OBTAINING U.S. DISCOVERY TO LITIGATE IN FOREIGN OR INTERNATIONAL TRIBUNALS PURSUANT TO 28 U.S.C. § 1782

TRANSNATIONAL LITIGATION GROUP WEBCAST

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VANITY FAIR

ChevronToxico
THE CAMPAIGN FOR JUSTICE IN ECUADOR

AMAZON WATCH

Donziger to Congress: "an ***independent*** court expert . . . found that Chevron is liable for up to ***$27 billion*** in damages."

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“This is Something You Would Never Do In the United States”

28 U.S.C. § 1782

§ 1782 Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found **may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal**, . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or **upon the application of any interested person** and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

“Smoke Mirrors and Bull…”

“The Only Language This Judge is Going To Understand Is One of Pressure, Intimidation, and Humiliation”

"The Business of Plaintiffs' Law.
To Make F…ng Money"

“Can Anyone Subpoena These Videos?”

Presentation Overview

- Overview of Section 1782
- The Statutory Requirements
- The Four *Intel* Factors
- The Discovery Available under Section 1782
- The Extra-Territorial Reach of Section 1782
- The Impact of Foreign Blocking, Privacy and Secrecy Laws
- Targeting Internet Service Providers
- Best Practices
- Conclusions
- Questions & Answers

What is 28 U.S.C. § 1782?

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

- Section 1782 governs the production of evidence in the United States for use in a foreign proceeding.
- It grants exclusive subject matter jurisdiction to federal courts to rule on discovery applications submitted under the statute.
- Courts have described the "twin aims" of Section 1782:
  - To provide equitable and efficient discovery procedures in US courts for the benefit of participants in adjudicative proceedings outside the US, and
  - To encourage other countries to provide similar means of assistance to US courts.[1]

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1: *See e.g., Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996); *see also See S.Rep. No. 88–1580 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3783* (legislative history accompanying 1964 amendments to Section 1782)

When might foreign discovery be *unavailable*?

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

Why has Section 1782 Become So Popular Recently?

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

> "Discovery in the federal court system is far broader than in most (maybe all) foreign countries, and it may seem odd that Congress would have wanted foreign litigants to be able to take advantage of our generous discovery provisions. The stated reason was by setting an example to encourage foreign countries to enlarge discovery rights in their own legal systems." *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011)

Why has Section 1782 Become So Popular Recently?

The *Chevron* Litigation

- Since 2010, the *Chevron* litigation has generated more than 50 orders and opinions involving Section 1782 and Chevron alone has brought over 23 actions pursuant to the statute.[1]
- Chevron used Section 1782 discovery to expose the fraud, obtaining numerous forms of evidence, including:
  - ❑ Documentary film outtakes
  - ❑ Lead attorney Steven Donziger's computer hard drive and other internal documents
  - ❑ Correspondence and internal documents of the Plaintiffs' scientific experts and consultants
  - ❑ Account information from the Plaintiffs' attorneys' account at Banco Pichincha
  - ❑ Testimony from former insiders including financiers, attorneys, scientific experts, and consultants

1: Theodore J. Boutrous, Jr., Ten Lessons From the Chevron Litigation: The Defense Perspective, 1 Stan. J. Complex Litig. 219, 234 n.56.

Why has Section 1782 Become So Popular Recently?

Evidence from the *Chevron* Litigation

From: Pablo Fajardo Mendoza [pafabibi@gmail.com]
Sent: Thursday, August 14, 2008 7:10 AM
To: Steven Donziger
Subject: Re: interesting

Things rise. It used to be: if you repeat a thing THREE times it becomes the truth.

BB

2008/8/13, Steven Donziger <sdonziger@gmail.com>:
If you repeat a lie a thousand times it becomes the truth.

—S[illegible] Donzi[illegible]

2008/8/13, Steven Donziger <sdonziger@gmail.com>:
If you repeat a lie a thousand times it becomes the truth.

—Steven Donziger

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Why has Section 1782 Become So Popular Recently?

Evidence from the *Chevron* Litigation

From: Julio Prieto
To: Steven Donziger; <juanpasaenz@hotmail.com>; luis; yanza; Pablo Fajardo Mendoza
Subject: accion de proteccion
Date: Tuesday, March 30, 2010 2:02:53 PM

Steve,
Today Pablo and Luis were kind enough to tell us what was going on in Denver, and the fact that certainly ALL will be made public, including correspondence.
From what you say we must prepare ourselves to minimize the effects...
Apparently this is normal in the U.S. and there is no risk there, but the problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail), and we are not willing to minimize our concern and to sit to wait for whatever happens.
For us it is NOT acceptable for the correspondence, the e-mails, between Stratus and Juanpa and myself

Apparently this is normal in the U.S. and there is no risk there, but the problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail), and we are not willing to minimize our concern and to sit to wait for whatever

The "Statutory" Requirements

To invoke Section 1782, an applicant must meet three statutory prerequisites:

1. The "**person**" from whom discovery is sought must "**reside**" or be "**found**" in the district of the court to which the application is made.
2. The request or application must be made "**by a foreign or international tribunal or upon the application of any interested person**."
3. The evidence sought must be "**for use in a proceeding in a foreign or international tribunal**."

In addition, "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

The "Statutory" Requirements

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What does it mean to "Reside" or be "Found" in a District?

- Being "found" in the district is a lower level of contact than residence, and can be satisfied even if the target of discovery is served with a subpoena while traveling through the district.
  - ✓ ***Edelman v. Taittinger,*** 295 F.3d 171 (2d Cir. 2002) permitted 1782 discovery in aid of French litigation against a third party who lived and worked in France, but was "found" in New York — visiting an art gallery. The court reasoned that if tag jurisdiction is sufficient to subject a person to liability, it is also sufficient to subject a potential witness to discovery.
  - ✓ ***In re Coalition to Protect Clifton Bay***, 2014 WL 5454823 (S.D.N.Y. Oct. 28, 2014) permitted discovery where the target did not reside in the district but accepted service of a subpoena through his New York based attorney.
  - × ***In re Microsoft***, 428 F.Supp.2d 188 (S.D.N.Y. 2006) found that a Dutch national did not "reside" in the district, where he was a partner at Clearly Gottlieb Steen & Hamilton LLP and a member of the New York bar, but lived in Brussels and worked full time at Cleary Gottlieb's Brussels office; nor was he "found" in this district as he had *not* been present in the district since the subpoenas were issued and was not personally served here.
- A business will likely be "found" in a district if it would be subject to personal jurisdiction in that district by virtue of its systematic and continuous activities there, even if the corporation's place of incorporation or headquarters is outside the district. *In re Oxus Gold PLC*, 2006 WL 2927615, at *5 (D.N.J. Oct. 11, 2006).

What does it mean to be a "Person" from whom discovery is sought?

✓ **Legal entities** and **actual people** may both be the target of Section 1782 subpoena.

× **Not Sovereign Governments**: The requirement that the target of a Section 1782 subpoena be a "person" precludes using the statute to obtain discovery from the US or other sovereign government. *See Al-Fayed v. Central Intelligence Agency,* 229 F.3d 272, 275 (D.C. Cir. 2000); *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov. of Lao People's Democratic Republic*, 2012 WL 966042 (S.D.N.Y. Mar. 20, 2012).

- The result of this limitation is that ***neither the US government nor its agencies may be targeted for discovery in connection with foreign litigation***.
- This is an important limitation, particularly as foreign governments continue to investigate and prosecute FCPA and other criminal violations in collaboration with US authorities.

Examples that sovereign states are not a Section 1782 "Person"

- ***Al-Fayed v. Central Intelligence Agency***, 229 F.3d 272 (D.C. Cir. 2000)
  - The petitioner sought to subpoena the Central Intelligence Agency for documents related to the car crash that caused the death of Princess Diana, which was subject to a French investigation.
  - The district court granted the CIA's motion to quash the subpoena on the ground that the federal government was not a "person" subject to Section 1782 discovery, and the circuit court affirmed.
  - The petitioner argued that Section 1782 expressly directs application of the FRCP, and under Rule 45, the word "person" includes the federal government. The court rejected this argument, limiting "person" to exclude the United States and its subdivisions and agencies.
- ***McKevitt v. Mueller***, 689 F. Supp. 2d 661 (S.D.N.Y. 2010)
  - An Irish citizen imprisoned in that country for terrorism-related offenses could not use Section 1782 to subpoena documents from the FBI concerning a cooperating witness who testified against the Irish Citizen at his criminal trial.
- ***Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov. of Lao People's Democratic Republic***, 2012 WL 966042 (S.D.N.Y. Mar. 20, 2012),
  - Two Thai companies sought discovery from Laos to identify assets against which to execute a Malaysian arbitration award they had obtained against Laos.
  - The SDNY held that "[b]ecause Laos is a foreign government, it is not subject to 28 U.S.C. § 1782 and cannot be compelled by this Court to produce witnesses, documents, or any other discovery materials."

The "Statutory" Requirements

To invoke Section 1782, an applicant must meet the following conditions:

1. The "**person**" from whom discovery is sought must "**reside**" or be "**found**" in the district of the court to which the application is made.
2. **Element #2:** The request or application must be made "**by a foreign or international tribunal or upon the application of any interested person**."
3. The evidence sought must be "**for use in a proceeding in a foreign or international tribunal**."

In addition, "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."

Letter rogatory or letter of request

- Prior to the statute's amendment in 1964, a Section 1782 application could be made only by letter rogatory issued by the foreign tribunal.

- A letter rogatory is the medium through which a country, speaking through its courts, requests the assistance of another country in the administration of justice in the requesting country.[1]

- The 1964 amendments preserved the right of a party to apply by letter rogatory or letter of request, but broadened Section 1782 to permit "any interested person" to apply for discovery.

Key Lesson:
The amendments' inclusion of "any interested person" is important because it means that a party to litigation before a foreign court can seek discovery directly from a US district court, without first having to apply to the foreign court for letters rogatory.

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1: *Tiedeman v The Signe,* 37 F. Supp. 819, 820 (ED La 1941) *aff'd* 133 F2d 719 (5th Cir 1943).

Who are the "interested person[s]" who can seek discovery under Section 1782?

- ✓ ***Parties***: A party to a foreign litigation is an "interested person."
- ✓ ***Those with a reasonable interest in judicial assistance***: *Intel* clarified that one who has significant "participation rights" in a proceeding possesses a "reasonable interest in obtaining judicial assistance," and therefore qualifies as an interested person.
  - The petitioner in *Intel* had such a reasonable interest — and, thus, standing to request 1782 assistance — because it had the ability to *submit evidence* to the foreign tribunal (the European Commission) and *seek judicial review* if the foreign tribunal dismissed the complaint or dropped the investigation.
  - Cases suggest that a person who has some right to participate in submitting evidence to the foreign tribunal is an "interested person."
    - *Al-Fayed v. Central Intelligence Agency*, 229 F.3d 272 (D.C. Cir. 2000): The relative of a crime victim who had the ability to appeal court decisions concerning the victim and offer new evidence had standing under 1782.
    - *In re Application of Esses*, 101 F.3d 873 (2d Cir. 1996): A person seeking to be appointed administrator of an estate overseas involved in the foreign litigation was an "interested person."

Who are "interested person[s]" who can seek discovery under Section 1782? cont'd

Governments

The United States and foreign governments can be interested persons that seek to obtain discovery pursuant to Section 1782.

- ✓ ***In re Crown Prosecution Serv.***, 870 F.2d 686 (D.C. Cir. 1989) recognized that "courts have repeatedly held" that "[a] foreign legal affairs ministry, attorney general, or other prosecutor . . . fits squarely within the section 1782 'interested person' category"
- ✓ ***In re Republic of Ecuador***, 2010 WL 4973492 (N.D. Cal. Dec. 1, 2010) rejected the assertion that the Republic of Ecuador is not an interested person under Section 1782.

Key Lesson:

Governments can *seek* discovery under 1782 even though the United States and foreign sovereigns are not "person[s] [who] reside[] or [are] found" in the district such that they can be *subjected to* 1782 discovery.

The "Statutory" Requirements

To invoke Section 1782, an applicant must meet the following conditions:

1. The "**person**" from whom discovery is sought must "**reside**" or be "**found**" in the district of the court to which the application is made.
2. The request or application must be made "**by a foreign or international tribunal or upon the application of any interested person.**"
3. **Element #3:** The evidence sought must be "**for use in a proceeding in a foreign or international tribunal**."

In addition, "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."

What does it mean for evidence to be "for use in" a proceeding?

- ***'Some relevance' standard***: The applicant need only show that the information has "some relevance" as a general matter to the foreign proceedings.
  - "This Court holds that 'for use in' mirrors the requirements in Federal Rule of Civil Procedure 26(b)(1) and means discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action."[1]
- ***Need not be admissible abroad***: Evidence may be sought "for use in" a foreign proceeding whether or not the evidence would ultimately be admissible in the foreign tribunal.
  - "[D]istrict courts need not determine that the evidence would actually, or even probably, be admissible in the foreign proceeding."[2]
  - "Section 1782(a) contains no requirement that particular evidence be admissible in a foreign proceeding to be considered 'for use in a proceeding in a foreign or international tribunal.'"[3]
- ***Need not be discoverable abroad***: Nor does the district court need to determine whether the requested evidence is "discoverable" in the foreign proceeding as a prerequisite to granting a Section 1782 request.
  - "[M]aking the extension of American assistance dependent on foreign law would open a veritable Pandora's box. . . . It would, [the drafters] judged, be wholly inappropriate for an American district court to try to obtain [an understanding of the applicable foreign law] for the purpose of honoring a simple request for assistance."[4]

1: *Fleischmann v. McDonald's Corp.*, 466 F. Supp. 2d 1020, 1029 (E.D. Ill. 2006).
2: *In re Veiga*, 746 F. Supp. 2d 8, 17-18 (D.D.C. 2010).
3: *Brandi-Dohrn v. IKB Deutsche Industriebank AG,* 673 F.3d 76, 77 (2d Cir. 2012).
4: *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095,1099 (2d Cir. 1995).

What does it mean for evidence to be "for use in" a proceeding?

De minimis burden

While the court is not free to accept an applicant's request on blind faith, "the burden imposed upon an applicant is *de minimus*."

- ✓ ***In re Veiga***, 746 F. Supp. 2d 8 (D.D.C. 2010): The Court granted Chevron's 1782 application to obtain discovery from the plaintiffs' Ecuadorian attorney Alberto Wray based on the court's "independent review of the Applicants' *prima facie* showing and its conclusion that the discovery sought in fact relates to claims and defenses they intend to assert in good faith."
- ✓ ***In re Application of Republic of Ecuador***, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010): The Court granted the Republic of Ecuador's 1782 application to obtain discovery from a businessman who had secretly recorded meetings with an Ecuadorian judge, where Ecuador made a "*prima facie* showing that the information it seeks . . . has, generally speaking, some relevance" to an international arbitration deciding on whether Ecuador denied Chevron due process in the Ecuador proceedings.
- ✓ ***In re Application of Sveaas,*** 249 F.R.D. 96 (S.D.N.Y. 2008): The Court granted an art collector's 1782 application to obtain discovery from an expert who advised on the sale of a $10 million sculpture even though there were factual disputes regarding the contested issues in the foreign litigations and the information known to the targeted expert. The court found that where conflicting statements result in a "factual dispute regarding the relevance of the discovery sought," it is inappropriate to deny discovery.

To which foreign tribunals does Section 1782 apply?

- ***1964 Amendment***: The word "tribunal" was substituted for "court" in the 1964 amendments to "make it clear that assistance is not confined to proceedings before conventional court."[1]
- ***"Proceedings" broadly interpreted***: Accordingly, courts have broadly interpreted the requirement that discovery requests be for use in a "proceeding in a foreign or international tribunal."
  - Obviously, litigation in a foreign judiciary is potentially subject to Section 1782.
  - Courts increasingly grant 1782 applications in aid of non-traditional, non-adjudicative proceedings including "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Intel*, 242 U.S. at 258.
    - ✓ The *Eleventh Circuit* held that a post-judgment petition filed in a Panama court to obtain evidence from a US resident qualified as a "proceeding," even though the petition itself was non-adjudicative. *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007).
    - ✓ The *Second Circuit* held that a Hong Kong proceeding to appoint an administrator for an estate qualified as a "proceeding." *In re Esses*, 101 F.3d 873 (2d Cir. 1996).

1: 1964 USCCAN at 3788.

To which foreign tribunals does Section 1782 apply? cont'd

Arbitrations

- Before *Intel*, US courts uniformly opposed the use of Section 1782 in the arbitration context.[1]
- For example, in *Republic of Kazakhstan v. Biedermann Int'l*, the Fifth Circuit ruled that even though Congress in 1964 substituted the word "tribunal" for the word "court" in Section 1782, there was no evidence of a congressional intent to extend Section 1782's reach "to the then-novel arena of international commercial arbitration." 168 F.3d 880 (5th Cir. 1999).

Functional Analysis

- The *Intel* decision did not explicitly rule whether arbitral bodies are tribunals for the purposes of Section 1782.
- But courts applying a "functional analysis" have found an arbitral body to be a foreign tribunal if the arbitral panel:
  - ✓ ***Is a first-instance decision maker***
  - ✓ ***Permits parties to gather and submit evidence***
  - ✓ ***Has authority to decide liability and impose penalties***
  - ✓ ***Issues a decision subject to judicial review***

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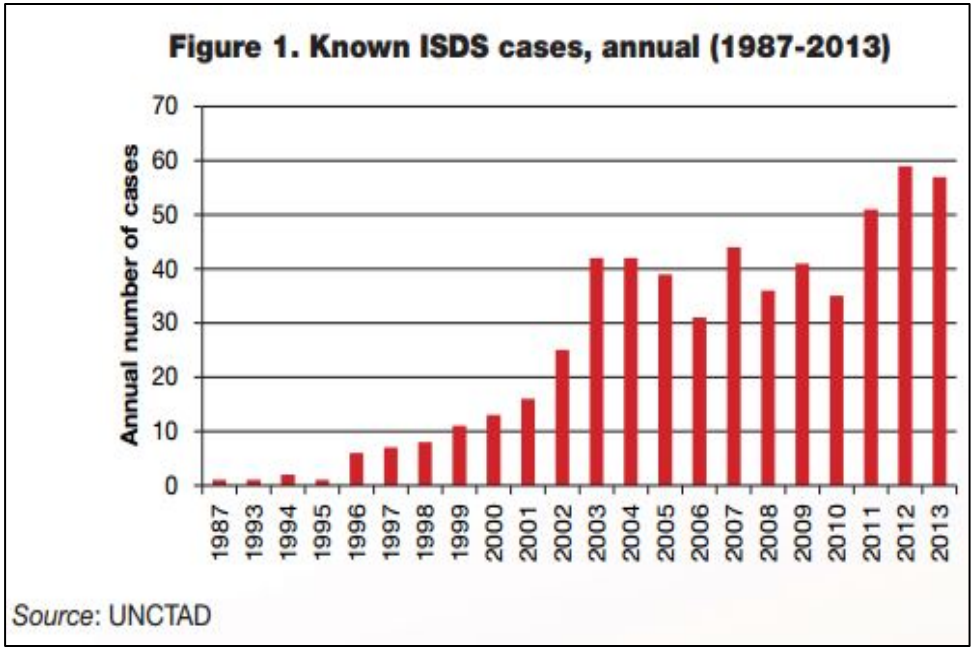
1: *Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999)).

Investor-State Arbitration

Uniformly found to be a Section 1782 "tribunal"

- Investor-state arbitrations are those that arise from treaty obligations contained in bilateral investment treaties or multilateral investment treaties.
- Since *Intel,* courts have uniformly held that an investor-state arbitration tribunal constitutes a tribunal under Section 1782.
  - *In re Application of Mesa Power Group*, LLC, 2012 WL 6060941 (D.N.J. Nov. 20, 2012)
  - *In re Application Chevron Corp.*, 2012 WL 3636925 (S.D. Fla. Jun. 12, 2012)
  - *In re Application of Republic of Ecuador*, 280 F.R.D. 506 (N.D. Cal. 2012)
  - *Republic of Ecuador v. Bjorkman*, 801 F. Supp.2d 1121 (D. Col. 2011)
  - *In re Application of Veiga*, 746 F. Supp.2d 8 (D.D.C. 2010)
  - *In re Application of Republic of Ecuador*, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010)
  - *In re Application of Chevron Corp*, 709 F. Supp.2d 283, 291 (S.D.N.Y. 2010)



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Source: Chart of known ISDS cases, annual (1987-2013) by United Nations Conference on Trade and Development, *available at h*ttp://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=453

Private Commercial Arbitration

District Courts are divided on whether private commercial arbitration constitutes a "tribunal."

- The **Northern District of Georgia**, **Southern District of Florida**, and **District of New Jersey** have held that Section 1782 may apply to private commercial arbitration.
  - ✓ *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) concluded that a private international arbitration by the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna was a Section 1782 tribunal because it acted as a first-instance decision-maker and issued decisions responsive to a complaint, reviewable in court, and enforceable in Austrian courts.
  - ✓ *In re Winning (HK) Shipping Co. Ltd.*, 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010) concluded that a private international arbitration to be conducted by the London Maritime Arbitrators Association (LMAA) constituted a Section 1782 tribunal because the arbitration arose pursuant to private agreement, could collect evidence and issue a decision on the merits, and was subject to review.
  - ✓ *In re Owl Shipping, LLC & Oriole Shipping, LLC*, 2014 WL 5320192 (D.N.J. Oct. 17, 2014) concluded that the LMAA constituted a Section 1782 tribunal, relying on *In re Winning*.
- The **Middle District of Florida** and the **Northern District of Illinois** have reached the opposite result.
  - × *In re Operadora DB Mexico, S.A. DE C.II.*, 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009) concluded that the ICC International Court of Arbitration was not a Section 1782 tribunal because the arbitration body issued decisions that were not judicially reviewable, derived its power from a private agreement, and was tasked with resolving disputes independently of state-sponsored tribunals.
  - × *In re Norfolk S. Corp.*, 626 F. Supp. 2d 882 (N.D. III. 2009) interpreted *Intel*'s reference to "arbitral tribunals" as including state-sponsored bodies but excluding purely private arbitrations.

Private Commercial Arbitration, cont'd

Appellate Courts have not provided clear guidance on whether private commercial arbitration constitutes a "tribunal."

- × The **Fifth Circuit** issued an unpublished opinion that Section 1782 did not apply to a private commercial arbitration conducted pursuant to an agreement under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.[1]
- × The **Second Circuit** held, in a pre-*Intel* decision, that Section 1782 did not apply to a private foreign arbitration held by the ICC International Court of Arbitration.[2]
- The **Eleventh Circuit** initially seemed open to the idea and held, in a now-vacated opinion, that Section 1782 applied to a private commercial arbitration because the tribunal was a "first-instance decision-maker whose judgment was subject to judicial review."[3] However, in January 2014, the Eleventh Circuit vacated the decision—in part because it did not have a sufficiently developed record on the nature of the arbitration tribunal—and issued a new decision that did not reach the issue because two lawsuits in Ecuadorian courts had been filed, thus obviating the need for the Eleventh Circuit to go further.[4]

Practice Pointers:

An applicant seeking discovery under Section 1782 for foreign arbitral proceedings must pay careful consideration to where it brings its application. Also, the application should stress the availability and scope of judicial review in the foreign jurisdiction, as a number of courts have shown willingness to permit Section 1782 discovery for use in private arbitration so long as the arbitration is subject to some form of judicial review.

1: *El Paso Corp. v. La Comision Ejecutiva Hidroelecctrica* , 341 Fed. Appx. 31 (5th Cir. 2009), *affirming* 617 F. Supp. 2d 481 (S.D. Tex. 2008).
2: *NBC v. Bear Stearns & Co*., 165 F.3d 184 (2nd Cir. 1999)
3: *In re Consorcio Ecuatoriano de Telecomunicaciones S.A*., 685 F.3d 987, 997 (11th Cir. 2012), *vacated*, 2014 WL 104132 (11th Cir. Jan. 10, 2014) .
4: *Consorcio* II, 2014 WL 104132, at *5-7.

Must the foreign proceeding be ongoing before a 1782 request may be submitted?

Within reasonable contemplation

The Supreme Court in *Intel* held that Section 1782 requires only that a proceeding be "within reasonable contemplation," and need not be "pending" or "imminent."[1]

- ✓ ***In re Wilhelm*, 470 F. Supp. 2d 409 (S.D.N.Y. 2007)** held that a Dutch criminal investigation into allegations of insider trading was sufficiently far along that an "adjudicative proceeding"—in this case a formal accusation—lay within reasonable contemplation
- ✓ ***Lazaridis v. Int'l Centre for Missing and Exploited Children, Inc***., 760 F. Supp. 2d 109 (D.D.C. 2011) found that a proceeding was within "reasonable contemplation" where the petitioner submitted two summonses for him to appear before a Greek magistrate judge in connection with a "pre-accusatory proceeding."
- ✓ In the *Chevron* litigation, Chevron obtained discovery in aid of the arbitration it filed against Ecuador pursuant to the US-Ecuador Bilateral Investment Treaty in advance of a ruling from the BIT tribunal determining whether it had jurisdiction to hear the dispute.[2] The Western District of Ohio followed the reasoning of the D.C. circuit that "*[t]he notion that it would somehow be premature for this Court to allow the requested discovery until the BIT Arbitration Panel has determined it has jurisdiction to hear the matter runs contrary to clear and unequivocal case law*."

1: *Intel*, 542 U.S. at 247.
2: *Chevron Corporation v. Barnthouse,* No. 10-mc-53, (W.D. Ohio Nov. 26, 2010).

Case Study: The Eleventh Circuit recently approved the use of Section 1782 for *pre-suit* discovery that exceeds the discovery available under the FRCP.

Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.[1]

- The Eleventh Circuit allowed the Ecuadorian wireless telecommunications operator Conocel to seek discovery before commencing foreign litigation against former employees involved in an alleged overbilling scheme because Ecuador, as a civil law country, requires litigants to attach to the complaint all evidence necessary to support their claims.
- To demonstrate that proceedings were within reasonable contemplation, Conocel submitted evidence of its extensive internal audit and provided a detailed explanation of its ongoing investigation and its intent to commence civil action against its former employees.
- FRCP Rule 27 also allows pre-suit discovery, but only depositions of adverse parties, if necessary to "perpetuate testimony," and if, among other things, the applicant can show that it plans to bring a suit "but cannot presently bring it or cause it to be brought."
- Because 1782 discovery is permitted as long as a dispositive ruling is "within reasonable contemplation," Section 1782 might allow more discovery with less of a showing if the potential litigation is abroad.

Key Lesson:
Especially when litigating in civil law countries, consider using Section 1782 to obtain pre-litigation discovery.

1: 747 F.3d 1262 (11th Cir. 2014)

The "Statutory" Requirements

To invoke Section 1782, an applicant must meet three statutory prerequisites:

1. The "person" from whom discovery is sought must "reside" or be "found" in the district of the court to which the application is made.
2. The request or application must be made "by a foreign or international tribunal or upon the application of any interested person."
3. The evidence sought must be "for use in a proceeding in a foreign or international tribunal."

In addition, "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**."

Privilege

- Section 1782 states, "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."
- The courts have generally interpreted this provision as including US federal and constitutional privileges, as well as privileges provided under foreign law:
  - **National security privilege**, *Al Fayed v. U.S.*, 229 F.3d 421 (4th Cir. 2000)
  - **Privilege against self-incrimination**, *In re Letters Rogatory from 9th Criminal Division*, 448 F. Supp. 786 (S.D. Fla. 1978)
  - **Sixth Amendment confrontation right**, *In re Letters of Request from Supreme Court of Hong Kong*, 821 F. Supp. 204 (S.D.N.Y. 1993)
  - **Foreign privileges**, *In re Veiga*, 746 F. Supp. 2d 27 (D.D.C. 2010)
  - **Journalist privilege**, *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011)
  - **Work-product**, *United* Kingdom v. U.S., 238 F.3d 1312 (11th Cir. 2001)
  - **Attorney-client privilege**, *Chevron v. Shefftz*, 2010 WL 4985663 (D. Mass. 2010)

Privilege

Foreign Privilege

- ***Authoritative proof***: The burdened party must offer "authoritative proof" that foreign law does indeed contain the privilege invoked and that it applies to the circumstances at issue.
- ***Ecuadorian Plaintiffs v. Chevron Corp.***, 619 F.3d 373 (5th Cir. 2010)
  - An affidavit from an Ecuadorian attorney suggested that the discovery Chevron sought from one of the Ecuadorian plaintiffs' environmental consultants was privileged and thus not available in Ecuador. The court found this *insufficient* to establish that Ecuadorian law shielded the consultant from a foundational deposition, under Section 1782, into whether the consultant had collaborated with a purportedly "neutral" expert appointed by Ecuadorian court.
  - The record directly contradicted a claim of privilege under Ecuadorian law since the Ecuadorian court had ordered the "neutral" expert to release to Chevron all documents that served as support or a source of information for his report.
  - The court reasoned that "*to avoid speculative forays into legal territories unfamiliar to federal judges, parties must provide authoritative proof that a foreign tribunal would reject evidence because of a violation of an alleged foreign privilege*."

Privilege

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

- ***Plaintiffs' lead US attorney, Steven Donziger***, was required to produce documents because the attorney-client privilege was waived by Donziger's failure to file a privilege log as required by FRCP 26(b)(5) and because Donziger acted more like a political advocate rather than as a legal advisor.[1]
- ***Plaintiffs' Ecuadorian lawyer Alberto Wray*** was required to produce documents despite claims of attorney-client privilege and work-product doctrine, as well as privileges under Ecuadorian law, where, among other things, documents had been disclosed to third parties and Wray failed to show documents were prepared in anticipation of litigation or provide "authoritative proof" that Ecuadorian law applied.[2]
- ***Plaintiffs' environmental consultant UBR*** was required to produce documents it created and submitted to a court-appointed damages expert, finding that the plaintiffs had waived work product and attorney-client privilege protections to the documents by submitting documents to court-appointed damages expert.[3]
- ***Plaintiffs' environmental consultant 3TM*** was ordered to submit to a foundational deposition despite claims of privilege where it was credibly alleged that the discovery sought was supplied to the purportedly "neutral" expert tasked with providing an independent report, for the purposes of ghostwriting the report submitted in the expert's name.[4]
- ***The film producer Plaintiffs recruited to make the movie "Crude"*** was required to produce 600 hours of outtakes notwithstanding an asserted journalist privilege where the district court credibly found that the purpose of the film was not independent commentary but to further the plaintiffs' judicial agenda.[5]
- ***Plaintiffs' environmental consultant William Powers*** was required to produce documents because any privilege was waived when transmitted to the court-appointed expert in Ecuador and, alternatively, the crime-fraud exception justified disclosure.[6]

1: *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135 (S.D. N.Y. 2010).
2: *In re Veiga*, 746 F. Supp. 2d 27, 77 Fed. R. Serv. 3d 1224 (D.D.C. 2010).
3: *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).
4: *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir.2010).
5: *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).
6: *In re Applic. of Chevron Corp.*, 2010 WL 3584520, at *6 (S.D. Cal. Sept. 10, 2010).

The Four "*Intel*" Factors

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

The Court's Discretion

- A district court has discretion as to whether — and to what extent — to lend its assistance.
- When the Supreme Court decided *Intel*, it specified four factors a court must consider when deciding whether to exercise that discretion.
- A party does NOT need to meet all four factors to obtain discovery under Section 1782, and no one factor is dispositive.

The Factors

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

Intel Overview

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

- **Resolved circuit split**: The Supreme Court took the *Intel* case to resolve a circuit split about whether Section 1782 assistance is available only if the foreign tribunal would allow the discovery and held that there was *no foreign discoverability requirement*.
- **Clarified several other questions**:
  - "*Any interested person*" encompasses persons with a "reasonable interest in obtaining [judicial] assistance"
  - The European Union commission at issue was a "tribunal" because "it acts as a *first-instance decision maker whose judgment is subject to judicial review*"
  - Clarified that the "proceeding" for which discovery is sought must be "*in reasonable contemplation but need not be 'pending' or 'imminent.*'"
- **Open questions**: Although *Intel* provides the framework for analyzing 1782 applications, the Court's reasoning and certain ambiguities in the statute have resulted in differing judicial interpretations of the statute.

Factor #1: Whether the discovery sought is within the non-US tribunal's jurisdictional reach and is accessible absent the assistance of Section 1782

- ***Rationale***: If the discovery sought is within the non-US tribunal's jurisdictional reach and is accessible absent the assistance of Section 1782, the need for aid is not as strong.
- ***However***: Even if the discovery is technically within the jurisdictional reach of the non-US tribunal, that tribunal's own rules may prevent it from obtaining the evidence — indicating that Section 1782 assistance is warranted. For example:
  - In many civil law jurisdictions, the court will not order the production of documents if the requesting party does not provide detailed information about the nature and extent of the requested documents.
  - In that case, the assistance of Section 1782 may be warranted in obtaining discovery *even from a party* to the non-US proceeding because the discovery applicant does not have enough information to provide the detail necessary for the civil law court to order production of documents.

"[W]hen 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. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States may be unobtainable absent § 1782(a) aid." *Intel*, 542 U.S. at 264.

Factor #1 Issue:

The fact that the target of a request for discovery is a party to the foreign proceeding typically militates against granting the relief, but circumstances may persuade the court to order the discovery nonetheless.

- ✓ ***In re Letter of Request from Dist. Court Stara Lubovna***, 2009 WL 3711924 (M.D. Fla. 2009)
  - The court ruled that the government was entitled to compel a suspected father to provide a DNA sample to determine paternity in assistance to a Slovak court.
  - The court reasoned that, while the father being a party to the Slovak proceedings would normally be a factor against ordering discovery, in the case at bar, the father had left the Slovak Republic and the Slovak court could not enforce its order while he was in the US.
- ✓ ***In re Carsten Rehder Schiffsmakler Und Reederei Gmbh***, 2008 WL 4642378 (M.D. Fla. 2008)
  - The court granted the 1782 application of a ship manager to obtain evidence from Siemens Energy, Inc. for use in a subrogated recovery action in China.
  - Though the target was a party to the foreign action, the court found that the evidence — in the form of the declaration of a Chinese lawyer and overseas counsel for the applicant — suggested China's discovery procedures were not comparable to those of the US and "obtaining the information without [the federal] court's assistance [was] by no means assured."

Factor #2: The receptivity of the foreign government or the court or agency abroad to US court assistance

- ***What is "receptivity"?***
  - Receptivity is an inquiry into whether a foreign legal system would "*reject* evidence obtained with the aid of section 1782."[1]
  - It is NOT a question of whether the foreign court would or could permit the discovery sought.
- ***Burdens of proof***:
  - The 1782 applicant "enjoy[s] a presumption in favor of foreign tribunal receptivity."[2]
  - The presumption in favor of receptivity can be overcome by "authoritative proof" that the foreign tribunal would *reject* the evidence sought under Section 1782.[3]
  - Courts have found such authoritative proof where the foreign tribunal or government has written to the district court and expressly stated that it did not want the American court's help.[4]
- ***Availability of corrective measures***: The high burden to prevent discovery is based upon the availability of corrective measures.
  - The foreign tribunal may simply choose to exclude or disregard the discovered material should that tribunal find that the district court overstepped its bounds in ordering the discovery.
  - The district court may tailor its discovery order: "[I]t is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief sought."[5]

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1: *In OOO Promnesfstroy,* 2009 WL 3335608, at *7 (S.D.N.Y. Oct. 15,2009) (emphasis in original)
2: *In re Owl Shipping, LLC*, 2014 WL 5320192, *3 (D.N.J. Oct. 17, 2014).
3: *Euromepa S.A. v. R. Esmerian, Inc*., 51 F.3d 1095, 1099–100 (2d. Cir.1995)
4: *In OOO Promnesfstroy,* 2009 WL 3335608, at *7.; *see also Schmitz v. Bemstein Liebhard & Lifshitz, LLP,* 376 F.3d 79, 84 (2d Cir. 2004).
5: *Euromepa*, 51 F.3d at 1101 (2d Cir.1995)

Factor #3: Whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the US

- ***Prohibited activity***: A request that attempts to bypass foreign proof-gathering restrictions, limitations, and procedures or other policies of a non-US country or the US is *unlikely* to be granted.[1] This factor discourages applicants seeking an end run around the foreign litigation.
- ***Burdens of proof***: Once a *prima facie* need for discovery pursuant to Section 1782 is demonstrated, the burden shifts to the opponent to show the application is an attempt at circumvention.[2]

***Practice Pointer*:**
In the *Chevron* litigation, Chevron overcame a challenge that it was attempting to circumvent Ecuadorian proof-gathering restrictions by submitting evidence that the Ecuadorian court had incorporated into the official docket evidence collected by Chevron in its other 1782 applications.[3]

1: *In re Microsoft Corp.*, 2006 WL 1344091, at *3.
2: *Heraeus Kulzer, GmbH v. Biomet Inc.*, 633 F.3d 591 (7th Cir. 2011).
3: *See Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373 (5th Cir. 2010).

Factor #3 Issue:
This factor is not a foreign discoverability requirement

- Section 1782 can be used to seek discovery that is broader than that available in the foreign forum.
- Indeed, *Intel* stressed that district courts may compel discovery of materials that cannot be discovered in foreign jurisdictions.[1]
  - Courts consistently approve reasonable efforts to overcome technical discovery limitations or to obtain evidence beyond the reach of the foreign tribunal.[2]
  - There is no requirement to first seek discovery from the non-US tribunal or exhaust other options before applying to a district court.[3]
  - Nor is there a requirement that discovery still be open in the foreign proceedings. *In re Coalition to Protect Clifton Bay*, 2014 WL 5454823 (S.D.N.Y. Oct. 28, 2014) (holding that an affidavit that discovery had closed in Bahamian proceedings for which discovery was sought did "not constitute 'proof-gathering restrictions or other policies'").

A section 1782 application can "in the discretion of [the federal district] court . . . obtain as much discovery as it could if the lawsuit had been brought in that court rather than abroad."

- *Heraeus Kulzer, GmbH v. Biomet Inc.,* 633 F.3d 591, 594 (7th Cir. 2011).

1: *Intel, 542 U.S. at 259-63.*
2: *In re Imanagement Servs,* 2005 WL 1959702, at *3 (E.D.N.Y. Aug. 16, 2005*).*
3: *Id*. at *3; *Euromepa, S.A. v. R. Esmerian, Inc.,* 51 F.3d 1095, 1098 (2d Cir. 1995).

Factor #4: Whether the request contains unduly intrusive or burdensome demands

Unduly intrusive or burdensome: The following requests were denied under this factor.

- ✕ *In re Degitechnic*, 2007 WL 1367697 (W.D. Wash. 2007), a Section 1782 subpoena was unduly burdensome where the applicant failed to bring a single discovery request in the foreign proceeding until five days before its brief was due (and over four months after the target's brief had been submitted) in litigation spanning twelve years.
- ✕ *In re Apotex Inc*., 2009 WL 618243 (S.D.N.Y. 2009), a Section 1782 application was unduly burdensome where the requested discovery required the nonparty to devote substantial resources to perform onerous searches and then review voluminous documents for a potentially small subset of company documents that dated back nearly 30 years.

May be rejected or trimmed: Unduly intrusive or burdensome requests under Section 1782 may be rejected or trimmed by the district court.

- *In re Roz Trading Ltd*., 469 F. Supp. 2d 1221, (N.D. Ga. 2006) granted an application, but explicitly limited the production of documents by date and subject matter.

Factor #4 Issue:
Third-parties lack standing to challenge requests as unduly intrusive or burdensome

- Courts have rejected attempts by third-parties to the 1782 action to challenge subpoenas as unduly burdensome or intrusive to the third party.
- This factor is primarily intended to protect the party from whom discovery is sought, not third parties who claim some interest in the discovery.[1]

✓ ***In re Coalition to Protect Clifton Bay***, 2014 WL 5454823 (S.D.N.Y. Oct. 28, 2014)

- The Bahamian Coalition to Protect Clifton Bay and one of its directors sought over a thousand hours of video footage, as well as notes and correspondence, from videographer Stephen Feralio captured while Feralio was working for Canadian fashion mogul Peter Nygard and filming Nygard's daily personal and professional life.
- The videographer was willing to turn over evidence, for use in seven litigations pending in the Bahamas, but only with a court order. Nygard and his affiliated companies intervened, seeking to quash the subpoenas.
- The court rejected the claim that the production of the videos would be unduly burdensome and intrusive as to the intervenors. The court also rejected intervenors' argument that granting the discovery would facilitate production of misappropriated material in violation of a contract between Feralio and the Nygard parties that the materials were subject to strict ownership, confidentiality and copyright protections.

✓ ***In re Chevron Corp.***, 2010 WL 5173279 (E.D. Pa. Dec. 10, 2010)[2]

- The court granted a Section 1782 request against the Ecuadorian plaintiffs' former US counsel and financier, Joseph Kohn and his firm Kohn, Swift & Graf, over the plaintiffs' objection that the request was unduly burdensome and intrusive. The court stated, "this factor is intended primarily to protect the party from whom discovery is sought" and noted that the targets had not objected to the discovery and had already prepared a privilege log of requested documents.

1: In re Application of Chevron Corp., 2010 WL 5173279 (E.D. Pa. 2010).
2: *Reversed on other grounds*, 650 F.3d 276 (3d Cir. 2011),

What kind of discovery can be obtained under Section 1782?

- **Documents and testimony**: The court may order the target to "*give his testimony or statement or to produce a document or thing*."
- **Corporate entities**: If the discovery target is a corporation, in addition to being required to produce documents, under Rule 30(b)(6), the target corporation may be required to designate one or more officers, directors or agents to testify on its behalf.
- **Limited discovery tools**: While the Federal Rules of Civil Procedure apply by default, not all of the discovery tools of the FRCP can be used in a Section 1782 proceeding.
  - The express terms of Section 1782 permit the district court only to require a person to produce "documents and testimony."
  - As a result, one court has held that Section 1782 does not permit service of interrogatories.[1]
- **Court's power to control scope**: The district court retains its power under FRCP Rules 26, 37 and 45 to control the scope of discovery and prevent its abuse.
  - The Second Circuit has observed that Rule 45(c)(3)(A)(ii), which requires courts to quash or modify a subpoena that forces a person who is not a party or an officer of a party to travel more than 100 miles from where that person "resides," may prevent the taking of a deposition under Section 1782 even if the "resides or is found" requirement is met.[2]
  - In one of the *Chevron* 1782 proceedings (against one of Steven Donziger's associates, Aaron Page), the Court held that Rule 37 applies in 1782 actions for sanctions/contempt purposes, as opposed to Rule 45.[3]

1: *Fleischmann v. McDonald's Corp.*, 2006 WL 3530582, at *10 (N.D. Ill. Dec. 6, 2006).
2: *Edelman,* 295 F.3d 171, 178 (2d Cir. 2002); *In re Microsoft,* 428 F.Supp.2d 188, 193 n.3.
3: *Chevron Corp. v. Page*, Nos. RWT-11-1942, 11-00395, Motions Hearing Tr. at 50 (D. Md. Apr. 22, 2014).

Does Section 1782 have extra-territorial reach to documents located abroad?

There is no clear-cut rule as to whether documents located outside the United States can be obtained through Section 1782 discovery from a corporation with a presence in the U.S.

Considerations that favor extra-territorial reach:

- U.S. discovery rules require production of all documents within a person's possession, custody or control.
- Section 1782 requires only that the person be found here, not that the documents be found here.
- Nothing in the language of Section 1782 suggests the evidence must be located in this country

Considerations that disfavor extra-territorial reach:

- The U.S. could become the global clearinghouse for document requests.
- Interference with other nations' courts and privacy laws.
- Some of the legislative history for the 1964 amendment to the statute indicates the statue was aimed at "obtaining . . . documentary evidence *in the United States*."[1]
- One of the main drafters of the statutory language, Professor Hans Smit of Columbia Law School, has suggested that § 1782 should be limited to evidence in the US, so that the American court system will not become an alternative discovery forum for litigation in other countries.[2]

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1: See S. Rep. No. 88-1580 (19624), reprinted in 1964 USCCAN 3782, 3788 (emphasis added).
2: *Smit, American Assistance to Litigation in Foreign and International Tribunals: § 1782 of Title 28 of the U.S.C. Revisited,* 25 Syracuse J. Int'l & Com. 1, 10-12 (1998).

Does Section 1782 have extra-territorial reach to documents located abroad? cont'd

The recipient of the subpoena should be in "possession, custody or control" of the discovery sought

- ✓ ***In re Chevron Corp***., 2012 WL 3636925 (S.D. Fla. June 12, 2012):Chevron obtained bank account records maintained in Ecuador with a 1782 request against the Miami, Florida branch of Banco Pichincha. The Court ordered discovery on the theory that the branch ultimately had possession, custody or control of the documents.

- × In contrast, in ***Kestrel v. Joy Global***, 362 F.3d 401 (7th Cir. 2004), the Seventh Circuit rejected a request to subpoena a US parent company to obtain documents held overseas by that company's foreign subsidiaries, because the documents were not only outside the US, but also outside the parent company's files. The court noted, "One uses [Rule] 34 to get documents from firms that possess them, not from their corporate affiliates," and that Section 1782 "neither instructs, nor permits, courts to disregard the distinction between the corporation that owns a set of documents, and a different corporation that owns stock in the first entity," absent a finding to pierce the veil.

- × Likewise, in ***Norex Petroleum Ltd. v. Chubb Ins. Co. of Can***., 384 F. Supp. 2d 45, 52 (D.D.C. 2005), the court rejected a request to subpoena an American company to produce documents located outside the US and belonging to the American company's UK-based corporate parent. The court noted the statute may preclude requiring the production of documents located outside the US and found no evidence the American subsidiary had possession, custody or control of the parent company's documents in the UK. Accordingly, it found the subsidiary could not be ordered to produce the documents, even assuming a 1782 petition may be directed to documents outside the US.

Does Section 1782 have extra-territorial reach to documents located abroad? cont'd

Where the target is "found" in the district and has "control" over the documents, courts are split on whether Section 1782 permits discovery of documents located overseas

- ✓ ***In re Gemeinschaftspraxis Dr. Med Schottdorf***, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006)
  - A German medical diagnoses partnership had commenced multiple suits in Germany against a physicians' association for reducing its fee payments by 20%. The partnership sought to subpoena global consulting firm McKinsey Company in New York to obtain a report and related documents—all located in Germany—that had recommended the 20% fee reduction.
  - The court held that Section 1782 assistance was available because "*Section 1782 requires only that the person be found here, not that the documents be found here*."
- × ***In re Kreke Immobilien KG***, 2013 WL 5966916 (S.D.N.Y Nov. 8, 2013)
  - Kreke sued the German private bank Oppenheim in the District Court in Cologne, claiming Oppenheim had misrepresented the risk of certain funds in which Kreke had invested.
  - Kreke brought a Section 1782 action against Deutshe Bank to obtain documents relating to Deutsche Bank's purchase of Oppenheim and detailing Oppenheim's management of the funds in question.
  - The court denied the application because "*there is reason to think that Congress intended to reach only evidence located within the United States,*" and because "the parties are all located in Germany, that all physical documents are in Germany, and that all electronic documents are accessible just as easily from Germany

How do Foreign Blocking, Privacy and Secrecy Laws Impact the Application of Section 1782 to Foreign Persons?

Foreign Statutes:

- Foreign blocking statutes are enacted to generally block, within a nation's territory, the gathering of evidence for litigation conducted abroad.
- Whereas a blocking statute precludes evidence gathering as a whole, privacy and secrecy laws protect certain information that a litigant might seek to gather.
- All of these laws regularly conflict with American-style discovery, like that found in Section 1782.
- Nevertheless, the Supreme Court has noted that blocking statutes "*do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute*."[1]

1782 has some built in protections:

- As explained previously, Section 1782 prohibits compelled disclosure in violation of "any legally applicable privilege." This includes disclosure that would violate foreign privileges.
- Additionally, Section 1782 grants the court discretion to deny "unduly intrusive or burdensome requests" and requests that attempt to "circumvent foreign proof gathering restrictions."[2]

GIBSON DUNN

1: *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for So. Dist. of Iowa*, 482 U.S. 522, n.29 (1987)
2: *Intel*, 542 U.S. at 265.

How do Foreign Blocking, Privacy and Secrecy Laws Impact the Application of Section 1782 to Foreign Persons? cont'd

Courts deciding Section 1782 requests have weighed the impact of foreign statutes as part of the *Intel* analysis, and come out on both sides.

× ***In re Okean B.V. and Logistic Solution Intern.***, 2014 WL 5090028 (S.D.N.Y. Oct. 10, 2014)

- The court quashed a section 1782 subpoena seeking documents located in Russia and Ukraine from the law firm Chadbourne & Parke LLP for use in proceedings in Amsterdam, Netherlands in part on the ground that they were "protected under Russian and Ukrainian client confidentiality and personal data privacy laws" such that disclosure "would offend core tenets of our [US] legal system (and those of Russia and Ukraine)."

✓ ***In re Chevron Corp.***, 2012 WL 3636925 (S.D. Fla. Jun. 12, 2012)

- The court granted Chevron's request to obtain account records from Banco Pichincha despite the bank's argument that Ecuador's General Law on Financial System Institutions prohibited disclosure of account information to third parties. The bank's expert declared that if the bank were to comply with such an order, it would expose itself to severe legal repercussions including employee imprisonment and hefty fines. However, the court adopted the view of Chevron's expert, that production of the documents would be consistent with the exceptions to disclosure in Ecuador's banking laws and, in any event, it was not clear that any banks had ever been sanctioned for violating the bank secrecy law in Ecuador.

Key Takeaways:

Courts may use their discretionary authority to deny Section 1782 requests where foreign laws that are regularly enforced could result in demonstrable harm to the discovery target if the application is granted.

- ✓ ***In re Ryanair Limited,*** 2014 WL 5088204 (N.D. Cal., Oct. 9, 2014)
  - The Northern District of California ordered Google and Twitter to produce evidence that would help determine the whereabouts of defendants who had defaulted in a lawsuit in Ireland and help enforce petitioner Ryanair's default judgment.
  - Ryanair did not seek the contents of any documents from Google or Twitter. Instead, it sought "identifying information" from an email account and a twitter handle that it alleged were electronically stored and easily retrievable.

Internet service providers potentially targeted in 1782 requests

- **Google**
- **Yahoo!**
- **Microsoft**
- **Twitter**
- **Instagram**
- **Tumblr**
- **Blog hosting websites**

Targeting Internet Service Providers in 1782 Proceedings

Issues under the Electronic Communications Privacy Act (18 U.S.C. § 2510 *et seq.*) may arise with subpoenas to ISPs for information related to customers' e-mail, social media postings and messages.

- The ECPA requires that entities that provide an "electronic communication service" (ECS) or "remote computing service" (RCS) "***not knowingly divulge to any person or entity the contents of a communication***."
- Courts have found email providers and social networking websites are either ECS or RCS providers, or both.[1]

A civil subpoena will be sufficient to compel an ECS's or RCS's disclosure of basic subscriber records, provided that the subscriber is first given notice of the subpoena and opportunity to move to quash.

- Discoverable records include transactional, *non-content*, records such as: (i) user name, (ii) true name, (iii) physical address, (iv) IP address, (v) session records, (vi) geographic location data, (vii) device identifying information, (viii) account settings, and (ix) file download metrics.
- ***Emails***: The Ninth Circuit has granted a 1782 request to subpoena Yahoo! to produce identifying information for email accounts, such as user names and addresses, and not the content of any communication.[2]
- ***Blogs***: The Northern District of California has granted a 1782 request to subpoena blog hosting website WordPress.com to produce identifying information of account users who posted blogs on the website.[3]
- ***Google search information***: The Northern District of California granted a Section 1782 application requiring Google to produce documents for use in six cases in China involving copyright, trademark and unfair competition claims. The subpoena sought all of the alleged infringer's *sponsored-link advertisements* distributed by the search engine; the amount and dates of the alleged infringer's *payments* to the search engine; the *search terms* that generated the display of the alleged infringer's sponsored-link advertisements; and the *names and contact information* of certain publishers.[4]

1: *Theofel v. Farey–Jones,* 359 F.3d 1066, 1077 (9th Cir. 2004) (provider of email services is an ECS); *Crispin,* 717 F.Supp.2d at 982, 990 (Facebook and MySpace are ECS and RCS providers); *United States v. Weaver,* 636 F.Supp.2d 769, 770 (C.D. Ill. 2009) (Microsoft, which provides email services through Hotmail, is both an ECS and RCS provider).
2: *London v. Does 1-4*, 279 Fed. Appx. 513 (9th Cir. 2008),
3: *In re Yamaha Motor Espana*, S.A., 2011 WL 2747302 (N.D. Cal. Jul. 13, 2011),
4: *In re Am. Petroleum Institute*, 2011. WL 10621207 (N.D. Cal. Apr. 7, 2011).

Targeting Internet Service Providers in 1782 Proceedings, cont'd

Courts typically deny 1782 requests to subpoena *the contents* of emails from ISP providers.

- ***Beluga Shipping GmbH & Co. v. Suzlon Energy Ltd.***, 2010 WL 3749279, at *4-5 (N.D. Cal. Sep. 23, 2010)
  - The court denied a Section 1782 request to issue subpoenas to Google to seek the *contents of emails* stored in Google's Gmail service on grounds that the ECPA prevents civil litigant from seeking the contents of a subscriber's stored email from the provider of remote computing service or electronic communications service without first receiving consent from the subscriber.
- ***Suzlon Energy, Ltd. v. Microsoft Corp.***, 671 F.3d 728 (9th Cir. 2011)
  - The Court denied a Section 1782 request to issue subpoenas to Microsoft Hotmail to obtain a foreign litigant's emails. The court found that "the plain language of ECPA extends its protection to non-citizens."

Key Lesson:

The content of communications — defined as "any information concerning the substance, purport, or meaning of [the] communication," (18 U.S.C. § 2510(8)) — cannot be compelled with a civil subpoena, absent consent or waiver on the part of the subscriber in question.

1: *Theofel v. Farey–Jones,* 359 F.3d 1066, 1077 (9th Cir. 2004) (provider of email services is an ECS); *Crispin,* 717 F.Supp.2d at 982, 990 (Facebook and MySpace are ECS and RCS providers); *United States v. Weaver,* 636 F.Supp.2d 769, 770 (C.D. Ill. 2009) (Microsoft, which provides email services through Hotmail, is both an ECS and RCS provider).

Targeting Internet Service Providers in 1782 Proceedings, cont'd

The First Amendment rights to anonymous speech and association also may protect against disclosure of private information absent a "compelling need for the discovery."

× ***In re Lazaridis***, 865 F. Supp. 2d 521 (D.N.J. 2011)

- The court quashed a subpoena served on the Bring Home Sean Foundation (BSHF) that provided assistance to victims of child abduction, which was issued pursuant to Section 1782 to aid proceedings in Greece.
- Among other things, the court found that BSHF "*raised serious concerns with regard to the First Amendment implications that would arise were it to provide private e-mail addresses, names, and ISP addresses to a third party.* BSHF has a privacy policy that informs members of the website that their private information will be protected. Courts have held that anonymous speakers posting on the internet are afforded First Amendment protections, and a party seeking disclosure of the speaker's identity must show a compelling need for the discovery, such that the need outweighs any First Amendment right."

✓ ***London v. Does 1-4***, 279 Fed. Appx. 513 (9th Cir. 2008)

- To prove her fault-based divorce claim in connection with proceedings in St. Martin, the applicant sought to subpoena Yahoo! to produce documents (1) identifying the names, addresses, and telephone numbers of the users of five email accounts; (2) describing the dates on which the five email accounts were created; (3) describing the IP address from which the five email accounts were created; and (4) identifying internet groups in which the account users participated. The court rejected the contention that the request violated First Amendment rights to anonymous speech, finding "*no authority for the proposition that the First Amendment bars release of identifying data for email accounts used to solicit sex partners on the Internet.*"

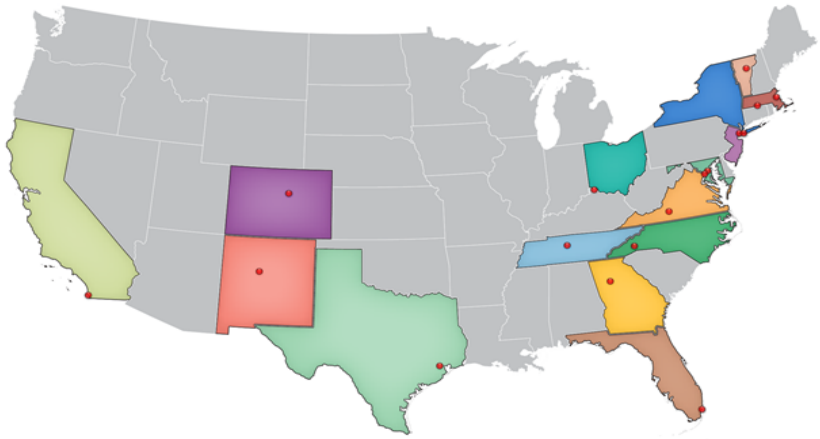
What best practices should counsel consider in light of the conflicting case law concerning Section 1782?

- ***Foreign Concerns***: As in any case before a foreign tribunal, the discovery applicant should consider whether the decision maker will appreciate or resent that the party went to other forums to get evidence, no matter what the evidence is. Sometimes the gains from having additional information may not be worth alienating the decision maker.
- ***Obtain Foreign Tribunal's Views***: Consider eliciting the views of the foreign tribunal on the discovery requests. Although not formally a factor in the *Intel* analysis, input from the foreign tribunal may serve two functions.
  - First, it can aid a US court that lacks knowledge about foreign discovery rules and about the particular litigation.
  - Second, it can demonstrate to the US court that the Section 1782 application is not merely an end-run around less-generous foreign discovery rules.
- ***Narrowly Tailored***: Be sure to tailor the discovery request to the facts of the foreign proceeding. The narrower the request is, the less likely it can be successfully challenged. Because Section 1782 discovery is largely discretionary, it definitely pays to keep things reasonable so that the district court does not suspect overreaching.
- ***Favorable Jurisdiction***: An applicant seeking Section 1782 discovery for use in *foreign arbitral proceedings* should carefully consider where to bring the application, given the split in authority regarding which arbitral bodies are considered Section 1782 "tribunals" for which discovery can be sought.

What best practices should counsel consider in light of the conflicting case law concerning Section 1782?

- **Consider All Potential Sources**: An applicant for 1782 discovery should consider the array of persons who may have discoverable information that help its claims or defenses in foreign litigation. For example, the wide-ranging application of Section 1782 allowed Chevron to obtain discovery from:
  - ***Director*** of *Crude*
  - Plaintiffs' environmental ***experts*** and ***consultants***
  - ***Bank*** that the plaintiffs used to improperly send money to the foreign judge and expert witness
  - ***Lawyers*** who assisted in procuring the judgment through fraud
  - ***Financiers*** who invested in the litigation
  - ***Internet service providers*** that plaintiffs used to communicate
  - ***Public relations firm*** retained by the Republic of Ecuador to smear Chevron in the media

Chevron's Key 1782 Discovery Proceedings



California

In re Chevron Corp. (E-Tech), No. 3:10-cv-01146-IEG-WMC (S.D. Cal.)
9/2/2010: A Federal Court in California granted Chevron's application to obtain evidence from E-Tech International and William Powers, environmental consultants for the LAPs whose work appears in the Cabrera report. The court found, "There is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own." 2010 WL 3584520, at *6 (S.D. Cal. Sep. 10, 2010)

Colorado

Chevron Corp. v. Stratus Consulting, Inc., et al., Case No. 10-cv00047-JLK (D. Colo.)
3/4/2010: A Federal Court in Colorado granted Chevron's application to obtain evidence from Stratus Consulting, an environmental consulting firm retained by counsel for the LAPs. The resulting evidence revealed that Stratus secretly drafted sections of the Cabrera Report and provided data to Cabrera for incorporation into his report. Stratus' executives ultimately renounced their participation in the LAPs' scheme to ghostwrite the Cabrera Report and disavowed the reports and the science behind them, testifying that there is no scientific merit to the LAPs' claims .

New Mexico

In re Chevron Corp. (E-Tech/Kamp), No. 10-mc-00021-JCH-LFG (D.N.M.)
9/1/2010: A Federal Court in New Mexico granted Chevron's application to obtain evidence from E-Tech International, an environmental consultant for the LAPs, and Richard Kamp, the director of E-Tech. In granting the application, the Court noted, "The release of many hours of the [*Crude*] outtakes has sent shockwaves through the nation's legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct." Slip Op. at 3-4 (D.N.M. Sept. 2, 2010).

Texas

In re Chevron Corp. (3TM), Misc. No. 4:10-MC-134 (S.D. Tex.; 5th Cir.)
4/5/2010: A Federal Court in Texas granted Chevron's application to obtain evidence from 3TM Consulting, one of the LAPs' environmental consulting firms whose work appears in the Cabrera Report. 3TM's President, Randy Horsak, testified that it was more likely than not that certain portions of the Cabrera Report included his work.

Ohio

In re Chevron Corp. (Barnthouse), Case No. 1:10-mc-00053-SSB¬KLL (S.D. Ohio)
9/16/2010: A Federal Court in Ohio granted Chevron's application to obtain evidence from Lawrence Barnthouse, one of the LAPs' "cleansing" experts who submitted a report to the Lago Agrio court on 9/16/2010 on purported natural resources damages, and who testified that he relied on the Cabrera Report to determine costs and did not perform his own analysis.

Florida

In re Chevron Corp. (Banco Pichincha), No. 1:11-cv-24599 (MGC) (S.D. Fla.)
2/27/2013: A Federal Court in Florida granted Chevron's application to obtain evidence from the Banco Pichincha accounts held by the Amazon Defense Front, Selva Viva and Luis Yanza. The resulting evidence showed payment of bribes to Cabrera, including a "secret account" used for money transfers to Ecuador and a previously unknown $33,000 transfer to Cabrera. The court concluded that "Chevron has obtained mounds of evidence, in multiple § 1782 proceedings, that suggests that the judgment itself was also ghostwritten." Dkt. 82 (S.D. Fla. June 12, 2012).

Massachusetts

In re Chevron Corp. (Shefftz), Case No. 1:10-mc-10352-JLT (D. Mass.)
12/7/2010: A Federal Court in Massachusetts granted Chevron's application to obtain evidence from Jonathan Shefftz, one of the LAPs' "cleansing" experts who submitted a report to the Lago Agrio court on 9/16/2010 on alleged unjust enrichment damages, and who testified that his report depended on "the accuracy of [Cabrera's] data series and his cost figures" without any attempt by Shefftz to verify the information.

In re Chevron Corp. (Bonifaz), No. 3:10- mc-30022-MAP (D. Mass.)
12/22/2010: A Federal Court in Massachusetts granted Chevron's application to obtain evidence from Cristóbal Bonifaz, the LAPs' former counsel who signed an agreement on behalf of the LAPs not to seek recovery against the ROE for contamination in Ecuador.

Georgia

In re Chevron Corp. (Calmbacher), Misc. No. 1:10-MI-0076 (N.D. Ga.)
3/3/2010: A Federal Court in Georgia granted Chevron's application to obtain evidence from Dr. Charles Calmbacher, one of the LAPs' judicial inspection experts. Dr. Calmbacher testified, on 3/29/2010, that he did not draft, nor did he authorize the filing of, two judicial inspection reports submitted by the LAPs in his name. Contrary to the report that was filed in the Lago Agrio case, Dr. Calmbacher concluded that he "did not see significant contamination that posed immediate threat to the environment or to humans or wildlife around it." In re Chevron Corp. (Calmbacher), Misc. No. 1:10-MI-0076 (N.D. Ga.)

New Jersey

In re Chevron Corp. (Uhl, Baron), No. 10-cv-2675 (SRC) (D.N.J.; 3d Cir.)
6/15/2010: A Federal Court in New Jersey granted Chevron's application to obtain evidence from Uhl, Baron, Rana & Associates, a consulting firm whose Associate Expert, Juan Cristóbal Villao Yepez, was identified as a member of Cabrera's supposedly neutral and independent team, but whose work also appears in materials prepared by the LAPs. The court found, "As far as the Court is concerned, the concept of an employee of a party covertly functioning as a consultant to a court appointed expert in the same proceeding can only be viewed as a fraud upon that tribunal." Hr'g Tr. at 43:13-44:16, (D.N.J. June 11, 2010). On 2/3/2011, the Third Circuit affirmed the District Court's order.

Washington, D.C.

In re Chevron Corp. (Wray), No. 1:10-mc-00371-CKK (D.D.C.)
7/22/2010: A Federal Court in Washington, D.C. granted Chevron's application to obtain evidence from Alberto Wray, the LAPs' former attorney who filed the Lago Agrio complaint. Forensic evidence determined that at least 20 of the 48 signatures on the document that ratified the complaint and appointed Wray as counsel were forged.

Virginia

In re Chevron Corp. (Scardina), Case No. 7:10-mc-00067 (W.D. Va.)
11/24/2010: A Federal Court in Virginia granted Chevron's application to obtain evidence from Robert Scardina, one of the LAPs' "cleansing" experts who submitted a report to the Lago Agrio court on 9/16/2010 on the costs of providing a potable water system. Scardina testified that the Cabrera report was the "sole source of information for what the existing potable water systems in the concession area was" and that he does not know "anything about the water quality in the concession area."

Tennessee

Chevron Corp. v. Quarles, No. 3:10-cv-00686 (M.D. Tenn.)
8/17/2010: A Federal Court in Tennessee granted Chevron's application to obtain evidence from Mark Quarles, an environmental consultant to the LAPs.

North Carolina

Chevron Corp. v. Champ, Case No. 1:10-mc-27 (W.D.N.C.)
8/27/2010: A Federal Court in North Carolina granted Chevron's application to obtain evidence from Charles Champ, an environmental consultant associated with the LAPs. The court found, "While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill." 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).

Vermont

Chevron Corp. v. Allen, Case No. 2:10-mc-91 (D. Vt.)
12/2/2010: A Federal Court in Vermont granted Chevron's application to obtain evidence from Douglas Allen, one of the LAPs' "cleansing" experts who submitted a report in the Lago Agrio court on 9/16/2010 on alleged environmental remediation damages. Allen testified that that he "relied on the Cabrera report" for his analyses and "made no efforts to independently verify" Cabrera's data.

New York

In re Chevron Corp. (Berlinger), Misc. No. 1:10-mc-00001-LAK (S.D.N.Y; 2d Cir.)
5/6/2010: A Federal Court in New York granted Chevron's application to obtain evidence from filmmaker Joseph Berlinger, including over 600 hours of outtakes from his movie "*Crude: The Real Price of Oil*," about the Lago Agrio case. The outtakes showed the LAPs' fraud, bribery and judicial intimidation.

In re Chevron Corp. (Donziger), Case No. 10-MC-00002 (LAK) (S.D.N.Y.)
8/6/2010: A Federal Court in New York granted Chevron's application to obtain evidence from Steven Donziger, the LAPs' lead US counsel. The court held: "There is substantial evidence that Donziger and others . . . improperly (1) pressured, intimidated, and influenced Ecuadorian courts, (2) colluded with Cabrera to substitute their own biased work product for the neutral and impartial assessment that Cabrera was appointed to produce, (3) concealed that role, (4) submitted to the Ecuadorian court over the signature of Dr. Calmbacher a report that Dr. Calmbacher denies having written, and (5) colluded with the GOE." 749 F. Supp. 2d 141, 162 (S.D.N.Y. Nov. 10, 2010).

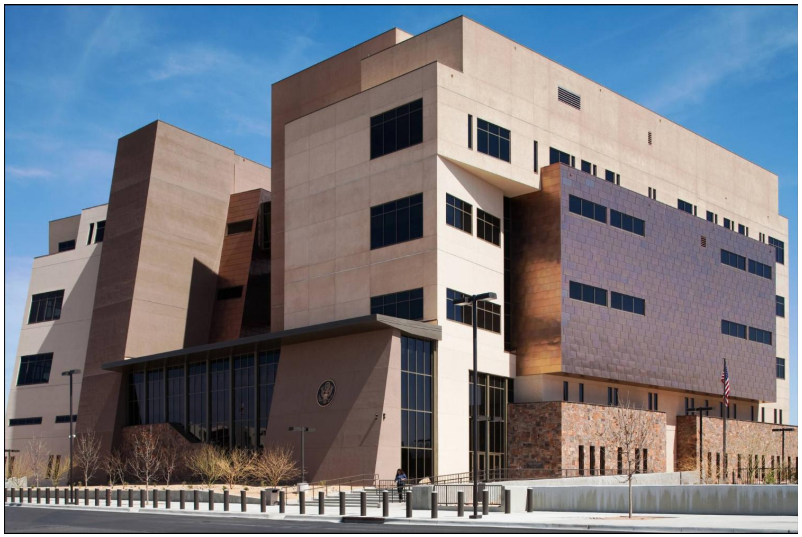
Maryland

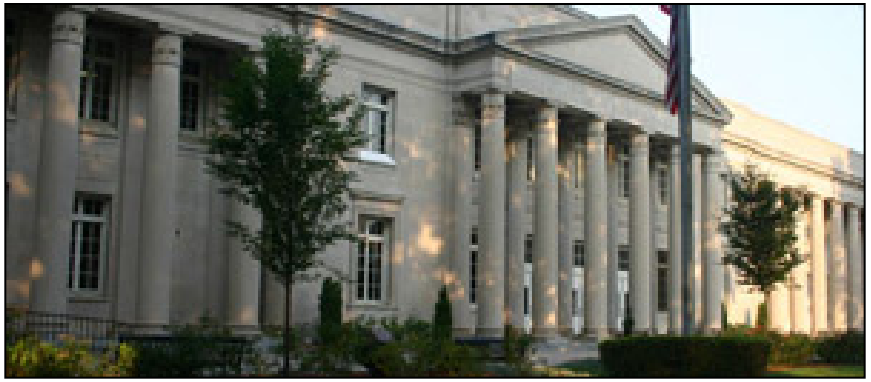
In re Chevron Corp. (Rourke), Case No. 10-cv-02989-AW (D. Md.)
11/24/2010: A Federal Court in Maryland granted Chevron's application to obtain evidence from Daniel Rourke, one of the LAPs' "cleansing" experts who submitted a report to the Lago Agrio court on 9/16/2010, on alleged excess cancer deaths.

In re Chevron Corp. (Picone), Case No. 8:10-cv-02990-AW (D. Md.)
10/24/2010: A Federal Court in Maryland granted Chevron's application to obtain evidence from Carlos Picone, one of the LAPs' "cleansing" experts who submitted a report to the Lago Agrio court on 9/16/2010 on the costs of providing health care to the purportedly affected population in Ecuador. Picone testified that the Weinberg Group (the LAPs' consulting firm charged with retaining the "cleansing experts") ghostwrote large portions of his reports.

Chevron Corp. v. Page, No. 11-CV-0395 (RWT) (CBD) (D. Md.)
1/25/2013: A Federal Court in Maryland granted Chevron's application to obtain evidence of judgment ghostwriting and other fraud from Aaron Marr Page, an attorney for the LAPs in connection with the Ecuador Litigation and the BIT Arbitration. The court concluded, "Chevron has shown to anyone with common sense that this is a blatant cut and paste exercise." Hr'g Tr. at 56-58, (D. Md. Jan. 25, 2013).

Chevron's Key 1782 Crime-Fraud Findings





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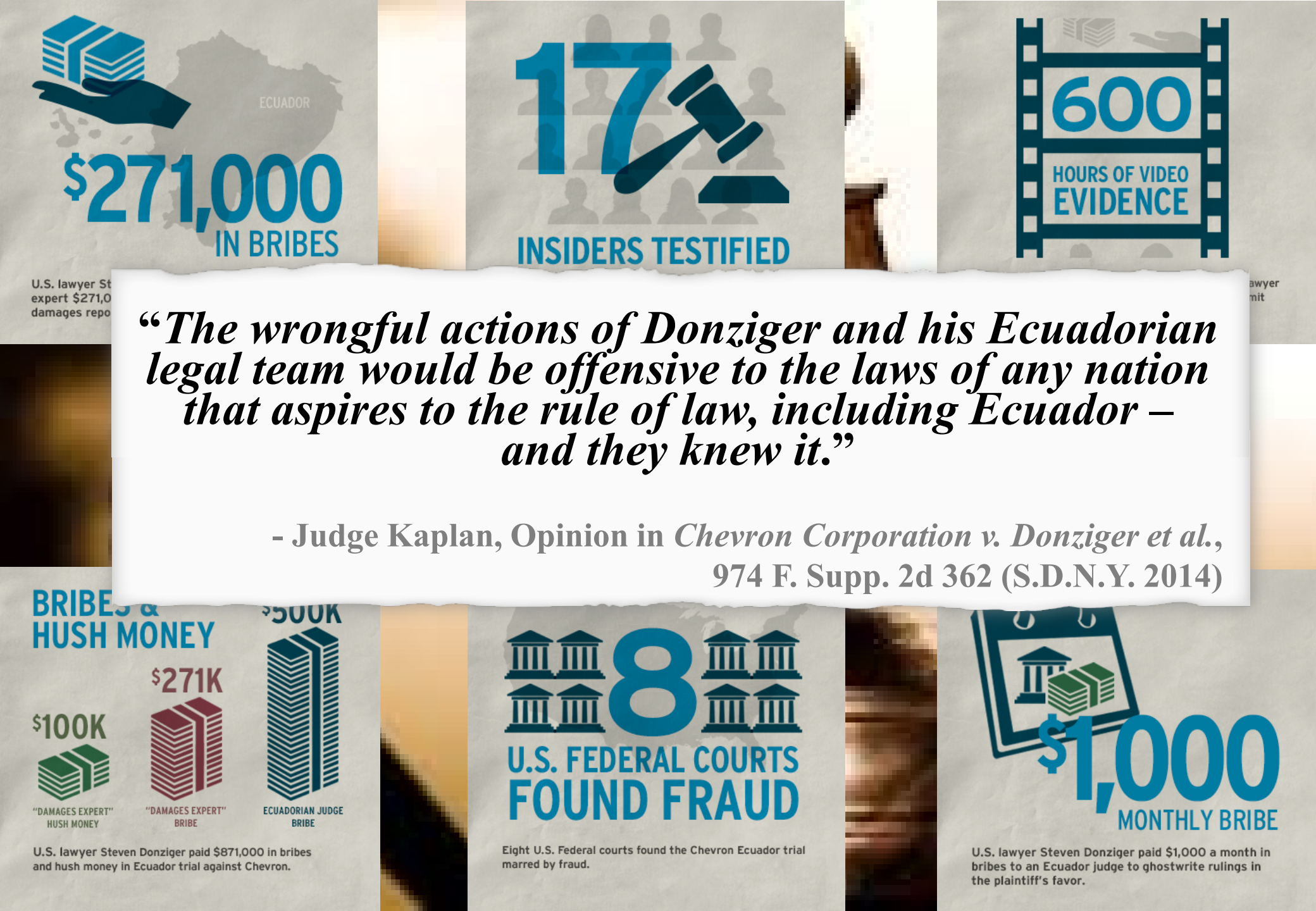
"While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that ***what has blatantly occurred in this matter would in fact be considered fraud by any court***. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill." (W.D.N.C. Aug. 30, 2010)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"The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador – and they knew it."
- Judge Kaplan, Opinion in Chevron Corporation v. Donziger et al., 974 F. Supp. 2d 362 (S.D.N.Y. 2014)
BRIBES &
HUSH MONEY
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"DAMAGES EXPERT"
HUSH MONEY
"DAMAGES EXPERT"
BRIBE
ECUADORIAN JUDGE
BRIBE
U.S. lawyer Steven Donziger paid $871,000 in bribes and hush money in Ecuador trial against Chevron.
8
U.S. FEDERAL COURTS
FOUND FRAUD
Eight U.S. Federal courts found the Chevron Ecuador trial marred by fraud.
$1,000
MONTHLY BRIBE
U.S. lawyer Steven Donziger paid $1,000 a month in bribes to an Ecuador judge to ghostwrite rulings in the plaintiff's favor.

OBTAINING U.S. DISCOVERY TO LITIGATE IN FOREIGN OR INTERNATIONAL TRIBUNALS PURSUANT TO 28 U.S.C. § 1782

TRANSNATIONAL LITIGATION GROUP WEBCAST

Scott Edelman
Avi Weitzman
Claudia Barrett
Colin Fraser

January 28, 2015

QUESTIONS & ANSWERS

GIBSON DUNN

Today's Panelists

Scott A. Edelman

Mr. Edelman is a partner in Gibson Dunn's Century City office, and Co-Chair of the firm's Transnational Litigation Group. He is a Fellow of the American College of Trial Lawyers, and has first-chaired numerous jury trials, bench trials and arbitrations, taking well over 20 to final verdict or decision. He has received a Clay Award as "Lawyer of the Year" from *California Lawyer* and has been recognized as an "Attorney of the Year" by *The Recorder*. Mr. Edelman has been repeatedly named by *Chambers USA* as a Tier 1 Leading Media and Entertainment Litigation Lawyer in California; by the *Hollywood Reporter* as one of the top 100 "Power Lawyers"; by *Daily Variety* as one of Hollywood's top litigators; and by *The Best Lawyers in America*® in the category of Entertainment Law: Motion Pictures & Television. He was also named a California "local litigation star" in Media and Entertainment Litigation in the 2012, 2013, 2014 and 2015 editions of *Benchmark Litigation*.

Avi Weitzman

Mr. Weitzman is a partner in Gibson Dunn's New York office. Since joining Gibson Dunn in 2012, Mr. Weitzman has been involved in a number of high-profile international litigations, including under Section 1782. Most recently, in November 2014, Mr. Weitzman successfully obtained hundreds of hours of videotapes for use in defamation and environmental proceedings in the Bahamas pursuant to Section 1782. Prior to that, Mr. Weitzman was a member of the Chevron trial team in its RICO lawsuit arising out of the fraudulently obtained Ecuadorian judgment against Chevron. From 2005 to 2012, Mr. Weitzman served as an Assistant United States Attorney in the Southern District of New York, primarily in the Securities and Commodities Fraud Task Force and the Organized Crime unit. As a federal prosecutor, Mr. Weitzman tried 12 federal criminal jury trials to verdict. He was one of the prosecutors overseeing Operation Perfect Hedge—the Government's unprecedented efforts to combat insider trading on Wall Street—and successfully defended the Government's use of wiretaps to prosecute Raj Rajaratnam, for which Mr. Weitzman received the Attorney General's Distinguished Service Award. In 2013, Mr. Weitzman was named one of five "Rising Stars" in the United States by *Law360* in the White Collar category. Mr. Weitzman was also named a 2014 "Rising Star" by the *New York Law Journal*.

Claudia Barrett

Ms. Barrett is an associate in Gibson Dunn's Washington, D.C. office. She has substantial experience in complex civil litigation matters and has represented national and multi-national companies in a wide variety of civil disputes in various federal and state courts and before arbitration panels. Ms. Barrett has substantial experience with Section 1782, having successfully obtained discovery from various technical U.S. experts who submitted reports to an Ecuadorian court in the Chevron case, and continues to work on various Section 1782 proceedings.

Colin Fraser

Colin Fraser is an associate in Gibson Dunn's Los Angeles. He currently practices with the firm's Litigation Department. His practice focuses on complex business litigation and transnational litigation. He has significant experience litigating in the U.S. claims relating to alleged tortious activities in foreign countries and defending against the recognition and enforcement of foreign judgments. Mr. Fraser also has prosecuted various actions brought under 28 U.S.C. § 1782 in federal courts around the country to obtain discovery for use in proceedings in the U.S., South America, and international arbitrations.

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