Getting evidence in the US before commencing litigation in Europe: Flexible use of 28 USC § 1782

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It is no secret that the United States permits far broader pre-trial discovery than most – possibly ***all*** -- other countries. Broad discovery has plusses and minuses. On the upside, it can lead to a high quality of justice. Both sides are able to ascertain the facts and evaluate the strengths and weaknesses of each side's position. If the case does go to trial, most if not all of the truth is likely to come out. But the downside is that this comes at a substantial price. Not only is discovery expensive, it also can be intrusive. Clients have to open their files and, quite often, subject themselves to pre-trial depositions.

Civil law countries operate very differently. Typically, there is no general pre-trial discovery, and any request that the court compel production of a document must be for a specific, and specifically described, document. So when litigants from civil law countries encounter American document production or deposition requirements, the shock can be severe.

In recent years, American discovery has been playing an increasing role in disputes in other countries. An American statute authorizes United States courts to permit taking discovery in the United States for use in proceedings in other countries or in international tribunals. Under 28 USC § 1782, a person with an interest in a proceeding overseas can make its own request to an American

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district court for leave to obtain evidence in the United States. Section 1782 permits an applicant to request documents or testimony, or both.[2]

For civil law litigants, the availability of discovery under 28 USC § 1782 can be an attractive avenue. German law, for example, does not contemplate pre-trial depositions. Witnesses testify only at trial. It is true that pretrial proceedings may feature references to anticipated testimony, but there are no advance examinations. Even the use of affidavits is very rare. Nor do parties request and exchange documents. The Court may direct a person to provide a specific document that a party has identified in detail, and which the Court believes may be useful in arriving at a decision. But there is no provision for requiring production of categories of documents. Parties develop evidence on their own.

Assuming the jurisdictional requirements are met for invoking § 1782, discovery may be available from third parties; from affiliates of the counterparty; or in some cases, even from the other party. Documents might be sought from files kept in the United States and, under recent case law, sometimes from outside the United States as well. And because even other common law countries have less expansive discovery rules than the United States, § 1782 may be of interest to litigants in common law jurisdictions as well.

So § 1782 is potentially a very powerful tool – so much so that in recent years, as the world economy globalizes and international trade continues to grow, the volume of applications under § 1782 has mushroomed. Given how powerful § 1782 can be, this development should not surprise anyone. But it still remains the case that non-American legal systems are different enough from the American that new issues under § 1782 continue to arise in American courts.

One issue that has gained increasing focus is pre-litigation discovery. The case law under § 1782 holds that a person may seek evidence under § 1782 even if no actual proceeding abroad had been filed yet. But this can be done only if a decisional proceeding is within "reasonable contemplation."[3] It's hard to know exactly what that means.

This issue takes on special importance in civil law countries, where procedural rules often require that the document initiating a lawsuit also include with it at least some of the evidence the plaintiff relies on. Sometimes a plaintiff may have a valid claim, but to support that claim, will need a document it doesn't have. So § 1782 may be an option in that situation, but only if the lawsuit is "within reasonable contemplation."

This article looks at pre-litigation discovery under § 1782. We begin with the basics of § 1782: what an applicant needs to show, and pointers for things to think about when making an application. The main focus, though, will be on how § 1782 can be used when a lawsuit outside the

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[2] If only documents are sought, the process usually takes up to six to eight months, because there has to be a court decision and then time for the documents to be produced. The process typically takes longer when the application seeks testimony in addition to documents, because the process typically goes in stages: first documents are produced and then, after the applicant takes some time to review the documents, the oral examination proceeds.

[3] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

US has not yet been filed. How far down the road to an actual lawsuit does a dispute have to be before an American court will be satisfied that litigation is within reasonable contemplation?

I. BACKGROUND: *INTEL V. AMD* AND 28 USC § 1782

Under 28 USC § 1782, an "interested person" may request that a district court authorize discovery in the United States "for use in" foreign litigation even without the foreign tribunal's knowledge or involvement.[4] Section 1782 gained special attention in 2004, when the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). In *Intel*, the Court held that § 1782 conferred broad discretion on district judges to permit foreign litigants to obtain discovery in the United States, subject to certain statutory and prudential guidelines.

Intel started in Europe. AMD had filed a complaint with the European Commission's Directorate-General for Competition ("D-G"), claiming that Intel was engaging in various kinds of anti-competitive activity. The D-G enforces the European antitrust laws; it investigates and provides a recommendation to the European Commission ("EC"), whose decisions as to liability are then reviewable in the European court system. In those proceedings, complainants such as AMD have certain rights, including the right to seek judicial review of certain decisions of the D-G. In the *Intel* case, AMD suggested to the D-G that, in the course of its investigation, the D-G should seek documents Intel had produced in a litigation against Intel in the United States. The D-G declined.

AMD decided that if the D-G wouldn't ask for the documents, AMD would. AMD applied for an order under § 1782, claiming it was an "interested person" entitled to seek discovery in the United States in aid of the antitrust proceeding in Europe. The district court held that § 1782 did not authorize the discovery and denied the application. After that decision was reversed on appeal, the Supreme Court agreed to hear the case.

Before the Supreme Court were a number of issues. First, whether a person seeking discovery under § 1782 could seek only discovery that would be permitted in the foreign jurisdiction. The various regional appellate courts (called "circuits" in the US) had split on that issue.[5] The Supreme

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4 Section 1782 provides in relevant part as follows:

> (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. . . . 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.

5 *Compare Application of Gianoli Adulante*, 3 F.3d 54 (2d Cir. 1993) (no foreign discoverability requirement); *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998) (same), *with In re Asta Medica*, 981 F.2d 1 (1st Cir.

Court also addressed whether a legal proceeding had to be pending or imminent before § 1782 could be invoked (circuits had split on this issue as well);[6] what kinds of foreign proceedings could be the subject of proper § 1782 applications; and whether a complainant in an administrative proceeding could be an "interested person" entitled to invoke § 1782. On each issue, the Supreme Court came down in favor of permitting the district court discretion to allow discovery. It held that, under § 1782: (a) AMD was an "interested person" even though not a formal party litigant; (b) a D-G investigation is a "proceeding" in a "foreign or international tribunal" for which discovery can be sought, even at the investigative, pre-decisional stage, so long as decisional proceedings are "within reasonable contemplation;" and (c) the discovery materials sought in the United States need not also be discoverable under the rules of the foreign proceeding.

The Supreme Court noted that, procedurally, "[t]he target [of the competition complaint] is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. Once the DG-Competition makes its recommendation, the Commission may dismiss the complaint or issue a decision holding the target liable and imposing penalties. The Commission's final action is subject to review in the Court of First Instance and the European Court of Justice."[7] So in the context of that case, there already was a proceeding underway -- it just wasn't in the court system yet. The Court did note in a footnote, though, that the D-G is not merely an investigating body, because its decisions are binding if they are not overturned by the European courts.[8] But as we shall see later, an "interested person" can apply for evidence under § 1782 even if there is no proceeding pending yet at all, investigative or otherwise.

Intel thus clarified that the statutory limits on discovery under § 1782 are actually quite narrow. As a result, much of the litigation about whether to permit discovery under § 1782 necessarily focuses on the discretionary factors. The Court in *Intel* identified several factors to guide the district courts' discretion:[9]

> First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .

1992) (evidence sought under § 1782 must be discoverable in forum of underlying dispute); *Lo Ka Chun v. Lo TO*, 858 F.2d 1564 (11th Cir. 1988); *In re Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988) (same).

6 *Compare In re Ishihara Chemical Co.,* 251 F.3d 120, 125 (2d Cir. 2001) (foreign case must be imminent) *with In re Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 691 (D.C. Cir. 1989) (foreign case must be "within reasonable contemplation").

7 *Intel*, 542 U.S. at 255.

8 *Id.* n.9.

9 *Intel,* 542 U.S. at 264-65.

> Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . . . [Third,], a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.[10]
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> [Fourth], unduly intrusive or burdensome requests may be rejected or trimmed.

These factors should be applied in support of § 1782's "twin aims of 'providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.'"[11] A court considering a § 1782 application thus needs to consider both the statutory requirements and the discretionary factors. Meeting the statutory factors is the threshold inquiry. Only if the applicant meets the statutory requirements does the district court consider the discretionary factors.

II. Development of § 1782 doctrine following *Intel*

In the years since *Intel*, the courts have generally held that an applicant meets the statutory threshold by showing the following:

> "(1) the person from whom discovery is sought reside[s] (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.' " [12]

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[10] This factor does ***not*** mean that foreign discovery restrictions apply in § 1782 proceedings. To the contrary: the United States Supreme Court in *Intel* specifically held that there is no "foreign discoverability" requirement under § 1782. *Intel*, 542 U.S. at 260-63.

Rather, this factor operates to weed out cases of behavior that can be viewed as abusive – for example, where the applicant invoked § 1782 after the foreign tribunal had already turned him down. *See, e.g.*, *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401 (7th Cir. 2004); *In re Microsoft Corp.*, 2006-1 Trade Cas. ¶ 75,208, 2006 WL 1344091, slip op. at 2 (D. Mass. April 17, 2006). In fact, this is precisely what happened in *Intel* after remand – the district court refused to permit the discovery because AMD had asked the D-G Competition to order the discovery and the D-G refused. *Advanced Micro Devices, Inc. v. Intel Corp.*, no. C 01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004).

[11] *Intel,* 542 U.S. at 254, *quoting Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002). *Accord, e.g., Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018); *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015) (quoting *Schmitz v. Bernstein Liebhard & Lifschitz LLP,* 376 F.3d 79, 84 (2d Cir. 2004)*; Certain Funds, Accounts &/or Investment Vehicles v. KPMG, LLP*, 798 F.3d 113 (2d Cir. 2015)..

[12] *In re Guo,* 965 F.3d 96, 102 (2d Cir. 2020); *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015).

This is the formulation used by the Second Circuit, which is the regional federal appellate court covering New York, Connecticut and Vermont. Other circuits formulate the test somewhat differently, some with four elements rather than three,[13] but the basic requirements are the same.

Each of these elements has spawned a fair amount of case law. For example, what does it mean to be "found" in the district? The Second Circuit held in October 2019 that a company is "found" in a district, and can be subject to § 1782 discovery there, if it is consistent with due process to do so.[14] Is arbitration in another country a "foreign or international tribunal" for which evidence can be sought under § 1782? The law on this one is split, and the Supreme Court has agreed to resolve the question in a case that should be decided before next summer.[15] Does the requirement that the evidence must be "for use" in an overseas proceeding mean that the evidence must be admissible in the foreign court? The answer is "no" -- the "for use" requirement means only that the applicant will be able to make some use of the evidence in the course of the foreign proceeding.[16]

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13 The Eleventh Circuit, for example, uses a nominally four-factor test, but it is substantively the same as the Second Circuit's test. According to the Eleventh Circuit,

> A district court may not grant an application under § 1782 unless four statutory requirements are met: (1) the request must be made "by a foreign or international tribunal" or by "any interested person"; (2) the request must seek evidence, be it the testimony or statement of a person or the production of a document or other thing; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and, finally, (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.

In re Furstenberg Finance SAS, 877 F.3d 1031, 1034 (11th Cir. 2017), *citing In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

14 *In re Del Valle Ruiz,* 939 F.3d 520, 528 (2d Cir. 2019). This is a very significant holding from the Second Circuit – so much so that a full discussion of its implications would warrant an article of its own.

15 *Servotronics Inc. v. Rolls Royce PLC*, 141 S.Ct. 1684 (Mar. 22, 2021) (granting certiorari).

The circuit split lines up this way: *In re Guo*, 965 F.3d 96 (2d Cir. 2020), *Servotronics Inc. v. Rolls Royce PLC*, 975 689 (7th Cir. 2020) and *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009), hold § 1782 cannot be used for private arbitrations. *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019) and *Servotronics, Inc. v. The Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) hold that it can be. A more complete discussion of how § 1782 applies to private arbitration can be found in Riback, "*The Growing Circuit Split About § 1782 – Can It Be Used for Private Arbitration?*", 35 Mealey's International Arbitration Report #10 (October 2020). (Contact the author if you would like a copy.)

16 *Mees, supra.*

How about a lawsuit that hasn't been commenced yet? Is a case that isn't yet filed "a proceeding before a foreign tribunal" for purposes of § 1782? Recall that in *Intel* there actually was a regulatory proceeding underway, in the investigative stage; the Supreme Court held that the district court had power to authorize § 1782 discovery because a court decision was within "reasonable contemplation."[17] But *Intel*'s language is not limited only to cases where there already is an investigation. The opinion says that "the 'proceeding' for which discovery is sought under §1782(a) must be in reasonable contemplation, but need not be 'pending' or 'imminent.'"[18] So in the years since *Intel* the lower courts have followed this guidance and have held that a § 1782 application can be granted even if the dispute in which the evidence is to be used isn't yet pending and even if no preliminary proceedings are underway, so long as a court proceeding is within "reasonable contemplation."[19]

This is not a huge leap and is not surprising. The Supreme Court in *Intel* was very aware that procedural rules in other countries, particularly civil law countries, often require a plaintiff to submit evidence with its initial pleading.[20] So § 1782 would be much less useful if it were limited to obtaining evidence for already-filed cases, or cases under investigation. So it makes sense that § 1782 can be used to obtain evidence for a proceeding that has not yet commenced, so long it is reasonably clear one will be filed.

But how close to an actual filing does a dispute have to be for an American court to accept that a legal proceeding is within "reasonable contemplation?" It definitely ***doesn't*** mean a foreign would-be litigant can come to the US to get evidence to help him decide whether he has a claim or not, or that such a litigant can obtain discovery under § 1782 merely by considering or discussing the possibility of commencing proceedings.[21] Americans can't do that for domestic lawsuits, and there is no reason to believe Congress wanted to allow foreigners to do that, either.

This issue – how close to an actual lawsuit does a dispute have to be before an American court will authorize discovery under § 1782 -- has been a focus of the case law in the lower courts for the last several years. The prior case law that *Intel* had rejected had required the applicant to show that the foreign case either was already pending or "very likely to occur and very soon to occur."[22] The lower courts in the succeeding years have come up with a new test that is easy to articulate, but not so easy to define. Some patterns do emerge, though.

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17 *Intel*, supra, 542 U.S. at 259.

18 *Intel*, 542 U.S. at 543. *Intel* rejected prior case law in the lower courts had held that the foreign proceeding had to be either pending or imminent, meaning that it was "very likely to occur and very soon to occur," *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001)

19 *See, e.g.*, *Certain Funds, Accounts and/or Investment Vehicles v. KPMG, LLP*, 798 F.3d 113, 124-25 (2d Cir. 2015); *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014).

20 *Intel*, 542 U.S. at 262 n.14.

21 *Certain Funds, supra,* 798 F.3d at 124-25 (2d Cir. 2015); cases cited at footnotes 32-34.

22 *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001)

Let's start with the appellate-level cases. Though they formulated their test in different words, the Second and Eleventh Circuits[23] both require a factual demonstration from the applicant that shows a lawsuit is in prospect. As the Eleventh Circuit in 2014 put it, "a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time."[24] The Second Circuit's test, enunciated in the 2015 case *Certain Funds v. KPMG, LLC*[25] is substantively similar:

> [T]he applicant must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated. . . . [T]he Supreme Court's inclusion of the word "reasonable" in the "within reasonable contemplation" formulation indicates that the proceedings cannot be merely speculative. At a minimum, a § 1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye.[26]

"Reliable indications," "objective indicium" and "concrete basis" all mean there must be a factual showing. The Second Circuit confirmed this in so many words in late 2020, by referring to "the fact-specific nature of the inquiry."[27]

But neither court specified which facts are necessary and sufficient to provide a "concrete basis" or "reliable indication." The Second Circuit explicitly declined to provide a formula -- as it said in *Certain Funds*, "[w]e need not decide here what precisely an applicant must show to establish such indications." It declined again in November 2020 to provide a precise explanation of which facts are sufficient.[28] Because this is a factual issue, the court apparently believed that providing a checklist would make the analysis less flexible and less attuned to the nuances of a particular case. That leaves us to divine from the facts of individual cases what sorts of scenarios can suffice.

A. Don't apply too early

First let's look at what does ***not*** suffice. *Certain Funds* denied an application that sought discovery for use in anticipated proceedings in Saudi Arabia and England. When the investors first applied for § 1782 discovery, all they had done is retained counsel and "discuss[ed] the possibility of

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23 The United States Court of Appeals for the Second Circuit is the regional federal appellate court that covers New York, Connecticut and Vermont. The Eleventh Circuit covers Florida, Georgia and Alabama.

24 *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014).

25 798 F.3d 113 (2d Cir. 2015).

26 *Id.*, 798 F.3d at 123-24.

27 *Mangouras v. Squire Patton Boggs,* 980 F.3d 88, 102 (2020)

28 *Mangouras, supra,* 980 F.3d at 102.

initiating litigation."[29] That was not enough even though, by the time the appeal was argued, they had actually commenced a proceeding in England. Whether a proceeding is within reasonable contemplation is measured as of the date of the § 1782 application.[30] The lesson, of course, is not to jump the gun – be sure to have your facts in place ***before*** you make your application.

It should also come as no surprise that the Second Circuit held in November 2020, in *Mangouras v. Squire Patton Boggs*,[31] that a § 1782 application should not have been granted where the allegations of wrongdoing abroad were conclusory and unelaborated. Vagueness is not a "reliable indication." The lower court cases are in accord. A subjective intention to launch a proceeding, coupled with little more than an explanation of how such proceedings work, is not a "concrete basis."[32] Listing possible venues and legal theories, without connecting them to facts or to the law of the relevant foreign country, likewise isn't enough – especially if the applicant hasn't even engaged counsel in the foreign country.[33] If the applicant "d[oes] not provide any detail as to the potential form of litigation it intended to pursue, nor does it provide legal theories under which it intended rely in such litigation," then it has failed to show that a lawsuit was reasonably contemplated.[34]

Especially fatal to an application is anything that suggests the applicant is using § 1782 to help decide whether to sue. Use of "whether" or "possibly" is often a giveaway. It certainly was in *Mangouras*, in which the applicant was hoping to prove that certain persons had lied in earlier proceedings. In deciding that the application should not have been granted, the court italicized the key words when it quoted Mangouras's attorney: "discovery is going to help us determine *whether or not* these individuals knew what they were testifying to was false."[35] The federal trial court in New York City likewise has turned away applicants who said they need the evidence to decide whether to sue

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29 *Certain Funds*, 798 F.3d at 124.

30 Because the § 1782 evidence must be for use in a foreign proceeding, developments in the proceeding after the application is brought may remain relevant. Thus, if the foreign case is dismissed, there may no longer be a basis for granting a § 1782 application. Any contention that the proceeding can be reopened, so that the § 1782 evidence can still be used, needs to be backed up with specific facts. *Khrapunov. Prosyankin*, 931 F.3d 922, 925-26 (9th Cir. 2019).

31 *Mangouras, supra,* 980 F.3d 88 (2d Cir. 2020).

32 *In re Sabag*, 2020 WL 4904811, case no. 19-mc-00084, slip op. at 4 (S.D. Ind. Aug. 18, 2020).

33 *In re Wei*, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018).

34 *In re Gulf Investment Corp.*, 2020 WL 7043502, case 19-mc-593 (VSB), slip op. at 4 (S.D.N.Y. Nov. 30, 2020). *See also Leutheusser-Schnarrenberger v. Kogan*, 2018 WL 5095133, case no. 18-mc-80171, slip op. at 3-4 (N.D.Cal. Oct. 17, 2018).

35 *Mangouras, supra,* 980 F.3d at 101.

and for what. That is a sure indicator that the future lawsuit is a matter of speculation and not within reasonable contemplation.[36] "Courts must guard against the specter that parties may use § 1782 to investigate whether litigation is possible before launching it."[37]

B. Make a record: hire counsel and develop a case

The leading case to date on what suffices to show litigation is "reasonably contemplated" is the same Eleventh Circuit decision that formulated the "reliable indications" test -- *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*,[38] decided in 2014. In that case, the applicant CONECEL had conducted an internal investigation and audit. Those steps indicated that certain former employees likely had engaged in fraudulent practices. The applicant was contemplating a civil, and later criminal, action in Ecuador. The reason CONECEL had not yet sued is that Ecuadorian law requires the plaintiff to annex its evidence to its pleading – evidence it did not yet have, but was seeking in the § 1782 application. So, the combination of an applicant's "facially legitimate and detailed explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid reasons for CONECEL to obtain the requested discovery under the instant section 1782 application before commencing suit" together sufficed to show "reasonable contemplation."

Note the very key role that a factual investigation played in *Consorcio Ecuatoriano.* The applicant had flushed out the key facts that formed the basis of their future lawsuit and presented them to the court. It also explained the basis for liability and identified the court in which the action would be commenced.

The cases that uphold § 1782 applications for evidence in as-yet-unfiled actions tend to focus on the applicant having actually developed the basis for the foreign case. There is some case-to case variation, but speaking generally, the court will consider persuasive a combination of most or all of these elements: the applicant has hired counsel, determined the facts, identified legal theories for the prospective lawsuit and represented its intention to litigate.

According to the Second Circuit, an application that provides the court with "well-documented assertions" of the basis for its claim, together with sworn declarations of the applicant's intent to

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36 *In re Sargeant*, 278 F. Supp.3d 814, 823 (S.D.N.Y. 2017). *See also In re Asia Maritime Pacific Ltd.*, 253 F. Supp.3d 701, 707-08 (S.D.N.Y. 2015); *In re Newbrook Shipping Corp.*, 2020 WL 6451939, case no 20-misc-150, slip op. at 5 n.2 (D.Md. Nov. 3, 2020).

37 *Sargeant, supra,* 278 F. Supp.3d at 823.

38 747 F.3d 1262, 1270 (11th Cir. 2014).

proceed, is enough to demonstrate that a claim was within reasonable contemplation.[39] Having previously commenced prior related litigation is an evidentiary point in favor of the applicant as well.[40]

The Fifth Circuit (regional federal appellate court for Texas, Louisiana and Mississippi) likewise relied on the factual detail the applicant provided. In *Bravo Express v. Total Petrochemicals & Refining U.S.*,[41] the Fifth Circuit placed great weight on several factors: the applicant "la[id] out, in great detail, the facts that give rise to the prospective lawsuit;" its counsel "attested that Bravo had already prepared its 'claim of particulars' against [the prospective defendant] and was "intending of filing [*sic*] it in October of this year before the UK courts, the commercial division, the High Court of London" and "had requested and received extensions of time to file from the prospective defendant in the foreign case."[42]

Filing a provisional pleading abroad for purposes of interrupting the prescription period is an indicator that litigation is reasonably contemplated, at least where the applicant sets forth the factual basis for its claims.[43] A regulatory complaint, if it is still pending, can also be viewed as a reliable indicator that litigation is reasonably contemplated.[44]

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39 *In re Furstenberg Finance SAS*, 785 Fed. App'x 882, 885 (2d Cir. 2019) (noting "Applicants' well-documented assertions, as well as those of their counsel, outlining the basis of their intended criminal complaint"), *aff'g* 334 F. Supp.3d 616, 619 (S.D.N.Y. 2018) ("applicants carried their burden of showing that a foreign proceeding is within reasonable contemplation by filing declarations swearing that they intend to file a criminal complaint against the movant, and articulating a specific legal theory on which they intend to rely"). The Eleventh Circuit had earlier come to a similar conclusion in the same dispute. *Application of Furstenberg Finance SAS*, 877 F.3d 1031, 1035 (11th Cir. 2017) (statement of intention coupled with "specific evidence" is sufficient).

District courts have reached similar conclusions. *See, e.g.*, *In re Hansainvest Hanseatische Investment-GmbH*, 364 F. Supp.3d 243, 249 (S.D.N.Y. 2018) ("hiring German litigation counsel, retaining experts and sending a detailed demand letter," plus representing on the record intent to file a case by year end suffice); *In re Top Matrix Holdings, Ltd.*, 2020 WL 248716, case no. 18-mc-465, slip op. at 4-5 (S.D.N.Y. Jan. 16, 2020) (sworn statement of intention plus description of legal theories is sufficient).

40 *In re Hornbeam*, 722 Fed. App'x 7, 9 (2d Cir. 2018).

41 613 Fed. App'x 319, 323 (5th Cir. 2015).

42 *Id.*

43 *California State Teachers Retirement Sys. v. Novo Nordisk, Inc.*, 2020 WL 6336199, case no. 19-16458 (D.N.J. Oct. 29, 2020).

44 *Sampedro v. Silver Point Capital, L.P.*, 818 Fed. App'x 14, 19-20 (2d Cir. June 5, 2020)

The bottom line is that the closer the applicant is to having the case ready to file, the more likely it is that an American court will agree the case is within reasonable contemplation for purposes of § 1782.

How about if the applicant is a prospective defendant rather than a plaintiff? If a company receives a "cease and desist" demand, is litigation sufficiently within contemplation that the company can obtain § 1782 evidence to bolster its defense? The answer appears to be that a litigation threat can demonstrate reasonably contemplated litigation, but not if the recipient ceased the conduct in accordance with the demand. In that event there is no reasonably contemplated litigation.[45]

C. Other considerations

1. So long as the applicant is able to establish that litigation is within reasonable contemplation, the court's § 1782 analysis is exactly the same for an unfiled foreign case as for a pending one. In either circumstance , so long as the evidence being sought is relevant, it can be sought via § 1782 whether or not the case has yet been filed.[46]

2. It has long been the case that evidence can be sought via § 1782 whether or not it is admissible in the foreign forum. The requirement is only that it be "for use in" the proceeding, meaning that it "can be employed with some advantage or serve some use;" it need not actually be suitable for admission into evidence.[47] Because there is no admissibility requirement, grant of a § 1782 application need not be reversed on appeal even if the foreign court has already refused to accept the evidence in question.[48] There may be discretionary reasons to block the discovery, but the power remains.

3. In certain jurisdictions there can be preconditions to suit. For example, the British Virgin Islands in at least some instances prohibits a company from commencing an action if it has not satisfied a previous BVI judgment against it. Does the precondition mean that the company cannot show litigation is reasonably contemplated?

Not if it has the ability to satisfy the judgment and has otherwise provided a factual demonstration of its intention and ability to sue.[49]

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45 *In re Caterpillar Inc.*, 2020 WL 1923227, case no. 19-mc-0031, slip op. at 10 (M.D. Tenn. Apr. 21, 2020).

46 *Mees v. Buiter,* 793 F.3d 291 (2d Cir. 2015).

47 *Id.* at 298.

48 *Sampedro, supra,* 818 Fed. App'x at 17.

49 *Hornbeam, supra,* 722 Fed. App'x at 9-10; *In re Bracha Foundation*, 663 Fed. App'x 755, 763-64 (11th Cir. 2016)

4. Can § 1782 be used in support of reopening a concluded litigation? It depends on the circumstances. If a settlement agreement provides a case can be reopened if certain events occur, then a reopened case is within reasonable contemplation if the conditions come to pass.[50] But merely seeking a "do over" is not a legitimate basis for a § 1782 application. This is especially so when the applicant has missed deadlines in the forum country or has brought similar unsuccessful claims repeatedly.

[50] *In re Pimenta*, 942 F. Supp. 3d 1282, 1287-88 (S.D. Fla. 2013).