UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

In Re Application of MESA POWER GROUP, LLC Applicant Pursuant to 28 U.S.C. § 1782(a) For Judicial Assistance in Obtaining Evidence from KOREA ELECTRIC POWER CORPORATION for Use in a Foreign and International Proceeding	:	CIVIL ACTION NO. 2:11-mc-270-ES **OPINION and ORDER**

CATHY L. WALDOR, United States Magistrate Judge.

Pending before the Court is Petitioner, Mesa Power Group, LLC's ("Mesa Power") *ex parte* application for an Order for discovery pursuant to 28 U.S.C. § 1782(a). Mesa Power seeks to compel the production of documents from Korea Electric Power Corporation ("KEPCO"), which maintains an office and conducts business in this District. (Docket Entry No. 1-1 at 1, Ex Parte Application (the "Application")). Mesa Power contends that the evidence it seeks is directly related to an international arbitration proceeding (the "NAFTA Arbitration") under the North American Free Trade Agreement ("NAFTA") involving Mesa Power and the Government of Canada ("Canada") (Id.).

The subject of the NAFTA Arbitration is a renewable energy agreement between KEPCO and other competitors of Mesa Power, and the Canadian Government. (Docket Entry No. 2 at ¶ 6, Decl. of Lee Robertson ("Robertson Decl.")). Mesa Power asserts that Canada violated Section

A of Chapter 11 of NAFTA by conferring preferential power transmission access to KEPCO and its cohorts over Mesa Power. (Id.). Consequentially, Mesa Power alleges that it suffered substantial losses and damages to its wind farm business operations in Canada. (Id. at ¶ 7). By way of this application, Mesa Power seeks to subpoena documents in KEPCO's possession demonstrating the preferential treatment received by KEPCO from the Canadian government. (Id. at ¶ 9). In consideration of Mesa Power's § 1782(a) application and supporting materials, the Court hereby **ORDERS** that this application be **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

Mesa Power is a Delaware limited liability corporation that is in the business of producing and managing wind energy and wind energy projects. (Id. at ¶ 2). Mesa Power owns Mesa Wind, LLC ("Mesa Wind"), which in turn owns and controls Mesa AWA, LLC ("Mesa AWA"). (Id.). Mesa AWA owns and controls four wind farm projects in Ontario, Canada. (Id.; Docket Entry No. 1-7 ("Exhibit B") at ¶ 8).

KEPCO is a South Korean corporation that develops, generates, constructs and operates renewable energy and transmission assets on an international scale. (Robertson Decl. at ¶ 4). KEPCO maintains an office, conducts business and has designated an agent for service of process at 400 Kelby Street, 16th Floor, Fort Lee, New Jersey 07024. (Id.).

NAFTA was created to, among other things, eliminate trade barriers and promote conditions of fair competition within the territories of its members. North American Free Trade Agreement, U.S.-Can.-Mex., art. 102, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289, 297 (1993). As a party to NAFTA, Canada is obligated to ensure the observance of NAFTA provisions by its provincial and territorial governments. NAFTA art. 105, 32 I.L.M. at 298. The wind farms that are the

subject of the NAFTA Arbitration are located in the province of Ontario. (Id. at ¶ 5). The Ontario Power Authority ("OPA") is a state enterprise that is wholly-owned and controlled by the province of Ontario. (Id. at ¶ 3). The OPA, vested with the authority of the Ministry of Energy, has the power to implement a renewable energy Feed-In-Tariff program (the "FIT Program") (Application at 2). The OPA is responsible for the administration of long-term fixed-price contracts with renewable energy suppliers under the FIT Program. (Id.).

The renewable energy obtained through the FIT Program is sold into the Ontario electrical grid for resale to individual customers. (Exhibit B at ¶ 10). To participate in the FIT Program, renewable energy producers must contract with the OPA. (Id. at ¶ 12). The FIT Program also requires green energy suppliers to connect to local distribution companies and transmission asset owners. (Id.). A successful FIT Program applicant receives a Power Purchase Agreement ("PPA") with the OPA, which guarantees a set purchase price over a 20-year period. (Id. at ¶ 13).

On January 21, 2010, the Government of Ontario signed a $7 billion agreement (the "Green Energy Investment Agreement" or "GEIA") with KEPCO and other competitors of Mesa Power (the "GEIA Investors") (Id. at ¶ 22). Mesa Power alleges that the Green Energy Investment Agreement provided the GEIA Investors with preferential access to renewable energy transmission and generation. (Id.). On August 3, 2011, the Government of Ontario awarded 20-year PPAs to the GEIA Investors, through the OPA. (Robertson Decl. at ¶ 8). As a result, Mesa Power alleges that it was refused FIT Program contracts and that it was effectively closed out of the market due to the Government of Ontario's preference in reserving transmission capacity for the GEIA Investors. (Application at 4).

On July 6, 2011, Mesa Power filed a Notice of Intent under the United Nations

Commission on Independent Trade Law ("UNCITRAL") Arbitration Rules to establish an international tribunal, to address violations of Section A of Chapter 11 of NAFTA by Canada. (Id. at 4–5). On October 4, 2011, Mesa Power formally commenced the NAFTA Arbitration by filing a Notice of Arbitration pursuant to NAFTA Article 1120. (Id. at 5). In the NAFTA Arbitration, Mesa Power is seeking: (1) a declaration that the Government of Canada breached NAFTA; (2) a declaration that such breach has caused harm to Mesa Power; and (3) an award of damages payable by Canada in an amount not less than CDN $775,000,000 for the value of Mesa Power's investments. (Id. at 5; Exhibit B at ¶¶ 71–73).

On November 15, 2011, Mesa Power filed this *ex parte* application pursuant to 28 U.S.C. § 1782(a) requesting an Order for discovery from KEPCO relating to the subject matter of the NAFTA Arbitration. (Application at 4–5). According to Mesa Power, the requested documentary evidence is necessary to prosecute its NAFTA Arbitration against Canada. (Id. at 5). Mesa Power asserts that the requested information is relevant to demonstrate the preferential treatment that the GEIA Investors received from the Government of Canada to its exclusion. (Id.; Exhibit B ¶¶ 13–15).

The Court reviews Mesa Power's *ex parte* application for judicial assistance in obtaining certain discovery from KEPCO for use in the NAFTA Arbitration pursuant to 28 U.S.C. § 1782(a).

II. DISCUSSION

A. Legal Standard

28 U.S.C. § 1782(a) provides, in relevant part, that:

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

28 U.S.C. § 1782(a). The primary purpose of § 1782 is to provide federal-court judicial assistance in gathering evidence for use in a proceeding in a foreign or international tribunal. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004). A discovery request pursuant to § 1782(a) requires the district court to determine whether it is authorized to entertain the request and whether it is appropriate to do so. A district court is authorized to grant a § 1782(a) request where:

> (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.

In re Bayer AG, 146 F.3d 188, 193 (3d Cir. 1998) (citing In re Esses, 101 F.3d 873, 875 (2d Cir. 1996).

A district court, however, is not required to grant a § 1782(a) application simply because it has the authority to do so. Intel, 542 U.S. at 264. The Supreme Court has identified the following discretionary factors for consideration in ruling on a § 1782(a) request:

> (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 or 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 § 1782 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 § 1782 application contains unduly intrusive or burdensome discovery requests.

Id. at 264-65. A district court may deny a § 1782(a) request if the discretionary factors do not weigh in favor of granting the application. In exercising its discretion, however, the district court should consider the twin aims of the statute: "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." Schmitz v. Bernstein, Leibhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 2004).

B. *Ex Parte* Proceeding

As an initial matter, the Court addresses the *ex parte* nature of Mesa Power's § 1782(a) application. Mesa Power alleges that it filed its application *ex parte* because it is concerned that some or all of the evidence that it seeks may be lost or compromised by KEPCO. (Application at 24). More specifically, Mesa Power is concerned that, due to the political nature of the allegations in the NAFTA Arbitration, the Government of Canada will pressure KEPCO to relocate relevant evidence to a foreign country outside the jurisdiction of this Court. (Robertson Decl. at ¶ 17). Mesa Power also believes that KEPCO may have its own motivations for relocating and/or compromising relevant documents. (Id. at ¶ 18). Thus, Mesa Power is petitioning this Court for a discovery Order to preserve the documentary evidence it seeks for use in the NAFTA Arbitration. (Id. at ¶ 17).

The Court does not take any position with respect to whether Mesa Power's concerns are justified. However, the Court agrees that an *ex parte* application is an acceptable method for obtaining discovery pursuant to § 1782(a). See Gushlak v. Gushlak, 486 F. App'x 215, 217 (2d

Cir. 2012) ("[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 ex parte."); see also In re Letters Rogatory from the Tokyo Dist., 539 F.2d 1216, 1219 (9th Cir. 1976) ("Letters Rogatory are customarily received and appropriate action taken with respect thereto ex parte."). The subpoenaed party may challenge such a discovery request with a timely motion to vacate or quash. Gushlak, 486 F. App'x at 217.

The Court will allow Mesa Power to proceed with its discovery request *ex parte*. The Court's order does not preclude KEPCO, Canada or any other entity involved in the NAFTA Arbitration from challenging the subpoena by raising objections and filing motions to quash or vacate this order within thirty (30) days.

C. Authority to Issue Subpoena

As provided in Section II.A. above, a district court is authorized to grant a § 1782(a) request where:

> (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.'

In re Bayer AG, 146 F.3d at 193. The Court has reviewed Mesa Power's application and has determined that all of the statutory requirements have been satisfied. Each element will be addressed fully and in turn below.

1. Residency Requirement

Section 1782(a) provides that "[t]he district court of the district in which a person *resides or is found*" may order discovery to be taken from that person. (emphasis added). In this case, the Court acknowledges that KEPCO maintains an office, conducts business and has appointed an agent for service of process at 400 Kelby Street, 16th Floor, Fort Lee, New Jersey 07024.

(Robertson Decl. at ¶ 4; Docket Entry No. 1-3 "KEPCO 2011 Annual Report" at 22). Therefore, Mesa Power has made a *prima facie* showing that KEPCO resides in this District and is subject to the jurisdiction of the Court pursuant to § 1782(a).

2. For Use in a Foreign or International Tribunal

The Court next considers whether the judicial assistance sought by Mesa Power satisfies the requirement "for use in a proceeding in a foreign or international tribunal." As initially introduced by Congress, § 1782 permitted district courts to authorize discovery "to be used in any civil action pending in any court in a foreign country ...." Intel, 542 U.S. at 248. In 1949, Congress deleted "civil action" from the text of § 1782 and added "judicial proceeding." Id. In 1964, Congress again broadened the scope of § 1782 by replacing the provision "in any judicial proceeding pending in any court in a foreign country" with the phrase "in a proceeding in a foreign or international tribunal." Id. at 248-49. Congress introduced the word "tribunal" to underscore the principle that "assistance is not confined to proceedings before conventional courts," but also includes "administrative and quasi-judicial proceedings." Id. at 249.

In line with the Supreme Court's exposition of § 1782 in Intel, a majority of courts have found that an international arbitration proceeding conducted pursuant to UNCITRAL rules constitutes a "foreign or international tribunal" for the purposes of the statute. See In re Oxus Gold PLC, No. 3:06-mc-82, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (holding that a bilateral investment treaty governed by UNCITRAL rules constituted a "foreign tribunal" under § 1782); In re Veiga, 746 F. Supp. 2d 8, 22-23 (D.D.C. 2010) (same); In re Chevron Corp., 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) (same); Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09-mc-265, 2009 WL 2877157, at *4 (D. Conn. Aug. 27, 2009) (same); see also Republic of Ecuador v. Bjorkman, 801 F. Supp. 2d 1121, 1128 n.1 (D. Colo. 2011) (citing In re Chevron, 709

F. Supp. 2d at 291) ("There appears to be significant agreement at the district court level that, after the Supreme Court's dicta in Intel Corp., international arbitral bodies operating under UNCITRAL rules constitute 'foreign tribunals' for the purposes of Section 1782.").

In this case, Mesa Power seeks documentary evidence from KEPCO for use in an international arbitral proceeding pursuant to the NAFTA and governed by the UNCITRAL Arbitration Rules. Mesa Power commenced this arbitration by submitting its claim under Article 1120 of the NAFTA. The tribunal established by Article 1120 must decide any disputed issues according to the provisions of the NAFTA and applicable international law. The arbitration at issue has been authorized by the NAFTA members to resolve disputes arising under the treaty. Therefore, the Court aligns itself with the cases cited above, and concludes that the NAFTA Arbitration meets the "foreign tribunal" specification of § 1782(a).

3. Interested Person

The Court next considers whether Mesa Power is an "interested person" within the meaning of the statute. Section 1782(a) provides that the district court may issue an order for discovery "upon the application of any interested person." In Intel, the Supreme Court construed the statutory language "any interested person" broadly to encompass "not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." 542 U.S. at 256–257 (quoting Hans Smit, International Litigation Under the United States Code, 65 Colum. L. Rev. 1015, 1027 (1965)). The Court further provided, "no doubt litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782." Id. at 256.

In this case, Mesa Power meets the "any interested person" standard of § 1782(a)

because it is the claimant in the NAFTA Arbitration. See Intel, 542 U.S. at 256 (holding that the complainant who triggers a European Commission investigation "possesses a reasonable interest in obtaining [judicial] assistance"). Mesa Power initiated the NAFTA Arbitration by filing a formal claim with the Government of Canada pursuant to NAFTA Article 1120. (Robertson Decl. at ¶ 10.) The information that it seeks in this application is allegedly necessary to prosecute its case against Canada. (Id. at ¶¶ 13–15.) Thus, Mesa Power has a significant interest in obtaining judicial assistance and satisfies this element.

D. Discretionary Factors

The Court has concluded that Mesa Power has met the statutory requirements of § 1782(a). However, a district court is not required to grant a §1782(a) application simply because it has the authority to do so. Intel, 542 U.S. at 264. The Supreme Court in Intel provided a list of discretionary factors that bear consideration in ruling on a § 1782(a) request. Id. Applying these factors to the case at hand, the Court has concluded that Mesa Power's application shall be granted; however, a modification to the scope of discovery is appropriate. The modification will be noted more fully below.

1. Jurisdictional Reach of Foreign Tribunal

The first Intel discretionary factor provides:

> 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 .... In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.

Id. This factor favors allowing Mesa Power to obtain the discovery it seeks because KEPCO is not a participant in the NAFTA Arbitration. (Exhibit B at 1–2.) The parties to the NAFTA

Arbitration are Mesa Power, the claimant, and the Government of Canada, the respondent. Id. Although the Court recognizes that KEPCO maintained a presence in the province of Ontario, it is not clear that the jurisdictional reach of the NAFTA tribunal extends to KEPCO, allowing the tribunal to compel documents from them. Hence, the evidence that Mesa Power seeks from KEPCO may be unavailable without § 1782(a) assistance. Further, the documents sought may only be present at KEPCO's New Jersey Facility which may be out of the jurisdictional reach of the international proceeding associated with this application.

2. Nature and Receptivity of Foreign Tribunal

The second Intel discretionary factor provides that a district court ruling on a § 1782(a) request may consider "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." Intel, 542 U.S. at 264. Notably, however, a district court's production-order authority is not limited to "materials that could be discovered in the foreign jurisdiction if the materials were located there." Id. at 253, 260. Absent objection to U.S. federal-court judicial assistance, such a categorical restriction would undermine § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that is unavailable under their own laws. Id. at 261–62.

There is no evidence before the Court to suggest that the NAFTA tribunal is hostile to U.S. federal-court assistance under § 1782(a). The tribunal is organized pursuant to NAFTA and the UNCITRAL Arbitration Rules and neither prohibits the filing or receipt of information under § 1782(a). Moreover, the information that Mesa Power seeks is directly related to the issues at the heart of the NAFTA Arbitration, and such information may be unavailable without § 1782(a) aid. Therefore, the secondary discretionary factor weighs in favor of Mesa Power.

3. Attempt to Circumvent Foreign Proof-Gathering Restrictions and Policies

The Court next considers whether Mesa Power's § 1782(a) request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." Id. at 264–65. There is nothing in the record to suggest that Mesa Power's application to this Court is an attempt to side-step proof-gathering or other restrictions in the NAFTA Arbitration. Moreover, the Court does not believe that the NAFTA tribunal is adverse to U.S. federal-court judicial assistance pursuant to § 1782(a). Mesa Power only seeks to obtain relevant information from KEPCO, a nonparticipant in the NAFTA Arbitration, which, as previously noted, may be outside the jurisdictional reach of the tribunal. Overall, the Court is convinced that none of the first three Intel factors caution against granting the application.

4. Unduly Intrusive or Burdensome Request

The fourth Intel discretionary factor permits a district court to reject or trim any "intrusive or burdensome" discovery requests. Id. at 265. This Court has construed this factor to mean that the § 1782(a) request be specific and narrowly tailored to the subject matter of the foreign or international proceeding. In re Oxus Gold, 2007 WL 1037387, at *7.

In the case at hand, Mesa Power is seeking several broad-based discovery requests that must be modified. As such, the Court denies, without prejudice, the documents sought in paragraphs 5, 7, 9, 11 and 12 of its application. (See Application at 6–11; Robertson Decl., Exhibit C at ¶¶ 5, 7, 9, 11, 12.) These requests clearly seek discovery that is outside the scope of the international proceeding as they demand production of all documents concerning communications with the respective foreign entities or all KEPCO prior submissions. The Court believes that modification is necessary to promote efficiency and protect the interests of those within this District. However, the Court permits Mesa Power leave to amend its discovery

requests and resubmit its amended subpoena within thirty (30) days of this Opinion, otherwise, they will be denied with prejudice.

III. CONCLUSION

For the reasons set forth in this Opinion, the Court grants Mesa Power's § 1782(a) application, but the scope of the requested discovery must be modified to alleviate undue burden on KEPCO. Therefore, the Court grants in part and denies in part Mesa Power's subpoena for discovery materials from KEPCO pursuant to § 1782(a). This Opinion does not preclude KEPCO, Canada or any other entity involved in the NAFTA Arbitration from challenging Mesa Power's subpoena by raising objections and filing motions to quash or vacate this Order within thirty (30) days.

So Ordered.

/s/Cathy L. Waldor
Cathy L. Waldor
United States Magistrate Judge

Dated: April 19, 2013