Austrian Arbitration Yearbook 2008

U.S. Discovery in Aid of International Arbitration and Litigation: The Expanded Role of 28 U.S.C. § 1782

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Wien 2008

Manzsche Verlags- und Universitätsbuchhandlung
Verlag C.H. Beck, München
Stämpfli Verlag, Bern

U.S. Discovery in Aid of International Arbitration and Litigation: The Expanded Role of 28 U.S.C. § 1782

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I. Introduction

While 28 U.S.C. § 1782 has been in existence in substantially the same form since 1964 to provide discovery assistance to foreign tribunals, it was not until 2004 that the United States Supreme Court breathed new life into this provision in its decision in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). Now, three years later, what was once a fairly obscure and seldom used section of the U.S. Code has become a major tool for international dispute resolution and an important weapon in any international practitioner's arsenal. Section 1782 offers great potential rewards to those who invoke it by making the U.S.'s liberal approach to discovery available to litigants in foreign proceedings. Such discovery includes the ability to take sworn deposition testimony of witnesses and request the production of documents or other tangible things. Recently, several U.S. courts have approved the use of § 1782 to obtain discovery for use in international arbitrations. Permission to conduct § 1782 discovery is not automatic, however, and an applicant must overcome certain hurdles. While the law regarding § 1782 is continuing to develop, it is clear that § 1782 has the potential to transform international dispute resolution.

In this article, we examine the history of § 1782 and its past limitations. We then discuss the Supreme Court's decision in *Intel* and how that decision established § 1782 as an essential discovery tool for international dispute resolution practitioners. We discuss this transformation particularly in the context of § 1782's expansion to international arbitration post-*Intel.* As an aid to international practitioners, we then consider the elements of a successful § 1782 application, including mandatory requirements listed in the statute and discretionary factors from the *Intel* decision. We also discuss scope restrictions on § 1782 discovery, extraterritorial reach concerning such discovery and other potential factors and defenses that courts may consider in ruling on a § 1782 application. We also discuss the issue of who has standing to object to § 1782 discovery, and we conclude with a practical how-to guide to bringing a § 1782 application in U.S. courts.

II. The History of § 1782 and Past Judicial Conflicts

Federal courts in the United States have provided for some manner of discovery assistance to foreign tribunals for over 150 years. In this section we examine this 150-year legislative history and also examine past conflicts that had arisen in U.S. courts regarding the application of § 1782.

A. Legislative History

In its current form, § 1782 provides 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.

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.[1])

How § 1782 arrived at this current form traces back to federal statutes from the mid-1800s providing for federal court assistance in collecting evidence for use in foreign courts.[2]) In 1948 and 1949, the U.S. Congress enacted further legislation broadening the scope of such discovery assistance. This legislation was codified at 28 U.S.C. § 1782 and extended the reach of discovery assistance first to any "civil action" and then to any "judicial proceeding" pending in any court in a foreign

[1]) 28 U.S.C. § 1782 (2000).

[2]) See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (providing for examination of witnesses in response to letters rogatory from foreign courts); Act of Mar. 3, 1863, ch. 95, 12 Stat. 769–770 (permitting federal courts to take testimony for use in "suits for the recovery of money or property" in any court in a foreign country with which the U.S. had peaceful relations and in which the foreign government was a party or had an interest).

country that had peaceful relations with the United States.[3]) Section 1782 also eliminated the requirement from the 1800s that the foreign government be a party or have an interest in the foreign suit.[4]) The provision, however, was limited to the taking of witness testimony and notably did not provide for the discovery of documents.[5])

In 1964, Congress revised § 1782 based on recommendations from the Commission on International Rules of Judicial Procedure (the "Commission"). Congress had created the Commission in 1958 to improve U.S. judicial assistance and cooperation with foreign countries.[6]) The 1964 revisions (with one later minor addition in 1996) amended § 1782 into its current wording.[7]) The 1964 revisions expanded the scope of § 1782 discovery to include documentary and tangible evidence, as well as testimony.[8]) The 1964 revisions also deleted the requirement that discovery be for use in a judicial proceeding pending in a court in a foreign country. Instead, Congress only required that the discovery be for use "in a proceeding in a foreign or international tribunal".[9]) According to the accompanying 1964 Senate Report, Congress used the word "tribunal" rather than "court" "to make it clear that assistance is not confined to proceedings before conventional courts" but was also available in proceedings before a "foreign administrative tribunal or quasi-judicial agency", including, for example, proceedings "pending before investigating magistrates".[10]) The Senate Report also recognized that judicial assistance would be available "whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature".[11])

The 1964 revisions combined for the first time into one section provisions dealing with (i) assistance to international tribunals and (ii) assistance to foreign courts and litigants.[12]) The old provisions on assistance to international tribunals

[3]) See Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949; Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

[4]) Id.

[5]) Id.

[6]) See Act of Sept. 2, 1958, Pub. L. 85-906, § 2, 72 Stat. 1743; S. Rep. No. 85-2392 (1958), reprinted in 1958 U.S.C.C.A.N. 5201, 5201. The Commission was assisted by a concurrent project on international procedure directed by Professor Hans Smit. This project issued a report in 1961 that criticized the use of the term "judicial proceeding" in § 1782 as possibly not including an investigative magistrate, juge d'instruction or foreign administrative tribunal, which may be considered quasi-judicial in nature. Hans Smit and Arthur R. Miller, International Co-Operation in Civil Litigation – A Report on Practices and Procedures Prevailing in the United States 13 (1961).

[7]) See Act of Oct. 3, 1964, Pub. L. 88-619, § 9, 78 Stat. 997; National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104–106, § 1342 (b), 110 Stat. 486.

[8]) Id.

[9]) Id.

[10]) S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

[11]) Id. at 3789.

[12]) See NBC v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999) (1964 revisions to § 1782 replaced 22 U.S.C. §§ 270–270g applying to international tribunals and old 28 U.S.C. § 1782 applying to judicial proceedings in any court in a foreign country); Hans Smit, Ameri-

had been found at 22 U.S.C. §§ 270–270g and authorized international, government-sanctioned tribunals to administer oaths, issue subpoenas and bring contempt charges.[13]) The 1964 revisions repealed these sections of the U.S. Code and reformulated them in § 1782 to "eliminate [...] the undesirable limitations [...] of the assistance extended by sections 270 through 270g".[14]) These limitations had been identified by Congress as extending assistance only to international tribunals established by a treaty to which the United States was a party and then only when the United States or one of its nationals was involved in proceedings before the international tribunal.[15]) In 1996, Congress further amended § 1782 (a) by adding the phrase "including criminal investigations conducted before formal accusation" after the phrase "in a proceeding in a foreign or international tribunal", bringing the statute to the wording that it contains today.[16])

Thus, the legislative history of § 1782 demonstrates a continual broadening of the scope of the provision. The limitations on U.S. judicial assistance evolved from assistance in "suits for the recovery of money or property" in a foreign court to "any civil action" in a foreign court to "any judicial proceeding" in a foreign court to "a proceeding in a foreign or international tribunal".[17]) Further, the scope of the provision was broadened to permit it to be invoked not only by governments but also private parties and to permit discovery of documents in addition to testimony. With these changes, Congress made the statute increasingly less restrictive and U.S. judicial assistance available in many more instances.

B. Past Conflicts Among the Courts

Prior to the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.,* there were conflicting rulings in federal courts regarding several aspects of § 1782.[18]) One conflict was whether § 1782 contained a "foreign-discoverability" requirement. That is, did § 1782 bar a U.S. court from granting discovery when the foreign tribunal or the interested person making the § 1782 application would not be able to obtain such discovery in the foreign jurisdiction? The U.S. Courts of Appeals for the First and Eleventh Circuits had held that § 1782

can 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, 1–3 (1998).

[13]) Act of July 3, 1930, ch. 851, §§ 1–4, 46 Stat. 10-06, as amended by Acts of July 3, 1930, ch. 851 §§ 5–8, ch. 50, 48 Stat. 117–118 (1933), repealed by Act of Oct. 3, 1964, § 3, 78 Stat. 995.

[14]) S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

[15]) Id. at 3784–3785, 3788–3789.

[16]) National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104–106, § 1342 (b), 110 Stat. 486.

[17]) See In re Letters Rogatory from the Justice Court, Dist. of Montreal, Can., 523 F.2d 562, 565 (6th Cir. 1975) (reviewing the evolution of Congress's extension of judicial assistance to the criminal processes of a foreign country).

[18]) Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

contained such a requirement.[19]) However, the Fourth and the Fifth Circuits had held that no foreign-discoverability requirement applied if the applicant seeking § 1782 discovery was a foreign sovereign.[20]) Adding to the confusion, the Second, Third, and Ninth Circuits had held that § 1782 did not contain a foreign-discoverability requirement.[21])

Another area of conflict was whether the proceeding before the foreign tribunal must be pending or at least imminent. The U.S. Court of Appeals for the District of Columbia had held that a foreign proceeding need only be within reasonable contemplation.[22]) The Ninth Circuit similarly had held that § 1782 did not require the foreign proceeding to be pending.[23]) However, the Second Circuit had held that the foreign proceeding must be imminent, that is, very likely to occur very soon.[24])

III. The U.S. Supreme Court's Decision in *Intel Corp. v. Advanced Micro Devices, Inc.*

In 2004, the U.S. Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*[25]) In this decision, the Court resolved several of the important past conflicts regarding the application of § 1782 while also expanding the reach of § 1782 and clarifying the standards for authorizing § 1782 discovery.[26])

As discussed in section II, *supra,* courts were in conflict over whether § 1782 contained a foreign-discoverability requirement and whether a proceeding before the foreign tribunal must be pending or imminent. The Supreme Court decided both of these issues in *Intel.* Regarding a foreign-discoverability requirement, the Court held that § 1782 was not subject to any such requirement.[27]) The Court stated that nothing in the statute's text or in the legislative history limited discovery to materials that could be discovered in the foreign jurisdiction if the materials

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19) See In re Astra Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992); In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988).

20) See In re Letter of Request from Amtsgericht Ingolstadt, F.R.G., 82 F.3d 590, 592 (4th Cir. 1996); In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venez., 42 F.3d 308, 310–311 (5th Cir. 1995).

21) See Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002); In re Bayer AG, 146 F.3d 188, 193–194 (3d Cir. 1998); In re Gianoli Aldunate, 3 F.3d 54, 59–60 (2d Cir. 1993).

22) In re Letter of Request from Crown Prosecution Serv. of U.K., 870 F.2d 686, 691 (D.C. Cir. 1989).

23) Advanced Micro Devices, 292 F.3d at 667.

24) In re Ishihara Chem. Co., 251 F.3d 120, 125 (2d Cir. 2001); In re Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991).

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

26) See generally id.

27) Id. at 259–263.

were located there.[28]) Further, the Court stated that, although comity between foreign governments and parity between litigants certainly could be important in deciding whether to grant a § 1782 application, such concerns did "not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782 (a)".[29])

Next, the Court rejected the requirement that the foreign proceeding be pending or imminent.[30]) Instead, the Court held that the foreign proceeding need only "be within reasonable contemplation".[31]) The Court relied on legislative history that reflected "Congress' recognition that judicial assistance would be available 'whether the foreign or international proceeding or *investigation* is of a criminal, civil, administrative, or other nature'".[32])

The Court also clarified and expanded who was an "interested person" and what constituted a "foreign or international tribunal". Regarding the term "interested person", the statutory language permits § 1782 discovery "upon the application of any interested person".[33]) The Court held that this text includes more than merely a person designated a litigant before the foreign or international tribunal, specifically rejecting the contention that an interested person must be a litigant, foreign sovereign or a designated agent of a foreign sovereign.[34]) Regarding the term "foreign or international tribunal", the Court held that § 1782 discovery extends to administrative and quasi-judicial agencies, including in that case a proceeding before the Directorate-General of Competition for the European Commission (an executive and administrative organ of the European Communities), to the extent it acts as a first-instance decisionmaker, i.e., renders a dispositive ruling responsive to the complaint and reviewable in court.[35]) The Court relied upon legislative history evidencing that § 1782 was intended to extend to administrative and quasi-judicial agencies and proceedings abroad.[36]) The Court also quoted with approval a law review article by Professor Smit that stated "[t]he term 'tribunal' […] includes investigating magistrates, administrative and *arbitral tribunals,* and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts".[37]) In a footnote, the Court stated that "[i]n light of the

[28]) Id. at 260.

[29]) Id. at 261. See section VI.3, infra, for the Court's discussion of the issue of parity among litigants. The Court further rejected the suggestion that a § 1782 applicant must show that it would be permitted under U.S. law to obtain the discovery sought if it was pursuing an analogous action in the U.S. Intel, 542 U.S. at 263.

[30]) Id. at 258–259.

[31]) Id. at 259.

[32]) Id. at 258, quoting S. Rep. No. 88-1580, at 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3789.

[33]) 28 U.S.C. § 1782 (1996).

[34]) Intel, 542 U.S. at 256.

[35]) Id. at 255, 257–258.

[36]) Id. at 257–258.

[37]) Id. at 258 (emphasis added), quoting Hans Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1026 n.71 (1965).

variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal'".[38])

The Court emphasized that U.S. district courts had discretion to permit discovery pursuant to § 1782 even when the statutory requirements were met.[39]) To assist courts in the exercise of their discretion, the Court listed the following four factors:

(1) Whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach, and thus accessible absent § 1782 aid.[40]) Specifically, the Court stated that "when the person from whom discovery is sought is a participant in the foreign proceeding […] the need for § 1782 (a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad".[41])

(2) "[T]he 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."[42])

(3) Whether the § 1782 application "conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States".[43])

(4) Whether the § 1782 application contains "unduly intrusive or burdensome requests".[44]) Such discovery requests "may be rejected or trimmed".[45])

In *Intel,* the Court was clear that it was rejecting the categorical limitations that the party opposing § 1782 discovery wanted to place on the use of § 1782.[46]) These included limitations of (i) who was an "interested person", (ii) what constituted a "foreign or international tribunal", (iii) the "pending" nature of the foreign proceeding and (iv) the foreign-discoverability rule.[47])

IV. The Extension of § 1782 to International Arbitration

U.S. courts have grappled for more than a decade with whether § 1782 permits parties to obtain discovery for use in international arbitrations. The issues include whether § 1782 extends to intergovernmental arbitrations, purely private commercial arbitrations, or both. In this section, we discuss the relevant cases,

38) Intel, 542 U.S. at 263 n.15.
39) Id. at 247, 260–261, 264–265.
40) See id. at 264.
41) Id.
42) Id.
43) Id. at 265.
44) Id.
45) Id.
46) Id. at 255.
47) Id. at 255–263.

both before and after *Intel,* and consider the impact of the *Intel* decision on this issue.

A. Arbitration Cases Pre-*Intel*

In 1994 in *In re Technostroyexport,* a U.S. district court found that § 1782 applied to private, international arbitrations.[48]) The case involved arbitration proceedings pending in Moscow and Stockholm between Technostroyexport, a Russian economic association, and IDTS, a New York corporation.[49]) The arbitrations had been initiated pursuant to contracts between Technostroyexport and IDTS.[50]) Technostroyexport brought a § 1782 application to obtain deposition testimony from IDTS' president and its sole shareholder, located in New York.[51]) In ruling on the application, the court stated:

> The court is of the view that an arbitrator or arbitration panel is a "tribunal" under § 1782. The court further believes that, if Technostroy had obtained a ruling from a foreign arbitrator that discovery should take place, the court would be empowered under § 1782 to enforce the ruling in the United States.[52])

However, the court held that because Technostroyexport had not obtained a ruling from the arbitrators regarding U.S. discovery, and instead proceeded in the first instance in U.S. court, the resort to § 1782 was improper.[53])

In 1996, in *In re Wilander,* a U.S. district court considered the related issue of whether a non-governmental private agency was a foreign or international tribunal within the meaning of § 1782.[54]) The tribunal in question was the Appeals Committee of the International Tennis Federation.[55]) The court, finding no support in the statute or legislative history that would include "a completely non-governmental private agency such as the ITF", ruled that this entity did not constitute a tribunal for purposes of § 1782 and rejected the application for discovery.[56])

The next U.S. case to examine the issue directly held that § 1782 did not extend to private international arbitration. The case, *In re Medway Power Limited,* dealt with an arbitration pending in the U.K. between two private parties.[57]) The

48) In re Technostroyexport, 853 F. Supp. 695, 697–699 (S.D.N.Y. 1994).
49) Id. at 696.
50) Id.
51) Id.
52) Id. at 697.
53) Id.
54) In re Wilander, No. 96 MISC 98, 1996 U.S. Dist. LEXIS 10357, at *6–7 (E.D. Pa. July 24, 1996).
55) Id. at *2.
56) Id. at *4–7.
57) In re Medway Power Ltd., 985 F. Supp. 402, 402–403 (S.D.N.Y. 1997).

arbitrator informally had requested discovery from a non-party in the U.S.[58]) The court, however, found that a private arbitration was not a tribunal under § 1782.[59]) The court stated:

> Congress intended this statute to assist official, governmental bodies exercising an adjudicatory function. The legislative history of Section 1782 does not suggest an intent to encompass unofficial, private arbitrations – which Congress and the courts have consistently treated as creatures of a contract which a court should enforce just like any other obligations imposed by private agreement.[60])

The court found evidence that "the ordinary understanding of 'tribunal' does not encompass private arbitrations".[61]) The court also distinguished *Technostroyexport* on the grounds that that case dealt with discovery from a party to the arbitration whereas here, discovery was requested from a non-party.[62]) The court also refused to allow § 1782 discovery because unlike a foreign tribunal, a private arbitrator has no power to order a non-party to produce discovery.[63]) The court stated that under U.K. law, the arbitrator in the U.K. would have to resort to a U.K. court to obtain an order compelling a non-party to provide discovery, at which point the U.K. court could request the assistance of the U.S. court.[64])

In 1999, the U.S. Court of Appeals for the Second Circuit held in *National Broadcasting Co, Inc. v. Bear Stearns & Co.,* that § 1782 is not available to obtain discovery for a private international arbitration.[65]) In the course of an arbitration in Mexico administered by the International Chamber of Commerce, a party to the arbitration sought § 1782 discovery from non-parties in the U.S.[66]) The court stated that because the text "foreign or international tribunal" in § 1782 was sufficiently ambiguous as to whether it included or excluded private commercial arbitration, the court would examine the legislative history of the provision.[67]) The court concluded:

> [T]he 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.

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58) Id. at 403.

59) Id.

60) Id.

61) Id. The court noted that other unrelated sections of the U.S. Code, such as 5 U.S.C. § 552b (c) (10) (1997), distinguished between tribunals and arbitrations. Id.

62) Id. at 404.

63) Id. at 404–405.

64) Id. at 405.

65) See NBC v. Bear Stearns & Co., 165 F.3d 184, 188–191 (2d Cir. 1999).

66) Id. at 186.

67) Id. at 188.

> 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.[68])

The court also relied upon policy considerations to support its holding.[69]) In the court's view, broad-based U.S. discovery likely would undermine the significant advantages of private arbitration–efficiency and cost-effectiveness–and would be inconsistent with the limited evidence gathering permitted for U.S. domestic arbitration under the Federal Arbitration Act, 9 U.S.C. § 7.[70])

A few months after *NBC,* the U.S. Court of Appeals for the Fifth Circuit, in *In re Republic of Kazakhstan,* also held that § 1782 did not apply to private international arbitrations.[71]) The case involved a party to a private arbitration, administered by the Arbitration Institute of the Stockholm Chamber of Commerce, seeking § 1782 discovery from a non-party in the U.S.[72]) In holding that § 1782 did not apply to private international arbitrations, the court stated it was following the Second Circuit in *NBC.* Like the Second Circuit, it examined § 1782's legislative history and found "no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration".[73]) The court also based its holding on a comparison to domestic arbitration procedure, stating that it was not likely that Congress intended to permit broader discovery under § 1782 for international private arbitrations than for domestic private arbitrations.[74]) Finally, the court looked to policy considerations, stating that § 1782 should not be used to circumvent "private international arbitration's

[68]) Id. at 190. As part of the lengthy discussion of the legislative history, the court noted that the Senate Report regarding the 1964 revisions to § 1782 relied upon the following article: Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 Colum. L. Rev. 1264 (1962). NBC, 165 F.3d at 190 n.6. Professor Smit had directed a project that aided the Commission formed by Congress to recommend changes to § 1782. In that article, Professor Smit stated that "an international tribunal owes both its existence and its powers to an international agreement". *Smit,* Assistance Rendered by the United States, at 1267.

[69]) See NBC, 165 F.3d at 190–191.

[70]) Id. at 191.

[71]) In re Republic of Kaz., 168 F.3d 880, 881 (5th Cir. 1999).

[72]) Id.

[73]) Id. at 882. The court quoted the same note from Professor Smit's 1965 law review article mentioning arbitral tribunals that Intel subsequently quoted, but concluded that such note did not go beyond governmental arbitrations. Id. at 882 n.4, quoting Hans Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1026 n.71 (1965) ("'tribunal' embraces all bodies exercising adjudicatory powers, and includes […] administrative and arbitral tribunals").

[74]) Republic of Kaz., 168 F.3d at 882–883. The court cautioned that the differences in available discovery could create new disputes regarding the characterization of private arbitrations as domestic or international. Id. at 883, citing NBC, 165 F.3d at 188–190.

greatest benefits", namely "a speedy, economical, and effective means of dispute resolution" with limited discovery.[75])

In a footnote, the court acknowledged that, following the 1964 revisions to § 1782, a majority of commentators, including Professor Smit in a law review article in 1998, were of the view that § 1782 extended to private commercial arbitrations.[76]) However, the court disregarded the views of the commentators, including Professor Smit, because they were not made contemporaneously with the 1964 revisions to § 1782.[77])

B. Arbitration Cases Post-*Intel*

Cases after *Intel* have approved of the use of § 1782 for international arbitrations, both governmental/intergovernmental and private. In 2006, in *In re Oxus Gold,* a magistrate judge in the U.S. District Court in New Jersey authorized the use of § 1782 to permit a United Kingdom company to issue a subpoena for documents and deposition testimony in aid of an investor-state arbitration in London.[78]) Oxus Gold, a party to the dispute, sought § 1782 discovery from non-parties for use in the arbitration as well as in several related court proceedings.[79]) The arbitration was being conducted pursuant to a bilateral investment treaty ("BIT") between the United Kingdom and the Kyrgyz Republic.[80]) The magistrate judge held that the arbitration panel constituted a foreign or international tribunal under § 1782.[81]) The magistrate judge relied on *Intel*'s finding that the use of § 1782, was not limited to conventional courts but also extended to administrative and quasi-judicial proceedings.[82]) Further, the magistrate judge cited the pre-*Intel* decision *NBC* for the proposition that governmental and intergovernmental arbitral tribunals were covered under § 1782, although international arbitrations resulting from private agreements were not.[83]) Because both the United Kingdom and the Kyrgyz Republic had authorized the arbitration for the purpose of adjudicating disputes under the BIT, the magistrate judge found that the proceeding was governmental or intergovernmental and was not the result of a private agreement.[84])

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[75]) Republic of Kaz., 168 F.3d at 883.

[76]) Id. at 882 n.5. In the 1998 law review article, Professor Smit made clear that he believed § 1782 extended to private international arbitration, and he criticized Medway and NBC. Smit, American Assistance, supra note 12, at 5–8.

[77]) Republic of Kaz., 168 F.3d at 882.

[78]) In re Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615 (D.N.J. Oct. 11, 2006).

[79]) Id. at *1–2, 6.

[80]) Id. at *6.

[81]) Id.

[82]) Id.

[83]) Id.

[84]) Id.

Subsequently, the chief judge of the U.S. District Court in New Jersey affirmed the magistrate judge's ruling in *Oxus Gold* that authorized the § 1782 discovery.[85]) The party opposing § 1782 discovery argued that the arbitration was merely a private commercial arbitration because the panel consisted of three private individuals chosen by the parties and did not involve any claims between sovereign nations or their instrumentalities.[86]) The chief judge disagreed. Acknowledging that the arbitration was between private litigants, the Court pointed to the fact that Article 8 of the BIT between the United Kingdom and the Kyrgyz Republic mandated that disputes between nationals of the two countries be resolved by arbitration governed by international law (the Arbitration Rules of the United Nations Commission on International Trade Law).[87]) The Court found, therefore, that the arbitration was a governmental or intergovernmental arbitration because it was being conducted within a framework defined and authorized by two nations.[88])

Shortly after the magistrate judge's decision in *Oxus Gold,* a U.S. District Court in Atlanta, Georgia, took the next step, holding that § 1782 could be used to obtain evidence for a private international commercial arbitration. In *In re Roz Trading Limited,* Roz Trading, a Cayman Islands company, sought documents from Coca-Cola for use in an arbitration before a panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the "Centre").[89]) Roz Trading and a subsidiary of Coca-Cola were parties to the arbitration pursuant to a joint-venture agreement.[90]) The court held that private arbitral panels, including those under the auspices of the Centre, were "tribunals" for purposes of §1782 and ordered Coca-Cola to produce documents.[91]) The court relied on the Supreme Court's ruling in *Intel* that the Directorate-General of Competition for the European Commission (the "DG-Competition") was a "tribunal" under § 1782.[92]) Similar to the DG-Competition, the court found the Centre to be a first-instance decisionmaker that issued dispositive rulings, responsive to a complaint and reviewable in court.[93]) The court held "[t]he Centre, when examined under the same functional lens with which the Supreme Court in *Intel* examined the DG-Competition, must necessarily be considered a 'tribunal' under *§ 1782 (a)*".[94])

[85]) In re Oxus Gold PLC, No. Misc. 06-82-GEB, 2007 WL 1037387, at *1 (D.N.J. Apr. 2, 2007).
[86]) Id. at *4.
[87]) Id. at *5.
[88]) Id. at *4–5.
[89]) In re Roz Trading Ltd., 469 F. Supp. 2d 1221, 1222 (N.D. Ga. 2006).
[90]) Id.
[91]) Id. at 1224–1228.
[92]) Id. at 1224–1225.
[93]) Id. at 1225.
[94]) Id.

The *Roz Trading* court also based its holding on the statutory language of § 1782. Specifically, the court held that the word "tribunal" was unambiguous and should be construed consistent with its common usage and widely accepted definition, which includes arbitral bodies.[95]) The court further found that there was no clearly expressed legislative intent to the contrary.[96]) The court added that the "clear import" of the 1964 revisions to § 1782 was "to broaden the scope of the statute to include non-judicial proceedings", citing *Intel's* note that Congress recognized that "judicial assistance would be available whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature".[97])

The court also found that the *NBC* and *Republic of Kazakhstan* decisions had been undermined by the Supreme Court's ruling in *Intel*. Specifically, it concluded that those decisions had come to the unsupported and incorrect view that the term "tribunal" was ambiguous and thus unnecessarily resorted to legislative history.[98]) Further, according to the court, even resorting to legislative history, *Intel* found a legislative intent to broaden the scope of the term "tribunal" beyond governmental proceedings and rejected placing strict limitations on § 1782.[99])

The *Roz Trading* court rejected a motion to stay its decision pending appeal.[100]) It held that Coca-Cola had not demonstrated that it was likely to succeed on the merits on appeal on the issue of whether the Centre was a tribunal under § 1782.[101]) The court stated "*Intel* directs the Court to interpret § 1782 by its terms. The text of § 1782 (a) provides no basis for distinguishing between 'public' and 'private' arbitral tribunals".[102]) Subsequently, the U.S. Court of Appeals for the Eleventh Circuit dismissed the *Roz Trading* appeal for lack of jurisdiction. The Eleventh Circuit held that the District Court's order directing production of documents was not a final or immediately appealable order because it contemplated further substantive proceedings concerning the scope of discovery.[103])

In June 2007, in *In re Hallmark Capital Corp.,* the U.S. District Court for the District of Minnesota granted a § 1782 application permitting discovery for use in an Israeli arbitration between two private parties, Hallmark Capital Corporation

[95]) Id. at 1225–1226.

[96]) Id. at 1226.

[97]) Id., quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004). The court commented that Congress easily could have added the word "governmental" before the word "tribunal" if it so wanted to limit § 1782. Roz Trading, 469 F. Supp. at 1226 n.3.

[98]) Roz Trading, 469 F. Supp. at 1227–1228.

[99]) Id.

[100]) In re Roz Trading Ltd., No. 06-CV-02305-WSD, 2007 WL 120844, at *1 (N.D. Ga. Jan. 11, 2007).

[101]) Id.

[102]) Id. at n.1.

[103]) Order at 1, Roz Trading Ltd. v. Coca-Cola Co., No. 07-10059-JJ (11th Cir. Mar. 23, 2007).

and UltraShape Inc.[104]) The court relied on *Roz Trading* in holding that the arbitral panel was a tribunal under § 1782.[105])

C. Analysis of Arbitration Cases and *Intel*'s Impact

Prior to *Intel,* the clear weight of the case law (*NBC, Republic of Kazakhstan, Medway* and *Wilander*) opposed extending § 1782 to private arbitration. At the same time, there was at least some support *(NBC)* for the proposition that § 1782 could be used to obtain discovery for intergovernmental arbitration. In the face of this case law, a majority of commentators, importantly Professor Smit, were of the view that § 1782 was applicable to private commercial arbitrations.[106])

Post-*Intel,* U.S. district courts have taken a broader view of § 1782 and extended § 1782 not only to governmental or intergovernmental international arbitrations but also to private international arbitrations. *Oxus Gold* took the first step by relying on the *Intel* and *NBC* decisions to hold that § 1782 could be used to obtain discovery in bilateral investment treaty arbitrations. *Roz Trading* took the next step by extending § 1782 to private international arbitrations conducted pursuant to private contract. Subsequently, *In re Hallmark* agreed with *Roz Trading* on this point.

Thus, in the period following *Intel,* courts have both read the *Intel* decision consistently with the *NBC* decision as limiting § 1782 to governmental or intergovernmental arbitrations and as support for extending the statute to private arbitrations. It now seems clear that governmental or intergovernmental international arbitrations fall within the scope of § 1782. As for private international arbitrations, the issue is less settled, with arguments on each side.

Arguments for Extending § 1782 to Private International Arbitrations

There are at least four arguments which emerge from the case law for extending § 1782 to private international arbitrations. A first argument is that in determining what constitutes a foreign or international tribunal, *Intel* focused on the function of the reviewing body at issue rather than its formal identity or label.[107]) In *Roz Trading,* the court viewed private arbitral tribunals as fitting *Intel*'s functional criteria of a first-instance decisionmaker that issues dispositive rulings, responsive to a complaint and reviewable in court.[108])

[104]) Order at 3, In re Hallmark Capital Corp., No. 07-mc-00039-JNE-SRN (D. Minn. June 1, 2007).

[105]) Id. at 2.

[106]) See In re Republic of Kaz., 168 F.3d 880, 882 n.5 (5th Cir. 1999) (quoting Smit).

[107]) See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 255, 257–258 (2004).

[108]) In re Roz Trading Ltd., 469 F. Supp. 2d 1221, 1225 (N.D. Ga. 2006).

A second argument is that the plain meaning of the term tribunal in § 1782 includes private international arbitration. *Roz Trading* found that the term tribunal unambiguously included private international arbitrations and as such the court did not need to resort to examining legislative history.[109])

A third argument is that in the event the legislative history of § 1782 is examined, there is no indication that Congress meant to exclude private international arbitrations,[110]) and further there is support in the legislative history for the conclusion that Congress intended to extend § 1782 beyond conventional courts.[111]) A part of this argument is that because the 1964 revisions significantly broadened the scope of § 1782, Congress could have expressly limited the scope of § 1782 to governmental or intergovernmental tribunals if it had wanted to, but it did not.[112])

A fourth argument is that Professor Smit, who had involvement in what led to the 1964 revisions of § 1782, and a majority of other commentators are of the view that private international arbitrations are included in the term tribunal under § 1782.[113])

Arguments Opposing Extending § 1782 to Private International Arbitrations

However, there are at least three arguments which emerge from the case law for opposing extending § 1782 to private international arbitrations. First, it can be argued that *NBC* and *Republic of Kazakhstan* have not been overruled by *Intel* and are still good law. As the *Oxus Gold* decisions demonstrate, *NBC* and *Republic of Kazakhstan* have been read consistently with *Intel* to extend § 1782 to governmental international arbitrations but not private international arbitrations.[114]) A second argument is that the term tribunal in § 1782 is ambiguous as to whether it includes private international arbitrations, and the legislative history does not offer support for such inclusion because it fails to specifically reference private international arbitrations.[115])

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[109]) Roz Trading, 469 F. Supp. 2d at 1224–1226; In re Roz Trading Ltd., No. 06-CV-02305-WSD, 2007 WL 120844, at *1 (N.D. Ga. Jan. 11, 2007).

[110]) Roz Trading, 469 F. Supp. 2d at 1226.

[111]) See, e.g., S. Rep. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788–3789; Roz Trading, 469 F. Supp. 2d at 1226.

[112]) Roz Trading recognized that the 1964 revisions to § 1782 replaced prior statutes that were expressly limited to intergovernmental international tribunals. 469 F. Supp. 2d at 1227 n.5. Thus, according to the court, Congress knew how to limit judicial assistance in this manner. Id.

[113]) See Hans Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1026 n.71 (1965); Smit, American Assistance, supra note 12, at 5–8; see also commentators cited in In re Republic of Kaz., 168 F.3d 880, 882 n.5 (5th Cir. 1999).

[114]) In re Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006); In re Oxus Gold PLC, No. Misc. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007).

[115]) NBC and Republic of Kazakhstan found the term “tribunal” to be ambiguous and

A third argument is that policy considerations favor not extending § 1782 to private international arbitrations. *NBC* and *Republic of Kazakhstan* recognized an inconsistency caused by permitting broad discovery in private international arbitrations where private parties have agreed in advance to proceed by certain rules limiting discovery. Further, broad discovery for private international arbitrations could create tension with U.S. domestic arbitrations to the extent such domestic arbitrations permit only more limited discovery.[116])

Outlook

Whether additional courts will follow the *Roz Trading* decision and allow § 1782 to be used in conjunction with private international arbitrations remains to be seen.[117]) It appeared the Eleventh Circuit would be able to make an important decision in this regard in deciding the appeal of *Roz Trading;* however, that court dismissed the appeal on procedural grounds.

V. Section 1782's Mandatory Requirements and Discretionary Factors

When seeking § 1782 discovery, a party must satisfy the mandatory statutory requirements as well as the four factors from the *Intel* decision, which should guide a court in exercising its discretion. In this section, we discuss these mandatory requirements and discretionary factors.

A. The Mandatory Requirements

The text of § 1782 (a) imposes four requirements that must be satisfied before an application for §1782 discovery will be granted:

> (1) the request must be made "by a foreign or international tribunal", or by "any interested person", (2) the request must seek evidence, whether it

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to not include private international arbitrations. NBC v. Bear Stearns & Co., 165 F.3d 184, 188–190 (2d Cir. 1999); Republic of Kaz., 168 F.3d at 882. Medway found that the ordinary understanding of "tribunal" did not encompass private international arbitrations. In re Medway Power Ltd., 985 F. Supp. 402, 403 (S.D.N.Y. 1997).

116) See discussion in NBC, 165 F.3d at 187–188, 190–191; Republic of Kaz., 168 F.3d at 882–883. A further argument against extending § 1782 to private international arbitration is the wording of the second discretionary factor from Intel, that considers "the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance". Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004). This factor, which the Court extracted from the legislative history of § 1782, appears to focus only on governmental bodies.

117) One court already has followed Roz Trading in this regard. See Order at 3, In re Hallmark Capital Corp., No. 07-mc-00039-JNE-SRN (D. Minn. June 1, 2007).

be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application of assistance.[118])

Person Seeking Discovery

Section 1782 may be invoked by a "foreign or international tribunal" or an "interested person".[119]) As discussed above in section III, an "interested person" includes, but is not required to be, a litigant, foreign sovereign or a designated agent of a foreign sovereign.[120]) An "interested person" also includes any other person possessing a reasonable interest in obtaining judicial assistance.[121])

Type of Discovery

The applicant may seek discovery in the form of the testimony or statement of a person or the production of documents or other tangible things.[122]) In practice, this requirement translates into depositions and document requests. One court has held that interrogatories or requests for admissions are not permitted under § 1782.[123])

Use of Discovery in a Proceeding in a Foreign or International Tribunal

The discovery must be "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation".[124]) Courts have held that the "for use in" requirement is satisfied if the evidence sought is relevant to a claim or defense before the foreign tribunal.[125]) An applicant need not, however, show that the evidence would be admissible.[126])

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[118]) In re Clerici, 481 F.3d 1324, 1331–1332 (11th Cir. 2007), citing 28 U.S.C. § 1782 (a).

[119]) 28 U.S.C. § 1782 (a).

[120]) See Intel, 542 U.S. at 256.

[121]) See id., quoting Hans Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1027 (1965). See also In re Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615, at *6–7 (D.N.J. Oct. 11, 2006) (finding that Oxus Gold PLC, an international mining group and majority parent of Talas Gold Mining Company, the party to the arbitration, was an "interested person").

[122]) 28 U.S.C. § 1782 (a).

[123]) Ishihara Chem., Co., 121 F. Supp. at 220–225.

[124]) 28 U.S.C. § 1782 (a).

[125]) See In re Oxus Gold PLC, No. Misc. 06-82-GEB, 2007 WL 1037387, at *5–6 (D.N.J. Apr. 2, 2007) (finding that requested discovery was "for use" in a proceeding because the information sought might be of some relevance to the trial court after the matter was remanded from the Kyrgyz Supreme Court).

[126]) See In re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court

Moreover, the foreign proceeding only needs to be within "reasonable contemplation", as opposed to pending or imminent.[127]) Finally, the requested discovery may be for use in more than just the foreign proceeding for which it is requested. For example, in *In re Michael Wilson & Partners, Ltd.,* the court allowed a § 1782 discovery application by Michael Wilson & Partners, Limited, an international law firm, requesting discovery from former clients that would be "for use in" a lawsuit pending in England, but that might also be used in private arbitration proceedings ancillary to the pending lawsuit.[128])

The term "foreign or international tribunal" is discussed above in sections III and IV. Under the Supreme Court's decision in *Intel,* the relevant inquiry is whether the foreign body acts as a first-instance decisionmaker, rendering a dispositive ruling responsive to the complaint and reviewable in court.[129]) This includes governmental and intergovernmental international arbitrations, and, by the reasoning of some (though not all) courts, private international arbitrations.[130]) Foreign courts and arbitral tribunals are not the only foreign bodies to have been examined; U.S. courts have held that the term "foreign or international tribunal" includes[131]) and excludes[132]) certain other foreign bodies.

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of Braz., 466 F. Supp. 2d 1020, 1027–1030 (N.D. Ill. 2006) (holding that "for use in" did not require that discovery be admissible in the foreign proceeding but should be construed consistent with the Federal Rules of Civil Procedure 26 (b) (1) to mean "discovery that is relevant to the claim or defense of any party, or […] any matter relevant to the subject matter involved in the foreign action" and finding that where personnel files and reasons for decision to fire petitioners were related to petitioner's wrongful termination litigation in Brazil, these materials were "for use in" within the meaning of § 1782); In re Imangement Serv. Ltd., No. 05-2311 (JAG), 2006 U.S. Dist. LEXIS 8876, at *6 (D.N.J. 2006) (finding that discovery was "for use in" the foreign court if the applicant intended to offer the evidence to the foreign court, but that the court did not need to know whether the foreign court would actually accept the evidence).

[127]) See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004).

[128]) In re Michael Wilson & Partners, Ltd., No. 06-cv-02575-MSK-PAC (MEH), 2007 WL 2221438 at *2 (D. Colo. July 27, 2007).

[129]) See Intel, 542 U.S. at 255, 257–258.

[130]) See section IV, supra.

[131]) See In re Microsoft Corp., 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (holding that the European Commission qualified as a "foreign tribunal"); In re Ishihara Chem., Co., 121 F. Supp. 2d 209, 218, rev'd on other grounds, 251 F.3d 120 (2d Cir. 2001) (holding that a proceeding before the Japanese Patent Office seeking to invalidate a patent was a "foreign proceeding" before a "foreign tribunal" because the proceeding was adversarial and the Japanese Patent Office was the "neutral adjudicator of the parties' dispute").

[132]) In re Wilander, No. 96 MISC 98, 1996 U.S. Dist. LEXIS 10357, at 6 (E.D. Pa. July 24, 1996) (holding that the Appeals Committee of the International Tennis Federation, a non-governmental private agency, was not a "foreign or international tribunal" under § 1782); In re Letters Rogatory Issued by Dir. of Inspection of the Gov't of India, 385 F.2d 1017, 1021 (2d Cir. 1967) (concluding that an Indian Income-Tax Office was not a "tribunal" within the meaning of § 1782 because the office's main function was tax assessment rather than tax proceedings).

Location of Person from Whom Discovery Is Sought

The "person" from whom discovery is sought must "reside […]" or be "found" in the district in which the application for § 1782 discovery is brought.[133]) The term "person" includes a corporation or other business entity found within the district.[134]) For purposes of § 1782, a "person" may be a party or a non-party to the foreign proceeding.[135]) The person from whom the applicant seeks discovery need not be a resident of the district; rather, the person only needs to be found in the district.[136]) Courts look to the particular facts and circumstances of the case to determine whether a person is "found"[137]) or "not found"[138]) in the district.

B. The Discretionary Factors

Once the mandatory requirements are met, the district court must then decide whether to exercise its discretion to grant § 1782 discovery. As discussed in section III, *supra,* the Supreme Court in *Intel* suggested four factors to guide a district court in exercising this discretion.

Participant or Nonparticipant

Pursuant to *Intel,* "when the person from whom discovery is sought is a participant in the foreign proceeding […] the need for § 1782 aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the

[133]) 28 U.S.C. § 1782 (a).

[134]) See, e.g., In re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Braz., 466 F. Supp. 2d 1020, 1023 (N.D. Ill. 2006) (granting a § 1782 discovery request against McDonald's Corporation for use in two Brazilian lawsuits); In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1113 (E.D. Wis. 2004) (granting a § 1782 discovery request against Kimberly-Clark Corporation and Kimberly-Clark Worldwide, Inc., for use in lawsuits commenced in the United Kingdom, France, The Netherlands, Germany, and Japan).

[135]) See In re Ishihara Chem, 121 F. Supp. at 218–220.

[136]) See In re Oxus Gold PLC, No. Misc. 06-82, 2006 WL 2927615, at *5 (D.N.J. Oct. 11, 2006) (noting, "Section 1782 (a) provides that a district court may authorize discovery of a person who resides or is found in the district").

[137]) See, e.g., In re Michael Wilson & Partners, Ltd., No. 06-cv-02575-MSK-PAC (MEH), 2007 WL 2221438 at *2 (D. Colo. July 27, 2007) (finding that two corporations with their principal places of business in Colorado were found in Colorado, even though their primary corporate representatives were overseas); In re Oxus Gold PLC, 2006 WL 2927615, at *5 (finding that the party from whom discovery was sought was found in New Jersey because he leased an apartment there, maintained regular doctor appointments with a physician there, and spent at least two months there every year for vacation and family visits).

[138]) See, e.g., In re Microsoft Corp., 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (finding that although the party from whom discovery was sought was a partner at a law firm in New York and a member of the New York bar, he was not found in New York because he had not been present there since the § 1782 discovery subpoenas had been issued and had not been personally served there).

matter arising abroad".[139]) The rationale is that a foreign tribunal has jurisdiction over a party appearing before it ("participant"), and can itself order the party to produce evidence.[140]) On the other hand, a party not appearing before the foreign tribunal in the foreign proceeding ("nonparticipant") is likely to be outside the foreign tribunal's jurisdictional reach, and obtaining evidence from a nonparticipant may not be possible for the foreign tribunal without § 1782 aid.[141])

Accordingly, courts find the fact that the discovery is being sought from a nonparticipant to be a strong factor in favor of granting a § 1782 application.[142])

Courts may permit § 1782 to be used to obtain discovery from a participant.[143]) However, the fact that discovery is being sought from a participant generally weighs against granting the request.[144]) Indeed, in an unpublished decision,

[139]) Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004).

[140]) Id.

[141]) Id.

[142]) See, e.g., In re Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *18–19 (S.D.N.Y. Dec. 29, 2006) (finding that New York based global consulting firm McKinsey Company, Inc., which had prepared a report that was at issue in a German court action, was a nonparticipant and that this weighed "decisively" in favor of permitting § 1782 discovery); In re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Braz., 466 F. Supp. 2d 1020, 1030–1031 (N.D. Ill. 2006) (finding that parent corporation, McDonald's, was not a party to a suit in which its wholly-owned subsidiary, McCal, was sued and that this supported granting a § 1782 application); In re Imangement Serv. Ltd., No. 05-2311 (JAG), 2006 U.S. Dist. LEXIS 8876, at *10 (D.N.J. 2006) (allowing § 1782 discovery and commenting that "[t]he assistance of § 1782 (a) may be especially necessary since, as a non-participant in the Russian Action, [the non-participant] may be outside the reach of the Russian court's jurisdiction, and discovery from him may be unobtainable without the assistance").

[143]) See, e.g., In re Clerici, 481 F.3d 1324, 1334 (11th Cir. 2007) (affirming district court order permitting § 1782 discovery from a participant to a Panamanian suit where the participant had subsequently left Panama and moved to the United States); In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1114–1115 (E.D. Wis. 2004) (ordering § 1782 discovery from a participant who had commenced infringement suits in the United Kingdom, France, The Netherlands, Germany, and Japan: "it is more efficient for a court located in the Eastern District of Wisconsin to order discovery from persons located in such district than to force [petitioner] to seek the same discovery in as many as five foreign actions and return to this court if its efforts fail").

[144]) See, e.g., In re Nokia Corp., No. 1:07-MC-47, 2007 U.S. Dist. LEXIS 42883, at *14 (W.D. Mich. 2007) (in denying a § 1782 application, the court stated that fact that discovery was requested from a party weighed against granting the application); In re Digitechnic, No. C07-414-JCC, 2007 WL 1367697, at *4 (W.D. Wash. May 8, 2007) (denying a § 1782 application for discovery from a participant in French litigation because "French discovery devices can adequately provide what [the requesting party] seeks"); Advanced Micro Devices v. Intel Corp., No C 01-7033, 2004 WL 2282320, at *2 (N.D. Cal. Oct. 4, 2004) (on remand, denying a § 1782 application in part because the discovery was being sought from a participant to the foreign proceeding); accord Schmitz v. Bernstein Liebhard & Lifshitz, LLP., 376 F.3d 79, 85 (2d Cir. 2004) (affirming denial of § 1782 application where discovery was sought from nonparticipant New York law firm (Cravath, Swaine & Moore), but was, "for all intents and purposes", targeted at Deutsche Telekom AG, a German corporation that had retained the law firm and was a participant in the German proceeding).

the Eleventh Circuit, in dicta, implied that the person from whom discovery is sought *must* be outside of the jurisdiction of the foreign tribunal.[145])

Receptivity of the Foreign Tribunal

The second *Intel* factor considers "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".[146]) In applying this factor, courts focus on the receptivity of the foreign tribunal to the evidence. Where the foreign government or tribunal has made clear that it does not want evidence from abroad, this factor weighs strongly against allowing § 1782 discovery.[147])

Alternatively, a specific request for § 1782 discovery by the foreign government or tribunal supports permitting such discovery.[148]) A lack of evidence that the foreign government or tribunal opposes § 1782 discovery supports permitting such discovery[149]) or is non-decisive.[150]) Further, the "receptivity of a foreign court to U.S. federal assistance may be inferred from the existence of treaties that

[145]) Lopes, 180 Fed. App'x at 877. In the case, the court ultimately granted discovery from a nonparticipant. Id. at 878.

[146]) Intel, 542 U.S. at 264.

[147]) See, e.g., Schmitz, 376 F.3d at 81–85 (denying § 1782 application for discovery for use in civil proceedings in Germany where the German Ministry of Justice and the Bonn Prosecutor had made specific requests to deny § 1782 discovery on the grounds that it would interfere with a related criminal investigation); In re Microsoft Corp., 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (quashing § 1782 discovery requests opposed by the European Commission). On remand of the Intel case, the district court denied the § 1782 application in part because the foreign tribunal had objected to such discovery. Advanced Micro Devices, 2004 WL 2282320, at *2.

[148]) In re Clerici, 481 F.3d at 1335 (affirming decision to permit § 1782 discovery where a Panamanian court had sent a letter rogatory requesting evidence from a party who was residing in Florida).

[149]) See, e.g., In re Roz Trading Ltd., No.1: 06-CV-02305-WSD, 2007 WL 120844, at *2 (N.D. Ga. Jan. 11, 2007) (stating that the court was not required to find that the foreign tribunal would "welcome and accept" the § 1782 discovery, and holding that it was proper for the court to grant § 1782 discovery where the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna did not have a policy against accepting the aid of U.S. courts); In re Igor Kolomoisky, No. M19-116, 2006 U.S. Dist. LEXIS 58591, at *5–6 (S.D.N.Y. Aug. 18, 2006) (granting § 1782 discovery where there was no evidence that the Russian government or Russian court in which the foreign proceeding was pending opposed the discovery); accord In re Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *24 (S.D.N.Y. Dec. 29, 2006) (observing in granting a § 1782 discovery request: "If in fact the Appellate Social Court opposes United States assistance, that court may simply choose to exclude the discovered material from evidence").

[150]) See, e.g., Kang v. Nova Vision, Inc., No. 06-21575-CIV, 2007 WL 1879158, at *2 (S.D. Fla. June 26, 2007) (finding fact that the German court where the suit was pending had neither requested nor indicated it would use the discovery was indecisive).

facilitate cooperation between the U.S. federal judiciary and the foreign jurisdiction".[151])

Circumvention of Foreign Proof Gathering Restrictions

The third discretionary factor is "whether the § 1782 application conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States".[152]) To decline § 1782 discovery on this ground, "a district court must conclude that the request would undermine a specific policy of a foreign country or the United States".[153]) When a party has petitioned a foreign tribunal for discovery, a U.S. court may find it is improper for that party to make a parallel discovery request under § 1782 as a means to override any adverse ruling by the foreign tribunal or in hopes that one discovery request will pay off.[154]) In *Microsoft,* the court explained that allowing discovery in such a case pits the United States court against the foreign tribunal and violates established principles of comity.[155]) Nonetheless, the fact that a party was unable to obtain discovery abroad does not foreclose the use of § 1782.[156])

The timing of the § 1782 request may be significant. One court, has viewed an eleventh-hour request for § 1782 discovery never sought in the foreign tribunal as appearing to circumvent foreign proof-gathering restrictions.[157]) Conversely,

[151]) See In re Imangement Serv. Ltd., No. 05-2311 (JAG), 2006 U.S. Dist. LEXIS 8876, at *11–13 (D.N.J. 2006) (inferring receptivity of Russian court to U.S. federal discovery assistance based on the existence of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, to which both Russia and the U.S. are parties).

[152]) Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004). Some courts have read Intel as suggesting only three factors, combining receptivity of the foreign tribunal with circumvention of foreign proof-gathering requirements. See, e.g., In re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Braz., 466 F. Supp. 2d 1020, 1030 n.3 (N.D. Ill. 2006), quoting Intel, 542 U.S. at 264–265 ("It is impossible to determine if an applicant is attempting to circumvent proof-gathering restrictions […] without examinings '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.'").

[153]) See In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1116 (E.D. Wis. 2004) (granting § 1782 application where requested discovery would not undermine the foreign policies of the several foreign countries in which proceedings were pending and that granting such discovery imposed no costs on the foreign governments or their inhabitants).

[154]) In re Microsoft Corp., 428 F. Supp. 2d 188, 195–196 (S.D.N.Y. 2006). See also, In re Nokia Corp., No. 1:07-MC-47, 2007 U.S. Dist. LEXIS 42883, at *14–16 (W.D. Mich. 2007) (declining to permit § 1782 discovery for use in a licensing dispute in a German court where the parties had pending parallel requests for evidence production in the German court).

[155]) Id.

[156]) In re Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *25–26 (S.D.N.Y. Dec. 29, 2006) (granting § 1782 request despite fact that party had previously tried, but failed, to obtain the requested discovery in two German proceedings).

[157]) In re Digitechnic, No. C07-414-JCC, 2007 WL 1367697, at *5 (W.D. Wash. May 8,

another court was wary of granting § 1782 discovery when it appeared the applicant was trying to "jump the gun" on discovery in the foreign proceeding.[158])

Breadth of Discovery Requests

The fourth *Intel* factor is whether the § 1782 application contains "unduly intrusive or burdensome requests".[159]) If the requested discovery is unduly intrusive or burdensome, it may be rejected[160]) or trimmed.[161])

VI. Scope Restrictions, Extraterritorial Reach and Other Factors and Defenses

In this section, we discuss the scope restrictions on § 1782 discovery, § 1782's extraterritorial reach and additional factors and defenses potentially bearing on § 1782.

A. Limitations on the Scope of § 1782 Discovery

There are several important limitations on the scope of permissible discovery under § 1782. First, § 1782 provides that "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".[162]) Section 1782 discovery may, therefore, be refused in whole or in part on the grounds that it seeks information protected by the attorney-client privilege, the work product doctrine, or another privilege or

2007) (finding that a party who filed its § 1782 discovery action just five days before its responsive brief was due in the Paris Court of Appeals was attempting to circumvent French discovery rules).

[158]) Norex Petroleum, Ltd. v. Chubb Ins. Co. of Can., 384 F. Supp. 2d 45, 54 (D.D.C. 2005) (denying § 1782 discovery for use in a Canadian proceeding that the court noted "may not even be at the stage in which discovery would be appropriate").

[159]) Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004).

[160]) Id. See also In re Microsoft Corp., 428 F. Supp. 2d 188, 196 (S.D.N.Y. 2006) (denying § 1782 discovery requests that were unduly intrusive and burdensome because they sought attorney notes summarizing communications that would be protected by the work-product doctrine).

[161]) See e.g., Kang v. Nova Vision, Inc., No. 06-21575-CIV, 2007 WL 1879158, at *2–3 (S.D. Fla. June 26, 2007) (allowing a § 1782 discovery request but narrowing the time period to encompass a span of four years rather than seven and requiring applicant to cover up to $10,000 of the expense incurred by the respondent); In re Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil, 466 F. Supp. 2d 1020, 1032–1033 (N.D. Ill. 2006) (limiting the scope of discovery to non-privileged materials found in the United States).

[162]) 28 U.S.C. § 1782 (a).

immunity.[163]) In addition, the person from whom discovery is sought may seek a protective order from the court limiting the discovery scope and maintaining the confidentially of certain matters, including trade secrets and other business information.[164]) Furthermore, the person responsible for a discovery subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.[165])

B. Extraterritorial Reach

Several district courts have considered whether the discovery sought by the § 1782 application is located in the U.S. Courts are divided over whether § 1782 can be used to obtain discovery from U.S. parties where the requested discovery is physically located abroad.

> In *In re Gemeinschaftspraxis Dr. Med. Schottdorf,* a district court in New York ordered McKinsey Company, the global consulting firm, to produce documents requested by a German litigant in aid of a lawsuit in Germany.[166]) McKinsey argued § 1782 did not apply because the documents were located outside of the United States.[167]) The district court disagreed, holding "*Section 1782* requires only that the *party* from whom discovery is sought be 'found' here; not that the *documents* be found here".[168]) The district court stated that limiting § 1782 to documents physically located in the

163) See Labor Court of Braz., 466 F. Supp. 2d at 1033 (the court instructed the party from whom discovery was requested to "use the applicable Federal Rules to object to the request" when the party thought material requested might be protected by privilege); Microsoft Corp., 428 F. Supp. 2d at 195 (denying § 1782 request for attorney notes because they were protected by the work-product doctrine).

164) See Intel, 542 U.S. at 266 (observing recipient of § 1782 subpoena may use Rule 26 of the Federal Rules of Civil Procedure to prevent discovery of business secrets and other confidential information); In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1117 (E.D. Wis. 2004) (holding that a district court possesses sufficient tools to ensure that confidential discovery material is not publicly disclosed even where foreign courts rarely enter orders protecting the secrecy of information).

165) Unless otherwise provided § 1782 discovery is governed by the Federal Rules of Civil Procedure, Rule 45 (c), which provides that a discovery subpoena must be quashed or modified for failing to permit a reasonable time for compliance, requiring the disclosure of privileged or otherwise protected information, subjecting a person to undue burden or requiring a non-party to travel over a certain distance in order to comply. Rule 45 (c) also provides discretionary grounds for quashing or modifying a discovery subpoena.

166) In re Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *28 (S.D.N.Y. Dec. 29, 2006).

167) Id. at *15.

168) Id. The court also rejected the argument that the production would be unduly burdensome because the documents would have to be translated from German into English so they could be reviewed by McKinsey's non-German-speaking U.S. counsel. Id. at *27–28.

district would be at odds with *Intel*'s instruction against adding requirements to § 1782 that are not plainly provided for in the text of the statute.[169])

The district court disagreed with *In re Application of Microsoft Corp.*, which in dicta stated § 1782 did not permit the discovery of documents held abroad.[170]) *Microsoft* in turn relied on *Norex Petroleum, Limited v. Chubb Insurance Co. of Canada,* which denied § 1782 discovery of documents located abroad as beyond § 1782's intended reach.[171])

C. Other Factors and Defenses

Some courts have read *Intel* as making "no attempt to set forth a comprehensive list of considerations to guide a district court's discretion under § 1782".[172]) That is, a district court is free to consider the *Intel* factors along with any other relevant factors.[173]) Aside from the mandatory and discretionary factors and scope restrictions already discussed, in exercising their discretion, courts have also examined additional factors for and defenses to § 1782 discovery, including whether a party must first exhaust its efforts to obtain the discovery abroad, whether the application will cause delay, and considerations of parity among the litigants.[174])

Exhaustion

A potential defense to § 1782 discovery is exhaustion – must a § 1782 applicant first attempt to obtain discovery from the foreign tribunal? Several courts have considered the argument and found it to be without merit.[175]) However, at

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169) Id. at *15–16.

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

171) Norex Petroleum, Ltd. v. Chubb Ins. Co. of Can., 384 F. Supp. 2d 45, 50–55, 57 (D.D.C. 2005) (declining as a general matter to extend § 1782 to documents physically outside the United States and explaining that the Supreme Court in Intel did not issue a blanket rejection of limitations on § 1782). See also In re Nokia Corp., No. 1:07-MC-47, 2007 U.S. Dist. LEXIS 42883, at *14–16 (W.D. Mich. 2007) (denying § 1782 discovery in part because the requested documents were located outside of the United States); In re Sarrio, S.A., 119 F.3d 143, 147 (2d Cir. 1997) (in dicta stating "despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States").

172) In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1114 (E.D. Wis. 2004).

173) Id.

174) For a discussion of whether § 1782 contains a foreign-discoverability requirement (Intel held it did not) or a foreign-admissibility requirement (courts have held there is no such requirement), see supra, section V.1.

175) See, e.g., In re Malev Hungarian Airlines, 964 F.2d 97, 100-02 (2d Cir. 1992) (finding that petitioner's failure to request discovery from respondent before the Hungarian court in a foreign proceeding before making a § 1782 request did not provide an adequate basis for a denial of § 1782 discovery); In re Roz Trading Ltd., 469 F. Supp. 2d 1221, 1229–1230 (N.D. Ga. 2006) (finding that petitioners were not required first to seek discovery through the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna); In re Order

least one court has noted that while there is no exhaustion requirement, a court need not overlook a party's failure to attempt any discovery measures in the foreign tribunal.[176])

Delay

A further potential defense is delay by the § 1782 applicant in seeking § 1782 discovery for use before the foreign tribunal. In exercising their discretion, courts have considered such delay in refusing to permit § 1782 discovery.[177])

Maintaining Parity Among Foreign Adversaries

There is also the issue of maintaining parity among foreign adversaries. If one participant before a foreign tribunal is granted U.S.-based discovery from a nonparticipant and can then use this discovery against its adversary before the foreign tribunal, the adversary may complain it does not have the same broad discovery available to it. In Intel, the Supreme Court addressed this issue, stating: "Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an 'interested person', a district court could condition relief upon that person's reciprocal exchange of information."[178]) Further, if the foreign tribunal was concerned about parity among adversaries, it could place conditions on its acceptance of § 1782 discovery.[179])

VII. Standing to Oppose § 1782 Discovery

Plainly, the person from whom § 1782 discovery is being sought has standing to oppose such discovery. In particular, the Federal Rules of Civil Procedure, which apply to § 1782 proceedings unless specified otherwise, permit recipients of

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for Judicial Assistance in a Foreign Proceeding in the Labor Court of Braz., 466 F. Supp. 2d 1020, 1031 (N.D. Ill. 2006) (finding that petitioners were not required to ask a Brazilian court for discovery before making its § 1782 request).

[176]) In re Digitechnic, No. C07-414-JCC, 2007 WL 1367697, at *4 (W.D. Wash. May 8, 2007) (denying § 1782 discovery from a participant in a French lawsuit that had not actually tried to obtain discovery via French discovery procedures, particularly where the participant had misleadingly exaggerated French discovery restrictions).

[177]) See id. at *5 (characterizing the § 1782 application as an "eleventh hour" request and quashing § 1782 discovery of documents estimated to span a seven-year period and involve hundreds of thousands of pages); In re Wilander, No. 96 MISC 98, 1996 U.S. Dist. LEXIS 10357, at *12–13 (E.D. Pa. July 24, 1996) (in denying § 1782 application, the court discussed a "suspicious pattern" by the applicant of "unexplained delays followed by claims of urgency").

[178]) Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 262 (2004)..

[179]) Id. See also In re Procter & Gamble Co., 334 F. Supp. 2d 1112, 1117 (E.D. Wis. 2004) (finding no parity concerns where an adverse party could initiate its own § 1782 action).

subpoenas to object to the requested discovery or the condition of its production, as well as move to quash the subpoenas outright.[180]) Somewhat less obvious is whether a party to the foreign proceedings ("participant") has standing to challenge its adversary's efforts to use § 1782 to obtain discovery from a non-party to the foreign proceedings ("nonparticipant"). As a general matter, courts allow participants to intervene to object to the use of § 1782 discovery from non-participants, where the discovery requested concerns the objecting participant. Specifically, "a party against whom the requested information is to be used has standing to challenge the validity of such subpoena on the ground that it is in excess of the terms of the applicable statute, here *28 U.S.C. § 1782*."[181]) A participant has standing to move to quash a § 1782 subpoena directed to a nonparticipant if the participant can claim some "personal right or privilege" that will be affected by the discovery sought.[182]) The issue has arisen frequently in connection with § 1782 discovery from U.S. financial institutions of information concerning the participant,[183]) as well as in other contexts.[184])

[180]) Fed. R. Civ. P. 45.

[181]) In re Letters Rogatory from the Justice Court., Dist. of Montreal, Can., 523 F.2d 562, 564 (6th Cir. 1975) (holding that a resident of Detroit had standing to challenge the validity of a § 1782 request by a Canadian tribunal to resident's bank in Detroit for the purposes of a pending criminal prosecution in Canada against resident).

[182]) In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz., 687 F. Supp. 880, 887 (S.D.N.Y. 1988), rev'd on other grounds, 936 F.2d 702 (2d Cir. 1991).

[183]) See, e.g., Lopes, 180 Fed. App'x at 877 (permitting participant to move to quash § 1782 discovery from nonparticipant banks and affirming entry of protective order in favor of participant); In re Sarrio, S.A., 119 F.3d 143, 148 (2d Cir. 1997) (holding in connection with documents subpoenaed from nonparticipant bank, "parties against whom the requested information will be used may have standing to challenge the lawfulness of discovery orders directed to third parties"); In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, 555 F.2d 720, 723 (9th Cir. 1977) (holding that "party against whom requested bank records are to be used has standing to challenge the validity of the order to the bank to produce the records"); Letters Rogatory from the Justice Court., Dist. of Montreal, Can., 523 F.2d at 562–564 (finding participant had standing to move to quash § 1782 subpoena directed to nonparticipant bank seeking participant's bank records); In re Letters Rogatory Issued by Dir. of Inspection of the Gov't of India, 385 F.2d 1017, 1017–1022 (2d Cir. 1967) (quashing subpoenas directed via § 1782 discovery order to nonparticipants, one of whom was a bank, on motion by participant).

[184]) See, e.g., In re Letter of Request from Crown Prosecution Serv. of U.K., 870 F.2d 686, 687–689 (D.C. Cir. 1989) (holding potential target in U.K. criminal investigation had standing to move to quash § 1782 discovery subpoenas directed to a U.S. law firm and management companies that were nonparticipants in the U.K. criminal investigation; "one against whom information obtained under Section 1782 may be used, has standing to assert that, to his detriment, the authority for which the section provides is being abused").

VIII. How to Make a § 1782 Application for Discovery to Be Used in an International Arbitration

An application for permission to take discovery pursuant to § 1782 should be brought in the U.S. district court for the district wherein the person from whom discovery is sought resides or can readily be found. The application may be made *ex parte,* that is, without notice to either the person from whom discovery is sought or the adverse party before the foreign tribunal. Requests under § 1782 are "customarily received and appropriate action taken with respect thereto *ex parte.*"[185]) The person from whom discovery is sought will have a chance to object and seek court redress after they have been served with the subpoena. If the discovery is sought from a non-party, the adverse party may seek to intervene in order to object. The adverse party will likely be found to have standing to object if the requested discovery is to be used against them. An objection by an adverse party will typically take the form of a motion filed with the court to quash. A non-party opposing § 1782 discovery may serve written objections and/or move to quash.

A typical § 1782 application will include: (i) an application providing background to the foreign proceeding and tribunal and discussing how the mandatory statutory elements and the discretionary *Intel* factors are met; (ii) an affidavit or declaration from a person involved in the foreign proceeding (for example, foreign counsel for the party making the § 1782 application) who can provide background to the foreign proceeding and the need for the § 1782 discovery; (iii) a proposed order that the district court can sign granting the § 1782 discovery; and (iv) a draft of the proposed discovery subpoena. The requested discovery may be in the form of testimony or statement (e.g., depositions) or production of documents or other tangible things (e.g., documents requests). It is suggested that that the specific requested discovery be included in the draft discovery subpoena as part of the § 1782 application.

Unless otherwise specified in the district court's order granting leave to conduct § 1782 discovery, the Federal Rules of Civil Procedure will govern the proceedings. The requirements for the service of subpoenas are set out in Rule 45.

[185]) In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, 539 F.2d 1216, 1219 (9th Cir. 1976) (stating witnesses can raise objections and exercise due process rights by motions to quash discovery subpoenas). See also Lopes v. Lopes, 180 Fed. App'x at 874 (denying motion to vacate a § 1782 order that had been issued upon a party's ex parte application); In re Esses, 101 F.3d 873 (2d Cir. 1996) (same); In re Oxus Gold PLC, No. Misc. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007) (denying motion to vacate a § 1782 order that had been issued upon a party's ex parte application); In re Gemeinschaftspraxis2006 U.S. Dist. LEXIS 94161 (S.D.N.Y. Dec. 29, 2006) (denying motion to vacate a § 1782 order that had been issued upon the ex parte application of a German party for use in a proceeding in Germany); In re Letter of Request from the Supreme Court of H.K., 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991) (finding that ex parte discovery applications are typically justified by giving parties adequate notice of discovery taken pursuant to the request and providing opportunity for parties to move to quash discovery).

Rules 26 and 45 provide various protections to the subpoenaed party, such as the right to seek a protective order, to refuse to provide privileged or otherwise protected information, or to object to the subpoena or move to quash it. Under Rule 45, a subpoenaed party generally has fourteen days in which to object.

A party seeking § 1782 discovery should consider making the application as soon as the opportunity for U.S. discovery presents itself. By applying promptly, the party seeking the discovery can avoid, or at least minimize, allegations of delay or bad faith. Also, U.S. discovery can be time-consuming. For example, the subpoenaed party normally will be entitled to a reasonable amount of time to collect requested documents. There may be issues with scheduling depositions. Further, the subpoenaed party may object and/or seek to quash the subpoena. Similarly, the adverse party may seek to intervene in order to oppose the requested discovery. Time needs to be factored in to permit the district court to resolve disputes regarding the propriety, scope and/or conditions of the requested discovery. While the process can move relatively quickly, a foreign party seeking § 1782 discovery should consult with experienced U.S. counsel to determine the amount of time that likely will be required in a particular case.

U.S. courts are generally protective of non-parties to lawsuits. In order to expedite matters and to avoid unnecessary difficulties, consideration should be given to drafting requests narrowly and limiting them to documents or classes of documents whose relevance can be explained readily. The applicant should also endeavor to the extent practicable to avoid submitting requests that are unduly intrusive or burdensome. Similarly, requests for depositions are more likely to be authorized if they are limited to those reasonably necessary. If the requested depositions are of corporate representatives, care should be exercised in specifying the matters on which examination is requested.

IX. Conclusion

Intel has made the broad U.S. discovery mechanisms of the Federal Rules of Civil Procedure available to litigants around the world. Where a U.S participant or a nonparticipant is involved in a case of any significance, international practitioners should give serious consideration to the use of § 1782 to obtain documents and/or deposition testimony. The parameters of § 1782 discovery are continuing to evolve, especially regarding private international arbitration. Recent district courts, relying on *Intel,* have extended § 1782 and its broad discovery to both governmental and private international arbitrations. It remains to be seen how higher U.S. courts will treat the question. In any event, § 1782 has become – and seems destined to remain – an important feature of the international dispute resolution landscape.