arbitration transcripts or any other transcript of any testimony or any document you authored that YOU have offered as an expert at any time during the last ten years, regardless of the nature of the dispute.

Ecuador - Chevron Dispute

9. All DOCUMENTS RELATING TO site inspections, including without limitation Pre-Inspections, Judicial Inspections, and Phase II “Shadow Team” Inspections, the taking of soil, water, or other samples, and/or the testing of soil, water, or other samples, RELATING TO the LITIGATION, including any actual or proposed expert opinions or reports relating thereto, photographs, videos, and site maps.
10. All DOCUMENTS RELATING TO any technical program or protocol developed, created, commented on, or implemented by YOU RELATING TO the LITIGATION, including any inspection or testing programs developed, created, commented on, or implemented by YOU.
11. All DOCUMENTS RELATING TO Judicial Inspection Playbooks RELATING TO THE LITIGATION.
12. All DOCUMENTS RELATING to Judicial Inspection Sites Sampling and Testing Program planning or strategy RELATING TO THE LITIGATION.
13. All DOCUMENTS RELATING TO the CHEVRON SITE INSPECTION TEAM (“SIT”) PRE-INSPECTION FIELD PROGRAM for sites or locations within the former PETROECUADOR-TEXPET Concession area.

Ecuador - Chevron Dispute

14. All DOCUMENTS RELATING TO any oversight, management, preparation, training, or review by YOU of any other expert RELATING TO THE LITIGATION.
15. All DOCUMENTS RELATING TO any database RELATING TO THE LITIGATION including the [REDACTED] Database and the [REDACTED] Database.
16. All DOCUMENTS RELATING TO TEXPET'S remediation of sites within the former PETROECUADOR TEXPET Concession area including all sampling and analysis results relating to sites remediated by TEXPET or Contractors acting on its behalf.
17. All DOCUMENTS RELATING TO Environmental Site Summary Reports for sites or locations within the former PETROECUADOR-TEXPET Concession are RELATING TO THE LITIGATION.

Chevron Used Section 1782 Discovery to Obtain Numerous Forms of Evidence

- Documentary film outtakes
- Lead attorney Steven Donziger's computer hard drive and other internal documents
- Correspondence and internal documents of the Plaintiffs' scientific experts and consultants
- Account information from the Plaintiffs' attorneys' account at Banco Pichincha
- Testimony from former insiders including financiers, attorneys, scientific experts, and consultants

PRIVILEGE - Section 1782 states, “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.”

- The courts have generally interpreted this provision as including US federal and constitutional privileges, as well as privileges provided under foreign law:
 - **National security privilege**, *Al Fayed v. U.S.*, 229 F.3d 421 (4th Cir. 2000)
 - **Privilege against self-incrimination**, *In re Letters Rogatory from 9th Criminal Division*, 448 F. Supp. 786 (S.D. Fla. 1978)
 - **Sixth Amendment confrontation right**, *In re Letters of Request from Supreme Court of Hong Kong*, 821 F. Supp. 204 (S.D.N.Y. 1993)
 - **Foreign privileges**, *In re Veiga*, 746 F. Supp. 2d 27 (D.D.C. 2010)
 - **Journalist privilege**, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011)
 - **Work-product**, *United Kingdom v. U.S.*, 238 F.3d 1312 (11th Cir. 2001)
 - **Attorney-client privilege**, *Chevron v. Shefftz*, 2010 WL 4985663 (D. Mass. 2010)
- **For foreign privilege** the burdened party must offer “**authoritative proof**” that foreign law contains the privilege invoked and that it applies to the circumstances at issue.

Privilege & Exceptions Thereto

The *Chevron* litigation involved several potential privileges that the courts, for the most part, declined to apply when ruling on—and granting—Chevron’s Section 1782 requests.

- ***Plaintiffs’ lead US attorney, Steven Donziger***, was required to produce documents because the attorney-client privilege was waived by Donziger’s failure to file a privilege log as required by FRCP 26(b)(5) and because Donziger acted more like a political advocate rather than as a legal advisor. *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135 (S.D. N.Y. 2010).
- ***One of Plaintiffs’ Ecuadorian lawyers*** was required to produce documents despite claims of attorney-client privilege and work-product doctrine, as well as privileges under Ecuadorian law, where, among other things, documents had been disclosed to third parties and the lawyer failed to show documents were prepared in anticipation of litigation or provide “authoritative proof” that Ecuadorian law applied. *In re Veiga*, 746 F. Supp. 2d 27, 77 Fed. R. Serv. 3d 1224 (D.D.C. 2010).
- ***One of Plaintiffs’ environmental consultants*** was required to produce documents it created and submitted to a court-appointed damages expert, finding that the plaintiffs had waived work product and attorney-client privilege protections to the documents by submitting documents to court-appointed damages expert. *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).

Privilege Exceptions (cont.)

- ***Another of Plaintiffs’ environmental consultants*** was ordered to submit to a foundational deposition despite claims of privilege where it was credibly alleged that the discovery sought was supplied to the purportedly “neutral” expert tasked with providing an independent report, for the purposes of ghostwriting the report submitted in the expert’s name. *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010).
- ***Plaintiffs’ film producer for the movie “Crude”*** was required to produce 600 hours of outtakes notwithstanding an asserted journalist privilege where the district court credibly found that the purpose of the film was not independent commentary but to further the plaintiffs’ judicial agenda. *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).
- ***Yet another of Plaintiffs’ environmental consultants*** was required to produce documents because any privilege was waived when transmitted to the court-appointed expert in Ecuador and, alternatively, the crime-fraud exception justified disclosure. *In re Applic. of Chevron Corp.*, 2010 WL 3584520, at *6 (S.D. Cal. Sept. 10, 2010).

Intel Discretionary Factors

- *Intel* Factors

- Whether the respondent is a party in the foreign proceeding;
- The nature of the foreign tribunal, the character of the proceeding underway abroad, and the receptivity of the foreign tribunal to federal court assistance;
- Whether the request conceals an attempt to circumvent foreign proof-gathering procedures;
- **Whether the request is overly intrusive or burdensome**

Intel Factor Four - Request Overly Intrusive or Burdensome

- **Courts resort to the same norms when considering 1782 applications:**
 - **Sensitivity around attorney-client privilege and confidentiality obligations.** *See Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 247 (2d Cir. 2018).
 - **Duplicative discovery.** *Lufthansa Technik AG v. Astronics Corp.*, 553 Fed. App'x 22 (2d Cir. 2014); *Sandra Holding Ltd. v. Al Saleh*, 2019 U.S. Dist. LEXIS 116920 (D. Mass. 2019).
 - **Overbroad and costly discovery, as well as disruption to Respondent's conduct of business.** *In re Apotex Inc.*, 2008 U.S. Dist. LEXIS 109420, at *7 (S.D.N.Y. Mar. 9, 2009) (subpoena would require “substantial resources to perform onerous searches and then review voluminous documents”); *In re Glob. Energy Horizons Corp.*, 647 F. App'x 83, 86-87 (3d Cir. 2016) (“desired discovery would likely have had a significant ‘collateral effect’ on [Respondent]'s operations”).

Intel Factor Four - Request Overly Intrusive or Burdensome

- Remember the Federal Rules

- FRCP Rule 26(b)(1): “any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of discovery in resolving the issue, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”
- FRCP Rule 45:
 - “A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena.” (d)(1)
 - Court must quash or modify if subpoena (i) fails to allow a reasonable time to comply; . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) **subjects a person to undue burden**. (d)(3)(A)
 - Court may quash or modify if it requires disclosing a trade secret. (d)(3)(B)

Intel Factor Four - Request Overly Intrusive or Burdensome

- **Fishing expeditions (generally) prohibited:**
 - District courts are counseled to deny fishing expeditions. *See, e.g., Fagan v. J.P. Morgan Chase Bank*, No. 19-mc-00111, 2019 U.S. Dist. LEXIS 32004, at *6-7 (W.D. Tex. Feb. 28, 2019).
 - **Especially where foreign proceedings are contemplated but not pending.** *See, e.g., In re Harbour Vict. Inv. Holdings Ltd.*, No. 15-MC-127, 2015 U.S. Dist. LEXIS 87912, at *21 (S.D.N.Y. June 29, 2015) (“If the discovery does not confirm the existence of [certain] bank accounts, it appears [p]etitioner will not commence [the purported contemplated] proceedings. In short, this is a fishing expedition.”).
- **General presumption against sweeping discovery requests.**
 - *In re Apotex Inc.*, 2009 WL 618243 (S.D.N.Y. 2009), a Section 1782 application was unduly burdensome where the requested discovery required the nonparty to devote substantial resources to perform onerous searches and then review voluminous documents for a potentially small subset of company documents that dated back nearly 30 years.
 - *In re Kreke Immobilien KG*, 2013 U.S. Dist. LEXIS 160283, *20-21, (S.D.N.Y. November 8, 2013) (“Recent cases suggest that courts should be more inclined to grant applications that seek either a single document or only those documents relating to a particular event.”).
- **May be rejected or trimmed:** Unduly intrusive or burdensome requests under Section 1782 may be rejected or trimmed by the district court.
 - *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, (N.D. Ga. 2006) granted an application, but explicitly limited the production of documents by date and subject matter; *In Re Ex Parte Application of Mauricio Mota*, Misc. No. 19-00369 (MN), Jan. 8, 2020 (Delaware District Court) (denying petitioner’s request to issue additional subpoenas but allowing petitioner to submit more tailored requests for further subpoenas).

§ 1782 Actions in the Ecuador - Chevron Dispute: An Example

- Since 2010, the Chevron litigation has generated more than **50 orders and opinions involving Section 1782**. Chevron brought over 23 actions pursuant to the statute; Ecuador brought almost as many.
- This case has forever changed how investment treaty claims with ties to the U.S. will be litigated.

Section 1782 is a Powerful Tool But Is it a Good Thing?

- Resulted in:
 - Compelled Production of Millions of Documents
 - Compelled Production of Video, Movie Outtakes
 - Compelled Production of Hard Drives
 - Changed Nature and Maybe Even Outcome of Dispute

Why Has Section 1782 Become So Popular Recently?

- With the continued expansion of the global economy and the increase in cross-border transactions, the number of international commercial disputes has grown and there is demand for international judicial assistance in the fact-finding stages of litigation.
- Parties in foreign litigations are increasingly submitting Section 1782 requests and have been very successful in using the statute to obtain discovery for proceedings abroad.
- The statute enables litigants to use the United States' broad discovery process to obtain evidence that might otherwise be unavailable within the constraints of the foreign proceedings.



THANK YOU!