OBTAINING U.S. DISCOVERY FROM U.S. ENTITIES, FOR CASES IN INDIA OR INTERNATIONAL ARBITRATION

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Through this piece, the authors analyse 28 U.S.C. § 1782, a provision which authorizes the order of production of documents or testimony by the United States Federal District Court in which an entity resides for use in a proceeding before a foreign or international tribunal. This provision is seen as an imperative, yet oft overlooked tool in the hands of a non-U.S. party, who requires information from a U.S. entity with whom the party is engaged in a dispute with. In this light, the authors explain the statutory conditions to be met for the provision to apply, in addition to the discretionary power of the courts in applying this provision. The authors in elucidating the utility of this doctrine conclude by providing instances of its strategic use.


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Hidden in a remote part of the United States Code under Judiciary and Judicial Procedure is a statute that every Indian lawyer dealing with disputes that have any connection to a U.S. entity should be aware: 28 U.S.C. § 1782. This short, obscure, but increasingly important, statute provides that parties to anticipated or ongoing litigation in Indian domestic courts or international arbitration can obtain discovery from an entity in the U.S. to assist them in those proceedings. This can include the full range of discovery allowed under U.S. Federal Rules of Civil Procedure: depositions (oral questioning under oath), interrogatories (written questions), requests for production of documents or orders that preserve property or other assets pending the outcome of the case.

This statute is particularly useful where an entity in the U.S., perhaps the parent or affiliate of a local Indian company, or other company with whom a Indian party had no direct dealings, or an individual, maintains and possesses relevant documents that might otherwise not be discovered in the Indian proceedings or the arbitration. These materials can range from the U.S. entity having information about how an athletic shoe was determined to be counterfeit in an anti-counterfeiting case brought by a local distributor against an alleged counterfeiter, design documents showing that there was a flaw in the design of, or concerns about, a manufactured component, documents indicating how a U.S. financial institution assessed the risks of an investment that was sold by a local subsidiary or intermediary, or outtakes from a documentary sought in connection with an on-going international dispute.¹

Obtaining such information via 28 U.S.C. § 1782 can provide powerful leverage to settle or resolve cases. It otherwise can place a party in a significantly stronger position to win a fight on the merits. The leverage granted by the statute is also increased because the application, and its grant, initially occurs ex parte and the other side first becomes aware of it only when it is served with the order for discovery. Moreover, as United States’ courts become seeming increasingly unfriendly venues for non-U.S. parties seeking to bring cases arising from events occurring outside the US, even when involving the products of U.S. corporations, the statute takes on added importance for parties attempting to obtain redress in their home jurisdiction or in arbitration.²

¹ See, e.g., In re Gurur Tekstil Iletisim Sanayi ve Dis Ticaret Ltd. Sti, Misc. Action, D. Mass. 2008 (involving athletic shoes, in which the authors were involved); and the now famous In Re Chevron Corp, 2010 U.S. Dist. Lexis 5178 (S.D. N.Y.) et seq. (Involving outtakes from the documentary film “Crude”).

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This note outlines 28 U.S.C. § 1782, sets out current law on the statute and encourages parties dealing with disputes that connected with U.S. entities not to overlook this mechanism, which might assist in successfully obtaining discovery to aid resolving the dispute.

I. The Scope of 28 U.S.C. § 1782

28 U.S.C. § 1782 is titled “Assistance to foreign and international tribunals and to litigants before such tribunals.” It allows a United States Federal District Court in which a person or corporation resides or is found to order the production of documents or testimony to any interested person for use in a proceeding before a foreign or international tribunal.\(^3\) The full text of the statute’s paragraph (a) reads as follows:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.\(^4\)

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\(^3\) 28 U.S.C. § 1782 is a United States Federal Statute. As such, jurisdiction for applying the statute is given only to U.S. federal courts, not to state courts in the United States.

Accordingly, to obtain an order compelling discovery under § 1782(a), a petitioner must satisfy the statute's three requirements:

[T]he application must be made in the U.S. Federal District Court for the place where the person or entity from whom the discovery is sought resides or is found; the information sought must be for use in a proceeding before a foreign or international tribunal; and the petitioner must be a foreign or international tribunal or "any interested person."5

Once the petitioner satisfies these statutory requirements, the District Court still has discretion to allow the application, under a test enumerated by the U.S. Supreme Court.6 A party applying under § 1782(a), therefore, must address both the statutory requirements as well as the discretionary concerns of the court.

II. SATISFYING 28 U.S.C. § 1782'S REQUIREMENTS

A. Located or Found Within the District Courts' Geographical Area

28 U.S.C. § 1782(a) requires that the application for discovery be made in the United States Federal District Court of the district where the person or entity from whom discovery is sought resides or is found. In applications involving corporations, this is usually relatively straightforward; the filing usually is made in the District Court where the corporation's principal place of business is located. In analysing residency in this context, particularly for individuals, it can be a little more complicated and courts look at: (a) the location of any spouse or children; (b) ownership of property; (c) location of filing for tax purposes; (d) amount of time spent in that location; and, (e) location of full time employment.7

When residency is questionable, a district court may still authorise discovery from a person who is found in the district—a more relaxed requirement. For example, in In Re the Matter of the Application of Oxus Gold PLC,8 Oxus, an international mining group based in the UK, made a 28 U.S.C. § 1782 application for discovery

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5 As explained below, an “interested person” is a party to the overseas proceeding.
6 Intel Corp. v. Advanced Micro Devices, 542 U.S. 241, 247 (2004) [Hereinafter “Intel”] (Holding that when all three statutory elements are met, § 1782(a) authorises but does not require a district court to grant an application for discovery).
8 Ibid.
from an individual in connection with proceedings before the courts of the Kyrgyz Republic and an international arbitration related to a gold mining license. The Respondent lived in Moscow, but the District Court of New Jersey held the petitioner satisfied the statutory requirement by showing that the respondent lived in a New Jersey rental property for two months every year and could be found in New Jersey on a consistent basis. As such, a person who lives and works in a foreign country is not necessarily beyond the reach of § 1782(a) simply because he or she was outside the district at the time the District Judge signed the discovery order.

B. Proceeding Before a Foreign or International Tribunal

First and foremost, it should be noted that it is not necessary to have begun a foreign proceeding to use 28 U.S.C. § 1782 and the 28 U.S.C. § 1782 application need not be against an entity that will be a party in that future proceeding. This was made clear in In the Application of Winning (HK) Shipping Co. Ltd., where a British Virgin Islands company used 28 U.S.C. § 1782 to obtain discovery from a Florida based company, Ship Management Services (Hereinafter “SMS”) in advance of an international arbitration proceeding (to be in London under the London Maritime Arbitrators Association Rules) actually beginning. This was so even though the anticipated arbitration would not be against SMS. Relying on the Supreme Court’s decision in Intel Corporation v. Advanced Micro Devices, Inc., the court noted “there is no requirement that the foreign proceeding be ‘pending’ or even ‘imminent’ as long as the proceeding is ‘within reasonable contemplation.’” The court further noted that, “First, there is no dispute that the entity SMS is not a participant to the anticipated arbitration proceeding.” Nevertheless, as the discovery was relevant to the management of the vessel, which had run aground, Winning obtained a deposition and production under the statute of various documents purportedly in the possession of the manager of the ship, SMS, to assist it in an intended arbitration

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9 See, In re Oxus Gold, supra, n. 7, at 5.
10 See also, In re Edelman, 295 F.3d 171, 180 (2d Cir. 2002) (Holding that reading § 1782(a) to require the respondent to be physically present within the district at the time the district judge signed the discovery order to be overly narrow and inconsistent with the purpose of the statute).
11 In the Application of Winning (HK) Shipping Co. Ltd, 2010 WL 1796579 (S.D. Fla.) (Apr. 30, 2010) [Hereinafter “Winning”].
12 Intel, supra, n. 6.
13 Intel, supra, n. 6, at 10.
against the ship owner arising out of a time charter contract that had not been performed. The discovery sought, and granted, also included discovery of documents and the deposition of the SMS superintendent or other persons knowledgeable about the management of the vessel.

The statute's definition "foreign or international tribunals" clearly covers adjudicative proceedings before foreign courts, but it has been held to be broader than simply court proceedings.\(^\text{14}\) For example, it has been held to embrace other decision making entities, such as the European Commission. However, where the foreign body is not engaged in the role of a judicial or quasi-judicial controversy, it falls beyond the definition.\(^\text{15}\)

C. Is Arbitration a Proceeding before a Foreign or International Tribunal?

The chief area of contention regarding the scope of the statute's language has concerned whether arbitration tribunals are "foreign or international tribunals" under § 1782(a). State-sponsored arbitral tribunals and investor state arbitrations appear to fall within the scope of § 1782(a).\(^\text{16}\) This was confirmed in the recent "Crude" documentary outtakes case, In re Application of Chevron Corporation,\(^\text{17}\) the Court granted Chevron's application for a subpoena for the production of outtakes of a documentary film entitled Crude from its U.S. based producer, pursuant to a bilateral investment treaty arbitration on-going between Chevron and Ecuador as well as litigation in Ecuador.\(^\text{18}\) The Court noted that the application fell within 28 U.S.C. § 1782 because the arbitration was not an arbitration tribunal established by private parties, but instead "a tribunal established by an international treaty". The

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\(^{14}\) See, H.R. Rep. No. 88-1052, at 9 (1963) ("The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts"); Nat'l Broadcasting Co. Inc. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) [Hereinafter "Nat'l Broadcasting"] (Interpreting the legislative history of the modern § 1782(a) as "intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies").

\(^{15}\) See, e.g., In re Letters of Request to Examine Witnesses from Court of Queen's Bench of Manitoba, Canada, 488 F.2d 511 (CA 1973) (Refusing a 28 U.S.C. § 1782 application where it was seeking testimony on behalf of a foreign governmental body - the Manitoba Commission of Inquiry- whose purpose was to conduct an investigation unrelated to a judicial or quasi-judicial controversy).

\(^{16}\) See, e.g., In re Oxus Gold, supra, n. 7, at *5 (citing Nat'l Broadcasting, holding that an international arbitration between two sovereign states rather than two contractually-bound private parties, constituted a "foreign or international tribunal" under § 1782(a)).

\(^{17}\) In re Application of Chevron Corporation, U.S. Dist. LEXIS 47042 (S.D.N.Y. 2010).

\(^{18}\) There was also litigation in Ecuador.
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case thus confirmed, at least in the Second Circuit, the application of 28 U.S.C. § 1782 to international treaty arbitrations.\(^{19}\)

This, however, does not mean that a 28 U.S.C. § 1782 application will be necessarily granted in cases involving disputes pending in investor-state arbitrations. For example, in *In re Application of Caratube Int’l Oil Co. LLP*,\(^{20}\) the Washington D.C. District Court denied a 28 U.S.C. § 1782 application made against non-parties to an arbitration for discovery in support of an ICSID arbitration. Though there was an issue between the parties as to whether an ICSID Tribunal was a “foreign or international tribunal” under the statute, the court determined the application on other grounds. It emphasised that the timing of such an application is important—the earlier the better: “Caratube does not defend its delay in filing its petition, and its tardiness in doing so—especially without prior notice to the Tribunal—supports denying the petition.”\(^{21}\) The Court also noted that the 28 U.S.C. § 1782 application seemed to be an attempt to circumvent the Tribunal’s own discovery process as agreed by the parties, and said, “[T]he Court views as substantially more important the facts that this arbitration is already ‘late in the procedure’ and that Caratube appears to be circumventing the Tribunal’s control over its own discovery process. Weighing these factors, the Court declines to order discretionary discovery and will therefore deny Caratube’s section 1782 petition.”\(^{22}\)

\(^{19}\) *In re Application of Chevron Corporation*, *supra*, n. 16, at 14-15. The court, perhaps over-egging the pudding, combined jurisprudence on public international investment treaty cases and private commercial arbitration in the context of § 1782. In doing so it did not take the uniform posture that there is no qualitative difference, noting instead that the Chevron/Ecuador arbitration was investor-state treaty arbitration. The Court then noted that in *Intel* the U.S. Supreme Court had cited a law review article that the term “tribunal” used in the statute “includes... administrative and arbitral tribunals...”. In this regard, the court stated that two district courts in the Second Circuit and one in the Third Circuit have followed this dictum and held that “international arbitral bodies operating under UNCITRAL rules constitute ‘foreign tribunals’ for purposes of Section 1782.”


\(^{21}\) *In re Application of Caratube Int’l Oil Co. LLP*, *supra*, n. 20, at 5.

\(^{22}\) There is some suggestion in the decision that the court considered that 28 U.S.C. § 1782 does not apply to ICSID arbitration. The court states, “The nature of the Tribunal, however, counsels against granting Caratube’s petition.” (Id. at 4). The court then cites Republic of Kazakhtan v Biedermann Int’l, 168 F. 3d 880, 883 (5th Cir. 1999) that concludes that “§ 1782 does not apply to private international arbitrations, that resort to § 1782 in the teeth of such arbitration agreements.” (Id.). This reference though is a reference to private arbitration, not public international arbitration—which is what BIT arbitration is. And, in any event, this dictum is merely a precursor to the Court’s reliance on delay as the main issue in its refusal to grant the petition. As such, in this author’s view at least, Caratube does not stand for the proposition that BIT arbitrations are beyond the reach of 28 U.S.C. § 1782.
Beyond public international law arbitrations, case law in the U.S. does remain unsettled on whether § 1782(a) is available to assist parties in private international commercial arbitrations. While the Second (New York) and Fifth (Louisiana, Mississippi and parts of Texas) Circuits previously held that private arbitral tribunals are not “foreign or international tribunals” for purposes for § 1782(a), a number of lower ranking district courts have interpreted the Supreme Court’s more recent Intel decision to include private commercial arbitral tribunals as “foreign or international tribunals.” Accordingly, it is perhaps more accurate to say that the pendulum is swinging to be more inclusive in this regard and not to deny § 1782 applications connected to private international arbitrations on the basis that they are not “foreign or international tribunals.” This is so even given Caratube.

The U.S. Supreme Court’s decision in Intel concerned whether the European Commission is a tribunal for § 1782(a) purposes when it acts as a first-instance decision-maker and its decisions are judicially reviewable. The Court held that it was, allowing the application. While not directly addressing the issue of whether international commercial arbitration tribunals are a “foreign or international tribunal”, the Court, in dicta, described the term “tribunal” as “including...administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts” [Emphasis added].

By this language, after Intel, courts emphasised that, similar to the European Commission, arbitral tribunals act as first-instance decision-makers whose decisions are reviewable in court. U.S. Courts also started to reject

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23 See, Nat’l Broadcasting, supra, n. 14, at 190 (In finding the statutory language of § 1782(a) to be ambiguous as to what constitutes a “foreign or international tribunal,” the court held that the absence of legislative history clearly indicating Congressional intent to apply § 1782(a) to private arbitral tribunals instead indicated Congressional intent not to apply § 1782(a) to private arbitral tribunals); Republic of Kazakhstan v. Biedermann, supra, n. 22 (Holding that “there is no contemporaneous evidence that Congress contemplated extending § 1782(a) to the then-novel arena of international commercial arbitration”).


25 See, Intel, supra, n. 6, at 258.

26 Intel, supra, n. 6, at 258 (Citing Hans Smit, International Litigation Under the United States Code, 65 COLUM. L. REV. 1015–16 (1965)).

27 See, In re Roz Trading, supra, n. 24, at 1225 (“The...arbitral panels [of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna] are similarly ‘first-instance decisionmaker[s]’ that issue decisions ‘both responsive to the complaint and reviewable in court.’”).
the notion that the wording of § 1782(a) is ambiguous, holding rather that the widely-used and commonly-accepted definition of “tribunal” includes private international commercial arbitral tribunals. Finally, while the Supreme Court has not ruled directly on the issue, its expansive interpretation of § 1782(a) in Intel convinced some U.S. courts that it would also read “foreign or international tribunal” expansively enough to include private international arbitral tribunals. The application of the Intel “arbitral tribunal” dicta has, however, come to be somewhat tortuous in some cases. For instance, in In the Application of Winning (HK) Shipping Co. Ltd, the court considered § 1782 applied to the arbitration because, “to the extent that the arbitration forum at issue is subject to the Arbitration Act 1996 (of England) or the Parties have agreed to follow the rules of the London Maritime Arbitrator’s Association, Winning is proceeding before a foreign tribunal.” The key to this decision was the Court’s determination that the LMAA “acts as a first instance decision maker whose decisions are subject to judicial review.”

In so deciding, the court contrasted other cases where the arbitral institution was the International Chamber of Commerce (“ICC”) or the Stockholm Chamber of Commerce (“SCC”), saying that their decisions were not subject to judicial review. The problem with this analysis by the Court is that it reaches the conclusion for the wrong reasons. It is inaccurate that ICC and SCC arbitration awards are not subject to a similar judicial review as that of the LMAA - indeed given the New York Convention’s internationally applicable uniform grounds for judicially contesting arbitral awards it is inaccurate as to virtually every private commercial arbitration institution (perhaps with the exception of the new “court-free” Bahrain chamber). Accordingly, contrasting private arbitrations based on “judicial reviewability” does not make a

28 Id., at 1225–26 (Rejecting National Broadcasting’s assertion that “foreign and arbitral tribunal” was ambiguous, instead holding that Intel’s approval of language that included arbitral tribunals as “foreign and arbitral tribunals” was consistent with the widely-used, commonly-accepted definition of “tribunal.” Had Congress wanted to limit § 1782(a), the Court stated, it simply would added the word “governmental” before the word “tribunal.”); see also, In re Babcock Borsig AG, supra, n. 24, at 240 (D. Mass. 2008) (In holding that an arbitral tribunal constitute a foreign or arbitral tribunal, the court held that “[t]here is no textual basis upon which to draw a distinction between public and private arbitral tribunals”).

29 See, In re Hallmark, 534 F.Supp. 2d 951, 955 (D. Minn. 2007) (“This expansive approach [of § 1782(a)] suggests that the Court would not restrict the scope of ‘tribunal’ to necessarily preclude assistance for use in private arbitrations”).

30 Winning, supra, n. 11, at *10.

31 Winning, supra, n. 11, at *9.
consistent counter argument to those cases that hold private arbitration tribunals exempt from § 1782.\textsuperscript{32}

As noted, U.S. courts are split regarding whether 28 U.S.C. § 1782 applies to international arbitration, and not all courts read Intel as extending § 1782(a) to private arbitral tribunals. The Southern District of Texas, for example, held that Intel did not explicitly agree with the assertion that the definition of “tribunal” includes private arbitral bodies, and that Intel’s analysis of the “foreign or international tribunal” issue paled in comparison to the analysis performed by the Second and Fifth Circuits,\textsuperscript{33} both of which held that private arbitral tribunals are not “foreign or international tribunals” for purposes of § 1782(a).\textsuperscript{34} Given Biedermann’s controlling precedent and Intel’s silence on the issue, the court reasoned that it lacked the power to grant discovery under § 1782(a).\textsuperscript{35} As noted above, another court concluded that § 1782(a) did not apply to ICC arbitration awards because such would not be judicially reviewable.\textsuperscript{36} Yet another court, while acknowledging that a number of district courts had extended § 1782(a) to private arbitral tribunals, nevertheless affirmed the position that only state-sponsored tribunals are subject to § 1782(a).\textsuperscript{37}

In sum, it is clear that on this issue that a petition under 28 U.S.C. § 1782 is permissible in the right situation, where one is involved in litigation proceedings in India’s courts. It is also now fairly well established that 28 U.S.C. § 1782 applies to public international arbitration matters. But there remains uncertainty and some confusion as to its applicability to private international arbitrations, the

\textsuperscript{32} The uncertainty of the same court that decided Winning of the application of 28 U.S.C. § 1781 to private arbitrations was also seen in Dockray v. Carnival Corp 2010 WL 2813803 (S.D. Fla. 2010), at 10. The court strongly intimated that the statute even post Intel may not apply to private arbitrations and declined to retain jurisdiction to compel discovery by Carnival based on the discretionary nature of the statute, in a case seeking to compel arbitration. The interesting (and novel) aspect to Dockray was the use of 28 U.S.C. § 1782 to seek to retain the court’s jurisdiction (Rather like that if a U.S. court stays a case pending arbitration) over discovery. Though rejected, such attempts to use the statute in this way, if allowed, may expand court oversight in arbitration proceedings’ discovery processes.

\textsuperscript{33} See, generally, Nat’l Broadcasting, supra, n. 14; Republic of Kazakhstan v. Biedermann Int’l, supra, n. 22.


\textsuperscript{35} See, La Comision Ejecutiva, Hidroelectrica del Rio Lempa v. El Paso Corp., supra, n. 34, at 486.


\textsuperscript{37} See, In re Norfolk Southern Corp. et al., 626 F. Supp.2d 882, 886 (N.D. Ill. 2009).
outcome perhaps depending upon where in the U.S. the U.S. entity is based and the particular U.S. District court involved.

D. Any Interested Person(s)

The final statutory requirement is that a § 1782(a) request come from either a foreign or international tribunal or “any interested person.” Litigants are the most common example of “interested person[s]” who may invoke § 1782(a). However, § 1782(a) plainly reaches beyond “litigant.” The statute also includes foreign and international officials, as well as any other person who possesses a “reasonable interest” in obtaining judicial assistance. Among those that courts have found to have a “reasonable interest” and therefore be “interested persons” for purposes of § 1782(a) are complainants in foreign administrative actions that grant them procedural rights, majority parents of a party in foreign proceedings, and the family members of a person who has died intestate in a foreign country.

III. OTHER CONSIDERATIONS RELEVANT TO A COURT’S GRANT OF § 1782(A) DISCOVERY

It must be remembered that when a court determines that a petitioner meets the above statutory requirements of § 1782(a), the court is not required to issue a discovery order. The grant of discovery pursuant to § 1782(a) is discretionary. Nevertheless, there are established rules to determine if discretion will be exercised in granting discovery.

In Intel, the Supreme Court set out three factors a court may consider in ruling on a § 1782(a) application:

(a) Is the discovery sought within the foreign tribunal’s jurisdictional reach, and thus accessible absent resort to § 1782(a)? If, for example, the person from whom discovery is sought is a party to the foreign proceeding, the need

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36 See, Intel, supra, n. 6, at 256.
39 See, Intel, supra, n. 6, rejecting respondent’s assertion that the term “interested persons” includes only “litigants, foreign sovereigns, and the designated agents of those sovereigns”.
40 See, Intel, supra, n. 6, at 256–57 (Holding that a complainant who triggered a European Commission investigation “possesses a reasonable interest in obtaining [judicial] assistance,” and is therefore an “interested person” under § 1782(a), despite lacking formal party or litigant status, because of the participation rights that accompany filing such a complaint).
41 See, id.
42 See, In re Oxus Gold, supra, n. 7, at *7.
44 Intel, supra, n. 6, at 247.
for § 1782(a) assistance may not be as great as if that party were a non-party to the foreign proceeding, since the foreign tribunal has jurisdiction over those before it and can itself order them to produce evidence.45

(b) What is the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign government or court to U.S. Federal Court judicial assistance?46 While Intel explicitly states that foreign discoverability is not a prerequisite for obtaining discovery under § 1782(a), a court may be less likely to grant a § 1782(a) petition if the foreign tribunal objects to it.47 The petitioner is not, however, required to seek the discovery sought through the foreign tribunal before requesting discovery from the district court.48 Nor must the applicant demonstrate that the information would be discoverable in the foreign jurisdiction.49

(c) Does the § 1782(a) request conceal an attempt to circumvent foreign proof-gathering restrictions?50

Finally, the district court may reject or trim a § 1782(a) request if it deems it to be unduly intrusive or burdensome.51

45 Intel, supra, n. 6, at 264.
46 Intel, supra, n. 6, at 264; see, In re Application of Babcock Borsig AG, supra, n. 24, at 241 (Explaining the importance of receptivity of the foreign tribunal to U.S. federal-court judicial assistance in light of the purpose of § 1782(a) and denying a § 1782(a) discovery request until the ICC provided affirmative indication of its receptivity to the requested materials).
47 See, La Comision Ejecutiva Hidroelectrica del Rio Lempa v. El Paso Corp., supra, n. 34, at 487 (In addition to holding that § 1782(a) categorically does not apply to private international tribunals, the court noted that the Swiss arbitral tribunal would have refused petitioner’s attempt to gather discovery in the United States had it had the authority to do so, and the district court would not have granted the discovery request out of respect for the Swiss tribunal).
48 See, In re Euromepa S.A., 964 F.2d 97, 100 (2d. Cir. 1992). But see, Aventis Pharma v. Wyeth, 2009 U.S. Dist. LEXIS 105422 (S.D.N.Y. Nov. 9, 2009) (Denying § 1782(a) application in part because over the course of a five-year dispute before a French Tribunal the applicant never sought the requested documents, which indicated an attempt to circumvent foreign proof gathering restrictions); see also, C. Mark Baker & Efren C. Olivares, Do ‘Foreign Tribunals’ Include Arbitration Panels?, NATL L. J. (May 31, 2010), available at http://www.fullbright.com/images/publications/20100531NLJ BakerOlivares.pdf (Suggesting that proceeding with a § 1782(a) request without alerting the arbitral tribunal puts a party at risk of losing the good will of the tribunal).
50 Intel, supra, n. 6, at 264–65.
51 Intel, supra, n. 6, at 265; see, In re Roz Trading, supra, n. 24, at 1230-31 (N.D. Ga. 2006) (Rejecting discovery requests that were without limitation as to time, place or subject matter, and granting discovery requests within certain time limitations that the court deemed relevant and narrowly tailored).
Further, in exercising its discretion, a court should be guided by the twin aims of the statute: to provide “equitable and efficacious procedures in United States courts for the benefit of tribunals and litigants involved in foreign litigation,” and to “encourage foreign countries by example to provide similar assistance to our courts.”52 One factor that may frustrate the statute’s purposes is untimeliness.53 When an applicant has had ample time to request discovery either from a foreign tribunal or a district court, but waits until the foreign tribunal has reached the advanced stages of its proceedings, the court may find that granting discovery at that point would not be an efficient and beneficial aid to the foreign tribunal.54

IV. THE STRATEGIC USE OF 28 USC § 1782

A 28 U.S.C. § 1782 application can be a powerful tool in the arsenal of a non-U.S. party involved in a dispute where there is a U.S. entity with information pertaining to the dispute. This was illustrated vividly in In the Application of Winning (HK) Shipping Co. Ltd. There, the application was made before any arbitration proceedings were begun. But there was a clear dispute pending. As such, the strategy behind the application was to garner evidence that would give Winning the most available information from which to make its case in the arbitration process. Moreover, the discovery sought was from a third party, which would not be a party to any arbitration, but that third party (the ship’s manager) had information directly relevant to the issue of why the charter party was not performed. Such an application is difficult to oppose. The information is sought from an entity from whom information (in arbitration) could not be compelled, but who has information that is directly relevant to the substantive merits of the proceedings. There were no privilege concerns that might prevent disclosure or raise a dispute. Further, the request was very specific: it sought only that which was needed pertaining the management of the ship at the relevant time. This is important. A tightly drafted and focused discovery request is much more likely to be granted than a broad “all documents” request, which may be rejected by

52 See, In re TSI, Ltd.,2009 U.S. Dist. LEXIS 77189, *5 (W.D.N.Y. Aug. 28, 2009); see also Eco Swiss China Time Ltd. v. Timex Corp., 944 F. Supp. 134, 138 (D. Conn. 1996) (Statute’s purpose is to provide “equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects”); Lo Kan Chan v. To, 858 F.2d 1564, 1565 (11th Cir. 1988) (Purpose is to strengthen power of district courts to respond to requests for international assistance and stimulate reciprocity).

53 See, Aventis Pharma v. Wyeth, supra, n. 48.

54 See, id. at 3–4.
the Court or opposed in part or full by the Respondent. While an application can, and frequently is, made after a foreign proceeding has begun (especially where the applicant is defending that proceeding), seeking to obtain discovery before a formal proceeding commences not only helps the party seeking the information to better understand the strengths and weaknesses of its case (particularly if that party is one that truly needs information to make its case to the fullest), but obtaining such discovery also can potentially put a party in a strong position to resolve the matter favorably in a settlement.

It should also be borne in mind that an application under 28 U.S.C. § 1782 is typically a short paper supported by an affidavit with relevant documents and attaching the discovery requests sought. As such, it can usually be prepared fairly quickly and filed. Moreover, as a miscellaneous proceeding in Federal Court, it is dealt with expeditiously and an order granted or not shortly (usually within days or a week) after filing. And, as noted before, the filing and the order is initially granted ex parte. Upon being issued, the Respondent can oppose the request, in which case a full hearing on the issue occurs.

V. CONCLUSION

28 U.S.C. § 1782 is a useful tool of which Indian lawyers should be aware when representing a party where a U.S. entity or person has information relevant to the matter as it allows potential broad discovery to be obtained. That discovery can take the form of depositions, document discovery or interrogatories available under U.S. Federal Rules of Civil Procedure, which would not otherwise be available to the foreign litigant. The process is generally much quicker than pursuing requests under the Hague Convention. In crafting the application, care is needed to address not only the statutory requirements but also the factors that weigh on the exercise of a court’s discretion as detailed in Intel. In particular, a petitioner should demonstrate the need for § 1782(a) discovery and the tribunal’s receptiveness to such discovery, while tailoring its discovery request in a specific, relevant and narrow way. When seeking to use § 1782(a) in a private international commercial arbitration context, however, a party should be aware of some courts’ hesitancy to extend § 1782(a) to cover such proceedings and be mindful of the jurisdiction in which it is required to file its application to determine the applicable law in that jurisdiction concerning § 1782 and international commercial arbitration.