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Assistance to Litigants in Foreign or International Tribunals

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Parties to proceedings taking place outside the United States may use the US discovery system to obtain from people or entities residing or found in the US discovery, such as document requests and testimony, to be used in the foreign proceeding. Litigants have the right to obtain such discovery without the need of letters rogatory or other complex and time-consuming requests by the foreign tribunal.

Section 1782, Title 28 of the US Code authorises a US district court, upon the application of an interested person, to order a person residing or found in the district to give testimony or produce documents for use in a foreign proceeding:

'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.'[1]

Many US courts have articulated the aforementioned statutory requirements as follows:

- the request must be made 'by a foreign or international tribunal', or by 'any interested person';
- the request must seek evidence, whether itbethe'testimonyorstatement'ofapersonortheproductionof'adocumentorotherthing';
- the evidence must be 'for use in a proceeding in a foreign or international tribunal'; and
- the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.'[2]

In 2004, the US Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, held that once the aforementioned *prima facie* requirements of section 1782 are met, district courts must also consider the following discretionary factors (commonly known as the '*Intel* factors'):

- whether 'the person from whom discovery is sought is a participant in the foreign 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 US federal-court judicial assistance';
- 'whether the section 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the US'; and
- whether the request is otherwise 'unduly intrusive or burdensome.'[3]

The statutory requirements of 28 USC, section 1782

THE APPLICANT MUST BE AN 'INTERESTED PERSON'

With respect to the first statutory requirement, the foreign litigant applying for this relief must be an 'interested person.' A party to the foreign proceeding, whether plaintiff/claimant or defendant/respondent, plainly qualifies as an 'interested person' under the statute.[4]

THE APPLICANT MUST SEEK DOCUMENTS AND TESTIMONY

As to the second statutory requirement, the applicant must seek evidence through means specifically provided for by the statute, namely documents and testimony. Discovery will be conducted in accordance with the Federal Rules of Civil Procedure.[5]

THE REQUESTED EVIDENCE MUST BE SOUGHT FOR USE IN A PENDING PROCEEDING IN A FOREIGN TRIBUNAL

Third, the requested evidence must be sought for use in an action pending in a foreign tribunal. Under *Intel*, the term 'tribunal' includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.[6]

In general, the 'for use' requirement is satisfied where the applicant has the ability to inject the requested information into a foreign proceeding and the requested discovery is something that will be employed with some advantage or serve some use in said foreign proceeding.[7]

THE PERSON FROM WHOM DISCOVERY IS SOUGHT IS FOUND IN A DISTRICT

The fourth statutory requirement is satisfied when the person (including entities) from whom discovery is sought is found in the district where the section 1782 application is filed.

The statute does not define the term 'found'. A number of district courts have held that the requirement is not met where the target is neither incorporated nor has its principal place of business in the district where the application is filed. Other district courts have used a more relaxed standard and held that mere presence of an office in the district where the application is filed is sufficient. In a 2019 decision, the Second Circuit (the New York Federal Court of Appeals) held that a person or entity 'resides or is found' within a district when the district court has personal jurisdiction over that person or entity consistent with due process.[8]

Section 1782 has extraterritorial reach. Therefore, US courts have the power to compel discovery even if the requested documents are physically located outside the US.[9]

The Intel discretionary factors

Once the Applicant satisfies the *prima facie* statutory requirements under section 1782(a), courts must consider each of the *Intel* discretionary factors.

THE PERSON FROM WHOM DISCOVERY IS SOUGHT MUST NOT BE A PARTICIPANT IN THE FOREIGN PROCEEDING

Section 1782 discovery is more likely to be justified when the person from whom the discovery is sought is not a participant in the foreign proceeding. This factor is met when the producing party is not a litigant in the foreign proceeding. The rationale of this factor is that non-participants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the US, may be unobtainable absent section 1782(a) aid.[10]

The nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government, court or agency abroad, to US federal court judicial assistance

The second *Intel* factor examines whether the foreign tribunal is willing to consider the information sought.[11] A nation's limit on discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions does not necessarily signal objection to aid from US federal courts. Instead, US courts look for authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782.[12] Such proof has been found to exist where the representative of a foreign sovereign has expressly and clearly made its position known.[13] The party opposing discovery under Section 1782(a) has the burden of demonstrating offence to the foreign jurisdiction.[14] US courts must consider only 'authoritative proof' that the foreign jurisdiction would reject the section 1782 request for assistance.[15] Section 1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding.[16]

THE APPLICANT MUST NOT ATTEMPT TO CIRCUMVENT FOREIGN PROOF-GATHERING RESTRICTIONS OR OTHER POLICIES OF A FOREIGN COUNTRY OR THE US

The applicant must not attempt to circumvent foreign proof-gathering limits or other policies of the foreign jurisdiction or the US. For the purposes of section 1782, district courts should consider neither discoverability nor admissibility in the foreign proceeding.[17]

Instead, district courts should err on the side of ordering discovery, since foreign courts can easily disregard any material that they do not wish to consider.[18] Absent a persuasive showing that a section 1782 applicant is actively seeking to circumvent the foreign tribunal's discovery methods and restrictions, this factor does not counsel against section 1782 relief.[19]

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[1] 28 United States Code, section 1782.

[2] *See*, *e.g.*, *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007).

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

[4] *In re Bernal*, 2018 WL 6620085 (S.D. Fla. Dec. 18, 2018).

[5] *Ibid.*

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

[7] *In re Ferrer*, 2018 WL 3240010 (S.D. Fla. July 3, 2018) (quoting *In re Accent Delight Int'l Ltd.*, 869 F.3d 121 (2d Cir. 2017)).

[8] *In re Del Valle Ruiz*, 2019 WL 4924395 (2d Cir. Oct. 7, 2019).

[9] *Ibid.*

[10] *In re: Application of Bracha Found.*, 663 F. App'x 755 (11th Cir. 2016) (quoting *Intel*,542 U.S. 241).

[11] *In re MTS Bank*, 2018 WL 3145806 (S.D. Fla. June 27, 2018) (quoting *Siemens AG v. W. Digital Corp.*, 2013 WL 5947973 (C.D. Cal. Nov. 4, 2013)).

[12] *In re MTS Bank*, 2018 WL 3145806 (quoting *Intel*, 542 U.S. 241).

[13] *In re Application of N. Am. Potash, Inc.*, 2012 WL 12877816 (citing *Schmitz v. Bernstein, Liebhard, & Lifshitz, LLP*, 376 F.3d 79 (2d Cir. 2004)).

[14] *In re Ferrer*, 2018 WL 3240010 (S.D. Fla. July 3, 2018) (quoting *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011)).

[15] *In re Application of Geinschaftspraxis Dr. Med. Schottdork*, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006).

[16] *Intel*, 542 U.S. 241.

[17] *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76 (2d Cir. 2012).

[18] *In re Application of Gushlak*, 2011 WL 3651268 (E.D.N.Y. Aug. 17, 2011).

[19] *In re Application of Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296 (S.D. Fla. 2012).