

FOREIGN LEGAL ASSISTANCE (FLA) ACTIONS UNDER 28 U.S.C. § 1782: USING U.S. COURTS TO OBTAIN INFORMATION FOR FOREIGN LEGAL CASES

WHAT IS A FOREIGN LEGAL ASSISTANCE (FLA) ACTION?

Corporations or individuals in the United States sometimes have information that is useful or necessary to a case in a court or tribunal outside the United States. The U.S. Foreign Legal Assistance (the FLA) Statute, 28 U.S.C. § 1782 (also known as “Section 1782”), allows those with an interest in the case to obtain that information.

A FLA action is a request to a federal court in the United States. It asks the court to help a foreign court, or a participant in a foreign legal case, to obtain information which can be used in a legal case in another country. The process of obtaining information is known as “discovery.” The foreign legal case can be either ongoing or under preparation. The discovery can be in the form of testimony, documents, or physical evidence. While this assistance is often granted, the U.S. court is not required to comply with FLA request. This means that even if all the legal requirements for the request are met, the judge may still reject it.

28 U.S.C. § 1782

Assistance to foreign and international tribunals and to litigants before such tribunals.

- (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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

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

- (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Proceeding in a Foreign or International Tribunal

There is no clear rule on what a “proceeding” can be, but examples include “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies.”

Interested Persons

The person requesting information does not need to be a party to the foreign proceeding, they only need to have a “reasonable interest in obtaining the assistance.”

HOW A FLA ACTION MAY BE USED

Section 1782, the Foreign Legal Assistance Statute (the FLA), allows an “interested person” to request information belonging to a U.S. person or company if the information will be helpful in a foreign or international legal case. This can be an especially powerful tool because although most countries have some form of discovery or information disclosure in lawsuits, the types and amounts of information that can be obtained and the procedures for obtaining it are different from country to country. It can often be difficult to use a foreign court system to obtain evidence located in the United States, but a FLA request can be made directly to a U.S. court. Courts granting these requests usually follow the same rules and procedures for discovery as they do for U.S. domestic cases, which allow a broad range of discovery of information. Applicants can ask for documents or evidence that is likely to be relevant to their legal action. They can request information even if they do not know exactly what the contents of this information is, and even if they do not know whether the evidence exists or not

While FLA actions are potentially very useful tools for obtaining information, there are some limitations on their availability. Requests for assistance are not very common, so there is not a lot of case law, or precedent, to give clear answers on questions involved in making these requests. Different courts in the U.S. also have varying opinions on how to use the FLA, so the rules that apply in a FLA action are not always the same throughout the United States. In addition, different judges may have different opinions as well. The rules for granting the request give judges a very high level of discretion. So even if you meet all of the legal requirements, a judge may still decide not to grant the application for foreign legal assistance.

If the judge denies a FLA request, the person making the request may appeal. However, the appellate court will only reverse the previous decision if it finds that the judge made a serious error, such as applying the wrong legal standard to evaluate the request.

Plaintiffs in a Nigerian lawsuit against Chevron’s Nigerian subsidiary are using a FLA petition to request evidence from Chevron Corp. in the United States, including environmental impact assessments and other evidence of the harmful environmental and health effects of gas flaring.

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004): The U.S. Supreme Court held that, in order to grant a FLA request, the “proceeding before foreign tribunal did not have to be pending or at least imminent,” the “applicant also did not have to show that United States law would allow discovery in domestic litigation analogous to foreign proceeding,” and “interested persons” could be anyone with a reasonable interest in obtaining judicial assistance.” The Court also set out guidelines on what to consider when deciding whether to grant a FLA request.

FAQ

DOES IT MATTER WHERE I FILE IT?

Yes. Under section 1782, a court only has jurisdiction to consider a FLA action if it is filed where the person from whom information is sought **resides or is found**. Normally, an individual person resides where his/her principal home is, and is found wherever he/she is physically present when officially notified of the request. The rules for jurisdiction over companies are more complicated, but generally, companies reside or are found where they are incorporated or where their headquarters are located, and also where they conduct significant business. Since multiple courts may be able to grant a request over the same person or company, applicants may need to consider which is the best forum for lodging a request.

AT WHAT STAGE OF THE CASE CAN I REQUEST ASSISTANCE?

The foreign legal case can be at any stage in which the information might be useful; it does not need to be ongoing, or even imminent. The FLA mentions “criminal investigations conducted before formal accusation,” and the Supreme Court has also stated that the case does not need to have been filed already, only that it is **within reasonable contemplation**. It may be possible to get information through before the legal action is even filed, when doing a fact-finding investigation that may lead to a legal case. Courts have also granted requests for information to use in proceedings to enforce judgments after trial, as well as active investigations and trials

WHAT KINDS OF SOURCES CAN I GET INFORMATION FROM?

Under U.S. procedures, any corporation or person – but not a government agency – that may have relevant information may be available for a FLA request. There are, however, some special considerations. First, a U.S. court may be less willing to grant a request against a person or corporation that is already a participant in the foreign legal case, because the foreign court itself could order that person to disclose information. In the Chevron case mentioned above, the foreign legal action was against Chevron Nigeria, but the request was directed to Chevron Corporation, the parent company in the United States, which was not subject to the authority of the Nigerian courts.

Second, courts generally will require corporations to produce information that is in the hands of another corporation that it owns – a subsidiary – if the parent corporation effectively controls the subsidiary. But some courts may place limits on providing information located outside the United States.

WHAT KINDS OF FOREIGN LEGAL CASES ARE COVERED BY §1782?

There is no clear rule on what kinds of foreign legal cases may be supported through a FLA action, and some courts disagree:

All U.S. courts should agree that cases include:

- ordinary court cases
- criminal investigations by magistrates, before a criminal case has been filed (in legal systems where judges investigate and arrange for prosecutions of crimes)
- administrative tribunals, which are courts run by government agencies, and typically consider government actions and benefits (such as immigration, patent, or social security proceedings)
- cases in international courts, such as the International Court of Justice or regional court systems

Some U.S. courts may disagree on whether cases include:

- arbitration tribunals, in which the participants agree to have their case decided by private arbitrators rather than a court
- governmental proceedings that do not result adjudication of cases (such as an investigating commission of a foreign legislature or executive agency)

Courts have not yet considered whether cases include:

- cases in national or regional human rights commissions
- other cases that may result in a decision, but the decision is not legally binding

FAQ

DO I HAVE TO TRY TO OBTAIN THE INFORMATION IN THE FOREIGN COURT FIRST?

Courts in FLA actions have suggested that there is no requirement to ask for the information in the foreign court before applying to a U.S. court. In fact, U.S. courts have often allowed discovery of information that cannot be obtained through the foreign discovery procedures. If the information would be easy to obtain through the foreign court, however, the U.S. court may be less likely to grant the FLA request. A U.S. court will be more likely to grant the request if the foreign tribunal will accept the information gathered.

ARE THERE ANY LIMITS ON OBTAINING INFORMATION THROUGH A FLA ACTION?

In general, you can try to obtain any information that is relevant to the foreign legal case, but there are limits. The U.S. court may reject a request if the foreign court is not likely to accept the information requested, and might ask the foreign court if it will accept it. The U.S. court might also deny or limit requests that are too **burdensome or intrusive** – that is, if they ask for too many documents, or information that is too difficult or too expensive to obtain, or information that is personal or sensitive. The U.S. court will also deny requests for information that is **privileged**, such as communications between a lawyer and his or her client. And the court will deny requests if the judge thinks they are designed to harass the person who has the information.

WHO CAN FILE A FLA REQUEST? WHO IS AN “INTERESTED PERSON”?

The FLA allows requests from foreign courts themselves as well as anyone who is an “interested person” in a foreign case. The term “interested person” is not limited to parties in the foreign legal case, such as a plaintiff or prosecutor. An interested person can be **anyone with a reasonable interest in obtaining the information**. This may include people who initiate an investigation, or anyone who has a right to submit information in a legal case – for example, in many countries, victims of crimes can submit evidence in criminal cases. The Supreme Court decided that a company that submitted a complaint to the European Commission regarding anti-competitive behavior was an “interested person,” because the company could submit evidence in the Commission’s investigation, and could appeal any decision of the Commission in court.

WHAT SHOULD THE REQUEST LOOK LIKE? HOW DO I ENSURE THE COURT ACCEPTS IT?

There is no standard form or template for FLA actions, but EarthRights International can provide examples of such requests. Each district courts has its own rules about formatted documents, so it is a good idea to research the local rules for the court where you plan to file the request

WHAT KIND OF INFORMATION CAN I OBTAIN THROUGH A FLA ACTION?

The statute itself mentions discovery of testimony and documents – this includes **depositions**, in which a person gives testimony, under oath, in a recording proceeding outside of court, and **document requests**, in which the person would turn over particular documents or other records (including digital files and audio and video recordings).

Courts have discretion to order other forms of evidence and information. Some courts have allowed physical evidence such as blood samples. The FLA allows the U.S. court to either follow the rules of the foreign court in determining what information to order and how it will be produced, or to follow the ordinary rules that apply in federal court cases – the Federal Rules of Civil Procedure. These rules allow several other ways to gather information, including **interrogatories**, which are written questions that must be answered under oath.

FAQ

ARE THERE GEOGRAPHIC LIMITATIONS ON WHERE THE DOCUMENTS OR TESTIMONY MAY BE LOCATED?

There may be geographical limitations on obtaining information, but the rules depend on whether or you are seeking documents and other physical evidence or if you are seeking oral testimony.

For **documents**, courts have differed on whether you can use a FLA request to obtain information located outside the U.S. In some cases involving corporations, important operational information (for example, environmental impact assessments or correspondence) might be produced and maintained by a foreign operating subsidiary rather than the American parent company. Some courts have rejected this practice, while others have suggested that it is acceptable, if the documents are under the control of someone in the U.S.

A court can only require **testimony**, however, from a person who lives within 100 miles of the court. This is because it is considered an unfair to require a person to travel a long way to provide testimony. So if you are seeking oral testimony, it is not enough just to file the request in the court of the district where the person is happens to be present at the moment; you must go to the court where the person lives.

IF I FILE THE REQUEST PROPERLY, AM I GUARANTEED TO GET IT?

No. The final decision is left to the discretion of the judge. Even if all the requirements are met, the judge can still deny or limit the request. As discussed above, you can appeal a denial, but appeals are difficult because district judges are given a lot of discretion on FLA requests.

HOW LONG WILL THE PROCESS TAKE?

This will vary depending on a number of things. If the person with the information does not object to the request, it may take a few months or longer to actually gather the information. If there is a fight in the court, however, it may take months or even years before any information is produced. There is no strict timeline for a judge to decide whether to grant or deny a request.

ARE THERE ANY PENALTIES IF THE REQUEST IS DENIED?

Maybe. If a request for assistance is denied, the court may require you to pay the costs of the other side, but it is unclear whether this has ever actually happened. At least one court has said that the requester will not be required to pay the other side's costs if the requester does not have money or the other side engaged in misconduct.

HOW MUCH DOES IT COST TO FILE A FLA REQUEST?

There are three kinds of costs that may be associated with a FLA request. First, anyone who files a case in federal court must pay a filing fee, which is often around US\$400. (Sometimes there are other fees as well.) But if you are poor, you can apply to have the fees waived. This is called *in forma pauperis*, and someone who is granted in forma pauperis status does not have to pay court fees. To seek this status, you need to submit an application that shows that you have little income or property.

Second, if you are requesting depositions – oral testimony under oath – you will need to pay for an official court reporter to administer the oath and transcribe the deposition – possibly US\$2000 or more – and a small fee to the person giving testimony.

Third, it is possible that you would need to pay for the costs of searching for, copying, and sending any documents or other forms of evidence. Normally, the person who has the documents would pay for these costs. However, in a few cases, courts have required the requesters have been required to split the costs, or pay all of the costs. Other courts have required the requesters to pay a bond – an amount of money to cover the costs of searching and copying – beforehand. The court would almost always tell you beforehand if it is going to require you to pay these costs, and if you have already established that you are poor – with *in forma pauperis* status – then most courts will be less likely to make you pay costs, especially if you are seeking information from a wealthy corporation or individual.