
ARE UNITED STATES COURTS RECEPTIVE TO INTERNATIONAL ARBITRATION?

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I. INTRODUCTION

USC provision § 1782, “Assistance to Foreign and International Tribunals and to Litigants before such Tribunals,” has received its fair share of attention in recent years. It has been showcased in

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various scholarly articles,¹ disputed in U.S. court decisions,² conceptually deconstructed through various perspectives,³ and resorted to in other forums.⁴ Many of these contributions, however, have been laced with legal verbiage, paying homage to pro-[court] litigation ideals and often losing sight of the key advantages and underlying purposes of international arbitration. We advocate divergence from this trend by addressing a core outstanding issue of § 1782: what is the appropriate method to provide judicial assistance to international arbitration tribunals regarding matters of discovery?

We contend that U.S. district courts would be better off refraining from rendering discovery assistance to arbitral tribunals unless they have first received the arbitral tribunal's blessing.⁵ The article and

1. See, e.g., Brandon Hasbrouck, *If it Looks Like a Duck . . . : Private International Arbitral Bodies are Adjudicatory Tribunals Under 28 U.S.C. § 1782(a)*, 67 WASH. & LEE L. REV. 1659 (2010); Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1 (1998); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990); Jenna M. Godfrey, Note, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1728(a)'s Application in Private International Arbitration Proceedings*, 60 AM. U. L. REV. 475 (2010).

2. See discussion *infra* Part III.

3. See, e.g., Oliver L. Knöfel, *Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration: A German Perspective*, 5 J. PRIVATE INT'L L. 281 (2009); Klaus Reichert, *Judicial Assistance in the Taking and Obtaining of Evidence Abroad in Aid of Arbitration: An Irish Perspective*, 18 J. INT'L ARB. 381 (2001); see also Gary B. Born, *Court-Ordered Discovery in Aid of a "Foreign" Arbitration: The U.S. Perspective*, 12 ASA BULL. 476 (1994).

4. See, e.g., *About OGE MID*, TRANSNAT'L DISP. MGMT., <http://www.transnational-dispute-management.com/ogemid/> (last visited May 14, 2012) (explaining that OGE MID was "started as a place for discussion, sharing of insights and intelligence, of relevant issues related in a significant way to international dispute management," and providing membership and discussion topic information).

5. See, e.g., Comm. on Int'l Com. Disputes, *28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration – Applicability and Best Practices*, 63 REC. 752, 753 (2008) (recommending that 28 U.S.C. § 1782 be granted only if the request is by the arbitrator or with the consent of the arbitrators and proposing that courts consider the source of the request as an important factor); Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT'L ARB. 61, 79 (2008) (setting forth various improvements to 28 U.S.C. § 1782 including that parties submit requests for assistance only with arbitrators' approval barring an emergency situation); Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 AM. REV. INT'L ARB. 295, 323 (2003) (advocating that federal

argument is divided into three parts. First, a brief outline of the legislative history of § 1782 will be provided to demonstrate that a literal and purposive reading of § 1782 invites an interpretation consistent with authorizing an international arbitral tribunal permission-granting status. Second, a review of several U.S. court cases illustrates that the veritable splatter-shot of judicial decisions on the matter demand greater consistency as well as improved respect for international comity and appreciation for the uniqueness of international arbitration. Third, the paper will look to the Canadian approach to question whether U.S. district courts can possibly learn from and improve upon the approach taken by their northern neighbors.

Before commencing, there are two points that warrant mention. First, a minority of district courts has determined that international arbitration is not captured within the § 1782's textual language of "foreign or international tribunal."⁶ We align ourselves with the majority of court decisions that regard international arbitral tribunals as falling within the scope of "foreign or international tribunal."⁷ Second, the present study is limited to the application of § 1782 to international arbitration tribunals only, which may not be applicable to the reasons for and against the application of the provision to other "foreign or international tribunals."

II. LEGISLATIVE HISTORY

The United States has a long history of providing judicial

courts receive "an arbitral directive or request that the information sought be disclosed" before ordering disclosure by a party in an arbitral proceeding).

6. See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 186 (2d Cir. 1999) (holding that the arbitration conducted in Mexico under the auspice of the International Chamber of Commerce was not a "proceeding in a foreign or international tribunal" pursuant to § 1782); see also *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (finding that proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce fell outside the phrase "foreign or international tribunal").

7. See, e.g., *In re Oxus Gold PLC*, No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D. N.J. Apr. 2, 2007) (granting a 28 U.S.C. § 1782 application in aid of an investor-state arbitration conducted under the US-Kyrgyz Bilateral Investment Treaty); see also *In re Roz Trading*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (granting a 28 U.S.C. § 1782 application in aid of an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna).

assistance to foreign courts.⁸ Section 1782 did not suddenly appear in 1964 like Minerva springing forth from Jupiter's head. Instead it was the gradual "product of congressional efforts, over the span of nearly 150 years."⁹ In 1855, Congress passed the first statute allowing U.S. federal courts to assist foreign courts in obtaining evidence located within U.S. territory in 1855.¹⁰ Subsequently, Congress passed the Acts of 1863,¹¹ 1948,¹² and 1949.¹³

In 1958, Congress, in an effort to facilitate international business activity, pro-actively established the Commission on International Rules of Judicial Procedure ("Commission").¹⁴ Congress recognized the need for statutory improvements in the area of judicial assistance in order to keep pace with the increased involvement of the United States in international relations and international litigation.¹⁵ The Commission, directed by Professor Hans Smit, was tasked with "investigat[ing] and study[ing] existing practices of judicial assistance and cooperation between the United States and Foreign

8. Cf. Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 539-40 (1953) (noting that the extent of the United States' cooperation in rendering assistance to foreign tribunals has been mixed and often "depended upon the nature of the foreign request," and whether the request was submitted to a state or federal tribunal).

9. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

10. See Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855) ("[W]here letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court."). Unfortunately, due to an error, which indexed the 1855 Act under the heading "Mistrials," the Act failed to achieve its intended goal of providing judicial assistance. See Jones, *supra* note 8, at 540 n.77.

11. Act of March 3, 1863, c 95, §§ 1-4, 12 Stat. 769 (1863). The Act of 1863 is considered more restrictive than the 1855 Act. Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV. 649, 655 (2005) (citing various restricting stipulations of the 1863 Act, including the fact that the "foreign proceedings must relate to the 'recovery of money or property,' the requesting state must be at peace with the United States, the government of the requesting state must be a party to or have an interest in the foreign proceedings, and the letter rogatory must have been issued 'from the court in which the suit is pending.'").

12. Act of June 25, 1948, ch. 646, 62 Stat. 869 (1948).

13. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103 (1949).

14. Act of September 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743 (1958).

15. S. REP. NO. 88-1580, at 2 (1964).

countries with a view to achieving improvements.”¹⁶ In 1963, the Commission recommended drastic changes to the procedures for providing international judicial assistance.¹⁷

In 1964, Congress, without any revisions, adopted the Commission’s proposed amendments to § 1782.¹⁸ Section 1782, as now enacted, provides in relevant part:

(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, 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.¹⁹

Section 1782 permits a district court to grant a petitioner’s request for judicial assistance if three statutory requirements are met: (1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the application is made by a foreign or international tribunal or any interested person.

The 1964 amendments clarified and liberalized existing U.S. procedures for international judicial assistance by enlarging the type of evidence that could be requested;²⁰ increasing the type of foreign proceedings that could make a discovery request;²¹ removing the

16. *Id.* at 12.

17. *See id.* at 14-20 (proposing many changes including the omission of several sections relating to sanctions for perjury and adding a section on service of process procedures).

18. Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995 (1964).

19. 28 U.S.C. § 1782 (2006) (citing Act of June 25, 1948, ch. 646, 62 Stat. 869 (1948)) (emphasis added). In 1996, Congress amended § 1782 by adding after the term “foreign or international tribunal” the language “including criminal investigations conducted before formal accusation.” *Id.*

20. *See S. REP. NO. 88-1580*, at 7 (1964) (“U.S. judicial assistance may be sought not only to compel testimony and statements but also to require the production of documents and other tangible evidence.”).

21. *See id.* (noting that “the word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts”).

word “pending” from the statute;²² and broadening the scope of persons who could apply for foreign assistance.²³ Moreover, the amendment provides courts with complete discretion in determining whether to grant or reject discovery requests, even if all statutory requirements are met. In exercising this discretionary power, courts should be mindful of Congress’ stated objectives of the 1964 amendments. These twin aims include: (1) providing liberal and efficient means of assistance to international litigation²⁴ and (2) encouraging other countries to provide comparable means of assistance to U.S. courts.²⁵

As will be discussed in the next section, limiting § 1782 discovery requests to cases where the tribunal either makes the request or where the interested party has received the arbitral tribunal’s blessing is consistent with § 1782’s twin aims.

III. CASE LAW

Receptivity is a concept referring to the degree to which a foreign tribunal would be disposed to accept and make use of evidence by means of a discovery process. Receptivity has always been a consideration in § 1782 interpretation, but it should have always been a significant factor, rather than being of a host of considerations. Nevertheless, the factor’s relative degree of influence on the outcomes of cases has varied. This section provides a review of § 1782 interpretation and application. It discusses the significance of the anti-climatic 2004 U.S. Supreme Court decision of *Intel v. AMD* as well as the noteworthy cases leading up to and following the *Intel* decision. Accordingly, this section consists of three parts: pre-*Intel* jurisprudence, the *Intel* decision itself, and post-*Intel* jurisprudence. The aim of this section is to illustrate how the receptivity factor, despite an apparent lack of emphasis in the case

22. See 28 U.S.C. § 1782.

23. See 28 U.S.C. § 1782(a) (providing that assistance may be granted “pursuant to a ... request made by a foreign or international tribunal or upon the application of any interested person”).

24. See S. REP. NO. 88-1580, at 2 (1964) (“providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects”).

25. See *id.* (“It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.”).

law, was and ought to be treated as a dominant factor of § 1782 analysis.

A. PRE-INTEL JURISPRUDENCE AND RELIANCE ON THE RECEPTIVITY FACTOR

As noted, the statutory framework of § 1782 aims to deliver two functional goals for document discovery: efficiency and international cooperation. The pre-*Intel* common law approach of interpreting and applying the twin aims of § 1782 included consideration of the receptivity factor.

Regarding the efficiency aim, the case law appears to support a presumption in favor of granting discovery provided that a petition is consistent with the purpose of § 1782.²⁶ That presumption, however, can be rebutted by means of the receptivity factor. In situations where it would be futile for the district court to exhaust its resources by approving the petition, the district court should decline § 1782 applications. For example, in the matter of *In re Euromepa*²⁷ the appellate court determined that discovery should be informed by the § 1782 twin aims unless it is demonstrated that the foreign tribunal would reject the discovered evidence.²⁸ In *Re Bayer*²⁹ the district court expanded on this principle. The district court explained that the burden of proof against a discovery application, particularly “the burden of demonstrating offense to the foreign jurisdiction, [rests with] the party opposing the application.”³⁰ Specifically, the district court wrote: “courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.”³¹

Regarding the international cooperation aim, respect for and deference to a foreign jurisdiction and its legal system are defining considerations of pre-*Intel* jurisprudence. For example, in deciding *In*

26. See *In re Euromepa S.A.*, 51 F.3d 1095, 1097 (2d Cir. 1995) (noting that Congress created section 1782 to generally function as a “one-way street” to encourage other countries to also offer assistance liberally).

27. *Id.*

28. *Id.* at 1098.

29. *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998).

30. *Id.* at 196.

31. *Id.* at 195.

re Aldunate,³² the district court, while granting the § 1782 application, questioned whether § 1782 discovery would circumvent Chilean law or act as affront to Chilean sovereignty. The district court's motivation was premised on the twin aims of § 1782, which culminated in its decision being premised on the promotion of international comity.³³ In the case of *In re Schmitz*,³⁴ the district court applied the same reasoning but reached the opposite result. In that case, petitioners sought documents from a German company in connection to a pending securities class action suit. German authorities specifically requested that the discovery not be provided because the discovery might jeopardize an ongoing criminal investigation. The district court held that the purpose of § 1782 would be undermined if it did not acknowledge the sovereignty concerns attached to the petitioners' application and thus relied on international comity to deny the application.³⁵

The thread that ties these cases together is that each case suggests that a dialogue or, at the very least, mutual respect and understanding is required between the district court and the foreign legal system. The *Euromepa* and *Bayer* cases indicate that the district court ought to apprehend confirmation that a foreign tribunal will admit, or at the very least not reject, the discovered evidence prior to granting § 1782 applications.³⁶ Similarly, the *Aldunate* and *Schmitz* matters confirm that the district court must account for the particulars of a foreign legal order before proceeding with § 1782 petitions.³⁷

Indeed, a number of pre-*Intel* district courts explicitly recognize that obtaining the permission of a foreign tribunal before entertaining

32. *In re Aldunate*, 3 F.3d 54 (2d Cir. 1993).

33. *Id.* at 61-62 (holding that the U.S. court did not abuse its discretion because the it made an inquiry into whether its grant of discovery would offend Chilean law).

34. *In re Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003).

35. *Id.* at 298.

36. See Deborah C. Sun, Note, *Intel Corp. v. Advanced Micro Devices, Inc.: Putting "Foreign" Back into the Foreign Discovery Statute*, 39 U.C. DAVIS L. REV. 279, 286-87 (2005) (stating that the Second, Third, and Ninth Circuits have refused to read a foreign discoverability requirement into the statute because the plain language and legislative history do not require it).

37. See Smit, *supra* note 5, at 315 n.45 (referring to several cases that stand for the proposition that there is an unofficial requirement of discoverability or admissibility under foreign or international law including the *Aldunate* and *Schmitz* cases).

a discovery application achieves the twin aims of § 1782. For example, *In re Nedenes District Court (Norway)*³⁸ a Norwegian court sought judicial assistance in connection with a paternity proceeding and requested pursuant to § 1782 to compel the respondent to provide a blood sample. In granting the request, the Southern District Court of New York reasoned that the “Norwegian Court specifically requested the assistance of this Court: accordingly, there [are] no Norwegian sovereignty concerns that could hinder that court’s efforts” and that granting the motion would “efficiently assist a request made by the Norwegian Court and would encourage Norway to provide similar assistance to our courts.”³⁹ The district court in *In re Technostroyexport*⁴⁰ applied the same reasoning but rendered a different result. In that case, Technostroy applied for § 1782 discovery to aid an arbitration proceeding pending in Moscow and Stockholm. In denying the application, the district court stated that:

Technostroy . . . made no effort to obtain any ruling from the arbitrators. It has come directly to the Federal District Court. The court concludes that, under these circumstances, it would be improper to order the discovery requested. . . . [If] Technostroy had obtained a ruling from a foreign arbitrator [first], the court would be empowered under §1782 to enforce that ruling in the United States.⁴¹

The district court’s subsequent comments, which acknowledge that arbitration rules and procedures are radically different than the procedure and rules of the courts, are further indications that a significant degree of deference ought to be afforded to foreign jurisdictions, particularly those that have different or special rules that ought to be preserved.⁴²

B. *INTEL V AMD*: MISSED OPPORTUNITY?

In 2004, the U.S. Supreme Court, for the first time, interpreted § 1782 in *Intel v. AMD*.⁴³ The *Intel* case originated from AMD’s

38. *In re Letter Rogatory From the Nedenes Dist. Ct., Nor.*, 216 F.R.D. 277 (S.D.N.Y. 2003).

39. *Id.* at 279.

40. *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994).

41. *Id.* at 697.

42. *Id.*

43. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The U.S. Supreme Court held that the European Commission was a tribunal within the

antitrust claims against Intel before the European Commission.⁴⁴ This case is significant because it simultaneously cleared up and clouded the application of § 1782. On the one hand, the *Intel* decision is helpful because it provided an analytical method of applying § 1782. On the other hand, that analytical framework undermines the purpose of § 1782 by restricting the role of the receptivity factor. Four findings of the Supreme Court warrant discussion because of their impact on the receptivity principle of § 1782.

First, the Supreme Court in emphasizing that discovery pursuant § 1782 is discretionary relegated receptivity as one of many factors for the district court to consider.⁴⁵ Alongside receptiveness, the district courts may consider: (1) whether the person from whom discovery is sought is a party in the foreign proceedings and subject to the jurisdiction of the foreign tribunal; (2) nature of the foreign tribunal; (3) whether the request attempts to circumvent foreign proof-gathering restrictions; and (4) whether the request is unduly intrusive or burdensome.⁴⁶

Second, the Supreme Court offered no guidance on the weight that should attach to the receptivity factor or how district courts should apply it.⁴⁷ As discussed below, failure to give direction to district

meaning of § 1782 because it was an investigative body reviewable by European Courts, it made dispositive rulings, and it was a first instance decision maker. While the case did not directly concern an arbitration proceeding, future cases have relied on the Supreme Court's dicta to extend application of § 1782 to assist arbitral proceedings. Specifically, district courts have relied on the Supreme Court's mention of an article written by Professor Hans Smit, the principal drafter of § 1782, which defined "tribunal" as including "arbitral tribunals" to justify such wide interpretation. *Id.* at 257-59.

44. *See id.* at 246-52. AMD's complaint asserted that Intel violated European competition law in several ways including that it abused its dominant position in the market through loyalty rebates, price discrimination, and exclusive agreements with retailers. To support its claim, Respondent AMD sought to invoke 28 U.S.C. § 1782(a) for an order to require petitioner Intel to produce documents from a prior antitrust suit Intel was involved in on file in the federal court in Alabama. The District Court denied AMD's application, finding that Section 1782 did not apply to this type of discovery. The Court of Appeals for the Ninth Circuit then reversed and remanded, directing the District Court to rule on the merits. The Supreme Court agreed with the Court of Appeals, holding that the District Court had authority to require the discovery under Section 1782. *Id.*

45. *Id.* at 264-65.

46. *Id.*

47. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004)

courts has led to inconsistent applications of the receptivity factor.

Third, the receptivity factor was further weakened when the Supreme Court completely ignored the European Commission's explicit wishes expressed in its amicus curiae brief "that it does not need or want the district court's assistance."⁴⁸ Interestingly, the Supreme Court reasoned that it was unclear whether the Commission's views were shared by similarly situated entities in the international community.⁴⁹ Why the Supreme Court expected the Commission to speak for all comparable international bodies is unclear.⁵⁰

Fourth, the Supreme Court's holding that § 1782 does not require adjudicative proceedings to be pending, but only that proceedings must be within reasonable contemplation, again undercuts the receptivity factor, thereby undercutting the very autonomy of the body purportedly in need of "judicial" assistance.⁵¹

C. POST-*INTEL* JURISPRUDENCE AND THE RECEPTIVITY FACTOR

The Supreme Court in *Intel* missed a viable opportunity to improve the significance of the receptivity factor. By de-emphasizing the factor's importance within § 1782, the *Intel* decision essentially undermined the twin aims of the provision and has left future cases in a state of confusion. The resulting effect has led to several different understandings regarding the role that the receptivity factor plays in the interpretation and application of § 1782.

(mentioning that the Court will not adopt supervisory rules and that more guidance on how to apply section 1782 should await further experience with its application in the lower courts).

48. See Smit, *supra* note 5, at 331-32 (suggesting that the Commission may have overstepped its boundaries when it attempted to provide its own interpretation of U.S. law). Specifically, the Commission argued that it was not a "foreign or international tribunal" within the meaning of § 1782. As Smit explains, "the Commission would have done better to defer to the Supreme Court's interpretation of United States law" and instead merely informed "the Supreme Court that it preferred that the assistance be denied." *Id.*

49. *Intel Corp.*, 542 U.S. at 265-66.

50. For criticism of the Supreme Court on this point, see Sun, *supra* note 36, at 295.

51. *Intel Corp.*, 542 U.S. at 259 (rejecting the Second Circuit's view that section 1782 only applies to proceedings that are pending or imminent; holding instead simply that the evidence eventually be used in a proceeding).

It is prudent to note that the majority of the post-*Intel* 1782 cases have arisen out of a singular dispute between a U.S. company, Texaco (now owned by Chevron), and the Republic of Ecuador. Since 2004, the long-running litigation between Chevron and Ecuador developed into three separate proceedings – civil, criminal and international arbitration – all foreign to U.S. jurisdiction.⁵² As a result of the pending trial, litigation and arbitration, Chevron and more recently Ecuador filed a number of § 1782 requests before several different district courts seeking discovery from various third parties.⁵³ The § 1782 jurisprudence resulting from the Chevron and Ecuador dispute is significant because it demonstrates that most of the post-*Intel* § 1782 cases involved the same parties and aimed to discover evidence to assist the same three pending cases, but that the relative weight these courts place on the receptivity factor has varied considerably. Ostensibly, there are three positions that district courts have taken when applying the receptivity factor: ambivalent, restrictive and cautionary.

The minority position of post-*Intel* § 1782 decisions is

52. See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). The Chevron and Ecuador dispute dates back to 1964, when TexPet, a Texaco subsidiary, began oil exploration and drilling in Ecuador. In 1993, a group of Ecuadorian nationals filed a class action lawsuit against Texaco in the United States District Court for the Southern District of New York seeking damages for environmental contamination caused by Texaco (“Aguindo suit”). At issue in that dispute was whether TexPet polluted the environment and caused health and social harms in the Amazon region of Ecuador. Shortly after the suit was raised, Texaco entered into a settlement agreement with Ecuador in which Ecuador promised to release its claims against Texaco if it performed certain environmental remediation work. By 2003, the Aguindo suit was dismissed due to *forum non conveniens*. *Id.* at 554. In the same year, however, the same plaintiffs raised a new suit in a small Ecuadorian township of Lago Agrio, claiming \$27 billion against Chevron, which had merged with Texaco in 2001 (“Lago Agrio litigation”). Likely in anticipation of an unfavorable outcome, in 2009, Chevron brought an investor-state arbitration under the UNCITRAL arbitration rules claiming several violations of the U.S.-Ecuador BIT, including allegations of fraud during the Ecuador prosecution of the Lago Agrio litigation. In February 2011, the Ecuadoran court ordered Chevron to pay \$8 billion in damages. See *Chevron Ordered to Pay \$8 billion by Ecuador Court*, L.A. TIMES, Feb. 14, 2011, <http://articles.latimes.com/2011/feb/14/business/la-fi-chevron-20110214>.

53. See *Chevron Corp. v. Naranjo*, 667 F.3d 232, 236 n.7 (2d Cir. 2012) (stating that Chevron has commenced dozens of discovery proceedings under section 1782, describing the phenomenon as “unique,” and noting that Ecuador initiated a proceeding under section 1782 in late 2011).

ambivalence. These decisions appear to completely disregard the receptivity factor altogether and make no mention of whether a foreign tribunal ought to be receptive to the discovered evidence.⁵⁴

Regarding the restrictive position, some courts appear to align their reasoning with the *Intel* decision by minimizing the factor's role in determining whether to grant discovery.⁵⁵ The Northern District Court of Georgia determined, through *In re Chevron*, that a district court may properly grant § 1782 requests "even if the specific panel deciding the underlying dispute would not order similar discovery or ultimately decides not to accept the specific discovery ordered by this Court."⁵⁶ Similarly, *In re Chevron*⁵⁷ the Southern District Court of New York noted that knowing the foreign court's views regarding whether the discovered evidence would be admitted would be helpful but was not dispositive.⁵⁸ Naked assurances of disputed receptivity were also insufficient to dismiss an application *In re Application of Chevron*.⁵⁹ In that case, Ecuador asserted that its civil court would not be receptive to certain requested documents because it already denied discovery of those same documents.⁶⁰ Chevron, however, insisted that their requests had not been denied by the Ecuadorian court.⁶¹ The appellate court concluded that "the status of Chevron's requests is not clear from the record"⁶² and, despite that uncertainty, granted the § 1782 application.

A number of district courts have also relied on the previous Chevron and Ecuador § 1782 jurisprudence as evidence indicating that the Ecuadorian courts and international arbitration are receptive

54. See, e.g., *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300 (2d Cir. 2011) (holding that a creator of a documentary film did not independently solicit and collect the participants' stories, and thus, was not entitled to withhold footage requested pursuant to section 1782 because the footage was not privileged).

55. *In re Chevron Corp.*, No. 1:10-MI-00076-WT-GGB, 2010 U.S. Dist. LEXIS 114724 (N.D. Ga. Mar. 2, 2010).

56. *Id.* at *11 (citing *In re ROZ Trading Ltd.*, 2007 U.S. Dist. LEXIS 2212, at *7).

57. *In re Chevron Corp.*, No. M-19-111, 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010).

58. See *id.* at *21.

59. See *In re Chevron Corp.*, 633 F.3d 153, 162–63 (3d Cir. 2011).

60. See *id.*

61. See *id.*

62. *Id.* at 163.

to third party evidence discovery.⁶³ The District of Columbia Court *In re Veiga* explains that absent authoritative proof from the foreign courts or international arbitration suggesting otherwise, evidence ought to be discovered because “[t]hose tribunals may simply choose to exclude or disregard the information obtained should they find that this Court has overstepped in ordering discovery.”⁶⁴ Similarly, *In re Republic of Ecuador and Dr. Diego Garcia Carrion*,⁶⁵ an Ecuadoran application, the district court reasoned that receptivity was either implicit or explicitly asserted because Chevron had itself sought and was awarded extensive § 1782 applications.⁶⁶ This position, of course, assumes that receptivity was properly considered in the cases relied upon. Reliance on previous decisions as an indication of future evidence admission by a foreign tribunal is faulty because each § 1782 application uncovers new evidence. Thus, each application ought to be treated as unique and considered on its own merits.

Regarding the cautionary position, other courts appear to contradict the *Intel* reasoning by favoring the receptivity factor as a prominent consideration of § 1782 applications. *In re Babcock*,⁶⁷ the district court regarded the receptivity of the foreign tribunal as “particularly important in light of the purposes of §1782” and acknowledged that “if there is reliable evidence that the foreign tribunal would not make any use of the requested material, it may be irresponsible for a district court to order discovery, especially where it involves substantial costs to the parties involved.”⁶⁸ *Babcock* also suggests that the burden of proof may not only fall solely on the respondent’s shoulders and instead it is up to both parties to demonstrate “authoritative proof” that the foreign tribunal would be receptive to the discovery materials requested.⁶⁹

63. See, e.g., *In re Veiga*, 746 F. Supp. 2d 8 (D.D.C. 2010); *In re Ecuador*, No. C 11-80171 CRB, 2011 U.S. Dist. LEXIS 108612 (N.D. Cal. Sept. 23, 2011); *In re Chevron*, Nos. 10-MC-208, 10-MC-209, 2010 U.S. Dist. LEXIS 134970 (E.D. Pa. Dec. 20, 2010).

64. *In re Veiga*, 746 F. Supp. 2d at *24.

65. *In re Ecuador*, 2011 U.S. Dist. Lexis 108612.

66. See *In re Ecuador*, 2011 U.S. Dist. Lexis 108612 at *11-12 (concluding that the receptivity factor was “either neutral or slightly favors the Applicants”).

67. *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008).

68. *Id.* at 241.

69. *Id.*

Similarly, the *Finserve Group*⁷⁰ decision professes a cautionary approach in light of the receptivity factor. In *In re Finserve* the district court denied Finserve's § 1782 petition because it had only expressed an intention to arbitrate and had not finalized the arbitration application process.⁷¹ In short, the district court was not prepared to permit discovery if it could not first be determined that the foreign arbitral tribunal would be receptive to such discovery. Specifically, the district court concluded "this Court has been presented with no indication as to the 'receptivity of the foreign government or the court or agency abroad to the United States federal court assistance.'" ⁷²

Another decision that emphasized a greater need for caution and the receptivity factor, *In re Chevron*, was issued by the District Court of Massachusetts.⁷³ In that case, the district court was willing to grant discovery for the pending Ecuadorian civil and criminal cases but was unwilling to permit the § 1782 petition for the UNCITRAL case. The district court concluded that it was "not convinced that, given its nature, the Treaty Arbitration tribunal is at all receptive to or in need of this court's assistance with regard to the particular discovery sought here" and that "since international arbitrators usually control the discovery process, this court believes it should exercise at least some restraint."⁷⁴

IV. LOOK NORTH: CANADA

In Canada, letters of request or letters rogatory are authorized under the *Canadian Evidence Act* and/or analogous provincial evidence acts. An application is brought before a superior court on notice to those affected by the letter of request. There are minor variations between the *Canadian Evidence Act* and the provincial equivalents. However, there are generally three basic jurisdictional requirements for enforcement in Canada: (1) that the evidence is sought by a 'court or tribunal' outside of Canada for use in a civil, commercial or criminal matter; (2) the evidence must be for a

70. *In re Finserve Group*, No 4:11-mc-2044-RBH, 2011 U.S. Dist. LEXIS 121521 (D.S.C. Oct. 20, 2011).

71. *See id.* at *2.

72. *Id.* at *9-10.

73. *In re Chevron Corp.*, 762 F. Supp. 2d 242 (D. Mass. 2010).

74. *Id.* at 250-51.

purpose for which letters of request could be issued under the rules of the Canadian court; and (2) the evidence sought must be within the jurisdiction of the Canadian Court.

Section 46(1) of the *Canada Evidence Act* provides the following:

46. (1) If, on an application for that purpose, it is made to appear to any court or judge that *any court or tribunal outside Canada*, before which any civil, commercial or criminal matter is pending, *is desirous of obtaining the testimony* in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge *may, in its or their discretion, order the examination on oath on interrogatories, or otherwise*, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order *may command the attendance* of that party or witness *for the purpose of being examined, and for the production of any writings or other documents* mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.⁷⁵

Unlike in the United States, Canadian courts have had far less of an opportunity to analyze whether letters rogatory or letters request issued by parties to private arbitral proceedings should be enforced. Likewise, there has been far less academic attention paid to the enforcement of letters rogatory by Canadian courts⁷⁶ and even less attention to whether international arbitral tribunals fall within the provincial or federal statutory scope of “court or tribunal of competent jurisdiction.”⁷⁷ While it seems clear that a Canadian court will enforce a request if the arbitration tribunal directly invokes the assistance of a foreign court,⁷⁸ it is less clear whether such a court

75. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 46(1) (emphasis added); see also Alberta Evidence Act, R.S.A. 2000, c. A-18, s. 56(1); Ontario Evidence Act, R.S.O. 1990, c. E-23, s. 60(1).

76. See, e.g., Bradley J. Freedman & Gregory N. Harney, *Obtaining Evidence from Canada: The Enforcement of Letters Rogatory by Canadian Courts*, 21 U. BRIT. COLUM. L. REV. 351 (1987).

77. Michael Penny, *Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT'L ARB. 249 (2001); see also W. Donald Goodfellow & Barbara E. Cotton, *Enforcement of Letters Rogatory Issued by a Foreign Arbitration Tribunal*, 30 ADVOC. Q. 316 (2005).

78. See, e.g., *Four Seasons Hotels Ltd. v. Legacy Hotels Real Estate Inv. Trust*, 2003 CanLII 25063 (Can. O.N. S.C.) (enforcing two letters rogatory issued by the

will enforce the letters rogatory emanating directly from a foreign arbitral tribunal. This section will review the Canadian approach to discovery requests from foreign arbitral tribunals with particular focus on its treatment of the receptivity factor.

A. MCCARTHY BARRIERS

In earlier cases, starting with the *McCarthy* Ontario Court of Appeal decision in 1963, the Canadian approach to enforcing letters of request can be characterized as cautious and conservative.⁷⁹ In *McCarthy*, the U.S. Securities and Exchange Commission (“SEC”) made an application under the *Ontario Evidence Act* and *Canadian Evidence Act* for aid to compel attendance of witnesses within Ontario to give evidence under oath for use in proceeding before the SEC.⁸⁰

When deciding whether to enforce a letter of request by a foreign tribunal, the Court of Appeal stressed that “[i]t is important to consider the nature, status and powers of the respondent.”⁸¹ To accomplish this task, Aylesworth JA established three basic factors, which should govern the granting of an order under either the *Ontario Evidence Act* or the *Canada Evidence Act*:

The foreign tribunal must have the power under its enabling statutes and rules to direct the taking of depositions outside of its jurisdiction;

There must be “reciprocity” between the court and the foreign tribunal;
and

The foreign tribunal must have the well-known sanctions of a court of law or equity with which it is able to enforce its duly authorized orders.⁸²

Based on these factors, Aylesworth JA refused to enforce the letters of request. In coming to this conclusion, Aylesworth made the following observations with regard to the *Evidence Acts*:

Superior Court of Washington on behalf of an ongoing arbitration before the American Arbitration Association in Washington).

79. *McCarthy v. Menin*, [1963] 2 O.R. 154 (Can. Ont. C.A.).

80. *See id.* paras. 2-4.

81. *Id.* para. 5.

82. *See United States v. A.G. Becker Inc.*, [1984] O.J. 479, para. 5 (Can. Ont. Sup. Ct. J.).

The legislation is designed to provide as a matter of international courtesy or comity for the taking of evidence of persons within the jurisdiction of our Courts in aid of foreign Courts and inherent I think, in the idea of international courtesy or comity is a mutuality of purpose and of powers.⁸³

This passage seems to import the concept of judicial reciprocity into the notion of international comity. Consequently, the SEC lacked such powers, specifically the ability to enforce a letter of request emanating from a Canadian court, and thus there was no mutuality of purpose or reciprocity between Ontario Courts and the SEC.

McCarthy was subsequently followed by the Ontario High Court of Justice in *Becker*.⁸⁴ This case similarly dealt with whether to enforce letters rogatory issued by the SEC. The Ontario Court began its analysis by summarizing the three *McCarthy* principles.⁸⁵ While the Court recognized that the U.S. Congress in 1964, a year after the *McCarthy* decision was rendered, amended its enabling legislation to give the Department of State the power to receive or issue letters rogatory, the Court was unconvinced that the Charter of the SEC had changed enough to meet the other two requirements (mutuality of purpose and sanctions of a court of law or equity).⁸⁶ In a somewhat apologetic conclusion, the Court stated:

But for the decision of the Court of Appeal on *McCarthy v Menin, supra*, I would be inclined to give the words “court or tribunal of competent jurisdiction” a fairly broad interpretation and to hold that the Commission, in this case, was a tribunal of competent jurisdiction.⁸⁷

More recently, in *BF Jones*, the Ontario Superior Court of Justice refused to enforce a letter of request from a private arbitrator in Florida.⁸⁸ In rejecting the order, the Superior Court highlighted one

83. *McCarthy*, 2 O.R. para. 10.

84. See *A.G. Becker*, [1984] O.J. paras. 4, 7. For other cases that followed *McCarthy*, see, for example, *United States v. Executive Securities Corp.*, [1977] 15 O.R. 2d 790 (Can. Ont. High Ct. J.); *Ontario (Securities Commission) v. Bennett*, [1991] 1 O.R. 3d 576 (Can. Ont. C.A.).

85. See *A.G. Becker*, [1984] O.J. para. 5.

86. See *id.* para. 7.

87. *Id.*

88. See *B.F. Jones Logistics Inc. v. Rolko*, [2004] 72 O.R. 3d 355 (Can. Ont. Sup. Ct. J.).

of the *McCarthy* factors, namely that the private arbitral tribunal governed by the Commercial Dispute Resolution Procedures of the American Arbitration Association lacked the authority to issue letters of request and, in fact, the arbitral tribunal only had the authority to “allow for the issuance of subpoenas.”⁸⁹ The Court accepted *McCarthy’s* purpose beyond the *Evidence Act* providing that “[i]nternational comity between friendly nations is the rationale for the existence of the power to order the taking of commission evidence. Reciprocity is a manifestation of that comity.”⁹⁰ Because the Florida arbitration lacked the ability to reciprocate a request, the application before the Ontario court was denied. The court recommended that the ‘proper procedure’ would be for the arbitral tribunal “to seek the assistance of a Florida court to issue a Letter of Request to this court.”⁹¹

In all three cases, *McCarthy*, *Becker* and *BF Jones*, the Ontario courts rejected the applications to enforce a letter of request and in all three cases the requests emanated directly from the foreign arbitral tribunal or commission. Instead of considering the receptivity of the foreign tribunal, which should have weighed in favor of granting the request, the Ontario courts focused on the alleged inability of the tribunal to reciprocate requests. In both *McCarthy* and *BF Jones* the courts effectively conflated reciprocity with the notion of international comity. In doing so, these courts seemed much more concerned about the structure of the body making the request (e.g. nature, status and powers) and how closely it resembled a traditional court rather than the source of the request.

B. *R V ZINGRE*: COMITY OVERTAKES RECIPROCITY

In the 1980s, Canadian courts began moving away from the *McCarthy* principles, emphasizing instead the importance of international comity in deciding whether to provide judicial assistance. Although comity is somewhat of an elusive term, the Supreme Court of Canada (SCC) has made a number of helpful contributions that help shape its boundaries. Laskin CJC in *Royal*

89. *Id.* para. 12.

90. *Id.* para. 15 (quoting *France v. De Havilland Aircraft of Can. Ltd.*, [1991] 3 O.R. 3d 705, 713 (Can. Ont. C.A.)).

91. *Id.* para. 16.

American Shows, for example, opined that “comity dictates that a liberal approach should be taken with requests for judicial assistance, so long at least as there is more than ephemeral anchorage in our legislation to support them.”⁹² Similarly, La Forest in *Morguard*, adopting the formulation of the US Supreme Court, stated:

“Comity” in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.⁹³

One of the most important cases that dealt specifically with whether to enforce a letter of request is *R v. Zingre*.⁹⁴ While the case did not address whether international arbitral tribunals fall within the scope of the *Evidence Act*, it is important because it demonstrates the Canadian trend of emphasizing international comity over reciprocity.⁹⁵ In *Zingre*, the SCC questioned “the right of a Manitoba Court to issue a commission authorizing two Swiss ‘extraordinary investigating judges’ to take testimony in Canada.”⁹⁶ The testimony was “in respect of the prosecution in Switzerland of three Swiss nationals for crimes allegedly committed in Manitoba.”⁹⁷ The investigating judges were tasked with “[examining various] documents and [interrogating] witnesses [for the purpose of] determining whether the evidence justified a formal trial” in Switzerland.⁹⁸

Dickson J, speaking for the majority, articulated the underlying purpose of § 46 of the *Canada Evidence Act*:

It is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of

92. United States Dist. Ct., M.D. Fla. v. Royal American Shows Inc., [1982] 1 S.C.R. 414, 421 (Can.).

93. *Morguard Inv. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, para. 31 (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

94. See *Zingre v. R.*, [1981] 2 S.C.R. 392 (Can.).

95. See generally Penny, *supra* note 77; Goodfellow & Cotton, *supra* note 77.

96. *Zingre*, 2. S.C.R. para. 1.

97. *Id.*

98. *Id.* para. 10.

mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.⁹⁹

Zingre introduced a presumption in favor of enforcing letters rogatory issued by a foreign tribunal unless it is contrary to public policy or it hinders the sovereignty of Canada. This approach was subsequently followed in *France (Republic) v De Havilland Aircraft of Canada Ltd* where the First Examining Magistrate of the High Court of Grasse made an application to an Ontario court for judicial assistance.¹⁰⁰ The Ontario Court of Appeal enforced the letter of rogatory even though there was no reciprocity from the French court.¹⁰¹ In coming to this conclusion, Doherty JA explicitly rejected reciprocity as a precondition for enforcement of letters rogatory and stated:

It is inappropriate to limit considerations of reciprocity to the powers of a particular court or tribunal. Rather, the question must be, is there a mechanism in place within the foreign jurisdiction which could respond favourably to a Canadian request by way of letters rogatory.¹⁰²

In other words, as long as a mechanism exists “within the foreign jurisdiction which could respond favourably to a Canadian request by way of letters rogatory” then the court should be inclined to enforce the letter.¹⁰³ Instead of inviting the tribunals to apply directly to the U.S. courts first for letters rogatory, the *De Havilland* case destroyed the need for the middleman. Moreover, the court warned that to require reciprocity “as a condition precedent” to the enforcement of letters of request would “undermine the goals of international cooperation which underlie the power to order the taking of commission evidence.”¹⁰⁴ Therefore, *De Havilland* successfully separated reciprocity from international comity.

99. *Id.* para. 18. For other articulations by the SCC on the principle of comity, see, for example, *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (Can.).

100. *See France v. De Havilland Aircraft of Can. Ltd.*, [1991] 3 O.R. 3d 705, 707 (Can. Ont. C.A.).

101. *See id.*

102. *Id.* at 714.

103. *Id.*

104. *Id.*

V. CONCLUSION

Maintaining receptivity as the governing factor under § 1782 applications not only furthers the twin aims of the statute, including the fostering of international comity. It also quells some of the concerns made by the earlier U.S. district courts which rejected § 1782 applications. For example, the Fifth Circuit in *Biedermann* warned of the potential consequences of extending § 1782 requests to arbitral tribunals:

Empowering arbitrators or worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.¹⁰⁵

Maintaining judicial restraint until, and unless, the tribunal has given its blessing will help protect international arbitration as a “speedy, economical, and effective means of dispute resolution.”¹⁰⁶

Receptivity, however, requires two-way participation. On the one hand, U.S. district courts must ensure that the tribunal approves the request. This approach not only respects the autonomy of the arbitral tribunal and recognizes its ability to regulate the arbitral procedure; it also prevents “inefficient and wasteful situations” in cases where the tribunal rejects the evidence.¹⁰⁷ U.S. courts could learn from recent Canadian trends, transitioning from a reciprocity focused analysis to a more receptive orientated approach that augments international comity as a primary criterion. As *BF Jones* is a 2004 decision that contradicts the Canadian movement, U.S. district courts have the opportunity to settle this transnational matter by ensuring that a foreign tribunals blessing is granted prior to approving a § 1782 document discovery request.

On the other hand, arbitral tribunals must be prepared to explicitly approve or disapprove of the § 1782 application. It does not just remain with the district courts to act in a consistent manner; tribunals

105. *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

106. *Id.*

107. Comm. on Int'l Com. Disputes, *supra* note 5, at 778.

must be prepared to resist the temptation to remain silent. For example, in *Methanex v. United States*, the investor sought the approval of the NAFTA tribunal to make two § 1782 applications.¹⁰⁸ In response, the NAFTA tribunal stated that it would not bless nor would it oppose the Methanex's proposed applications under § 1782.¹⁰⁹ Even though the tribunal voiced its concerns with regard to the timeliness of the proposed applications, the tribunal nonetheless maintained that Methanex was "at liberty to make any such applications at any time."¹¹⁰ Although Methanex withdrew its § 1782 applications before the district courts could make a determination, the tribunal's ambivalence towards the application is very unhelpful.¹¹¹ For § 1782 to be successful in aiding rather than hampering international arbitration, respect must run both ways. If arbitral tribunals expect respect, they are going to have to be willing to demonstrate it.

108. See *Methanex Corp. v. United States*, OXFORD REP. INT'L INV. CLAIMS 167 (2005) (Rowley et al., Arbs.).

109. See *id.* para. 21.

110. *Id.*

111. For an analysis of Methanex's § 1782 application, see generally Timothy G. Nelson, *Can Parties to a NAFTA Arbitration Get Discovery From U.S. Courts under 28 U.S.C. § 1782? The Methanex Question Revisited*, 26 MEALEY'S INT'L ARB. REP. 15 (2011).