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Discovery In Federal Courts In Support Of Foreign Litigation: Lending A Helping Hand Or Legal Imperialism?

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THE FEDERAL COURTS LAW REVIEW[‡]

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DISCOVERY IN FEDERAL COURTS IN SUPPORT OF FOREIGN LITIGATION: LENDING A HELPING HAND OR LEGAL IMPERIALISM?

*Edward D. Cavanagh**

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For over a century and a half, Congress has authorized the federal courts to assist in the production of evidence for use in foreign tribunals.¹ In 1948, these provisions were codified at 28 U.S.C. § 1782, which currently provides:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person”²

Historically, invocations for assistance under section 1782 have been “rare.”³ Indeed, one can fairly assert that until the latter part of the twentieth century, section 1782 was largely

¹ See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (authorizing examination of witnesses upon receipt of letters rogatory from a foreign state); Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769 (authorizing district courts to compel witnesses in the United States to provide testimony for use abroad).

² 28 U.S.C. § 1782 (2018).

³ 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2005.1 (3d ed. 1999), Westlaw (database updated October 2020) [hereinafter *Wright & Miller*].

dormant. However, in the wake of the Supreme Court's seminal *Intel*⁴ decision in 2004, requests for discovery in the United States from foreign sources—although comprising only a tiny percentage of federal dockets—have increased dramatically, quadrupling in the period 2005-2017.⁵ The federal courts have generally been very accommodating of these requests.⁶

Yet, Congress's rationale for the adoption of the "foreign discovery option" embodied in section 1782, and, more importantly, for retaining it, remains elusive. Did Congress intend simply to lend a helping hand to foreign tribunals or, in an act of legal imperialism, did it intend to impose American-style discovery on the international community? The stated purposes of section 1782 are two-fold: (1) to provide an efficient means of assistance in the federal courts to foreign tribunals and participants in litigation outside the United States; and (2) to serve as an example to foreign countries and thereby encourage these countries to provide similar assistance to American courts in matters pending in the United States.⁷ However, the potentially limitless discovery offered to foreign parties under section 1782 is not essential to attain either of the foregoing goals. In any event, existing protocols, notably the Hague Convention, could achieve the same goals.

Implementation of section 1782 creates both conceptual and practical problems for the federal courts. Conceptually, the willingness of federal courts to provide American *procedural* remedies to foreign actors in the form of pretrial discovery under section 1782 stands in stark contrast to a line of Supreme Court cases decided in the past fifteen years—the same period which foreign discovery requests under section 1782 have quadrupled—wherein the Court has categorically refused to extend *substantive* remedies under American law to foreign litigants suing in American courts on claims that arose

⁴ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

⁵ See Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2109 (2020).

⁶ *Id.* at 2120-21.

⁷ See *Malev Hungarian Airlines v. United Techs. Int'l Inc. (In re Malev Hungarian Airlines)*, 964 F.2d 97, 99 (2d Cir. 1992) (citing S. Rep. No. 88-1580 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3792-94).

outside of the United States.⁸ In *F. Hoffmann–La Roche Ltd. v. Empagran S. A.*, Justice Breyer eschewed “legal imperialism” that would both reward forum shopping by foreign litigants and also potentially undermine foreign antitrust enforcement regimes that were not as plaintiff-friendly as the American antitrust laws.⁹ The liberal trend in entertaining section 1782 requests would also appear to be at odds with *Twombly* and its progeny, wherein the Supreme Court underscored the need for district courts to contain the high discovery costs in matters before them.¹⁰ The blank check for discovery offered to foreign litigants by section 1782 creates the potential for district courts to apply differing legal standards to discovery requests emanating abroad from discovery requests in domestic cases pursuant to the Federal Rules of Civil Procedure.

Apart from the foregoing conceptual problems, federal courts face several significant practical problems in implementing section 1782. First, a court faced with a section 1782 discovery request must rule in a vacuum. In contrast, the judge is assigned to a matter for all purposes in domestic cases; therefore, the court has some knowledge of the case and the context in which the discovery has been sought. Second, section 1782 requests are ordinarily made *ex parte*; thus, the court does not have the benefit of an adversarial debate over the merits of the discovery request as it would in a domestic case.¹¹ Third, the statute does not require the participation of the foreign tribunal in the discovery process; therefore, in the absence of such participation, district courts cannot ascertain the interests of the foreign tribunal in the American discovery proceeding.¹² Fourth, many aspects of the discovery process under section 1782 are inefficient and costly.¹³

⁸ See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Kiobel ex rel. Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *F. Hoffmann–La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004).

⁹ See *Empagran*, 542 U.S. at 169 (“But, if America’s antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.”).

¹⁰ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

¹¹ See, e.g., *Hornbeam Corp. v. Hornbeam Corp. (In re Hornbeam Corp.)*, 722 F. App’x 7, 11 (2d Cir. 2018); *Gushlak v. Gushlak*, 486 F. App’x 215, 217 (2d Cir. 2012).

¹² See Wang, *supra* note 5, at 2143-44.

¹³ See *In re: Application Pursuant to 28 U.S.C. § 1782 of Michael Page Do Brasil Ltda.*, No. 17-4269 (KM), 2018 WL 7018716, at *8 (D.N.J. Jan. 19, 2018) (“Petitioner’s

Requests under section 1782 operate as stand-alone actions.¹⁴ Any one foreign case may generate discovery requests directed to numerous federal district courts. Each district court then considers the discovery request in its own silo, without the benefit of input from other similarly-situated courts.¹⁵ This lack of coordination is not only wasteful but also creates potential inconsistencies in outcomes that, in turn, may lead to unfair results.

Clearly, the institutional challenges posed by section 1782 have been, and continue to be, formidable. One approach might be to simply close U.S. courts to discovery requests by foreign tribunals or foreign litigants, either by legislative repeal of section 1782 or by narrowly confining the exercise of judicial discretion in granting discovery in foreign cases to the point where seeing such discovery would no longer be cost efficient for foreign litigants. However, it would be a serious mistake for U.S. courts to isolate themselves from the international legal community. First, the core goal of section 1782—to provide assistance to foreign tribunals and then litigants—is itself a worthy goal.¹⁶ As international trade continues to grow, cross-border litigants will likewise increase; cooperation among various national courts is essential in fairly resolving these cross-border disputes. Second, by providing discovery, U.S. courts do offer foreign tribunals an incentive to reciprocate and thereby benefit U.S. tribunals. Third, withdrawal from the international community could have detrimental effects on U.S. companies operating in world markets by effectively inviting foreign tribunals to react in kind by denying U.S. companies access to potentially relevant evidence. That said, the foregoing concerns do not justify the exercises in section 1782 as currently written—a blank check for foreign discovery, no notice provisions, no authorization for coordinating multiple section 1782 applications and the absence of standards for deciding foreign discovery issues. The goals of section 1782 can be preserved through

efforts to seek discovery in the United States [under section 1782] are certainly inefficient . . .”).

¹⁴ See *In re Letters Rogatory Issued by Dir. Of Inspection of the Gov't of India*, 385 F.2d 1017, 1018 (2d Cir. 1967).

¹⁵ See Wang, *supra* note 5, at 2143-44.

¹⁶ See *Malev Hungarian Airlines v. United Techs. Int'l Inc. (In re Malev Hungarian Airlines)*, 964 F.2d 97, 99 (2d Cir. 1992).

congressional enactment of a slimmed-down statute that is both fairer and more efficient than the law as it currently exists.¹⁷

This essay will: (1) discuss the origins and goals of section 1782; (2) identify and analyze the conceptual and practical problems that have arisen in the implementation of section 1782; (3) discuss the desirability of retaining section 1782; and (4) propose solutions to the conceptual and practical problems identified herein so that a revitalized section 1782 can be fairly and efficiently implemented.

I. ORIGINS OF SECTION 1782

A. *The Statute*

Legislative efforts to provide the aid of the federal courts in the gathering of evidence for use in foreign tribunals date back to 1855, at which time Congress enacted a statute authorizing the federal courts to respond to letters rogatory from a foreign tribunal to compel witnesses in the U.S. to offer testimony for use in foreign courts in “suits for the recovery of money or property.”¹⁸ The scope of aid to foreign tribunals was substantially expanded in 1948 with the adoption of section 1782, which empowered federal courts to entertain depositions for use “in *any civil action* pending in any court in a foreign country with which the United States is at peace[,]” thereby abrogating the prior requirement that a “foreign country be a party or have an interest in the proceeding.”¹⁹

Congress then amended section 1782 in 1964 to authorize federal courts to assist foreign courts in gathering documentary and testimonial evidence.²⁰ In addition, the 1964 amendments provided that discovery could be had “in a proceeding in a foreign or international tribunal[,]” making clear that “assistance is not confined to proceedings before conventional courts,” but may be provided to “administrative and quasi-judicial proceedings.”²¹

¹⁷ See *infra* notes 139-149 and accompanying text.

¹⁸ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, at (2004) (citations omitted).

¹⁹ *Id.* at 248 (citations omitted).

²⁰ *Id.* at 248-49 (citations omitted).

²¹ *Id.* (citations omitted).

B. Intel

In October 2000, Advanced Micro Devices Inc. (“AMD”) filed an antitrust complaint against Intel Corp. with the Directorate General for Competition of the Commission of the European Communities, the European Union’s antitrust authority.²² AMD and Intel were “worldwide competitors in the microprocessor industry.”²³ AMD alleged that “Intel, in violation of European competition law, had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements with manufacturers and retailers, price discrimination, and standard-setting cartels.”²⁴ In the course of the Commission’s antitrust investigation, AMD recommended that the Commission seek the assistance of U.S. courts to obtain discovery of certain documents that had been produced in an earlier antitrust case in the U.S., pursuant to section 1782(a).²⁵ The Commission, however, declined; and thereafter AMD filed a petition related to the same materials.²⁶ The Supreme Court held that section 1782 authorizes, but does not require, discovery on the record facts and remanded the matter to the lower courts to determine whether the discovery sought should be granted.²⁷

In so ruling, the Court concluded that section 1782 accords the district court broad leeway in deciding whether to grant the foreign discovery request; that is, “a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.”²⁸ Rather, under section 1782, “a district court is free to grant discovery in its discretion”²⁹ Nor is a district court barred from ordering discovery in those situations in which the foreign court would not authorize the discovery being sought in the American courts. The Supreme Court in *Intel* rejected categorical limitations on foreign discovery; instead, it adopted a flexible approach identifying several factors that district courts should

²² *Id.* at 250.

²³ *Id.* (citation omitted).

²⁴ *Id.*

²⁵ *Id.* at 250-51.

²⁶ *Id.* at 251.

²⁷ *Id.* at 266.

²⁸ *Id.* at 264.

²⁹ *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012) (citation omitted).

consider in the exercise of discretion under section 1782: (1) whether the person from whom U.S. discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the foreign proceedings, and whether the foreign authority is receptive to U.S. judicial assistance; and (3) whether the discovery request is unduly intrusive or burdensome.³⁰

1. Whether the Person from Whom U.S. Discovery is Sought is a Participant

Where the person from whom U.S. “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.”³¹ Because a foreign tribunal has jurisdiction over those appearing before it, that tribunal could order them to produce the information requested. On the other hand, since non-participants may be beyond the foreign tribunal’s jurisdiction, section 1782 may be the only viable means of obtaining evidence available in the United States.³²

2. Nature of the Foreign Tribunal and Receptivity to American Discovery

As noted, Congress has not limited section 1782 discovery to proceedings before conventional courts.³³ However, the breadth of section 1782 remains unclear. For example, the circuits are currently split on whether section 1782 applies to private arbitrations held abroad.³⁴

Perhaps the more important question is whether section 1782 discovery may be had where the tribunal in question would not permit the discovery sought. The Supreme Court rejected Intel’s argument that section 1782 petitions requesting documents located in the district should be categorically denied where the person seeking them would be unable to obtain these documents if they

³⁰ See *Intel*, 542 U.S. at 264-65.

³¹ *Id.* at 264.

³² *Id.*

³³ See *supra* note 21 and accompanying text.

³⁴ See *infra* notes 103-105 and accompanying text.

were located in the jurisdiction in which the foreign tribunal sits.³⁵ Nevertheless, the Court held that the foreign tribunal's receptivity to judicial assistance from American courts in discovery should be a factor for a district court to consider in the exercise of its discretion under section 1782.³⁶ Specifically, the court cautioned lower courts to be on the alert as to "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."³⁷ Curiously, the Court went on to state that a district court in the exercise of its discretion may order discovery under section 1782 even where, as in *Intel*, the European Commission stated unequivocally in its amicus brief to the Court "that it does not need or want the District Court's assistance."³⁸

3. Nature of the Discovery Request

The Court in *Intel* further ruled that unduly burdensome requests may be "rejected or trimmed[,]" citing with approval lower court decisions that have upheld the power of district courts under section 1782 to protect confidential information and to allow only discovery that is not burdensome or duplicative.³⁹ Lower courts post-*Intel* have also underscored the powers of the district courts to circumscribe discovery requests brought in bad faith or for harassment purposes.⁴⁰

The Court also declined Intel's suggestion that the Court exercise its supervisory authority and establish rules of sound practice with respect to discovery requests under section 1782, opting instead—for the moment at least—to allow standards to evolve through lower rulings construing the statute.⁴¹

³⁵ See *Intel*, 542 U.S. at 263.

³⁶ *Id.* at 265-66.

³⁷ *Id.* at 264-65.

³⁸ *Id.* at 265-66.

³⁹ *Id.* at 265 (citing *In re Bayer AG*, 146 F.3d 188, 196 (3d Cir. 1998)).

⁴⁰ See, e.g., *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012) (acknowledging that section 1782 request may be denied where it is sought for harassment); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 n.6 (2d Cir. 1995) (noting that section 1782 request may be denied in toto for suspected bad faith or harassment).

⁴¹ See *Intel*, 542 U.S. at 266.

The Supreme Court further acknowledged that “[s]everal facets of this case remain largely unexplored[,]” viz., granting the discovery sought would: (1) result in the divulging of confidential information; (2) encourage “fishing expeditions”; or (3) undermine EU antitrust enforcement efforts.⁴² That said, the Court nevertheless observed that no one had suggested that AMD’s allegations against Intel were pretextual or that section 1782’s preservation of legally applicable privileges, as well as the controls in place under the Federal Rules of Civil Procedure, would be ineffective in barring discovery of Intel’s trade secrets or other confidential information.⁴³

On remand, the district court in *Intel* applied the factors enunciated by the Supreme Court and denied the discovery sought by AMD under section 1782.⁴⁴ In reaching its conclusion, the district court emphasized the EU’s lack of interest in U.S. discovery to aid its deliberations, as evidenced by the EU’s amicus filings before the Supreme Court.⁴⁵ In addition, the court also stressed that by invoking section 1782, AMD was attempting to circumvent the EU’s discovery restrictions.⁴⁶ The district court also concluded that the discovery sought by AMD was unduly burdensome, although it expressly stated that this particular finding was not necessary to its ruling denying discovery.⁴⁷

That ruling tells us that discovery under section 1782, notwithstanding the considerable breadth given the statute by the Supreme Court, is not automatic. Still, the fact that the *Intel* case went all the way to the Supreme Court and back before the discovery sought was ultimately denied, illustrates that section 1782 discovery proceedings can be costly and time-consuming for litigants and courts alike—wholly apart from the nature and amount of discovery requested.

⁴² *Id.* at 266.

⁴³ *Id.*

⁴⁴ See *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at *2-3 (N.D. Cal., Oct. 4, 2004).

⁴⁵ *Id.* at *2.

⁴⁶ *Id.*

⁴⁷ *Id.* at *3.

B. Operation of Section 1782

The *Intel* decision in 2004 marked a turning point in the history of section 1782. Although perhaps, strictly speaking, not dormant, section 1782 was rarely invoked prior to *Intel*. After 2004, however, discovery requests under section 1782 have exploded.⁴⁸ How section 1782 requests are handled by the federal courts turns in large part on whether the request comes from private or foreign tribunals.

1. Discovery Requests under Section 1782 by Private Parties

As a threshold matter, the decision as to whether to grant discovery under section 1782 is wholly within the district court's discretion; a court need not grant foreign discovery merely because it has the power to do so.⁴⁹ Unquestionably, a person seeking to invoke the assistance of the district court under section 1782 faces fewer restrictions than one seeking discovery for use in a domestic case under the Federal Rules of Civil Procedure. Only parties may seek discovery under the Federal Rules.⁵⁰ In contrast, discovery under section 1782 may be sought by a foreign tribunal or an "interested person."⁵¹ The section 1782 discovery request may be served in "the district in which a person [from whom discovery is sought] resides or is found . . ."⁵² Unlike the Federal Rules, the statute has no requirement that the foreign tribunal or the parties to the foreign proceeding be given notice of the discovery request.⁵³ Accordingly, section 1782 discovery requests may be, and frequently are, *ex parte* in nature.⁵⁴ Discovery may be sought against multiple parties in different district courts without any requirements of notice to, or coordination among, district courts.⁵⁵ Each discovery request is treated as a case filing and given its own index number.⁵⁶ Rulings on discovery requests under section 1782

⁴⁸ See Wang, *supra* note 5, at 2113-14.

⁴⁹ See *Intel*, 542 U.S. at 264.

⁵⁰ See FED. R. CIV. P. 26-36.

⁵¹ 28 U.S.C. § 1782(a) (2018).

⁵² *Id.*

⁵³ See *id.*

⁵⁴ See *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012).

⁵⁵ See Wang, *supra* note 5, at 2135-37.

⁵⁶ *Id.* at 2125.

are treated as final judgments and may be appealed immediately, unlike discovery rulings under the Federal Rules of Civil Procedure, which are interlocutory in nature and appealable only upon entry of a final judgment.⁵⁷

In addition, whereas the Federal Rules of Civil Procedure, with rare exceptions not relevant here, permit discovery only in a pending action, section 1782 allows discovery not only in pending actions, but also where the foreign proceeding is “within reasonable contemplation.”⁵⁸ Moreover, an “interested person” seeking section 1782 discovery need not be a party to the action.⁵⁹ The Federal Rules of Civil Procedure, on the other hand, require that a person seeking discovery be a party to a federal action.⁶⁰ Like the Federal Rules, section 1782 excludes privileged materials from discovery.⁶¹ Beyond privilege, however, the statute imposes no limitations.⁶² Notably, the requirements under the Federal Rules that the discovery sought be “relevant to any party’s claim or defense and proportional to the needs of the case” are not included in section 1782.⁶³ Finally, because discovery under section 1782 is discretionary with the district court, any ruling is subject to review on an abuse of discretion standard.⁶⁴

2. Discovery Requests by Foreign Tribunals Under Section 1782

Where the section 1782 discovery request comes from a foreign tribunal rather than a private party, the judicial analysis is much different from a typical discovery request under the Federal Rules of Civil Procedure. First, the request comes from a court, rather than the litigating parties, and is thus non-adversarial in nature.

⁵⁷ See *Malev Hungarian Airlines v. United Techs. Int’l Inc. (In re Malev Hungarian Airlines)*, 964 F.2d 97, 104 (1992) (Feinberg, J., dissenting).

⁵⁸ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

⁵⁹ *Id.* at 246 (permitting AMD to seek discovery in pending EU action even though it was not a party to that action).

⁶⁰ See FED. R. CIV. P. 26; *but see* FED. R. CIV. P. 27 (prescribing situations where an expected party may obtain pre-complaint discovery).

⁶¹ 28 U.S.C. § 1728(a) (2018).

⁶² *See id.*

⁶³ FED. R. CIV. P. 26(b)(1); *see* 28 U.S.C. § 1782(a) (2018).

⁶⁴ *See Lo Ka Chun v. Lo To (In re Lo Ka Chun)*, 858 F.2d 1564, 1565-66 (11th Cir. 1988).

Accordingly, the tribunal request is analogous to an administrative subpoena issued by a federal agency to be enforced by a district court.⁶⁵ Given that there is no adversarial controversy, there is little need for the district court to exercise discretion. Indeed, the three comity-based factors enunciated in *Intel*—(1) whether the information sought is available in the foreign forum; (2) whether the foreign tribunal would accept the aid of American courts; and (3) whether the section 1782 request is an attempt to circumvent the foreign tribunal’s discovery limitations—will invariably point to granting the discovery request by a foreign tribunal.⁶⁶ The district courts’ discretion may be further circumscribed if the requesting tribunal is from a country where the Hague Evidence Convention is in effect vis-à-vis the United States.⁶⁷ As a result, U.S. courts grant section 1782 requests from foreign tribunals, “more or less as a matter of course.”⁶⁸

The foregoing discussion is instructive in answering the question posed by this Article’s title: Does section 1782 merely lend a helping hand, or is it promoting legal imperialism? On the one hand, given that U.S. efforts to aid foreign tribunals date back to the 1850’s⁶⁹—long before pretrial discovery was first authorized under the Federal Rules of Civil Procedure—it is hard to argue that Congress was seeking to impose American-style discovery on the world. Moreover, in 1948, the year the provisions for U.S. assistance to foreign courts were codified, pretrial discovery was not yet an important factor in U.S. litigation because it was only a decade old and still a novel concept. On the other hand, two post-1948 events suggest that legal imperialism, even if not contemplated by the 1948 legislators, had effectively become the goal of section 1782: (1) the 1964 amendments to section 1782; and (2) the *Intel* decision.

First, the 1964 amendments authorized document discovery under section 1782, adding to the earlier provisions of the statute authorizing courts to order deposition testimony.⁷⁰ As a result, section 1782 paralleled the two principal avenues of discovery

⁶⁵ See Wang, *supra* note 5, at 2130-31.

⁶⁶ *Id.* at 2131-32.

⁶⁷ *Id.* at 2132.

⁶⁸ *Id.*

⁶⁹ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

⁷⁰ See *supra* note 20 and accompanying text.

under the Federal Rules. Second, the *Intel* decision made clear that section 1782 vests broad discretionary powers in district courts to order discovery that is unwanted by the foreign tribunal, not available to the foreign tribunal, and beyond that authorized by the Federal Rules of Civil Procedure.⁷¹ The fact that section 1782 discovery applications have increased significantly post-*Intel* suggest that U.S. courts are willing to impose American-style discovery on foreign courts.

II. DOES RETAINING SECTION 1782 MAKE SENSE?

A. *Substantive v. Procedural Remedies in U.S. Courts*

It is somewhat anomalous that U.S. courts are making the discovery process under section 1782 available to foreign persons and tribunals, while at the same time barring claims for substantive relief by foreign plaintiffs purporting to sue under American law on claims that arise outside of the United States. In a line of cases beginning with *Empagran* and extending through to *Morrison*, *Daimler*, and *Kiobel*, the Supreme Court has given the cold shoulder to these foreign-based claims.

Empagran is perhaps the best example of how the Supreme Court has locked the courthouse doors on foreign litigants suing on claims that arose abroad. *Empagran* was an antitrust case involving price-fixing throughout the world by international suppliers of vitamins.⁷² All of the defendants were from outside the United States, and in the wake of a successful price-fixing prosecution of the defendants by the United States Department of Justice Antitrust Division, plaintiffs from Australia, the Ukraine, Ecuador, and Panama brought a private treble-damage claim against the same defendants in D.C. District Court.⁷³ All transactions sued upon occurred outside the United States.⁷⁴ The plaintiffs chose to sue in the United States, apparently in an effort to benefit from plaintiff-friendly remedies under American antitrust law—mandatory treble damages and attorneys' fees for prevailing plaintiffs. The Supreme Court held that the Sherman

⁷¹ See *Intel Corp.*, 542 U.S. at 261-63.

⁷² *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 159-60 (2004).

⁷³ *Id.*

⁷⁴ *Id.*

Act does not apply to injuries suffered by a foreign plaintiff based on conduct in a foreign market, where the foreign injury is independent from the anticompetitive effect in the United States market.⁷⁵ In so ruling, the Court noted that application of American antitrust law on the record facts “creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”⁷⁶

The Supreme Court also observed that Congress may have hoped that U.S. antitrust laws might have served as a model competition policy for other countries to adopt.⁷⁷ However, the Court further noted that if the Sherman Act failed to gain followers in the international arena, then Congress would not have tried to impose its policies on other nations “in an act of legal imperialism. . . .”⁷⁸ The parallels to section 1782 are striking. Yet, without any mention of *Empagran*—decided during the same term—the Court in *Intel* held that discovery may be ordered by American courts in aid of foreign-based claims by foreign litigants, even where the foreign tribunal has made it crystal clear “that it does not need or want the Districts Court’s assistance.”⁷⁹

Empagran was not an outlier—it was a trend-setter. In 2010, the Supreme Court in *Morrison* ruled that U.S. securities law did not apply in an action by foreign investors against an Australian bank, as well as an American defendant, for securities fraud allegedly occurring on foreign exchanges.⁸⁰ The Court held that in absence of express congressional intent in the securities statute, the securities law could not be applied extraterritorially.⁸¹

Daimler, decided in 2014, involved an action brought in California federal court under the Alien Tort Statute against Daimler, a German company that manufactures Mercedes-Benz automobiles, by Argentinian nationals claiming that Daimler’s Argentinian subsidiary—in concert with the government of Argentina—engaged in acts of torture, as well as other human

⁷⁵ *Id.* at 166-67.

⁷⁶ *Id.* at 165.

⁷⁷ *Id.* at 169.

⁷⁸ *Id.*

⁷⁹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

⁸⁰ *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 251-52, 265 (2010).

⁸¹ *Id.*

rights violations, against plaintiffs in Argentina.⁸² The Court held that any exercise of personal jurisdiction over Daimler by the California district court would deny due process because Daimler lacked sufficient minimum contacts with the forum state, thereby closing the U.S. courthouse doors to the foreign-based claims.⁸³

Finally, in *Kiobel*, decided in 2013, the Supreme Court upheld the dismissal of a claim under the Alien Tort Statute brought by Nigerian nationals living in the United States against Dutch, British, and Nigerian corporations, alleging that the defendants aided and abetted the Nigerian government in committing human rights violations against plaintiffs in Nigeria.⁸⁴ In rejecting the plaintiffs' claims, the Supreme Court ruled that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."⁸⁵

In stark contrast, federal courts have been willing, perhaps even eager, to make American discovery machinery available to assist foreign tribunals and litigants under section 1782.⁸⁶ Federal courts have been hospitable to discovery requests from abroad notwithstanding the Supreme Court's admonition in *Twombly* that judges should be sensitive to the high cost of discovery when entertaining motions to dismiss and allow cases to proceed to discovery only when a complaint alleges "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [illegality]."⁸⁷ In so ruling, the Court effectively assigned trial judges with the task of serving as gatekeepers who must determine which cases will or will not proceed to discovery.⁸⁸ Arguably, *Twombly* has nothing to do with discovery under section 1782. *Twombly* involved only potential domestic discovery under the Federal Rules of Civil Procedure, not discovery at the behest of

⁸² See *Daimler AG v. Bauman*, 571 U.S. 117, 120-21 (2014).

⁸³ *Id.* at 139.

⁸⁴ See *Kiobel ex rel. Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111-12, 124-25 (2013).

⁸⁵ *Id.* at 124-25.

⁸⁶ See Wang, *supra* note 5, at 2091-92.

⁸⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

⁸⁸ *Id.* at 558 ("So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.'").

foreign parties or a foreign tribunal.⁸⁹ Moreover, the concerns about discovery costs raised in *Twombly* may well have reflected the growing skepticism within the federal judiciary about the merits of private antitrust treble-damages actions.⁹⁰

Nevertheless, any attempt to dismiss the message of *Twombly* as irrelevant must ultimately fail. First, the fact that *Twombly* involved domestic discovery rather than foreign discovery under section 1782 is a distinction without a difference. The Court in *Twombly* was concerned about the cost of discovery to litigants and to courts, irrespective of the source of the discovery request.⁹¹ Second, cases decided in the wake of *Twombly* have made clear that its holding is not limited to antitrust cases; rather, it applies to federal cases across the board.⁹² Yet, where discovery is sought under section 1782, the admonitions of *Twombly* have gone largely unheeded. Indeed, as noted above, where discovery is sought by a foreign tribunal, federal courts tend to rubber-stamp the request with very little scrutiny of the request themselves.⁹³

B. Statutory Construction Issues

In addition, Congress used broad strokes in drafting section 1782, which has presented courts with a host of statutory construction issues. In *Intel*, the Supreme Court clarified numerous aspects of the statute, holding that: (1) non-litigants may be “interested persons” under section 1782;⁹⁴ (2) discovery can be had under section 1782 without a pending action as long as a foreign proceeding was “within reasonable contemplation”—that is, it need not be “imminent”;⁹⁵ (3) section 1782 has no foreign discoverability

⁸⁹ *Id.* at 550.

⁹⁰ *Id.* at 558 (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”) (citations omitted).

⁹¹ *Id.* at 558-59.

⁹² See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted) (“As the court held in *Twombly* . . . , the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”).

⁹³ See Wang, *supra* note 5, at 2020-21.

⁹⁴ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-57 (2004).

⁹⁵ *Id.* at 258-59.

requirement;⁹⁶ and (4) a foreign quasi-judicial agency qualifies as a “judicial tribunal” under the statute.⁹⁷

Intel did not address the question of whether private foreign arbitration falls within the scope of section 1782. Prior to *Intel*, the leading case was the Second Circuit’s decision in *National Broadcasting Co. v. Bear Stearns & Co.*, which held the statute inapplicable to foreign private arbitrations.⁹⁸ The *NBC* court concluded that: (1) the phrase “foreign or international tribunal” in the statutory text was ambiguous on whether private arbitrations were included; (2) legislative and statutory history of the phrase “foreign or international tribunal” demonstrated that section 1782 was inapplicable to private arbitration; and (3) to read section 1782 as including private arbitrations would impair the “efficient and expeditious conduct of arbitrations.”⁹⁹ Although acknowledging that Congress had intended to expand the coverage of section 1782, the Second Circuit concluded that “Congress did not intend for that statute to apply to an arbitral body established by private parties[,]” given the specific reference in legislative reports to gathering evidence for use “before a foreign administrative tribunal or quasi-judicial agency” and the absence of any mention of arbitration or private dispute resolution.¹⁰⁰

Did *Intel* overrule *NBC* on the issue of the applicability of section 1782 to private arbitration? On this question, a split in the Circuits has emerged.¹⁰¹ Recently, in *Hanwei Guo v. Deutsche Bank Securities*, the Second Circuit re-examined its *NBC* ruling in light of *Intel* and concluded that *Intel* did not displace *NBC*.¹⁰² The *Hanwei Guo* court observed that *Intel* did not involve a private arbitration and that *NBC*’s thorough analysis of section 1782

⁹⁶ *Id.* at 260-61.

⁹⁷ *Id.* at 258.

⁹⁸ 165 F.3d 184, 191 (2d Cir. 1999).

⁹⁹ *Hanwei Guo v. Deutsche Bank Secs. Inc.*, 965 F.3d 96, 102 (2d Cir. 2020).

¹⁰⁰ *National Broadcasting Co.*, 165 F.3d at 189, 191.

¹⁰¹ Compare *Hanwei Guo*, 965 F.3d at 104-05 and *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 33-34 (5th Cir. 2009) (holding that *Intel* has no effect on prior analysis) with *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 211-16 (4th Cir. 2020) (holding that section 1782 extends to private arbitration) and *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re: Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 725-28 (6th Cir. 2019).

¹⁰² See *Hanwei Guo*, 965 F.3d at 106.

“comports with both *Intel*’s reiteration of broad principles and its specific analysis of § 1782.”¹⁰³

Notwithstanding the forceful Second Circuit opinion in *Hanwei Guo*, the issue of whether private arbitrations are within the purview of section 1782 remains unresolved and will undoubtedly give rise to more litigation in other circuits.

C. Cost/Benefit Analysis

1. Benefits

Why are federal courts willing to give foreign litigants the benefits of American discovery but not the benefits of American substantive law? What explains the apparent disparate treatment of discovery requests in domestic cases under the Federal Rules of Civil Procedure and foreign discovery requests under section 1782? The answers to these questions are not readily apparent, but a review of the legislative history of section 1782 may shed some light on the inquiry. As discussed, the goals of section 1782 are twofold: (1) to provide “efficient means of assistance to participants in international litigation in our federal courts”; and (2) to encourage “foreign countries by example to provide similar means of assistance to our courts.”¹⁰⁴ Thus, Congress hoped that by making discovery through the federal courts broadly available to foreign tribunals, American courts would thereby invite and receive reciprocal treatment.¹⁰⁵

Encouraging foreign tribunals to provide American litigants and American courts the same level of cooperation that U.S. courts provide to foreign litigants and tribunals is surely a worthy goal. Historically, foreign tribunals have resisted unilateral attempts to gain American-style discovery of information located within their borders in aid of litigation pending in the United States on several grounds: (1) as an offense to sovereignty of the foreign tribunal; (2) differing notions of privacy; and (3) differing vehicles for evidence taking.¹⁰⁶ In addition, some countries have enacted “blocking

¹⁰³ *Id.*

¹⁰⁴ *See supra* note 7 and accompanying text.

¹⁰⁵ *See id.*

¹⁰⁶ *See* Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention*, 24 INT’L LAW. 393, 395 (1990).

statutes” that bar compliance with discovery orders of American courts.¹⁰⁷ These blocking statutes may: (1) prohibit disclosure of documents to foreign courts without prior government approval; (2) invest discretionary authority with government agencies to bar compliance with particular discovery orders; and (3) either block disclosures about specified industries outright or grant administrative agencies the power to block such disclosures.¹⁰⁸ Providing reciprocal discovery to earn the good will of foreign tribunals may diminish the force of these anti-discovery arguments.

Still, the scope of the potential benefit is subject to debate. Given the strong policy reasons against allowing discovery,¹⁰⁹ skeptics might argue it is doubtful that the good will offered by U.S. courts through granting discovery in foreign cases under section 1782 would prompt foreign governments to give discovery to U.S. litigants, but deny the same to their own citizens.

2. Costs

These potential benefits of foreign cooperation and reciprocity, however, come at a potentially steep price.

a. Notice

Section 1782 contains no notice requirements. The foreign person or tribunal may seek discovery before a district judge in any district where the person from whom discovery is sought “resides or is found.”¹¹⁰ Proceedings seeking discovery under section 1782, as noted above, typically proceed *ex parte*, which, of course, means that neither the foreign tribunal itself nor the other parties to the litigation are necessarily aware of the section 1782 application.¹¹¹ Nor does anyone involved in the foreign proceedings necessarily have an opportunity to be heard before the U.S. court entertains the discovery request. The *ex parte* nature of the discovery application gives rise to a plethora of problems. Lack of notice creates obvious due process concerns. In domestic discovery

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 395, n.12.

¹⁰⁹ *See supra* note 106 and accompanying text.

¹¹⁰ 28 U.S.C. §1782(a) (2018).

¹¹¹ *See supra* note 14 and accompanying text.

involving nonparties, all parties to the litigation are entitled to notice.¹¹² Accordingly, any argument for allowing discovery under section 1782 to proceed *ex parte* would seem especially weak. The benefits are elusive and the potential unfairness is clear. Moreover, neither the foreign tribunals nor other parties to the litigation have an opportunity to object *prior* to the district courts' consideration of the discovery petition. It is no answer to say that foreign participants are protected because they can object to section 1782 discovery *after* the order is issued by the district. Once the initial discovery ruling has been entered, objectors thereto are at a serious tactical disadvantage in any attempt to revise or modify that ruling.

b. Lack of Information for the Courts

Second, the court considering the discovery petition under section 1782 only hears one side of the story and is coming to the discovery request cold. Unlike in domestic cases, where the court has been assigned the case from day one and has, through the pretrial process, developed at the very least some knowledge of the case, the courts in section 1782 cases lack the benefit of having approved a discovery plan at the initial pretrial hearing or having supervised the pretrial phase of the case and knows only what the person petitioning for discovery tells it.

The court is thus forced to make its discovery rulings in a vacuum. Under these circumstances, lacking a full picture of the case, a court will invariably face difficulty in determining whether the discovery sought is proportional to the needs of the case.¹¹³ Proportionality determinations are likely to be even more difficult where the discovery request seeks electronically stored information.

c. Inefficiency of Multiple Requests

Third, section 1782 places no limits on the number of discovery requests that can be made by a foreign litigant.¹¹⁴ Accordingly, it is

¹¹² See FED. R. CIV. P. 45(a)(4).

¹¹³ Cf. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . .").

¹¹⁴ See 28 U.S.C. § 1782(a) (2018).

possible for multiple requests, perhaps for the same information, to be made in different federal courts, simultaneously. Where such multiple requests are made, the foregoing problems relating to the ex parte nature of section 1782 requests, the judge's lack of familiarity with the facts of the case, and the difficulties in measuring proportionality are compounded. Section 1782 does not provide any mechanism for coordinating such multi-channel discovery requests. Conceivably, without any coordination, different courts could reach a different outcome on similar or identical discovery requests, thereby raising issues as to whether the process is fair. Moreover, having multiple judges making uncoordinated rulings on essentially identical discovery requests raises obvious efficiency concerns.

d. Impairing the Adversary System

Fourth, the ex parte proceedings under section 1782 undermine the adversary system. The underlying philosophy of the adversary system is that where the litigants put their respective best feet forward, the court will be in the best position to render a fair and reasoned decision. Discovery is a scion of litigation and has historically been conducted in accordance with the adversary system, that is, in rendering a decision on discovery issues, the court relies on the parties to make their best arguments in order to come to a fair and just outcome. The ex parte nature of a section 1782 petition thus robs the court of this important benefit of the adversary system.

D. Requests by Litigants v. Request by Tribunals

Section 1782 authorizes federal district courts to order discovery upon the request of a foreign tribunal or upon the application of an "interested person[.]" which may include a party or a non-party, to a foreign proceeding.¹¹⁵ Whether discovery is sought by an interested person or a foreign tribunal, discovery applications under section 1782 present distinct challenges to the district courts.

¹¹⁵ *Id.*

1. Discovery by “Interested Persons”

At first blush, a party’s application to a foreign litigation would appear analogous to party-initiated discovery that occurs daily in the federal courts, in that both under the Federal Rules of Civil Procedure and section 1782, districts courts have broad powers to authorize and oversee discovery. Nevertheless, significant differences exist in private discovery in foreign cases under section 1782 and in domestic cases under the Federal Rules. First, the federal judge hearing the section 1782 application has no knowledge of the underlying facts of the case and the information that it does receive comes from only one side because the application is *ex parte*. In addition, the court does not necessarily have the benefit of input from the foreign tribunal. In these circumstances, issues of relevance may be difficult to determine, and proportionality questions may be even more challenging. Moreover, the U.S. court would typically have no information as to whether the discovery sought would be admissible before the foreign tribunal or whether its use therein would violate the law of that country.

Second, as discussed above, the section 1782 discovery application is treated as a stand-alone action by the federal courts. Unlike discovery orders under the Federal Rules of Civil Procedure, which are interlocutory in nature and not immediately appealable as of right, section 1782 applications are treated as final judgments that may be immediately appealed.¹¹⁶ This sets the stage for potential prolonged satellite litigation that is likely to prove expensive for the litigants and disruptive to the foreign tribunal.

More problematic is the situation where the private foreign applicant under section 1782 is not a party to the proceedings in the foreign tribunal. Here, the Federal Rules of Civil Procedure provide no blueprint. Pre-litigation discovery is tightly circumscribed under Rule 27 of the Federal Rules of Civil Procedure.¹¹⁷ Where a person is not a party to an action, there is no “case or controversy” within the meaning of Article III of the Constitution, which raises serious questions regarding the applicant’s standing to seek discovery in federal court and whether the court even has subject matter

¹¹⁶ See *supra* note 57 and accompanying text.

¹¹⁷ FED. R. CIV. P. 27.

jurisdiction to entertain the application.¹¹⁸ Questions of standing and subject matter jurisdiction aside, there remain very practical questions as to whether non-party discovery would be cost-justified or would prove disruptive to the foreign tribunal.¹¹⁹

A third issue that arises where foreign discovery is sought by participants in the litigation rather than by the tribunal itself is whether the target of the discovery is a party to the proceedings. Presumably, where the target of discovery is a party to the proceedings, the foreign tribunal is fully empowered to grant or deny the discovery sought.¹²⁰ Intervention by the U.S. court in these circumstances raises the possibility that U.S. court rulings might interfere with proceedings in the foreign tribunal.

On the other hand, where the target of the discovery is a non-party, the need for assistance would seem more pressing.¹²¹ Even then, however, discovery should not be automatic. Courts need to guard against applicants' attempts to game the system using section 1782. Suppose, for example, that discovery is sought from a U.S. entity whose documents are located in the foreign forum, and the district court grants that order. U.S. courts have long held that discovery orders can be enforced extraterritorially. Suppose further that the foreign tribunal had denied discovery of the information in question. Granting the discovery application would be allowing the litigants to sidestep the strict rules of the foreign forum. If U.S. courts were to allow the discovery sought in these circumstances, it would threaten the integrity of the foreign proceedings.¹²² That fact alone would weigh heavily against an American court granting a section 1782 discovery application.

¹¹⁸ See U.S. CONST. art III, §2.

¹¹⁹ Cf. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 265-66 (noting that the European Commission had filed an amicus brief with the court stating that "it does not need or want the District Court's assistance").

¹²⁰ See *id.* at 264.

¹²¹ See *id.* (in these circumstances, the non-party may be outside the jurisdiction of the foreign tribunal and the evidence, located within the U.S., may be unobtainable in the absence of section 1782).

¹²² *Id.* at 264-65 (noting that attempts to sidestep foreign discovery restrictions weigh against permitting discovery under section 1782).

2. Discovery by a Foreign Tribunal

The situation is quite different where the discovery request emanates from the foreign tribunal. Here, there would be no doubt as to the tribunal's willingness to accept the assistance of a U.S. court and no suggestion whatsoever that the request would be an attempt to circumvent the rules of the foreign forum.¹²³ Given the fact that the request comes from a court and is non-adversarial in nature, U.S. courts tend to grant them "more or less as a matter of course."¹²⁴ Still, even though a foreign court is involved, the process is not without red flags. First, given the non-adversarial nature of the process, the appropriate parameters of the discovery request may be difficult to define. Second, to the extent American courts rubber stamp the foreign tribunal's request, they may not be carefully scrutinizing that request for issues of burdensomeness and privilege. At the same time, apart from section 1782, the Hague Evidence Convention, to which the U.S. is a party, severely restricts the reasons for denying the foreign discovery request.¹²⁵ At the end of the day, the routine granting of discovery requests by foreign tribunals is perhaps justifiable but not without risks.

E. Parity

Informational parity is an important concern of the federal civil justice system. The Federal Rules of Civil Procedure categorically reject the concept of trial by ambush.¹²⁶ Lack of access to relevant information can leave a litigant in the dark and vulnerable to surprise and thereby place that litigant at a significant disadvantage in presenting or defending its case. That not only seriously undermines the adversary system but also may lead to unfair results. In *Intel*, the Supreme Court nevertheless made clear that perceived lack of parity resulting from the operation of section 1782 is not grounds for barring foreign

¹²³ See Wang, *supra* note 5, at 2130-31.

¹²⁴ *Id.* at 2132.

¹²⁵ *Id.*

¹²⁶ See generally *Wright & Miller*, *supra* note 3, at §1029. See also *Se-Kure Controls, Inc. v. Vanguard Prods. Grp., Inc.*, No. 02 C 3767, 2007 WL 781250, at *1 (N.D. Ill. Mar. 12, 2007) ("[T]rial by ambush is incompatible with the just determination of cases on their merits.").

discovery.¹²⁷ The Court emphasized that the district courts have broad discretion to condition discovery orders granted under section 1782 on the agreement of the discovery applicant to engage in reciprocal information exchanges with its adversaries.¹²⁸ The lower courts have followed suit.¹²⁹

*F. Alternatives to Avenues of Discovery in International
Litigation*

Section 1782 is not the exclusive vehicle for foreign tribunals and litigants to obtain discovery in U.S. courts; they may also proceed via letters rogatory and the Hague Evidence Convention.¹³⁰ Discovery requests via letters rogatory or the Hague Evidence Convention both emanate from foreign governmental authorities and thus leave no doubt about a foreign tribunal's receptivity to discovery.¹³¹ Discovery requests under either route are enforced in the same manner by the Department of Justice Office of International Judicial Assistance.¹³² However, both avenues have been criticized as time-consuming, costly, and inefficient.¹³³ The Hague Evidence Convention is operative between the U.S. and only fifty-four foreign countries.¹³⁴ In addition, most foreign signatories have resisted providing pretrial discovery authorized by the Federal Rules.¹³⁵ U.S. litigants, in turn, have sought to bypass the Hague Convention by simply invoking the Federal Rules, which U.S. courts have enforced extraterritorially.¹³⁶ The Hague Evidence Convention has thus created much discord and has done little to address discovery issues in international litigation in a unified manner. In short, neither letters rogatory nor the Hague Evidence

¹²⁷ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 (2004).

¹²⁸ *Id.*

¹²⁹ See, e.g., *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995).

¹³⁰ See Wang, *supra* note 5, at 2100-102, 2104-105.

¹³¹ *Id.* at 2101, 2104.

¹³² *Id.*

¹³³ See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 542-43 (1987).

¹³⁴ See Wang, *supra* note 5, at 2104-105.

¹³⁵ See *id.* at 2105.

¹³⁶ See, e.g., *Westinghouse Elec. Corp. v. Rio Algom Ltd. (In re Uranium Antitrust Litigation)*, 480 F. Supp. 1138, 1144 (N.D. Ill. 1979).

Convention addresses issues of discovery in international litigation in a satisfactory way.

III. ASSESSMENT AND PRESCRIPTIONS

When Congress enacted section 1782 in 1948, the winds of economic change were blowing fiercely. The world stood on the cusp of an era of globalization, a period in which national borders would no longer be significant barriers to international trade and evolving globalized economies benefitted from cooperation among national legal systems—the same cooperation offered by section 1782. Nevertheless, the statute got little notice in the international community and experienced a prolonged period of dormancy. For that reason, it was relatively uncontroversial for many years. With the dawning of the twenty-first century, its usage picked up and its shortcomings became exposed. The three principal shortcomings of section 1782 are: (1) the *ex parte* nature of discovery procedures thereunder; (2) the lack of coordination between U.S. courts and foreign tribunals, and among federal courts where one person makes multiple discovery requests in different districts; and (3) lack of statutory standards governing discovery procedures and discovery limits. Set forth below are proposals for addressing these shortcomings. Although these proposed changes could, in theory, be effectuated through “best practices” guidelines, the optimal solution would be for legislative action that would assure fairness and consistency.

A. Ex Parte Proceedings

The practice of entertaining section 1782 applications *ex parte* should cease. Applicants should be required to provide notice of a section 1782 proceeding to the foreign tribunal and to all participants in the foreign proceeding. The foreign tribunal and other participants should then be given the opportunity to object to the requested discovery before the district court rules. By allowing the foreign tribunal and all participants to have input at the application stage, the district court is likely to have a fuller picture of the foreign proceeding and the context in which the discovery request has been made. In addition, the foreign tribunal would have an upfront opportunity to raise objections to U.S. discovery—

including that the tribunal would not be receptive to the requested discovery or that the section 1782 application is an attempt to circumvent the more restrictive discovery rules of the foreign tribunal. As a result, district courts could save time and effort in processing section 1782 applications.

B. Coordination

Upon receiving an application under section 1782, the federal district court should have discretionary authority to confer with the foreign tribunal as to whether the discovery sought would be welcomed by that tribunal and whether the information sought would be useful in deciding the merits of the foreign proceeding. The utility of such a conference is likely to vary from case to case; therefore, the decision as to whether to engage the foreign tribunal should be left to the sound discretion of the district court. Still, by conferring with the foreign tribunal, the district court can get a quick read as to the foreign tribunal's receptivity to the discovery sought, thereby fostering a spirit of cooperation that can help avoid misunderstandings down the road.

In addition, the district court should be required to coordinate with other district courts that have received discovery requests from the same applicant involving the same foreign proceeding. To this end, an application under section 1782 should be required to identify all districts in which discovery requests for a given foreign proceeding have been filed. Then, through procedures analogous to multi-districting under 28 U.S.C. § 1407, the matters can be transferred to one federal judge for disposition.¹³⁷ This protocol would assure fairness, consistency, and procedural efficiency in outcomes.

C. Consistency with the Federal Rules of Civil Procedure

Section 1782 allows the district court significant leeway in prescribing the practice and procedure for taking testimony or obtaining documents for use in foreign litigation:

The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the

¹³⁷ See 28 U.S.C. § 1407 (2018).

foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legal applicable privilege.¹³⁸

Thus, the district court may adopt its own practice and procedures or those of the foreign tribunal, but, absent any specific designation, the Federal Rules of Civil Procedure govern by default. However, other than specifying that privileged material is not discoverable, the statute is vague on the *content* of any discovery ordered. Thus, in construing section 1782, district courts have faced two questions: (1) whether discovery under section 1782 turns on whether the foreign tribunal would allow the discovery in question; and (2) whether the applicant must show that the information sought under section 1782 is discoverable under the Federal Rules of Civil Procedure. The Supreme Court in *Intel* answered both queries in the negative.¹³⁹ First, the Court categorically rejected any foreign discovery rule.¹⁴⁰ Instead, the Court committed the decision to grant the section 1782 application to the district court's sound discretion.¹⁴¹ Second, the Court held that the applicant need not show "that United States law would allow discovery in domestic litigation analogous to the foreign proceeding."¹⁴² In other words, the district court's discretion is not cabined by the Federal Rules of Civil Procedure.

The Court concluded that section 1782 "does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here" and that any such

¹³⁸ 28 U.S.C. § 1782(a) (2018).

¹³⁹ See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-63 (2004).

¹⁴⁰ See *id.* at 260 ("[N]othing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there.").

¹⁴¹ See *id.* at 264-65.

¹⁴² *Id.* at 263.

analysis “can be fraught with danger.”¹⁴³ In so ruling, the Court rejected Justice Breyer’s proposed “limiting principles,” which called for automatic denial of a section 1782 application where: “(1) [a] private person seeking discovery would not be entitled to that discovery under foreign law,” and “(2) the discovery would not be available under domestic law in analogous circumstances.”¹⁴⁴ Although the Court found that Justice Breyer’s test can be fraught with danger, it did not explain the danger that such an exercise would entail.¹⁴⁵ The better practice would be for the courts to limit the scope of discovery under section 1782 to the scope of discovery under the Federal Rules.¹⁴⁶ Further, courts should also require a certification as part of the section 1782 application that the discovery requested is consistent with the requirements of Rule 26(g) of the Federal Rules of Civil Procedure. That is, the discovery sought is: (1) consistent with the Federal Rules; (2) not being sought for an improper purpose; (3) not redundant or cumulative; and (4) proportional to the needs of the case.¹⁴⁷ Violations of the certification would be sanctionable. Incorporating the discovery standards under the Federal Rules of Civil Procedure into section 1782 would provide certainty, predictability, and consistency in the evaluation of section 1782 discovery applications. It would also assure comparable treatment as between discovery applications from foreign sources and domestic discovery requests.

CONCLUSION

The U.S. has a long history of aiding foreign litigants and tribunals by making discovery available through federal courts, and it is far too late in the day for Congress to exit the international litigation stage by repealing section 1782. Even if Congress were to do so, U.S. courts would still be obligated by treaty to provide assistance to foreign courts in certain cases. That said, implementation of section 1782 has created a host of conceptual and practical problems that Congress should address. The goals of

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 270 (Breyer, J., dissenting).

¹⁴⁵ *See id.* at 263 (majority opinion).

¹⁴⁶ *See* FED. R. CIV. P. 26(b)(1) (stating that discovery may be had of all matters, not privileged, relevant to a claim or defense).

¹⁴⁷ *See* FED. R. CIV. P. 26(g)(1)(B).

section 1782 could be preserved and its practical problems minimized by Congressional enactment of a slimmed-down foreign discovery option that is both fairer and more efficient than existing protocols under section 1782 as currently drafted.