

**A COMPARATIVE LAW ANALYSIS OF
U.S. JUDICIAL ASSISTANCE**

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ABSTRACT

This thesis analyzes 28 U.S.C. §1782 from a comparative point of view, and highlights the problems with the statute that become quite apparent when comparing the statute with its common law counterparts. I have chosen England and Canada as comparative jurisdictions because they are common law jurisdictions with at least some pre-trial discovery, judicial assistance statutes, and developed caselaw regarding these issues. The main deficiencies of §1782 that a comparative analysis brings to light are its anti-comity implications, its unfairness to U.S. defendants, and its refusal to acknowledge worldwide distaste toward U.S. style discovery. A simple solution to §1782's current problems would be to allow only foreign courts and tribunals to request judicial assistance, as opposed to any interested person.

RÉSUMÉ

La présente thèse adopte une approche comparative à la fois pour analyser l'article 1782 de l'U.S.C. 28 et pour souligner les problèmes qui surviennent lorsque cette loi est comparée à ses pendants des pays régis par la common law. Le Canada et l'Angleterre se sont imposés en tant que pays comparables puisque ces derniers sont régis par la common law, procèdent à des enquêtes préalables, disposent de lois sur l'entraide judiciaire et d'une jurisprudence détaillée faisant état des problèmes qui y sont liés. Aussi, l'emploi d'une méthode comparative a permis de révéler les principales lacunes de l'article 1782, soit ses conséquences néfastes sur la courtoisie entre tribunaux, son injustice à l'égard des inculpés américains et son refus de reconnaître le malaise éprouvé mondialement envers les techniques employées par les États-Unis pour recueillir des

éléments de preuve. Par ailleurs, une solution simple aux problèmes actuels de l'article 1782 consisterait à permettre uniquement aux cours et aux tribunaux étrangers de réclamer l'entraide judiciaire, plutôt que de le permettre à toute personne intéressée.

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INTRODUCTION

The U.S. civil justice system is unique in many respects, from elaborate pre-trial procedure to the use of biased experts and the absence of a cost shifting mechanism between parties. Perhaps the United States' most unique characteristic is its discovery system. U.S. broad pre-trial discovery sets it apart not only from civil law jurisdictions, but also fellow common law jurisdictions. Pre-trial discovery from non-parties, pre-trial depositions and categorical document requests, all based on a relatively broad relevance standard have been criticized worldwide. This criticism has been manifested in blocking statutes,¹ Article 23 of the Hague Evidence Convention,² and defensive judicial decisions by Canadian and English judges rejecting requests judicial assistance for pre-trial discovery by U.S. courts.

One unique aspect of U.S. civil justice related to its broad discovery is the U.S. judicial assistance scheme. Judicial assistance is the comity-based act of a court aiding a foreign court or tribunal by compelling an individual or corporation within its jurisdiction to produce evidence for use in a foreign proceeding. For example, if a French court would like to hear testimony from a Canadian non-party witness, it would request to the Canadian court with jurisdiction over the individual to compel the individual to provide testimony for use in the French proceeding. The Hague Evidence Convention governs

¹ Blocking statutes are enacted in many countries that impose criminal liability on residents that comply with U.S. judicial orders compelling discovery. This situation most often occurs when a citizen or resident of another country is a party to a U.S. law suit and relevant documents or individuals are located outside the United States. ¹ Among countries which have enacted blocking legislation are Australia, Bermuda, Canada, the Cayman Islands, Germany, France, Liechtenstein, Norway, Panama, Singapore, Switzerland, and the United Kingdom. *See generally* A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 79 -143 (1983) (presenting annotated collection of blocking statutes in English).

² The Convention On The Taking Of Evidence Abroad In Civil Or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. 7444, 847 U.N.T.S. 231, reprinted in 8 I.L.M. 37, Art. 23 (1969) (“[a] Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries”).

the process by which courts in member states can request evidence from other member state courts by establishing a letter of request mechanism and mandating central authorities in member states to send and receive letters of requests.

Although the United States is a member of the Hague Evidence Convention, it has a separate paradigm for judicial assistance requests that exists concurrently with the Convention found at 28 U.S.C. §1782 (“§1782”). This statute substantially differs from any other judicial assistance scheme by allowing requests directly from “interested persons”, including litigants and others, engaged in actual or potential foreign proceedings. So, for example, a litigant contemplating filing suit in French court who desires information from a U.S. company or individual may petition a U.S. court with jurisdiction over the U.S. resident to compel the desired information. Importantly, §1782 allows individuals to directly petition U.S. courts without approval by the foreign tribunal in which the individual has instituted or is contemplating proceedings even before they have formally instituted foreign proceedings. Designed to spread U.S. style discovery, it liberally grants judicial assistance requests to interested persons, despite the fact that the discovery granted is often not allowed in the jurisdiction in which the foreign tribunal sits.

This thesis analyzes §1782 from a comparative point of view, and highlights the problems with the statute that become quite apparent when comparing the statute with its common law counterparts. I have chosen England and Canada as comparative jurisdictions because they are common law jurisdictions with at least some pre-trial discovery, judicial assistance statutes, and developed caselaw regarding these issues. As

will be seen, even these close cousins have vastly different pre-trial discovery standards and judicial assistance schemes.

Chapter 1 compares the U.S. discovery system with Canada and England's discovery systems, illustrates the U.S.'s comparatively broad relevance standard and liberal use of several pre-trial discovery methods, and discusses the resulting global hostility toward U.S. discovery. It also discusses the policy considerations that underlie discovery systems, and evidence systems without pre-trial discovery, including efficiency, the quest for truth, cost, and privacy. Chapter 2 then analyzes §1782's history from its inception and subsequent amendments to the landmark Supreme Court case in 2004, *Intel v. Advanced Micro Devices*,³ to post-*Intel* case law. This chapter emphasizes the evolution of the foreign discoverability requirement that arose in pre-*Intel* case law and was conclusively abolished in *Intel*, as well as the ramifications of the absence of such a requirement in post-*Intel* cases. Chapter 3 then looks at Canada's and England's judicial assistance statutes, and emphasizes those countries' domestic discoverability requirements based largely out of defensive postures against U.S. requests for assistance. This chapter also analyzes these courts' insistence that requests come solely from tribunals themselves, as opposed to litigants or other persons.

Chapter 4 then analyzes §1782 from a comparative perspective, emphasizing three main points that emerge from a comparative analysis. First, the U.S. system's refusal to consider foreign discoverability ignores the important policy considerations underlying foreign discovery systems, and unnecessarily burdens foreign judges in contravention of the concept of comity on which judicial assistance is based. Second, §1782 is blatantly unfair to U.S. defendants in foreign proceedings, as they are subject to

³ 542 U.S. 241 (2004).

the use of §1782 by their opponents, and therefore subject to U.S. discovery obligations, while they can only utilize the comparatively limited discovery tools in the foreign jurisdiction where the suit is located. Finally, §1782, as interpreted by *Intel* and post-*Intel* decisions, ignores the worldwide call rejecting U.S. style discovery by injecting U.S. pre-trial discovery methods and standards into foreign proceedings in jurisdictions that have conclusively rejected the U.S. system.

These three criticisms could be fixed by the very simple act of amending §1782 to only allow requests for judicial assistance by foreign tribunals themselves, as opposed to “interested persons”, similar to the Canadian and English judicial assistance statutes. This change would ensure that the foreign tribunal wants the evidence, and end unnecessarily subjecting U.S. defendants and non-parties to unfair asymmetrical discovery obligations. Although the U.S. system of discovery may work for the United States, it clearly does not work for foreign tribunals, and we should stop attempting to export it in the face of worldwide rejection.

CHAPTER 1: DISCOVERY SYSTEMS AND UNDERLYING POLICY CONSIDERATIONS

In order to understand how §1782 functions, an understanding of the differences between jurisdictions' discovery systems is necessary. Specifically, to comprehend the ramifications of the U.S. judicial assistance scheme without a foreign discoverability requirement, it is necessary to understand the different scope of discovery available to plaintiffs under U.S. law and in foreign jurisdictions. Also, many U.S. judicial opinions rejecting a foreign discoverability requirement characterize foreign discovery systems as having merely “technical limitations”, and ignore the policy decisions underlying discovery limitations in foreign jurisdictions. Because in my analysis I argue that U.S. judicial ignorance of the policies underlying foreign discovery limitations is a flaw in the U.S. judicial assistance system, these policies are discussed here.

A. Differences between civil law and common law generally.

One purpose of both civil law and common law adjudication is to establish facts through proof.⁴ Broadly speaking, the main differences between common law jurisdictions and civil law jurisdictions include distribution of power over the evidence gathering process between judges and advocates, the availability and scope of a pre-trial discovery phase and the structure of trials.

One of the main differences between civil law and common law jurisdictions is whether the judges or advocates have control over gathering evidence and presentation of legal issues. In common law systems, advocates pursue gathering evidence without oversight by the court.⁵ The court is generally only involved when one party complains

⁴ ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, 5 (2006). [hereinafter “UNIDROIT PTCP”].

⁵ ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN INTERNATIONAL LAW, 140 (1996).

of an uncooperative opposing party or a need to limit or expand the scope or methods of discovery. Despite the court's lack of involvement, the parties pursue discovery with the force of the court's power behind them to compel or forbid discovery and impose sanctions for noncompliance.⁶ In contrast, in civil law jurisdictions judges, as opposed to advocates, oversee evidence gathering and presentation of legal issues.⁷

Another important difference between civil law and common law systems is the nature of trials. In civil law systems, trials are made up of a series of short hearings, as opposed to common law systems that have one concentrated trial with a significant pre-trial period.⁸ Once a common law trial has begun, the time for gathering evidence is over.⁹ One explanation for the concentrated trial in common law jurisdictions is the jury system, in which "a group of lay people are required to take time out of their own work lives to hear and help decide a dispute" by deciding issues of fact.¹⁰ When using a jury system, parties must prepare all the evidence to be presented to the jury before the jury is assembled and its members' valuable time begins being usurped. This led to the trial as a

⁶ Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292 (2002). See also Lowenfeld, *supra* note 5, at 140. It should be noted that this balance between judges' and advocates' involvement varies within common law jurisdictions. For example, in England, recent civil procedure reforms have placed considerably more power in judges to oversee pre-trial discovery beyond initial limited mandatory disclosures.

⁷ UNIDROIT PTCP, *supra* note 4, at 6; KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW*, 42-44 (Carolina Academic Press 2003).

⁸ UNIDROIT PTCP, *supra* note 4, at 6. See also Peter Schlosser, *Lectures on Civil Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 11 (1996) ("[i]n civil law countries, conducting a lawsuit consists of piece meal litigation, which is primarily characterized by written elements. . . . [T]he absence of a 'trial' has marked the structure of litigation in civil-law countries"); Hein Kotz, *Civil Justice in Europe and the United States*, 13 DUKE J. OF COMP. & INT'L LAW 61, 72 (2003) ("[o]ne salient characteristics of European civil procedure lies indeed in the fact that it is wholly unfamiliar with, and knows nothing of, the idea of a 'trial' as a single, temporally continuous presentation in which all materials are made available to the adjudicator. Instead proceedings . . . may be described as a series of isolated conferences before the judge).

⁹ Lowenfeld, *supra* note 5, at 140.

¹⁰ Chase, *supra* note 6, at 293. See also Kotz, *supra* note 8, at 72 ("[p]rocedure in the common law jurisdictions . . . has been deeply influenced by the institution of the jury").

“concentrated” event that occurred only after advocates had exchanged and distilled the evidence to be presented to the jury.¹¹

With regard to the scope of evidence parties are entitled to from opposing parties, civil law and common law are starkly opposed. “Under the civil law, there is no discovery as such.”¹² Instead of pre-trial depositions, oral testimony is taken only at a court proceeding or before a proceeding to be preserved and presented to the court. Parties are generally not entitled to request pre-trial document production, and instead only submit documents to the court as evidence for a pending proceeding. Contrary to the common law bifurcated concept of a case as including a discrete pre-trial phase and trial phase, civil law jurisdictions conceptualize a case centering around a judge “exploring and sifting” the evidence necessary to reach a “justifiable conclusion”.¹³ Accordingly, civil law proceedings generally proceed as a series of hearings in which a judge analyzes evidence and legal aspects of discrete issues in the case with no pre-trial phase.¹⁴

B. Policy considerations underlying all jurisdictions’ evidentiary systems.

The evidence and/or discovery system of each jurisdiction, whether common law or civil law, is essentially a balance of competing policy interests. The policies being balanced are discovering “truth”, (i.e., what really happened), efficiency, cost and the right to privacy.

1. Truth: Helping courts and advocates figure out what really happened.

¹¹ Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1020 (1998). Professor Hazard points out that most cases in U.S. courts no longer use juries, but that the bifurcated concepts of pre-trial and trial phases that arose out of using the jury system remained. *Id.*

¹² UNIDROIT PTCP, *supra* note 4, at 9.

¹³ Hazard, *supra* note 11, at 1021-22.

¹⁴ *Id.*

The most common argument in favor of broad pre-trial discovery is that forcing each party to exchange all relevant information allows the parties, and hence, the court, to get to the truth of what happened.¹⁵ Put plainly, “to the extent that information and evidentiary material increase the likelihood of finding the historical facts, they promote the accuracy of adjudication.”¹⁶ Related to this is the idea that parties are entitled to a disclosure of all non-privileged relevant information in order to attempt to prove the truth, according to them.¹⁷ Common law practitioners have often marveled at the civil law’s apparent “indifference” to truth, which they perceive as attainable only through pre-trial discovery.¹⁸

2. Efficient adjudication: Making litigation an effective dispute resolution mechanism.

Because both parties and courts have limited time and resources, all legal systems acknowledge that accuracy must be balanced with efficiency to some degree.¹⁹ One commonly espoused benefit to the pre-trial discovery system is that gathering pre-trial evidence narrows the contested issues resulting in increased efficiency during the trial.²⁰ An understanding of all potential evidence gained through extensive pre-trial discovery crystallizes exactly what each party will focus on and rely upon, and allows each party to

¹⁵ See e.g., Lowenfeld, *supra* note 5, at 145 (“American discovery is often oppressive, intrusive, expensive, time consuming; it does, however, aim to bring out the truth”); Robert G. Johnston & Sara Lufano, *The Adversary system as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L.R. 147, 160 (2002) (“the scope of allowable discovery should be construed broadly in order to aid the search for truth”); MR. JUSTICE TODD L. ARCHIBALD & MR. JUSTICE RANDALL ECHLIN, ANNUAL REVIEW OF CIVIL LITIGATION 2005, CHAP. G, Introduction (discussing the importance of the Canadian discovery process for “ensuring that the court has before it all relevant information in its search for truth”).

¹⁶ Huang, *supra* note 7, at 39.

¹⁷ CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE, 8 FED. PRAC. & PROC. CIV.2D § 2001.

¹⁸ See Huang, *supra* note 7, at 47-48. See e.g., Lowenfeld, *supra* note 5, at 144 (“while I am far from a whole-hearted defender of the American discovery system, I have sometimes been equally astonished by other countries’ outlook on the search for truth”).

¹⁹ Huang, *supra* note 7, at 39.

²⁰ Wright, Miller & Marcus, *supra* note 17, at § 2001.

craft specific arguments and tactics to respond.²¹ Underlying the common law concept of efficiency is the separation of the right to discover information and the right to present information in court.²² On the other hand, common law discovery is intrinsically duplicative, and thereby, inefficient. As noted by one scholar, “[w]itnesses are prepared, examined, and cross-examined during pre-trial, then prepared, examined, and cross examined again at trial”.²³

3. Cost: The exorbitant costs of pre-trial discovery and its effect on settlements.

In the United States, and I suspect in other jurisdictions as well, the word “litigation” strikes fear in people’s hearts of unreasonable and burdensome costs for years to come. Critics of pre-trial discovery often point to the system’s high cost burden on clients.²⁴ Conversely, one often-touted benefit of pre-trial discovery is that it encourages settlement, thereby ultimately decreasing trial costs.²⁵ Pre-trial discovery forces parties to “put their cards on the table”.²⁶ Once each side has seen the relative strengths and weaknesses of the other side’s evidence, they are able to engage in a risk analysis of success at trial, and this often leads to successful settlement negotiations.²⁷

²¹ CHARLES PLATTO, PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE 238 (1990).

²² Wright, Miller & Marcus, *supra* note 17, at § 2001.

²³ Kotz, *supra* note 8, at 72. Indeed, any U.S. junior associate that has come across the same document time and time again while sifting through thousands of pages of discovery could testify to the duplicative nature of discovery and time and effort it requires.

²⁴ See e.g., SHELBY R. GRUBBS, ED., INTERNATIONAL CIVIL PROCEDURE 782 (2003). See also Lowenfeld, *supra* note 5, at 144 (arguing that American-style discovery “unquestionably increases the costs of litigation, sometimes massively so”).

²⁵ Platto, *supra* note 21, at 238; Grubbs, *supra* note 24, at 782.

²⁶ See Lowenfeld, *supra* note 5, at 144.

²⁷ PAUL MATTHEWS & HODGE M. MALEK, DISCLOSURE, 4 (2001) (“the perceived advantages to the disclosure process include fairness to both sides, playing with “all the cards face up on the table”). Accord Huang, *supra* note 7, at 43 (“the settlement rate in the continental system is much lower than in common law systems”). The view that pre-trial discovery encourages settlement is not shared by all. For instance, some commentators view such a notion as a “flawed assumption that knowledge settles cases, whereas litigators have known for years that risk and uncertainty are the greatest catalysts for settlement.” See Introduction to Discovery Rules, Chapter 26.I.A, 10 FED. PROC. L. Ed. §26.7 (discussing Dan Downey, *Discoverectomy: A Proposal to Eliminate Discovery*, 11 REV. LITIG. 475 (1992)).

Both sides of the cost debate have valid points; while pre-trial discovery is unbelievably expensive, the vast majority of cases in the United States settle,²⁸ which relieves parties of trial costs. In reality, however, in the absence of a very settlement-oriented in-house counsel, cases do not generally settle until each side's attorneys have amassed a generous portion of fees. Pre-trial costs cover a myriad of dimensions, including (just to name a few): experts' fees, court-reporter fees, traveling to review of both sides' documents, taking and defending depositions, decrypting electronic files that may contain relevant information, and amassing and computing damages information.

4. Privacy: The right to be left alone by courts, lawyers and litigants.

One of the most noticeable aspects of extensive pre-trial discovery is the intrusion into an individual's or corporation's privacy it causes. The more methods of pre-trial discovery that are available, the more parties and non-parties are obligated to produce evidence, and the broader the scope of discoverable evidence. Essentially, the wider the net is cast, the more privacy interests will be undermined by the discovery process. In fact, one of the most "repugnant" aspects of common law, specifically, U.S. style, discovery to civilian lawyers is its intrusion into privacy.²⁹ Privacy is one reason all jurisdictions recognize various privileges and immunities that allow them to not produce otherwise required information.³⁰

5. Proportionality: Striking a balance between competing considerations.

Discovery systems, or a lack thereof, can be best interpreted as located on a spectrum of the above policy interests, with each country deciding the point on the

²⁸ In fact, 80-90% of actions commenced in Canada and the England also settle, with less discovery, which may cut against the argument that the extensive U.S. pre-trial discovery system facilitates discovery.

²⁹ Chase, *supra* note 6, at 293.

³⁰ Accord Huang, *supra* note 7, at 254-55.

spectrum that best suits its needs.³¹ Accordingly, both common law countries with pre-trial discovery systems and civil law countries without them justify their systems using the principle of proportionality.³² While common law practitioners may criticize civil law systems for not placing enough emphasis on truth, civil law practitioners may view pre-trial discovery as ignoring cost and privacy. Ultimately, at the heart of both sets of criticisms is the idea that the other system is not striking a good balance of policy interests, and therefore, is not observing the concept of proportionality.

One recent development that shows the principle of proportionality at work across legal systems is the attempt by the Unification of Private Law (“UNIDROIT”) and American Law Institute (“ALI”) to harmonize civil law and common law procedural schemes by creating the Principles of Transnational Civil Procedure.³³ Principle of Transnational Civil Procedure (“PTCP”) 16 addresses “Access to Information and Evidence” and gives each party “access to relevant and nonprivileged evidence.”³⁴ With regard to the exchange of information, PTCP 16.2 reads: “Upon timely request of a party, the court should order disclosure of relevant, nonprivileged, and reasonably identified evidence in the possession or control of another party, or, if necessary and on just terms,

³¹ *Id.*, at 249. See also Kotz, *supra* note 8, at 74 (“all procedural systems must balance the importance of truth for the fact-finding process against the need to protect areas of business and personal privacy from unreasonably invasion. But not all systems will strike the same balance between the two goals”).

³² Huang, *supra* note 7, at 249-50. Indeed, the motivation underlying the England’s 1998 reform of its civil procedure rules was to make disclosure costs and burdens proportional to the ultimate usefulness and value of the results in relation to the overall money involved in the case, and the importance and complexity of the case, the financial resources of the parties. The Civil Procedure Rules 1998, S.I. 1998 No. 3132 (L.17) 1.1(a)-(c); Matthews & Malek, *supra* note 27, at 5, 17 (arguing that narrowed pre-trial discovery results in “buying comparative speed and cheapness (and hence accessibility to courts) at the price of less perfect justice”). See also Archibald & Echlin, *supra* note 15 (“[i]n an attempt to strike a balance between the interests in disclosure and the interests in protecting the privacy of individuals in the litigation process, the courts and, in some provinces, legislatures, have developed rules limiting the use to which information and documents obtained during the discovery process may be put”).

³³ UNIDROIT PTCP, *supra* note 4.

³⁴ *Id.*, at 36.

³⁴ *Id.*

of a nonparty.”³⁵ This is an attempt to allow parties access to pre-trial discovery, but keeps such discovery within the judge’s control. It also requires that evidence requested be “reasonably identified”, which is an attempt to prevent fishing expeditions, but not require absolute specificity.³⁶ PTCP 16.2 allows parties to request that the judge order a non-party to produce evidence. The PTCP drafters define “relevant” evidence as “probative material that supports, contradicts, or weakens a contention of fact at issue in the proceeding”.³⁷ The PTCP explicitly disallow “fishing expedition[s] to develop a case for which [a party] has no support,” while acknowledging that “an opposing party may properly be compelled to produce evidence that is under its control.”³⁸

C. Discovery systems within common law jurisdictions: Variations on a theme?

The common law countries being discussed in this article, Canada, England and the United States, have many similarities, including mandatory initial disclosure of documents by parties, the right to subsequent pre-trial discovery of evidence relating to the claims and defenses in the case, recognition of certain immunities or privileges from the production of evidence, the use of multiple methods of discovery and court discretion to limit or change the scope of discovery.

These systems are also vastly different. The U.S. system is often referred to as “exceptional” and in its own category given the varied methods of discovery and broad scope of discoverable information available to litigants.³⁹ The differences between these

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See e.g., Chase, *supra* note 6; Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005). Another often-cited difference among common law countries is allocation of costs. The U.S. cost rule is that each party ordinarily pays its own lawyer and cannot recover expense from a losing opponent except in exceptional cases when attorneys’ fees are warranted, usually at the discretion of the trial judge. In most other common law jurisdictions (except

systems stem largely from their discrete standards of what categories of information are available to litigants during the pre-trial phase, and the methods available to litigants to obtain information. For example, while the U.S. system allows litigants to discover information that may lead to admissible evidence that might itself not be admissible at trial, England allows litigants to discover evidence only that they will rely upon, or that supports or adversely affects either party's case, at trial. The most striking features of the U.S. system compared to other common law jurisdictions are parties' right to depose both parties and non-parties without leave of court,⁴⁰ and the right to request general categories of documents not known to exist.

Another difference between common law discovery systems is confidentiality of information obtained during discovery. Pursuant to the U.S. Federal Rules of Civil Procedure ("FRCP"), a party can use a deposition or documents obtained during discovery in one case in a subsequent proceeding involving substantially the same issues and parties.⁴¹ Hence, U.S. law requires a judge to enter a protective order before information disclosed in discovery is confidential and not subject to use in other proceedings.⁴² Conversely, in the England, "all discovered material is automatically subjected to an obligation of confidentiality."⁴³ Likewise in Canada, information gathered during pre-trial discovery is subject to an "implied" or "deemed" "undertaking

Japan and China), "the winning party recovers at least a substantial portion of litigation costs". UNIDROIT PTCP, *supra* note 4, at 7.

⁴⁰ As discussed below, while Canada allows pre-trial depositions of parties without leave of court, but not non-parties; England does not allow pre-trial depositions without leave of court.

⁴¹ See e.g., *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377 (9th Cir. 1982); 35A C.J.S. Federal Civil Procedure §664.

⁴² Fed. R. Civ. P. 26(c). Although the need for a protective order to obtain confidentiality may seem like an extreme aberration from other discovery systems, in reality, discovery in most federal cases is governed by a protective order at the request of the parties' attorneys.

⁴³ Matthews & Malek, *supra* note 27, at 13.

of confidentiality”.⁴⁴ Pursuant to this rule, a party may only use information in the case that the information is gathered for, and may never use the information if the trial never takes place without leave of court.⁴⁵

When looking at the purpose of pre-trial discovery or disclosure, another stark difference between the U.S. and English approaches becomes clear. U.S. and Canadian practitioners regularly rely on discovery as a “check” on witnesses to ensure that they are being truthful under oath and impeach them when they are not. Pre-trial discovery “freezes” witnesses’ testimony before trial, which can prevent witnesses from changing their story during trial.⁴⁶ It is common practice in the United States, for example, to use pre-trial oral depositions to impeach witnesses that have altered their version of events at trial. English courts reject this as a valid purpose of discovery.⁴⁷

1. The U.S. system of broad discovery.

Despite a narrowing trend in U.S. discovery, the standard of discoverable evidence and scope of discovery methods available to parties is broader in the U.S. system than Canada or England.⁴⁸ Pursuant to the FRCP, parties must initially disclose information “that the disclosing party may use to support its claims or defenses.”⁴⁹ This

⁴⁴ See e.g., Ontario Rule of Civil Procedure 30.1, R.R.O. 1990, Reg. 194, §30.1.01.3; *Québec Inc. v. Lac d’Amiante du Québec Itée*, 2001 SCC 51, 204 D.L.R. (4th) 331.

⁴⁵ *Lac d’Amiante du Québec Itée*, 2001 SCC 51, ¶64-65.

⁴⁶ Platto, *supra* note 21, at 238.

⁴⁷ *Berkeley Administration Inc. v. McClelland*, [1990] F.S.R. 381, 383 (C.A.) (“[p]lainly the atmosphere in the case is such that the plaintiffs have grave skepticism about anything said on behalf of the defendants, but it is not a purpose of discovery to give the opposing party the opportunity to check up on whether the discovery has been properly carried out. If they do not believe the deponent they should call for him to appear and be cross-examined on his oath. Alternatively, if they wish to do so, they may seek the opportunity at trial to explore the matter further”). See also *Matthews & Malek*, *supra* note 27, at 103 (“[n]or would discovery be ordered to enable ‘checks’ to be made on opponents’ statements on oath regarding existing discovery”).

⁴⁸ *Matthews & Malek*, *supra* note 27, at 12-13.

⁴⁹ Fed. R. Civ. P. 26(a)(1)(A). The U.S. initial mandatory disclosure rule was amended in 2000 to require initial disclosure only of documents the disclosing party intends to use. The previous version of the rule required parties to disclose witness and documents, “whether favorable or unfavorable” regardless of

includes mandatory disclosure of the names and contact information of “each individual likely to have discoverable information”, a copy or description of all “documents, data compilations, and tangible things” in possession or control of the disclosing party, a computation of damages claimed by the disclosing party and any relevant insurance agreement regarding potential liability.⁵⁰

a. The U.S. standard: “reasonably calculated” to lead to international criticism.

After initial mandatory disclosures, the U.S. system allows parties to obtain discovery “regarding any matter, not privileged that is relevant to the claim or defense of any party.”⁵¹ The U.S. federal rules define “relevant” to include information “reasonably calculated to lead to the discovery of admissible evidence,” including information that would not be admissible at trial.⁵² It should be noted, however, that the current version of the U.S. federal rules only allows discovery of relevant information to the parties’ specific claims or defenses.⁵³ This is a change from previous versions of the rule that defined “relevant” to include information relating to the “subject matter” of the case generally.⁵⁴ Another unique aspect of U.S. discovery is the fact that discovery requests need not specify existing documents, but instead may consist of requests for categories of

whether it intended to use them. *See* advisory committee note to 2000 amendment to Fed. R. Civ. P. 26(a)(1).

⁵⁰ Fed. R. Civ. P. 26(a)(1)(A)-(D). Although the Federal Rule regarding mandatory initial disclosures also requires parties to disclose the names and contact information of both expert and lay witnesses and deposition testimony that will each side will attempt to introduce at trial, disclosure of this information is generally exchanged during the trial preparation period before trial, as opposed to during the information gathering discovery phase.

⁵¹ Fed. R. Civ. P. 26(b)(1). Each discovery method is governed by its own federal rule. Oral depositions are governed by FRCP 30, written depositions are governed by FRCP 31, written interrogatories are governed by FRCP 33, document production is governed by FRCP 34, inspection of land or property are governed by FRCP 45(a)(1)(C), medical examinations are governed by FRCP 35, and requests for admission are governed by FRCP 36.

⁵² Fed. R. Civ. P. 26(b)(1). *See* Lowenfeld, *supra* note 5, at 142.

⁵³ Wright, Miller & Marcus, *supra* note 17, § 2008.

⁵⁴ *Id.*

documents that are often quite broad.⁵⁵ For example, a discovery request may ask for “all documents relating to the 1998 transaction between parties.” This characteristic has led many foreign practitioners and judges to see U.S. discovery requests as “fishing” expeditions.⁵⁶

b. Methods of discovery available to litigants: Everything but waterboarding.

The U.S. system allows parties to discovery information by a variety of methods, including oral depositions, written depositions, written interrogatories, production of documents or tangible things, inspection of land and property, physical and mental examination, and requests for admission.⁵⁷ After the mandatory pre-trial “meet-and-confer” conference between parties, a party need not obtain leave of court to depose a party or non-party one time, unless the deponent is in prison.⁵⁸

Although all of these methods are potentially available to litigants, it is important to note two categories of limitations on a party’s ability to use them: limitations explicitly stated in the federal rule governing the method and the court’s discretion to limit discovery. For example, FRCP 33 limits litigants to propounding only twenty-five written interrogatories without a court order or stipulation by parties.⁵⁹ Similarly, FRCP 30 limits litigants to ten written and oral depositions combined without court order or stipulation,⁶⁰ and limits the length of depositions to seven hours each.⁶¹ Another example

⁵⁵ See Lowenfeld, *supra* note 5, at 142.

⁵⁶ See e.g., *British Airways Board v. Laker Airways Ltd.* [1984] 3 WLR 413 at 419, [1985] AC 58 at 78. See also Lowenfeld, *supra* note 5, at 142 (discussing *British Airways*).

⁵⁷ Fed. R. Civ. P. 26(a)(5). See Platto, *supra* note 21, at 239.

⁵⁸ Fed. R. Civ. P. 30(a). See also Wright, Miller & Marcus, *supra* note 17, §§ 2104, 2109.

⁵⁹ Fed. R. Civ. P. 33(a).

⁶⁰ Fed. R. Civ. P. 30(a)(2)(A).

⁶¹ Fed. R. Civ. P. 30(d)(2).

is that the invasive method of mental or physical examination is only available if the physical or mental state of a party, or person in the custody of a party, is at issue.⁶²

The U.S. federal rules also give judges discretion to limit discovery upon motion by a party for a protective order,⁶³ or on its own initiative.⁶⁴ The court's power to limit discovery is a manifestation of the federal rules' interest in proportionality.⁶⁵ A court may limit discovery if it determines that (1) the discovery sought is "unreasonably cumulative or duplicative", (2) may be obtained by more convenient and less expensive alternative methods, (3) the discovering party has had "ample opportunity" to discover the information requested, or (4) "the burden or expense of the proposed discovery outweighs its likely benefit" in light of the "needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."⁶⁶ The court may limit discovery in a number of ways, including prohibiting the discovery or ordering that it be had on "specific terms and conditions", or only by certain methods.⁶⁷

c. Discovery from non-parties.

One aspect of the U.S. system that foreign practitioners find strange is the U.S. system's tolerance of non-party discovery. Like parties, non-parties are subject to

⁶² Fed. R. Civ. P. 35(a).

⁶³ Fed. R. Civ. P. 26(c). A protective order may be granted if a party or person from whom discovery is sought, after attempting to confer with the discovering party, can show "annoyance, embarrassment, oppression, or undue burden or expense." *Id.*

⁶⁴ Fed. R. Civ. P. 26(b)(2)(C). In 1983, the FRCP were amended to "deal with the problem of over-discovery" by "encourag[ing] judges to be more aggressive in identifying and discouraging discovery overuse." Advisory Committee Note to 1983 Amendments to FRCP 26(b). *See also* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 183 (1999) (discussing the new role of judge pursuant to amended FRCP).

⁶⁵ Wright, Miller & Marcus, *supra* note 17, § 2008.1 (noting that "Rule 26(b) was amended in 1983 to promote judicial limitation of the amount of discovery on a case-by-case basis to avoid abuse or overuse of discovery through the concept of proportionality").

⁶⁶ Fed. R. Civ. P. 26(b)(2)(C).

⁶⁷ Fed. R. Civ. P. 26(c)(1)-(8).

discovery within the parameters of the FRCP without leave of court. Therefore, anyone in possession of discoverable information can be requested, or compelled by the court if necessary, to make such information available.⁶⁸ Foreign practitioners often marvel at the U.S. discovery system's pre-trial use of oral depositions for parties, non-parties and potential witnesses alike.⁶⁹ While a non-party can be orally deposed or required to produce documents or to permit inspection of tangible objects or property,⁷⁰ parties cannot use written interrogatories to obtain information from non-parties.⁷¹

2. England's discovery system: A revamped and narrowed approach to pre-trial disclosure.

England's discovery system falls closest to the privacy end of the policy spectrum out of the common law systems discussed here. The English system requires leave of court for all discovery taken beyond the mandatory initial standard disclosure between parties, unless, of course, the party consents to discovery.

a. The English standard: Standard disclosure.

"Disclosure" is the term synonymous with "discovery" now used for pre-trial exchange of information in England.⁷² Like mandatory initial disclosures in the United States, the English rules of civil procedure require each party to initially disclose documents on which it relies, the documents that adversely affect its own case or adversely affect or support another party's case.⁷³ Documents are broadly defined to

⁶⁸ See Lowenfeld, *supra* note 5, at 141.

⁶⁹ See e.g., Matthews & Malek, *supra* note 27, at 13.

⁷⁰ See Fed. R. Civ. P. 34 and Fed. R. Civ. P. 45. See also Huang, *supra* note 7, at 223.

⁷¹ University of Texas at Austin v. Vratil, 96 F.3d 1337 (10th Cir. 1996). See also Wright, Miller & Marcus, *supra* note 17, §§ 2163, 2171.

⁷² Matthews & Malek, *supra* note 27, at 3.

⁷³ The Civil Procedure Rules 1998, S.I. 1998 No. 3132 (L.17) ("CPR") 31.6. See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM, 601 (Oxford Univ. Press 2003).

include “anything in which information of any description is recorded”.⁷⁴ Upon receiving orders for disclosure, a party may refuse to disclose certain documents on the basis that disclosure is not proportionate to the issues in the case.⁷⁵

This disclosure standard was modified in the 1998 overhaul of the English rules of civil procedure based on Lord Woolf’s recommendations.⁷⁶ The new “standard disclosure” obligation replaced the previous obligation of parties in English courts to disclose all documents “relating to matters in question in the action” or “relating to any matter in question in the cause or matter.”⁷⁷ The previous disclosure rule required parties to disclose background documents as well as documents that could be used as a “springboard” to the above categories of documents, and was widely criticized as overly burdensome and overbroad.⁷⁸ The new English civil procedure rules split cases into three categories, small claims, fast track and multi track cases.⁷⁹ Only parties in fast track or multi track are entitled to standard disclosure.⁸⁰ Disclosure obligations do not apply to small claims cases.⁸¹ Subsequent to mandatory standard disclosure, parties can request that the court order specific disclosure of documents.⁸²

b. Methods of discovery available to litigants.

⁷⁴ CPR 31.4.

⁷⁵ CPR 31.3. The refusing party must state the grounds on which disclosure is not proportionate. CPR 31.2.

⁷⁶ See ACCESS TO JUSTICE, THE FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES BY THE RIGHT HONORABLE THE LORD WOOLF, MASTER OF THE ROLLS (1996). The former Rules of the Supreme Court (“RSC”) were replaced on April 26, 1999 with new Civil Procedure Rules and Civil Procedure (Modification and Enactments) Order 1998 (S.I. 1998 No. 2940).

⁷⁷ RSC, Ord. 24, r. 1(1), 3(1). See Matthews & Malek, *supra* note 27, at 94.

⁷⁸ Andrews, *supra* note 73, at 602.

⁷⁹ CPR 27, 28 & 29. These rules apply to small claims track, fast track and multi-track cases, respectively. See also Neil Andrews, *A New Civil Procedural Code for England: Party-Control “Going, Going Gone”*, C.J.Q. 2000 19 (JAN) 19-38 (describing the Woolf Reform and ensuing restricted pre-trial disclosure).

⁸⁰ CPR 31.5.

⁸¹ CPR 27.2(b).

⁸² CPR 31.12. See also Practice Direction Part 31.-5.1-5.5.

Litigants in England have several methods of obtaining further information, including interrogatories, witness statements, depositions of witnesses, inspection of land or property and physical or mental examinations of individuals.⁸³ After standard disclosure, however, a litigant must seek leave of court before attempting to utilize any of these methods.⁸⁴ This is the main and most crucial difference between the English system and the U.S. federal rules of civil procedure and some Canadian provinces' rules. For example, serving interrogatories on another party, which is allowed without court approval in the United States up to a certain number, is considered specific disclosure requiring court approval. If a litigant seeks specific disclosure of documents, it must specify the documents or class of documents it wants disclosed,⁸⁵ and cannot request large categories of documents that may or may not exist. Pre-trial depositions are also forbidden.⁸⁶ Oral examination before a trial is generally only allowed if the witness is likely to be unavailable to testify at the trial, and his testimony will be treated as part of the trial.⁸⁷

c. Obtaining discovery from non-parties: A relative emphasis on privacy.

In England, “traditionally only parties to litigation are obliged to give discovery; and generally discovery from a third party is not available.”⁸⁸ Parties may not request

⁸³ Malek & Matthews, *supra* note 27, at 5-6.

⁸⁴ *Id.*, at 134-35.

⁸⁵ CPR 31.12.

⁸⁶ Nicholas Lavender & George Menzies, *Obtaining Evidence in England and Wales: The Role of Solicitors and Barristers*, INT. I.L.R. 1997, 206-211, 207 (“English law has no oral discovery procedure”). For a detailed discussion of English oral examination procedure, see *id.*

⁸⁷ *Id.*

⁸⁸ Huang, *supra* note 7, at 223. See Ronald E. Myrick, *Obtaining Evidence Abroad for Use in United States Litigation*, 15 SUFFOLK TRANSNAT’L L.J. 1, 25 (1991) (stating that as a general rule “discovery is not permitted against a stranger to an English suit. A stranger to a suit may not be compelled to give oral

information from non-parties without leave of court. As well-stated by one scholar: “The philosophy underlying this position is that the resolution of private disputes should not interfere with the peace and lives of other persons and should impose as little burden as possible on third parties.”⁸⁹ Before 1998, courts could require non-parties to allow inspection of documents and produce documents in personal injury or death cases if such discovery furthered the “proper administration of justice”.⁹⁰ Based on the new Civil Procedure Rules, a judge in *any* case may order a non-party to disclose only those documents which are “likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings” and when disclosure is “necessary in order to dispose fairly of the claim or to save costs.”⁹¹

3. Discovery in Canada: The province of the provinces.

Like the United States and England, Canada’s provinces allow advocates to gather pre-trial evidence. The law of civil procedure in Canada is made at the provincial level.⁹² Despite the lack of a federal code of civil procedure, a discrete set of court rules do exist for Canadian federal courts. Accordingly, I discuss the approaches taken by the Canadian Federal Court Rules, and the civil procedure rules for the provinces of Ontario and British Columbia regarding judicial assistance to foreign courts.

a. The standard: “Relating” to any matter in the action.

A party in any Canadian province will usually be required to disclose the existence of documents relating to any issue in the pending action.⁹³ For example, the

evidence, except by subpoena, or to produce documents, except by subpoena duces tecum, and, in each case, only at the trial.”).

⁸⁹ Huang, *supra* note 7, at 223-24.

⁹⁰ Matthews & Malek, *supra* note 27, at 79.

⁹¹ CPR 31.17.

⁹² See Platto, *supra* note 21, at 215-16.

⁹³ *Id.*

Ontario Rules of Civil Procedure require parties to produce “[e]very document relating to any matter in issue in an action.”⁹⁴ Similarly, the British Columbia Supreme Court Rules allow examination of a party, written interrogatories and requests for documents “regarding any matter, not privileged, relating to a matter in question in the action”, including contact information of all persons who might have such information.⁹⁵

In some provinces, this obligation arises upon the lapse of a certain amount of time after the close of pleadings, which is similar to the U.S. and English mandatory disclosure systems.⁹⁶ In other provinces, however, a party only becomes obligated to disclose documents after the other party requests such documents.⁹⁷ The second type of disclosure obligation is similar to the U.S. system prior to the FRCP amendments requiring mandatory disclosure.

b. Methods of discovery available to litigants: A litigant’s right to choose.

After mandatory disclosure, where required, most Canadian provinces utilize various methods of discovery, including depositions and interrogatories, requests for admission, inspection of physical land and mental or physical examination. The main difference between the United States and Canada is while the U.S. system allows parties to utilize many or all of the methods concurrently, some Canadian provinces allow parties to utilize only certain methods and not others. While some Canadian provinces allow a party to utilize both written *and* oral examination,⁹⁸ others require a party to choose

⁹⁴ R.R.O. 1990, Reg. 194, §30.02(1).

⁹⁵ B.C. Reg. 221/90, §§26(1), 27(22).

⁹⁶ Platto, *supra* note 21, at 216. *See e.g.*, R.R.O., Reg. 194, §30.03.

⁹⁷ Platto, *supra* note 21, at 216. *See e.g.*, B.C. Reg. 221/90, §221/90, §26(1). Quebec, however, has no mandatory disclosure of documents.

⁹⁸ One example of a Canadian province that allows both oral and written examination is British Columbia.

between methods. Examples of the latter system include the Federal Rules of Court and the province of Ontario, in which a party may examine another party *either* by written *or* oral examination.⁹⁹ A party may not examine a person by both written and oral examination without leave of court.¹⁰⁰

Like the U.S. federal rules, a party may request a medical examination of an individual if the examinee's condition is an issue in the pending case.¹⁰¹ Most Canadian provinces will also allow inspection of property. Unlike the U.S. federal rules, however, a court order is generally required before a party is entitled to inspect property.¹⁰²

c. Obtaining discovery from non-parties.

Parties in Canadian courts generally may only examine or request documents from non-parties with leave of court.¹⁰³ Similar to England, Ontario further limits non-party discovery by prohibiting a court from ordering discovery from non-parties unless it is satisfied that the moving party cannot obtain the information it seeks from other parties, that prohibiting non-party discovery would be “unfair” to the moving party, and that the examination will not unduly delay the trial, entail unreasonable expense or “result in unfairness”.¹⁰⁴

4. Resistance to U.S. style discovery.

As noted above, the U.S. discovery system is often euphemistically termed “exceptional”. One scholar has framed the controversy over different discovery systems as “not one pitting the common law against the civil law, but rather one pitting the United

⁹⁹ R.R.O. 1990, Reg. 194, §31.02(1); Fed. Reg. SOR/98-106, §234.

¹⁰⁰ R.R.O. 1990, Reg. 194, §31.02(1).

¹⁰¹ Platto, *supra* note 21, at 220. *See e.g.*, R.R.O. 1990, Reg. 194, §33.01; B.C. Reg. 221/90 Rule 30(1).

¹⁰² Platto, *supra* note 21, at 220. *See e.g.*, R.R.O. 1990, Reg. 194, §32.01; B.C. Reg. 221/90, Rule 30(4) & (5).

¹⁰³ *See* Platto, *supra* note 21, at 217, 219. *See e.g.*, R.R.O. 1990, Reg. 194, §30.10(1); B.C. Reg. 221/90, §26(11). *Park v. B.P.Y.A. 1610 Holdings*, (2005) 46 B.C.L.R. (4th) 265, ¶11.

¹⁰⁴ R.R.O. 1990, Reg. 194, §31.10(1)(a) & (b).

States of America against the rest of the world.”¹⁰⁵ The U.S. discovery system is often referred to as unnecessarily broad, and providing parties a great opportunity to “disgorge information” from other parties.¹⁰⁶ Lord Diplock summed up a common view on U.S. discovery as follows: a “wide-roving search for any information that might be helpful.”¹⁰⁷ As stated above, the term most widely used to characterize U.S. discovery is “fishing”¹⁰⁸ – suggesting that plaintiffs go fishing for information from defendants that they can use to build their case and support additional causes of action.

Similar criticisms by U.S. practitioners and judges have spawned amendments to the U.S. federal rules over the past fifteen years that reflect a trend toward restricting discovery practices generally seen as overbroad.¹⁰⁹ Many of these amendments are discussed above. These amendments to the U.S. federal rules suggest a re-calibration of the balance in the underlying policy considerations, with an increased interest in proportionality.¹¹⁰ Despite these amendments, it is quite safe to say that the U.S. discovery system is “exceptionally” broad relative to other jurisdictions.

¹⁰⁵ Lowenfeld, *supra* note 5, at 137

¹⁰⁶ Grubbs, *supra* note 24, at 782

¹⁰⁷ *British Airways Board v. Laker Airways Ltd.* [1984] 3 WLR 413 at 419, [1985] AC 58 at 78. *See also* Lowenfeld, *supra* note 5, at 142 (citing Lord Diplock’s decision in *British Airways Board*).

¹⁰⁸ *See e.g.*, *Radio Corporation of America v. Rauland Corp.* [1956] 1 QB 618 at 649, 1 All ER 549; *Rio Tinto Zinc Corporation v. Westing House Electronic Corporation* [1978] AC 547 at 609, [1978] 2 WLR 81 at 87. *See also* Lowenfeld, *supra* note 5, at 142-43 (discussing use of term “fishing” by foreign courts and scholars).

¹⁰⁹ Wright, Miller & Marcus, *supra* note 17, § 2001 (discussing concerns in the 1970s and 1980s regarding abusive discovery practices and amendments from 1983 to 2000 curtailing discovery and allowing judges to limit discovery in response to these concerns).

¹¹⁰ *C.f.* Marcus, *supra* note 39, at 183-84 (“America is finally eliminating the “extravagant” features of discovery, opening the way to accommodation with the practices of the rest of the world”).

CHAPTER 2: THE EVOLUTION OF JUDICIAL ASSISTANCE IN THE UNITED STATES AND THE IMPACT OF *INTEL V. ADVANCED MICRO DEVICES*

Chapter 1 analyzed the differences between discovery systems, and the policies behind states' evidentiary and discovery rules. With that context in mind, this chapter traces the evolution of judicial assistance in the United States with a focus on the issue of foreign discoverability. The issues surrounding foreign discoverability are laid out as discussed in U.S. caselaw, and arguments before the Supreme Court in *Intel v. AMD Micro Devices, Inc.*¹¹¹ The purpose of this chapter is to give a detailed background of U.S. decisions regarding foreign discoverability to use as a springboard in Chapter 4's analysis of the U.S. system.

A. Background of 28 U.S.C. 1782.

Section 1782 of Title 28 of the United States Code ("§1782") is the statutory provision that grants U.S. district courts the authority to provide judicial assistance to international and foreign tribunals.¹¹² Congress first provided judicial assistance to foreign tribunals in 1855 through the use of letters rogatory via diplomatic channels.¹¹³ Over the next 100 years, amendments continually broadened U.S. courts' ability to provide judicial assistance by eliminating previous statutory requirements.¹¹⁴ In the late 1950s, Congress acknowledged that an increase in international commercial and financial

¹¹¹ 542 U.S. 241.

¹¹² 28 U.S.C. §1782 (2004). For a comprehensive history of the evolution of §1782 from its inception in 1855 to the present, see the Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel v. Advanced Micro Devices, Inc.*, 2004 WL 214306 (Jan. 30, 2004). The Supreme Court decision in *Intel* also traces the evolution of the statute. 542 U.S. 241. See also Roger J. Johns & Anne Keaty, *The New and Improved Section 1782: Supercharging District Court Discovery Assistance to Foreign and International Tribunals*, 29 AM. J. TRIAL ADVOC. 649 (2006).

¹¹³ Act of March 3, 1855, ch. 140, §2, 10 Stat. 630.

¹¹⁴ See Act of June 25, 1948, ch. 646, §1782, 62 Stat. 949 (eliminating the requirement that the government of a foreign country be a "party or have an interest in the proceedings"); Act of May 24, 1949, ch. 139, §93, 63 Stat. 103 (replacing the term "civil action" with "judicial proceeding" when characterizing the type of foreign proceeding in which U.S. courts could provide assistance).

transactions required a “comprehensive study” of the optimal level of judicial assistance.¹¹⁵ Congress created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to U.S. and foreign judicial assistance practices.¹¹⁶ The commission revised §1782 with the intention to liberalize U.S. judicial assistance, “offer a model and invitation to foreign states to follow the American example,” and “promote a better understanding and acceptance of American discovery purposes”.¹¹⁷

In 1964, Congress adopted the Commission’s suggested legislation, which resulted in a complete revision of §1782.¹¹⁸ One of the most notable amendments was that federal district courts could order the production of documents or testimony “for use in a proceeding in a foreign or international *tribunal*.”¹¹⁹ This quoted language replaced “judicial proceedings pending in any *court* in a foreign country with which the United States is at peace”.¹²⁰ The 1964 Act’s legislative history stated that Congress used the word “tribunal” to ensure that “assistance is not confined to proceedings before conventional courts”, but also extends to “administrative and quasi-judicial proceedings all over the world.”¹²¹ The courts have often interpreted §1782’s legislative history to

¹¹⁵ S. Rep. No. 2392 (1958).

¹¹⁶ Act of Sept. 2, 1958, Pub. L. No. 85-906, §2, 72 Stat. 1743.

¹¹⁷ Hans Smit, *Recent Developments in International Litigation*, 35 TEX. L. REV. 215, 229, 235 (1994). Professor Smit was a member of the commission, and has published numerous articles regarding the intent behind the 1964 amendments. 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, 9 (1998) (“[t]he revised section 1782 greatly liberalized assistance given to foreign and international litigants and tribunals” and “the purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals”).

¹¹⁸ *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88 (1963); Act of Oct. 3, 1964, Pub. L. No. 88-619, §9, 78 Stat. 997.

¹¹⁹ 28 U.S.C. 1782(a) (emphasis added).

¹²⁰ Act of May 24, 1949, ch. 139, §93, 63 Stat. 103 (emphasis added).

¹²¹ S. Rep. No. 1580 (1964). In 1996, §1782 was subsequently modified to add “criminal investigations conducted before formal accusation” to “foreign or international tribunal” to allow for assistance to war-

espouse the statute’s “twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.”¹²²

Another important change in §1782 included an expansion of who may request information. In early versions of the statute, only the foreign tribunal itself could request information, however, the 1964 amendments allowed “any interested persons” to bring a §1782 request.¹²³ The “interested person” need not have obtained authorization from the foreign tribunal before requesting judicial assistance. This change was designed to allow litigants to request information pursuant to §1782, as well as persons “designated by or under foreign law”.¹²⁴

The legislative history encouraged district courts to consider “the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country.”¹²⁵ The senate report noted that §1782 “permits, but does not command, following the foreign or international practice” for gathering the requested information.¹²⁶

In its current form, §1782(a) reads as follows:

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

crimes tribunals. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §132(b), 110 Stat. 486.

¹²² This phrase was first espoused in *Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d. Cir. 1992), and has subsequently been frequently cited by courts and scholars. See e.g., *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. at 252; Deborah Sun, *Note, Intel Corp. v. Advanced Micro Devices Inc.: Putting “foreign” back into the foreign discovery statute*, 39 U.C. DAVIS L. REV. 271, 288 (2005).

¹²³ S. Rep. No. 1580, at 3789.

¹²⁴ *Id.* The legislative history defines an “interested person” as “a person designated by or under a foreign law, or a party to the foreign or international litigation”).

¹²⁵ *Id.* at 3788.

¹²⁶ *Id.* at 3789.

criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. . . .¹²⁷

B. The concept of foreign discoverability in pre-*Intel* decisions.

It was not until the late 1970s that U.S. courts started having to answer the question of whether §1872 contains a requirement that the requested documents be admissible or discoverable in the foreign tribunal. As is evident from the comparison of discovery methods and standards between common law jurisdictions in Chapter 1, evidence discoverable in the United States is often not discoverable in other jurisdictions, such as third party depositions or document production of large categories of documents. Accordingly, if a U.S. court is limited to ordering discovery of information only discoverable in the foreign jurisdiction where the foreign tribunal sits, the methods and scope of discovery it can order is considerably less than if it is not so limited.

The Ninth Circuit briefly touched on the issue in 1976 in *In re Letters Rogatory from the Tokyo District, Tokyo Japan* (“Tokyo case”).¹²⁸ The court received a request for deposition testimony from a judge of the Tokyo District Court, and held that it need not determine whether the evidence requested for use was admissible in a Japanese court proceeding. The Ninth Circuit considered the issue again the following year in *In*

¹²⁷ 28 U.S.C. §1782(a).

¹²⁸ 539 F.2d 1216 (9th Cir. 1976).

Request For Judicial Assistance from the Seoul District Criminal Court, Seoul Korea (“*Seoul case*”).¹²⁹ In the *Seoul* case, the circuit court affirmed an order by the district court that records from a third-party bank be produced, as requested by the District Criminal Court in Seoul, Korea. Acknowledging that the tribunal itself was requesting information, the court held “[i]n our judgment our federal courts, in responding to requests, should not feel obligated to involve themselves in technical questions of foreign law relating to subject-matter jurisdiction of foreign or international tribunals, or the *admissibility* before such tribunals of the testimony or material sought.”¹³⁰

It is important to note that in both the *Tokyo* and *Seoul* cases, the foreign tribunal itself was requesting evidence, not a party before a foreign tribunal. Because letters rogatory were the predominant vehicle for requests for judicial assistance at this time, the common practice was that tribunals, as opposed to litigants before such tribunals, made §1782 requests.¹³¹ Accordingly, discoverability was not a concern to U.S. courts because the tribunal itself was requesting the information. The Ninth Circuit, therefore, did not consider discoverability, but concerned itself only with the appellant’s argument that the requested records were not admissible.

Throughout the 1980s, both district and circuit courts interpreted §1782 with regard to foreign discoverability and admissibility. The first decision to cite the *Seoul* case made apparent the complexities that arose when a *litigant* before a foreign tribunal, as opposed to the tribunal itself, requested assistance. In *In re the Court of the Commissioner of Patents for the Republic of South Africa* (“*South Africa Patent case*”),

¹²⁹ 555 F.2d 720 (9th Cir. 1977).

¹³⁰ *Id.* at 723 (emphasis added).

¹³¹ See e.g., *In re Letters Rogatory from City of Haugesund, Norway*, 497 F.2d 378 (9th Cir. 1974); *In re Letter Rogatory from the Justice Court District of Montreal, Canada*, 523 F.2d 562 (6th Cir. 1975).

the U.S. District Court for the Eastern District of Pennsylvania denied a request by the plaintiff in a South African patent case for documents and testimony from the U.S. defendant.¹³² The court noted that “[i]n contrast to the usual circumstances concerning letters rogatory, the requesting party in this case is a litigant in a foreign action.”¹³³ The court concluded that it needed to “act with special regard” for the foreign tribunal in such circumstances, and expressed suspicion that the requested materials were not available through South African procedures.¹³⁴ The court considered the importance of cooperation with foreign tribunals, and noted that “[f]ew actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals.”¹³⁵ The court reasoned that granting discovery for documents that were not discoverable in South Africa would “allow litigants to circumvent the restrictions imposed on discovery by foreign tribunals.”¹³⁶ The *South Africa Patent* case, read in conjunction with the *Tokyo* and *Seoul* cases, seemed to establish that when a *litigant* is requesting information, the court must satisfy itself that the information is in fact discoverable in the foreign tribunal; and that the U.S. court need not determine the admissibility of the requested information in the foreign court, regardless of whether the litigant or tribunal was requesting information.

¹³² 88 F.R.D. 75 (E.D. Penn. 1980).

¹³³ *Id.* at 77.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

The Third Circuit was the next court to step into the fray in *John Deere Ltd. v. Sperry Corporation*.¹³⁷ In that case, John Deere, the defendant in a Canadian patent infringement action, sought the depositions, including production of related documents, of U.S. employees of the Canadian plaintiff, Sperry Corporation. The lower court first granted John Deere's request, then subsequently vacated its order on the grounds that the material sought did not appear to be admissible at trial in Canada.¹³⁸ The district court concluded that not only would the requested discovery burden Sperry, but it "would represent an unwelcome intrusion into the judicial processes of a foreign tribunal" because "[it does not] appear that under Canadian rules of evidence the discovery sought will be admissible at trial."¹³⁹ The Third Circuit reversed the lower court, and held "[w]here, in the first instance, the matter sought would be discoverable were all persons within the foreign jurisdiction, the foreign tribunal should decide what use it wishes to allow the elicited documents and testimony."¹⁴⁰

The next circuit court to consider the issue, the Eleventh Circuit, affirmed an order by the lower court granting a request by the Attorney General and Minister of Legal Affairs for Trinidad and Tobago for documents in a criminal investigation. The circuit court held that "[w]hile a district court generally should not decide whether the requested evidence will be admissible in the foreign court, . . . the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance."¹⁴¹

¹³⁷ 754 F.2d 132 (3d. Cir. 1985).

¹³⁸ *John Deere Ltd. v. Sperry Corp.*, 100 F.R.D. 712 (E.D. Penn. 1983).

¹³⁹ *Id.* at 714.

¹⁴⁰ 754 F.2d at 136-37.

¹⁴¹ *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988). The Eleventh Circuit also mandated a foreign discoverability requirement in another case that same year. *See Lo Ka Chun v. Lo To* 858 F.2d 1564 (11th Cir. 1988).

The First Circuit then joined the Eleventh Circuit in requiring that the party requesting discovery pursuant to §1782 has the burden of showing the U.S. court that the requested information is discoverable in the foreign jurisdiction.¹⁴² In a strongly worded opinion reversing a district court's holding that foreign discoverability is not required, the First Circuit discussed several potential problems with the district court's approach. The First Circuit expressed concern that interpreting §1782 to not include a foreign discoverability requirement may lead other nations to conclude that "[U.S.] courts view their laws and procedures with contempt" contrary to the statute's stated goal of stimulating cooperation with foreign tribunals.¹⁴³ The court also pointed out that without a discoverability requirement, "foreign litigants may use Section 1782 to circumvent foreign law and procedures" by using it to obtain information unavailable in the foreign jurisdiction.¹⁴⁴

The court also addressed unfairness to U.S. defendants in foreign proceedings:

Under the district court's ruling, a [U.S.] party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the [U.S.] party is confined to restricted discovery in the foreign jurisdiction.¹⁴⁵

Shortly after the First Circuit's decision, the U.S. District Court for the Central District of California explicitly discussed whether different requirements existed for

¹⁴² *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992).

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.* at 5.

requests by litigants, as opposed to tribunals themselves.¹⁴⁶ The court reasoned that when a foreign tribunal requests information, “it is clear that the discovery sought is permitted and authorized by that body,” but when a litigant requests information “federal courts must exercise caution to prevent the circumvention of foreign discovery provisions and procedures.”¹⁴⁷

At the end of the 1980s, the law was fairly uniform across the four circuits that had ruled on the issue. There was no admissibility requirement regardless of whether the litigant was a foreign tribunal, a government official or a litigant in the proceedings. There was no discoverability requirement when the tribunal itself, or a government official, was requesting evidence. When a litigant was requesting the evidence, however, courts were obligated to make sure that the requested evidence was discoverable in the foreign jurisdiction. This loose uniformity did not last long, however, as the Second Circuit veered onto a different course in the early 1990s.

The Second Circuit was the first court to hold that §1782 did not have a foreign discoverability requirement, regardless of whether the requesting party was a foreign tribunal or litigant. In *In re Application of Gianoli Aldunate* the Second Circuit conclusively held that §1782 did not contain a foreign discoverability requirement, without reference to whether the requesting party is a litigant or tribunal.¹⁴⁸ The court

¹⁴⁶ *In re Application for an order for judicial assistance in a foreign proceeding in the high court of justice, Chancery Division, England*, 147 F.R.D. 223 (C.D. Ca. 1993).

¹⁴⁷ *Id.* at 226. The U.S. Court of Appeals for the District of Columbia impliedly concurred with this line of cases by holding that a request for evidence by the Crown Prosecution Service in the United Kingdom need not be determined “discoverable”, but must be “taken in a manner appropriate for British proceedings.” *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989).

¹⁴⁸ 3 F.3d 54 (2d Cir. 1993). For a discuss of the circuit split that *Aldunate* created, see Steven Saraisky, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127, 1141 (1994); Peter Metis, *International Judicial Assistance: Does 28 U.S.C. 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L.J. 332, 350-53 (1994); Cynthia Day Wallace,

affirmed a lower court's order authorizing discovery at the request of guardians in a Chilean incompetency proceeding and the lower court's refusal to vacate that order based on the U.S. residents' argument that the requested discovery was not discoverable under Chilean law.¹⁴⁹ The appellate court, like the lower court, relied heavily on the text of the statute, concluding that "[t]he language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction," and "we are not free to read extra-statutory barriers to discovery into section 1782."¹⁵⁰ Although the court acknowledged that both the text and legislative history of §1782 give the discretion to a district court to consider the foreign discoverability, it concluded that this discretion did not translate into an "implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country."¹⁵¹

The most widely-discussed Second Circuit case was *In the Matter of the Application of Euromepa, S.A.*¹⁵² The district court rejected a §1782 petition by a party before the Cour D'Appel in France because it did not want to interfere with French judge-controlled evidentiary procedures, and because the requesting party had not first requested that the French court order the requested discovery for use in court.¹⁵³ The Second Circuit reversed the district court, asserting that although a court should respect "authoritative proof" by a foreign tribunal that it would reject the requested evidence, "we do not read the statute to condone speculative forays into legal territories unfamiliar

'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judicial Overload? 27 INT'L LAW 1055, 1061-64 (2003); Christopher Walker Sanzone, *Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. 1782*, 29 VAND. J. TRANSNAT'L L. 117 (1996).

¹⁴⁹ 3 F.3d. at 56-57.

¹⁵⁰ *Id.* at 59.

¹⁵¹ *Id.* at 59-60.

¹⁵² 51 F.3d 1095 (2d Cir. 1995). For a detailed discussion of *Euromepa*, see Richard D. Haygood, *Note: Euromepa v. Esmerian: The Scope Of The Inquiry Into Foreign Law When Evaluating Discovery Requests Under 28 U.S.C. Sec. 1782*, 21 N.C. J. INT'L L. & COM. REG. 491 (1996).

¹⁵³ 155 F.R.D. 80 (S.D.N.Y. 1994).

to federal judges.”¹⁵⁴ Hence, the court concluded that if a party presented “authoritative proof” that a foreign tribunal did not want the evidence then the U.S. court could not order the requested discovery, but short of such proof, a U.S. judge should not attempt to determine foreign discoverability or admissibility, and should order the discovery.

The Fifth Circuit was the first court of appeals to consider the issue after the Second Circuit diverged from the other circuits. In *In re Letters Rogatory from the Court of First Instance in Civil Matters, Caracas, Venezuela*, the Fifth Circuit followed the line of cases requiring a foreign discoverability determination when the request comes from a private litigant, but not when a foreign tribunal is requesting the information.¹⁵⁵ Like the earlier cases, the court reasoned that no discoverability requirement in the case of private litigants could offend the forum nation “by furthering a scheme to obviate that nation’s discovery rules.”¹⁵⁶ One year later, the Fourth Circuit joined the Fifth Circuit by explicitly holding that while discoverability may be required for foreign litigants, no foreign discoverability requirement exists when a foreign tribunal is the requesting party.¹⁵⁷ The circuit split widened in 1998, when the Third Circuit revisited the issue, and decided to follow the Second Circuit, holding that “the lack of a finding of discoverability is an inadequate basis on which to deny a §1782 application.”¹⁵⁸ The Third Circuit’s decision created a presumption of discoverability by holding that “district courts should treat relevant discovery materials sought pursuant to §1782 as discoverable

¹⁵⁴ 51 F.3d at 1099-1100.

¹⁵⁵ 42 F.3d 308 (5th Cir. 1995). See also *In re Tyragg-Hansa Insur. Co., Ltd.*, 896 F.Supp. 624 (E.D. La. 1995) (following the *Venezuela* case and refusing to grant request by foreign litigant to compel deposition testimony for use in an English proceeding where the deposition was not obtainable under English law).

¹⁵⁶ 42 F.3d at 310-11.

¹⁵⁷ *In re Letter of Request from Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590 (4th Cir. 1996).

¹⁵⁸ *In re Bayer AG*, 146 F.3d 188, 195 (3d Cir. 1998).

unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application.”¹⁵⁹

C. Domestic discoverability requirement

The question of whether the requested information is discoverable in U.S. proceedings that are similar to the foreign proceeding has not come up often, but has been raised. Obviously, the reason it is often not raised is because within the U.S. broad discovery system, most requested information is allowed, and litigants are not likely to request information that is not discoverable in like U.S. proceedings. In *In re Letter of Request from the Boras District Court, Sweden*, the district court for the Eastern District of New York faced a request for a blood test for use in a paternity proceeding in Sweden.¹⁶⁰ The defendant argued that because the requesting party had not stated that she had intercourse with him during the period of conception, a prima facie showing of paternity had not been offered, which was required in New York law before a blood test could be ordered. The court rejected the defendant’s argument, stating that “[t]o insist on compliance with New York law would improperly read additional conditions to discovery not found in section 1782.”¹⁶¹

D. *Intel Corporation v. Advanced Micro Devices, Inc.*

As the above discussion of the various circuits’ treatment of §1782 illustrates, clarity was needed by the time the U.S. Supreme Court considered whether either §1782 contained a foreign or domestic discoverability requirement in 2004. This section discusses the factual background of *Intel*, the arguments raised by the parties and amicus curiae, the Court’s holding and Justice Breyer’s dissenting opinion.

¹⁵⁹ *Id.*

¹⁶⁰ 153 F.R.D. 31 (E.D.N.Y. 1994).

¹⁶¹ *Id.* at 34.

1. EC proceedings and nature of the EC commission.

In October 2000, Advanced Micro Devices, Inc. (“AMD”) filed a complaint with the Directorate-General for Competition (“DG-Competition”) alleging that Intel Corporation (“Intel”) had abused its dominant position in the European market through various anticompetitive practices.¹⁶² The European Commission, the executive and administrative organ of the European Communities, polices competition law and policy through the DG-Competition.¹⁶³ The DG-Competition investigates alleged violations of the European Union’s competition laws in response to complaints filed by market actors, such as AMD, or on its own initiative.

If, after a preliminary investigation, the DG-Competition decides *not* to pursue a complaint, it produces a written decision that is subject to judicial review by the EC Court of First Instance and ultimately the EC Court of Justice. Parties to subsequent judicial review proceedings of DG-Competition findings do not have an opportunity to submit evidence to the judicial tribunals. The only time in which parties can submit evidence is during the investigative stage before the DG-Competition.

If the DG-Competition decides to pursue the complaint, it will serve the targeted company with its preliminary views that a violation of competition laws has occurred, and advise the company of its intent to recommend an adverse decision. The alleged violator then has the right to take part in a non-adversarial information gathering hearing.

¹⁶² The facts leading up to the *Intel* Supreme Court decision are set forth in several court documents, including the Supreme Court decision itself at 542 U.S. 241.

¹⁶³ A thorough description of the function and structure of the DG-Competition can be found in the Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, *Intel v. Advanced Micro Devices*, 2002 WL 32157391 (Nov. 15, 2002) [hereinafter First EC Brief], and the Brief of Amicus Curiae of the Commission of the European Communities Supporting Reversal, *Intel v. Advanced Micro Devices*, 2003 WL 23138389 (Dec. 23, 2003) [hereinafter Second EC Brief]. For a detailed discussion of the DG-Competition’s procedures, see also Tony Reeves, Henk Albers & Russell Hunter, *A Closer Look at Intel v. AMD in Light of the EU Complaints Procedure*, 19 Fall-ANTITRUST 72 (2004).

The decision regarding whether a violation occurred after the information gathering hearing is also subject to judicial review.

After filing its complaint with the DG-Competition, AMD recommended to the DG-Competition that it seek discovery of documents that Intel had produced in a U.S. private antitrust suit several years before.¹⁶⁴ The DG-Competition declined to act on AMD's recommendation, and AMD subsequently petitioned the U.S. District Court for the Northern District of California for an order directing Intel to produce the documents pursuant to §1782.

2. *Intel* lower court and appellate court decisions.

The district court denied AMD's §1782 request based largely on the fact that the DG-Commission was not an adjudicative body, and therefore, not a "tribunal" overseeing a "proceeding" within the meaning of §1782.¹⁶⁵ On appeal, the Ninth Circuit reversed the district court, holding that the DG-Competition was a "proceeding before a tribunal" within the meaning of §1782. The court concluded that because the DG-Competition's recommendations are adopted by the EC Commission, "a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties" and because "EC decisions are appealable to the Court of First Instance and then the Court of Justice", the discovery was sought for a proceeding "leading to quasi-judicial proceedings".¹⁶⁶

The court also held that §1782 did not contain a foreign discoverability requirement, hence, information requested pursuant to §1782 need not be discoverable

¹⁶⁴ 542 U.S. at 250. The documents in the previous U.S. case, *Intergraph Corp. v. Intel Corp.*, 3 F.Supp.2d 1255 (N.D. Ala. 1998), were subject to a protective order, and thus, not available for use outside that litigation.

¹⁶⁵ *Advanced Micro Devices, Inc. v. Intel Corp.*, 2002 WL 1339088 (N.D. Ca. Jan. 7, 2002).

¹⁶⁶ *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 667 (9th Cir. 2002).

under the laws of the foreign jurisdiction. The fact that AMD was not entitled to the required discovery under the DG-Competition's rules did not, therefore, automatically foreclose AMD from requesting them pursuant to §1782. To support its conclusion, the court reasoned:

We find nothing in the plain language or legislative history of §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 . . . Had Congress wished to impose such a requirement on parties, it could have easily done so.¹⁶⁷

The Ninth Circuit reasoned that “allowance of liberal discovery seems entirely consistent with the twin aims of §1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.”¹⁶⁸

3. The high court's decision in *Intel*.

Intel petitioned the U.S. Supreme Court for a Writ of Certiorari, which the high court granted.¹⁶⁹ The parties' arguments before the high court, as well as various amicus curiae briefs filed by the U.S. Government, the EC, the Products Liability Advisory Council, Inc. (“PLAC”) and the National Association of Manufacturers (“NAM”), highlight various aspects of the issues briefly touched upon by the circuit court decisions discussed above. In this section, the various arguments in favor of, and arguing against, a foreign discoverability requirement are addressed with emphasis on the specific party raising the issue.

a. The textual and legislative history argument.

¹⁶⁷ *Id.* at 669.

¹⁶⁸ *Id.*

¹⁶⁹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 540 U.S. 1003 (Nov. 10, 2003).

Like the Second Circuit in its decisions finding no foreign discoverability requirement, both AMD and the U.S. government as amicus curiae heavily relied on the absence of any mention of a foreign discoverability requirement in §1782's text or legislative history to argue against any such requirement.¹⁷⁰ AMD also used a textual argument to dismiss the Fifth and Fourth Circuit's approaches of distinguishing between litigants and tribunals as the requesting party.¹⁷¹ AMD cited predominantly to Hans Smit, a member of the committee commissioned by Congress in 1958, to suggest changes to the statute, who has repeatedly asserted in various publications over the past forty years¹⁷² that the drafters intended to allow discovery not discoverable in the foreign jurisdiction.¹⁷³

Intel argued that §1782's goal of providing "assistance" to foreign tribunals was meant only to put litigants seeking information in the United States in the same position as if the information was in the foreign jurisdiction.¹⁷⁴ Intel claimed that §1782 meant to "diminish the legal significance of a person's (or document's) geographic location".¹⁷⁵ Intel argued that the absence of a foreign discoverability requirement would put undue importance on geographic location by entitling litigants to much more expansive

¹⁷⁰ Brief for Respondent, *Intel Corp. v. Advanced Micro Devices Inc.*, 2004 WL 297864 (Feb. 13, 2004) [hereinafter Brief for Respondent]; Brief for the United States as Amicus Curiae Supporting Affirmance, 2004 WL 214306 (Jan. 30, 2004) [hereinafter Brief for the U.S. Government].

¹⁷¹ Brief for Respondent, *supra* note 170, at 31-32.

¹⁷² See e.g., Hans Smit, *The Supreme Court Rules On The Proper Interpretation Of Section 1782: Its Potential Significance For International Arbitration*, 14 AM. REV. INT'L ARB. 295 (2003); 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 (1998); Hans Smit, *Recent Developments In International Litigation*, 35 S. TEX. L. REV. 215 (1994).

¹⁷³ Brief for Respondent *supra* note 170, at 10-12.

¹⁷⁴ Brief for Petitioner, *Intel Corp. v. Advanced Micro Devices, Inc.*, 2003 WL 23138394 (Dec. 31, 2003), at 22 [hereinafter Brief for Petitioner].

¹⁷⁵ *Id.*

discovery solely because the requested evidence was in the United States – a result the drafters did not intend.¹⁷⁶

b. Reciprocity and Promoting an Example of Cooperation for Foreign Courts.

Following the Ninth Circuit’s interpretation of §1782’s aims, AMD cited Professor Smit’s claim that U.S. courts providing discovery to foreign litigants that is unavailable in the foreign jurisdiction would “promote” the statute’s aims by “making available to foreign tribunals and statutory ‘interested persons’ the broad discovery generally available in American litigation.”¹⁷⁷ AMD further argued that this would result in U.S. courts “communicat[ing] to the world at large what it regarded as the proper example to emulate in extending international cooperation and, in the process, promot[ing] better understanding and acceptance of American discovery practices.”¹⁷⁸

Intel argued that the statute’s goal of cooperation required foreign discoverability as a prerequisite to assistance, as “Congress’s ultimate objective was to foster a system of international cooperation that respects the rules of different legal regimes by making the geographic location of a document or person largely immaterial to the particular fact-finding process established by the [foreign] ‘tribunal.’”¹⁷⁹

c. Forcing U.S. judges to consider foreign law.

Respondents also feared that a foreign discovery requirement would force U.S. judges to “become familiar with ‘the subtleties of the applicable foreign system,’ solely

¹⁷⁶ *Id.*

¹⁷⁷ Brief for Respondent, *supra* note 170, at 11.

¹⁷⁸ *Id.* (citing Smit, 35 S. TEX. L. REV. at 235).

¹⁷⁹ Brief for Petitioner, *supra* note 174, at 3.

for the ‘purpose of honoring a simple request for assistance.’”¹⁸⁰ Drawing from previous decisions voicing this concern, AMD argued that U.S. judges should not be forced to mete out the nuances of international law by trying to make sense of foreign law experts’ competing affidavits submitted by the parties when trying to prove or disprove foreign discoverability.

d. Comity concerns.

In a self-admitted “highly unusual” step for the EC, it filed amicus curiae briefs in support of Intel, both in support of the Court granting Certiorari and on the merits supporting reversal of the lower court.¹⁸¹ Using strong language, the EC stated to the Court that it was “deeply concerned” that §1782, as interpreted by the Ninth Circuit, would “directly threatened the Commission’s enforcement mission in competition law and possibly interfere with the Commission’s responsibilities in other areas of regulatory concern,”; ultimately “becom[ing] a threat to foreign sovereigns if interpreted expansively by this court.”¹⁸²

The EC expressed concern that the Ninth Circuit’s holding allowing AMD discovery would undermine its Leniency Program of reducing penalties for companies that come forward to tell the DG-Competition about existing competition violations by deterring companies from coming forward in the first place for fear of subsequent discovery.¹⁸³ The EC also expressed concern that allowing complainants before it to utilize §1782 would undermine its cooperation and existing agreements with U.S.

¹⁸⁰ Brief of Respondent, *supra* note 170, at 11 (citing Smit, 35 S. TEX. L. REV. at 235).

¹⁸¹ First EC Brief, *supra* note 163; Second EC Brief, *supra* note 163.

¹⁸² Second EC Brief, *supra* note 163, at 3.

¹⁸³ First EC Brief, *supra* note 163, at 6.

antitrust agencies, such as the Department of Justice and the Federal Trade Commission, through which the agencies share information.¹⁸⁴

The EC opined that the DG-Competition was not a “tribunal” for purposes of §1782, and with regard to its function, the EC described itself as follows:

Neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights as between private parties. *It never performs the functions of a tribunal*, because it never decides the merits of any dispute between the complainant and the target. . . . The Complainant is not a party to the Commission’s investigations. . . . Only at the very end of the process, when the Commission acts of DG Competition’s final recommendation to abandon the investigation or make a finding of infringement, does the investigative function blur into decisionmaking. But while the line between prosecutorial and adjudicative functions in the last stage of the proceeding may be less sharp than that which exists in United States practice, *that modest convergence in no way converts the Commission into a “tribunal” of the sort contemplated in Section 1782.*¹⁸⁵

Finally, the EC pointed out that “the discovery sought by AMD is information that the Commission has thus far declined to seek on its own behalf,”¹⁸⁶ and that “other channels exist for the [EC], as a governmental actor, to obtain information located in the United States It is the Commission’s clear preference, for example, to rely on the formal mechanisms that it has carefully negotiated with the United States specifically for the purpose of cooperation in competition law enforcement.”¹⁸⁷ The EC emphasized that “this is a very serious matter” and warned that allowing complainants before it, or

¹⁸⁴ *Id.* at 5.

¹⁸⁵ Second EC Brief, *supra* note 163, at 7-9 (emphasis added).

¹⁸⁶ *Id.* at 4, 12.

¹⁸⁷ *Id.* at 12.

companies it is investigating, discovery pursuant to §1782 “would be a breach of the principle of international comity.”¹⁸⁸

An adjudicative proceeding would only be initiated if the DG-Competition concluded that it would not further investigate and AMD decided to request review of that conclusion by the Court or First Instance, or if the DG-Competition found that Intel had acted anti-competitively and Intel then sought judicial review of that decision. Intel argued that this resulted in any adjudicative proceeding as “purely speculative” at the current investigative stage of the DG-Competition’s proceedings.¹⁸⁹ Intel emphasized the EC’s argument that to interpret the DG-Competition as a “tribunal” would “open [§1782] to discovery requests in connection with virtually *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review.”¹⁹⁰ Intel also pointed to decisions by European courts concluding that the EC Commission is not a “tribunal” for the purposes of European treaty interpretation.

As its initial argument, AMD posited that the DG-Competition was a “tribunal” because “its proceedings result in a final decision on the merits of a complaint, determining the legal rights of a party, and possibly imposing penalties.”¹⁹¹ AMD placed more emphasis on its second argument that because on appeal, “the Court of First Instance can only consider evidence that was proffered to the Commission, . . . it is only now, before the EC acts on the complaint, that such evidence may be obtained and

¹⁸⁸ First EC Brief, *supra* note 163, at 7.

¹⁸⁹ Brief for Petitioner, *supra* note 174, at 28-29.

¹⁹⁰ *Id.* at 29-30.

¹⁹¹ Brief for Respondent, *supra* note 170, at 34.

submitted.”¹⁹² It claimed that its pending request for discovery was for use both in the investigative stage and the subsequent judicial review stage of the DG-Competition’s findings. Essentially, AMD argued that the DG-Competition was a tribunal, but even if it was not, the resulting judicial review of its decision was, which was one of the proceedings for which it sought evidence.

In response to comity concerns generally, AMD relied on earlier Second Circuit precedent that a comity-based argument “depends on the demonstrably false premise that the inability to obtain discovery in a foreign court *necessarily* ‘means that the foreign court objects to the inquiry.’”¹⁹³ Intel, on the other hand, argued that foreign countries may be offended by a U.S. law that allows parties to use U.S. courts as vehicles for obtaining information from U.S. parties that is unavailable in their own laws and procedures.¹⁹⁴

PLAC and NAM, associations representing U.S. and international products manufacturers, addressed comity concerns in their amicus briefs in support of Intel, relying largely on *Asta Medica* and the *South Africa Patent* case, arguing that foreign tribunals are hostile to U.S. discovery, therefore, giving litigants before foreign tribunals access to U.S. discovery will discourage, as opposed to encourage, cooperation among international tribunals.¹⁹⁵ PLAC noted that a country’s discovery rules are linked to their conception of litigation, as discussed in Chapter 1, and injecting U.S. discovery into foreign proceedings could “distort” those proceedings and the balance that country has

¹⁹² *Id.* at 36.

¹⁹³ *Id.* at 24 (quoting *Bayer*, 146 F.3d at 194).

¹⁹⁴ Brief for Petitioner, *supra* note 174, at 20-21 (citing *In re Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992)).

¹⁹⁵ Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioner, *Intel v. Advanced Micro Devices*, 2003 WL 23112943 (Dec. 31, 2003), at 18-19 [hereinafter PLAC brief].

struck between competing policy concerns underlying its discovery system.¹⁹⁶ NAM argued that “allowing foreign litigants to circumvent the limits on discovery that foreign nations have imposed would “threaten[] to undermine fundamental choices these nations have made about how to structure their judicial systems.”¹⁹⁷

The U.S. government’s amicus brief also analyzed comity, and posited that “[c]omity concerns provide a weak foundation for inferring that Section 1782 contains [a foreign discoverability requirement] because those concerns may actually *favor* production of the materials at issue.”¹⁹⁸ Without arguing for the Fourth or Fifth Circuit’s approach distinguishing requests by litigants and foreign governments, the U.S. government noted that if the request comes from a foreign court or enforcement agency, the request should be evaluated without engaging in a “potentially offensive inquiry into the lawfulness of the request under foreign law.”¹⁹⁹ With regard to requests by litigants, the U.S. government reasoned as follows:

The foreign tribunal’s laws may limit discovery within its borders out of concerns that are peculiar to its legal practices, culture, or traditions, but have no analogue in the United States. . . . The application of a foreign discoverability rule would make little sense in that situation; rather, it would undermine Section 1782’s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons that have no bearing on international comity, they cannot obtain under their own laws. . . . A foreign tribunal’s general reluctance to order production of materials present in the United States likewise provides no sound basis for a foreign discoverability rule because that

¹⁹⁶ *Id.* at 4-5.

¹⁹⁷ Brief of Amicus Curiae for the National Association of Manufacturers at 4, 2002 WL 32157392 (Nov. 15, 2002) [hereinafter NAM brief].

¹⁹⁸ Brief for the U.S. Government, *supra* note 170, at 23.

¹⁹⁹ *Id.*

reluctance may simply reflect that tribunal's desire to avoid offending *this* country.²⁰⁰

e. Fairness & Parity

Fairness to U.S. parties in foreign litigation was the central concern of the PLAC, and was discussed by Intel. The fairness issue has two prongs, including (1) the lack of “parity”, or equality, between parties that results when a U.S. party is subject to asymmetrical discovery obligations beyond the bounds of the foreign jurisdiction’s law with no rights to equal discovery, and (2) the ability of the foreign party to circumvent discovery restrictions in the foreign jurisdiction by utilizing §1782.

PLAC was concerned with U.S. companies being sued in foreign courts, arguing that no foreign discoverability requirement would “encourage foreign plaintiffs to assert against U.S. defendants expansive discovery rights that their own legal systems do not provide,” and §1782 “will become a vehicle for imposing asymmetrical discovery obligations on American companies involved in foreign litigation.”²⁰¹ The EC itself expressed concern that applying §1782 to the DG-Competition would “encourage companies to file pretextual complaints with the Commission solely in order to use §1782, wasting the Commission’s scarce resources.”²⁰²

Both AMD and the U.S. government advocated reliance on U.S. district judges’ discretion to react to each case specifically to cure any concerns regarding fairness and parity. The EC expressed concern about broadly interpreted §1782 then leaving each case to the discretion of the district courts, arguing that “[t]he inevitable unpredictability and inconsistency simply exacerbate the problems already inherent in requiring a foreign

²⁰⁰ *Id.* at 24.

²⁰¹ PLAC Brief, *supra* note 195, at 4-5.

²⁰² Second EC Brief, *supra* note 163, at 4.

sovereign to monitor [U.S.] litigation to determine when it should appear and explain its interests in a [U.S.] tribunal.”²⁰³

With regard to using foreign courts’ discretion to solve any potential difficulties, the U.S. government recommended that “the foreign tribunal itself can adopt appropriate rules of practice respecting the admission of evidence to maintain whatever measure of parity that it concludes is appropriate.”²⁰⁴ In a similar vein, AMD, again relying on Professor Smit, argued that “if the foreign jurisdiction truly regarded ‘extra’ discovery allowed in the U.S. as contrary to the policies of the foreign jurisdiction, it could simply refuse to admit or consider such evidence, thereby rendering the additional discovery simply meaningless.”²⁰⁵

Intel pointed out that AMD could not obtain the discovery it was seeking because “European law does not provide for it, either at the investigation phase or at any subsequent judicial review phase.”²⁰⁶ As stated in Intel’s brief:

[E]ven if the documents in question were in Europe, AMD would have no right to them under European law It would make nonsense of this statute to place AMD in a superior position to obtain invasive discovery simply because the documents happen to be in the United States rather than in the jurisdiction of the forum in which AMD claims a need for them.²⁰⁷

f. The Supreme Court’s holding.

Six of the Supreme Court justices filed a majority opinion, with one concurring justice and one dissenting justice, holding that AMD could utilize §1782 because it was an “interested person”, the DG-Competition was a “tribunal” and a reasonably

²⁰³ *Id.* at 17.

²⁰⁴ Brief for U.S. Government, *supra* note 170, at 25.

²⁰⁵ Brief for Respondent, *supra* note 170, at 12.

²⁰⁶ Brief for Petitioner, *supra* note 174, at 23.

²⁰⁷ *Id.* at 24.

contemplated “proceeding” existed. The Court also held that §1782 contained no threshold requirement that the information sought be discoverable in the foreign jurisdiction. The Court interpreted §1782’s legislative history to leave the decision to the district courts’ discretion, and noted that the district court could tailor its order in response to concerns about fairness or comity.²⁰⁸ The Court also held that the information requested pursuant to §1782 need not be discoverable in a comparative U.S. proceeding.

The Court concluded that its holding did not offend principles of comity, relying on the U.S. government’s assertion that a foreign nation limits discovery “for reasons peculiar to its own legal practices, culture, or tradition—reasons that do not necessarily signal objection to aid from [U.S.] federal courts.”²⁰⁹ The court also followed the U.S. government’s reasoning that “[a] foreign tribunal’s reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to §1782.”²¹⁰ The Court even verbatim restated the U.S. government’s argument that foreign tribunals often may want evidence that is not discoverable in their jurisdiction, and in those situations, a foreign discoverability requirement would be “senseless”.²¹¹

The Court also followed AMD and the U.S. government’s suggestion that any parity or fairness concerns are assuaged by U.S. courts using discretion to tailor orders accordingly, or by foreign tribunals “placing conditions on the acceptance of

²⁰⁸ 542 U.S. at 260-261.

²⁰⁹ 542 U.S. at 261-262. For detailed discussions of the *Intel* decision, see E. Morgan Boeing, *Majority & Dissent in Intel: Approaches to Limiting Judicial Assistance*, 29 HASTINGS INT’L & COMP. L. REV. 381 (2006); Richard A. Rothman, *Intel Corp. v. Advanced Micro Devices Inc. Exporting U.S. Discovery Abroad: Risks, Rewards & Ramifications*, 51 DEC. FED. LAW 20 (2004); Johns & Keaty, *supra* note 112.

²¹⁰ 542 U.S. at 262.

²¹¹ *Id.*

information” to maintain parity.²¹² The Court espoused four factors for district courts to consider when ruling on §1782 requests. The first factor distinguished between requests for a non-party to produce information and for a party to produce information. Because a foreign tribunal has jurisdiction over parties before it, the need for §1782 aid was not as great as when information from a non-party was requested, which may be outside the foreign tribunal’s jurisdictional reach. Second, the Court restated §1782’s legislative history that the court may take into account “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.”²¹³ Third, the court can consider whether the requesting party is attempting to circumvent foreign proof-gathering restrictions or policies. Fourth, district courts may reject or tailor “unduly intrusive or burdensome requests.”²¹⁴

The Court also rejected a domestic discoverability requirement. It concluded that “Section 1782 is a provision for assistance to tribunals abroad. It does not direct [U.S.] courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.”²¹⁵

The Court remanded to the district court, which applied the Court’s four factor test and ultimately rejected AMD’s §1782 request in its entirety, reasoning that the EC Commission had jurisdiction over Intel, as a party to its proceedings, and therefore, U.S. judicial assistance was less necessary.²¹⁶ The district court also based its holding on the

²¹² *Id.*

²¹³ S. Rep. No. 1580, at 3788.

²¹⁴ 542 U.S. at 265.

²¹⁵ *Id.* at 263.

²¹⁶ *Advanced Micro Devices v. Intel Corp.*, 2004 WL 2282320 (N.D. Ca. Oct. 4, 2004).

fact that the EC Commission clearly did not want the discovery, and AMD was attempting to circumvent the EC Commission's discovery proceedings.²¹⁷

g. The dissent and remand.

The lone voice of Justice Breyer spoke in a dissenting opinion. Justice Breyer rejected the majority's reliance on district courts' case-by-case analysis on the grounds that discovery and discovery-related judicial proceedings are expensive and cause delay. Such expense and delay appear futile when the information obtained is ultimately unusable by the foreign court. The alternative he offered to reliance on district courts' discretion is the following rule:

[A] court should *not* permit discovery where both of the following are true: (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.²¹⁸

With regard to whether the DG-Competition was a "tribunal", Justice Breyer proffered the logical rule that "when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word 'tribunal' is in serious doubt, then a court should pay close attention to the foreign entity's own view of its 'tribunal'-like or non-'tribunal' status."²¹⁹

E. Trends In The Post-*Intel* Caselaw

In the last three years many district courts have applied *Intel*'s four factor test in determining whether to grant §1782 requests. In fact, there has been a sharp increase in the number of §1782 requests since *Intel*. Given that any "interested party" can request information "for use" in a foreign or international tribunal, now quite broadly defined,

²¹⁷ *Id.*

²¹⁸ *Id.* at 270.

²¹⁹ *Id.* at 269.

even if that information is not discoverable pursuant to the tribunal's rules, this increase is not surprising. In the three years following *Intel*, there have been over twenty published opinions dealing with §1782 requests. When one considers that in the forty years between 1964 when §1782 was amended and 2004 when *Intel* was decided there are approximately forty published opinions, the post-*Intel* increase is quite apparent. Another noteworthy aspect of post-*Intel* cases is the large proportion of requests granted by district courts. As a general rule, the district courts ordered the requested discovery.²²⁰ The only decisions rejecting §1782 discovery requests did so because the foreign tribunal appeared before the district court explicitly asking the court to deny the discovery requests.²²¹ These cases are discussed below.

1. The “authoritative proof” test.

Prior to *Intel*, the Second Circuit in *Euromepa* held that no foreign discoverability requirement existed, and a district court should reject a §1782 request only if presented with “affirmative proof” that the foreign tribunal would reject the evidence.²²² Post-*Intel* caselaw appears to have adopted *Euromepa*'s holding requiring that no foreign discoverability requirement exists, and a court may reject a §1782 request only if it is

²²⁰ See e.g., *In the Matter of the Application of Kolomoisky*, 2006 WL 2404332 (S.D.N.Y. Aug. 18, 2006); *In re Application of Grupo Qumma, S.A. de C.V.*, 2005 WL 937486 (S.D.N.Y. Aug. 22, 2005); *Fleischmann v. McDonald's Corp.*, 2006 WL 3530582 (N.D. Ill. Dec. 6, 2006); *In re Application of Hill*, 2005 WL 1330769 (S.D.N.Y. June 3, 2005); *In re Application of IManagement Serv. Ltd.*, 2005 WL 1959702 (E.D.N.Y. Aug. 16, 2005); *Lopes v. Lopes*, 180 Fed. Appx. 874 (11th Cir. 2006); *In re Application of Guy*, 2004 WL 1857580 (S.D.N.Y. Aug. 19, 2004); *In re the Application of Servicio Pan Americano de Proteccion, C.A.*, 354 F.Supp.2d 269 (S.D.N.Y. 2004); *In the Matter of the Application of the Procter and Gamble Co.*, 334 F.Supp.2d 1112 (E.D. Wis. 2004); *In re Application of Gemeinschafts-Praxis Dr. med. Schottdorf*, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006).

²²¹ One case was also denied based on the fact that the documents requested were located outside the United States, and therefore, the district court did not have jurisdiction to compel production of them. *Norex Petroleum Ltd. v. Chubb Insur. Co. of Canada*, 384 F.Supp.2d 45 (D.D.C. 2005). This case is discussed in detail in Chapter 4 addressing the ramifications of *Intel* regarding foreign storage of documents by U.S. companies.

²²² 51 F.3d at 1099-1100.

presented with “authoritative proof” that the foreign tribunal is opposed to the district court granting discovery, or would reject the information as evidence.

The emerging “authoritative proof” test was recently espoused by the district court for the Southern District of New York:

The Second Circuit has instructed this Court to consider ‘only authoritative proof’ in considered these [discretionary] factors. . . . Such authoritative proof has been found to exist where the representative of a foreign sovereign has expressly and clearly made its position known. . . . By contrast, proof resting on unequivocal interpretations of foreign policy or law generally provides an insufficient basis to deny discovery . . . Rather, in such cases the Second Circuit has instructed that district courts generally should err on the side of permitting the requested discovery. . . . This liberal construct is owing to the availability of corrective measures abroad; for example, the foreign tribunal may simply choose to exclude or disregard the discovered material should that tribunal find that the district court overstepped its bounds in ordering the discovery.²²³

For example, in *In re Application of Grupo Qumma, S.A. de C.V.*, the district court judge ordered production of information requested for use in a Mexican judicial proceeding, despite claims that the Mexican court could not consider such evidence, based on a lack of “authoritative proof” that the Mexican court would reject the information.²²⁴ The district court for the Eastern District of New York also granted a discovery request based on the fact that it did not have “authoritative proof” that the foreign court would reject the requested discovery as evidence.²²⁵ This case is a particularly stunning application of the authoritative proof test, as the court found the test not satisfied despite a clear directive from the foreign court that it would not accept the

²²³ 2006 WL 3844464, at *6.

²²⁴ 2005 WL 937486, at *3.

²²⁵ *In re Application of Imanagement Serv.*, 2005 WL 1959702.

requested discovery as evidence. The Bank of New York (“BNY”), a defendant in a pending lawsuit in the Moscow City Arbitrazh Court, requested an order compelling deposition testimony and the production of related documents from three non-parties for use in the Russian action. Imanagement, the opposing party, filed an opposition to BNY’s request, and submitted a ruling from the Russian court refusing to stay its proceedings while BNY pursued its §1782 request. The Russian court ruling submitted to the district court stated that the Russian court would not stay proceedings because, pursuant to Russian procedure rules, a transcript of witness testimony obtained without an order from the Russian court may not “serve as due evidence”.²²⁶ BNY countered that it would attempt to introduce the requested deposition testimony as “other documents and materials” pursuant to Russian procedural rules.

The court held that “authoritative proof” that the Russian court would not consider the deposition testimony was required for it to reject BNY’s request. The court then rejected the Russian Court’s ruling as providing such proof because the ruling addressed only deposition testimony, and not “other documents and materials”.²²⁷ The court also noted Imanagement’s intention to use the depositions to identify pertinent documents, which it had no “authoritative proof” that the Russian court would reject.²²⁸

Along these same lines, the only decisions rejecting a discovery request were issued by courts with authoritative proof in the form of a submission to the court directly from the foreign tribunal that it did not want the district court to grant the requested discovery. For example, in *Schmitz v. Bernstein Liebhard & Lifshift, LLP*, the Second Circuit affirmed a district court judge’s denial of a discovery request for use in a German

²²⁶ *Id.* at *1.

²²⁷ *Id.* at *4.

²²⁸ *Id.*

judicial proceeding.²²⁹ Counsel for Deutsche Telekom AG (“DT”), a German corporation, had previously produced documents to the Public Prosecution Office in Bonn, Germany for use in pending criminal proceedings against DT. The Prosecution office subsequently provided the documents to plaintiffs’ counsel in a securities class action pending before the district court for the Southern District of New York. Plaintiffs in civil lawsuits pending against DT in German courts then sought production of the documents used in the American proceedings for use in Germany, which the Prosecution Office declined. The German plaintiffs then petitioned the district court for the documents pursuant to §1782.

DT submitted a letter to the district court from the Bonn District Attorney’s office stating that “production of the documents ‘would ultimately be a circumvention of the restrictions on the access to the pieces of evidence so far imposed by the Bonn District Attorney’s Office.’”²³⁰ The Germany Ministry of Justice also wrote a letter to the U.S. Deputy Attorney General stating that “disclosure of the documents concerned may jeopardize German sovereign rights,” and that the Prosecutor only produced the documents to the U.S. plaintiffs with the understanding that they would only be used in that case, and are subject to a protective order.²³¹ Based on the submissions from the German government, the district court denied the German plaintiffs’ request for documents. The circuit court affirmed the lower court’s finding that “granting the request here ‘would in fact encourage foreign countries to potentially disregard the sovereignty

²²⁹ 376 F.3d 79 (2d Cir. 2004).

²³⁰ 259 F.Supp.2d 294, 298 (S.D.N.Y. 2003).

²³¹ *Id.*

concerns of the United States and generally discourage future assistance to our courts.’’²³²

The only other district courts to publish opinions rejecting §1782 requests after *Intel* all also received explicit submissions from the foreign tribunal, the EC Commission in each case, requesting that the request not be granted. All of these cases relate to §1782 requests by Microsoft Corporation in various district courts for information for use in a DG-Competition investigation. In 2004, the DG-Commission concluded an investigation of Microsoft’s actions in the EU market, finding Microsoft guilty of infringement of anticompetition laws. The EC adopted the DG-Competition’s infringement findings and instructed Microsoft to come into compliance.

Microsoft requested all the documents in the DG-Competition’s possession pertaining to communications between the Commission and third parties, such as Sun Microsystems, Inc., Novell, Inc. and Oracle Corporation. The DG-Competition informed Microsoft that it was entitled to non-confidential versions of the requested documents, but Microsoft also wanted further discovery, and on March 2, 2006, Microsoft filed an application to the Commission for further discovery, requesting certain relevant material that might not be in the Commission’s file. The following day, Microsoft filed *ex parte* applications pursuant to 28 U.S.C. § 1782 in three U.S. district courts—the Southern District of New York, the District of Massachusetts, and the Northern District of California—seeking permission to serve subpoenas *duces tecum* to third parties that

²³² 376 F.3d at 84-85 (quoting the lower court’s decision at 259 F.Supp.2d at 300).

might be holding such documents. Microsoft filed §1782 requests in several district courts requesting that the third parties produce the related documents.²³³

Each court received submissions from the EC Commission explicitly stating its opinion that it was not receptive to receiving information from Microsoft obtained through §1782 requests, as such requests would allow Microsoft to circumvent its procedures. Accordingly, each district court rejected Microsoft's request. One district court reasoned that "[w]here, as here: the foreign tribunal can obtain the documents at issue and provide them to Microsoft; that [the] tribunal does not want the involvement of this court; and there is no showing of fundamental unfairness in the absence of intervention, considerations of comity strongly favor quashing the subpoena."²³⁴

Another court concluded that "[t]his situation involves a tribunal's specific order restricting a specific litigant's ability to gather evidence. Under these circumstances, the subpoenas constitute an attempt to circumvent specific restrictions the [EC] has placed on Microsoft's right to obtain certain kinds of information. This alone weighs heavily against allowing the requested discovery."²³⁵ That court also emphasized that because the EC "is *not* receptive to U.S. federal court judicial assistance in this case," "[a]s a matter of comity, this court is unwilling to order discovery when doing so will interfere with the [EC]'s orderly handling of its own enforcement proceedings."²³⁶ Similarly, a third district court concluded that "[g]ranting discovery in the face of opposition from the foreign tribunal would undermine the spirit and purpose of the statute by discouraging

²³³ *In re* Application of Microsoft Corp., 2006 WL 825250 (N.D. Ca. Mar. 29, 2006); *In re* Application of Microsoft Corp., 2006 WL 1344091 (D. Mass. April 19, 2006); *In re* Application of Microsoft Corp., 428 F.Supp.2d 188 (S.D.N.Y. 2006).

²³⁴ 2006 WL 1344091 at *4 (D. Mass April 16, 2006).

²³⁵ 2006 WL 825250, at *3.

²³⁶ *Id.*

that and other foreign tribunals from ‘heeding similar sovereignty concerns posited by our governmental authorities to foreign courts.’”²³⁷ These *Microsoft* decisions suggest that it is not just the Second Circuit that has adopted the “authoritative proof” standard.

2. Parties’ use of foreign law experts.

Despite the U.S. judges’ concern regarding federal judges being forced to discern foreign law,²³⁸ one result of its four factor test is the routine use of foreign law experts by parties to “help” courts determine the foreign tribunal’s practices pursuant to the second discretionary factor, the nature and character of the tribunal and proceeding, and the tribunal’s receptivity to assistance. District court judges have had a hard time determining the state of a foreign jurisdiction’s law in the face of “battling affidavits”. For example, the district court for the Southern District of New York characterized “[t]he competing affidavits offered by the parties” regarding Mexican discovery rules as “contradictory and difficult to understand.”²³⁹ In a very recent case, that court was faced with competing affidavits regarding German law, and could only conclude that “in the end the Court is left without an answer as to which expert is correct. . . . This court is not expected to declare a winner in this ‘battle-by-affidavit of international legal experts.’”²⁴⁰

In *Fleischmann v. McDonald’s Corporation*, the court received voluminous amounts of information from both sides regarding Brazilian law in a §1782 proceeding. The court expressed frustration at the amount of foreign law evidence, and opined that “[a] collateral issue such as discovery should rarely call for the amount of expert

²³⁷ 428 F.Supp.2d at 194 (citing the district court opinion in *In re Schmitz*, 259 F.Supp.2d at 298). Similarly, the district court in *Fleischmann v. McDonalds Corporation*, which granted discovery, distinguished itself from *Microsoft* and *Intel* based on the fact that the party opposing discovery “had not shown that the [foreign] Court would be unreceptive to materials discovered here under 1782(a)” 2006 WL 3530582, at *10.

²³⁸ See e.g., *Euromepa*, 51 F.3d at 1099; *John Deere*, 754 F.2d at 136.

²³⁹ *In re Application of Grupo Qumma, S.A. de C.V.*, 2005 WL 937486, at *3.

²⁴⁰ *In re Application of Gemeinschafts-Praxis Dr. Med. Schotttdorf*, 2006 WL 3844464, at *7.

evidence that is usually necessary to interpret foreign law.”²⁴¹ In these cases, the district court judges were more inclined to leave it to the foreign court to decide, as they were not comfortable trying to discern the foreign law based on the evidence submitted by parties.

3. Courts’ reliance on foreign judges to determine whether to admit the evidence received.

District court judges granting §1782 requests repeatedly relied on foreign judges to decide whether they wanted to use the requested information when there was a question as to foreign discoverability or admissibility. As stated succinctly by the district court for the Southern District of New York, “[i]f in fact the [foreign] court opposes [U.S.] assistance, that court may simply choose to exclude the discovered material from evidence. . . . The availability of that corrective measure assuages any concern I may otherwise have had on the issue.”²⁴² This reasoning is related to U.S. courts’ view that even though information may not be available in a foreign jurisdiction, the foreign tribunal may still be interested in receiving the information as evidence.

For example, in *In the Matter of the Application of Procter & Gamble Company*, the district court granted Procter & Gamble’s request for discovery for use in patent infringement actions that Kimberly-Clark Corporation brought against it in several foreign jurisdictions, including the United Kingdom, France, The Netherlands, Germany and Japan.²⁴³ After concluding that the threshold requirements of §1782 were met, the court analyzed *Intel*’s four factors. With regard to Kimberly-Clark’s argument that Procter and Gamble was attempting to circumvent foreign jurisdictions’ discovery restrictions, the court reasoned as follows:

²⁴¹ 2006 WL 3530582, at *6.

²⁴² 2006 WL 3844464, at *7.

²⁴³ 334 F.Supp.2d 1112.

Granting discovery under §1782(a) would not undermine the policies of foreign governments in favor of low discovery costs because as a general rule it imposes no costs on such governments or on their inhabitants. Section 1782 applies to litigants who reside or are found within the United States, i.e., litigants normally subject to American discovery procedures and their attendant costs. Further, foreign courts are not obligated to consider evidence obtained pursuant to §1782(a); thus allowing the discovery will not burden such courts with evidence that they deem irrelevant.²⁴⁴

Another district court that ordered discovery requested pursuant to §1782 addressed the nondiscoverability of the information pursuant to Venezuelan discovery rules.²⁴⁵ In *Servicio Pan Americano de Proteccion, C.A.*, Servicio Pan Americano de Protección (“Servicio”), a Venezuelan security firm, requested information for use in a proceeding brought against it by HSBC Bank in a Venezuelan civil court proceeding. Specifically, Servicio sought documents relating to HSBC’s insurance claims relating to the suit. Servicio argued that although evidence of HSBC’s insurance claims would aid its defense, Venezuelan rules of civil procedure barred it from obtaining insurance documents without evidence that specific documents existed.

The court characterized the Venezuelan rules of civil procedures’ prohibition on categorical discovery of documents not known to exist as a “technical limitation”, and concluded that “Venezuelan courts would appear to readily accept [the documents] if properly authenticated.”²⁴⁶ The Court further stated that “[w]hile the United States’ documentary discovery rules appear significantly more liberal than those of Venezuela, the Supreme Court recognized in [*Intel*] that a foreign court’s procedural discovery limitations . . . should not prevent a district court from enabling a foreign litigant to

²⁴⁴ *Id.* at 1116.

²⁴⁵ 354 F.Supp.2d at 274.

²⁴⁶ *Id.* at 275.

obtain admissible evidence here.”²⁴⁷ The court concluded that “[s]ince the information would be useful to a Venezuelan court but potentially unobtainable under Venezuelan laws for *purely technical reasons*, application of a foreign discoverability rule in this case would be senseless.”²⁴⁸

Likewise, in *In re Application of Grupo Qumma, S.A. de C.V.*, the court ordered the requested discovery, despite its nondiscoverability in the Mexican court, reasoning that “[o]f course, the Mexican court is free to deny the application.”²⁴⁹ The judge in *In re Application of Imanagement Services Ltd.* also left it to the Russian court to determine whether to consider the evidence obtained by §1782. The court noted that “it is unclear whether the Russian court has the authority to order discovery from non-parties who reside outside the court’s jurisdiction, and resort to §1782 may be the only avenue by which Imanagement can obtain the discovery it seeks. The request for assistance may reflect a reasonable effort to overcome a *technical discovery limitation*.”²⁵⁰ Here again, the court considered itself doing a favor to both the requesting party and foreign tribunal by giving it evidence the tribunal may find quite useful, but could not order itself based on “technical” procedural rules of the foreign jurisdiction.

While an analysis of the impact of the *Intel* and post-*Intel* interpretations of §1782 follows in Chapter 4, this section was designed to provide a thorough explanation of the evolution of U.S. caselaw regarding foreign discoverability, as well as detail the various issues involved. The next sections will address English and Canadian judicial assistance

²⁴⁷ *Id.*

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ 2005 WL 937486, at *4.

²⁵⁰ 2005 WL 1959702, at *5 (emphasis added).

schemes, to further contextualize the U.S. judicial assistance scheme in concrete and global terms.

CHAPTER 3: JUDICIAL ASSISTANCE BY ENGLISH AND CANADIAN COURTS

This section analyzes Canadian and English judicial assistance systems with an emphasis on foreign and domestic discoverability and admissibility. The purpose of this section is to further contextualize the U.S. judicial assistance system in concrete and comparative terms. Specifically, this section illustrates that both England and Canada have a domestic discoverability requirement, consider the relevance of the information to the foreign proceeding, and take care not to impose undue burden on citizens within their jurisdiction when granting judicial assistance. Section 1782's need for both domestic and foreign discoverability requirements becomes more apparent when viewed in the context of its fellow common law jurisdictions. This section is meant to provide background for discussion of these issues, which will be analyzed in detail in Chapter 4.

U.S. judicial assistance schemes cannot be neatly juxtaposed with foreign judicial assistance schemes due to the fundamentally defensive nature of foreign schemes and the fundamentally offensive nature of the U.S. scheme.²⁵¹ The vast majority of letters of request in both Canada and England come from U.S. courts. U.S. courts generally have jurisdiction to order foreign *parties* to produce evidence, but do not have jurisdiction to order discovery from *non-parties* located outside the United States.²⁵² Hence, the vast

²⁵¹ Beginning as early as 1956, English courts have routinely pointed out that U.S. discovery is much broader than in England, and taken a defensive posture rejecting requests from U.S. courts that do not take the differences between the two systems into account. *Accord* Daniela Levarda, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving A Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1380-81 (1995) (stating that with regard to parties, "[u]nlike the United States, which takes the offensive in compelling extraterritorial disclosure, the United Kingdom has traditionally employed a defensive approach in limiting the scope of discovery orders to conduct within its borders"). *See e.g.*, *Radio Corp. of America v. Rauland Corp.*, [1956] 1 All ER 549, 551; *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All ER 434, 441 (H.L.).

²⁵² *See* Fed. R. Civ. P. 45; *S&S Screw Machine Co. v. Cosa Corp.*, 647 F. Supp. 600 (M.D. Tenn. 1986) ("because [U.S.] courts lack sovereign power to compel compliance [with discovery orders] by non-parties abroad, the [Hague Evidence Convention] perforce becomes the exclusive means to gather evidence from those persons"). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §442 cmt. a (1985) ("[t]ypically, discovery requests and orders are addressed to parties before the court. . . .

majority of requests for evidence come from U.S. courts for oral examination and document production of non-parties.²⁵³ With the world's broadest allowable discovery, U.S. courts will almost never be faced with requests for judicial assistance that exceed the scope of allowable discovery pursuant to the federal rules. Conversely, foreign courts are regularly faced with requests for judicial assistance by U.S. courts that exceed the scope of their allowable discovery. Non-U.S. judicial assistance statutes and case law dealing with judicial assistance spend considerable time rejecting requests by U.S. courts for evidence that is not discoverable within their jurisdictions. This situation is distinctly different from U.S. courts receiving requests for judicial assistance, in which U.S. judges are liberally granting judicial assistance without considering whether such requests offend U.S. civil procedure.

A. England: English judges and their frustrations with U.S. lawyers and judges.

English judges' jurisdiction to provide judicial assistance to foreign courts is statutory. The English statute dealing with judicial assistance is The Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act").²⁵⁴ The 1975 Act replaced The Foreign Tribunal Evidence Act 1856, and the Evidence By Commission Acts 1859 and 1885 to give effect to the United Kingdom's accession to the Hague

. Discovery requests and orders may be addressed to nonparties within the United States as well"); Barry Donnelly & John Fellas, NEW YORK LAW JOURNAL, VOL. 228, NO. 36 (Aug. 22, 2002), at n.2 ("[i]f the person for whom discovery is sought is a party to the lawsuit, it is generally possible to seek discovery from such a person simply by relying on the Federal Rules of Civil Procedure, rather than having to follow the [Hague Evidence Convention] procedures"); Robert C. O'Brien, *Compelling the Production of Evidence by Nonparties in England Under the Hague Convention*, 24 SYRACUSE J. INT'L L. & COM. 77, 80 (1997). It should be noted that if the non-party present outside the United States is a U.S. national or resident, the U.S. court may order discovery pursuant to 28 U.S.C. §1783. *See id.*, at 89 ("28 U.S.C. §1783 provides for an important exception to the territorial limits placed on a court's authority to enforce a subpoena under Rule 45 where [U.S.] nationals or residents are involved").

²⁵³ Accord Peter Balasubramanian and Cynthia Tape, *Obtaining Evidence in Canada for Use in Foreign Proceedings: Principles and Practice*, NYSBA INT'L LAW PRACTICUM, Spring 2004, Vol. 17, No. 1, p. 20 ("the vast majority of letters of request in Canada deal with requests coming from the United States . . .").

²⁵⁴ The Evidence (Proceedings in Other Jurisdictions) Act, 1975 [hereinafter "The 1975 Act"]. Civil Procedure Rule 34, Section II corresponds to The 1975 Act.

Evidence Convention.²⁵⁵ The United Kingdom’s “qualified” Article 23 reservation was codified in section 4 of the 1975 Act, which forbids orders that require parties to respond to broad categorical document requests or requests for pre-trial discovery.²⁵⁶

Like §1782, The 1975 Act authorizes English courts to give judicial assistance to civil and criminal proceedings in foreign courts, as well as “international proceedings”.²⁵⁷ Also like §1782, English judges can order a wide range of discovery methods, including the examination of witnesses, either orally or in writing, the production of documents, the inspection of property, medical examinations or the taking of blood samples.²⁵⁸

One of the most important differences between U.S. and English judicial assistance laws is that English courts consider requests for judicial assistance only “issued by or on behalf of a court or tribunal” and not from litigants before foreign courts.²⁵⁹ In practice, however, foreign courts generally act merely as a conduit between litigants requesting information and the English court, with foreign judges rarely analyzing the letter of request presented to it by litigants before forwarding it onto English courts.²⁶⁰ In fact, English courts have expressed frustration that U.S. judges n

²⁵⁵ *Westinghouse Electric Corp.*, [1978] 1 All ER at 441-42; *Re Asbestos Insur. Coverage Cases*, [1985] 1 All E.R. 716 (H.L.), ¶7 [hereinafter “*Asbestos case*”]. See also K. Lipstein, *The Evidence (Proceedings in Other Jurisdictions) Act 1975: An Interpretation*, (1990) 39 I.C.L.Q. 1(JAN) 120-135.

²⁵⁶ While many states entered “unqualified” declarations pursuant to Article 23 that effectively barred any pre-trial discovery of documents whatsoever, the United Kingdom entered a “qualified” declaration that it will not execute letters of request that require a person to produce “any document *other than particular documents specified*” in the request.” See Donnelly & Fellas, *supra* note 252, at 1; O’Brien, *supra* note 252, at 84-86 (“The United Kingdom and almost every other contracting state made the declaration permitted under Article 23. However, unlike several European countries such as Germany, France and Italy, the United Kingdom did not make a blanket declaration refusing to execute all letters of request for documents”); *Graco v. Kremlin*, 101 F.R.D. 502 (N.D. Ill. 1984) (discussing the Hague Evidence Convention and Article 23 in detail).

²⁵⁷ The 1975 Act, §§1(b), 5(1)-(3), 6(1)-(3).

²⁵⁸ *Id.* §2(2)(a)-(f).

²⁵⁹ *Id.* §1(a).

²⁶⁰ *Gredd v. Busson*, [2003] EWHC 3001 (Q.B.), ¶27(8) (“this court appreciates that orders for the issue of letters of request are normally made by the US judge without any real scrutiny. The order is normally made in the terms sought by the applicant without any (or any significant) amendment and without the

particular do not ensure that evidence requested by litigants in proposed letters of request comply with English civil procedure before sending them to the English Court.²⁶¹ The most salient differences for the purpose of this article, are the foreign and domestic discoverability requirements found in the 1975 Act, as well as the fact that English courts only entertain judicial assistance requests by foreign courts directly.

1. Domestic discoverability requirement in England.

The 1975 Act specifically prohibits courts from ordering discovery of information that is not discoverable in similar proceedings in English courts.²⁶² The 1975 Act states that “[a] person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give . . . in civil proceedings in the part of the United Kingdom in which the court that made the order exercises jurisdiction.”²⁶³

The 1975 Act also states that “[a]n order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for purposes of civil proceedings in the court making the order.”²⁶⁴

judge being informed of the significant differences between US federal procedure and those of these courts”).

²⁶¹ See e.g., *Westinghouse Electric Corp.*, [1978] 1 All E.R. at 452(e); *Gredd*, [2003] EWHC 3001 at ¶24 (“[t]here is an important pertinent difference between US procedure and English procedure in civil cases that is, in my experience, frequently not known to litigation lawyers and judges in the USA”); *Genira Trade & Finance Corp. v. Refco Capital Markets Ltd.*, [2001] EWCA Civ. 1733, ¶1 (“much time is taken up in our courts trying to give effect to Letters of Request, problems in relation to which could have been avoided if proper steps had been taken to bring to the attention of the foreign court the constraints under which the English court operates”). See also Donnelly & Fellas, *supra* note 252 (discussing *Refco* and English courts’ frustration with U.S. letters of request).

²⁶² See Steven Loble, *Jurisdiction and Evidence – An English Perspective*, 4 ILSA J. INT’L & COMP. L. 489 (1998) (noting that “[t]he English Court is prohibited from making an order requiring any particular steps to be taken unless they are steps which could be taken to obtain evidence for the purposes of civil proceedings in the English Court”).

²⁶³ The 1975 Act, §3(1)(a).

²⁶⁴ *Id.* §2(3). See also Steven Loble, *Obtaining Evidence in England for use in Proceedings in the United States of America*, §4 (“[t]he English Court is prohibited from making an order requiring any particular steps to be taken unless they are steps which could be taken to obtain evidence for the purposes of civil proceedings in the English Court”), available at http://www.loble.co.uk/obtaining_evidence.htm.

The 1975 Act's codification of the United Kingdom's Article 23 declaration in the Hague Evidence Convention solidified its stance that pre-trial discovery would not be permitted because it was not part of England's civil procedure.²⁶⁵ This includes not only oral and documentary pre-trial discovery, but discovery from third-parties generally.²⁶⁶ Hence, English courts impose a domestic discoverability requirement on requested discovery. As alluded to above, English judges have adopted defensive postures against "fishing", the term widely used to describe U.S. style discovery, defined as searching for material, either by document requests or pre-trial depositions, that may lead to the ability to make factual allegations, as opposed to directly eliciting known evidence to support allegations of fact.²⁶⁷

a. Requests for documents.

The 1975 Act explicitly prohibits courts from ordering parties to respond to categorical document requests (i.e., "all documents relating to . . ."). Specifically, the statute forbids requests that require an individual to "state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power" or "produce any documents other than particular documents specified in the order . . ."²⁶⁸ Not surprisingly, English courts have consistently denied or modified letters of request that include categorical document requests and/or documents not known to exist.²⁶⁹ As explained by the House of Lords, document requests must specify "individual documents separately described" that are

²⁶⁵ *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶1.

²⁶⁶ *Id.* at ¶¶1, 29.

²⁶⁷ *First American Corp. v. Al-Nahyan*, [1998] 4 All E.R. 439.

²⁶⁸ The 1975 Act §2(4)(a) & (b). *See also* Loble, *supra* note 264 ("[d]ocuments sought must be specifically listed and not referred to by general descriptions").

²⁶⁹ *See e.g., Asbestos Case*, [1985] 1 All E.R. 716 (C.A.).

“actual documents, about which there is evidence which has satisfied that they exist, or at least that they did exist, and that they are likely to be in the respondent’s possession”.²⁷⁰

b. Requests for oral examination.

Except under exceptional circumstances, parties are not entitled to pre-trial depositions or discovery from non-parties. The 1975 Act has been interpreted by English judges to prohibit both document requests and requests for oral examination for pre-trial discovery purposes.²⁷¹ Where a letter of request seeks testimony of far-reaching broadly defined topics, an English court will reject such a request.²⁷² Similarly, where a “U.S. style” pre-trial deposition is requested with no suggestion that such oral evidence will be used at trial, an English court will reject the request.²⁷³ This rule stems in part from a desire to protect witnesses from “an oppressive request” such that they have some idea of the subjects on which they will be questioned.²⁷⁴

English judges have acknowledged that oral examination can be used both as a pre-trial deposition and presented as evidence at trial,²⁷⁵ and therefore, may allow pre-trial oral examination if the requesting party represents that it is also to be used at trial.²⁷⁶ Further, unlike categorical document requests, it is not fatal to a requesting party to be unsure exactly what the potential deponent/witness knows and utilize background

²⁷⁰ *Asbestos Case*, ¶¶13-14. See also O’Brien, *supra* note 252, at 97-98 (discussing *Asbestos* holding by the House of Lords); Myrick, *supra* note 88, at 28 (“[a] Request may only seek production of documents which are sufficiently particularized, that is, individual documents separately described”).

²⁷¹ *Gredd*, [2003] EWHC 2001 at ¶2.

²⁷² See e.g., *First American Corp.*, 4 All ER 439; *Gredd*, [2003] EWHC 2001 at ¶20.

²⁷³ See e.g., *Refco Capital Markets*, [2001] EWCA Civ. 1733, ¶37 (rejecting pre-trial deposition that “was in reality a typical [U.S.] style discovery deposition . . . and that is an exercise which the English Statute simply does not allow”).

²⁷⁴ *First American Corp.*, [1998] 4 All ER 439; *State of Minnesota v. Philip Morris Inc.*, [1998] I.L. Pr. 170, 176 (“the court will not allow uncertain, vague or other objectionable requests to be implemented. A witness is entitled to know within reasonable limits the matters about which he or she is to be examined”).

²⁷⁵ See also *Gredd*, [2003] EWHC 3001 at ¶29 (citing to *First American Corp.*).

²⁷⁶ The seminal case discussing this issue is *First American Corp.*, cited to heavily for this proposition in *Gredd*.

questions.²⁷⁷ The reasoning behind these allowances is that under English civil procedure, a witness at trial is often asked background information, and trial testimony often leads to the discovery of more evidence.²⁷⁸ That being said, timing is sometimes relevant, as an English court may be more prone to grant requests for oral examination once the pre-trial evidence phase has ended or is wrapping up, and trial is imminent.²⁷⁹

c. Get out the blue pencil: Modifying letters of request.

English judges sometimes “blue pencil” or modify letters of request by striking those portions that they deem overbroad to comply with English civil procedure.²⁸⁰ Because English judges want to aid foreign courts in keeping with their Hague Evidence Convention obligations and on comity grounds,²⁸¹ modification of overbroad requests is a way for English judges to aid foreign courts while preserving the principle of domestic discoverability. In the case of document requests, judges may strike categorical

²⁷⁷ *First American Corp.*, 4 All ER 439. See also *Gredd*, [2003] EWHC 3001 at ¶28 (“the fact that the applicant does not know what evidence the deponent would give is not fatal provided there is a sufficient case that he may reasonably be thought to be able to give relevant evidence. The fact that his evidence may lead to the discovery of further evidence again is not fatal”).

²⁷⁸ As explained by the court of appeals: “Section 2(2) of the 1975 Act bars the court from making an order for oral testimony to be taken pursuant to a letter of request unless the order is of a type that could have been made for the purpose of obtaining oral testimony for domestic litigation. In the case of a witness who there is reason to believe has relevant evidence to give, a subpoena served on the witness in order to obtain his evidence for trial could not be set aside on the ground that it was ‘fishing’. In a comparable case, a court would not be deprived by s. 2(2) of power to accede to a letter of request.” *First American Corp.*, [1998] 4 All E.R. 439. See also *Gredd*, [2003] EWGC 3001 at ¶¶28, 29. (“[w]e have all been in cases where answers in cross-examination or indeed in examination in chief have led to a search for further testimony or documents, notwithstanding that those answers were given at trial” and noting that asking preliminary questions of a witness “is not fishing,” but “a normal technique of examination”).

²⁷⁹ See e.g., *Asbestos Case*, [1985] 1 WLR 331 at ¶10. See also Myrick, *supra* note 88, at 27 (“[b]ecause an English court can honor only a Request for evidence, the timing of any Request to the English court is important. . . . If the Request is made too early, the requesting party is vulnerable to an accusation that the evidence is required for use other than at trial”).

²⁸⁰ See e.g., *Westinghouse*, [1978] 1 All ER 434.

²⁸¹ Lord Denning’s often-cited phrase in the court of appeals’ decision in *Westinghouse* states “[i]t is the duty and the pleasure of the English courts to do all it can to assist the foreign court, just as it would expect the foreign court to help it in like circumstances”. [1978] A.C. 437. See also *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶28.

document requests and identify only particular documents.²⁸² In the case of requests for oral examination, judges may make such examination subject to restrictions such as eliciting testimony for trial only and limiting questions to those that could be asked at trial.²⁸³

When English courts receive a letter of request that is predominantly seeking pre-trial evidence via categorical document requests and related deposition testimony, some judges have declined to conduct such “substantive alteration”.²⁸⁴ With regard to document requests, it is often the case that categorical document requests simply cannot be modified to include only specific documents because categorical document requests do not presuppose the requested document actually exists.²⁸⁵

2. Foreign discoverability and admissibility in England

Section 3 of the 1975 Act addresses foreign admissibility and discoverability. It provides that where the individual from whom evidence is requested includes a statement in his objection that he could not be compelled to produce the requested evidence in the foreign jurisdiction, the English court may not compel production of the evidence.²⁸⁶ The

²⁸² *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶30.

²⁸³ *Id.* See also I.R. Scott, *Obtaining Evidence for Proceedings in Other Jurisdictions*, C.J.Q. 2002, 21(MAR), 83-87, 85 (discussing *Refco*’s holding that “so far as documents are concerned, the court can by application of blue pencil identify particular documents that it could order to be disclosed . . . [a]nd so far as oral testimony is concerned, the court can make its order subject to conditions”).

²⁸⁴ See e.g., *Gredd*, [2003] EWHC 3001 at ¶32; *Minnesota*, [1998] I.L.Pr. 170 at ¶¶50-52, 69. See also Loble, *supra* note 262, at 504 (discussing *Minnesota* and the judge’s conclusion that he could not blue pencil the request). In *Westinghouse*, Lord Wilberforce allowed sweeping alteration of a broad letter of request from a U.S. court, and Lord Viscount Dilhorne dissented, arguing that such “substantive alteration” was not within the province of English judges. See *Westinghouse*, [1978] 1 All ER at 454(d)-(e).

²⁸⁵ *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶34-36. See also Donnelly & Fellas, *supra* note 252, at 3 (discussing the court’s unwillingness to blue-pencil the request in this case).

²⁸⁶ The 1975 Act §3(1)(b) states: “A person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give-- subject to subsection (2) below, in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.” Subsection 2 states that “subsection (1)(b) above shall not apply unless the claim of the person in question to be exempt from giving the evidence is either--(a) supported by a statement contained in the request whether it is so supported unconditionally or subject to conditions that are fulfilled; or (b) conceded by the applicant for the order . . .”

English court may also not compel evidence that the applicant concedes may not be compelled by the foreign court.²⁸⁷

In practice, English judges rarely have to consider the foreign discoverability requirement, as the vast majority of requests for evidence come from U.S. courts, and any evidence granted by English judges will be well within U.S. broad discovery parameters. Foreign discoverability is rarely an issue also because English judges only allow requests from foreign courts directly, as opposed to from litigants or other individuals. This guarantees that the foreign tribunal desires the information, and reduces the need to make sure that the requested evidence may not be discoverable or admissible.

English courts have, on occasion, made tentative inquiries into whether the requested evidence is “relevant” to the foreign proceeding. The general rule, as stated by the English court of appeals is as follows:

An English court must look to the issue of relevance of the requested testimony, if it is raised, in broad terms, leaving to the foreign court, in all but the clearest cases, the decision as to whether particular answers, or answers on particular topics, would constitute relevant admissible evidence.²⁸⁸

Indeed, it is only in cases in which English judges find the requesting party’s claim that the requested evidence is relevant to the foreign proceeding to be “extremely dubious” that a request is rejected on those grounds.²⁸⁹

²⁸⁷ *Id.*

²⁸⁸ *First American Corp.*, [1998] 4 All ER 435. Quoted by *Gredd*, [2003] EWHC 2001 at ¶27(12). See also *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶31 (quoting Lord Keith in *Westinghouse*, [1978] A.C. 437 for the general principle that “the court of request should not be astute to examine the issues in the action and circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible”); *Asbestos Cases*, [1985] 1 WLR 331 ¶18 (“[i]t would be quite inappropriate, even if it were possible, for this House or any English court to determine in advance the matters relevant to the issues before the Californian courts on which each of these witnesses is in a position to give evidence”).

²⁸⁹ See e.g., *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶40.

B. Canadian judicial assistance.

While Canadian statutory law regarding judicial assistance has remained generally unchanged for nearly forty years, Canadian courts' approach to judicial assistance has significantly shifted from a restrictive approach to a more liberal approach.²⁹⁰ Canada is not a member of the Hague Evidence Convention, therefore unlike England, its courts are not under an international obligation to provide judicial assistance to foreign tribunals. However, Canadian courts are quite willing to provide such assistance and often rely on the principles of international comity and reciprocity as motivating factors for providing judicial assistance to foreign tribunals.²⁹¹

The Canada Evidence Act is the federal statute that gives Canadian courts discretion to provide judicial assistance to foreign courts.²⁹² The Act states, in part, as follows:

If, on an application . . . any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within [the Canadian court's] jurisdiction, . . . the court or judge may, in its or their discretion, order the examination on oath on interrogatories . . . may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or

²⁹⁰ Bradley J. Freedman & Gregory N. Harney, *Obtaining Evidence from Canada: The Enforcement of Letters Rogatory by Canadian Courts*, 21 U.B.C. L. REV. 351, 351 (1987). A good description of the shift from the restrictive approach that categorically rejected pre-trial discovery requests to the post-*Zingre* liberal approach requiring a public policy analysis can be found in *Republic of France v. De Havilland Aircraft of Canada Ltd.*, [1991] 1 C.P.C. (3d) 76, 3 O.R. (3d) 705.

²⁹¹ See *Zingre v. The Queen*, [1981] 2 S.C.R. 392, ¶18 (“[i]t is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect.”); *Westinghouse Electric Corp. v. Duquesne Light Co.*, 16 O.R. (2d) 273, 78 D.L.R. (3d) 3, ¶35 (“[c]ourts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries”). See also Freedman & Harney, *supra* note 290, at 352-53.

²⁹² Canada Evidence Act, R.S.C., c. E-10, §43.

documents relating to the matter in question that are in the possession or power of that party or witness.²⁹³

Most provinces have similar legislation,²⁹⁴ which governs requests to provincial courts for judicial assistance concurrently with the Canada Evidence Act.²⁹⁵ The provincial statutes are largely similar to the federal statute, therefore, the concurrent application is not problematic.²⁹⁶ Like the federal statute, the provincial statutes also allow for both the production of documents and oral testimony.²⁹⁷ This chapter focuses on Ontario and British Columbia, as the majority of decisions in this area come from these provinces.

1. Public policy considerations: The Canadian answer to domestic discoverability.

The Act states that “[n]o person shall be compelled to produce . . . any writing or other document that he could not be compelled to produce at a trial of such a cause.”²⁹⁸

Pursuant to this section, a court cannot compel the production of evidence that could not

²⁹³ *Id.* §46. It is well-established that the term “testimony” in the Act includes both documents and oral testimony. *United States District Court v. Royal American Shows*, [1982] 1 S.C.R. (2d) 414, §10. *See also* *Freeman & Harney*, *supra* note 290, at 357; *Myrick*, *supra* note 88, at 46.

²⁹⁴ *See e.g.*, the British Columbia Evidence Act, R.S.B.C. 1996, c. 124, §53. All provinces except New Brunswick, Newfoundland and Prince Edward Island have enacted legislation similar to the Canada Evidence Act. *Balasubramanian & Tape*, *supra* note 253, at 21-22.

²⁹⁵ *Freedman & Harney*, *supra* note 290, at 356 (“[w]ith regard to letters rogatory relating to foreign civil matters, the general practice is to apply to the court pursuant to both federal and provincial legislation. A majority of the caselaw supports this approach and indicates that both federal and provincial legislation are valid and applicable with regard to foreign civil matters.”); *Balasubramanian & Tape*, *supra* note 253, at 21 (“[i]n provinces/territories that have enacted legislation, the practice is to apply concurrently in the same court proceedings under both the *Canada Evidence Act* and the relevant provincial/territorial statute”). *Michael Penny, Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT’L ARB. 249, 250 (2001). *But see* *Medical Ancillary Services v. Sperry Rand Corp.*, [1979] 95 D.L.R. (3d) 735, 23 O.R. (2d) 406 (holding that only the Ontario Evidence Act applies, despite the fact that the application was brought pursuant to both the Federal and Ontario Evidence Acts), *disagreed with on other grounds by Mulroney v. Coates*, [1986] 8 C.P.C. (2d) 109, 54 O.R. (2d) 353.

²⁹⁶ *Freedman & Harney*, *supra* note 290, at 356.

²⁹⁷ *Id.* at 357.

²⁹⁸ Canada Evidence Act, R.S.C., c. E-10, §50(2).

be compelled in a similar Canadian trial.²⁹⁹ Early Canadian caselaw consistently held that information requested must be for trial purposes only, and requests for pre-trial discovery would not be granted.³⁰⁰ In *Zingre*, however, the Canadian Supreme Court held that a request should not be rejected solely because it may be used as pre-trial discovery.³⁰¹ Instead, the court replaced that “inflexible rule” with a balancing test, with specific emphasis on whether granting the request would violate Canadian public policy or sovereignty.³⁰² As recently summarized by the Ontario Court of Appeal, the test includes analysis of the following factors:

- (1) the evidence sought is relevant;
- (2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
- (3) the evidence is not otherwise obtainable;
- (4) the order is not contrary to public policy;
- (5) the documents sought are identified with reasonable specificity;
- (6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.³⁰³

Domestic discoverability is encapsulated by these factors, specifically the fourth, fifth and sixth factors. As the Canadian Supreme Court explained:

²⁹⁹ See *Friction Division Prod. Inc. v. Du Pont Nemours & Co.*, 51 O.R. (2d) 244, ¶34; JAY E. GRENIG AND JEFFREY S. KINSLER, *HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE* §15.72 (2d. ed. 2004) (“questions posed cannot be broader than those allowed under Canadian law”); Penny, *supra* note 295, at 251 (“[t]he second requirement for the enforcement of a letter of request is that the evidence be for a purpose for which letters of request could be issued under the rules of the Canadian court”). See also the British Columbia Evidence Act, R.S.B.C. 1996, c. 124, §53(4)(b) (with a similar provision prohibiting courts from compelling evidence that could not be compelled in the B.C. Supreme Court); Ontario Evidence Act, R.S.O. 1990, c. E.23, s. 60(1) (with a similar provision allowing judges to compel evidence requested by foreign tribunals for “a purpose for which a letter of request could be issued under the rules of court”).

³⁰⁰ See e.g., *Westinghouse*, 16 O.R. (2d) 283, at ¶21. Early caselaw also held that the requested material be “absolutely necessary”, but that requirement has not survived the *Zingre* public policy test discussed below. See Myrick, *supra* note 88, at 45; Freeman & Harney, *supra* note 290, at 360-363; Penny, *supra* note 295, at 252.

³⁰¹ *Zingre*, 2 S.C.R. 392 at ¶22.

³⁰² *Id.* See also Freedman & Harney, *supra* note 290, at 365-367.

³⁰³ *Presbyterian Church of Sudan v. Rybiak*, [2006] 215 O.A.C. 140, 33 C.P.C. (6th) 27 (Ont. Ct. App. 2006), ¶20.

The interests of sovereignty have come into conflict with the principle of judicial comity in a number of situations and Canadian courts have refused to order the testimony of the individual for use in the foreign proceedings: for example (i) where a request for production was vague and general . . . and the Court held that if the litigation were being conducted in Canada the litigants would not be required to comply with such a request; (ii) when discovery was sought against an individual not a party to the litigation, in violation of local laws of civil procedure . . . ; (iii) when the main purpose of the examination was to serve as a ‘fishing expedition’, a procedure not allowed in English or Canadian courts³⁰⁴

This public policy consideration includes the impact on Canadian sovereignty, which encompasses “the imposition of an unfair burden, or prejudice to” the Canadian from who information is requested.³⁰⁵ Although some decisions suggest that courts may compel evidence that could not be compelled pursuant to local rules,³⁰⁶ courts often look to provincial civil procedure to compare the burden on the witness pursuant to the request with the burden the witness would bear pursuant to local rules.³⁰⁷ Where most of these factors weigh in favor of compelling evidence (i.e., specific documents are requested that

³⁰⁴ *Zingre*, [1981] 2 S.C.R. 392, ¶19 (citations omitted). See also *O.P.S.E.U. Pension Trust Fund v. Clark*, [2006] 212 O.A.C. 286, 30 C.P.C. (6th) 261, ¶16 (noting that “Canadian sovereignty” includes considering whether compelling evidence would create an “imposition of an unfair burden or prejudice to” the Canadian citizen from whom the information is requested).

³⁰⁵ *DeHavilland Aircraft of Canada Ltd.*, 1 C.P.C. (3d) 76, ¶37. See also *Henry Bacon Building Materials Inc. v. Royal Canadian Mounted Police*, [1994] 98 B.C.L.R. (2d) 59, 35 C.P.C. (3d) 340, ¶¶34-35 (B.C.S.C.) (binding British Columbia courts to *Zingre* and holding that “labeling [evidence for discovery or trial purposes] does not address the key issue and is no longer determinative as to whether examination will be ordered What must be determined is the impact the proposed examination will have on the witnesses”).

³⁰⁶ *Mulrony*, 8 C.P.C. (2d) 109, at ¶18 (the purpose of evidence must be conducive only to the purpose of the requested disclosure pursuant to local rules, not the specific situation in which evidence is requested); *Freedman & Harney*, *supra* note 290, at 370 (“it may now be concluded that an absolute prohibition against the enforcement of letters rogatory where the evidence sought is intended for use as part of a foreign discovery process, or where the order requested is broader and more burdensome to the potential witness than could properly be ordered in a local action, is no longer appropriate and should not be applied”).

³⁰⁷ See e.g., *A-Dec Inc. v. Dentech Prod. Ltd.*, [1988] 31 B.C.L.R. (2d) 320, ¶30-52; *Fecht v. Deloitte & Touche*, [1997] 97 O.A.C. 241, 32 O.R. (3d) 417, ¶¶8,9. See also *Penny*, *supra* note 295, at 253 (“[t]he scope of a letter of request is measured against what the witness’s obligations would be if the litigation had been conducted in Canada”).

are necessary and relevant), Canadian courts may compel the production of evidence that is solely sought for pre-trial purposes.³⁰⁸ However, requests for pre-trial discovery that are seeking information that may lead to admissible evidence, as opposed to potential evidence itself, remain problematic. Canadian courts continue to reject broad “fishing” requests for evidence, reasoning that “[a] wide-ranging ‘fishing trip’ type discovery imposes a greater burden than does simply providing known evidence for trial.”³⁰⁹

It is worth noting that *Zingre* involved a request by a public prosecutor in Switzerland. Subsequent decisions have distinguished *Zingre*’s holding when requests by U.S. courts are at issue, suggesting that a U.S. request may be rejected solely on the grounds that it seeks pre-trial discovery.³¹⁰ Canadian judges regularly “go behind” letters rogatory received from U.S. courts to determine whether, despite language that the testimony will be used at trial, the substance of the request is in fact pre-trial discovery.³¹¹

2. Modification of requests for evidence.

Canadian judges have not expressed the same hesitancy as English judges to narrow what appear to be overbroad requests for evidence. Modification of requests for evidence is, in fact, a common tool used by Canadian judges to make overly burdensome requests less onerous for the individual within the court’s jurisdiction.³¹²

³⁰⁸ See e.g., *O.P.S.E.U. Pension Trust Fund*, [2006] 212 O.A.C. 286.

³⁰⁹ *Henry Bacon Building Materials Inc.*, 98 B.C.L.R. (2d) 59 at ¶32. See also *GST Telecommunications, Inc. v. Provenzano*, 2000 B.C.S.C. 72; 73 B.C.L.R. (3d) 133, ¶26 (citing same).

³¹⁰ See e.g., *Presbyterian Church of Sudan*, 215 O.A.C. 140, at ¶18 (“a foreign request should not be rejected solely because it relates to a pre-trial proceeding. However, that fact can be considered where, for example, the foreign discovery process is much broader than in Canada as is the case in the United States.”).

³¹¹ See e.g., *Internet Law Library, Inc. v. Matthews*, 2003 CarswellOnt 1157, 2003 WL 11592 (Ont. S.C.J.); *Westinghouse Electric Corp.*, [1977] 16 O.R. (2d) 273, 78 D.L.R. (3d) 3.

³¹² See e.g., *Presbyterian Church of Sudan v. Talisman Energy Inc.*, [2006] A.W.L.D. 945, 385 A.R. 274 (limiting the topics on which the Canadian witness could be examined); *GST Telecommunications, Inc.* 2000 B.C.S.C. 72 (limiting both topics for oral examination and requests for document production); *Peckarsky v. Lipton Wiseman Altbaum & Partners*, [1999] 38 C.P.C. (4th) 170, 96 O.T.C. 178. See also Penny, *supra* note 295, at 252.

3. Foreign Discoverability and Admissibility: Relevancy analysis by Canadian Judges.

Like in England, a foreign discoverability requirement per se is generally unnecessary in Canada because the foreign tribunal itself is requesting the information. Further, because the vast majority of requests come from U.S. courts, it is generally assumed that the evidence requested is discoverable pursuant to the U.S. broad discovery rules. Built into the statute is language requiring that the foreign tribunal itself actually desires the requested information.³¹³ Like England, the tribunal itself, and not the litigants, must request the information, which is further insurance that it actually wants the requested evidence.

While Canadian judges, like English judges, have repeatedly stated that it should be left to the foreign judge requesting the information to determine admissibility, Canadian judges regularly evaluate relevance.³¹⁴ Relevance is often considered by Canadian courts determining whether a request violates public policy and Canadian sovereignty.³¹⁵ Canadian courts often look to the broadness of the request when

³¹³ See The Canada Evidence Act, R.S.C., C. E-10, §46. *Accord De Havilland Aircraft of Canada Ltd.*, [1991] 1 C.P.C. (3d) 76, 3 O.R. (3d) 705 (“[t]he prerequisites to the exercise of the discretion created by s. 46 were satisfied in this case: (1) it appeared that a foreign court was desirous of obtaining the evidence . . .”).

³¹⁴ See e.g., *Fecht v. Deloitte & Touche*, [1997] 32 O.R. (3d) 417, 15 C.P.C. (4th) 293, ¶8. (affirming lower court’s rejection of a request for evidence where there was “simply not a sufficiently substantially link to the foreign litigation”). See also *Balasubramanian & Tape*, *supra* note 253, at 23 (“[i]f the evidence sought is not shown to be relevant, the request for assistance may be refused, or ‘read down’ if it is overbroad . . . While Canadian courts may show deference to the foreign court’s determination of relevance, they are not ‘a “mere rubber-stamp” of an extra-judicial court.’”); *Myrick*, *supra* note 88, at 47 (“[t]he relevance of the evidence sought is generally not thoroughly determined, since this is a matter which the trial judge in the foreign court ought to determine. The Canadian courts may, however, briefly consider this question.”). *Accord A-Dec, Inc.*, 31 B.C.L.R. (2d) 320 at ¶11 (“[t]he proposed testimony must have a ‘close bearing’ on the issues between the parties”).

³¹⁵ See *Penny*, *supra* note 295, at 252 (“[w]hile Canadian courts will show deference to the foreign court’s request for assistance, they are not merely a rubber stamp of the foreign court. In the absence of a showing that the evidence sought is relevant, the request for assistance will be refused, or ‘read down’ if it is overbroad.”).

analyzing relevance, reasoning that narrower requests are likely more to be relevant than broad vague requests that may yield information not pertinent to the specific claims at issue in the foreign litigation.³¹⁶ As recently explained by Judge Goudge in the Ontario Court of Appeal, “[w]ithout some showing of relevance, the court may be sanctioning a fishing expedition and requiring one of its citizens to participate in a process that may be of no assistance to the foreign litigation.”³¹⁷ Although determining relevance necessitates an inquiry into the relationship between the claims at issue in the U.S. proceeding and the requested evidence, Canadian courts generally use Canadian evidentiary standards when determining relevance. Hence, it cannot be said that Canadian courts have a foreign discoverability or admissibility requirement in which they inquire into foreign evidentiary rules. Given that they entertain only requests from foreign tribunals directly, as opposed to litigants, this is generally not problematic.

³¹⁶ See e.g., *Presbyterian Church of Sudan*, 215 O.A.C. 140, at ¶35.

³¹⁷ *Id.* at ¶31.

CHAPTER 4: ANALYZING §1782 THROUGH A COMPARATIVE LENS

Using a comparative analysis, one observes three main deficiencies in the current language and judicial interpretations of §1782. The first is that by ignoring foreign discoverability, U.S. judges are reducing important evidentiary limitations in foreign jurisdictions to “technical limitations” and thereby ignoring important policies behind these limitations. The second observation is the lack of emphasis that U.S. judges place on the burden the U.S. judicial assistance scheme places on U.S. defendants and non-party witnesses to foreign proceedings, unlike the extreme priority Canadian and English courts place on burden to its citizens. The third is the incongruence between §1782 trying to spread broad judicial assistance to the world and export U.S. style discovery and the well-established global hostility against U.S. style discovery.

There is a simple solution to these deficiencies and the current state of confusion surrounding under what circumstances §1782 applies – allow requests from tribunals and courts themselves only, as opposed to from “interested persons”. Courts in Canada and England rarely have to consider foreign discoverability or admissibility, and when they do, it is almost always in the context of overbroad requests from U.S. courts that may not be relevant to the U.S. proceedings. One reason they do not have this concern is because they accept requests only from foreign tribunals themselves. This solution would solve the foreign discoverability problem, reduce the burden on U.S. defendants and non-party witnesses pulled into foreign proceedings, and harmonize U.S. judicial assistance with other countries’ judicial assistance schemes.

When §1782 was amended in 1964, the United States was still convinced that other countries might want to adopt its liberalized style of discovery. Since 1964, the

Hague Evidence Convention has been ratified and numerous blocking statutes have been enacted by foreign countries prohibiting residents from complying with discovery orders by U.S. judges. Foreign judges have repeatedly defensively denied requests for judicial assistance by U.S. courts seeking categorical document requests or pre-trial depositions. The recent narrowing of the allowable discovery pursuant to the U.S. Federal Rules of Civil procedure suggests that the United States itself is rethinking its previous approach to broad discovery. At this point, U.S. courts should stop attempting to spread U.S. liberal discovery at the expense of U.S. defendants and in the face of defensive foreign jurisdictions.

This section explores these three observations, and also argues that a simple solution to the current deficiencies of §1782 is to restrict the ability to request judicial assistance to foreign and international tribunals themselves.

A. Comity necessitates a foreign discoverability requirement.

Judicial assistance is premised on the concept of comity among courts.³¹⁸ The very term “judicial *assistance*” itself shows that assisting foreign courts is the purpose behind this service that courts provide to foreign tribunals. Despite the comity-based reasoning behind judicial assistance, §1782 aids litigants, or potential litigants, as opposed to tribunals directly, often when the tribunal has expressed no desire for the requested discovery, and the discovery is contrary to the rules of the jurisdiction in which

³¹⁸ See *Zingre*, [1981] 2 S.C.R. 392, ¶18 (“[i]t is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect.”); *Gredd*, [2003] EWHC 3001, ¶27(1) (“[c]omity requires this court to view a letter of request issued by a foreign court for the purpose of civil proceedings before it benevolently”); *U.S. v. Lopez*, 688 F.Supp. 92, 97 (E.D.N.Y. 1988) (“[t]he execution of a request for judicial assistance by the foreign court is based, in the absence of a treaty, on comity between nations at peace”), *Freedman & Harney*, *supra* note 290, at 352 (“[t]he principle underlying the issuance and enforcement of letters rogatory is international comity”).

the tribunal resides. It seems that the drafters of §1782 were more interested in helping private parties and exporting U.S. discovery than aiding foreign tribunals.

There are two prongs to the comity implications of the post-*Intel* §1782 judicial assistance scheme. The first is the interpretation by U.S. courts of foreign jurisdictions' evidentiary restrictions as "technical limitations". The second is U.S. courts' decision to solve any ambiguity regarding whether the requested information is discoverable in the foreign jurisdiction by granting the request for judicial assistance and leaving it to the foreign court to decide whether it wants it or not. These two prongs are interrelated, as U.S. judges have often reasoned that they should compel the requested discovery, even if not discoverable in the foreign jurisdiction, because the foreign judge may want to use it, but be constrained by his jurisdiction's "technical limitations". Courts often justify this course of action by stating that they should not engage in "speculative forays" regarding foreign law, and reason that it should be left to the foreign tribunal to decide whether it wants to consider the discovered evidence.

1. Interpretation of foreign jurisdictions' evidentiary restrictions as "technical limitations".

As discussed in Chapter 2, many U.S. judges have justified their holdings granting discovery that may not be discoverable in foreign jurisdictions by characterizing foreign jurisdictions' discovery limitations as "technical limitations".³¹⁹ U.S. decisions have repeatedly characterized foreign prohibitions against pre-trial discovery as "technical" discovery limitations, refusing to acknowledge that a jurisdiction's rules regarding discovery and pre-trial evidence are premised on policy decisions made by that

³¹⁹ See the discussion at pp. 58-61.

jurisdiction's lawmakers and courts, not simply technical limitations in countries that share the U.S. view on the usefulness of broad pre-trial discovery.³²⁰

As discussed in Chapter 1, important policy considerations underlie countries' evidentiary rules. Such policy considerations include efficiency, "truth", privacy and cost. Each country's unique approach to what is and is not discoverable or admissible is a result of that country's decision as to how to balance these factors.³²¹ Far from being "technical limitations", these rules are an important part of the legal and cultural framework of foreign jurisdictions. When U.S. judges dismiss foreign jurisdictions' evidentiary limitations as "technical", they are undermining and undervaluing the importance of these rules. PLAC acknowledged this in its brief to the U.S. Supreme Court, when it noted that not imposing a foreign discoverability requirement would disturb the "balance of benefits and burdens" chosen by foreign jurisdictions.³²² NAM also acknowledged this by arguing that foreign nations' limits on discovery are "fundamental choices these nations have made about how to structure their judicial systems" which are undermined by allowing parties to circumvent them.³²³

Scholars have also attempted to categorize foreign discovery rules as either important or unimportant to the foreign jurisdiction. One scholar has suggested that

³²⁰ See e.g., *In re Bayer AG*, 146 F.3d at 194 ("[i]t does not follow that the inability to obtain discovery means that the foreign court objects to the inquiry. In many of such situations it may signify merely the unavailability of an applicable procedure" and "there is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use"); *Application of IManagement Serv.*, 2005 195702; *In re Application of Grupo Qumma, S.A. v. C.V.*, 2005 WL 937486; *Servicio Pan Americano de Proteccion, C.A.*, 354 F.Supp.2d 1112.

³²¹ Accord Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 625 (2001) ("[f]oreign systems have, of course, made very different policy judgments about the extent of discovery allowed in civil cases" and "permitting a party to inspect documents and later determine whether they will or will not place them in evidence contradicts a core value of the civil law litigation and national judgments about what best serves the truth-finding process").

³²² PLAC brief, *supra* note 195, at 4, 11, 19.

³²³ NAM brief, *supra* note 197, at 11.

courts analyze the reason why particular information is not discoverable in a foreign jurisdiction to determine whether producing such information would be offensive.³²⁴ Jurisdictions' evidentiary rules and rules of civil procedure simply cannot be subject to such piecemeal analysis of determining more or less important reasons why some information is discoverable in a jurisdiction or some is not. A jurisdiction's overall approach, including all of its specific rules, is a decision on the proper balance between truth, efficiency, privacy and cost. It seems directly counter to the idea of comity to attempt to categorize some civil procedure provisions as more or less fundamental to the jurisdiction's policies.

2. U.S. courts leave it to the foreign judge to decide.

Instead of analyzing foreign discoverability or admissibility, U.S. judges now routinely grant judicial assistance requests and leave it to the foreign court to decide whether it wants to consider the requested evidence.³²⁵ A corollary to this is U.S. judges' reasoning that a foreign court may still want to consider evidence that is not discoverable in its jurisdiction. U.S. judges avoid any comity concerns by labeling the foreign jurisdiction's laws prohibiting such discovery as merely technical limitations, and concluding that the U.S. judge is helping the foreign judge to circumvent jurisdictions' pesky limitations by providing potentially useful information.

³²⁴ See Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV. 649, 666 (2005) (arguing that "[w]hether or not the foreign state would be offended by the grant of judicial assistance depends on the reason why the particular information is not discoverable under the foreign law").

³²⁵ *In re the Application of Servicio Pan Americano de Proteccion, C.A.*, 354 F.Supp.2d 269; *In the Matter of the Application of the Procter and Gamble Co.*, 334 F.Supp.2d 1112; *In re Application of Imanagement Serv.*, 2005 WL 1959702.

The *Intel* holding and the U.S. government in its amicus brief to the court got the ball rolling by reasoning that foreign tribunals may want evidence that is not discoverable in their jurisdiction.³²⁶ The U.S. government argued as follows:

Even when the requesting entity is a private party, the unavailability of discovery under foreign law does not necessarily imply that foreign tribunals would take offense at a district court's decision to order discovery in this country. The foreign tribunal's laws may limit discovery within its borders out of concerns that are peculiar to its legal practices, culture, or traditions, but have no analogue in the United States. . . . The application of a foreign discoverability rule would make little sense in that situation; rather, it would undermine Section 1782's objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons that have no bearing on international comity, they cannot obtain under their own laws.³²⁷

The majority accepted this argument, restating part of it verbatim, and added:

A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). . . . When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless.³²⁸

In fact, foreign courts have no use for information that is not discoverable in their jurisdiction, and allowing litigants access to U.S. style discovery only muddles and obfuscates the tribunals' proceedings. Imagine trying to submit a piece of evidence to a U.S. court that is not discoverable in the U.S. system. The U.S. judge would simply not be interested in it as is outside the judge's concept of evidence, and would simply confuse

³²⁶ See 542 U.S. at 261-262, Brief for U.S. Government, *supra* note 170, at 24. For the discussion on this issue, see *supra* pp. 45-46, 49. See also Chukwumerije, *supra* note 324, at 667 (discussing this aspect of the *Intel* holding).

³²⁷ Brief for U.S. Government, *supra* note 170, at 24.

³²⁸ 542 U.S. at 261-262.

proceedings. Accordingly, many foreign courts' work hard to resist the spread of U.S. style discovery through defensive judicial assistance, as discussed in Chapter 3, blocking statutes, and lodging Hague Evidence Convention article 23 reservations. Pre-*Intel* cases that imposed a foreign discoverability requirement on litigants requesting judicial assistance acknowledged this dissonance. As discussed above, the Fifth Circuit reasoned that a foreign discoverability requirement was necessary to avoid "offending the forum nation by furthering a scheme to obviate that nation's discovery rules."³²⁹ Likewise, the First Circuit acknowledged that such a requirement was necessary to "avoid offending foreign tribunals", and expressed concern that to forgo a foreign discovery analysis would "lead some nations to conclude that [U.S.] courts view their laws and procedures with contempt".³³⁰ Scholars have also voiced concern that "injection" of U.S. discovery into foreign proceedings will be inefficient and seen as U.S. legal imperialism.³³¹

It is particularly ironic that *Intel* requires district court judges to give heightened deference to requests for non-party discovery, which is one aspect of U.S. style discovery that foreign judges find most offensive. Hence, a §1782 request has a higher chance of success if it requests information from a non-party, despite the fact that no other jurisdiction in the world allows pre-trial discovery of non-parties without leave of court and a very good reason.

³²⁹ *In re* Letters Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d at 310-11.

³³⁰ Application of Asta Medica, S.A., 981 F.2d at 6-7. See also *In re* Court of the Commissioner of Patents for the Republic of South Africa, 88 F.R.D. at 77 ("[f]ew actions could significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate tribunals").

³³¹ See Warner Lien, *supra* note 321, at 624 ("[t]he injection of American discovery procedures into foreign proceedings will otherwise be both counterproductive to efficiency interests in both forums and may well trigger charges of American interference, chauvinism, or legal imperialism").

Intel and other cases rejecting a foreign discoverability requirement do not address this argument, but emphasize a textual argument that a requirement is simply not found in the statutory language of §1782. While the textual argument may be a reason to interpret §1782 in its current state as not including a foreign discoverability requirement, it does not solve the problem of offense to foreign tribunals and undermining of the importance of foreign evidentiary limitations by U.S. judges. This reality necessitates a reading of §1782 that imposes a foreign discoverability requirement, or more desirable, amendment of §1782 to allow requests by the tribunals themselves. As long as §1782 continues to grant individual litigants access to judicial assistance without a foreign discoverability requirement, the undermining of foreign evidentiary limitations will necessarily persist.

In a similar vein, U.S. courts are often overly sympathetic to parties seeking evidence via §1782. Courts have characterized §1782 as the only avenue by which the parties may be able to get the evidence they are looking for, and completely ignore the fact that having brought suit or submitted to the jurisdiction of a foreign court in which they are not entitled to that information.³³² U.S. style discovery is only available against defendants that a U.S. court can assert jurisdiction over and that the plaintiff has chosen to pursue claims against in U.S. court. If a plaintiff brings suit in another jurisdiction it is making a choice not to utilize U.S. courts as a vehicle to resolve its claims. A necessary consequence is that the defendant cannot be subject to U.S. style discovery.

c. U.S. judges avoiding foreign law analyses.

³³² *In re Application of Imanagement Serv.*, 2005 WL 1959702, at *5 (“it is unclear whether the Russian court has the authority to order discovery from non-parties who reside outside the court's jurisdiction, and resort to § 1782 may be the only avenue by which Imanagement can obtain the discovery it seeks”).

Another reason that courts have avoided foreign discoverability analyses is the undesirability of “speculative forays” into foreign law.³³³ Both judges and scholars have expressed concern that a foreign discoverability requirement would force U.S. judges to interpret foreign law.³³⁴ However, U.S. courts utilize party-appointed biased expert witnesses for everything from damages in large-scale antitrust cases and economic analysis in class action certifications to technical aspects of technological advances in intellectual property cases. These examples highlight just a minute cross-section of the myriad of highly complex subjects that U.S. judges are routinely forced to decide with the use of biased experts.

Why is it, with the U.S. system’s wide acceptance of biased experts explaining incredibly complicated subjects from all aspects of civilization, that we should be so concerned about making judges determine an aspect of foreign law? Why is the “battle of affidavits” so insidious with regard to foreign law, when it is so widely accepted in other arguably more complicated subject matters we routinely require judges to decide. Intuitively, a U.S. judge would be better equipped to discern an area of foreign law through the use of biased experts than she would to determine damages for anticompetitive behavior in the U.S. microprocessor market, for example.

Further, U.S. judges are regularly required to make foreign law determinations when deciding whether to dismiss cases on the basis of *forum non conveniens* and choice of law decisions.³³⁵ What makes an inquiry into the admissibility or discoverability of

³³³ 51 F.3d at 1099.

³³⁴ See e.g., *Application of Grupo Qumma*, 2005 WL 937486 at *3; *Application of Gemunachts-Praxis Dr. med. Schottdorf*, 2006 WL 3844464 at *7; *In re Euromepa*, 51 F.3d at 1099. This issue is discussed at *supra* pp. 57-58.

³³⁵ See e.g., *Gilstrap v. Randianz*, 443 F.Supp.2d 474 (S.D.N.Y. 2006) (analyzing English law prohibiting class actions). But see Kotz, *supra* note 8, at 61 (“comparing the machinery of civil justice in the common

evidence any more onerous or difficult than substantive law inquiries? In the case of foreign discoverability, foreign law will almost never allow the requested discovery, hence, it would not be too difficult for U.S. judges to discern.

If the Supreme Court's goal was to prevent expert battles regarding foreign law, it did not achieve that goal. A hallmark of post-*Intel* is disagreement between biased experts regarding the law of the foreign jurisdiction. These experts are utilized to help the court establish the second factor of the *Intel* test, "the nature and character of the proceedings and the receptivity of the foreign tribunal to assistance". Rather than protecting U.S. judges from having to decide foreign law questions based on biased experts, the *Intel* decision guaranteed it.

B. Unfairness to U.S. defendants.

Allowing plaintiffs in foreign proceedings to utilize §1782 to obtain evidence not discoverable in the foreign jurisdiction is extremely unfair to U.S. defendants as it creates asymmetrical obligations and privileges by subjecting U.S. defendants to U.S. discovery obligations in foreign courts without offering them use of the same tools. What is even more surprising than these inequitable burdens is U.S. courts' refusal to acknowledge them and protect U.S. defendants and non-parties from them. Canadian and English judges regularly limit judicial assistance based on the burden that producing the requested evidence will place on their countries' citizens. Conversely U.S. judges rarely consider the burden on U.S. defendants that §1782 causes, especially judicial assistance to discover information not discoverable in the foreign jurisdiction. The lack of a domestic discoverability requirement also unfairly burdens U.S. defendants because they are

law and the civil law . . . was a subject fraught with greater risks of fundamental misunderstanding of foreign law than those which beset the comparative endeavors in substantive law").

subject to U.S. discovery before foreign tribunals that they would not be subject to before similar U.S. tribunals.

1. Asymmetrical obligations and privileges.

Consider a scenario in which an English company sues a U.S. company in English court. Using §1782, the English plaintiff could obtain multiple pre-trial depositions, including those of third-party witnesses, as well as request large categories of documents not known to exist. The U.S. defendant, however, would be entitled to only the discovery allowed under English law, which generally does not include depositions and certainly does not include third-party depositions or categorical document production. In this situation, the U.S. company's officers, managers and employees will be deposed and forced to produce documents. The U.S. company could be forced to search for and produce documents in response to categorical document requests. The English company, however, is not subject to any of these burdens. It will be forced to produce only the documents required in initial standard disclosures according to English civil procedure, and possibly specific disclosures if ordered by the court. No third-party depositions will be taken unless the English court grants leave, which it only does in extraordinary cases.

It is hard to argue that this situation is fair. As succinctly argued by NAM to the Supreme Court:

Allowing §1782 to be used in the manner it was used here will severely disadvantage American companies involved in disputes with foreign competitors who do not do substantial business in the United States. . . . [S]uch foreign competitors can obtain discovery from both U.S. firms and related third parties under broad American discovery rules, while remaining subject themselves only to the more limited rules of the jurisdiction where the foreign proceeding has been instituted.³³⁶

³³⁶ NAM Brief, *supra* note 197, at 8.

The First Circuit also pointed out the asymmetrical unfairness of §1782 without a foreign discoverability requirement by noting that “[a]ll the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the [U.S.] party is confined to restricted discovery in the foreign jurisdiction.”³³⁷

U.S. courts have attempted to deal with this unfairness by simply ordering that the U.S. defendant produce the requested information, and if the foreign court or tribunal does not want to consider the evidence, it does not have to. This solution is not only inefficient and costly, but it does not avoid unfairness to U.S. defendants. Even if the foreign court ultimately does not accept the evidence obtained pursuant to §1782, the U.S. defendant or non-party still has to go through the trouble, time and cost of producing it without receiving reciprocal information from the English plaintiff, despite the fact that the plaintiff chose to bring suit in English court with knowledge of that jurisdiction’s discovery limitations.

Courts and scholars have also attempted to deal with unfairness concerns by acknowledging that U.S. courts have the discretion to limit orders compelling discovery pursuant to §1782, including imposing conditions on production, such as reciprocity.³³⁸

While that is a nice idea, no U.S. judge has imposed a reciprocity requirement in any

³³⁷ *In re Application of Asta Medica* 981 F.2d at 5-6. *See also* NAM Brief, *supra* note 197, at 9 (citing this language).

³³⁸ *See e.g., Intel*, 542 U.S. at 262 (“[c]oncerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an ‘interested person,’ a district court could condition relief upon that person’s reciprocal exchange of information.”); *In re Bayer AG*, 146 F.3d at 194. *See also* Smit, *supra* note 117, at 13 (“in order to create equality of treatment, an American court, when asked to compel production by a litigant before a foreign or international tribunal, may condition discovery on that litigant’s agreeing to make the same extent of discovery available to its opponent”); Chukwumerije, *supra* note 324, at 670-71 (“[r]ather than using the need for parity between the parties as a basis for erecting a requirement that runs counter to the spirit of cooperation in section 1782, courts can better address this legitimate desire for balance by using their broad discretion under the section to ‘fashion creative means’ of implementing the objectives of the section”). *Accord* Rothman, *supra* note 209, at 23 (counseling U.S. residents subject to §1782 requests to “insist on a reciprocal exchange of discovery”).

published decision regarding §1782. The likely reason for the absence of such conditions is that it is not really a viable or workable solution. It assumes that the U.S. defendant wants documents or testimony from the foreign plaintiff or related third-parties. It also triggers defenses such as blocking statutes and the Hague Evidence Convention reservation of the jurisdiction in which the reciprocal information is located. It also imposes continuing jurisdiction on the U.S. district court, as it is quite likely that continued fighting and requests for judicial relief or assistance would result in such situations. It simply is not done and is not workable.

Both of these approaches ignore the extreme time and expense that a U.S. party would have to go to in order to produce ultimately meaningless discovery. They also ignore the fact that the other party then has information that it is not entitled to do what it wants with, either to use to craft other causes of action in the jurisdiction it is in, or in other jurisdictions. Even if it is unable to use the information received directly to support a cause of action because the foreign tribunal will not admit the evidence, it can simply re-request documents now known to exist after bringing a cause of action. Information can be used to question witnesses regarding issues that the party would not have otherwise known about, or to recontextualize documents that can be used in the litigation. Lawyers will find ways to utilize the information received outside the channels of direct submissions to tribunals.³³⁹ Unfairness to U.S. parties and non-parties occurs the moment that they are forced to produce discovery that they cannot, be forced to produce, in the jurisdiction in which the proceeding is occurring or contemplated.

³³⁹ See NAM Brief, *supra* note 197, at 14 (“[f]oreign prosecutors and private ‘interested’ parties could misuse information gathered via §1782 in any number of ways: to build an entirely different case against the U.S. firm, either in U.S. court or overseas; to blackmail certain persons within or related to the company; to profit by selling the information to other entities; or (in the case of a business rival) to compete more effectively against a U.S. firm”).

2. Disregard for the burden on U.S. defendants by U.S. lawmakers and judges.

As discussed in Chapter 3, both Canadian judges and English judges put great weight on the burden that judicial assistance causes citizens of their countries. The public policy test that has evolved in Canadian caselaw is primarily concerned with burden on Canadian citizens and companies. Canadian courts have stressed that judicial assistance is contrary to public policy when it would result in “the imposition of an unfair burden or prejudice to” the Canadian party or non-party from whom the request is sought.³⁴⁰ Likewise, English judges have characterized requests for broad discovery requests as “oppressive” from the witness’s perspective.³⁴¹

It is strange that given the extreme burden that §1782, as interpreted by the Supreme Court, imposes on U.S. companies, the issue really does not come up in U.S. judicial decisions. In fact, U.S. judges’ complete disregard for the unfavorable position that §1782 puts U.S. defendants is quite noticeable when juxtaposed with foreign judges’ concern. This is likely because judges generally compare the burden of producing the requested information with the witness’s burden pursuant to domestic discovery rules. The burden of foreign judicial assistance requests from U.S. courts is nearly always greater than what the burden would be in domestic proceedings. Conversely, U.S. parties’ burden pursuant to §1782, when compared with their burden in U.S. proceedings, is no greater. This results in U.S. judges ignoring the fact that the U.S. defendant is not before a U.S. court, and should only be subject to the allowable scope of discovery in the state with jurisdiction over the case again it.

³⁴⁰ See *DeHavilland Aircraft of Canada Ltd.*, 1 C.P.C. (3d) 76, ¶37. See also *supra* pp. 73-75.

³⁴¹ *First American Corp.*, [1998] 4 All E.R. 439; *State of Minnesota*, [1998] I.L. Pr. 170, 176 (“[a] witness is entitled to know with reasonable limits the matters about which he or she is to be examined”).

This comparable analysis is seen in *Procter v. Gamble*, in which the U.S. court compelled §1782 discovery, reasoning that “[§]1782 only applies to litigants who reside or are found within the United States, i.e., litigants normally subject to American discovery procedures and their attendant costs.”³⁴² Indeed, what is essentially needed is for U.S. judges to protect U.S. companies from U.S. discovery abroad, which is not an intuitive concern when viewed without the context of foreign jurisdictions’ procedures. Foreign judges are used to the need to take a defensive stance against U.S.-style discovery, whereas U.S. judges have repeatedly interpreted §1782 as a mandate to spread U.S. liberal discovery to the world, ignoring the repercussions of that approach on U.S. defendants and U.S. non-parties.

The drafters of the 1964 amendments to §1782 hoped that spreading liberal discovery to the world would encourage other countries’ to adopt U.S. style discovery, or at grow to view it more favorably.³⁴³ It is clear that has not happened. The main result of the U.S. aggressive and liberal judicial assistance scheme is unfairness to U.S. defendants in foreign proceedings. Instead of continuing the failed mission of spreading U.S. discovery, U.S. judges and lawmakers should acknowledge that this policy is only hurting U.S. companies and individuals and putting them at a disadvantage in foreign proceedings, and accept defeat.

**3. The asymmetry between U.S. defendants and foreign plaintiffs
violates the principle of equality between parties.**

³⁴² 334 F.Supp.2d at 1116.

³⁴³ See *supra* pp. 26 (discussing §1782 drafters’ intention to spread U.S. discovery to the world).

Courts worldwide acknowledge that equality between parties is a fundamental principle of due process.³⁴⁴ The fundamental nature of this right is evidenced by Article 35(2) of the Statute of the International Court of Justice, which states that “[t]he conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, *but in no case shall such conditions place the parties in a position of inequality before the Court.*”³⁴⁵ When U.S. defendants are forced to litigate claims in foreign courts at a distinct disadvantage to the foreign litigant, they are being placed in a position of inequality that contradicts fundamental concepts of civil justice.

4. Ramifications of the asymmetrical burden on foreign defendants.

Obligating U.S. defendants to produce information that is not discoverable in the foreign jurisdiction will encourage foreign plaintiffs to bring suit in foreign court using pretextual claims solely to utilize §1782.³⁴⁶ If a foreign plaintiff could file suit against a U.S. company either in the United States or in a foreign jurisdiction, and it could obtain U.S. style discovery against the defendant without being subject to it itself in the foreign jurisdiction, then that is the preferable jurisdiction for the plaintiff to file suit. The EC brought up this point when it argued that EC tribunal resources will be wasted dealing with such pretextual claims. NAM also pointed this out, arguing that this is especially

³⁴⁴ See e.g., *Parex Bank v. Russian Sav. Bank*, 116 F.Supp.2d 415, 424 (S.D.N.Y. 2000) (noting that the Russian civil code “include[s] . . . the presumption of equality of parties, adversarial presentation of oral and written evidence, lifetime tenure for judges, and appellate review”); *Eurofood IFSC Ltd.*, 2006 E.C.R. I-3813, ¶66 (holding that in insolvency proceedings, creditors are entitled to the fundamental right of “equality of arms”); The Honorable Samuel L. Bufford, *Center Of Main Interests, International Insolvency Case Venue, And Equality Of Arms: The Eurofood Decision Of The European Court Of Justice*, 27 NW. J. INT’L L. & BUS. 351 (2007) (discussing the E.C.J.’s use of the principle in a civil context).

³⁴⁵ Article 35(2) of the Statute of the International Court of Justice, June 26, 1945, Department of State publications 2349 and 2353, Conference Series 71 and 74. The statute was ratified along with the UN Charter on July 28, 1945, and went into effect on October 24, 1945.

³⁴⁶ See PLAC Brief, *supra* note 195, at 15; Second EC Brief, *supra* note 163, at 4, 14.

troubling in conjunction with a broad reading of “tribunal” to include countless investigative agencies.³⁴⁷ Indeed, when plaintiffs can bring claims in tribunals with no standing requirements, or pursuant to jurisdiction solely by means of a U.S. company’s presence in a foreign market, bringing a claim against a competitor in order to benefit from §1782 becomes especially enticing.

It is currently not settled whether foreign plaintiffs can utilize §1782 to force U.S. defendants to produce documents located *outside* the United States. It is clear that §1782 can be used to require a company to produce documents located in, for example, a Texas office. It is unclear, however, whether §1782 can be used to force a U.S. company to produce documents located, for example, at its subsidiary in Germany. While the U.S. District Court for the Southern District of New York has held that U.S. judges may force individuals or companies within its jurisdiction to produce documents located outside the United States,³⁴⁸ the U.S. District Court for the District of Columbia has held that it may not force a U.S. company under its jurisdiction to produce documents located abroad.³⁴⁹ If subsequent caselaw follows the Southern District of New York’s approach, the asymmetrical burden of §1782 on U.S. defendants could substantially worsen. If §1782 could be used to obtain information outside the United States, “American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world.”³⁵⁰ In the above example, an English plaintiff could sue a U.S. defendant in English court and use §1782 to obtain information located in England, while not be subject to pre-trial obligations itself.

³⁴⁷ NAM brief, *supra* note 197, at 5-6.

³⁴⁸ *In re* Application of Gemeinschaftspraxis Dr. med. Schottdorf, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006).

³⁴⁹ *Norex Petroleum Ltd. v. Chubb Insur. Co. of Canada*, 384 F.Supp.2d 45 (D.D.C. 2005).

³⁵⁰ Smit, *supra* note 117, at 11.

Section 1782 was not designed to transform U.S. courts into vehicles for obtaining evidence located anywhere in the world pursuant to broad U.S. discovery rules.³⁵¹

If subsequent caselaw follows the District of Columbia approach, then U.S. companies will have an incentive to move all documents out of the United States to avoid having to produce such evidence. Either scenario is problematic, and a solution to both scenarios would be to allow only the production of evidence discoverable in the foreign jurisdiction, or require the tribunal itself to request the information. An English plaintiff could not circumvent an English court's discovery limitations to obtain information located in England by using §1782 because an English court would likely never make such a request to a U.S. court.

5. The lack of a domestic discoverability requirement unfairly burdens U.S. defendants.

As pointed out by Justice Breyer, the DG-Competition is akin to an investigation by the Department of Justice's antitrust division, or possibly an adjudicatory action by the Federal Trade Commission.³⁵² In either situation, AMD would be a nonlitigant, as neither of those scenarios are adversarial proceedings, with very limited discovery rights, if any.³⁵³ This gives a nonlitigant in the United States the ability to nonetheless utilize U.S. discovery by instituting a complaint abroad.³⁵⁴

C. Incongruence with global hostility toward U.S. style discovery.

As discussed in Chapter 1, global hostility exists toward U.S. discovery. This hostility is manifested in judicial opinions, such as *Minnesota v. Philip Morris*, in which

³⁵¹ See *id.* (“[t]he drafters of Section 1782 did not anticipate recourse to Section 1782 for this purpose”).

³⁵² 542 U.S. at 270-271.

³⁵³ *Id.* at 271.

³⁵⁴ See Rothman, *supra* note 209, at 21.

the English Court of Appeal described U.S. discovery as “generat[ing] unnecessary costs and complexity” and termed it as “fishing” that allows “a roving inquiry . . . to obtain information which may lead to obtaining evidence in general support of a party’s case.”³⁵⁵ Judicial hostility toward U.S. discovery is also seen in the defensive posture that Canadian and English judges have adopted toward U.S. requests for judicial assistance. As discussed in Chapter 3, time and time again judges have written opinions explaining the differences between U.S. and domestic discovery, and narrowing or rejecting requests for pre-trial discovery based on these differences.

This hostility is also manifested in Article 23 of the Hague Evidence Convention, which allows members to proactively announce their refusal to grant letters of request issued for “the purposes of obtaining pretrial discovery of documents”.³⁵⁶ As explained by the District Court of Illinois when analyzing the convention:

[T]he first-time participation of the United States, in particular, presented problems because of liberal American discovery practices. One response to the American presence was Article 23, which allows signatory states to declare that their compulsory process may not be invoked, via a Letter of Request, for the purpose of obtaining pre-trial discovery.³⁵⁷

It is telling that nearly every country that ratified the Hague Evidence Convention made the declaration prohibiting judicial assistance for pre-trial discovery.³⁵⁸

It is also telling that many countries have enacted blocking statutes, which impose criminal penalties on residents that disclose information. These statutes are enacted for

³⁵⁵ [1998] I.L. Pr. 170, ¶¶13, 15.

³⁵⁶ Hague Evidence Convention, *supra* note 2, art. 23.

³⁵⁷ *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 520 (D.C. Ill. 1984). *See also* O’Brien, *supra* note 252, at 85 (citing language).

³⁵⁸ *Id.* Only Barbados, Israel, Czechoslovakia and the United States did not make a declaration under article 23 of the Convention. *Graco*, 101 F.R.D. at 522 n. 26; O’Brien, *supra* note 252, at 84.

the purpose of protecting residents that are parties to U.S. court proceedings from U.S. discovery obligations.³⁵⁹ Although these statutes come into play when foreign defendants are parties to U.S. proceedings, and U.S. judges have forced the defendants to produce information, as opposed to situations in which judicial assistance from foreign courts is requested, they are solid evidence of a general global sentiment regarding U.S. discovery.

D. A simple solution – allow requests from tribunals only.

Much of the scholarship and caselaw regarding §1782 revolves around the current wording of §1782 and whether or not a foreign discoverability requirement can be inferred in the text of current statute. In *Intel*, the Supreme Court clearly and definitely answered “no” to that question. Courts also look to the drafters’ intent to determine how to interpret the statute, and find the clear directive to spread liberal U.S. discovery. Little scholarly discussions asks the question of whether the statute should be amended and how it actually functions globally. Understandably, judges are not charged with criticizing a statute or drafters’ intent, but simply interpreting it as accurately as possible.

When one steps away from the textual interpretation question, does not tacitly accept the drafters’ intention to spread liberal U.S. discovery, and is free to analyze how the statute functions globally in relation to other jurisdictions’ discovery systems and judicial assistance statutes, its shortcomings become clear. Section 1782 deviates from any other jurisdiction’s judicial assistance statute by allowing any “interested persons” to request judicial assistance, as opposed to only tribunals themselves. This puts the device in the hands of advocates, as opposed to the tribunals that will or will not utilize the

³⁵⁹ For a detailed discussion of blocking statutes, see David Brewer, *Obtaining Discovery Abroad: The Utility Of The Comity Analysis In Determining Whether To Order Production Of Documents Protected By Foreign Blocking Statutes*, 22 HOUS. J. INT’L L. 525 (2000).

information. Section 1782 then pays no heed to the allowable discovery in the jurisdiction in which the foreign tribunal sits, or the allowable discovery in like proceedings in the United States. Section 1782 does this all in the name of spreading U.S. style liberal discovery. Post-*Intel*, §1782 allows advocates to pursue evidence in situations where proceedings are merely contemplated in any range of tribunals worldwide.

It is now clear that advocates are abusing §1782 to the detriment of U.S. defendants in foreign proceedings and related non-parties. It is also clear that U.S. courts are spending more time than ever dealing with §1782 requests, and this trend will surely continue with *Intel*'s broad reading of the statute.³⁶⁰ Despite *Intel*'s desire to avoid questions of foreign law, U.S. judges now routinely must oversee expert battles regarding foreign law in order to adequately apply *Intel*'s four-part test. All of this time and effort is being spent on obtaining evidence that is not discoverable in the vast majority of jurisdictions in which the foreign proceedings are pending or contemplated.

Instead of allowing U.S. defendants' and non-parties' time and resources to be unfairly wasted for the sake of textual interpretation, it is time to revisit the statute given the extreme change of circumstances globally regarding U.S. discovery. When §1782 was amended in 1964, the Hague Evidence Convention was not yet ratified, blocking statutes were not yet prevalent and little foreign judicial assistance caselaw had developed. In essence, the world had not yet concretely established its position rejecting U.S. style discovery. With all of the changes over the past forty years, it is now time to

³⁶⁰ *Accord* Sue Ann Mota, *Global Antitrust Enforcement: The Sherman Act Does Not Apply Without Any Direct Domestic Effect, but Discovery Assistance May be Available to Aid a Foreign Tribunal, According to the U.S. Supreme Court*, 38 J. MARSHALL L. REV. 495, 512 (2004) (“[d]istrict courts should be forewarned that another influx of such suits will be forthcoming after the [*Intel*] decision If the burden becomes too onerous on U.S. courts, as Justice Breyer fears, Congress should revisit this statute”).

revisit the statute. While yet another overhaul of §1782 may be appropriate, a simple amendment would vastly improve the current situation – removing the ability of “interested persons” to request judicial assistance, and placing that power solely in the tribunal itself, or appropriate government official in criminal proceedings. Judicial assistance is designed for one tribunal to help another, not as a tool for advocates with virtually no limits.

In the legislative history of §1782, the extremely aberrant change of allowing “interested persons” to request information is not explained, leading one to conclude that it was added as one of many steps toward liberalizing judicial assistance. With the benefit of hindsight, this liberalization has not had the intended effect of global acceptance of U.S. style discovery, and has resulted in unfairly burdening U.S. defendants and non-parties, and putting U.S. defendants at a disadvantage in foreign proceedings.

This simple amendment would harmonize §1782 with other jurisdictions’ judicial assistance statutes, as well as prevent useless burden on U.S. defendants and non-parties by placing them at unfair disadvantages in foreign proceedings. It would also reduce the likelihood that U.S. judicial assistance will offend foreign tribunals by giving parties before them information not available in the jurisdiction that the foreign tribunal does not want. Only allowing the foreign tribunal itself to request information in the first place would remove the possibility that the defendant’s or non-party’s time and money is being asymmetrically expended in situations when the tribunal does not want the requested information.

Pursuant to post-*Intel* case law, a foreign tribunal must itself appear before a U.S. judge and tell the court in no uncertain terms that the requested judicial assistance would be offensive and undermine its procedure in order to ensure that the U.S. judge does not produce the requested information. Placing the burden on foreign tribunals to monitor and appear before U.S. court proceedings to avoid having their proceedings disrupted by §1782 is simply unacceptable and completely counter to the nation of comity.

It is clear that with the Supreme Court's adherence to textual interpretation of statutes, the pre-*Intel* approach of requiring foreign discoverability when private parties request information is not an option. It seems that the only way forward that will avoid judicial gloss is to amend §1782. It has been over forty years of intense globalization as more U.S. businesses do business abroad than ever before. It is time for §1782 to reflect the realities of today; that the world will not embrace U.S. discovery and that U.S. businesses will continue to be subject to more and more suits and proceedings in foreign courts and tribunals of all kinds.

FINAL CONCLUSION AND SUMMARY

The U.S. judicial and discovery systems are comparatively quite unique. Because the U.S. judicial assistance scheme was amended in 1964 to spread liberal U.S. discovery, it has had the effect of injecting U.S. discovery into foreign proceedings. This would not be problematic if there was a guarantee that the foreign tribunal actually desired the discovery provided by the U.S. court. Section 1782 makes no such guarantee by allowing any “interested person” to request judicial assistance even before a proceeding before a foreign tribunal has begun, and without approval by the foreign tribunal. The result is that §1782 transforms judicial assistance into a tool for foreign litigants to unfairly use against U.S. defendants and non-parties. This result is directly contrary to the comity-based purpose of judicial assistance to assist foreign courts and tribunals directly, and ignores the important policy reasons behind other countries’ limited evidentiary rules.

Canada and England’s judicial assistance statutes allow requests for judicial assistance only from the foreign court or tribunal itself. These countries’ statutes also pay careful attention to the burden that a request will impose on their citizens. The U.S. judicial assistance could learn a lot from these countries, and altering the current statutory language and judicial inquiry to align with them would go far in making §1782 what it was originally designed to be – a vehicle for assisting foreign *courts*. It would also reduce the unfair asymmetrical burden that §1782 currently imposes on U.S. defendants and non-parties. Further, it would acknowledge that the world has categorically rejected U.S. discovery, and foreign courts and tribunals are hostile to U.S. discovery being involuntarily injected into their proceedings.

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