

# Unlocking American Discovery for Foreign Cases: A Primer on Section 1782

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**F**or foreign litigants and their counsel, a law in the United States known colloquially as “Section 1782” (28 U.S.C. §1782) offers both an opportunity and a challenge. Section 1782 allows parties to existing or contemplated foreign proceedings—or other persons with an interest in those proceedings—to obtain evidence located in the United States.

Applicants may seek documents, witness testimony, and other forms of discovery for use in the foreign proceeding. It offers foreign litigants access to the relatively broad discovery afforded in the United States for use in foreign proceedings, where discovery may be limited. Here, we examine how Section 1782 applications work, courts’ considerations when deciding whether to grant them, and strategies for crafting and opposing them.

## What Is Section 1782?

Section 1782 permits a U.S. federal court to order discovery “for use” in a proceeding before a foreign or international tribunal upon application from an interested person (an applicant) or pursuant to a letter rogatory or request issued by the foreign tribunal.

For instance, an applicant might seek documents from U.S. companies or individuals, or

testimony from someone residing in the United States. This can be significant to the applicant or tribunal because U.S. discovery is often much broader than discovery in other jurisdictions, and the applicant may be able to obtain information under Section 1782 that they could not obtain under their own country’s law.

## Minimum Requirements

Before a court will consider granting discovery under Section 1782, the Applicant must meet three statutory requirements:

1) The target of the discovery “resides” or is “found” in the U.S. district where the application is filed.

• **Tip:** Individuals who reside in the district and entities with their headquarters in the district or incorporated in the U.S. state in which the district sits will satisfy this requirement. For instance, many financial institutions and global companies with Manhattan offices “reside” in the Southern District of New York.

2) The discovery is “for use” in a proceeding before a foreign or international tribunal.

• **Tip:** This is often the most disputed factor—especially if the foreign proceeding has not yet started or if the claims have been previously rejected by a foreign tribunal. Courts generally require some objective indication that the

discovery could be used in a reasonably contemplated foreign proceeding.

3) The request is made by a foreign tribunal itself or by any “interested person.”

- **Tip:** Litigants, prospective litigants, and complainants/victims in criminal cases qualify as an “interested person,” but the interested party need not be a direct participant in the action. For instance, a creditor of a company in a foreign bankruptcy proceeding or a nonparty shareholder of a company involved in a foreign derivative suit could also qualify.

### **Courts’ Discretionary Considerations**

Even if the statutory requirements are met, courts are not obligated to grant a Section 1782 application, and have broad discretion to grant, deny, or narrow the scope of the discovery sought. They consider four “Intel factors” (named after the U.S. Supreme Court decision declaring them) to guide courts’ discretion. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 244–45 (2004).

**1. Whether the person from whom discovery is sought is a participant in the foreign litigation.** If the target of discovery is a party in the foreign proceeding, Section 1782 may not be necessary.

**2. Whether the foreign government, court, or agency would be receptive to assistance from a U.S. federal court.** If the foreign court is likely to disregard evidence uncovered in the United States, such as because the foreign jurisdiction has a blocking statute prohibiting the introduction of foreign evidence, the discovery may not be worth the burden imposed on the U.S. discovery target.

**3. Whether the request circumvents foreign proof-gathering restrictions.** If the discovery sought is expressly foreclosed by rules or policies important to the foreign tribunal, courts are less likely to grant certain types of discovery. For instance, a country’s privacy laws may prohibit

the gathering of certain types of evidence that would be permitted in the United States.

**4. Whether the request is unduly intrusive or burdensome.** Courts may deny or narrow requests that are overly broad or impose excessive burdens on the responding party.

### **Practical Tips for Navigating The U.S. Court’s Discretionary Authority**

- **Embrace the court’s wide discretion.** Most applications are decided based on the Intel factors.

For applicants, don’t neglect these factors. Courts will expect applications to justify the discovery both under the statutory requirements and the discretionary factors. Ensure that your requests are targeted, and that the discovery you are seeking can actually be used in the foreign proceeding.

For opponents, do not be afraid to forcefully argue that discretionary factors foreclose discovery. Courts may also consider other arguments beyond the four enumerated factors, making the discretionary factors fertile ground for a party opposed to the discovery to raise a variety of challenges.

- **Limit the scope of your discovery requests from the start.** If a court finds a request is too broad or burdensome, it may well deny the application entirely even though it would have granted a narrower request.

### **Ex Parte Proceedings and Opposing a Section 1782 Order**

Most Section 1782 requests are filed *ex parte* (without notice to the opposing party) and are often granted quickly. However, the person or entity receiving the subpoena or other interested parties can then move to vacate the order or quash the subpoena.

- **A motion to vacate** argues that the court should withdraw its prior order granting the Section 1782 application, often by challenging the statutory requirements or discretionary factors.

• **A motion to quash** focuses on narrowing or nullifying the specific subpoena, for instance on grounds of overbreadth, attorney-client privilege, or undue burden on the party from whom discovery is sought.

These motions can halt discovery obligations until the court rules. In some cases, the parties may negotiate a compromise or narrow the scope of discovery while these motions are pending.

### Think U.S. Discovery May Be Useful For You?

If you are a foreign litigant or lawyer participating in litigation outside the United States and believe relevant documents or witnesses may be located in the United States, you should consider if Section 1782 may be helpful to you. Keep the following in mind:

• **Pinpoint targets.** Are any entities or individuals who may have relevant documents or information about your case located in the United States? If so, they could be a potential target of Section 1782 discovery. But don't cast too wide a net—pursue Section 1782 only if the information in the United States is truly relevant to your case.

• **Go narrow, win big.** U.S. courts frown on fishing expeditions. A well-defined discovery request is more likely to sail through and less likely to provoke a scorched-earth opposition.

• **Ex parte isn't a free pass.** You can file without notice to the opposing party at first, but plan for the possibility of a fight once the target sees the subpoena. Build in time to litigate a disputed application or negotiate scope with the target.

### Just Received a Section 1782 Subpoena?

Have you just received a Section 1782 subpoena, or learned that the opposing party in your foreign litigation has obtained one? Keep these strategies in mind:

• **Pause, read, react.** An expansive Section 1782 subpoena can feel alarming, but it is not final. Note your response deadlines—you can push back if you act promptly.

• **Avoid all-or-nothing thinking.** Total annihilation of the application or subpoena is not always necessary. Sometimes it is most strategic (and most efficient) to negotiate a narrowed scope or challenge only part of the application rather than fighting tooth and nail.

• **Protect privilege.** Section 1782 doesn't override attorney-client privilege or other legal shields. Don't waive your rights by producing privileged materials.

• **Leverage realities on the ground.** Even if the statutory requirements are satisfied, the U.S. court can still say no. Undue burden, irrelevance, or unfairness to parties abroad can all torpedo an otherwise valid request.

### Conclusion

Section 1782 offers a powerful tool for accessing U.S.-style discovery for use in foreign proceedings. Because U.S. courts have broad discretion to grant or deny such discovery, any party—whether seeking discovery or resisting it—should be prepared to address not only the statutory requirements but also the facts “on the ground” that justify (or negate) the need for the discovery sought.

By understanding how courts evaluate Section 1782 applications and what defenses are available, foreign litigants and counsel can better navigate the strategic advantages and pitfalls of this discovery tool in the United States.

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