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INTERNATIONAL JUDICIAL ASSISTANCE: AN ANALYSIS OF *INTEL v. AMD* AND ITS AFFECT ON § 1782 DISCOVERY ASSISTANCE

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I. INTRODUCTION

This Article will first briefly review the events leading up to the *Intel* decision.[1] It will then explain the procedure of making a § 1782 request and address the *Intel* decision's overall impact on this process. The discussion will primarily focus on the Court's four major holdings: (1) § 1782 assistance is not limited to "pending" or "imminent" adjudicative proceedings; (2) the European Commission (EC) acts as a "foreign

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1. Intel v. AMD, 124 S. Ct. 2466 (2004).

tribunal;" (3) as a complainant in the EC, Advanced Micro Devices (AMD) is an "interested person;" and (4) § 1782 does not contain a foreign discoverability requirement.[2] In addition to discussing the Court's rulings, this Article will also analyze whether the decision is consistent with congressional intent and prior case law. Finally, this Article will examine the district court's decision on remand, specifically focusing on whether it followed the U.S. Supreme Court's guidelines when it exercised its discretionary authority.

II. BRIEF OVERVIEW OF *INTEL V. AMD*

Intel arose when AMD filed a complaint with the Directorate General for Competition (DG-Competition) of the EC in October 2000.[3] AMD alleged that archrival Intel violated EC competition laws by monopolizing the worldwide market for Windows-capable microprocessors.[4] In support of its case, AMD suggested that the DG-Competition seek discovery of some 600,000 pages of documents that Intel produced in the United States during a private antitrust litigation in Alabama.[5] After DG-Competition openly declined its recommendation, AMD independently attempted to secure the documents.[6] AMD filed a § 1782 request in the U.S. District Court for the Northern District of California seeking the evidence obtained in the Alabama litigation.[7] The district court rejected AMD's request, but the Ninth Circuit later reversed.[8] Intel subsequently petitioned the U.S. Supreme Court to review the decision.[9]

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2. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).

3. *Intel*, 124 S. Ct. at 2474. Complaints are filed with the DG-Competition, who conducts a preliminary investigation that results in a written decision on whether to further pursue the complaint. Although the party filing the complaint may offer its own evidence and recommendations, the DG-Competition has complete discretion on whether to prosecute. If the DG-Competition decides to proceed with the complaint, it must make a recommendation to the EC. The EC will then evaluate the complaint and the DG-Competition's findings, and either issue a decision for infringement and impose penalties or dismiss the complaint entirely. Lawrence W. Newman & David Zaslowsky, *The Supreme Court on International Discovery*, N.Y. L.J., July 29, 2004, at 3.

4. *Intel*, 124 S. Ct. at 2475.

5. AMD requested the district court to unseal certain documents involved in Intel's lawsuit with Intergraph. *Id.*; *see also* Intergraph Corp. v. Intel Corp., 3 F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated by* 195 F.3d 1346 (1999), *remanded to* 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (2001).

6. *Intel*, 124 S. Ct. at 2475.

7. *Id.*

8. *Id.*

9. *Id.* at 2476.

The U.S. Supreme Court remanded the case to the district court.[10] In its 7-1 decision, the Court stressed the district court's enormous discretion and articulated several guidelines for the lower court to follow when making its determination.[11] Among its recommendations include three significant findings that resolve the circuit courts' previously conflicting policies: (1) non-litigants can invoke § 1782 assistance, (2) the foreign proceeding only needs to be within reasonable contemplation, and (3) the desired evidence is not required to be discoverable in the foreign jurisdiction.[12] With these guidelines, the U.S. Supreme Court remanded *Intel* for the district court to determine what documents, if any, will be released for the DG-Competition's investigation.[13]

III. *INTEL*'S OVERALL IMPACT ON § 1782'S STATUTORY REQUIREMENTS

Section 1782 reflects congressional effort to provide and foster foreign discovery assistance to tribunals throughout the world.[14] The statute was created with two goals in mind: to provide efficient means of discovery assistance to participants in international proceedings and to encourage foreign countries by example to provide similar services to U.S. courts.[15] Courts have traditionally focused on promoting these two aims when adjudicating § 1782 applications.[16] Section 1782 generally provides a far less cumbersome procedure for obtaining discovery assistance than the other available foreign tools.[17] For this reason, foreign parties seeking

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10. *Id.* at 2484.

11. *Intel*, 124 S. Ct. at 2484. Justice Ruth Bader Ginsberg authored the majority opinion. Justice Stephen Breyer provided the dissenting opinion, while Justice Sandra Day O'Conner did not take part in the case. *Id.* at 2472.

12. *See* Gregory P. Joseph, *International Discovery*, NAT'L L.J., Aug. 2, 2004, at 77.

13. *Id.* at 2484.

14. Intel v. AMD, 124 S. Ct. at 2473.

15. *In re* Schmitz, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003).

16. Peter Metis, *International Judicial Assistance: Does 28 U.S.C. 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L.J. 332, 338 & 347 (1994).

17. Foreign parties may also pursue U.S. discovery assistance through treaties. The Hague Evidence Convention and the treaties on Mutual Legal Assistance in Criminal Matters are among the treaties that contain discovery assistance clauses. Foreign parties generally have an easier time seeking discovery under § 1782 than under these treaties because § 1782 does not require letter rogatories, treaty provisions, or U.S. governmental assistance. Despite the apparent advantages of the statute, parties have sometimes found it to be an unattractive option in practice because it provides the district court with too much discretion. James Bernard & Marvin G. Pickholz, *Civil Disclosure and Freezing Orders: Recovering Property from Overseas*, 12 DICK. J. INT'L L. 479, 482 (1995). Because of the great complexity, this Article will not discuss the relationship between § 1782 and treaties.

discovery in the United States for proceedings abroad typically take advantage of this statute.[18]

In order to qualify for discovery assistance under § 1782, a request must always meet the following three statutory requirements: (1) the person from whom discovery is sought resides or is found in the district court's jurisdiction, (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 an interested person.[19] If these requirements are met, a district court is authorized, but not required, to approve a § 1782 request for discovery assistance.[20] As will be described in detail later, although *Intel* did not change the analysis of the first statutory condition, it significantly broadened the interpretation of the second and third requirements.[21]

A. *Person from Whom Discovery is Sought Resides or is Found in the District Court's Jurisdiction*

The first requirement has generally been an easy determination to make.[22] A "person" includes any individual, corporation, or company that resides or is based in the district court's jurisdiction.[23] The "person" classification clearly includes both parties and nonparties to the foreign proceeding.[24] Furthermore, individuals found temporarily in the district are also subject to discovery under § 1782. For example, a foreign national, who is simply visiting the United States, can be ordered to produce discovery pursuant to § 1782.[25]

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18. For this reason, foreign parties seeking discovery in the United States for proceedings abroad should take advantage of this liberal statute. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited,* 25 SYRACUSE J. INT'L L. & COM. 1, 19 (1998).

19. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).

20. Intel v. AMD, 124 S. Ct. 2466, 2482 (2004).

21. *See infra* text accompanying notes 26-121.

22. *See* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited,* 25 SYRACUSE J. INT'L L. & COM. 1, 9-10 (1998); *see generally infra* text accompanying notes 26-121.

23. *See also* 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).

24. *See In re* Ishihara Chem. Co., 121 F. Supp. 2d 209, 218 (E.D.N.Y 2000).

25. *See In re* Edelman, 295 F.3d 171, 177 (2d Cir. 2002).

B. *Discovery is for Use in a Proceeding Before a Foreign Tribunal*

Prior to the U.S. Supreme Court's ruling in *Intel,* courts had different interpretations of the second statutory requirement.[26] Some courts required that the adjudicative proceeding be pending or imminent, while other courts refused to impose such a requirement.[27] Likewise, several courts narrowly construed what proceedings qualified as foreign tribunals, while other courts used a much broader interpretation.[28] The U.S. Supreme Court helped clarify some of these ambiguities in its *Intel* opinion.[29]

Intel argued that because the complaint was still in the investigation phase, there was no pending or imminent adjudicative proceeding.[30] The Court, however, rejected Intel's argument, holding that § 1782 did not require that a foreign proceeding be pending or imminent.[31] It based its decision on two grounds. First, there was no mention of pending or imminent in the text of the statute.[32] Second, legislative history clearly proves that Congress intended to have § 1782 discovery assistance available in foreign criminal, civil, and administrative proceedings and *investigations*.[33] Accordingly, the Court held that a valid § 1782 request only requires that the dispositive ruling be within a reasonable contemplation.[34]

The U.S. Supreme Court made the correct ruling.[35] Both congressional intent and the guiding principles behind § 1782 clearly support the Court's decision to reject the requirement that the foreign proceeding be pending or imminent.[36] Prior to the 1964 amendment of the statute, § 1782 authorized discovery only for judicial proceedings "pending in any court in a foreign country."[37] The 1964 revision, however, deleted the word "pending" and instead inserted language requiring only that the evidence be "for use" in a proceeding.[38]

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26. *Intel*, 124 S. Ct. at 2466.
27. *See generally id.*
28. *Id.* at 2479.
29. *Id.* at 2474, 2479-80.
30. *Id.* at 2479.
31. *Intel*, 124 S. Ct. at 2479.
32. *Id.*
33. *Id.* at 2480.
34. *Id.*
35. 28 U.S.C. § 1782 (1963), *amended by* Pub. L. 88-619.
36. *Id.*
37. Brief B: Brief for United States as Amicus Curiae Supporting Affirmance, at 17; 28 U.S.C. 1782 (1958).
38. Brief for Respondent, 2004 WL 29784, at 8.

Despite this clear alteration, some courts, such as the Second Circuit, refused to enforce the change because they were unsure whether the modification was intentional or inadvertent.[39] However, this analysis is incorrect for several reasons. First, the face of the amended 1964 statute does not make any specific textual reference that the proceeding must be pending.[40] If Congress wanted the pending requirement to remain intact, it would have simply left that portion of the statute untouched. On the contrary, the Congress chose to delete it. Second, there is no clear legislative evidence, as AMD suggested, that the deletion was accidental or unintentional.[41] In fact, when the legislature makes such a material change, it is presumed that the deletion signifies an intent to modify the meaning of the statute.[42] Commentary by Hans Smit, the leading drafter of the 1964 revision, further strengthens this presumption.[43] Smit, whom the Second Circuit itself calls the "chief architect" of the modern § 1782,[44] contemporaneously authored an article that explained the rationale behind the 1964 amendment in significant detail.[45] In his commentary, Smit clarified:

> In the new version, the word "pending" was eliminated to facilitate the gathering of evidence prior to the institution of litigation abroad. . . . The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal. It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.[46]

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39. *In re* Request for Int'l Judicial Assistance for the Federative Republic of Brazil, 936 F. 2d 702, 706 (2d Cir. 1991).

40. *See* 28 U.S.C. 1782; *see also* Intel v. AMD, 124 S. Ct. 2466, 2479 (2004).

41. Brief for Respondent at 37, Intel, 124 S. Ct. at 2466.

42. *See In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988).

43. Smit has been described as the "dominant drafter" and "chief architect" of the modern § 1782. He was the director of the Columbia Law School Project on International Procedure and also a key Reporter to Congress's Commission on International Rules of Judicial Procedure. The Commission was specifically created to recommend revisions to U.S. laws that improve existing practices of foreign discovery assistance. Euromepa S.A. v. R. Esmerian, 51 F.3d 1095, 1099 (2d 1995) (quoting Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L.J. 215, 235 (1994)); Respondent's Brief at 4, *Intel*, 124 S. Ct. at 2466 (No. 02-572).

44. Brief for Respondent, 2004 WL 297864, at 4.

45. *See generally* Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965).

46. *Id.* at 1026-27 n.72.

Therefore, according to Smit, Congress's decision to delete the pending requirement was anything but inadvertent.[47] Rather, Congress made the change to offer U.S. discovery assistance in those foreign proceedings that are not yet pending, but that will be initiated in the future.[48]

The 1964 Senate Report,[49] which accompanied the statutory revisions, further supports the argument that the pending requirement was purposely deleted.[50] For example, the report confirms Congress's intention to open the doors to § 1782 assistance for cases that are only in the pre-litigation phase.[51] The report specifically states that discovery is authorized "whether the foreign or international proceeding or *investigation* is of a criminal, civil administrative, or other nature."[52] In 1996, through another revision, Congress again reaffirmed its intent to allow § 1782 assistance during the pre-litigation phase.[53] The revision explicitly stated that a district court could order discovery pursuant to § 1782 for use in a proceeding in a foreign tribunal, "including criminal *investigations* conducted before formal accusations."[54] This language confirms prior interpretation that § 1782 permits the collection of evidence during the investigation stages of a proceeding. Therefore, as both the legislative history and the Smit's commentary indicate, Congress intentionally deleted the pending requirement from the text of the statute, in order for courts to grant pre-litigation discovery assistance to foreign parties and tribunals.[55]

The Court's decision not to apply a pending requirement also makes sense on a practical level. As previously mentioned, § 1782 was created to provide efficient means of discovery assistance to participants in international proceedings.[56] If § 1782 is strictly limited to pending cases, this goal cannot be fully achieved. The *Intel* case illustrates the problems created by enforcing such a requirement.[57] The EC allows interested

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47. *See id.*

48. S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3789.

49. *Id.* at 9.

50. *Id.*

51. *See generally id.*

52. *Id.*

53. Nat'l Defense Authorization Act of 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (2005) (effective Feb. 10, 1996).

54. 28 U.S.C. § 1782(a) (2005) (effective Feb. 10, 1996).

55. S. REP. NO. 88-1580, at 9; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965); Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215 (1994).

56. *In re* Schmitz, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003).

57. Intel v. AMD, 124 S. Ct. 2466, 2477 (2004).

parties, such as AMD, to provide evidence in support of its complaint.[58] If the claims are compelling, the EC's investigating branch, the DG-Competition, can further litigate the matter.[59] If, instead, the DG-Competition decides to dismiss the complaint, the complainant has the right to appeal.[60] However, judicial review of the DG-Competition's decision is limited to the record compiled by the DG-Competition, the complainant, and the target up to the time of the appellate hearing.[61] The appellate court can only consider whatever evidence these parties have access to and can present during this pre-litigation phase.[62] In other words, by the time the pending requirement is met, it would be too late for the complainant to submit evidence for the reviewing court to consider in its hearing.[63] Therefore, the pending requirement would prevent parties from having their claims fairly adjudicated. This scenario clearly violates § 1782's fundamental goal of providing efficient means of discovery assistance to participants in international proceedings.

Proponents of the pending requirement argue that such an interpretation will open the doors to burdensome fishing expeditions. If no immediate time constraint is enforced, they argue, parties with no realistic plans of pursuing litigation will misuse § 1782 as a scare tactic to force opposing parties to settle. These arguments, however, have little merit. Such reasoning ignores the text of the statute, which states that a court may order the production of evidence "for use" in a foreign proceeding.[64] The phrase "for use" should inherently weed out the majority of frivolous requests. After all, the U.S. Supreme Court interpreted the "for use" language as a requirement for the requesting party to prove that a dispositive ruling "be within reasonable contemplation."[65] Likewise, district courts that have applied this reasonableness standard have focused on evidence that establishes that a foreign proceeding is likely to occur.[66] In other words, requests will not be granted on hollow assertions that a judicial proceeding will follow. Therefore, the fear that the U.S. Supreme Court opened the doors to countless fishing expeditions is greatly exaggerated.

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58. Newman & Zaslowsky, *supra* note 3, at 3.
59. *Id.*
60. *Id.*
61. Brief for Respondent at 37, Intel v. AMD, 124 S. Ct. 2466 (2004) (No. 02-572).
62. Brief for Respondent at 14-15, *Intel*, 124 S. Ct. at 2466.
63. *Id.*
64. 28 U.S.C. § 1782(a) (2005) (effective Feb. 10, 1996).
65. *Intel*, 124 S. Ct. at 2480.
66. *See In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988).

According to the second statutory element, the requested discovery must be used in a foreign tribunal. Prior to the 1964 amendment, § 1782 provided assistance only to those cases adjudicated in a foreign court.[67] The amendment, however, expanded § 1782 to permit discovery for use in any "foreign or international tribunal."[68] The Senate Report, accompanying the change, stated the amendment "clarifies and liberalizes existing U.S. procedures"[69] explaining:

> The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the courts have discretion to grant assistance when proceedings are pending before *investigating* magistrates in foreign countries. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.[70]

Therefore, the 1964 amendment clearly expanded § 1782's scope.[71] As the Senate Report states, district courts now have discretion to grant discovery for use in administrative hearings and quasi-judicial proceedings.[72] In 1996, Congress further clarified its intent through another amendment. This revision added that a district court could grant discovery for use in a proceeding in a foreign tribunal "including criminal investigations conducted before formal accusation[s]."[73] This added language confirms prior authority that district courts even have discretion to grant § 1782 discovery for use in pre-litigation proceedings.

Under the current, revised statute, the U.S. Supreme Court was correct in ruling that the EC qualifies as a foreign or international tribunal. In fact, Smit specifically identified the EC as the type of tribunal for which the

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67. Bernard & Pickholz, *supra* note 17, at 486.

68. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).

69. S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

70. *Id.* (emphasis added) (citations omitted).

71. *See id.*

72. Smit also reiterated the Senate Report's findings. In his commentary, Smit stated that the term "tribunal" includes both investigating magistrates and administrative tribunals. Smit, *supra* note 45, at 1026 n.71.

73. 28 U.S.C. § 1782(a) (2005) (effective Feb. 10, 1996).

newly liberalized discovery assistance was intended.[74] "New Section 1782 . . . permits the rendition of proper aid in proceedings before the EEC [European Economic Community] Commission in which the Commission exercises quasi-judicial powers . . ."[75] Hence, in this particular instance, the drafter's intent clearly supports the Court's decision.

In addition to legislative intent, the Court's ruling is also supported by policy reasons linked to the structure of the EC's decision-making process. All complaints filed with the EC are first given to its DG-Competition branch.[76] The DG-Competition conducts a preliminary investigation into the matter.[77] It then submits a comprehensive report to the EC with a final suggestion on whether to further pursue the issue.[78] If the DG-Competition recommends pursuing the matter, the EC will review the DG-Competition's investigation findings and issue a decision.[79]

As stated above, the legislature recognizes that § 1782 can apply to investigative proceedings, such as the one conducted by the DG-Competition. Furthermore, the EC itself has the authority to adjudicate complaints that allege anti-competitive conduct.[80] Similar to an actual court, in order to make a decision, the EC must first make rulings on essential questions of fact and law. If the EC ultimately finds instances of infringement, it can impose appropriate liabilities and penalties.[81] Because the EC, like American criminal courts, engages in basic adjudicative functions, it properly falls within the reach of § 1782.

Even if the EC is not a tribunal, the matter will eventually lead to a proceeding in a tribunal. If either the DG-Competition or the EC dismisses the complaint, the complainant has the right to seek an appeal by the European Court of First Instance and the Court of Justice, both of which classify under § 1782 as foreign courts.[82] Likewise, the defense also has the right to appeal an unfavorable decision.[83] In other words, no matter what action the EC takes, its final decision is clearly subject to judicial review by a traditional court. Therefore, even if the district court denies the

74. Smit, *supra* note 45, at 1027 n.73.

75. *Id.*

76. Newman & Zaslowsky, *supra* note 3, at 3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Newman & Zaslowsky, *supra* note 3, at 3.

82. *See* Intel v. AMD, 124 S. Ct. 2466, 2479 (2004); *see also* Newman & Zaslowsky, *supra* note 3, at 3.

83. *See* Intel v. AMD, 124 S. Ct. 2466, 2479 (2004); *see also* Newman & Zaslowsky, *supra* note 3, at 3.

complainant's request for discovery during the EC proceeding, it must permit the request for use in the appellate proceedings.

Taking into account the Court's decision not to enforce a foreign discoverability requirement, practical reasons favor granting the request now rather than forcing the complainant to file another § 1782 request in preparation for appellate hearings.[84] Most importantly, the district court will save a substantial amount of time and money if it grants the complainant's current § 1782 request. If not, the complainant will file a new application for the appellate hearing. Because the European Court of First Instance and the Court of Justice are clearly traditional tribunals, this appellate stage request will be granted. Therefore, if a court will inevitably grant the same request in the later stages of the foreign litigation, then it is a waste of resources for a court to deny the initial § 1782 application. It is also important to emphasize that § 1782 only requires that the foreign tribunal proceeding be within reasonable contemplation.[85] The proceeding does not have to be pending or imminent. Because the parties can appeal any adverse EC decision, the appellate hearing is within reasonable contemplation. For these reasons, the district court cannot deny AMD's § 1782 request on the sole basis that it does not satisfy the foreign tribunal requirement.

C. *Application Made by a Foreign or International Tribunal or an Interested Person*

Section 1782's third statutory requirement demands that the applicant be a foreign or international tribunal or an "interested person."[86] Courts historically have interpreted "interested person" to encompass a wide range of applicants. Although the statute covers foreign litigants and sovereigns, the meaning of "interested person" extends well beyond these

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84. Because § 1782 does not have a foreign discoverability requirement, the district court cannot reject a § 1782 request on the basis that the European appellate court would not consider evidence outside of the EC's investigation.

85. *See Intel*, 124 S. Ct. at 2480; *see also* 28 U.S.C. § 1782(a) (2005) (effective Feb. 10, 1996).

86. 28 U.S.C. § 1782 (a) (2005) (effective Feb. 10, 1996). The third requirement has generally been fulfilled in three different ways. First, the traditional process of submitting a letter rogatory can be used. The burdensome process of filing a letter rogatory, however, makes this a less appealing and a less used option. Second, a traditional tribunal, such as a foreign court, can make a direct discovery request. Third, and the most controversial option, "any interested person" may file a § 1782 request to the appropriate U.S. district court. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996). No letter rogatory, treaty provision, or permission from a foreign tribunal is required for "any interested person" to take advantage of this rule. Bernard & Pickholz, *supra* note 17, at 479.

parties. Eligible applicants have included: foreign litigants,[87] the Tokyo district attorney,[88] the Minister of Legal Affairs in Trinidad and Tobago,[89] and an agent for the court-appointed trustee of a foreign debtor about to enter into bankruptcy proceedings.[90]

The U.S. Supreme Court in *Intel* similarly followed the trend towards a broad interpretation of an interested person. It ruled that the category of interested persons, who qualified for § 1782 assistance, was broader than litigants, foreign sovereigns, and agents of foreign sovereigns.[91] For example, even though AMD was not a litigant in the foreign proceeding, the Court held that AMD qualified as an interested person because it possessed "a reasonable interest in obtaining [§ 1782] assistance."[92] As the complainant, AMD played a significant role in the proceeding by triggering the EC investigation.[93] In addition, AMD had the right to submit evidence for consideration by the DG-Competition, as well as the right to appeal the DG-Competition's ultimate decision.[94] Given these active participatory roles, the Court held that AMD qualified as an interested person with a reasonable interest in obtaining § 1782 discovery assistance.

For the aforementioned reasons, the U.S. Supreme Court made the correct decision by classifying AMD as an interested party in the EC proceeding. However, the Court failed to elaborate on the general requirements necessary to qualify as an interested person under § 1782. The particular meaning of this expression is unclear on the face of the statute. Nor is there much decisional law discussing the exact definition of an interested person in other contexts.[95] Despite the U.S. Supreme Court's failure to provide further clarification on this term, legislative history and other federal statutes help shed light on the correct definition of § 1782's interested person. Based on these guiding references, an interested person is a party who has a legal interest in the matter at hand and who also plays an actual role in the proceeding.

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87. *See, e.g., In re* Merck & Co., Inc., 197 F.R.D. 267 (M.D.N.C. 2000).

88. *See, e.g., In re* Letters Rogatory from the Tokyo Dist. Prosecutor's Office, 16 F.3d 1016, 1019 (9th Cir. 1994).

89. *See, e.g., In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1155 (11th Cir. 1988).

90. *See, e.g.*, Lancaster Factoring Co. v. Mangone, 90 F.3d 38, 42 (2d Cir. 1996).

91. *See* Intel v. AMD, 124 S. Ct. 2466, 2478 (2004).

92. *Id.* (quoting Smit, *supra* note 45, at 1027).

93. *Id.*

94. *Id.*

95. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1544 (9th Cir. 1993).

To better understand the derivation of the above definition, it is important to recognize that when making the determination of whether an individual is an interested person, there are two conflicting policies at play—the general Federal Rules of Civil Procedure and § 1782's expansive text. Under the Federal Rules of Civil Procedure, discovery is generally available only to parties that file a complaint.[96] Thus, the party has to be a litigant in the underlying proceeding. This requirement was created to prevent non-litigants from abusing the court system by conducting burdensome fishing expeditions.[97] In certain circumstances, however, the Federal Rules permit courts to grant limited discovery to non-litigants. Pursuant to Rule 27, a district court can grant requests for discovery during the pre-litigation phase of a proceeding.[98] In order to qualify under Rule 27, the requesting party must both verify that he/she intends to file a complaint[99] and also prove that there is a significant risk that the evidence will be lost if pre-complaint discovery is not permitted.[100] Even if these requirements are met, the rule only authorizes pre-litigation discovery in the form of depositions.[101] It does not allow general discovery.[102] Therefore, in essence, general federal discovery tools are only available to litigants.

Unlike the Federal Rules of Civil Procedure, the text of § 1782 clearly authorizes district courts to grant discovery assistance to foreign non-litigants.[103] The statute states: "The order may be made . . . by a foreign or international tribunal or upon the application of any *interested person* . . ."[104] Furthermore, § 1782's legislative history confirms the district court's power to provide discovery assistance to non-litigants. According to the Senate Report, litigants are simply included among the interested persons who may invoke section 1782.[105] Smit, the key drafter of the 1964 amendment, similarly endorsed the expansive use of the term interested person. In his contemporaneous commentary, Smit explained, "[t]he latter term [interested person] is intended to include not only

96. *See* FED. R. CIV. P. 26(b)(1).

97. *In re* Solorio, 192 F.R.D. 709 (D.C.D. UT 2000).

98. *See* FED. R. CIV. P. 27.

99. *Id.* The requirement that the requesting party verify that he/she will eventually file a complaint is arguably another way for courts to ensure that its discovery tools are limited to actual future litigants.

100. Nevada v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995).

101. *Id.*

102. *See also* FED. R. CIV. P. 26 (governing this area).

103. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).

104. *Id.* (emphasis added).

105. *See* S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

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 possesses a reasonable interest in obtaining the assistance."[106] Therefore, based on the face of the statute and its legislative history, it is clear that Congress intended that § 1782 discovery assistance be available to non-litigants—a policy that is more expansive than the Federal Rules of Civil Procedure.

When interpreting whether a foreign non-litigant is an interested person and thus qualifies for § 1782 aid, it is important that the ruling strikes a balance between the two conflicting policies. In other words, the decision should take into account § 1782's broad use of interested person, without flagrantly violating the Federal Rules' fundamental principle of preventing unnecessary fishing expeditions. Otherwise, if § 1782 is read to apply to any interested person, regardless whether the individual has a general or specific stake in the case, the Court would be opening its doors to a flood of foreign discovery requests. It is implausible why the Court would be willing to spend taxpayer dollars on a foreign party's request, when it does not offer the same general service to its own citizens. Although some variation is necessary to encourage international comity, such drastic diverging policies are unexplainable. Therefore, § 1782's interested person clause should be interpreted in light of the Federal Rules of Civil Procedure.

This balance can best be achieved if an interested person is defined as a party who has a legal stake in the matter at hand and who also plays an actual role in the proceeding. This definition strikes a reasonable balance for several reasons. The requirement that the applicant has a legal stake in the proceeding ensures that Congress's intent is expressed while preventing parties from misusing the federal discovery tools. As previously mentioned, without such a constraint, federal courts would be flooded with § 1782 applications from legal scholars and journalists who have just a general interest in the particular topic, rather than a specific stake in the case. It is hard to believe that the framers intended to directly allow such floods of applications.[107] Thus, by demanding the foreign party to demonstrate that it has a particular legal stake in the case, a court can control the number of applications filed.[108] This goal is also met by

106. Smit, *supra* note 45, at 1027.

107. If Congress intended to allow even those remotely interested in the legal topic to file a § 1782 request, the statute would not have listed the specific groups that qualify for such assistance. *Cf.* 28 U.S.C. § 1782(a) (2005) (effective Feb. 10, 1996) (stating that a request may be made "by a foreign or international tribunal or upon the application of any interested person . . .").

108. The issue of whether an applicant has a legal stake in the foreign proceeding is not a foreign discoverability issue. An individual's legal stake can be determined by questioning his/her

requiring the non-litigant to show that it plays an actual role in the proceeding. This showing proves that the party is not abusing § 1782 by advancing his, or her, own personal interests, but rather is using the statute for the benefit of the foreign proceeding.

The proposed definition also allows a court to grant § 1782 assistance to those foreign parties who could presumably file suit in an American court, but are unable to bring suit in the foreign court due to particular nuances in that foreign court's system. For example, any nonparty who has a specific stake in the outcome of a case should be allowed to file for § 1782 assistance. Under these circumstances, despite the foreign party's non-litigant status, it is still considered, at the very least, an interested party under the strictest interpretation of the federal rules. Therefore, the actual purpose of the statute is not lost in a debate of mere logistics.

The interpretation also does not threaten to overthrow prior case law. As previously mentioned, courts have broadly interpreted the term to include a variety of applicants such as district attorneys,[109] foreign Ministers of Legal Affairs,[110] agents for trustees involved in foreign proceedings,[111] and, as of recently due to *Intel*, a complainant who initiates an investigation and has the power to appeal the investigating body's ultimate finding.[112] All these individuals qualify as an interested person under the proposed definition. They are all parties with a legal stake in the case at hand.

For example, the agents and district attorney are directly advocating the legal interests and rights of their clients. Likewise, AMD has a common interest in seeking protection from Intel's arguably monopolistic practices. Unlike a scholar, taxpayer, or ordinary citizen, who has just a general interest in the case, AMD's concern is more genuine and significant. Its business outlook can drastically change depending on how the EC rules on the matter. Therefore, AMD, like the other mentioned parties, has a specific legal interest in the foreign proceeding.

Similarly, the listed parties also play an actual role in the proceeding. The agents and district attorney are directly advocating their voices as interested parties, while AMD initiated the complaint and had the authority

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general involvement in the case; whereas the issue of discoverability requires a court to specifically address whether an item is subject to discovery in the foreign court.

109. *See, e.g., In re* Letters Rogatory from the Tokyo Dist. Prosecutor's Office, 16 F.3d 1016, 1019 (9th Cir. 1994).

110. *See, e.g., In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1155 (11th Cir. 1988).

111. *See, e.g.*, Lancaster Factoring Co. v. Mangone, 90 F.3d 38, 42 (2d Cir. 1996).

112. Intel v. AMD, 124 S. Ct. 2466, 2478 (2004).

to appeal the DG-Competition's decision. These duties clearly show that the parties' § 1782 request is for use in the foreign proceeding, rather than solely for advancing personal motives. Therefore, the proposed definition of interested person clarifies the specific requirements, without drastically overturning prior case law.

The proposed interpretation also complies with other federal statute's use of the term interested person. In ordinary federal usage, the phrase, interested person, does not entirely eliminate non-litigants, nor does it include any individual with only a general interest in the underlying proceeding. Rather, these statutes typically rely on a middle ground definition, such as the one proposed in this Article. For example, 5 U.S.C. § 555 (b), the Federal Administrative Procedure Act governing ancillary matters, defines an interested person as one who "may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding . . ."[113] As this text illustrates, there is no requirement that the interested person be a party in the proceeding. Likewise, the statute does not include individuals who only have a general interest in the matter. Rather, in order to be an interested person under § 555, a party must exhibit a specific interest, such as the responsibility "for the presentation, adjustment, or determination of an issue . . ."[114]

An act governing the prohibition of ex parte communications, 5 U.S.C. § 557, also relies on the term interested person.[115] Similar to § 555, § 557 attaches a middle ground definition to the term.[116] The phrase broadly includes competitors, public officials, and nonprofit or public interest organizations and associations with a specific interest in the agency matter being regulated.[117] In other words, the term does not include those individuals with only a general interest in the agency proceeding—the same policy driving the proposed § 1782 definition.[118]

It is important to note that § 555, § 557, and § 1782 all refer to different contexts. Sections 555 and 557 both govern agency matters, while § 1782 applies specifically to foreign discovery requests. However, despite this discrepancy, as the above analysis shows, each statute's use of the term "interested person" shares a key similarity—a middle ground approach.

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113. 5 U.S.C. § 555(b) (2005).

114. *Id.*

115. 5 U.S.C. § 557(d)(1)(A) (2005).

116. *Id.*; 5 U.S.C. § 555 (2005).

117. Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1544 (9th Cir. 1993).

118. *Id.*

This approach does not completely exclude non-litigants nor does it open the door to any and all persons. Rather, under this middle ground interpretation, an interested person must exhibit a specific interest in the underlying matter. Therefore, as § 555 and § 557 illustrate, the proposed definition is aligned with the general statutory use of the phrase interested person.

All in all, taking into account prior case law, § 1782's legislative history, and other statutory uses of the term, the proposed definition strikes the proper balance between the fundamental principles of the Federal Rules of Civil Procedure and § 1782's expansive text. This interpretation assures compliance with the actual text of § 1782 while not overriding the legislature's general intent, as shown in its legislative history and through other statutory uses of the term interested person.

III. NO FOREIGN DISCOVERABILITY REQUIREMENT

Prior to *Intel*, courts were split on whether § 1782 contained a threshold requirement that evidence sought to be discovered under § 1782 must also be discoverable under the laws of the foreign jurisdiction.[119] The U.S. Court of Appeals for the First and Eleventh Circuits imposed this discoverability requirement on all applicants.[120] On the opposite extreme, the Second, Third, and Ninth Circuits refused to enforce any form of a discoverability requirement.[121] The Fourth and Fifth Circuits took the middle ground approach, as they enforced the requirement on all parties except foreign sovereigns.

The U.S. Supreme Court resolved this disagreement in *Intel* by ruling that § 1782 does not contain any foreign-discoverability requirement.[122] In other words, § 1782 does not bar a district court from ordering the production of documents, even though the documents are not discoverable in the foreign jurisdiction.[123] Similarly, the Court also ruled that an applicant is not required to prove that U.S. law would allow discovery in

119. Metis, *supra* note 16, at 336.

120. Newman & Zaslowsky, *supra* note 3, at 3.

121. *Id.*

122. Intel v. AMD, 124 S. Ct. 2466, 2481 (2004).

123. The requesting party is not required to first try to obtain evidence through the foreign tribunal before invoking § 1782 rights. W. Cameron Beard, *Foreign Parties Invoke U.S. Law to Seek Evidence*, 21 NAT'L L.J. 26 (1999).

a domestic litigation analogous to the actual litigation taking place in the foreign tribunal.[124]

The Court's reasoning was direct: neither the plain text of the statute or its legislative history suggested that Congress intended to impose such a blanket restriction.[125] If Congress wanted to enforce this significant limitation, the Court stated, it would have clearly expressed its desires in the statutory text.[126] The Court also rejected Intel's comity argument, finding that foreign tribunals would not be offended by district courts ordering the production of discovery that would otherwise be undiscoverable under the rules of that foreign country.[127] For these reasons, the U.S. Supreme Court refused to impose a foreign discoverability requirement on § 1782 applications.[128]

The Court issued the wrong ruling. It should not have completely eliminated a foreign discoverability requirement on all § 1782 requests. Contrary to the Court's opinion, such a ban will produce the opposite result than what § 1782 was created to achieve. By enacting § 1782, Congress intended to assist foreign parties and tribunals by bringing "the United States to the forefront of nations adjusting their procedures to those of sister nations . . ." with the overall goal of encouraging foreign countries similarly to adjust their procedures.[129] The complete elimination of the foreign discoverability requirement, however, does not help achieve either of these goals. It does not improve the assistance to foreign parties and proceedings, nor does it better encourage foreign countries to apply similar liberal discovery policies. Rather, to best promote these aims, the Court should enforce a mandatory foreign discoverability requirement on all requesting parties, except foreign tribunals.

The text of the statute does not explicitly impose different discoverability requirements on foreign litigants, interested parties, or foreign tribunals. However, as both the Fourth and Fifth Circuits emphasize, different policies are necessary to achieve § 1782's goal of improving international comity.[130] Requests by foreign litigants and

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124. *Intel*, 124 S. Ct. at 2482.

125. *Id.* at 2481.

126. *Id.*

127. *Id.*

128. *Id.* at 2482. However, applicants have had a better chance in getting their requests approved when the documents were discoverable in the foreign jurisdiction. Don Zupanec, *Discovery for Use in Foreign Proceeding: Discoverability in Foreign Jurisdiction*, 19 FED. LITIGATOR 11 (2004).

129. S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3783.

130. *See In re* Letter of Request from Amtsgericht Ingolstadt, 82 F.3d 590 (4th Cir. 1996); *In re* Letter Rogatory from First Court, Caracas, 42 F.3d 308 (5th Cir. 1995). These cases advocate

interested parties must be examined under the foreign tribunal's laws in order to prevent an applicant from circumventing the forum nation's rules by diverting a discovery request to an American court.[131] In other words, a discoverability requirement is needed out of fear of offending the foreign forum nation. Similar concerns are not implicated when a foreign court requests § 1782 assistance. After all, the foreign court is presumably the more informed authority of what is discoverable under its own laws.[132] "For an American court to double-check the foreign court's request would [trigger] exactly the kind of [results] that § 1782 seeks to avoid."[133] For these reasons, a discoverability requirement should be imposed on foreign litigants and interested parties, but not on foreign courts.

Although the district court can encompass these policies in the discretionary portion of its application evaluation, these guidelines should be mandatory in order to ensure that § 1782's main goals are achieved. Otherwise, some judges could deviate from these rules. In order to clearly explain why this modified approach would better advance § 1782's objectives, the analysis will be broken up into two parts: (1) why a threshold foreign discoverability rule should be enforced on foreign litigants and interested parties; and (2) why foreign tribunals should be exempt from such a restriction.

A. *Foreign Litigants and Interested Parties*

A threshold foreign discoverability requirement on all foreign litigants and interested parties will advance both of § 1782's principal objectives. First, it will increase international comity by providing foreign tribunals with only useful and wanted evidence. By tailoring § 1782 requests to comply with the foreign state's laws, American courts would be sending the message that they respect and thus seek to abide by the foreign tribunal's discovery rules. The lack of a discoverability requirement, however, would not produce the same results. Simply ordering discovery without analyzing the foreign discovery laws will not show that the United States is respecting the other nation's judicial system. The district court, after all, is not making the effort to even glance at the sister nation's rules. In fact, without a discoverability rule, there is a risk that American courts

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for a discoverability requirement on foreign litigants and interested parties, but not on foreign courts. Both courts solely base their arguments on advancing § 1782's twin aims of providing efficient means of assistance to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to American courts. *Id.* at 592.

131. *See generally Ingolstadt*, 82 F.3d at 590; *Caracas*, 42 F.3d at 308.

132. *Caracas*, 42 F.3d at 311.

133. *Id.*

will actually generate animosity in the legal community, especially if the district court grants a party access to evidence that would otherwise be undiscoverable under the foreign state's laws. In such a case, rather than accommodating the actual discovery needs of the sister nation, the district court's decision will setup "a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation."[134] By granting discovery where the foreign rules specifically forbid it, American courts will show a blatant disregard for the sovereign's decision on how to enforce and how not to enforce its laws.[135] This scenario can be avoided if a foreign discoverability requirement is enforced on foreign litigants and interested parties. At the time a § 1782 request is made, the requesting party should be required to present proof that the evidence is likely to be discoverable in the foreign jurisdiction. If the requesting party does not meet this relatively relaxed standard, then the application should be rejected.

However, in *Intel*, the Court rejected such a blanket restriction because it would prevent discovery of materials that are forbidden in the sister nation for reasons peculiar to its legal practice but not the U.S. practice.[136] In other words, the foreign nation may limit discovery for reasons that do not necessarily signal objection to aid from U.S. courts.[137] For example, a foreign tribunal may refuse to grant depositions because it is a very costly procedure. However, if the tribunal were presented with such evidence from an outside source, such as an America court, it may potentially utilize the evidence in making its final decision. Therefore, in scenarios like these, the Court argued, application of a foreign-discoverability rule serves no purpose.[138] Rather, the rule only frustrates § 1782's goal of assisting foreign tribunals in obtaining relevant information.[139]

Although the Court's argument has merit, its importance is overstated. After all, these concerns can be addressed in the discretionary portion of the district court's analysis as an exception to the discoverability rule. For example, such an exception could be stated in the following manner: a district court can grant a § 1782 request for evidence that is otherwise undiscoverable in the foreign nation, if the requesting party can prove that the evidence will be reviewed in the foreign proceeding. This exception

134. *In re* Asta Medica, 981 F.2d 1, 6 (1st Cir. 1992).

135. *See In re* Order for Judicial Assistance in a Foreign Proceeding, 147 F.R.D. 223, 225 (C.D. Cal. 1993).

136. Intel v. AMD, 124 S. Ct. 2466, 2481 (2004).

137. *See id.*

138. *Id.* at 2481-82.

139. *Id.* at 2482.

addresses the Court's concern without completely prohibiting the discoverability requirement and the above-mentioned benefits that go along with such a rule. Furthermore, this approach's benefits heavily outweigh its costs. With little effort, the requesting party can seek a foreign court official's permission, via an affidavit or other court authorized document, to seek discovery. This proof would meet the exception's relaxed standards. In exchange for this small effort, district courts can ensure that they are still advancing § 1782's chief goal of international comity. Demanding the requesting party to prove that the foreign court authorizes the use of the contested discovery is in itself a sign that the district court respects the other nation's discovery rules. Likewise, a foreign court's refusal to grant written permission can be interpreted as a signal that it does not place a high value on the requested evidence. Therefore, rejecting the applicant's § 1782 request in this scenario is also consistent with promoting international comity.

Enforcing a discoverability requirement, with the above-mentioned exception, will also promote § 1782's second main objective: to effectively assist foreign parties and proceedings.[140] The discoverability requirement only permits the district court to order discovery in accordance with the foreign court's rules, while the exception permits the discovery of evidence that, although forbidden by the foreign nation for reasons peculiar to its legal practice, the foreign court grants special permission for the district court to produce. Thus, this comprehensive policy only allows the production of useful evidence—evidence that the foreign court will consider in its adjudication. The requirement filters out any evidence that the foreign court cannot use in its judicial process. Section 1782, therefore, is more helpful to foreign tribunals if a discoverability requirement is enforced. Rather than wasting time sorting through pages of undiscoverable documents, as is the case in a forum without a discoverability requirement, foreign tribunals will now only receive useful evidence.[141]

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140. *In re* Schmitz, 259 F. Supp. 2d 294, 299 (S.D.N.Y 2003).

141. Intel v. AMD, 124 S. Ct. 2466, 2481 (2004).

> We question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from the United States federal courts.

Id.

A foreign discoverability rule also promotes efficiency.[142] Under the Court's current approach, district courts can grant a broad discovery request, leaving it to the foreign court to decide whether the evidentiary rules are satisfied.[143] This policy, however, makes little economic sense considering the great cost savings to the subjected party by preventing the production of undiscoverable evidence at its earliest stages.[144] In other words, it is irrational to allow an overly broad discovery order when it is possible to trim or reject the request at the onset, and thereby save considerable time and money. Furthermore, parties are naturally less likely to submit requests that have no chance of satisfying the foreign discoverability rule. The reduction in frivolous requests will decrease the time, energy and tax dollars that American courts will spend on adjudicating § 1782 applications.

The rule's benefits are even more attractive considering the relatively easy methods available to determine the foreign discoverability of evidence. For example, the district court could base its determination on expert testimony on the foreign nation's litigation process. The requirement could also be satisfied if the requesting party presented a court authorized document attesting that the evidence is likely to be discoverable in the foreign tribunal. Either way, district courts can attain significant savings by enforcing a discoverability rule that poises only minor consequential costs.

The Court's decision to entirely eliminate a foreign discoverability requirement could create advantages for some parties while unfairly disadvantaging others. Justice Breyer emphasizes the significance of this problem in his dissenting opinion.[145] More specifically, the Court's decision to eliminate a discoverability rule could severely disadvantage American companies involved in disputes with foreign companies who do not do substantial business in the United States.[146] If the district court decides to exercise its broad discretion and grant liberal discovery

142. I made a logical conclusion here. If there is no discoverability requirement, then the foreign tribunal will be presented with a broad scope of evidence—which may include inadmissible evidence. Thus, the foreign court will have to spend time deciding which part of the evidence is discoverable/admissible and which part is undiscoverable/inadmissible. On the other hand, if the American court imposes a discoverability requirement, then the foreign tribunal will only get discoverable evidence. Hence, it would not have to go through the additional analysis as in the first example.

143. *Intel*, 124 S. Ct. at 2481.

144. Reply Brief for Petitioner at 19; *Intel*, 124 S. Ct. at 2466.

145. *See Intel*, 124 S. Ct. at 2485.

146. Brief of Amici Curiae Nat'l Ass'n of Mfrs. at 7, *Intel*, 124 S. Ct. 2466 (No. 02-572), *available at* 2002 WL 32157392.

assistance, foreign companies may be able to obtain discovery from both the U.S. firm and related third parties who are situated in the district court's jurisdiction. In other words, "[a]ll the foreign party need do is file a request for assistance under section 1782 and the floodgates are open for unlimited discovery."[147] The U.S. firm, on the other hand, will only be able to secure the limited discovery available under the foreign court's jurisdiction. Therefore, applying § 1782 without a discoverability requirement could create serious inequities between foreign and American companies.

Enforcing a foreign discoverability rule is the best way to eliminate this inequality. This requirement will prevent foreign parties from invoking § 1782 to evade the foreign nation's strict discovery rules in hopes of seeking broad U.S. discovery.[148] Therefore, regardless of whether the foreign company files in the United States or its forum nation, both the foreign and U.S. companies will be subject to the same discovery rules.

The Court's decision could also create unwanted loopholes where both parties have substantial contacts in the United States. For example, assume that Company A conducts business in the United States and in Japan, while Company B only conducts business in the United States. Under the *Intel* opinion, Company B could possibly invoke a proceeding against Company A in Japan and then file a § 1782 application for discovery. In other words, Company B could obtain broad discovery without having to undertake the considerable burdens of filing a lawsuit in the United States. Company A, on the other hand, may not be able to sue Company B in Japan because Company B may be beyond Japan's jurisdiction.

Like the first example, a foreign discoverability rule may be the best way to prevent this loophole. Under such a rule, Company B would be forced to either file a suit in Japan and work under Japan's discovery rules or, if it desired broader discovery rights, initiate the more burdensome lawsuit in the United States.[149] In other words, whichever forum the plaintiff chose, both parties would have access to the same discovery tools. As these two examples show, the remarkably broad *Intel* opinion exposes U.S. companies to dangerous discovery practices simply because the parties operate in foreign markets. Therefore, in order to equalize the playing field, § 1782 should contain a foreign discoverability requirement.

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147. *In re* Asta Medica, 981 F.2d 1, 5 (1st Cir. 1992).

148. *In re* Letter Rogatory from the First Court of First Instance in Civil Matters, 42 F.3d 308, 310 (5th Cir. 1995).

149. *See generally* Brief of the Nat'l Ass'n of Mfrs. *Intel*, 124 S. Ct. 2466 (No. 02-572), *available at* 2002 WL 32157392.

B. *Foreign Tribunals*

Foreign tribunals should not be subject to a discoverability requirement. Unlike the justifications for foreign litigants and interested parties, § 1782's main objectives are better served without imposing such a rule on tribunals. For instance, in the case of a private applicant, a discoverability determination prevents the applicant from circumventing the foreign state's discovery rules. It ensures that the applicant's request is limited only to evidence that is discoverable in the forum state. Thus, by only ordering discovery that abides by the foreign nation's discovery rules, district courts promote international comity. The similar comity argument is not present in the case where the applicant is a foreign tribunal, because the tribunal is presumably an expert in its discovery rules.[150] In other words, the foreign tribunal is the best interpreter of its own nation's laws. It is this quality that makes it unnecessary to apply a discoverability rule on a sovereign's § 1782 request. Imposing such a requirement would foster animosity, because the district court would essentially be second-guessing the tribunal on the interpretation of its own laws. Such a scenario is especially damaging considering that § 1782 was specifically designed to foster relationships with foreign countries in order to encourage them to grant reciprocal discovery assistance to the United States in the future.

Section 1782's second main objective, to assist foreign parties and proceedings, is also better achieved without a discoverability requirement on sovereign applicants. Because the tribunal is an expert on its country's evidentiary laws and also the author of the § 1782 application, it is nearly certain that all the evidence requested will be used in the foreign action. Therefore, in order to promote international comity and assist foreign parties and proceedings, it is in the statute's interest not to have a discoverability requirement on a foreign tribunal's § 1782 application.

A similar rationale has also been applied to a sovereign's discovery request pursuant to Treaties on Mutual Legal Assistance in Criminal Matters (MLAT). For example, the Eleventh Circuit held that government MLAT discovery requests are subject only to the restrictions set forth in the MLAT itself.[151] In other words, the MLAT is not subject to a discoverability requirement. Because both MLAT and § 1782 applications are requests for discovery assistance, the Eleventh Circuit's ruling strengthens the argument against enforcing a discoverability requirement on a tribunal's § 1782 discovery application.

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150. *Letter Rogatory from the First Court of First Instance in Civil Matters*, 42 F.3d at 310.
151. *In re* Commissioner's Subpoenas, 325 F.3d 1287, 1304 (11th Cir. 2003).

C. *Preservation of All Legally Applicable Privileges*

Although the Court held that § 1782 did not contain a discoverability requirement, the Court specifically emphasized that § 1782 orders cannot demand production of evidence in violation of any legally applicable privilege.[152] This restriction recognizes all privileges to which the subjected party may be entitled under appropriate conflict of law rules. Therefore, whenever a privilege is asserted under § 1782, a court must determine whether there is a relevant American or foreign privilege precluding the production of evidence.[153]

The Court's stance on enforcing all applicable American and foreign privileges clashes with its policy against applying a foreign or domestic discovery requirement. The Court's ruling, however, is correct for two reasons. First, subsection (a) of § 1782 confirms Congress's intent to preserve privilege law: "[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."[154] Although this text does not explicitly acknowledge the inclusion of both American and foreign privileges, the Senate Report provides the needed clarity by stating: "[Section 1782] provides for the recognition of all privileges to which the person may be entitled, including privileges recognized by foreign law."[155] Second, privileges were granted broad protection under § 1782 to preserve specific freedoms. More specifically, subsection (b) explicitly reaffirms the pre-existing rights of persons within the United States to voluntarily give evidence in connection with foreign or international proceedings.[156] By explicitly protecting privileges, Congress intentionally took away the district court's discretion to override these rights. This protection also stressed to foreign countries the large degree of freedom existing in this area in the United States.[157] For these reasons, the Court was correct in emphasizing that privileges were exempt from the non-discoverability rule.

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152. *Intel*, 124 S. Ct. at 2480.
153. Smit, *supra* note 22, at 17-18.
154. 28 U.S.C. § 1782 (2005) (effective Feb. 10, 1996).
155. S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3790.
156. *Id.*
157. *Id.*

IV. THE DISTRICT COURT'S DISCRETION TO GRANT DISCOVERY ASSISTANCE

The district court is not required to order discovery merely because an applicant satisfies § 1782's three statutory requirements. Rather, satisfying the requirements only grants the district court authority to order such discovery.[158] According to *Intel*, the court enjoys a wide degree of freedom in deciding whether or not to grant a § 1782 request. In fact, its order may only be overturned for abuse of discretion.[159]

Although neither the legislature nor the judiciary has defined a specific set of guidelines for the district court to follow, the U.S. Supreme Court in *Intel* mentioned a few factors that a district court may consider in exercising its discretionary authority. The Court emphasized that the directions were only suggestions. In other words, provided that the three statutory requirements are met, the district court holds full discretion in framing its analysis on whether to grant an applicant's request for discovery assistance.

The first factor the Court highlighted was whether the person from whom discovery is sought is a participant in the foreign proceeding.[160] When evidence is sought from a participant, the foreign or international tribunal can exercise its own jurisdictional powers to compel the participant to produce evidence. In contrast, nonparticipants generally lack access to the foreign tribunal's discovery powers. In such cases, a § 1782 request may be the applicant's last hope to obtain the desired evidence. Therefore, a district court should be more likely to compel discovery from a nonparticipant, because the requested evidence may be harder to obtain or even unobtainable absent § 1782 aid.[161]

The U.S. Supreme Court also recommended that district courts scrutinize the scope of the request.[162] If the request is overly intrusive or burdensome, the district court should consider trimming it. This function, the Court stated, will prevent rampant "fishing expeditions" and other such abuses of the statute.[163]

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158. *Intel*, 124 S. Ct. at 2482.

159. United Kingdom v. United States, 238 F.3d 1312, 1319 (11th Cir. 2001).

160. Intel v. AMD, 124 S. Ct. 2466, 2483 (2004).

161. Newman & Zaslowsky, *supra* note 3, at 3.

162. *Intel*, 124 S. Ct. at 2483.

163. *Id.* at 2484. The Court seems to have made this suggestion to prevent abuse of § 1782 rather than to encourage the use of the Federal Rules of Civil Procedure as a guiding factor in deciding § 1782 requests. This observation seems accurate because the Court made no reference to the Federal Rules of Civil Procedure in any other portion of the opinion. *See generally id.*

District courts reviewing a § 1782 request should also take into account "the nature of the foreign tribunal, the character of the [foreign] proceedings underway abroad, and the receptivity of the foreign government or court or agency abroad to U.S. federal-court judicial assistance."[164] In other words, the court's decision should promote § 1782's goal of encouraging similar discovery assistance from other foreign countries.[165] In order to foster such international comity, district courts should reject discovery applications that harm or insult foreign tribunals. For example, district courts are encouraged to filter out requests that intentionally circumvent a foreign nation's evidentiary rules.[166] Similarly, if the request offends the foreign country for other material reasons, the court should deny the application based on comity reasons.[167] The court also has authority to reject requests by foreign parties who are prohibited from obtaining the evidence in their foreign tribunals. Therefore, as these factors emphasize, when making a decision to grant discovery, district courts should make certain that the goal of international comity is not compromised.

If the district court ultimately decides to grant discovery assistance, it must issue an order directing that the appropriate evidence be obtained.[168] A court has a wide latitude in constructing this order. It can mandate that the rules governing the procedure for gathering the evidence be either the rules of the foreign litigation, the Federal Rules of Civil Procedure or any combination thereof.[169] In short, the court has complete discretion to determine whether to grant a discovery order, as well as the appropriate manner in which to obtain the requested evidence.[170]

V. THE DISTRICT COURT'S DECISION ON REMAND

The U.S. Supreme Court determined that AMD's discovery request met all three of § 1782's statutory requirements. Because the threshold requirements were satisfied, the Court stated that it was now in the district court's discretion whether to grant AMD's discovery request. After suggesting a few factors to guide the lower court's discretional authority,

164. *Id.* at 2483.
165. *See generally* Bernard & Pickholz, *supra* note 17.
166. *Intel*, 124 S. Ct. at 2483.
167. Schmitz v. Bernstein Liebhard & Lifshitz, 376 F.3d 79, 84 (2d Cir. 2004).
168. Bernard & Pickholz, *supra* note 17, at 482.
169. *Id.*
170. *Id.*

the U.S. Supreme Court remanded the case to the Northern District of California.

The district court issued its decision on remand in October 2004. AMD's discovery request was rejected in its entirety.[171] In reaching this decision, Judge James Ware relied exclusively on the four discretionary factors mentioned in the U.S. Supreme Court's opinion. First, Judge Ware noted that Intel, the party from whom discovery was being sought, was a participant in the foreign proceeding.[172] As the U.S. Supreme Court emphasized and Judge Ware reiterated, in such a case, the need for § 1782 assistance was generally not compelling. Because the foreign court has jurisdiction over Intel, it could have independently ordered Intel to produce evidence if such documents were deemed necessary.[173] Second, the EC was clearly opposed to judicial assistance in this case.[174] The EC filed two amicus curiae briefs in which it specifically explained why it did not want or need § 1782 aid.[175] For example, it stated that such assistance would jeopardize "vital Commission interests."[176] Furthermore, even if such a request was granted, the EC did not consider it necessary to request or even subsequently review the documents sought.[177] Third, in Judge Ware's opinion, AMD's application was an attempt to circumvent the EC's decision not to permit such discovery.[178] Fourth, AMD's request was unduly intrusive and burdensome. AMD failed to make any attempts to tailor its application to the matter in controversy.[179] Therefore, collectively based on these four grounds, Judge Ware denied AMD's § 1782 request in its entirety.

The district court's opinion should help curb some fears of § 1782 being used as a tool to circumvent foreign evidentiary rules. Although Judge Ware repeatedly stressed his discretionary power in rejecting the § 1782 request, his opinion concentrated solely on the four factors mentioned in the U.S. Supreme Court's opinion.[180] Hence, if Judge Ware's decision is any indication of the district courts' reliance on the U.S. Supreme Court's discretionary factors, applicants should have some sense

171. AMD v. Intel, 2004 WL 2282320, at *3 (N.D. Cal. 2004).
172. *Id.* at *2.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See* Brief of Amici Curiae Comm'n of the European Cmtys., at 11-16, Intel v. AMD, 124 S. Ct. 2466 (2003) (No. 02-572), *available at* 2003 WL 23138389.
177. *Id.*
178. *AMD*, 2004 WL 2282320, at *3.
179. *Id.*
180. *Id.* at *2-3.

of how to gauge the success of their § 1782 requests. The U.S. Supreme Court's four-factor test is devised to filter out unduly burdensome requests, as well as those applications that circumvent the foreign tribunal's evidentiary rules. As the district court illustrated in *Intel*, a broadly drafted request, which exceeds the scope of the foreign proceeding, will almost certainly be denied. Therefore, at the very least, applicants should understand that § 1782 is not a free-for-all method of acquiring a company's documents simply because the company is involved in a foreign proceeding.