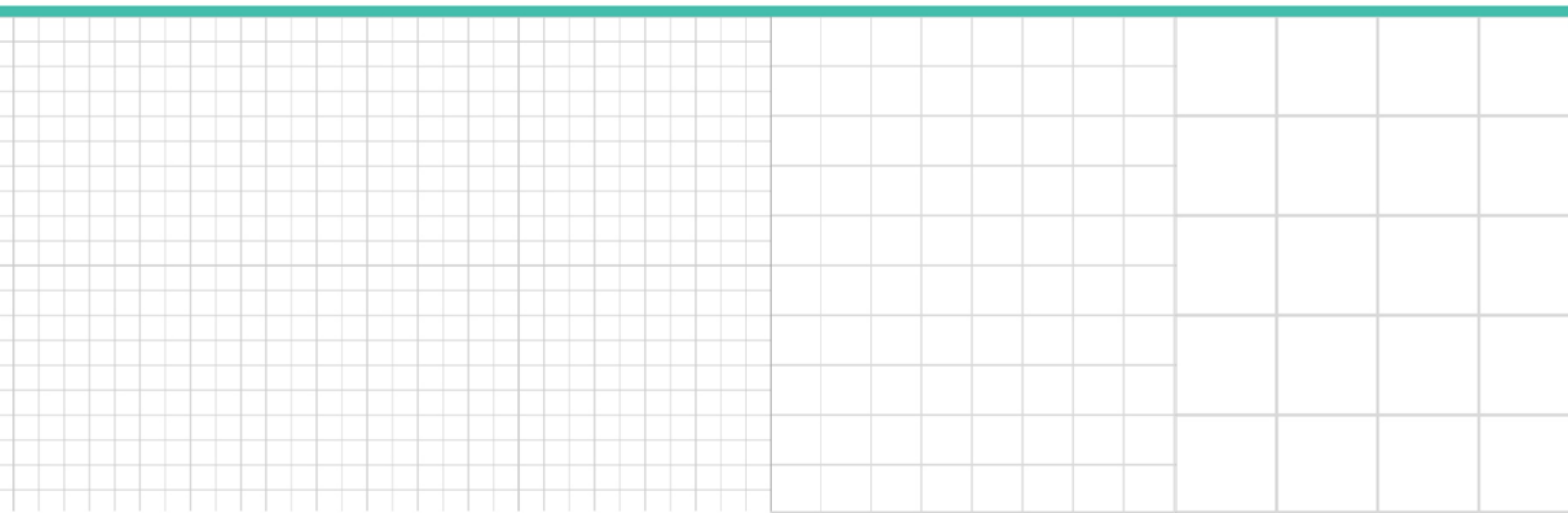


Professional Perspective

**Section 1782:
Getting Discovery in
the U.S. to be Used in a
Foreign Matter**

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Section 1782: Getting Discovery in the U.S. to be Used in a Foreign Matter

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Section 1782 is a powerful tool that allows litigants to obtain discovery in the U.S. for use in foreign proceedings, including in foreign courts and some foreign arbitral tribunals. This article examines recent case law interpreting this statute, discusses some hot topics in Section 1782 litigation, and offers practice pointers both for those seeking Section 1782 discovery and for those defending against it.

Section 1782 Overview

[28 U.S.C. § 1782](#) is a federal statute that allows a litigant (or a potential litigant) in a foreign legal proceeding to apply to a U.S. federal court for an order compelling another person to provide evidence for use in that foreign proceeding. The statute provides, in relevant part:

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. ... 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.

How to Initiate a Section 1782 Application

Section 1782 requests may be initiated in one of two ways. First, a letter rogatory issued by a non-U.S. tribunal may be delivered directly to the district court (usually included as part of an application prepared by a party or other interested person). Second, a party or other interested person may make an application, without a letter rogatory, directly to the district court. Because the letters rogatory process can be lengthy and varies dramatically from country to country, the vast majority of Section 1782 requests are filed by a party or interested person directly with the court.

Letters rogatory or applications from interested persons are usually considered by a district court *ex parte*; once the court orders a subpoena to compel evidence to be served, the party subject to the subpoena can raise any objections by motion to quash. *In re Letters Rogatory from Tokyo Dist.*, [539 F.2d 1216](#), 1219 (9th Cir. 1976).

What Must a Section 1782 Application Show?

In essence, an applicant under Section 1782 merely needs to show three things:

- It is a party or an “interested person” in a foreign proceeding
- The proceeding is before a “foreign or international tribunal”
- The person from whom evidence is sought “resides or is found” in the district of the court where the application is filed

If the applicant satisfies these statutory requirements, Section 1782 “authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to ‘interested person[s]’ in proceedings abroad.” *Intel Corp. v. Advanced Micro Devices, Inc.*, [542 U.S. 241](#), 247 (2004).

Generally, an application must explain what discovery is being sought, why the prerequisites for assistance under Section 1782 are met in the particular instance, and why the district court should exercise its discretion to compel the documents or testimony. An affidavit or declaration accompanying the application should set out any facts about the non-U.S. proceeding that may be relevant to the district court's decision to order the discovery. The application should address at least the following matters:

- The nature of the foreign action
- The applicant's interest in the action
- The location and address of the person whose documents or testimony is being sought
- The relevance of and need for the documents or testimony

What Type of Evidence May an Applicant Obtain Under Section 1782?

Section 1782 allows an applicant to obtain documentary and testimonial evidence. Courts have interpreted the statute's reference to the Federal Rules of Civil Procedure as a guideline that the standards for discovery under the FRCP should apply when a discovery order is sought under Section 1782. *Bayer AG v. Betachem, Inc.*, [173 F.3d 188](#), 191 (3d Cir. 1999); *Weber v. Finker*, [554 F.3d 1379](#), 1384-85 (11th Cir. 2009). However, as noted below, a district court may refuse to order discovery permitted under the FRCP if it believes that the applicant is seeking to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S. *Intel Corp. v. Advanced Micro Devices, Inc.*, [542 U.S. 24](#), 265 (2004).

Who Has Been Using Section 1782?

Intel Corp. v. Advanced Micro Devices is a seminal Supreme Court case that provided the detailed interpretation of Section 1782 and made the discovery under this provision more attainable than before. According to our review of case law, in the post-*Intel* era (i.e., from 2004 onwards), most applications under Section 1782 have been filed by companies from England, Germany, and other European countries where discovery is much more limited than in the U.S.

These cases span across various legal claims, from breach of contract suits to intellectual property disputes. There has been an increase in recent years in applications from Middle Eastern countries, while Russian litigants have also made extensive use of Section 1782 for proceedings both in Russia and elsewhere. Other than litigants from Japan, few Asian litigants have filed Section 1782 applications in recent years.

One of the most highly publicized uses of Section 1782 was made by Chevron Corporation, which in 2010 filed several Section 1782 applications in connection with the defense of environmental damage claims brought against it in the Republic of Ecuador. See, e.g., *In re Chevron Corp.*, [753 F. Supp. 2d 536](#) (D. Md. 2010). Many observers believe that cost considerations have been one of the reasons why Section 1782 has not been used even more extensively.

The Impact of *Intel*

Before 2004, district and appellate courts disagreed as to the scope of permitted discovery under Section 1782, who may request Section 1782 discovery, at what stage of a non-U.S. proceeding a Section 1782 order may be granted, the meaning of the statute's term "tribunal," and whether an applicant under Section 1782 needed to show that the requested evidence would be "discoverable" in the foreign jurisdiction.

The case law concerning Section 1782 was largely (although not completely) clarified in 2004 when the Supreme Court issued its decision in *Intel*, 542 U.S. at 247. The Supreme Court held that Section 1782 discovery may be sought by any "interested person," even if not a litigant, *Id.* at 256, such discovery may sometimes be sought even prior to the initiation of formal proceedings outside the U.S., and a "tribunal" within the meaning of the section is any tribunal that acts as a "first-instance decisionmaker."

The Supreme Court in *Intel* held that federal district courts have broad discretion to fashion a discovery order or deny a discovery request under Section 1782, but the Court set out four factors that a district court should consider when adjudicating a request that satisfies the statutory prerequisites:

- Whether the documents or testimony sought are within the non-U.S. tribunal's jurisdictional reach, and thus accessible absent the assistance of Section 1782
- The nature of the non-U.S. tribunal, the character of the proceeding abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court assistance
- Whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.
- Whether the request contains unduly intrusive or burdensome demands

Intel also largely abolished any requirement of "discoverability" before the non-U.S. tribunal. Essentially, *Intel* held that Section 1782 discovery is available to a non-U.S. litigant almost as freely as discovery in connection with a lawsuit pending entirely before a U.S. court.