

By Edward A. Klein

DISCOVERING AND ERICA

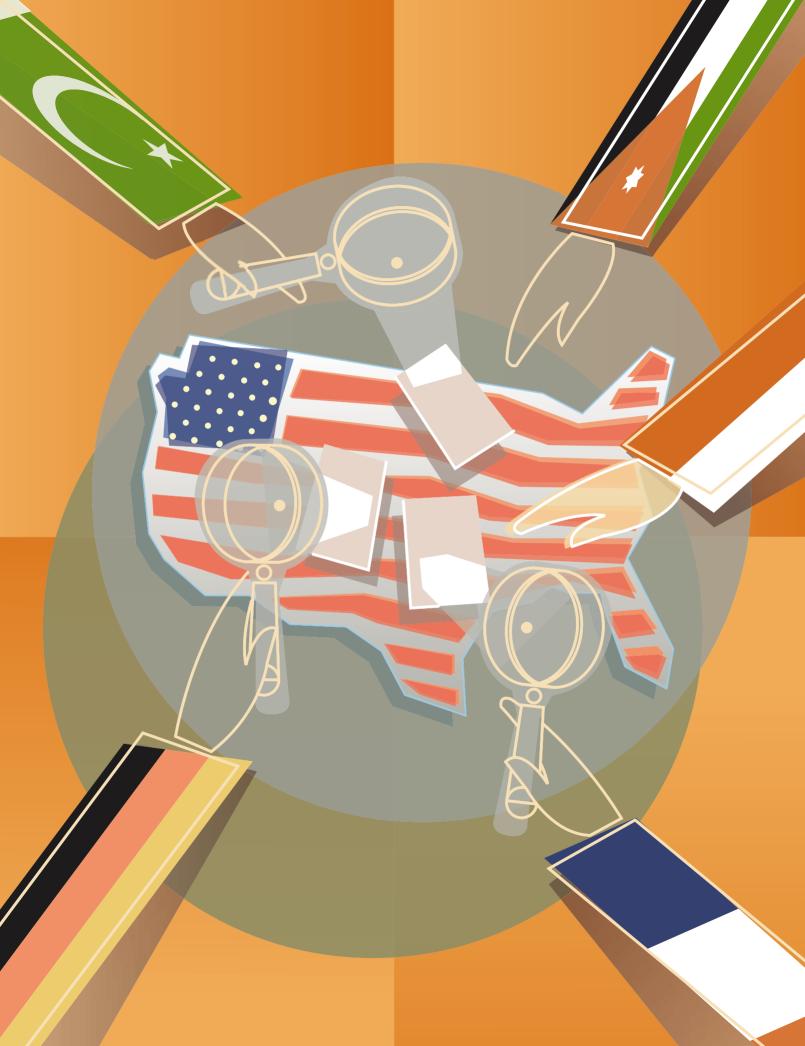
Recent court decisions have addressed the uncertainties in the federal statute permitting foreign discovery in the United States

ecent arrests and trials of suspected terrorists in Bahrain, France, Germany, Indonesia, Jordan, Malaysia, Pakistan, Spain, Yemen, and elsewhere demonstrate the global nature of the antiterrorism campaign being led by the United States. Although these cases are being pursued in foreign jurisdictions, witnesses and other evidence are likely to be located in the United States. As a result, prosecutors and suspects in such cases may invoke 28 USC Section 1782, a little-known federal statute that enables parties to take discovery in the United States for legal proceedings abroad.

Since 1855, U.S. law has provided some degree of assistance to foreign parties seeking evidence in the United States. The law evolved over the years, with Congress substantially broadening its scope in 1964. The current version of the statute potentially applies to all foreign civil and criminal matters and is not limited to terrorism or any other category of cases. The statute, which has remained virtually unchanged for almost 40 years, states:

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 accusations. 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 testi-

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mony 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 in 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 proscribe otherwise, the testimony or statement shall be taken, and the document or thing produced in accordance with the Federal Rules of Civil Procedure.

Additionally, "[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."²

Three Questions

Although the statute appears to be relatively straightforward, it has generated considerable litigation in recent years. That litigation has focused on three questions: What are the statute's expressed requirements and limitations? Are there any implied requirements? And, if the statute's requirements are satisfied, what discretion does the district court have in implementing the statute?

Courts have interpreted the statute as imposing three requirements. First, the discovery sought must be for use in a "proceeding in a foreign or international tribunal." Next, the application must seek discovery from a "person" who "resides or is found" in the district in which the application is filed. Third, the application must be made by a "foreign or international tribunal" or an "interested person."³

The first requirement has led courts repeatedly to address what constitutes a "proceeding in a foreign or international tribunal" under Section 1782. Traditional lawsuits in courts of law are clearly included. However, it is less clear whether inquiries conducted by administrative bodies and other similar proceedings fall within the terms of the statute. The Ninth Circuit has held that the phrase is "intended to be read broadly to include quasijudicial and administrative bodies and foreign investigating magistrates."4 In the Ninth Circuit, any proceeding that is "related to a quasi-judicial or judicial proceeding" qualifies under Section 1782.5 The Second Circuit applies a slightly different analysis. The test there concerns whether the foreign proceeding is "adjudicative in nature." Despite the apparent precision of these tests, the case

law suggests they are difficult to apply and the results turn on the particular facts of an individual case.⁷

Until recently, surprisingly little attention has been paid to the issue of whether a private international arbitration qualifies as a "foreign or international tribunal." The majority of commentators believe that Section 1782 does apply to private commercial arbitrations, 8 and one early district court case so held. 9 However, in recent years, the Second and Fifth Circuits have decided that a private international arbitration is not a foreign or international tribunal within the meaning of the statute. 10 There does not appear to be any circuit court authority to the contrary.

In future years, courts will likely have to decide whether the International Criminal Court (ICC) constitutes a "foreign or international tribunal" under the statute. The ICC was created in 1998 pursuant to the Rome Statute of the International Criminal Court and came into effect in July 2002. Although the United States initially supported the creation of a permanent international criminal court, this country later renounced the ICC and indicated that the United States would not have any involvement in the court. Thus, although the ICC would likely qualify as an "international tribunal" under Section 1782, the U.S. government's adverse position may provide litigants with a basis for resisting discovery sought in connection with an ICC proceeding.

The statute's second requirement is that the discovery be sought from a person who resides or is found in the district. A recent case arising out of the automobile crash in Paris that killed Princess Diana established new law regarding the definition of a "person" under Section 1782. Although both individuals and entities qualify as persons under the statute, until recently no court had decided whether the federal government constitutes a person under Section 1782. In connection with a French investigation of the crash, Mohammed Al Fayed (the father of Dodi Fayed, the other crash victim) sought to subpoena documents from the Central Intelligence Agency. The trial court refused to compel compliance with the subpoena on the ground that "person" did not include the sovereign. Al Fayed appealed, and the D.C. Circuit Court affirmed the lower court. The court noted the statute did not expressly refer to the federal government one way or the other. After analyzing a number of statutes and precedents, and addressing Section 1782's reference to the Federal Rules of Civil Procedure, the D.C. Circuit Court concluded that the term "person" does not include the federal government or its agencies.11

The statute's final requirement is that the

Section 1782 applicant be either the tribunal itself or an "interested person." The statute does not define the term "interested person," but courts have generally held that this encompasses both persons designated as such under foreign law and parties to the foreign proceeding. ¹² Although parties attempting to resist discovery have challenged Section 1782 applications on the ground that the applicant is not an interested person, there does not appear to be any reported decision denying discovery on this basis.

If an applicant establishes the three requirements necessary to invoke Section 1782, the statute mandates that the court nonetheless deny the application if the discovery would violate "any legally applicable privilege." A party may thus resist discovery under Section 1782 on the ground that such discovery would violate his or her constitutional rights, such as the privilege against self-incrimination or the right to be free from unreasonable searches and seizures. Likewise, if the discovery fails to meet the constitutional requirements of due process, it should be prohibited. ¹⁵

Courts have interpreted the phrase "any legally applicable privilege" to encompass a variety of statutory and common law rights. The Eleventh Circuit, for example, upheld the decision of the U.S. magistrate that refused to disclose grand jury materials, attorney work product, and records of intercepted conversations on statutory and common law grounds. ¹⁶

The "legally applicable privilege" precluding discovery may also be a privilege under a foreign legal system.¹⁷ However, courts have had some difficulty when confronted with such a claim. Indeed, the Second Circuit has suggested that courts should require "authoritative proof" of an alleged foreign privilege before refraining from granting a Section 1782 application based on such claims.¹⁸

Implied Limitations

Most of the litigation concerning Section 1782 has not focused on the express statutory requirements and limitations but rather on potential implied extrastatutory limitations or conditions. One such issue is whether the foreign proceeding must be "pending" at the time of the Section 1782 application. Until 1964, the statute was expressly limited to "pending" proceedings. That requirement was deleted in the 1964 amendments, and courts have generally recognized that there is no such requirement. Some courts are nonetheless reluctant to accept the elimination of the "pending" requirement. Most notably, the Second Circuit has suggested that the omission of the "pending" require-



ment may have been inadvertent.¹⁹ The Second Circuit has thus substituted an "imminence" requirement in place of the "pending" requirement:

Though we will not insist that a proceeding be "pending," we think it prudent, in the absence of any indication as to why Congress deleted the word "pending" and in view of the distinct possibility that the deletion might have been inadvertent, to require that the adjudicative proceeding be imminent very likely to occur and very soon to occur.20

It appears that the court was trying to strike a balance between legitimate discovery requests and privacy interests of U.S. citizens:

That [imminence] standard permits foreign governments to obtain judicial assistance from American courts when they are on the verge of instituting adjudicative proceedings in which the uses of disclosed material may be carefully controlled but avoids the risk inherent in making confidential material available to investigative agencies in countries throughout the world at preliminary stages of their inquiries. The latter course poses dangers to legitimate privacy interests of our citizenry that we do not believe Congress intended to imperil.²¹

In contrast, the Ninth Circuit has repeatedly refused to recognize either a "pending" or an "imminence" requirement. $^{\rm 22}$ The Ninth Circuit's rejection of the Second Circuit position is persuasive:

Focusing on the plain language of the statute...we note that the word "imminent" does not appear. Surely, had Congress wanted to authorize assistance of foreign investigations only when foreign proceedings are imminent, it could have said so. It is also impossible to read an imminence requirement into the statute following the 1996 amendment to [Section] 1782 (authorizing assistance in "criminal investigations conducted before formal accusation") without leading to an absurd result. Appellant's insistence on "imminence" would create an untenable Catch-22 for foreign law-enforcement authorities seeking U.S. aid: investigators would be unable to receive such help before proceedings actually became imminent, and yet the proceedings might never become imminent because the investigators would be stymied in collecting evidence necessary to justify the filing of criminal charges.23

This dispute has yet to be resolved, and the remaining circuits have taken a variety of positions on this issue. For example, the D.C. Circuit requires that the proceedings in the foreign tribunal be "in reasonable contemplation" when the discovery request is made.24 The Eleventh Circuit's position apparently requires only that the evidence will eventually be used in a proceeding.²⁵

The Question of Discovery

Perhaps the most widely litigated issue regarding Section 1782 is whether an applicant must make a threshold showing, prior to obtaining discovery, that the information sought in the United States would be subject to discovery in the foreign jurisdiction. The courts have offered three answers to this question: yes, it depends, and no.

In the First and Eleventh Circuits, a

request for discovery under Section 1782 will only be granted if the evidence would be discoverable in the foreign jurisdiction.²⁶ In re Application of Asta Medica, S.A. is the leading proponent of a requirement that the information be discoverable. In that case, the First Circuit held that the history, rationale, and policy considerations of Section 1782 require an applicant to show that the information is discoverable under foreign law before discovery will be ordered in the United States. The court was apparently concerned that a U.S. party involved in litigation in a foreign country with limited pretrial discovery could be disadvantaged against the foreign party:

All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restrictive discovery in the foreign jurisdiction. Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. This result would be contrary to the concept of fair play embodied in United States discovery rules and the notion that "[m]utual knowledge of all relevant facts gathered by both parties is essential in proper litigation."27

The First Circuit was also concerned that, by enabling foreign litigants to obtain information not available in the foreign jurisdiction due to either procedural restrictions or substantive laws, Section 1782 could be used to circumvent those foreign laws and procedures. The court held that "Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation."28

The Fourth and Fifth Circuits also give great weight to concerns regarding circumventing foreign restrictions on discovery and avoiding offense to foreign tribunals. Accordingly, they impose a discoverability requirement when the Section 1782 applicant is a private litigant but not when the discovery request comes from the foreign court itself.29 These courts reason that, since the foreign court is presumably the arbiter of what is discoverable under its own rules, it makes no sense for a U.S. court to double-check the foreign court's request to determine whether the discovery would be available in the foreign iurisdiction.

The Second, Third, and Ninth Circuits have all rejected a discoverability requirement, regardless of whether the applicant is a private litigant or a foreign court.30 Those circuits note that there is nothing in the text of Section 1782 that makes any reference to a foreign discoverability requirement. In Advanced Micro Devices, Inc. v. Intel, for example, the court noted: "The legislative history is equally devoid of any indication that Congress intended to limit the scope of [Section] 1782 to those situations in which the discovery sought would be discoverable under the law of the foreign jurisdiction."31 Moreover, these circuits have held that a discoverability requirement would not further the statute's purposes of providing efficient means of assistance to foreign courts and encouraging other nations to do the same.32

Courts have generally refused to impose any other extrastatutory limitations or requirements. For example, courts have rejected claims that a witness should not be required to give evidence because that evidence is not admissible in the foreign jurisdiction.³³ Appellate courts have been no more receptive to the claim that a district court should not order discovery under Section 1782 until and unless the applicant first seeks that discovery from the foreign tribunal. They have held that a "quasi-exhaustion requirement," which would force litigants to first seek the information through the foreign tribunal before requesting discovery from the district court, finds no support in the plain language of the statute and runs counter to its purposes.³⁴

Courts have likewise rejected the argument that Section 1782 requires that foreign courts have corresponding assistance procedures.35 As the Second Circuit explained, "Congress purposely engineered [Section] 1782 as a one way street. It grants wide assistance to others, but demands nothing in return."36 In practice, many countries have signed bilateral mutual legal assistance treaties with the United States or are party to the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, which

provide additional avenues for obtaining discovery in foreign countries. However, these agreements are not a prerequisite to obtaining discovery under Section 1782.

Trial Court Discretion

An applicant that satisfies the statutory requirements, as well as any extrastatutory hurdles, is not home free: The district court has discretion to grant, limit, or deny discovery.37 The court's discretion has been described as "considerable,"38 "wide,"39 and "broad."40

The statute does not provide any guidance as to how the court should exercise such discretion.41 Several courts have stated that "in exercising its discretion under [Section] 1782, the district court should be guided by the statute's twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts."42 In fact, the Second Circuit has stated that so long as the district court fashions its order in accordance with these twin aims, it acts within its discretion.43 Other courts have suggested a number of relevant factors to consider in the exercise of discretion. These factors include: 1) the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country,44 2) whether the foreign tribunal for which the discovery is sought would take offense to the granting of the application, 45 3) discoverability, 46 4) reciprocity, 47 and 5) whether the application is made in good faith. 48 As a practical matter, any reasonable exercise of discretion is likely to be upheld, given the district court's considerable authority in this regard.

In the context of terrorism, national security is likely to be considered as an important factor in a court's exercise of discretion. For example, even if a foreign government or suspected terrorist satisfies the requirements of Section 1782, a district court is likely to give great weight to a plea by the U.S. Department of Justice to deny the discovery request on national security grounds.⁴⁹ It is also likely that foreign policy concerns could affect Section 1782 litigation regarding a proceeding in the International Criminal Court. For example, the executive branch may support a discovery request from a prosecutor if the defendant is a suspected terrorist but vehemently oppose a similar request if the defendant is a U.S. citizen. Courts will undoubtedly be called upon to address such issues in exercising discretion under the statute.

The district court also has discretion regarding the procedures to be employed in connection with Section 1782. The statute

provides that the court's order "may prescribe the practice and procedure, which may be in whole or in 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."50 However, absent an explicit prescription, the discovery process will be guided by the Federal Rules of Civil Procedure, with courts usually deferring to those rules.51

In granting a Section 1782 application, the court may also impose appropriate conditions.⁵² Such conditions generally take the form of protective orders governing the confidentiality of the discovery materials or the protection of privileged information.⁵³ In some instances, however, the conditions are substantially more significant. For example, in response to a concern that permitting discovery in the United States would alter the balance created by the procedural rules of the foreign tribunal, the Second Circuit has endorsed trial court orders that impose reciprocal discovery obligations on the parties.54 District courts thus have extremely wide discretion regarding virtually all aspects of an application under Section 1782.

Section 1782 can provide an effective means of obtaining evidence in the United States for foreign or international proceedings. The statute has been used sparingly and most often in ordinary civil and criminal matters, but it is likely to be employed with increasing frequency in the future. Moreover, although it will usually be invoked in connection with international commercial disputes and mundane criminal investigations, it will undoubtedly play a role in the campaign against international terrorism.

¹ Act of Mar. 2, 1855, ch. 140, §2, 10 Stat. 630; In re Request for Assistance from the Ministry of Legal Affairs of Trin. & Tobago, 848 F. 2d 1151, 1152 (11th Cir. 1988). The text of the Act of Mar. 2, 1855, along with other historical statutes concerning judicial assistance for foreign tribunals, is contained in an appendix to the opinion in In re Letter Rogatory from the Justice Court, Dist. of Montreal, Can., 523 F. 2d 562 (6th Cir. 1975). 2 28 U.S.C. §1782(a).

³ In re Application of Ishihara Chem. Co., Ltd., 251 F. 3d 120, 124 (2d Cir. 2001); In re Bayer A. G., 146 F. 3d 188, 193 (3d Cir. 1998). The statute does not prescribe any particular procedure necessary for its invocation. The case law reflects a variety of procedures, including petitions, motions, and ex parte applications, and there is no reported decision denying §1782 on the ground that the application was procedurally improper.

⁴ In re Letters Rogatory from Tokyo Dist. Prosecutor's Office, 16 F. 3d 1016, 1019 (9th Cir. 1994).

⁵ Advanced Micro Devices, Inc. v. Intel Corp., 292 F. 3d 664, 668 (9th Cir. 2002).

⁶ Euromepa, S.A. v. R. Esmerian, Inc., 154 F. 3d 24, 27 (2d Cir. 1998) appeal after remand of Euromepa, S.A. v. R. Esmerian, Inc., 51 F. 3d 1095, 1097 (2d Cir. 1995); In re Letters Issued by the Dir. of Inspection of the Gov't of India, 385 F. 2d 1017, 1020 (2d Cir. 1967).

 7 In re the Application of Ishihara Chem. Co., 121 F. Supp. 2d 209, 218 (E.D. N.Y. 2000) (Patent invalidity proceeding before the Japanese patent office is a proceeding in a foreign or international tribunal.); In re Gianoli Aldunate, 3 F. 3d 54, 62 (2d Cir. 1993) (Chilean incompetency proceeding in which a court-appointed guardian sought discovery to inventory property is within the statute's scope.); Advanced Micro Devices, Inc., 292 F. 3d at 666-68 (Investigation being conducted by the Directorate General-Competition of the European Commission qualifies.); In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan, 539 F. 2d 1216, 1219 (9th Cir. 1976) (Investigation being conducted by the Tokyo public prosecutor's office is a proceeding before a foreign or international tribunal.); In re Request for Int'l Judicial Assistance for the Federative Republic of Braz., 936 F. 2d 702, 705 (2d Cir. 1991) (Investigation conducted by Brazilian police, tax, and currency officials does not qualify.); Letters Issued by the Dir. of Inspection of the Gov't of India, 385 F. 2d at 1021 (Tax assessment inquiry by an Indian income tax officer unrelated to judicial proceedings does not qualify.); In re Letters of Request to Examine Witnesses from the Court of Queen's Bench from Manitoba, Can., 488 F. 2d 511, 512 (2d Cir. 1996) (Canadian Commission of Inquiry, whose purpose is to conduct investigations, does not qualify.); Fonseca v. Blumenthal, 620 F. 2d 322, 324 (2d Cir. 1980) (Investigation by the Colombian Superintendent of Exchange Control is not a proceeding in a foreign or international tribunal.).

8 See Republic of Kazakstan v. Biedermann Int'l, 168 F. 3d 880, 882 n.5 (5th Cir. 1999) (collecting authorities). ⁹ In re Application of Technostroyexport, 853 F. Supp. 695, 697 (S.D. N.Y. 1994).

10 NBC v. Bear Stearns & Co., Inc., 165 F. 3d 184, 185 (2d Cir. 1999); Republic of Kazakstan, 168 F. 3d at 881-

 $^{\rm 11}\,\mathrm{Al}$ Fayed v. Central Intelligence Agency, 229 F. 3d 272, 273-76 (D.C. Cir. 2000).

12 See, e.g, In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office, 16 F. 3d 1016, 1019 (9th Cir. 1994); In re Application of Esses, $101\ F.\ 3d\ 873$, $875\ (2d\ Cir.$ 1996); In re Letter of Request from the Crown Prosecution Service of the U.K., 870 F. 2d 686, 690

 $^{\rm 13}$ 28 U.S.C. §1782(a) ("[A] person may not be compelled to give...testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.").

¹⁴ See, e.g., In re Letter of Request from the Boras Dist. Court, Sweden, 153 FRD 31, 34 (E.D. N.Y. 1994) (finding those rights would not be violated by order requiring blood sample).

15 See In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez., 42 F. 3d 308, 311 (5th Cir. 1995) (rejecting claim that letter rogatory violated due process); In re Letter of Request from the Local Court of Pforzheim, Div. AV, F.R.G., 132 FRD 366 (W.D. Mich. 1989) (finding that an order compelling witness to provide a blood sample did not violate any due process right). Some courts have suggested that the due process analysis requires federal courts to look beyond the discovery and examine the proceeding in which that discovery is to be used. Surprisingly, courts seem to agree that, before ordering discovery, they may "scrutinize the underlying fairness of foreign proceedings to insure they comply with notions of due process." John Deere Ltd. v. Sperry Corp., 754 F. 2d 132 n.3 (3d Cir. 1985); accord In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, Seoul, Korea, 555 F. 2d 720, 724 (9th Cir. 1977) (recognizing that an inquiry into the foreign proceedings may be appropriate if "departures from our concepts of fundamental due process and fairness are involved"); In re Letter of Request from the

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Gov't of France, 139 FRD 588, 592 (S.D. N.Y. 1991) (Federal courts are not to decide the propriety of the use of the evidence obtained under §1782 "absent a showing that a requesting country is manipulating §1782 in a manner offensive to concepts of fundamental due process and fairness."). For the time being, this issue seems more theoretical than real. There is no reported case of a court denying a request under §1782 on the ground that the foreign proceeding does not comply with due process. This is not surprising in light of the fact that discovery under §1782 is generally sought for use in proceedings in countries that share U.S. concepts of due process. The true test will arise if discovery is sought under the statute for use in a proceeding that offends such principles.

¹⁶ United States v. United Kingdom, 238 F. 3d 1312, 1320-22 (11th Cir. 2001); see also Al Fayed v. United States, 210 F. 3d 421, 424-25 (4th Cir. 2000) (refusing to issue subpoena for classified documents).

¹⁷ In re Erato, 2 F. 3d 11, 14-15 (2d Cir. 1993); accord In re Request for Assistance from the Ministry of Legal Affairs of Trin. & Tobago, 848 F. 2d 1151, 1156 (11th Cir. 1988)

18 In re Metallgesellschaft A.G., 121 F. 3d 77, 80 (2d Cir. 1997).

19 In re Request for Int'l Judicial Assistance for the Federative Republic of Braz., 936 F. 2d 702, 705 (2d Cir. 1991): but see In re Letter of Request from the Crown Prosecution Serv. of the U.K., 870 F. 2d 686, 691 (D.C. Cir. 1989) ("[W]e will not treat Congress' deletion of the word 'pending' as a mistake or mere accident.").

 $^{\rm 20}$ Request for Int'l Judicial Assistance for the Federative Republic of Braz., 936 F. 2d at 706.

21 Id. at 706.

²² Advanced Micro Devices, Inc. v. Intel Corp., 292 F. 3d 664, 667 (9th Cir. 2002) ("[N]or need the proceeding be imminent, as Congress made clear through the elimination of the requirement that the proceeding be 'pending.").

²³ United States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Federation, 235 F. 3d 1200, 1205 (9th Cir.

²⁴ In re Letter of Request from the Crown Prosecution Serv. of the U.K., 870 F. 2d at 687.

²⁵ In re Request for Assistance from the Ministry of Legal Affairs of Trin. & Tobago, 848 F. 2d 1151, 1152 (11th Cir. 1988).

²⁶ In re Application of Asta Medica, S.A., 981 F. 2d 1, 6-7 (1st Cir. 1992); United States v. United Kingdom, 238 F. 3d 1312, 1319 (11th Cir. 2001).

²⁷ Application of Asta Medica, S.A., 981 F. 2d at 5-6.

²⁹ In re Letter of Request from Atsgericht Ingolstadt, F.R.G., 82 F. 3d 590, 592 (4th Cir. 1996); In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez., 42 F. 3d 308, 310 (5th Cir. 1995).

30 In re Request for Int'l Judicial Assistance for the Federative Republic of Braz., 936 F. 2d 702, 706 (2d Cir. 1991); In re Bayer A. G., 146 F. 3d 188, 193 (3d Cir. 1998); Advanced Micro Devices, Inc. v. Intel Corp., 292 F. 3d 664, 668-9 (9th Cir. 2002).

31 Advanced Micro Devices, Inc., 292 F. 3d at 669; Baver A. G., 146 F. 3d at 193.

32 Bayer A.G., 146 F. 3d at 193; In re Metallgesellschaft A.G., 121 F. 3d 77, 79 (2d Cir. 1997).

33 Bayer A.G., 146 F. 3d at 193; In re Request for Assistance from the Ministry of Legal Affairs of Trin. & Tobago, 848 F. 2d 1151, 1156 (11th Cir. 1988); In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, Seoul, Korea, 555 F. 2d 720, 723 (9th Cir. 1977).

34 Metallgesellschaft A.G., 121 F. 3d at 79; Application

of Malev Hungarian Airlines, 964 F. 2d 97, 100 (2d Cir.

35 Bayer A.G., 146 F. 3d at 193; Maley Hungarian Airlines, 964 F. 2d at 97.

36 Euromepa, S.A. v. R. Esmerian, Inc., 51 F. 3d 1095, 1097 (2d Cir. 1995).

37 Bayer A. G. v. BetaChem, Inc., 173 F. 3d 188, 191 (3d Cir. 1999); Metallgesellschaft A.G., 121 F. 3d at 79; accord Al Fayed v. United States, 210 F. 3d 421, 424-25 (4th Cir. 2000) ("[T]he statute explicitly commits to the district court's discretion the determination of whether to grant a request for assistance in a foreign tribunal."); United States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Federation, 235 F. 3d 1200, 1206 (9th Cir. 2000) ("[T]he fact that §1782 authorizes assistance does not mean that the district court must exercise its discretion to grant such assistance.").

38 Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Federation, 235 F. 3d at 1205.

39 Al Faved, 210 F. 3d at 424.

40 Euromepa, S.A., 51 F. 3d at 1102; In re Lo Ka Chun, 858 F. 2d 1564, 1565 (11th Cir. 1988).

⁴¹ Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Federation, 235 F. 3d at 1206.

42 Al Faved, 210 F. 3d at 424 (internal quotation omitted); accord BetaChem, Inc., 173 F. 3d at 191; Euromepa, S.A. v. R. Esmerian, Inc., 154 F. 3d 24, 28 (2d Cir. 1998) (modifying Euromepa, S.A. v. R. Esmerian, Inc., 51 F. 3d 1095, 1097 (2d Cir. 1995)).

43 In re Application of Esses, 101 F. 3d 873, 876 (2d Cir. 1996); accord In re Gianoli Aldunate, 3 F. 3d 54, 61 (2d Cir. 1993) ("[B]ecause the district court's exercise of discretion properly was guided by the purposes of §1782, we hold that the court did not abuse its discretion.").

44 Letter of Request for Legal Assistance from the Deputy Prosecutor Gen, of the Russian Federation. 235 F. 3d at 1206; In re Bayer A. G., 146 F. 3d 188, 193 (3d Cir. 1998).

45 Bayer A.G., 146 F. 3d at 195; Gianoli Aldunate, 3 F. 3d at 59

46 In re Metallgesellschaft A.G., 121 F. 3d 77, 79 (2d Cir. 1997); Euromepa, S.A., 51 F. 3d at 1098; Gianoli Aldunate, 3 F. 3d at 60.

⁴⁷ John Deere Ltd. v. Sperry Corp., 754 F. 2d 132, 135 (3d Cir. 1985).

⁴⁸ Euromepa, S.A., 51 F. 3d at 1101; accord Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Federation, 235 F. 3d at 1205 (District court has discretion to decline application if request is being used to harass political opponents.).

49 Responding to a request by a court in Hamburg, Germany, the Department of Justice agreed to let officials depose convicted bomber Ahmed Ressam but refused to permit the testimony of suspected terrorists Ramzi Binalshibh and Zacarias Moussaoui. Finn, U.S. Refuses to Allow Terror Suspects to Testify, Washington Post, Nov. 20, 2002.

50 28 U.S.C. §1782(a).

⁵¹ Id.; Bayer A.G. v. BetaChem, Inc., 173 F. 3d 188, 191 (3d Cir. 1999).

52 BetaChem, Inc., 173 F. 3d at 191; In re Gianoli Aldunate, 3 F. 3d 54, 59 (2d Cir. 1993).

 53 See, e.g., In re Bayer A.G., 146 F. 3d 188, 196 (3d Cir. 1998) (noting that the trial court could consider appropriate measures to protect the confidentiality of the materials); Euromepa, S.A., 51 F. 3d at 1100 n.4.

 54 In re Application of Esses, 101 F. 3d 873, 876 (2d Cir. 1996); see also In re Metallgesellschaft A.G., 121 F. 3d 77, 80 (2d Cir. 1997) (criticizing the district court for denying a §1782 application and not tailoring the discovery order or imposing reciprocal discovery obligations).

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