
NOTE

Intel Corp. v. Advanced Micro Devices, Inc.: Putting “Foreign” Back into the Foreign Discovery Statute

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INTRODUCTION

Imagine that the plaintiffs in a lawsuit pending overseas utilize an American statute designed to facilitate the production of domestic discovery for use in foreign proceedings.¹ The plaintiffs present their discovery request to a federal district court, but the foreign tribunal involved steps in with strong objections to such evidence. The foreign tribunal argues that disclosure of such documents would jeopardize its country's sovereign rights and circumvent its criminal procedure law. The district court carefully considers the foreign tribunal's concerns in its analysis of the discovery request and eventually decides to issue the plaintiffs a denial.

This exact situation took place in the case of *In re Schmitz*.² The statute involved was 28 U.S.C. § 1782(a) (hereinafter the "foreign discovery statute").³ This statute governs the conditions under which U.S. courts may provide assistance to foreign and international tribunals and litigants before those tribunals.⁴ Its legislative purpose is to provide efficient assistance to participants in international litigation and encourage foreign countries to provide domestic courts with similar assistance.⁵ These two goals are commonly referred to as Congress's twin aims.⁶

On its face, the statute specifies the technical requirements that parties requesting discovery, parties providing discovery, and foreign tribunals must meet.⁷ However, the statute does not require the district court to consider the foreign tribunal's receptiveness when issuing a discovery order (hereinafter the "receptivity factor").⁸ As shown by the

¹ This hypothetical is based on *In re Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003).

² *Id.*

³ 28 U.S.C. § 1782(a) (2000).

⁴ *In re Edelman*, 295 F.3d 171, 175-76 (2d Cir. 2002); *In re Bayer AG*, 146 F.3d 188, 191-92 (3d Cir. 1998); *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 278 (S.D.N.Y. 2003).

⁵ *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002); *Bayer*, 146 F.3d at 191-92; *In re Malev Hungarian Airlines*, 964 F.2d 97, 99 (2d Cir. 1992).

⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2476 (2004); *In re Esses*, 101 F.3d 873, 876 (2d Cir. 1996); *Malev*, 964 F.2d at 100; John Fellas, *Obtaining Evidence Located in the U.S. for Use in Foreign Litigation: 28 USC § 1782*, in INT'L BUS. LITIG. & ARB. 2003, at 71 (PLI Litig. & Admin. Practice Course, Handbook Series No. 688, 2003).

⁷ 28 U.S.C. § 1782(a).

⁸ *Intel*, 124 S. Ct. at 2483-84 (holding that foreign receptivity factor is only one of many factors that district court may take into account when deciding section 1782 requests); *In re Schmitz*, 259 F. Supp. 2d 294, 298-300 (S.D.N.Y. 2003) (explaining that "it is legitimate to take Germany's explicitly stated sovereignty concerns into account," but stopping short of

introductory hypothetical, this factor is crucial in situations where the foreign tribunal has expressed its opposition to such discovery.⁹ In *Schmitz*, the German tribunal involved shared concerns that granting discovery would jeopardize German sovereign rights and circumvent German criminal procedure.¹⁰ The New York district court prudently considered these concerns and eventually chose to deny the discovery request, noting that granting the request in light of this information would not only fail Congress's twin aims, but also hinder them.¹¹

The twin aims were also contemplated in *In re Gianoli Aldunate*.¹² Here, the district court made an inquiry into whether discovery under section 1782(a) would circumvent Chilean law or affront Chilean sovereignty.¹³ Concerned with meeting Congress's goal of international cooperation, the Second Circuit held that considering this information was crucial to insuring that the district court was furthering, rather than hindering, the statute's purposes.¹⁴

What the district courts did in *Schmitz* and *Gianoli* was essential to meeting section 1782(a)'s congressional goal of international comity.¹⁵ Yet, under the statute, the *Schmitz* court could have ignored the foreign tribunal's protests, and the *Gianoli* court could have refused to acknowledge any Chilean law that restricted such discovery.¹⁶ In fact, in

requiring such consideration under section 1782); S. Rep. No. 88-1580, § 9 (1964), reprinted in 1964 U.S.C.A.N. 3782, 3788 (explaining that "the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country" are some factors district court has discretion to consider when presented with section 1782(a) request). In the cases of *Euromepa* and *Bayer*, the Second and Third Circuit Courts, respectively, used strong language *encouraging* district courts to treat relevant discovery materials as discoverable under the statute unless the party opposing the application could demonstrate facts sufficient to justify denial of the application. *Bayer*, 146 F.3d at 195; *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995).

⁹ *Schmitz*, 259 F. Supp. 2d at 298-99 (citing letter from German Ministry of Justice sent to district court, expressing concern that disclosure of requested documents would jeopardize German sovereign rights and circumvent German criminal procedure); see also Brief of Amicus Curiae Commission of the European Communities at 4, *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 U.S. 2466 (2004) (No. 02-572) (requesting that Supreme Court read section 1782 to exclude discovery requests predicated on Commission's investigation of alleged infringement of competition laws).

¹⁰ *Schmitz*, 259 F. Supp. 2d at 298.

¹¹ *Id.* at 298-300 (noting that it is "legitimate" under section 1782 to take country's explicitly stated sovereignty concerns into account).

¹² *In re Gianoli Aldunate*, 3 F.3d 54, 61-62 (2d Cir. 1993).

¹³ *Id.* at 61.

¹⁴ *Id.* at 62.

¹⁵ *Id.* at 61-62; *Schmitz*, 259 F. Supp. 2d at 299.

¹⁶ Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV.

the few situations where the foreign tribunals have expressed resistance to the issuance of discovery orders, most courts have refused to interpret the statute to *require* such a consideration.¹⁷ Without an explicit foreign receptivity requirement, courts cannot achieve Congress's goals of providing efficient assistance to foreign tribunals and encouraging reciprocity.¹⁸

The Supreme Court addressed the amended section 1782(a) for the first time in *Intel Corp. v. Advanced Micro Devices, Inc.*¹⁹ The Court held that parties can obtain U.S. discovery under the statute without having to show that the foreign jurisdiction would also permit the same discovery under its own rules — a concept known as foreign discoverability.²⁰ The Court also held that whether the discovery would have been available in a domestic case analogous to the foreign proceeding was immaterial.²¹ Furthermore, the Court declined to adopt requirements barring or limiting section 1782(a) discovery — including a foreign receptivity requirement — choosing instead to leave the task to the lower courts.²²

This Note argues that *Intel* misunderstands section 1782(a) with respect to foreign receptivity and that the holding will not facilitate the efficient assistance that Congress desires. By refusing to set categorical limits on section 1782(a) discovery, the Supreme Court failed to require consideration of foreign receptivity to the discovery.²³ Part I of this Note

1015, 1029 (1965) [hereinafter *International Litigation*] (stating that in exercising its discretion, district court may not only refuse discovery request, but may also grant it “upon such terms and conditions as it deems appropriate”).

¹⁷ See *supra* note 8.

¹⁸ See *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995) (holding that absent specific proof that foreign tribunal would reject evidence obtained under section 1782, Congress's twin aims should inform district court's ruling on discovery request); *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 278-79 (S.D.N.Y. 2003) (noting that because Norwegian Court specifically requested assistance of district court under section 1782, there were no Norwegian sovereignty concerns to address and granting discovery request would effectively assist Norwegian Court and encourage Norway to provide similar assistance to U.S. courts); *Schmitz*, 259 F. Supp. 2d at 295 (holding that granting section 1782 request despite foreign tribunal's clear protests against such discovery would not effectuate twin aims of statute).

¹⁹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2472-74, 2476 (2004).

²⁰ *Id.* at 2480.

²¹ *Id.* at 2482; see e.g., Richard A. Rothman, *Intel Corp. v. Advanced Micro Devices Inc. Exporting U.S. Discovery Abroad: Risks, Rewards, and Ramifications*, 51 FED. LAW. 20, 20 (2004).

²² *Intel*, 124 S. Ct. at 2483; Rothman, *supra* note 21, at 20.

²³ *Intel*, 124 S. Ct. at 2483-84.

addresses the background of the foreign discovery statute and its varying interpretations by the circuit courts.²⁴ This discussion reveals that Congress never specifically articulated a foreign receptivity requirement in the statute's legislative history.²⁵ However, considering foreign receptivity to the discovery is the logical step toward achieving Congress's goals of providing efficient assistance and encouraging international comity in light of *Intel's* resolution of the foreign discoverability issue.²⁶ Part II discusses the Supreme Court's *Intel* decision.²⁷ Part III argues that both congressional intent and international judicial cooperation require that courts read a foreign receptivity requirement into the statute.²⁸ Part III also explains the standard by which lower courts should consider a foreign tribunal's receptivity to the requested U.S. discovery.²⁹

As in the hypothetical and *Schmitz*, foreign tribunals may refuse outside discovery to safeguard their own judicial procedures.³⁰ Under *Intel*, domestic courts and the parties targeted by discovery will waste resources producing documents ultimately unwanted by the foreign tribunals.³¹ More importantly, the decision authorizes district courts to grant discovery requests that may upset foreign tribunals that make specific protests.³² To prevent these situations, the Court should read

²⁴ See discussion *infra* Part I (discussing history and current state of foreign discovery statute, followed by explanation of differing interpretations of statute by circuit courts).

²⁵ See S. Rep. No. 88-1580, § 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788.

²⁶ The *Schmitz* court reasoned that granting the section 1782(a) request in light of the German court's concerns "would not effectuate the twin aims of the statute" and would most likely "hinder the efforts of German prosecutors and courts and discourage German assistance to U.S. courts in later applications made in Germany." *In re Schmitz*, 259 F. Supp. 2d 294, 299 (S.D.N.Y. 2003).

²⁷ See discussion *infra* Part II (summarizing *Intel* facts, procedure, reasoning, and holding).

²⁸ See discussion *infra* Part III (discussing justifications for Court to read into section 1782(a) foreign receptivity requirement).

²⁹ See discussion *infra* Part III.C (explaining standard by which Court should require district courts to consider foreign receptivity standard).

³⁰ See *Schmitz*, 259 F. Supp. 2d at 299 (arguing that granting discovery request in light of German court's objections could "hinder efforts of German prosecutors and courts and discourage German assistance to U.S. courts in later applications made to Germany"); see also Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 6 ("finding that [p]ermitting discovery requests on the grounds endorsed by the court below would undermine the European Community's carefully balanced policies regarding the disclosure of confidential information").

³¹ See *supra* note 30.

³² For an example where a district court considering a section 1782 request avoided upsetting the German tribunal before which the foreign proceeding was being held, see

into section 1782(a) the requirement that lower courts must consider the foreign tribunal's receptiveness to domestic discovery.

I. BACKGROUND

28 U.S.C. § 1782(a) allows interested parties to foreign litigation to request discovery located in the United States for proceedings before a foreign tribunal.³³ The debate over this statute centers on whether the statute means just what it says or if it contains unwritten requirements.³⁴ The following background of section 1782(a) will help to shed some light on this controversy.

A. 28 U.S.C. § 1782(a)

The language of section 1782(a) has undergone significant modification over the years.³⁵ In 1964, Congress amended the foreign discovery statute by substantially increasing its scope.³⁶ The most recent version of 28 U.S.C. § 1782(a) reads:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person³⁷

The previous version of the foreign discovery statute caused uncertainties for courts and resulted in limited assistance.³⁸ Congress

Schmitz, 259 F. Supp. 2d at 297-300.

³³ 28 U.S.C. § 1782(a) (2000).

³⁴ See discussion *infra* Part I.B.

³⁵ S. Rep. No. 88-1580, § 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788-90; 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, 1 (1998) [hereinafter *American Assistance*] ("The 1964 revision of Section 1782 was a drastic one."); *International Litigation*, *supra* note 16, at 1026 (stating how 1964 revision "provid[ed] a completely new text" for 28 U.S.C. § 1782); Cynthia Day Wallace, *'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?*, 37 INT'L LAW. 1055, 1057 (2003) ("In 1964 . . . section 1782 of the U.S. Code . . . was substantially amended.").

³⁶ S. Rep. No. 88-1580, § 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788; *International Litigation*, *supra* note 16, at 1026.

³⁷ 28 U.S.C. § 1782 (2000).

³⁸ *International Litigation*, *supra* note 16, at 1026.

meant for the 1964 changes to clarify, liberalize, and enhance the assistance U.S. courts had already been providing foreign investigations under this statute.³⁹ Prior to 1964, the statute only provided for the taking of depositions for use in judicial proceedings pending in foreign courts.⁴⁰ The new amendment allows for the discovery of tangible evidence and not just testimony and statements.⁴¹ Congress also expanded the statutory definition of “foreign proceedings” to include those of foreign administrative tribunals, quasi-judicial agencies, and international tribunals.⁴² The amendment allows a section 1782(a) request to be either in the form of a letter rogatory or made directly by an “interested person.”⁴³ In addition to litigants before the tribunal, “interested person” now includes foreign and international officials and anyone with a “reasonable interest” in obtaining discovery.⁴⁴ Congress also broadened the discretion of district courts to consider section 1782(a) requests and no longer requires the foreign proceedings to be pending.⁴⁵ This amended version of the foreign discoverability statute was interpreted by the Supreme Court in *Intel*.⁴⁶

Despite the overhaul of the statute, federal circuit courts have continued to clash over its interpretation.⁴⁷ The challenges of dealing with foreign judicial systems have contributed to some courts’ reluctance to give a plain meaning reading of the statute.⁴⁸ Common reasons include reluctance to add to burdens of overtaxed courts, lack of understanding of foreign adjudicatory processes, and distrust of those processes.⁴⁹ The concerns raised by section 1782(a) and the corresponding responses have differed from circuit to circuit, hence the

³⁹ Wallace, *supra* note 35, at 1057.

⁴⁰ *International Litigation*, *supra* note 16, at 1026.

⁴¹ 28 U.S.C. § 1782; S. Rep. No. 88-1580, § 9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

⁴² See sources cited *supra* note 41.

⁴³ See sources cited *supra* note 41. A letter rogatory is the medium through which a country, speaking through its courts, requests the assistance of another country in the administration of justice in the requesting country. Fellas, *supra* note 6, at 72.

⁴⁴ 28 U.S.C. § 1782(a) (2000); *International Litigation*, *supra* note 16, at 1027.

⁴⁵ See *supra* note 26.

⁴⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2476 (2004).

⁴⁷ *American Assistance*, *supra* note 35, at 2 (explaining that statutory text is clear, but judicial unwillingness to give statute unbiased reading has generated considerable caselaw); see discussion *infra* Part I.B (discussing circuit inconsistency over whether section 1782(a) contains foreign discoverability and foreign receptivity requirements).

⁴⁸ See *American Assistance*, *supra* note 35 at 2.

⁴⁹ *Id.*

inconsistencies in the statute's interpretation.

B. Foreign Receptivity: A Consideration Few Courts Have Undertaken

Although Congress designed the 1964 amendment to section 1782(a) to rectify the previous statute's problems, these changes only generated more confusion among the courts.⁵⁰ Different circuit courts have read into the statute different requirements, none of which are mentioned in section 1782(a)'s plain language.⁵¹ Much of the caselaw on the amended version of section 1782(a) focuses on whether the statute contains a foreign discoverability requirement.⁵² As a result, a substantial portion of the *Intel* opinion is devoted to resolving this dispute.⁵³

The foreign discoverability requirement is a judicially-created concept that holds that the party seeking discovery must first show that the sought-after information is also discoverable under foreign law.⁵⁴ The First and Eleventh Circuits imposed this burden on foreign parties seeking discovery,⁵⁵ with the First Circuit justifying this by citing fairness

⁵⁰ Lower courts have struggled with defining "foreign or international tribunals" and "interested person" and determining whether judicial proceedings must be pending. See *In re Esses*, 101 F.3d 873, 875 (2d Cir. 1996) (holding that brother of person who died intestate in foreign country was "interested person" under section 1782(a) in family estate action); *In re Request for Int'l Judicial Assistance for the Federative Republic of Braz.*, 936 F.2d 702, 705-06 (2d Cir. 1991) (holding that investigation conducted by police, tax, and currency officials not adjudicatory proceeding under section 1782(a) and that adjudicative proceedings need not be pending but must be "imminent — very likely to occur and very soon to occur").

⁵¹ See *infra* notes 54-65 and accompanying text.

⁵² A number of cases interpreting section 1782(a) have addressed the existence of such a requirement. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2480 (2004); *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 668-69 (9th Cir. 2002); *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995); *In re Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993); *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

⁵³ *Intel*, 124 S. Ct. at 2480-82.

⁵⁴ *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 278 (S.D.N.Y. 2003); *American Assistance*, *supra* note 35, at 13.

⁵⁵ The First and Eleventh Circuits consistently interpreted section 1782(a) to impose a foreign discoverability requirement on the party seeking discovery. *United Kingdom*, 238 F.3d at 1319 (holding that defendants must meet foreign discoverability requirement in case where English defendants in credit card fraud conspiracy sought on appeal to compel section 1782(a) disclosure of materials related to American prosecution of alleged coconspirators); *Asta Medica*, 981 F.2d at 7 (reversing district court's grant of section 1782(a) application to foreign corporation because foreign corporation failed to show foreign discoverability of sought-after material); *Trin. & Tobago*, 848 F.2d at 1156 (affirming district

concerns.⁵⁶ On the other hand, the Second, Third, and Ninth Circuits refused to read into the statute a foreign discoverability requirement.⁵⁷ These circuits pointed to the fact that both the statute's plain language and legislative history make no mention of such a requirement.⁵⁸ These

court's grant of section 1782(a) application to Minister of Legal Affairs of Trinidad and Tobago in part because Minister of Legal Affairs had shown that material requested would also be discoverable in Trinidad and Tobago).

⁵⁶ The First Circuit explained that application of section 1782(a) without such a requirement would make fully available the liberal U.S. discovery rules to foreign litigants. *Asta Medica*, 981 F.2d at 5. Foreign parties might then be tempted to take advantage of section 1782(a) to circumvent their own more restrictive foreign laws and procedures. *Id.* at 6; see Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1018-19 (1998) (noting that pretrial discovery is unique to United States). In the meantime, American litigants might be disadvantaged because they would be dealing with the more restrictive discovery rules abroad.

⁵⁷ See *Advanced Micro Devices*, 292 F.3d at 668-69 (rejecting foreign discoverability requirement, as court could not find any indication of it in plain language of section 1782 nor in its legislative history); *Bayer*, 146 F.3d at 193 (holding that "imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute" in case where Third Circuit vacated district court's denial of section 1782(a) request to German corporation seeking discovery from American corporation for use in patent infringement action against Spanish corporations); *Metallgesellschaft*, 121 F.3d at 79 (reversing district court's denial of section 1782(a) discovery request on basis of German corporation's failure to meet foreign discoverability requirement by holding that such requirement does not exist, in accordance with *Gianoli*); *Euromepa*, 51 F.3d at 1098 (reversing district court's denial of section 1782(a) request to French litigants because Second Circuit found that statute did not contain foreign discoverability requirement, in accordance with *Gianoli*). In *Gianoli*, 3 F.3d at 58, American residents, from whom discovery was sought, argued that section 1782 contained a foreign discoverability requirement. The Second Circuit rejected this argument, thus affirming the district court's decision to grant a section 1782(a) discovery order to Chilean applicants. *Id.* at 59. The Second Circuit reasoned that Congress would have included such a requirement in the statute if it had intended such a requirement to apply. *Id.*

⁵⁸ *Advanced Micro Devices*, 292 F.3d at 669 ("We find nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding."); *Bayer*, 146 F.3d at 193 ("[I]mposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute. . . . If Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign jurisdiction, it would have done so explicitly."); *Metallgesellschaft*, 121 F.3d at 79 (citing lack of reference in section 1782(a) to requirement of discoverability under laws of foreign jurisdiction); *Euromepa*, 51 F.3d at 1098 (stating that Congress would have written it in if it had intended such requirement); *Gianoli*, 3 F.3d at 59 ("The language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction."). The Second Circuit held that, at most, foreign discoverability could serve as a useful tool in a court's consideration of a section 1782(a) request. *Metallgesellschaft*, 121 F.3d at 79-80 (explaining that district courts cannot use foreign discoverability as "such a blunt instrument" but merely "a useful tool"); see also *Euromepa*, 51 F.3d at 1098 (stating that foreign discoverability is "simply one factor that a district judge may consider in the

courts interpreted the statute to allow lower courts to exercise their discretion, and consider fairness when granting discovery requests.⁵⁹

A second area of confusion, which has received much less attention, including from the *Intel* Court, has been whether the statute should be read to encourage or require consideration of foreign receptivity.⁶⁰ Most circuits that have interpreted the foreign discovery statute have never addressed the consideration of foreign receptivity.⁶¹ Only the Second and Third Circuits have given weight to this factor, and even then, they have been reluctant to read such a requirement into section 1782(a).⁶² Instead, they use language that borders on requiring consideration of foreign receptivity.⁶³ In *In re Bayer AG*, the Third Circuit cited the twin aims of the statute when it held that “district courts should treat relevant discovery materials sought pursuant to § 1782 as discoverable *unless* the party opposing the application can demonstrate facts sufficient to justify the denial of the application.”⁶⁴ In *In re Euromepa S.A.*, the Second Circuit also cited the statute’s twin aims when it stated, “Absent specific directions to the contrary from a foreign forum, the statute’s underlying policy should generally prompt district courts to provide some form of discovery assistance.”⁶⁵

Unlike the courts that interpreted section 1782(a) to require foreign discoverability, the courts that have interpreted the statute to encourage

exercise of his or her discretion”).

⁵⁹ The Second and Third Circuits suggested that district judges could deal with these fairness concerns by crafting appropriate discovery orders that would level the playing field between American litigants in foreign courts and foreign litigants in American courts. *Bayer*, 146 F.3d at 194 (citing *Euromepa*, 51 F.3d at 1101) (listing available methods of crafting appropriate discovery order to district court facing concerns of patent unfairness in granting section 1782(a) discovery request); *In re Esses*, 101 F.3d 873, 876 (2d Cir. 1996) (holding that district court is “well-equipped” to determine scope and duration of discovery by adding reciprocal discovery order); *Euromepa*, 51 F.3d at 1101-02 (suggesting conditioning of discovery upon parties’ reciprocal exchange of information as one example of “closely tailored” discovery order that district court wishing to insure procedural parity could give); *In re Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992) (noting that, although 28 U.S.C. § 1782 is “one-way street” that grants wide assistance to others but demands nothing in return, district courts may accept offer of reciprocal discovery from party invoking section 1782, and pointing out that district courts can utilize their powers under Federal Rules of Civil Procedure to prescribe practice and procedure for discovery).

⁶⁰ Only the Second and Third Circuits addressed the issue of foreign receptivity. *Bayer*, 146 F.3d at 195; *Euromepa*, 51 F.3d at 1102; see *Gianoli*, 3 F.3d at 61-62.

⁶¹ See *supra* notes 52, 54.

⁶² See *supra* note 54.

⁶³ See *infra* notes 64-65 and accompanying text.

⁶⁴ *Bayer*, 146 F.3d at 195 (emphasis added).

⁶⁵ *Euromepa*, 51 F.3d at 1102.

consideration of foreign receptivity have done so in accordance with Congress's twin aims.⁶⁶ The difference is that, while the former courts tried to limit the statute with the express goal of making the statute less generous to foreign litigants,⁶⁷ the latter courts only limited the statute at the specific requests of foreign litigants.⁶⁸ Thus, consideration of foreign receptivity carries out Congress's intent for section 1782(a) to act as a "one-way street . . . that grants wide assistance to others, but demands nothing in return."⁶⁹

To resolve these conflicts in statutory interpretation, the Supreme Court granted certiorari in the *Intel* case.⁷⁰ Though the Court was clear in striking down the foreign discoverability requirement, it was silent on another important issue: *Intel* provided no new insight on the consideration of foreign receptivity.⁷¹

II. *INTEL CORP. V. ADVANCED MICRO DEVICES, INC.*

The circuit split over the interpretation of section 1782(a) arose in *Advanced Micro Devices, Inc. v. Intel Corp.* and led to the Supreme Court's grant of certiorari.⁷² The Supreme Court's ruling resolved the main question of whether the statute contains a foreign discoverability requirement.⁷³ It also briefly addressed the issue of how much consideration lower courts should give to the foreign court's receptivity of the sought-after discovery.⁷⁴ This opinion served as the Supreme Court's first thorough review of section 1782(a) since the 1964 amendment.⁷⁵

⁶⁶ *Bayer*, 146 F.3d at 195; *Euromepa*, 51 F.3d at 1099-1100; *Gianoli*, 3 F.3d at 61-62.

⁶⁷ The First Circuit explained in *Asta Medica* that failure to require foreign discoverability allows for situations in which the statute confines an American litigant to restricted discovery in a foreign jurisdiction. *In re Asta Medica*, 981 F.2d 1, 5-6 (1st Cir. 1992). Meanwhile, the foreign litigant gets the advantage of the United States' unlimited discovery. *Id.* at 5. The Circuit Court was also concerned that without this requirement, foreign litigants may use section 1782(a) to circumvent their own more restrictive foreign discovery laws and procedures. *Id.* at 6.

⁶⁸ See *supra* notes 64-65 and accompanying text.

⁶⁹ *In re Malev Hungarian Airlines*, 964 F.2d 97, 101 (2d Cir. 1992) (quoting Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965)).

⁷⁰ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2476 (2004).

⁷¹ See discussion *infra* Part III.

⁷² *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 668-69 (9th Cir. 2002).

⁷³ *Intel*, 124 S. Ct. at 2476.

⁷⁴ *Id.* at 2482.

⁷⁵ *Id.* at 2472-74, 2476.

Respondent Advanced Micro Devices, Inc. ("AMD") filed an antitrust complaint against petitioner Intel Corporation ("Intel") with the Directorate-General for Competition ("DG-Competition") of the Commission of the European Communities ("Commission").⁷⁶ The complaint alleged that Intel had violated European competition law by abusing its dominant position in the European market through methods like price discrimination.⁷⁷ AMD recommended that the DG-Competition seek documents Intel had produced for discovery in a private antitrust suit in an Alabama federal court.⁷⁸ The DG-Competition declined to take such action.⁷⁹ AMD then sought an order from the District Court for the Northern District of California directing Intel to produce those documents under 28 U.S.C. § 1782(a).⁸⁰

The District Court concluded that the statute did not authorize discovery of such documents.⁸¹ The Ninth Circuit reversed and remanded with instructions to rule on the application's merits.⁸² While the case was on remand in the District Court, Intel petitioned the Supreme Court for certiorari.⁸³ The Supreme Court granted certiorari in view of the circuit split on the question of whether section 1782(a) contains a foreign discoverability requirement.⁸⁴ The issue was whether the requesting party's inability to obtain the same documents if located in the foreign jurisdiction would bar the discovery order.⁸⁵

The Supreme Court held that the statute does not impose such a foreign discoverability requirement.⁸⁶ There is no mention of such a rule in the statutory text.⁸⁷ In addition, legislative history does not indicate that Congress intended to impose this rule on the provision of assistance under section 1782(a).⁸⁸ Intel pointed out two policy concerns in support of a foreign discoverability requirement: avoiding offense to foreign

⁷⁶ *Id.* at 2472.

⁷⁷ *Id.* at 2475.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2476.

⁸⁴ *Id.*

⁸⁵ *Id.* at 2480.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 2481.

governments and maintaining parity between litigants.⁸⁹ The Court acknowledged that these comity and parity concerns were important for district courts to consider when exercising their discretionary section 1782(a) power.⁹⁰ Yet, the Court explained that these concerns did not permit it to insert a generally applicable foreign discoverability rule into the statutory text.⁹¹ By sticking to the plain meaning of the statute, the Supreme Court rejected the argument that section 1782(a) contains a foreign discoverability requirement.⁹²

After resolving the foreign discoverability question, the Court struck down Intel's remaining arguments, thus recognizing AMD's ability to make the discovery request.⁹³ The Court found that complainants like AMD are "interested persons" within the meaning of the statute.⁹⁴ The Court also found the Commission to be a "foreign or international tribunal" within the meaning of the statute.⁹⁵ In addition, the Court held that, since the codification of the 1964 amendment, section 1782(a) no longer requires an adjudicative proceeding to be pending.⁹⁶ In the present case, the Court held that a dispositive ruling by the Commission (reviewable by European courts) simply has to be within reasonable contemplation.⁹⁷ Also, the court found that the statute does not require the requesting party to show that U.S. law would allow discovery in domestic litigation analogous to the foreign proceeding.⁹⁸ The Court's interpretation of the statute thus increased the opportunities in which parties could invoke section 1782(a).⁹⁹

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2480-82.

⁹³ *Id.* at 2478-84.

⁹⁴ *Id.* at 2478 (holding that complainant who triggers European Commission investigation "possesses a reasonable interest in obtaining [judicial] assistance" and, therefore, qualifies as "interested person").

⁹⁵ *Id.* at 2479 (holding that European Commission qualifies as "foreign or international tribunal" to extent it acts as "first-instance decisionmaker, from § 1782(a)'s ambit").

⁹⁶ *International Litigation*, *supra* note 16, at 1026.

⁹⁷ *See Intel*, 124 S. Ct. at 2479-80 (explaining that foreign tribunal must eventually use sought-after evidence in adjudicative proceeding, but adjudicative proceeding itself does not have to be pending).

⁹⁸ *See id.* at 2482 (stating that section 1782 is provision for assistance to foreign tribunals and does not direct American courts to engage in comparative analysis of their own discovery provisions).

⁹⁹ *See id.* at 2472-73 (allowing more section 1782(a) applicants by loosening statutory requirements for eligible tribunals, interested parties, and foreign proceedings and by striking down any foreign discoverability requirement).

Lastly, the majority listed a few factors district courts *could* take into consideration when presented with a section 1782(a) request: 1) the nature of the foreign tribunal, 2) the character of the proceedings abroad, and 3) the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance.¹⁰⁰ The Court refused to make foreign receptivity a required consideration and provided no further guidance on it.¹⁰¹ Instead, the Court essentially read section 1782(a) to authorize district courts to assist a complainant in a Commission proceeding leading to a dispositive ruling. By affirming the Ninth Circuit's ruling, the Supreme Court gave AMD another chance to have its section 1782(a) request reviewed in district court.¹⁰² Unfortunately, the Court failed to provide clear guidance on the foreign receptivity question.¹⁰³

III. ANALYSIS

The Supreme Court's decision in *Intel* did not go far enough in providing direction to the lower courts applying section 1782(a). Its failure to fully address the foreign receptivity factor will result in inconsistencies among the circuit courts. The Court only listed foreign receptivity as one factor that district courts may consider.¹⁰⁴ In doing so, the Court failed to provide additional guidance on the issue.¹⁰⁵ Also, *Intel* neglects to satisfy Congress's twin aims because of the Court's oversight on the foreign receptivity issue.¹⁰⁶ From a foreign tribunal's

¹⁰⁰ See *id.* at 2483 (listing "receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance," nature of foreign tribunal, and character of proceedings underway abroad as factors federal courts presented with section 1782(a) may take into account).

¹⁰¹ *Id.*

¹⁰² Upon remand, the district court judge rejected AMD's discovery request, stating that it was "unduly intrusive and burdensome," especially in light of the fact that the European Commission had determined that the documents were both unwanted and unlikely to be reviewed. *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at *2-3 (N.D. Cal. Oct. 4, 2004).

¹⁰³ *Intel*, 124 S. Ct. at 2483 (holding that consideration of foreign receptivity is neither required nor prohibited).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* This was the extent of the guidance the Supreme Court provided to the circuit courts, some of which had weighed the importance of the foreign receptivity factor differently. See discussion *supra* Part I.B (explaining circuit confusion regarding whether foreign receptivity factor is required by section 1782(a) and, if so, how to apply such a requirement).

¹⁰⁶ See Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 16-18, for a discussion of the Commission's strong opposition to being classified as a

perspective, U.S. courts cannot truly provide efficient assistance without consistently giving receptivity to the requested discovery due consideration.¹⁰⁷ Because the Court's holding in *Intel* fails to make this consideration a requirement, the decision invites district courts to offend foreign tribunals.¹⁰⁸

A. *To Fulfill Congressional Intent, Courts Must Read Section 1782(a) to Require Consideration of the Receptivity Factor*

To achieve Congress's twin aims, the Supreme Court should have read into section 1782(a) a foreign receptivity requirement.¹⁰⁹ This means that when a litigant presents the district court with a discovery request, the court must consider whether the foreign tribunal desires such assistance.¹¹⁰ This would allow the foreign tribunal to exercise its discretion in accepting or rejecting evidence before it is ordered under section 1782(a).¹¹¹ The Court would maximize the efficiency Congress desired by making the foreign tribunal's receptivity a deciding factor in section 1782(a) requests.¹¹²

A receptivity factor would prevent wasteful situations in which the

"tribunal" within the meaning of 28 U.S.C § 1782(a). The Commission argues that such a classification would burden it with the responsibility of having to monitor all section 1782 requests involving the Commission. *Id.* This heavy burden would set a bad tone between the Commission's relations with U.S. courts. *Id.*

¹⁰⁷ See *id.* at 4-5, 14 (explaining that each time discovery request involving Commission is made that might threaten circumvention of Commission policies, Commission would have to make concerns clear to district court, which may or may not decide to consider these concerns).

¹⁰⁸ See *id.* at 14-18 (stating that "[c]omity is sorely lacking in such a scheme" where Supreme Court would designate Commission as "tribunal" within meaning of section 1782 and require it to police such discovery requests before all district courts, and hinting that "each adverse decision by an individual district court will be a potential irritant in relations between these important allies").

¹⁰⁹ See *id.* for the Commission's explanation as to why it does not want the discovery requested by AMD. The Commission first and foremost would prefer that the Supreme Court not categorize it as a "tribunal" under section 1782, it follows then that the Commission would also prefer that the Court at least require district courts to consider the concerns of unreceptive tribunals like the Commission when deciding section 1782 requests. *Id.*

¹¹⁰ *Id.*

¹¹¹ *American Assistance*, *supra* note 35, at 8.

¹¹² See Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 16-18, where the Commission has made it clear that it does not want the discovery requested by AMD. Requiring the district court to consider this fact would prevent any wasteful situation where the district court would grant the discovery despite the Commission's concerns, only to have it ultimately reject the discovery. *Id.*

court and those targeted by the discovery request gather documents that the foreign tribunal will reject.¹¹³ The *Intel* Court reasoned that a foreign tribunal's reluctance to order the discovery did not necessarily signal resistance to receiving section 1782(a) discovery.¹¹⁴ However, the Commission specifically stated in an amicus curiae brief its resistance to the receipt of such materials.¹¹⁵ Thus, the Court's reasoning is mistaken because, in addition to not requesting the discovery, the Commission submitted a brief detailing its opposition to it.¹¹⁶

The Commission also expressed strong concerns that categorizing it as a tribunal would directly threaten its enforcement mission in competition law and other regulatory responsibilities.¹¹⁷ The Court's categorization of the Commission as a tribunal placed it within the meaning of "foreign tribunal" under section 1782(a).¹¹⁸ The Court's holding failed to address this situation in which the foreign tribunal felt that its categorization as such would ultimately undermine its own judicial procedures.¹¹⁹

Instead, the Court minimized the Commission's concerns.¹²⁰ The Court stated that it was unclear if the amicus brief meant the Commission "never" or "hardly ever" wanted assistance from U.S. courts.¹²¹ The Court's response ignored the fact that the Commission stated that it did not want assistance in this specific case.¹²² Why the

¹¹³ *In re Schmitz*, 259 F. Supp. 2d 294, 298 (S.D.N.Y. 2003) serves as an example where the district court avoided such a wasteful situation by rejecting a section 1782(a) request. Here, the German Ministry of Justice sent a letter clearly asking the district court to refrain from granting this discovery request that would jeopardize German sovereign rights and circumvent German criminal procedure. *Id.* By making foreign receptivity only a factor discretionary to district courts, *Intel* foreshadowed a possible rejection of section 1782 evidence by the European Commission if, on remand, the district court had decided to grant the request. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2483 (2004); Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 4.

¹¹⁴ *Intel*, 124 S. Ct. at 2481.

¹¹⁵ Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 4.

¹¹⁶ *Id.* at 3-5.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Intel*, 124 S. Ct. at 2479.

¹¹⁹ Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 2; see e.g., *In re Schmitz*, 259 F. Supp. 2d 294, 298 (S.D.N.Y. 2003) (arguing that "twin aims" are not being met if district court granted discovery request despite German court opposing these documents on grounds of jeopardizing German sovereign rights and circumventing German criminal procedure law).

¹²⁰ *Intel*, 124 S. Ct. at 2484.

¹²¹ *Id.*

¹²² Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at

Court could not recognize this and respond to the Commission's concerns is unclear. By failing to acknowledge the wasteful order of discovery that the Commission warned of, the majority made such a situation possible here.¹²³

Although *Intel* was headed back to the district court for a final discovery ruling, the Court should have provided clearer direction on the issue of foreign receptivity for that court.¹²⁴ The Court could have at least recognized the Commission's amicus brief as an example of what to consider under the receptivity factor.¹²⁵ Instead, the majority stated that it was unclear whether the amicus brief was representative of other Commission-like international entities' views on section 1782(a).¹²⁶ The problem with this response is that the Commission was not seeking to speak for other foreign tribunals, nor did it have to.¹²⁷ It would be unreasonable to expect the Commission to defend all subsequent foreign tribunals against a discovery order threatening their regulatory powers.¹²⁸ The Court's treatment of the brief glossed over the Commission's concerns and passed up the opportunity to remedy them with application of the receptivity factor.¹²⁹

One might argue that the Court's inclusion of foreign receptivity as one of a few factors to consider is enough.¹³⁰ The assumption is that lower courts are competent to give this factor due consideration in each section 1782(a) request they receive.¹³¹ This seems to be the assumption upon which the Court grounds its opinion, as it leaves this factor to the

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¹²³ See *id.* at 4.

¹²⁴ See *infra* notes 128-33 and accompanying text (explaining *Intel*'s potential to cause continued circuit split between lower courts over foreign receptivity).

¹²⁵ The discussion in Part III.C, *infra*, focuses on what type of evidence courts should focus on when considering a foreign tribunal's receptivity to the requested discovery. The Supreme Court could have used the Commission's clearly worded amicus brief as an example of authoritative proof of receptivity for lower courts.

¹²⁶ *Intel*, 124 S. Ct. at 2482.

¹²⁷ See Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 1-3.

¹²⁸ *Cf. id.* (mentioning that expansive interpretation of section 1782 could become threat to foreign sovereigns, but detailing only specific threat to Commission).

¹²⁹ See *Intel*, 124 S. Ct. at 2483-84 (acknowledging fact that Commission "does not need or want the District Court's assistance," but providing no guidance on what district court should do with this clear opposition to evidence).

¹³⁰ The *Intel* Court seems to assume that, aside from being told which factors can be considered, district courts do not need to be told how to apply these factors. *Id.*

¹³¹ See *id.* at 2483 (showing that Court's sparse guidance on receptivity factor assumes competency of lower courts to apply factor).

discretion of lower courts.¹³²

In reality, however, lower courts will probably continue to apply the Court's holding as they did prior to this decision.¹³³ *Intel* simply tells lower courts that the receptivity factor is discretionary, but provides no comment on the circuits' past exercises of such discretion.¹³⁴ Without any more guidance than they had before *Intel*, the circuit courts are unlikely to change their attitudes toward application of the receptivity factor.¹³⁵ For example, Second and Third Circuit courts will most likely give the receptivity factor more consideration than other circuits will.¹³⁶ This is a factor that these two circuits had already contemplated prior to the *Intel* decision.¹³⁷ In the meantime, the remaining circuits, which have not addressed this issue, may give this factor varying degrees of deference or no deference at all.¹³⁸ The result is that the first set of courts may encourage international judicial cooperation, while the second set may cause international friction.¹³⁹ Achieving Congress's goals of international comity depends greatly upon the degree of consideration courts give to foreign receptivity.¹⁴⁰ Meeting these goals and solving the circuit inconsistency calls for clearer guidelines than what the Supreme Court provided.

A solution to this potential circuit split is to include the receptivity

¹³² See *id.* (leaving lower courts to apply receptivity factor to their discretion).

¹³³ See discussion *supra* Part I.B (explaining circuit confusion over whether section 1782(a) contains foreign receptivity requirement and how to apply requirement).

¹³⁴ *Intel*, 124 S. Ct. at 2483.

¹³⁵ See *supra* notes 61-65 and accompanying text (discussing circuits' attitudes toward receptivity factor prior to *Intel*).

¹³⁶ See *In re Bayer AG*, 146 F.3d 188, 195 (3d Cir. 1998) and *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995), where the Second and Third Circuits addressed the receptivity factor.

¹³⁷ See *supra* note 130.

¹³⁸ Circuits other than the Second and Third have not addressed the receptivity factor, so it is unclear how these other circuits will apply the receptivity factor in the future.

¹³⁹ See discussion *supra* Part III.A (explaining why failure to consider foreign receptivity will hinder Congress's twin aims).

¹⁴⁰ See *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 279 (S.D.N.Y. 2003) (granting Norwegian court's request for section 1782(a) discovery would effectively assist Norwegian court and encourage that court to provide similar assistance to our courts in future); *In re Schmitz*, 259 F. Supp. 2d 294, 299 (S.D.N.Y. 2003) (stating that granting section 1782(a) under circumstances where German entity has made its concerns about requested discovery clear would not effectuate statute's twin aims); Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 16 ("[T]he federal courts should apply a strong presumption against any interpretation [of section 1782(a)] that undermines international comity.").

factor as a judicial requirement of section 1782(a).¹⁴¹ To do so would provide uniformity and clarity to district courts and foreign tribunals, therefore achieving the efficient international cooperation desired by Congress.¹⁴² Part III.C below will discuss how the Court should impose such a foreign receptivity requirement.

B. Without a Section 1782(a) Requirement that District Courts Consider Foreign Receptivity, the Intel Decision Inhibits International Judicial Cooperation

Making the receptivity factor a section 1782(a) requirement would counteract *Intel's* hindering effect on international judicial cooperation. The Court's holding in *Intel* can lead to results opposite to those foreign authorities desire, thereby promoting disharmony between American and foreign courts.¹⁴³ The Commission submitted its brief in *Intel* to prevent problems that would multiply for its enforcement mission if the Court wrongly construed section 1782(a).¹⁴⁴ Each time an unwanted discovery request is made, the Commission will have to prove overriding concerns of subversion of its own laws.¹⁴⁵ The Commission will have to monitor and appear in district court proceedings throughout the United States to explain its interests in blocking discovery requests.¹⁴⁶ Consideration of such evidence, however, is only discretionary to the district courts.¹⁴⁷ There is no way to ensure that district courts will reward the Commission's efforts.¹⁴⁸ Requiring the Commission to shoulder this burden is therefore unreasonable.¹⁴⁹

¹⁴¹ *Bayer*, 146 F.3d at 195.

¹⁴² *See Nedenes*, 216 F.R.D. at 278-79 (noting that because Norwegian Court specifically requested assistance of district court under section 1782, there were no Norwegian sovereignty concerns to address and granting discovery request would effectively assist Norwegian Court and encourage Norway to provide similar assistance to U.S. courts).

¹⁴³ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2485 (2004) (Breyer, J., dissenting).

¹⁴⁴ Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 2-3.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 6-7.

¹⁴⁷ *Intel*, 124 S. Ct. at 2483.

¹⁴⁸ *See id.* (concluding that because receptivity factor is discretionary, it will not guarantee that district courts will respond to Commission's section 1782(a) objections).

¹⁴⁹ Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 17. As the Commission argues in its amicus brief, such a responsibility subjects the Commission to "burdens and indignities." *Id.* at 5. In addition, the *Intel* decision leaves no guarantee that each district court will reward the Commission's efforts. *See id.* at 17.

In circumstances like the one in *Schmitz*, foreign tribunals are explicitly opposed to the aid of discovery under section 1782(a).¹⁵⁰ The Supreme Court's decision in *Intel* inadequately deals with such situations.¹⁵¹ The *Schmitz* court had the foresight to give the foreign tribunal's receptiveness due deference in light of Congress's twin aims.¹⁵² The *Gianoli* court also recognized these twin aims in its holding.¹⁵³ However, the *Intel* decision does not promise such treatment by a district court.¹⁵⁴ In fact, any other treatment would engender frustration and anger from a foreign tribunal that has openly communicated opposition toward section 1782(a) discovery.¹⁵⁵ *Schmitz* shows that such opposition is possible, while, unfortunately, *Intel* does not guarantee a proper response.¹⁵⁶

Opponents of making the receptivity factor a requirement might say that it gives too much deference to foreign desires. Such a requirement might allow foreign courts to interpret section 1782(a). For example, by simply submitting an opposing letter to the district court, a foreign entity can potentially exercise control over the discovery request.¹⁵⁷ Some

¹⁵⁰ *In re Schmitz*, 259 F. Supp. 2d 294, 298 (S.D.N.Y. 2003).

¹⁵¹ *Intel*, 124 S. Ct. at 2486-87 (Breyer, J., dissenting) (arguing that, in order to serve statute's comity interests, Court should pay deference to Commission's characterization of its own functions when Commission insists that it is not tribunal within scope of section 1782(a)).

¹⁵² *Schmitz*, 259 F. Supp. 2d at 299.

¹⁵³ *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993). For another case where the district court was mindful of Congress's twin aims, see *In re Letter Rogatory from Nedenes District Court, Norway*. *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 278-79 (S.D.N.Y. 2003). Here the court noted that because the Norwegian Court had specifically requested assistance from the district court under section 1782, there were no Norwegian sovereignty concerns to address. *Id.* Thus, granting the discovery request would effectively assist the Norwegian Court and encourage Norway to provide similar assistance to U.S. courts in the future. *Id.*

¹⁵⁴ *Intel*, 124 S. Ct. at 2483.

¹⁵⁵ See Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 2-3, for an example of where the foreign entity clearly opposed section 1782 discovery and hinted at international relations problems if the district court ignores the opposition. See also *Gianoli*, 3 F.3d at 62 (citing district court's concern that discovery under section 1782 might be "affront" to Chilean court or Chilean sovereignty); *Schmitz*, 259 F. Supp. 2d at 298 (holding that ignoring Germany's explicitly stated sovereignty concerns would discourage foreign countries from heeding any similar sovereignty concerns expressed by our courts to foreign courts).

¹⁵⁶ Compare *Schmitz*, 259 F. Supp. 2d at 298 (demonstrating that situations can exist in which foreign tribunal clearly opposes section 1782(a) discovery), with *Intel*, 124 S. Ct. at 2484 (failing to guarantee that foreign tribunal's clearly expressed section 1782(a) opposition will be heeded).

¹⁵⁷ See *Schmitz*, 259 F. Supp. 2d at 298-99 (showing how one foreign tribunal's clearly

might view this as affording these foreign entities too much power in interpreting an American statute and deciding discovery requests in American courts.

The problem with this argument is that section 1782(a) involves relations with a foreign tribunal.¹⁵⁸ Therefore, courts cannot interpret this statute as if it were a typical statute limited to domestic matters. A district court must give some degree of consideration to the foreign court's opinion.¹⁵⁹ To meet Congress's twin aims of facilitating international comity, this consideration should take the form of the receptivity requirement.¹⁶⁰ Yet, the Supreme Court held that the statute does not require district courts to consider evidence that a foreign tribunal opposes the discovery.¹⁶¹ Ironically, the *Intel* decision helps to obstruct the international comity that Congress intended to create through section 1782(a).

Also, any concerns that a simple letter or informal statement from the foreign tribunal to the district court might be able to determine the outcome of a discovery request are addressed in Part III.C below, which sets the standard by which courts should consider foreign receptivity. Finally, once the foreign tribunal expresses its receptiveness toward section 1782(a) discovery and the district court duly considers it, the district court judge still has the discretion to decide how much weight to give this factor and whether to grant or deny the discovery order. The foreign receptivity requirement requires only that the district court *consider* receptivity; it does not require the court to deny the discovery order. Thus, adoption of a foreign receptivity requirement helps foreign tribunals without threatening the section 1782(a) discretionary power of district court judges.

C. Adopting the Authoritative Proof Standard

If the courts adopt a foreign receptivity requirement, then questions of

expressed opposition to section 1782(a) discovery helped to determine fate of discovery request).

¹⁵⁸ 28 U.S.C. § 1782 (2000).

¹⁵⁹ *In re* Letter Rogatory from Nedenes Dist. Court, Nor., 216 F.R.D. 277, 279 (S.D.N.Y. 2003); *Schmitz*, 259 F. Supp. 2d at 298.

¹⁶⁰ *Cf. Schmitz*, 259 F. Supp. 2d at 298 (stopping short of making foreign receptivity requirement of section 1782(a), but holding that failing to acknowledge foreign concerns would undermine statute's twin aims).

¹⁶¹ *Intel*, 124 S. Ct. at 2483.

how courts should apply it arise.¹⁶² The primary question is how district courts are to ascertain whether or not the foreign tribunal will be receptive to the section 1782(a) discovery.¹⁶³ Neither the statutory text nor its legislative history requires courts to conduct independent examinations of foreign discovery law.¹⁶⁴ In fact, the Second Circuit has held that an extensive examination of foreign discovery law is not desirable when considering foreign receptivity.¹⁶⁵ The court deemed such an approach costly, time consuming, and an inherently unreliable method of deciding section 1782(a) requests.¹⁶⁶ Judges would be inefficient if they devoted their time and resources to the difficult task of gaining a sufficient understanding of foreign discovery law.¹⁶⁷ This approach also poses the danger that district judges will give biased or conflicting interpretations of foreign law.¹⁶⁸ The drafters of section 1782(a) recognized these problems as “a veritable Pandora’s box.”¹⁶⁹ Requiring district courts to make such inquiries could lead to unduly expensive and time consuming fights about foreign law.¹⁷⁰ For American courts to engage in such tasks under the statute would be both undesirable and inappropriate.¹⁷¹

The solution is to adopt the Second Circuit’s “authoritative proof” approach, first set out in *Euromepa*.¹⁷² The circuit set this as the standard by which district judges are to consider foreign receptivity.¹⁷³ Specifically, a district court must consider receptivity to section 1782(a) discovery only when the tribunal provides authoritative proof that it would reject such evidence.¹⁷⁴ Such proof can take the form of judicial, executive, or legislative declarations that specifically address the use of evidence gathered under foreign procedures.¹⁷⁵ The existence of

¹⁶² *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995).

¹⁶³ *Id.* at 1099-1100 (addressing whether courts should undertake their own inquiry into laws of foreign jurisdiction).

¹⁶⁴ 28 U.S.C. § 1782 (2000); *Euromepa*, 51 F.3d at 1099.

¹⁶⁵ *Euromepa*, 51 F.3d at 1099.

¹⁶⁶ *Id.* at 1099-1100.

¹⁶⁷ *Fellas*, *supra* note 6, at 93.

¹⁶⁸ *Euromepa*, 51 F.3d at 1099.

¹⁶⁹ Hans Smit, *Recent Developments In International Litigation*, 35 S. TEX. L. REV. 215, 235 (1994) [hereinafter *Recent Developments*].

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Euromepa*, 51 F.3d at 1100.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

authoritative proof does not mean that a district judge must automatically reject the section 1782(a) request. Rather, it serves as the only type of foreign receptivity proof that a judge may consider in exercising the discretion granted by the statute.¹⁷⁶ In the absence of this type of clear directive, district courts should fall back on the twin aims that Congress has provided.¹⁷⁷ Adoption of this authoritative proof standard eliminates any need for district courts to conduct their own inquiries into foreign discovery law.¹⁷⁸

One drawback to the authoritative proof standard is the burden it places on foreign tribunals to respond to each section 1782(a) request.¹⁷⁹ The European Commission made its distaste for this situation clear in an amicus curiae brief in *Intel*.¹⁸⁰ It argued that a case-by-case approach would oblige foreign governments to appear regularly in U.S. courts to fight each unwanted discovery request.¹⁸¹ Such situations would be contrary to principles of international comity.¹⁸²

However, the Commission's suggestion that its amicus brief serve as a blanket rejection of other similar section 1782(a) requests is a poor solution.¹⁸³ Each discovery request is different and possesses its own merits. Due to the highly discretionary nature of the statute, judges may find that some requests are more acceptable than others.¹⁸⁴ Therefore, using an authoritative rejection from a foreign tribunal as a blanket rejection of all section 1782(a) requests from that country would be ill-

¹⁷⁶ S. Rep. No. 88-1580, § 9 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788 (“[Section 1782(a)] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable.”).

¹⁷⁷ *Euromepa*, 51 F.3d at 1100.

¹⁷⁸ *Id.* at 1099-1100.

¹⁷⁹ For an example of such a burden, see Brief of Amicus Curiae Commission of the European Communities, *supra* note 9, at 17.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 4 (asking Supreme Court to read section 1782(a) to “exclude discovery requests predicated on the Commission’s investigation and evaluation of alleged infringement of competition laws.”).

¹⁸⁴ The circuit split over whether the statute contained a foreign discoverability requirement demonstrates the discretionary nature of section 1782(a). *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998) (holding that statute contains no foreign discoverability requirement); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995) (same); *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992) (holding that statute contains foreign discoverability requirement); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (same).

advised.

Lastly, foreign tribunals are best suited to educate American courts on their discovery laws and should speak up when parties file objectionable discovery requests.¹⁸⁵ A foreign tribunal is the ultimate judge of whether it can properly use the obtained discovery in its own forum.¹⁸⁶ Moreover, American courts are ill-equipped to conduct in-depth investigations into foreign discovery law whenever parties make a section 1782(a) request.¹⁸⁷ Thus, it would be simpler for the foreign tribunal to respond to an unwanted discovery request with a declaration explaining its objections.¹⁸⁸ Even if an unreceptive foreign tribunal refuses to make the authoritative proof showing, it can still reject the evidence produced under section 1782(a).¹⁸⁹ Therefore, the fact that a foreign tribunal can choose whether to respond to the request minimizes the burden mentioned by the Commission.¹⁹⁰

CONCLUSION

The Supreme Court's holding in *Intel* insufficiently clarified how courts should treat foreign receptivity in a section 1782(a) discovery request. Although it categorically resolved the confusion over foreign discoverability, the Court dedicated only a sentence to the issue of foreign receptivity, listing it as merely one of a few factors district courts may consider with a section 1782(a) request.¹⁹¹ Without foreign receptivity as a requirement, however, lower courts will continue to disagree over how much consideration to give that factor.¹⁹² Inconsistent

¹⁸⁵ See *Euromepa*, 51 F.3d at 1099-1100 (stating that it would be unwise for district courts to try and interpret foreign discovery law, while it would be "helpful and appropriate" for foreign tribunals to provide guidance of their own discovery laws when trying to oppose section 1782(a) requests); *Recent Developments*, *supra* note 169, at 235 (arguing that, without proper understanding of "the subtleties of the applicable foreign system," it would be wholly inappropriate for district court to try and obtain this understanding on its own for purpose of considering section 1782(a) request).

¹⁸⁶ *American Assistance*, *supra* note 35, at 8.

¹⁸⁷ See *supra* note 185.

¹⁸⁸ *Id.*

¹⁸⁹ See *Recent Developments*, *supra* note 169, at 235 (noting that drafters of section 1782 wished to make American discovery "available" to foreign litigants and tribunals, leaving ultimate decision to accept or reject such discovery with foreign tribunal).

¹⁹⁰ *Id.*

¹⁹¹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2483 (2004).

¹⁹² See discussion *supra* Part III.A (arguing that because *Intel* provided little guidance to lower courts regarding foreign receptivity factor, lower courts will most likely continue to apply that factor in same way as before *Intel*).

results from discovery requests involving foreign tribunals will only hamper attempts at international comity.¹⁹³ *Intel* will not achieve Congress's goals of providing efficient assistance to international litigation participants and encouraging similar assistance from foreign countries to our courts.¹⁹⁴

The solution that both fulfills congressional intent and brings about international judicial cooperation is for courts to read a foreign receptivity requirement into section 1782(a).¹⁹⁵ To avoid misapplication of the statute, courts should limit this reading to authoritative proof that the foreign tribunal will reject the section 1782(a) discovery.¹⁹⁶ Absent such a clear directive from the foreign tribunal, the twin aims of the statute should guide the district courts.¹⁹⁷ The drawback to this approach is the apparent burden it places on foreign courts to provide authoritative proof.¹⁹⁸ This burden only exists, however, when the tribunal is hostile to the section 1782(a) discovery and decides to respond.¹⁹⁹ If the tribunal chooses not to respond and the district court orders discovery, the tribunal can always refuse to accept such evidence.²⁰⁰ The interests of efficiency, however, require foreign tribunals to educate American courts about foreign discovery laws and to speak up against unwanted discovery.²⁰¹ This guidance would alleviate strain on district courts, save valuable time and resources, and promote international comity at a time when world events suggest it is lacking.²⁰² Until the Supreme Court adds a foreign receptivity

¹⁹³ *Id.*

¹⁹⁴ *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002).

¹⁹⁵ See discussion *supra* Part III.A-B (arguing that Court should read foreign receptivity requirement into section 1782(a) in order to fulfill Congress's twin aims).

¹⁹⁶ See discussion *supra* Part III.C (explaining standard by which courts should apply foreign receptivity requirement).

¹⁹⁷ *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2d Cir. 1995); see *In re Letter Rogatory from Nedenes Dist. Court, Nor.*, 216 F.R.D. 277, 278-79 (S.D.N.Y. 2003) (noting that because Norwegian Court specifically requested assistance of district court under section 1782(a), there were no Norwegian sovereignty concerns to address and granting discovery request would fall in line with Congress's twin aims).

¹⁹⁸ See discussion *supra* Part III.C (addressing argument against requiring foreign tribunals opposing section 1782(a) requests to provide district courts with authoritative evidence that foreign tribunals will reject such evidence).

¹⁹⁹ See discussion *supra* Part III.C (explaining that any burden placed on foreign tribunal by section 1782(a) request only exists if foreign tribunal is hostile to request and decides to reply).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *American Assistance*, *supra* note 35, at 2 (discussing district courts' lack of time

requirement to 28 U.S.C. § 1782, the statute will not live up to its congressional purpose.

and resources and confusion regarding foreign adjudicatory processes when facing section 1782(a) requests).