ALERT MEMORANDUM

Receptivity Revisited: Fifth Circuit Holds That a Foreign Court's Refusal of the Same Discovery Weighs Against Section 1782 Relief

November 24, 2026

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors*

NEW YORK

Jeffrey A. Rosenthal
+1 212 225 2086
jrosenthal@cgsh.com

Carmine D. Boccuzzi, Jr.
+1 212 225 2508
cboccuzzi@cgsh.com

Lina Bensman
+1 212 225 2069
lbensman@cgsh.com

WASHINGTON, D.C.

Nowell D. Bamberger
+1 202 974 1515
nbamberger@cgsh.com

Rathna Ramamurthi
+1 202 974 1752
rramamurthi@cgsh.com

PARIS

Delphine Michot
+33 1 40 74 68 00
dmichot@cgsh.com

LONDON

Christopher P. Moore
+44 20 7614 2227
cmoore@cgsh.com

Paul Kleist
+44 20 7614 2209
pkleist@cgsh.com

SÃO PAULO

Pedro Martini
+55 11 2196 7233
pmartini@cgsh.com

In *Motorola Mobility, L.L.C. v. Advanced Standard Communication, L.L.C.*, the U.S. Court of Appeals for the Fifth Circuit reversed an order granting discovery under 28 U.S.C. § 1782 (Section 1782) in support of proceedings in Germany and before the Unified Patent Court (UPC).[1] The decision clarifies how district courts in the circuit should analyze the discretionary factors established by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* (*Intel*), including that parties resisting discovery need not furnish "authoritative proof" that a foreign tribunal would be unreceptive to judicial assistance under Section 1782. Most notably, the court held that, under the "receptivity" discretionary factor, a foreign tribunal's refusal to authorize the discovery at issue weighs against granting an application under Section 1782, even if the foreign legal system generally welcomes U.S. judicial assistance. The decision cements a circuit split over who bears the burden under the *Intel* discretionary factors and what that burden requires.

* Cleary associates Nicholas Maisel and Aarushi Kaul and law clerk Hallie Gruder also contributed to this alert.
[1] *Motorola Mobility, L.L.C. v. Advanced Standard Commc'n, L.L.C.*, No. 26-10747 (5th Cir. Oct. 29, 2026) ("*Motorola*").

© Cleary Gottlieb Steen & Hamilton LLP, 2026. All rights reserved.
This memorandum was prepared as a service to clients and other friends of Cleary Gottlieb to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

Background

Section 1782 enables certain participants in foreign proceedings to take discovery in the United States.[2] Where its statutory prerequisites are met, it authorizes district courts, in their discretion, to permit discovery for use in a foreign or international proceeding that is pending or "within reasonable contemplation."[3]

It is common ground that a party seeking Section 1782 discovery must prove the existence of the statutory prerequisites.[4] But a district court is not required to grant a Section 1782 application simply because it has the authority to do so.[5] Instead, the Supreme Court in *Intel* identified four non-exclusive factors to guide the exercise of that discretion: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) "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"; (3) whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome."[6]

Although the courts of appeals have addressed receptivity, part of the second factor, less often than other recurring Section 1782 issues since *Intel*, the factor has generally favored applicants.[7] That trend reflects the courts' understanding of the statute's purposes: Congress enacted Section 1782 to assist participants in international litigation and to encourage foreign countries "by example" to provide similar assistance, including by authorizing discovery that may be unavailable abroad. Accordingly, a foreign court's unwillingness to order discovery under its own rules does not necessarily mean that it would decline to consider evidence obtained in the United States.

In applying the receptivity factor, courts have confronted two related questions: first, whether the Section 1782 applicant has the burden to show that the foreign tribunal would be receptive to the discovery, or the party resisting discovery must show that it would not be; and second, what that burden entails, and in particular whether a resisting party must furnish "authoritative proof" of the foreign tribunal's hostility or may rely on something less.

In practice, courts addressing these disputes have often not articulated a burden of proof and instead focused on the level of specificity by which receptivity should be measured. Applicants emphasize, typically with success, that if the foreign legal system routinely accepts evidence obtained through Section 1782, then the receptivity factor should weigh in favor of discovery.[8] Resisting parties, by contrast, focus on the particular proceeding at hand and on any indication that the foreign tribunal has no interest in the evidence sought.[9] Courts have credited resisting parties'

[2] 28 U.S.C. § 1782(a); *see also Motorola* at 6–7 (describing the statute's purpose "to provide efficient assistance to parties litigating in foreign tribunals, and by example, to encourage foreign assistance in U.S. Courts") (citing *Intel*, 542 U.S. 241, 252 (2004)).
[3] *Intel*, 542 U.S. at 259.
[4] *Mees v. Buiter*, 793 F.3d 291, 297 (2d 2015); *In re Banco Mercantil del Norte, S.A.*, 126 F.4th 926, 930 (4th Cir. 2025); *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010); *In re Application of Venequip, S.A.*, 83 F.4th 1048, 1055 (7th Cir. 2023); *Khrapunov v. Prosyankin*, 931 F.3d 922, 925 (9th Cir. 2019)
[5] *Intel*. 542 U.S. at 264; *Motorola*, slip op. at 7.
[6] *Inte*l, 542 U.S. at 264-65.
[7] *See, e.g., In re del Valle Ruiz*, 939 F.3d 520, 534 (2d Cir. 2019) ("[T]he *[Inte*l] factors plainly weigh in favor of discovery against SIS. . . . Second, there is no evidence that the foreign proceedings would be unreceptive to the evidence."); *Victoria, LLC v. Likhtenfel*d, 791 F. App'x 810, 817 (11th Cir. 2019) ("Because the Appellants have failed to show that the Russian Bankruptcy Court would be unreceptive to discovery, there was no abuse of discretion nor clear error in the determination that the second *Intel* factor favored discovery.").
[8] *See, e.g.*, *Banco Mercantil*, 126 F.4th at 934–35 (affirming reliance on cases indicating Mexican courts' receptivity to foreign discovery over a foreign law opinion).
[9] *See, e.g., Khrapunov*, 931 F.3d at 922 ("In particular, the English courts' willingness to proceed to judgment without the benefit of the evidence Khrapunov sought, and the courts' treatment of Khrapunov's claims (including one judge's conclusion that Khrapunov's position was 'totally without merit') likely bear on both 'the character of the

arguments under the second *Intel* factor principally in exceptional circumstances, such as where the foreign court is bound by a rule that precludes consideration of evidence sought,[10] or where the foreign court has already signaled its unwillingness to receive certain documentary evidence.[11]

The Fifth Circuit's Decision in Motorola

Motorola squarely addressed the receptivity factor. The case arose from patent infringement suits brought by Advanced Standard Communication (ASC) against Motorola before the UPC and a Munich court.[12] In support of its fair, reasonable, and non-discriminatory licensing defense, Motorola sought ASC's unredacted patent purchase agreement (PPA) through a Section 1782 application in the Northern District of Texas and, shortly thereafter, through a production request before the UPC.[13] In April 2026, the UPC denied the request as "unfounded" because Motorola had not substantiated the facts the PPA was meant to prove, but noted that its ruling "[did] not preclude an order to produce evidence at a later date."[14] Weeks later, without acknowledging the UPC's ruling, a magistrate judge granted the Section 1782 application, holding in relevant part that ASC had failed to "carry th[e] burden" of providing "authoritative proof" that the UPC would not be receptive to U.S. judicial assistance. In its decision, the magistrate judge relied on *Ecuadorian Plaintiffs v. Chevron Corp.*, where an appeals court affirmed the grant of a Section 1782 application, because the party resisting discovery failed to meet their burden of furnishing "authoritative proof" that the materials sought were privileged under foreign law.[15] The *Motorola* district court affirmed under a clear-error standard, relying on the magistrate judge's receptivity finding notwithstanding the UPC's intervening denial of the same request.[16]

On appeal, ASC challenged the receptivity finding, arguing that, unlike in *Ecuadorian Plaintiffs*, "the foreign tribunal ha[d] ruled on the very evidence sought."[17] Motorola defended the finding by pointing to the German legal system as a whole. It relied on unrebutted expert testimony that German courts are "receptive to evidence obtained through §1782 proceedings," and argued that treating the UPC's denial as non-receptivity "conflates two distinct concepts": a foreign tribunal's refusal to order discovery under its own procedures, and its willingness to receive evidence obtained elsewhere.[18]

The Fifth Circuit sided with ASC. *First*, the court explained that it "has not imposed on respondent the burden of furnishing 'authoritative proof' for any of the Intel factors," and that *Intel* does "not require [respondents] to prove a negative, i.e., that [foreign] courts or [a foreign] legal system generally would under no circumstances be receptive to the § 1782 discovery sought."[19] Building on its unpublished decision in *Candel* earlier this year, the court limited the "authoritative proof" language in *Ecuadorian Plaintiffs* to claims of foreign privilege, i.e., a party arguing that a foreign tribunal would be unreceptive to U.S. judicial assistance need not offer the "authoritative proof" otherwise required to sustain a finding that the requested discovery is privileged under

proceedings underway abroad' and the 'receptivity' of the English courts 'to U.S. federal-court judicial assistance.'").

[10] *See, e.g. Euromepa S.A. v. R. Esmerian, Inc.,* 51 F.3d 1095, 1100 (2d Cir. 1995) ("authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782" may be found in a "forum country's judicial, executive or legislative declarations").

[11] *financialright GmbH v. Robert Bosch LLC*, No. 2:17-mc-51337, ECF No. 25, at 26–31 (E.D. Mich. Feb. 12, 2018) (Patti, M.J.), *case closed*, ECF No. 26 (E.D. Mich. Mar. 15, 2018). Cleary Gottlieb acted on behalf of Robert Bosch LLC. *See also SPS Corp I*, 110 F.4th 586, 594 (3d Cir. 2024).

[12] *Motorola*, slip op. at 2.

[13] *Id.* at 2–3.

[14] *Id.* at 3–4.

[15] *Ecuadorian Plaintiffs*, 619 F.3d at 378.

[16] *Motorola*, slip op. at 4.

[17] Reply Brief of Appellant at 7, *Motorola*, No. 26-10747 (5th Cir. Oct. 2, 2026), ECF No. 82.

[18] Brief of Appellees at 7–9, *Motorola*, No. 26-10747 (5th Cir. Sept. 30, 2026), ECF No. 81 (citing *Intel*, 542 U.S. at 253–54, and *Metallgesellschaft*, 121 F.3d at 80).

[19] *Motorola*, slip op. at 8 (quoting *SPS Corp I, Fundo de Investimento em Direitos Creditorios Nao Padronizados v. Gen. Motors Co.*, 110 F.4th 586, 594 (3d Cir. 2024)).

foreign law and therefore unavailable under Section 1782.[20]

Second, and most significantly, the court gave greater weight to the UPC's specific ruling than to evidence that German courts generally accept U.S.-obtained evidence. Motorola's German counsel had opined "without contradiction, that the German courts would accept evidence gleaned from the Section 1782 process."[21] But the UPC had questioned the PPA's relevance and indicated that discovery might become appropriate only at a later stage, and both parties' experts agreed that the German courts would likely follow the UPC.[22] The Fifth Circuit therefore concluded that "[i]nstead of weighing in favor of discovery as a matter of law, the receptivity factor balances against it by reason of prematurity," noting that Motorola could renew its request abroad or file a new Section 1782 application if circumstances changed significantly.[23]

Third, the court observed that Motorola was "outright hoping for an end-run around what it perceives as a blockade to the evidence it wants," and that accordingly, the third discretionary factor under *Intel* – which asks whether a Section 1782 request is an attempt to circumvent foreign proof-gathering restrictions—also cut against discovery.[24] In so holding, the court distinguished the Third Circuit's decision in *In re Chevron*, which declined to find such an attempted circumvention "[w]ithout a definitive determination that the [foreign] Court has denied . . . access to the same documents."[25] It instead followed *SPS Corp I*, which held that allowing discovery after a foreign court "denied [the] preliminary discovery request" would "undermine finality, encourage parties to attempt to circumvent adverse foreign rulings, and generate inefficiency."[26]

The court's treatment of the UPC's ruling had to be reconciled with the long-settled principle that Section 1782 does not require that the discovery sought be available under the law of the foreign jurisdiction.[27] *Motorola* reaffirmed that the statute "does not impose" such a requirement, but reasoned that comity remains an "important . . . touchstone[]" for the district court's discretion, and faulted the district court for giving "short shrift to the potential clash between United States discovery and ongoing litigation in the respective forums abroad."[28] In effect, *Motorola* held that while the mere unavailability of discovery abroad does not bar relief under Section 1782, a foreign court's considered decision to deny the very same discovery can weigh against it.[29]

The Appellate Landscape After Motorola

Motorola is not the first post-*Intel* appellate decision to address these questions, and the courts of appeals are divided both on who bears the burden on receptivity and on what that burden requires.

The Second Circuit has placed the burden on the party opposing discovery to supply "authoritative proof" that the foreign tribunal would not be receptive to the discovery.[30] And, it has cautioned courts not to "condition discovery on an overt expression from the foreign court that it wants or needs the information."[31] The Third Circuit has likewise placed the burden on the opponent of discovery, but without an "authoritative proof" requirement.[32] It has also relied on a foreign court's characterization of "similar discovery requests" to find that the foreign court was

[20] *Id.* at 8–9 & n.6; *Candel & Partners SAS v. ExxonMobil Corp.*, 2026 WL 2126863, at *3 & n.3 (5th Cir. July 23, 2026).
[21] *Motorola*, slip op. at 9.
[22] *Id.* at 9–10.
[23] *Id.* at 10 (citing *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.,* 362 F.3d 401, 406 (5th Cir. 2004) and *Mees*, 793 F.3d at 303).
[24] *Id.* at 10–11.
[25] *Id.* at 11 (quoting *In re Chevron Corp.*, 633 F.3d 153, 163 (3d Cir. 2011)).
[26] *Id.* at 11 (quoting *In re Chevron Corp.*, 633 F.3d at 163, and *SPS Corp I*, 110 F.4th at 594).
[27] *Intel*, 542 U.S. at 260-63; *In re Application for an Order Permitting Metallgesellschaft AG to take Discovery*, 121 F.3d 77, 79-80 (2d Cir. 1997).
[28] *Motorola*, slip op. at 11–12 (quoting *Intel*, 542 U.S. at 261).
[29] *Id.* at 10–12; *see also Kestrel Coal*, 362 F.3d at 406.
[30] *See, e.g., Metallgesellschaft,* 121 F.3d at 80.
[31] *Mees*, 793 F.3d at 304.
[32] *In re Chevron*, 633 F.3d at 162.

not receptive.[33] The First, Seventh, and Eleventh Circuits, by contrast, impose no burden on either side, but still consider evidence on how the foreign tribunal is likely to treat the discovery sought. The First Circuit, for example, has found that the receptivity factor weighed against discovery because the European Patent Office, which lacked jurisdiction to decide the legal issue to which the requested discovery was relevant, would not be receptive to evidence on that question.[34] And the Seventh Circuit, while accepting that Swiss courts would not treat evidence obtained through Section 1782 as inadmissible, remained cautious about Swiss receptivity, including because those courts would likely view the 'wholesale importation' of American discovery 'warily and with a degree of skepticism.' *Motorola* appears to move the Fifth Circuit toward that approach, although the court expressly reserved the question of "precise burdens of proof in regard to Section 1782 applications."[35]

Whatever their position on the burden, the courts of appeals have generally drawn a common distinction. Where a foreign court has specifically signaled that it is not interested in the discovery sought, courts have tended to deny the application. Where the foreign court has merely been silent or "passive," the receptivity factor has generally favored the applicant. Even the circuits that impose no burden have looked closely at such signals.

Conclusion

Motorola makes clear that a foreign tribunal's specific, recent refusal of the same discovery can outweigh general evidence that the foreign legal system accepts U.S.-obtained evidence, and in doing so reflects a broader trend among the courts of appeals of treating such specific adverse signals as weighing against relief.[36] That approach may sit in some tension with the Second Circuit's caution against requiring an overt expression of foreign interest and with the Third Circuit's earlier *Chevron* decision, and the question may ultimately require resolution by the Supreme Court.[37] For now, although the circuits remain divided on the burden question, they have not divided on the weight owed to a foreign court's specific rulings, and *Motorola* offers a clear appellate illustration that such rulings can be decisive.[38]

As a practical matter, parties applying for Section 1782 discovery—particularly in the Fifth Circuit—should be wary of seeking discovery that a foreign court has specifically refused to order, and should be prepared to explain why the foreign court would actually receive and consider the evidence at the current stage of the foreign proceeding. Conversely, particularly where the foreign court has not addressed the specific discovery at issue, parties resisting Section 1782 discovery should look for specific rulings or statements from the foreign tribunal itself about the admissibility of comparable evidence, which—particularly after *Motorola*—may be a more powerful tool than evidence about the foreign legal system. With its extensive international platform, Cleary Gottlieb has considerable experience addressing these issues both as counsel and experts.

…

CLEARY GOTTLIEB

[33] *SPS Corp I*, 110 F.4th at 594; *In re Vestolit GmbH*, No. 25-3549, 2026 WL 2860203, at *1 (3d Cir. Sept. 23, 2026) (nonprecedential).
[34] *In re Schlich*, 893 F.3d 40, 50–53 (1st Cir. 2018).
[35] *Motorola*, slip op. at 7 n.4, 8; *Dep't of Caldas v. Diageo PLC*, 925 F.3d 1218, 1222–23 (11th Cir. 2019); *In re Schlich*, 893 F.3d 40, 46 (1st Cir. 2018); *Venequip*, 83 F.4th at 1058; *compare In re Chevron*, 633 F.3d at 162–63, and *In re Biomet Orthopaedics Switz. GmbH,* 742 F. App'x 690, 697–98 (3d Cir. 2018), *with SPS Corp I*, 110 F.4th at 594, *and Vestolit*, 2026 WL 2860203, at *1. The Fourth Circuit, in the narrower context of foreign privilege claims, placed the burden of establishing a foreign privilege on the party asserting it, but declined to adopt the "authoritative proof" standard. *See Banco Mercantil*, 126 F.4th at 933–34 & n.7 (describing circuit split).
[36] *Motorola*, slip op. at 9–10; *Schlich*, 893 F.3d at 51–53; *SPS Corp I*, 110 F.4th at 594; *Vestolit*, 2026 WL 2860203, at *1; *Venequip*, 83 F.4th at 1056–58.
[37] *See Mees*, 793 F.3d at 303–04 & n.21; *In re Chevron*, 633 F.3d at 162–63; *In re O'Keeffe*, 646 F. App'x 263, 267 (2d Cir. 2016).
[38] *Motorola*, slip op. at 8–10.