

Interpretative Challenges of 28 U.S.C. § 1782 in the Aftermath of *Intel Corp. v. Advanced Micro Devices, Inc.*

ABSTRACT

The rise of globalization and the normalization of transnational commercial agreements motivated the United States to make commitments that seek to facilitate the resolution of international litigation and dispute resolution processes. One of the byproducts of the United States' commitment to international cooperation is 28 U.S.C. § 1782, a statute that opens American courts to foreign parties seeking discovery for use in foreign proceedings. Continuous amendments to this statute, paired with a Supreme Court decision that provided an overly vague, unworkable balancing test, gave free rein to lower courts' discretionary powers, ultimately resulting in a myriad of conflicting decisions. This Note seeks to address some of the aforementioned conflicts and proposes an amendment to 28 U.S.C. § 1782 that would reduce the extent to which courts' discretionary powers play a role in the outcome of § 1782 requests, resulting in a more straightforward application of the statute.

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I. INTRODUCTION

The advent of modern means of communication, paired with the increased availability of international transportation, has multiplied the opportunities to enter in international transactions and dealings.¹ Naturally, these cross-border transactions have been tied to an increase of international litigation, as well as domestic litigation with an international component.² Although the federal powers of the United States have recognized the unique procedural challenges presented by international litigation since at least 1855,³ it was not until the middle of the twentieth century that Congress started to substantially regulate the ability of federal domestic courts to assist in obtaining evidence for use in foreign and international proceedings.⁴

1. See Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 (1965) [hereinafter Smit, *International Litigation*] (introducing the conditions under which the United States Congress decided to create the Commission on International Rules of Judicial Procedure).

2. See *id.* (explaining how the increase and expansion of international litigation “enhanced the need for rules that promote just, speedy, and inexpensive adjudication of disputes with international elements.”). For examples of legal cases presenting a “foreign element” issue, see Sagi Peari, *Which Law Applies to Adjudicate Litigation with a Foreign Element?*, OUPBLOG (May 28, 2018), <https://blog.oup.com/2018/05/law-adjudicate-litigation-foreign-element/> [<https://perma.cc/JSF7-4ZHU>] (archived July 16, 2020).

3. See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (giving the United States government the power to execute letters rogatory).

4. See Act of Sept. 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743 (creating a Commission and Advisory Committee on International Rules of Judicial Procedure); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

Since 1948, 28 U.S.C. § 1782⁵ has provided a mechanism for foreign parties and tribunals to take depositions and obtain discovery from companies and individuals located within the United States for use in foreign or international proceedings.⁶ A product of decades of experimentation and subject to continuous changes,⁷ the provision seeks to fulfill a dual set of aims: providing an efficient means of assistance to participants in international litigation and encouraging foreign countries to provide a similar means of support to US courts.⁸

However, the continuous amendments to 28 U.S.C. § 1782 and its increasingly broad scope have created confusion for both foreign and domestic parties.⁹ The uncertainty regarding how to interpret a variety of aspects covered by § 1782 has only worsened after a series of conflicting and unclear judicial interventions.¹⁰ The Supreme Court's

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5. 28 U.S.C. § 1782 (2018) states in relevant part:

(a) *The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.*

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

- § 1782(a) (emphasis added).

6. See Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 103; 1 JAMES W.M. MOORE & KEVIN SHIREY, MOORE'S FEDERAL RULES PAMPHLET, pt. 4, § 1782.2, 782–86 (Matthew Bender & Co. 2019) (explaining how the statute operates).

7. See *Intel Corp.*, 542 U.S. at 247–49 (reviewing the amendment history of the statute).

8. See, e.g., *In re Metallgesellschaft*, 121 F.3d 77, 79 (2d Cir. 1997); *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992) (discussing the dual aims of the statute and how they inform the judicial inquiry).

9. See Michael Campion Miller, Alejandro G. Rosenberg & Michael Stoll, *28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts*, May 2012 FED. LAW. 44, 44–47 (examining the gradual change undergone by the statute and its status after Supreme Court intervention).

10. See Sarah LaFreniere, *Inconsistent Case Law on 28 U.S.C. § 1782 Continues to Confuse Litigants and District Courts*, HAUSFELD (Nov. 8, 2018), <https://www.hausfeld.com/news-press/inconsistent-case-law-on-28-u.s.c-1782-continues->

holding in *Intel Corp. v. Advanced Micro Devices, Inc. (Intel)* sought to provide lower courts with answers to some of these interpretative conflicts while equipping them with a set of balancing factors to assist in the determination of whether to grant aid in a foreign proceeding.¹¹

Far from solving these problems, *Intel* has generated further debate as to the interpretation of § 1782, ultimately leading to several federal circuit court splits and diverging interpretations of the statute.¹² The circuit courts disagree on a number of issues, including: (1) the extraterritorial reach of the statute, (2) whether “foreign or international tribunals” under § 1782 should be read to include international arbitral tribunals, (3) the impact of applicant delay in requesting aid on the courts’ ability to grant discovery, and (4) whether an applicant’s ability to obtain discovery pursuant to § 1782 extends to a foreign party’s US legal counsel, and if it does, whether the applicant’s potential to reach documents held by US legal counsel extends to documents that have been declared confidential in the context of a domestic proceeding.¹³

to-confuse-litigants-and-district-courts [https://perma.cc/M7KZ-WYJ9] (archived July 16, 2020) (discussing conflicting circuit court decisions and highlighting some underlying interpretative problems that are contributing to such conflict).

11. *Intel* sought to resolve the issues arising from § 1782 by explicitly solving some of the existing conflicts and by establishing four discretionary factors for courts to consider before granting a § 1782 discovery request. These factors contemplate whether (1) the party requesting the discovery is one of the parties to the foreign proceeding, (2) the foreign tribunal’s attitude towards U.S. assistance, (3) the request is an attempt to circumvent foreign proof-gathering restrictions or public policies, and (4) burdensomeness of fulfilling the request. *See Intel Corp.*, 542 U.S. at 241–66.

12. *See, e.g., LaFreniere, supra* note 10 (introducing an interpretation conflict between the Second and Third Circuit as to whether 28 U.S.C. § 1782 allows to obtain discovery from a “foreign-litigant’s U.S. counsel”); Julia Sherman, *Section 1782 Discovery: Recent Decisions Highlight Splits in the Second Circuit*, KLUWER ARB. BLOG (July 10, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/07/10/section-1782-discovery-recent-decisions-highlight-splits-in-the-second-circuit/>

[https://perma.cc/KN4J-DK94] (archived July 16, 2020) (highlighting an interpretative split within the U.S. District Court for the Southern District of New York on the issues of meaning of a foreign tribunal, extraterritorial application of the statute, and the role of applicant delay); *Sixth Circuit Approves Discovery in Aid of Foreign Private Arbitrations*, AKIN GUMP (Oct. 7, 2019), <https://www.akingump.com/images/content/1/0/v2/109550/Sixth-Circuit-Approves-Discovery-in-Aid-of-Foreign-Private-Arbit.pdf> [https://perma.cc/T9Y4-28V6] (archived July 16, 2020) (explaining that the Sixth Circuit’s decision to read 28 U.S.C. § 1782 to allow discovery requests in relation to commercial arbitration procedures is in conflict with previous decisions by the Second and Fifth Circuits).

13. *See In re Hulley Enters.*, 358 F. Supp. 3d 331, 351 (S.D.N.Y. 2019); Tyler B. Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 in Aid of Foreign and International Litigation and Arbitration*, 22 AM. REV. INT’L ARB. 135, 136–37 (2011) (discussing some of the issues raised by parties and resolved by courts as to the interpretation of vague words within the statute); LaFreniere, *supra* note 10 (discussing a number of circuit court splits arising from diverging interpretations of the statute); Sherman, *supra* note 12 (discussing a number of interpretative conflicts among lower courts within the same circuit).

This Note focuses on surveying cases to determine how different courts have resolved the challenges presented by § 1782 while looking for a possible solution to their divergence in exercising discretion under the statute. To date, these cases have generated an intense debate within the legal profession¹⁴ due to a seeming departure from the traditional liberal interpretation of § 1782 propitiated by *Intel*. This debate is particularly important given the potential impact such decisions have on multinational corporations.¹⁵ Section 1782 makes US broad discovery rules and procedures available to foreign litigants whose domestic litigation systems are often stricter or do not even contemplate pretrial discovery.¹⁶ At the same time, access to US discovery rules and procedures allows a larger number of lawsuits to survive at the expense of the party producing the discovery (generally, financial institutions and other large multinational corporations).¹⁷

14. Interestingly, this issue seems to attract more discussion by active practitioners working for law firms in transnational matters than by scholars. However, judicial interpretation of 28 U.S.C. § 1782 has been highly criticized by a number of scholars. See, e.g., Marat A. Massen, *Discovery for Foreign Proceedings after Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 875 (2010) (“The Supreme Court’s decision . . . in *Intel Corp. v. Advanced Micro Devices, Inc.* has led district courts after *Intel* to render troubling and inconsistent decisions on whether to grant requests for discovery for use in foreign tribunals under 28 U.S.C. § 1782.”); 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, 1–2 (1998) [hereinafter Smit, *American Assistance*] (“All too frequently, the development of considerable case law bears testimony to deficiencies in statutory text. . . . [T]hat is not the case here. The statutory text is straightforward and clear. The case law it has spawned has been caused by judicial unwillingness to give it the meaning that an unbiased reading requires.”); Deborah C. Sun, *Intel Corp. v. Advanced Micro Devices, Inc.: Putting Foreign Back into the Foreign Discovery Statute*, 39 U.C. DAVIS L. REV. 279, 286 (2005) (“Different circuit courts have read into the statute different requirements, none of which are mentioned in section 1782(a)’s plain language.”).

15. See Christopher J. Hought & Mark G. Hanchet, *Section 1782 Discovery: A Back Door for Foreign Litigants*, MAYER BROWN (Mar. 2012), <https://www.mayerbrown.com/en/perspectives-events/publications/2012/03/section-1782-discovery-a-back-door-for-foreign-lit> [https://perma.cc/RX7F-3M4K] (archived July 17, 2020) (discussing the potential impact of a decision resolving a §1782 discovery request in the context of a German securities fraud litigation on banks and financial institutions).

16. See Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 306–07 (2002) (“[T]he number of discovery mechanisms available to the American lawyers as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets us apart.”).

17. See George Shepherd, *Still a Failure: Broad Pretrial Discovery and the Superficial 2015 Amendments*, 51 AKRON L. REV. 817, 822–23 (2017) (“[A] plaintiff can commence a case with few, or no, facts in hand and instead attempt to gather facts during the discovery process.”); Hought & Hanchet, *supra* note 15 (“A bank presented with a Section 1782 discovery request faces an uncertain road. Compliance . . . can be exceptionally expensive, require disclosure of sensitive or private information, and possibly expose the entity to future liability.”).

The debate about the judiciary's inability to exercise discretion homogenously in the context of § 1782 became once again relevant after the Second Circuit issued its 2017 decision on *Kiobel v. Cravath, Swaine & Moore, LLP*, reversing a district court's grant of a § 1782 discovery request seeking to reach confidential documents held by a foreign party's counsel in the United States.¹⁸ In determining that the district court abused its discretion by granting the request, the Second Circuit reasoned that the *Intel* factors went against the petitioner and also pondered "the respect owed to confidentiality orders, and the concerns for lawyer–client relations."¹⁹ A year later, the Third Circuit reversed a district court's decision quashing a subpoena issued pursuant to § 1782 in a case with similar facts (*In re Biomet Orthopaedics Switzerland GmbH*), showing the courts inability to reach an agreement as to the proper scope of § 1782 and how to properly apply the *Intel* factors.²⁰

Another recent example of a controversy involving 28 U.S.C. § 1782 is the Second Circuit's decision in *In re del Valle Ruiz*.²¹ The case presented a question regarding the extraterritorial reach of § 1782, in particular, whether the applicants could use a discovery request in the Southern District of New York to reach documents stored in Spain for use in a procedure in front of the Court of Justice of the European Union.²² In this instance, the court took a surprising stance, distancing itself from the holding of a majority of the circuit's lower courts and the court's own previous dicta by endorsing the

18. See generally *Kiobel v. Cravath, Swaine & Moore, LLP*, 895 F.3d 238 (2d Cir. 2017).

19. *Id.* at 248.

20. See LaFreniere, *supra* note 10 (discussing important differences in the reasoning of the *Cravath* and *Biomet* cases). See generally *In re Biomet Orthopaedics Switz. GmbH*, 742 F. App'x 690 (3d Cir. 2018).

21. See Alison Frankel, *2nd Circuit: Foreign Evidence Is Fair Game for 1782 Requests*, REUTERS (Oct. 8, 2019, 5:10 PM), <https://www.reuters.com/article/us-otc-1782/2nd-circuit-foreign-evidence-is-fair-game-for-1782-requests-idUSKBN1WN2IP> [<https://perma.cc/Q6Q3-CCVB>] (archived July 17, 2020) (highlighting the relevance of the Second Circuit's holding to foreign corporations); Gilbert A. Samberg, *Second Circuit Affirms the Extraterritorial Discovery Reach of 28 U.S.C. § 1782*, NAT'L L. REV. (Nov. 4, 2019), <https://www.natlawreview.com/article/second-circuit-affirms-extraterritorial-discovery-reach-28-usc-1782> [<https://perma.cc/8H4V-TD2J>] (archived July 17, 2020) (discussing the court's reasoning of *In re del Valle Ruiz*). See generally *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019).

22. See *In re del Valle Ruiz*, 939 F.3d at 523–24 (providing an overview of the facts of the case and affirming the lower court's decision to apply the statute extraterritorially); *In re Del Valle Ruiz*, 342 F. Supp. 3d 448, 450–52, 459–60 (S.D.N.Y. 2018) (discussing the background of the case and concluding that grant of the application is appropriate); Petitioners' Reply Memorandum in Further Support of Petitioners' Application and Petition for an Order to Conduct Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782 at 1–2, 4–6, *In re Del Valle Ruiz*, 342 F. Supp. 3d 448 (S.D.N.Y. 2018) (No. 1:18-MC-00127), 2018 WL 2316093 (discussing the extraterritoriality issue in depth and advancing the petitioner's position).

Eleventh Circuit's reasoning underlying the 2016 *Sergeeva v. Tripleton International Ltd.* decision.²³

This Note argues that 28 U.S.C. § 1782 should be amended and that judicial discretion in its application should be restricted in order to afford aid to foreign-interested parties and tribunals in pursuance of the provision's twin aims (increasing efficiency and encouraging reciprocity) in every possible instance while establishing the necessary safeguards to preserve the key features of the American adversarial system.²⁴ Part II discusses the history and development of 28 U.S.C. § 1782, as well as other related international commitments developed in parallel to this provision. Part III then presents a range of circuit courts' decisions, analyzes the proposed interpretative solutions put forth by legal scholars, and assesses a variety of procedures followed by other states' legal systems facing the foreign-discovery issue. Finally, Part IV proposes a legislative amendment that aims to resolve each of the existent interpretative disagreements.

II. THE ENACTMENT AND HISTORY OF 28 U.S.C. § 1782: AN EXAMINATION OF THE PROVISION'S LEGISLATIVE HISTORY, TEXT, AND PURPOSE

A. *The Road to 28 U.S.C. § 1782*

In 1855, Congress enacted its first act recognizing the need for judicial assistance to foreign parties and tribunals under the title "An Act to Prevent Mis-trials in the District and Circuit Courts of the United States, in Certain Cases."²⁵ The statute's enactment occurred after the federal government realized that it lacked a statutory grant of power to execute letters rogatory—a court's request for assistance to

23. See *In re del Valle Ruiz*, 939 F.3d at 532–33 (endorsing the Eleventh Circuit's previous holding accepting extraterritorial application of the statute). See generally *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016). For a more detailed explanation of the Second Circuit's rationale leading to a departure from its previous dicta in *In re del Valle Ruiz*, see *infra* Part III.A.

24. Eric D. McArthur, a renowned Supreme Court and appellate litigation attorney, explains the importance of certain privileges to the maintenance of the adversarial system as follows:

The [attorney-client] privilege reflects society's judgment that effective legal representation is necessary to the administration of justice in our adversarial system, that effective representation requires "full and frank communication between attorneys and their client," and that full and frank communication cannot be secured without legal protection against compelled disclosure of the content of attorney-client communications.

Eric D. McArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729, 731 (2005).

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

a foreign court in the context of ongoing litigation²⁶—when a French court requested assistance in obtaining testimony in connection with a proceeding taking place in France.²⁷ The Act provided:

[W]here letter rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letter mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.²⁸

The 1855 Act was followed by “An Act to Facilitate the Taking of Depositions within the United States, to be used in the Courts of other Countries, and for other Purposes,” which restricted the scope of judicial aid in response to the submission of letters rogatory by establishing new requirements.²⁹ In particular, the Act established that the testimony sought had to be used (1) “in any suit for the recovery of money or property,” (2) in a court “in any foreign country with which the United States are at peace,” and (3) “the government of such foreign country shall be a party or shall have an interest” in the proceeding.³⁰ In practice, these new requirements discouraged federal courts from providing assistance in foreign proceedings.³¹

It was not until 1948 that Congress moved towards a model focused on providing broader means for judicial assistance to foreign parties and courts, in line with the liberal spirit of the newly-enacted Federal Rules of Civil Procedure.³² The Act “to Revise, Codify, and Enact into Law Title 28 of the United States Code Entitled ‘Judicial Code and Judiciary’” amended the Act of 1863, and codified it under 28 U.S.C. § 1782.³³ Congress removed the requirement that a foreign

26. See TIMOTHY P. HARKNESS, RAHIM MOLOO, PATRICK OH & CHARLINE YIM, *DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR JUDGES* 18–19 (2015).

27. See Jenna M. Godfrey, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(a)'s Application in Private International Arbitration*, 60 AM. U. L. REV. 475, 480 n.23 (2010) (discussing the context in which the 1855 statute was enacted).

28. 10 THE STATUTES AT LARGE AND TREATIES OF THE UNITED STATES OF AMERICA FROM DECEMBER 1, 1851, TO MARCH 3, 1855 630 (George Minot ed., 1855).

29. Act of March 3, 1863, ch. 95, 12 Stat. 769.

30. *Id.*

31. See Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 540–41 (1953) (discussing the consequences following from the first amendment to the statute).

32. The Federal Rules of Civil Procedure, enacted in 1938, promoted “broad and liberal discovery” in sharp contrast to prior practice. See Alexander Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942) (discussing the contributions the new rules made to the field and civil proceedings).

33. The 1948 version of 28 U.S.C. § 1782 stated:

The deposition of any witness residing within the United States to be used *in any civil action pending in any court in a foreign country*

country be a party or have an interest in the proceeding, broadening the provision's scope.³⁴ The reach of § 1782 further increased through a 1949 amendment, which struck out the word "residing" and inserted the words "judicial proceeding" in lieu of "civil action."³⁵ Courts understood the amendment's language as allowing judicial assistance in both civil and criminal cases.³⁶

In 1958, Congress, responding to the significant growth of international commerce, created the Commission on International Rules of Judicial Procedure in order to increase the existing set of tools available to obtain information and resolve disputes arising in foreign jurisdictions.³⁷ The Commission's proposals, including a reform of § 1782, were accepted by Congress in 1964.³⁸

The 1964 Amendment of § 1782 allowed courts not only to compel depositions but also the production of documents and "other things."³⁹ The amendment further substituted the phrase "in any judicial proceeding pending in any *court* in a foreign country" with "in a proceeding in a foreign or international *tribunal*," which opened the provision to a larger number of proceedings, including "administrative and quasi-judicial proceedings."⁴⁰ These changes initiated the path

with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found.

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (emphasis added).

34. Compare Act of March 3, 1863, ch. 95, 12 Stat. 769, with Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949. See generally Godfrey, *supra* note 27, at 481 (discussing the changes brought by the 1948 and 1949 amendments).

35. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

36. See Jones, *supra* note 31, at 541–42 (discussing the contemporary understanding of the changes made by the legislature).

37. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004) (discussing the creation of the Commission and the motivations that powered the institution).

38. See Act of October 3, 1964, Pub. L. No. 88-619, sec. 9, § 1782, 78 Stat. 995, 997.

39. See *id.*; see also Smit, *International Litigation*, *supra* note 1, at 1026 (explaining how the statute operated after the 1964 amendment, and how such operation was distinguishable from the previous form of the statute).

40. Compare Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949, and Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103, with Act of October 3, 1964, Pub. L. No. 88-619, sec. 9, § 1782, 78 Stat. 995, 997 (1964). The 1964 version of 28 U.S.C. § 1782 stated, in relevant part:

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) 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*

towards a liberal interpretation of the scope of federal judicial assistance in foreign proceedings and formed the courts' current understanding of § 1782.⁴¹

The last amendment to § 1782 took place in 1996 when Congress expressly added "including criminal investigations conducted before formal accusation" to follow "foreign or international tribunal," leaving the text of § 1782 (in relevant part) as follows:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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

or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

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

§ 1782(a) (emphasis added). *See also Intel Corp.*, 542 U.S. at 249 (emphasis added) (citing S. REP. NO. 1580, 88th Cong., 2d Sess., 7 (1964); H.R. REP. NO. 1052, 88th Cong., 1st Sess., 9 (1963)) (discussing a variety of proceedings that would qualify as a tribunal under the statute).

41. *See* Robert J. Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example*; In Re Westinghouse Uranium Contract Litigation, 10 GA. J. INT'L & COMP. L. 101, 104 n.4 (1980) (comparing the Hague Evidence Convention to the statute and asserting that "the judicial assistance statute . . . is much more liberal"); Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 COLUM. L. REV. 1264, 1266-67 (1962) [hereinafter Smit, *Assistance Rendered*] (advocating for further liberalization of United States' assistance in connection with foreign proceedings).

Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.⁴²

With this amendment, Congress increased once again the scope of tribunals that could resort to § 1782.⁴³ In particular, this amendment resulted from a commitment to provide judicial assistance to the International Criminal Tribunals for the Former Yugoslavia and Rwanda, after the United States implemented two United Nations Security Council resolutions through “two international agreements concerning the surrender of suspects” to these *ad hoc* tribunals in 1994 and 1995.⁴⁴

B. *The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) and Other Instruments for Judicial Assistance Incorporated into US Law.*

Understanding the United States’ international commitments in matters of judicial cooperation is relevant to the interpretation of 28 U.S.C. § 1782 and its twin aims because these commitments set a floor on US courts’ obligations towards other states’ judicial bodies. Traditionally, a majority of states have agreed to provide judicial assistance in foreign proceedings through the operation of letters rogatory (civil and criminal procedures) and Mutual Legal Assistance Treaties (criminal procedures only).⁴⁵ Therefore, in the absence of a treaty or a statutory obligation, a court receiving a letter rogatory could disregard the request.⁴⁶

42. 28 U.S.C. § 1782(a) (2018) (emphasis added); *see also* National Defense Authorization Act for Fiscal Year 1996, Pub L. 104-106, § 1342(b), 110 Stat. 486 (introducing the 1996 amendment).

43. *See* Godfrey, *supra* note 27, at 483 (discussing the effects of the 1996 amendment).

44. Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT’L L. 510, 510 (1996); *see* National Defense Authorization Act for Fiscal Year 1996 § 1342; Göran Sluiter, *Obtaining Evidence for the International Criminal Tribunal for the Former Yugoslavia: An Overview and Assessment of Domestic Implementing Legislation*, 15 NETH. INT’L L. REV. 87, 93 n.30 (1998) (explaining that the United States was one of the states enacting “legislation regulating the cooperation with . . . Ad Hoc Tribunals.”); *see also id.* at 101–02, 102 nn.77, 79 (conveying the flexibility of common law systems with respect to “interstate legal assistance” and highlighting United States’ policy of accommodating “the practice and procedure of the international tribunal” in its execution of legal assistance requests).

45. *See generally* T. MARKUS FUNK, MUTUAL LEGAL ASSISTANCE TREATIES AND LETTERS ROGATORY: A GUIDE FOR JUDGES 1 (2014) (describing the traditional means of legal assistance between countries).

46. Augustine, *supra* note 41, at 115 (describing the procedure routinely followed to obtain assistance of foreign authorities in situations in which a foreign witness is not willing to participate voluntarily).

In 1972, the United States ratified The Hague Conference of Private International Law's Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), a treaty designed to "facilitate the transmission of Letters of Request and . . . to improve mutual judicial co-operation in civil or commercial matters."⁴⁷ The Hague Evidence Convention sought to modernize and improve previous rules (such as that introduced above), which provided for a complicated method of judicial assistance through "letters of request" and limited use of consuls.⁴⁸ Consequently, the Hague Evidence Convention provided for the use of letters of request, diplomatic and consular officers, and commissioners, as well as established a mandatory floor for international assistance for the signatories.⁴⁹

The United States Delegation understood Article 27 of the Hague Evidence Convention to allow any country to "unilaterally offer by internal law and practice, wider, broader, more liberal, and less restrictive international assistance. Specifically, the free and open system of assistance, available in the United States under 28 U.S.C. §§ 1781 and 1782 . . . remains unchanged and unrestricted."⁵⁰ Relatedly, the Supreme Court has reiterated the United States' position that the Hague Evidence Convention is "neither the exclusive nor the mandatory procedure for obtaining documents and information in a foreign signatory's territory," in contravention to the assumption by some contracting states that it is the only means for obtaining discovery within the United States.⁵¹

47. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, pmbl., June 1, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force Oct. 7, 1972) [hereinafter Hague Convention on the Taking of Evidence Abroad].

48. See *Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law*, 8 INT'L. LEGAL MATERIAL 785, 807 (1969) [hereinafter *Report on Eleventh Session of the Hague*] (discussing the United States government's view of the Hague Evidence Convention's goals).

49. See *id.* at 807–08 (enumerating the Convention's achievements); see also Hague Convention on the Taking of Evidence Abroad, *supra* note 47, art. 27 ("The provisions of the present Convention shall not prevent a Contracting State from . . . permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention).

50. *Report on Eleventh Session of the Hague*, *supra* note 48, at 808.

51. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 529 (1987); HARKNESS, MOLOO, OH & YIM, *supra* note 26, at 11 (2015) (discussing the United States' position as to whether the Hague Evidence Convention is the exclusive means to obtain evidence from a foreign state). The assumption by foreign sovereigns that the Hague Evidence Convention's procedures are the only available channel for obtention of discovery in the United States is likely motivated by their own approach to international cooperation in discovery matters. For example, France has repeatedly argued that because the United States is a party to the Hague Convention, parties to a litigation seeking evidence in the United States can only use the request methods specifically provided for in the Convention. This posture stems

Therefore, the preexisting statutory discovery cooperation regime in the United States, which exceeds the international threshold established by the Hague Evidence Convention, remains the main source for foreign litigants to obtain discovery. However, the Hague Evidence Convention acts as a complement to § 1782 by encouraging reciprocity in the field of judicial assistance through the commitment of the other signatories to a minimum level of cooperation when US citizens or courts need to obtain discovery from a foreign jurisdiction.⁵²

C. *The Supreme Court's Interpretation of 28 U.S.C. § 1782: Intel Corp. v. Advanced Micro Devices, Inc.*

In its *Intel* decision, the Supreme Court interpreted 28 U.S.C. § 1782(a) for the first time since the introduction of the key 1964 and 1996 amendments.⁵³ The case arose in the context of an antitrust complaint filed at the Directorate-General for Competition of the Commission of the European Communities (DG-Competition) by Advanced Micro Devices (AMD) against Intel Corporation (Intel Corp.), promptly followed by a § 1782 discovery request in the US District Court for the Northern District of California.⁵⁴ The district court denied the request after interpreting that § 1782(a) did not allow the production of the requested discovery; the Ninth Circuit reversed and remanded.⁵⁵ Intel Corp. petitioned for certiorari,⁵⁶ and the Supreme Court agreed to hear the issue in order to resolve an interpretative

from France's dislike of parties "importing" foreign evidence or trying to "export" domestic evidence in its domestic judicial proceedings. See *infra* Part IV.A.

52. See HARKNESS, MOLOO, OH & YIM, *supra* note 26, at 8 (discussing the background of the Hague Evidence Convention and its degree of success, as reflected by number of ratifications).

53. See generally *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004); Sun, *supra* note 14, at 282 ("The Supreme Court addressed the amended section 1782(a) for the first time in *Intel Corp. v. Advanced Micro Devices, Inc.*").

54. See *Intel Corp.*, 542 U.S. at 246. The § 1782 request sought to obtain documents that Intel Corp. had produced in the context of a private antitrust litigation in Alabama. See Anan Suryakant Patel, *International Judicial Assistance: An Analysis of Intel v. AMD and its Effects on § 1782 Discovery Assistance*, 18 FLA. J. INT'L L. 301, 302 (2006) (providing a brief summary of the case's procedural history).

55. See *Intel Corp.*, 542 U.S. at 246.

56. Intel Corp. argued, among other things, that "interested person" under § 1782(a) included only "litigants, foreign sovereigns, and the designated agents of those sovereigns"; that the documents were not "for use in a foreign or international tribunal"; that the action at issue was not "pending or imminent"; and that granting a request was conditional on the information being discoverable pursuant to the foreign jurisdiction's rules pursuant to policy concerns of avoiding foreign government offense and maintaining the litigants' parity. See Brief for Petitioner at 10–11, 23–24, 27–29, *Intel Corp. v. Advanced Micro Devices, Inc.*, 524 U.S. 241 (2004) (No. 02-572), 2003 WL 23138394, at *19–23, *26, *27–33.

conflict between circuit courts.⁵⁷ In particular, the court assessed “the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal.”⁵⁸ After examining the history of 28 U.S.C. § 1782,⁵⁹ the procedural background of the case,⁶⁰ and the institutional character of the DG-Competition, the court engaged in a review of the plain text of the statute, concluding that it authorized the federal district court to assist AMD because the proceeding by the DG-Competition, although not judicial in nature, led to a dispositive ruling⁶¹ and the DG-Competition was, at minimum, a “quasi-judicial” agency.⁶² The Court further found that § 1782 did not limit requests to pending or imminent procedures, but instead required “only that a dispositive ruling . . . be within reasonable contemplation.”⁶³ The Court also determined that although “comity and parity concerns” could be pondered in the district court’s exercise of discretion, they did not allow for a judicial “insertion of a generally applicable foreign discoverability rule into the text of § 1782(a).”⁶⁴ Finally, the court provided a set of balancing factors for district courts to use in their discretionary review of § 1782 discovery requests.⁶⁵ These factors include:

57. See *Intel Corp.*, 542 U.S. at 253 (explaining that the Court decided to grant certiorari in order to address a circuit court split regarding the interpretation of the statute); *Intel Corp. v. Advanced Micro Devices, Inc.*, 540 U.S. 1003 (2003) (Mem.) (granting certiorari); Petition for a Writ of Certiorari at 8, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (No. 02-572), 2002 WL 32151598 (petitioning for certiorari and setting forth the questions presented).

58. *Intel Corp.*, 542 U.S. at 246.

59. See *supra* Part II.A (describing the evolution of the statute at issue).

60. For a summary of the procedural background of this case, see Mousa Zalta, *Recent Interpretation of 28 U.S.C. § 1782(A) by the Supreme Court in Intel Corp. v. Advanced Micro Devices, Inc.: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants*, 17 PACE INT’L L. REV. 413, 427 (2005) (summarizing the content of the Court of Appeals’ decision and its determination).

61. See *Intel Corp.*, 542 U.S. at 255–56 (quoting Smit, *International Litigation*, *supra* note 1, at 1026) (holding that §1782(a) extends to parties “possess[ing] a reasonable interest in obtaining [judicial] assistance.”).

62. See *id.* at 257–58.

63. *Id.* at 259.

64. *Id.* at 261. In rejecting *Intel Corp.*’s assertions that § 1782(a) did not require an imminent or pending proceeding and did not have an implicit foreign discoverability requirement, the court resolved interpretative issues that resulted in conflicting decisions between circuit courts. See Zalta, *supra* note 60, at 429 (discussing the implications of the decision with regard to interpretation of the statute). Before *Intel*, there were three main interpretations of § 1782(a): (1) the First and Eleventh Circuits required a *prima facie* finding of foreign discoverability in order to grant a request; (2) the Fourth and Fifth Circuits also required a finding of foreign discoverability, except when “the foreign tribunal itself was requesting evidence from a U.S. court”; and (3) the Second, Third, and Ninth Circuits rejected reading a foreign discoverability requirement into the text of § 1782(a). See Massen, *supra* note 14, at 893–97 (summarizing the lower courts’ approaches to foreign discoverability).

65. See *Intel Corp.*, 542 U.S. at 264 (providing four non-exhaustive factors to be evaluated by courts in exercise of their discretion to grant discovery orders under § 1782).

(1) whether the person from whom discovery is sought is a participant in the foreign proceeding (because there is no need for U.S. judicial intervention where the foreign tribunal itself can compel parties to produce evidence); (2) the nature of the foreign tribunal and the character of the proceeding abroad, including whether the foreign government or the court or agency is receptive to U.S. federal court assistance; (3) whether the request is an attempt to circumvent proof-gathering restrictions or policies in the foreign jurisdiction where the litigation is pending; and (4) whether the request is unduly intrusive or burdensome.⁶⁶

The Court's decision to maintain lower courts' discretion in § 1782 by issuing a set of balancing factors, instead of "adopt[ing] requirements barring or limiting section 1782(a) discovery," ultimately led to the current interpretative disagreements.⁶⁷ *Intel* allows lower courts to exercise their own judgment when parsing and considering the facts surrounding a § 1782 request while broadening the scope of two out of three statutory requirements necessary to invoke § 1782.⁶⁸ Although the Court made its decision in an attempt to be consistent with the "statute's text and its legislative history," it ultimately resulted in "troubling or inconsistent decisions" by district courts that have effectively frustrated the statute's twin goals of "fostering international judicial cooperation and providing efficient resolutions of foreign cases."⁶⁹

III. THE CIRCUIT COURTS' DIVERGENT INTERPRETATIONS OF 28 U.S.C. § 1782 AND *INTEL*

A. *Extraterritorial Application.*

As previously introduced, the *Intel* decision solved a number of interpretative conflicts while it left other issues unresolved.⁷⁰ Courts continue to disagree on whether § 1782 authorizes domestic federal courts to order a person "residing" or "found" in the United States to produce documents within that person's possession, custody, or control

66. *Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782*, JONES DAY: INSIGHTS (Apr. 2009), <https://www.jonesday.com/en/insights/2009/04/developments-in-us-law-regarding-a-more-liberal-approach-to-discovery-requests-made-by-foreign-litigants-under-28-usc--1782> [https://perma.cc/WC3Z-XZ3K] (archived July 18, 2020).

67. Sun, *supra* note 14, at 282 (analyzing the Court's reasoning and the ultimate outcome of the case).

68. See Patel, *supra* note 54, at 304 (as a general matter, to qualify for assistance under § 1782, a request must fulfill three main statutory requirements, namely, "(1) the person from whom discovery is sought resides or is found in the district court's jurisdiction, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the application is made by a foreign or international tribunal or an interested person").

69. Massen, *supra* note 14, at 875–76.

70. See *supra* Part I and notes 12–13 (introducing the main interpretative issues and circuit splits in relation to the statute).

that are located outside the United States.⁷¹ This issue has become more contentious over the last two decades due to the proliferation of internet-supported “servers”⁷² and “cloud computing”⁷³ services that allow domestic parties to have “possession, custody or control” over documents that are stored in a computer or server located in a foreign country.⁷⁴

The prevailing view among courts seems to be that § 1782 does not authorize the discovery of documents abroad.⁷⁵ The courts that have found against the extraterritorial application of § 1782 have generally based their decisions on three sources: (1) the published opinion of Hans Smit, an expert in international law and civil procedure that participated in the drafting of the statute;⁷⁶ (2) a statement included in a Senate Report from the time of drafting;⁷⁷ and (3) dicta from the Second Circuit.⁷⁸ The main argument against extraterritorial application of the statute is that the statute’s purpose is “to make

71. See Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1177 & n.380 (2019) (discussing the courts disagreement as to whether the statute can be applied extraterritoriality and comparing the issue to a similar one confronted by the Federal Arbitration Act).

72. Servers are defined as computers in a network that are used to provide services such as access to files to other computers. See *server*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/server> (last visited Oct. 30, 2019) [<https://perma.cc/CM3K-68NP>] (archived July 18, 2020).

73. Relatedly, cloud computing is “the practice of storing regularly used computed data on multiple servers that can be access through the internet.” *Cloud computing*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cloud%20computing> (last visited Oct. 30, 2019) [<https://perma.cc/Y4J3-ZUUT>] (archived July 18, 2020). See *supra* note 72 and accompanying text (discussing the meaning of “server”).

74. Robinson, *supra* note 13, at 136–37.

75. See, e.g., *Kestrel Coal PTY, Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (dictum) (seemingly supporting Smit’s view that § 1782’s reach does not extend to information located outside of the United States, but declining to decide the issue); *Four Pillars Enters. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079–80 (9th Cir. 2002) (finding support for the view that § 1782 does not encompass discovery located in other countries); *In re Nokia Corp.*, No. 107-MC-47, 2007 WL 1729664, at *5 (W.D. Mich. June 13, 2007) (suggesting that the documents being located abroad weighted against granting a § 1782 request); *Norex Petrol., Ltd. v. Chubbs Ins. Co. of Can.*, 384 F. Supp. 2d 45, 50–55 (D.D.C. 2005) (stating that case law suggests that extraterritorial application is inapplicable and agreeing with the reasoning of the District Court for the Southern District of New York and Second Circuit).

76. See Smit, *American Assistance*, *supra* note 14, at 10–12 (providing four reasons why the statute should not be interpreted to apply extraterritorially).

77. See *Kuwait Inv. Auth. v. Sarrjo S.A. (In re Sarrjo, S.A.)*, 119 F.3d 143, 147 (2d Cir. 1997) (emphasis omitted) (citing S. REP. NO. 88-1580 (1964), *reprinted in* 1964 U.S.C.A.N. 3782, 3788) (“[T]he district court relied in part on a Senate report asserting that the amendments providing for documentary discovery under the statute were intended to aid ‘in obtaining oral and documentary evidence in the United States.’”).

78. See *id.* (“On its face, § 1782 does not limit its discovery power to documents located in the United States. In finding such a limitation, the district court relied in part on a Senate report . . . [and] policy concerns . . . [T]here is reason to think that Congress intended to reach only evidence located within the United States.”).

available to foreign and international tribunals and litigants evidence to be obtained in the United States,” not to allow foreign litigants to obtain evidence located abroad that they could not have obtained through their domestic proceedings.⁷⁹

However, the Eleventh Circuit departed from other circuit courts’ dictum⁸⁰ when it held that § 1782 applies extraterritorially in *Sergeeva v. Tripleton International Ltd. (Sergeeva)*⁸¹ and *Fuhr v. Credit Suisse AG (Fuhr)*.⁸² In *Sergeeva*, the appellant, a “corporate administration services”⁸³ company called Trident Corporate Services (Trident), sought a decision reversing the district court’s pronouncement granting a § 1782 request against the organization.⁸⁴ Trident opposed the request because it contended that the documents required were located outside the United States and in the possession of a third party.⁸⁵ The corporation further argued that the district court should have applied the judicial canon of presumption against extraterritoriality⁸⁶ when it interpreted § 1782’s scope, which in turn would prevent requests based on that statute from reaching documents located outside of the United States.⁸⁷ The court rejected the argument and stated that § 1782 should be interpreted “in accordance with the Federal Rules of Civil Procedure.”⁸⁸ More explicitly, the court determined that Rule 45, which requires parties to produce

79. Smit, *American Assistance*, *supra* note 14, at 11.

80. *Kestrel Coal*, 362 F.3d at 404; *Four Pillars Enters.*, 308 F.3d at 1079; *Norex Petrol.*, 384 F. Supp. 2d at 50–55.

81. *See Sergeeva v. Tripleton Int’l Ltd.*, 834 F.3d 1194, 1199–200 (11th Cir. 2016) (holding that the extraterritorial location of stored information is “not a per se bar to discovery under § 1782”).

82. *Fuhr v. Credit Suisse AG*, 687 F. App’x 810, 816 n.8 (11th Cir. 2017).

83. Although Trident Corporate Services, Inc. defines itself as a provider of “a full range of fund accounting and administration services,” the district court made findings that the company had in fact assisted Dubin, Sergeeva’s former husband, with transferring marital estate property to a number of off-shore companies incorporated in the British Virgin Islands and Bahamas. *See In re Sergeeva*, No. 1:13-CV-3437-LMM-RGV, 2015 WL 12862925, at *1 (N.D. Ga. Oct. 13, 2015), *aff’d sub nom. Sergeeva v. Tripleton Int’l Ltd.*, 834 F.3d 1194; TRIDENT TRUST, <https://tridenttrust.com/locations/united-states-atlanta/> (last visited July 18, 2020) [<https://perma.cc/GJG5-YTMT>] (archived July 18, 2020).

84. *Sergeeva*, 834 F.3d at 1197–98.

85. *See id.* at 1197.

86. *Id.* The presumption against extraterritoriality is a long-standing canon of construction that holds that in case of doubt, a statute should be construed “as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.” This understanding is a byproduct of the universally accepted rule that an act’s characterization as lawful or unlawful should be made by the laws of the jurisdiction where an act is committed. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356–57 (1909); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 85 (1998) (summarizing the Court’s view of the presumption of extraterritoriality in *American Banana*).

87. *See Sergeeva*, 834 F.3d at 1200.

88. *Id.*

electronically stored information and draws geographical limitations with a basis on the place of production, was relevant to the interpretation of § 1782.⁸⁹ Therefore, since Trident’s “residence” was in Atlanta (that is, Atlanta was the place of discovery production), it was irrelevant that the documents sought were stored outside of the United States’ territory.⁹⁰

In *Fuhr*, the Eleventh Circuit reviewed a district court’s grant of an applicant’s request to obtain evidence from a financial corporation in order to defend himself in a German defamation lawsuit.⁹¹ Although the court reversed the order, finding for the financial entity for separate reasons, it plainly rejected the corporation’s argument that the court “lacked the power to compel production of documents . . . because the documents were located abroad” and reasserted its holding in *Sergeeva*.⁹²

These Eleventh Circuit’s decisions were in complete opposition to the assertions made by several other courts,⁹³ most notably, the Second Circuit’s pronouncement in *In re Sarrio*.⁹⁴ However, this conflict might soon result in the Eleventh Circuit’s view on extraterritorial application becoming controlling.⁹⁵ In October 2019, the Second Circuit explicitly addressed this topic for the first time and resolved the longstanding split among its district courts with respect to the extraterritoriality issue by holding that “a district court is not *categorically barred* from allowing discovery under § 1782 of evidence located abroad.”⁹⁶

In *In re del Valle Ruiz*, the Second Circuit reviewed a decision by the U.S. District Court for the Southern District of New York granting a § 1782 request against Santander Investment Securities Inc. (SIS), a

89. See FED. R. CIV. P. 45(a)(1)(A)(iii), (c)(2)(A) (“A subpoena may command . . . production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person[.]”); *Sergeeva*, 834 F.3d at 1200.

90. See *Sergeeva*, 834 F.3d at 1200 (“[T]he District Court could require that Trident Atlanta produce responsive documents and information located outside the United States—so long as Trident Atlanta had possession, custody, or control of such responsive material.”).

91. See *Fuhr v. Credit Suisse AG*, 687 F. App’x 810, 811 (11th Cir. 2017).

92. See *id.* at 816 n.8.

93. See Bookman, *supra* note 71, at 1177 n.380 (referencing a number of opinions by the U.S. District Court for the Southern District of New York holding that § 1782 does not apply extraterritorially); see also *In re del Valle Ruiz*, 939 F.3d 520, 532 n.16 (2d Cir. 2019) (citing *Kuwait Inv. Auth. v. Sarrio S.A. (In re Sarrio, S.A.)*, 119 F.3d 143, 147 (2d Cir. 1997)) (“Most courts that have concluded that § 1782 does not apply extraterritorially rely on dicta from this Court, a contemporaneous Senate report, and a 1998 article by one of § 1782’s principal drafters.”).

94. Compare *Sergeeva*, 834 F.3d at 1194–202, with *Kuwait Inv. Auth. v. Sarrio S.A. (In re Sarrio, S.A.)*, 119 F.3d 143, 146 (2d Cir. 1997) (respecting the lower court’s holding that § 1782 does not reach discovery located abroad).

95. Compare *In re Sarrio, S.A.*, 119 F.3d at 143–48, with *In re del Valle Ruiz*, 939 F.3d at 520–34.

96. *In re del Valle Ruiz*, 939 F.3d at 533 (emphasis added).

US-based affiliate of Spanish financial entity Banco Santander (Santander).⁹⁷ In the initial action, the district court granted the request despite Santander's assertion that the presumption against extraterritoriality functions as a bar against discovery of evidence located in a foreign country under § 1782.⁹⁸ The Second Circuit rejected Santander's argument under the premise that the statute at issue does not recognize a cause of action, directly regulate conduct, or allow for relief (i.e., it is a jurisdictional statute) and the Supreme Court has never applied this canon of construction to a "strictly jurisdictional" statute.⁹⁹ Furthermore, the court found support for its decision on the Eleventh Circuit's reasoning invoking the Federal Rules of Civil Procedure.¹⁰⁰

However, although the Second Circuit Court of Appeals adopted the Eleventh Circuit's position and distanced itself from what seemed to be its previous view against extraterritoriality,¹⁰¹ it did so with the qualification that courts "may properly, and in fact should, consider the location of documents and other evidence" when exercising their discretionary power.¹⁰² Although the other circuits still have to respond to this interpretative change by the Second Circuit, it is now a possibility that one of the main interpretative hurdles of § 1782 will be solved without the assistance of the Supreme Court or the legislature.¹⁰³

B. *The Meaning of "Foreign or International Tribunals"*

The importance of international business transactions and the popularization of alternative methods of dispute resolution has presented another important issue: whether § 1782's reference to "foreign or international tribunals" is intended to encompass not only traditional judicial bodies but also *ad hoc* and private international

97. *Id.* at 523.

98. *Id.* at 531.

99. *Id.* at 532 (citing *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2100-01 (2016)); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013)).

100. See *supra* notes 83-87 and accompanying text (summarizing the Eleventh Circuit's position as to the extraterritoriality issue).

101. See *Kuwait Inv. Auth. v. Sarrjo S.A. (In re Sarrjo, S.A.)*, 119 F.3d 143, 147 (2d Cir. 1997) ("[T]here is reason to think that Congress intended [the statute] to reach only evidence located within the United States.").

102. *In re del Valle Ruiz*, 939 F.3d at 533 ("Our previous dicta notwithstanding, we join the Eleventh Circuit in holding that a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad.").

103. See Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 804 (2010) (discussing how the Supreme Court could learn from the Federal Circuit's methods to review district court cases and criticizing the Supreme Court's "failure to provide clear analytical directions," which in turn causes its docket to fill with interpretative clashes).

arbitration panels and tribunals.¹⁰⁴ The scope of the phrase “foreign or international tribunals” is a particularly longstanding § 1782 question.¹⁰⁵ However, disagreement among appellate courts did not occur until 2019.¹⁰⁶

On one side, the Second Circuit issued its leading decision *National Broadcasting Co. v. Bear Stearns & Co.* in 1999, holding that § 1782 does not apply to “an arbitral body established by private parties.”¹⁰⁷ *National Broadcasting* involved a dispute between NBC and Azteca, a Mexican broadcasting company. The dispute revolved around the parties’ programming and services agreement, which included a provision mandating resolution of disputes through arbitration in the International Chamber of Commerce (ICC) under ICC rules and Mexican law.¹⁰⁸ In anticipation of an arbitration proceeding pursuant to the agreement, NBC submitted a § 1782 subpoena application, which was quashed by the lower court due to the nature of the dispute-resolution procedure.¹⁰⁹ The issue went on appeal, where the court answered the question of whether the ICC was a “foreign or international tribunal” within the meaning of the statute.¹¹⁰ In reaching its decision, the court looked at the language of

104. See Laura Emmy Malament, *Making or Breaking Your Billion Dollar Case: U.S. Judicial Assistance to Private International Arbitration under 28 U.S.C. § 1782(a)*, 67 VAND. L. REV. 1213, 1214 (2014) (highlighting the increasing importance of arbitration as a method to resolve disputes).

105. Hans Smit, an international law expert, first discussed this issue in 1965. See *supra* notes 85–89 and accompanying text (discussing Hans Smit’s role in the drafting of 28 U.S.C. § 1782); see also Arthur W. Rovine, *Topic in Transnational Litigation: Section 1782 and International Arbitral Tribunals: Some Key Considerations in Key Cases*, 23 AM. REV. INT’L ARB. 461, 461–62 (2012) (emphasis omitted) (citing Hans Smit, *International Litigation*, *supra* note 1, at 1021 (“[T]ribunal encompasses all bodies that have adjudicatory power, and is intended to include . . . arbitral tribunals or single arbitrators.”)).

106. Although § 1782’s arbitration dilemma has been widely discussed by scholars for the last fifty-some years, it has not been addressed by courts until relatively recently. Before 2019, only two courts of appeals (for the Second and Fifth Circuit) had pronounced about the issue, both reaching the same outcome. In 2019, the Sixth Court issued an opposing interpretation to the then-uniform stance. See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).

107. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d. Cir. 1999). Note that the Second Circuit’s decision was issued before *Intel*, which is problematic because *Intel* explicitly discussed the nature of tribunals that would qualify for the assistance provided by § 1782. *Id.* But see *In re Chevron Corp.*, No. M-19-111, 2010 U.S. Dist. LEXIS 47034, at *17–18 (S.D.N.Y. May 10, 2010) (memorandum opinion) (rejecting respondents’ argument relying on *Nat’l Broad. Co.* because the arbitration at issue was pending in a tribunal established by a bilateral investment treaty and pursuant to UNCITRAL rules and invoking dictum from *Intel* in support of the position that, at a minimum, international arbitral bodies under UNCITRAL are tribunals within the meaning of the statute).

108. See *Bear Stearns*, 165 F.3d at 186.

109. *Id.*

110. *Id.*

the statute,¹¹¹ its legislative history,¹¹² and policy reasons surrounding the existence of arbitration and the use of discovery.¹¹³ The court relied mainly on the silence of § 1782's legislative history to determine that the expression "foreign and international tribunal" did not encompass private tribunals.¹¹⁴ This narrow interpretation of the word "tribunal" was soon adopted by the Fifth Circuit¹¹⁵ and has received at least some support from the lower courts of the Seventh, Ninth, Tenth, and Eleventh Circuits.¹¹⁶

On the other side, the Sixth Circuit recently issued its decision in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, criticizing the reasoning of the Second and Fifth Circuits¹¹⁷ and holding that the DIFC-LCIA¹¹⁸ Arbitration Centre is a tribunal within the meaning of the statute because "the text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and

111. See *id.* at 188 (determining the term "foreign or international tribunals" to be undefined and looking at "its ordinary or natural meaning").

112. See *id.* at 188–90 (determining that although it is clear that the 1964 amendment to the statute sought to broaden its scope to include "governmental or intergovernmental arbitral tribunals," it did not clearly intend to reach private international tribunals).

113. See *id.* at 190–91 (discussing the characteristics making arbitration an attractive method of conflict resolution and how those features were at odds with the concept of "broad-ranging discovery" made possible pursuant to the Federal Rules of Civil Procedure).

114. See *id.* at 190 ("[W]e are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention.").

115. See *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) ("[W]e elect to follow the Second Circuit's recent decision that § 1782 does not apply to private international arbitration.").

116. See *In re Operadora DB Mex., S.A.*, No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *28–29 (M. D. Fla. Aug. 1, 2009) (holding that "Congress did not clearly intend to include private arbitral proceedings within the ambit of 'foreign or international tribunals.'"); *Norfolk S. Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882, 884 (N. D. Ill. 2009) (following the Second and Fifth Circuit's interpretation of the statute after noting that the Seventh Circuit has not yet addressed the issue); *In re Grupo Unidos por el Canal S.A.*, No. 14-mc-80277-JST (DMR), 2015 U.S. Dist. LEXIS 52358, at *24–25 (N. D. Cal. Apr. 21, 2015) (holding that "private arbitrations . . . do not fall within the meaning of 'tribunal'"); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00226-MSK-KMT, 2015 U.S. Dist. LEXIS 50910, at *22–23 (D. Colo. Apr. 17, 2015) (holding that a private arbitration tribunal is not a § 1782 tribunal).

117. See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 726 (6th Cir. 2019) ("[W]e believe the Second and Fifth Circuits turned to legislative history too early in the [statutory] interpretation process.").

118. DIFC-LCIA is the acronym for the Dubai International Financial Centre-London Court of International Arbitration, an arbitration center established as the result of the cooperation of the United Arab Emirates and the London Court of International Arbitration, with an aim to become a regional hub for dispute resolution. See generally DIFC-LCIA ARB. CTR., <http://www.difc-lcia.org/> (last visited Jan. 11, 2020) [<https://perma.cc/FKN6-VHD9>] (archived July 19, 2020) (introducing the role of DIFC-LCIA).

having the authority to issue decisions that bind the parties.”¹¹⁹ The dispute in *Abdul Latif Jameel Transp.* arose after ALJ, a Saudi Arabia-incorporated transportation company, entered into a “General Service Provider” contract with FedEx International to provide international delivery services in Saudi Arabia.¹²⁰ Pursuant to the contract, the parties agreed to resolve any disputes through mandatory arbitration in Dubai under the rules of the DIFC-LCIA.¹²¹ When a dispute arose, FedEx commenced arbitration against ALJ pursuant to the contract provisions, and ALJ filed an § 1782(a) application for discovery in the U.S. District Court for the Western District of Tennessee.¹²² The district court denied the application after determining that the DIFC-LCIA Arbitration panel was not a “foreign or international tribunal.”¹²³ On appeal, the Sixth Circuit reviewed the issue *de novo*, engaging in statutory interpretation of § 1782.¹²⁴ The court explained that since there was no statutory definition readily available to interpret the meaning of “foreign or international tribunal,” it was necessary to look at the language of the statute, giving its words their ordinary meaning at the time of enactment, as revealed by dictionaries and, if necessary, other evidence of usage (including the use of the word in legal writing and by courts, the statutory context, and the overall statutory scheme).¹²⁵ After determining that dictionaries left “room for interpretation” as to the meaning of “tribunal,”¹²⁶ the court turned to other relevant usages of the word and found that legal scholars,¹²⁷ state courts,¹²⁸ the Sixth Circuit itself,¹²⁹ and the Supreme Court¹³⁰ had all used the word “tribunal” in some occasion to refer to private arbitration. The court further examined the statute’s surrounding language and a related provision found in 28 U.S.C. § 1781, and determined that the legal framework surrounding § 1782 did not

119. *Abdul Latif Jameel Transp. Co.*, 939 F.3d at 723.

120. *See id.* at 714.

121. *See id.*

122. *See id.* at 715–16.

123. *See id.* at 716.

124. *See id.* at 717.

125. *See id.* at 717–18.

126. *See id.* at 719–20 (discussing the definition of tribunal of a variety of legal dictionaries and non-legal sources and determine the results inconclusive).

127. *See id.* at 720 (introducing the work of Justice Joseph Story, and in particular his Commentaries on Equity Jurisprudence, as an example of usage of the word tribunal in connection to private arbitration).

128. *See id.* at 721 (highlighting a number of cases in which the Supreme Courts of Pennsylvania, New Jersey, and Tennessee, among others, referred to private arbitration panels as tribunals).

129. *See id.* (citing *Toledo Steamship Co. v. Zenith Transportation Co.*, 184 F. 391, 400 (6th Cir. 1911)).

130. *See id.* at 721–22 (explaining that the Supreme Court has referred to private arbitral bodies as tribunals both before and after the current language of § 1782 was enacted, which signals that the courts’ understanding of the word tribunal has been uniform throughout time).

provide any reasons against reading “tribunal” to encompass private, contracted-for arbitration panels.¹³¹ Finally, the court supported its decision with dictum from the Supreme Court’s *Intel* decision suggesting that “tribunal,” as read in the statute, extended to non-judicial proceedings and non-judicial arbitral authorities.¹³²

The aforementioned cases are incredibly interesting because the courts interpreted the exact same sources and came to conflicting interpretations, which ultimately led to opposing outcomes in the underlying cases.¹³³ This conflict reflects the troublesome result of the current language of § 1782 and the subsequent body of decisions interpreting it: applications with a similar factual background have widely divergent chances of success depending on the jurisdiction where the respondent resides or is found. However, although the decision issued by the Sixth Circuit effectively creates a circuit split as to the interpretation of “foreign or international tribunal” within § 1782, it is unlikely that the Supreme Court will intervene to resolve this challenge given that it already hinted its stance in the *Intel* decision.¹³⁴

C. Impact of Applicant Delay

An additional source of uncertainty in the interpretation of § 1782 appeared as a result of the courts’ interpretation of the *Intel* opinion, and more particularly, of the courts’ exercise of discretion by taking into account circumstances not expressly set forth by—but related to—the *Intel* factors.¹³⁵ This approach is justified by a widely held understanding that § 1782 is to be interpreted in accordance with the

131. See *id.* at 723.

132. See *id.* at 724–25 (discussing the Supreme Court’s approving reference in *Intel* to a Senate Report contemporaneous to the statute, the work of Hans Smit, and the amicus brief of the Commission, all of which alluded to non-judicial tribunals).

133. Compare *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d. Cir. 1999), with *Abdul Latif Jameel Transp. Co.*, 939 F.3d at 710–32.

134. See John B. Pinney, *In International Arbitration, Parties May Be Entitled to U.S. Discovery*, AM. B. ASS’N: ALT. DISP. RESOL. PRAC. POINTS (Dec. 18, 2019), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/in-international-arbitration-parties-may-be-entitled-to-us-discovery/> [<https://perma.cc/C32M-7JVQ>] (archived July 19, 2020) (stating that although the circuit split could eventually lead to the Supreme Court revisiting the issue, it is more likely that the Sixth Circuit’s position prevail). *But see* Ted Folkman, *Case of the Day: Abdul Latif Jameel Transportation v. FedEx*, LETTERS BLOGATORY: BLOG OF INT’L JUD. ASSISTANCE (Sept. 24, 2019), <https://lettersblogatory.com/2019/09/24/case-of-the-day-abdul-latif-jameel-transportation-v-fedex/> [<https://perma.cc/VPQ5-78GF>] (archived July 19, 2020) (asserting that this issue could be granted certiorari depending on the outcome of a similar case currently being heard on the Second Circuit). For a general discussion of the Supreme Court’s tendency to revisit its own decisions, see Christopher P. McMillion & Kevin Vance, *Criticism from Below: The Supreme Court’s Decision to Revisit Cases*, 5 J.L. & CTS., 81, 82–83 (discussing the negative effects of case-revisiting in the rule of law).

135. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

Federal Rules of Civil Procedure.¹³⁶ Specifically, Rule 26 gives courts broad discretion in the supervision of discovery and resolution of discovery disputes.¹³⁷ Therefore, some courts interpret *Intel's* reading of § 1782 as giving courts discretion to deny a discovery request even if the *Intel* factors have been fulfilled, based on extraneous circumstances.¹³⁸

In particular, the Second Circuit has repeatedly expressed that the untimeliness of a request strongly counsels against providing assistance.¹³⁹ In support of its position, the Second Circuit has argued that granting an “inexcusable untimely” request would injure the twin aims of the statute because such a request fails to provide an “efficient means of assistance to the foreign proceeding.”¹⁴⁰ The Second Circuit’s courts have further argued that this interpretation goes hand in hand with the fourth *Intel* requirement (burdensomeness of fulfilling a request) because “the longer the delay in seeking documents, the greater burden is imposed on parties expected to respond to the documents requests.”¹⁴¹ The impact of delay has become quite relevant to the discretionary analysis of lower courts, with some recent decisions

136. See, e.g., *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998); *In re Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992); *In re 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008) (“The proper scope of discovery sought under section 1782, like all federal discovery, is governed by Federal Rule 26(b).”).

137. See *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 552 (1987) (Blackmun, J., dissenting) (mentioning the “broad discretion our courts normally exercise in managing pretrial discovery”).

138. See *Intel Corp.*, 542 U.S. at 264 (“[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.”); *In re Hulley Enters.*, 358 F. Supp. 3d 331, 340 (S.D.N.Y. 2019) (citing *Kiobel v. Cravath, Swaine & Moore, LLP*, 895 F.3d 238, 244 (2d Cir. 2018)) (alteration in original) (internal citation omitted) (“To guide district courts in the decision to grant a Section 1782 petition, the Supreme Court . . . discussed non-exclusive factors (the ‘*Intel* factors’) to be considered in light of the ‘twin aims’ of Section 1782.”); see also *Intel Corp.*, 542 U.S. at 266 (mentioning the ability of district courts to control discovery under the Federal Rules of Civil Procedure).

139. See *Nascimento v. Faria*, 600 F. App’x 811, 812 (2d Cir. 2015) (summary order); *In re Nascimento*, No. 14 Misc 0020, 2014 U.S. Dist. LEXIS 71212, at *1-2 (S.D.N.Y. May 13, 2014) (using the court’s discretionary power to quash a subpoena due to the untimeliness of the request); see also *Aventis Pharma v. Wyeth*, No. M-19-70, 2009 U.S. Dist. LEXIS 105422 (S.D.N.Y. Nov. 9, 2009) (denying an application because the applicant did not attempt to obtain the documents through a foreign court that could reach them, despite being involved in a 5-year long litigation in that court). *But see In re ALB-GOLD Teigwaren GmbH*, No. 19-mc-1166 (MKB) (ST), 2019 U.S. Dist. LEXIS 148595, at *33–35 (E.D.N.Y. Aug. 30, 2019) (holding that a filing delay of six months since the conclusion of an arbitration does not render the application untimely to the point of injuring the twin aims of §1782).

140. See *Nascimento*, 600 F. App’x at 812 (citing *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012)) (“District courts must exercise their discretion under [Section] 1782 in light of the twin aims of the statute . . .”) (internal quotation marks omitted); *In re Hulley Enters.*, 358 F. Supp. 3d at 351 (internal citations omitted).

141. See *In re Hulley Enters.*, 358 F. Supp. 3d at 351–52.

listing it as a separate, identifiable factor in addition to the traditional *Intel* statutory plus four-factor analysis.¹⁴²

The position of the Second Circuit was recently emphasized in *In re Hulley*.¹⁴³ This case involves a series of disputes between the former shareholders of Yukon, a Russian oil and gas company, and the Russian government arising from an alleged expropriation of the corporation.¹⁴⁴ After the Russian government raised a defense of “unclean hands”¹⁴⁵ against a foreign arbitral panel’s initial determination finding the Russian government’s practice tantamount to a creeping expropriation, the shareholders filed a § 1782 request to obtain information from White & Case, formerly representing the oil company and currently representing the Russian government in a variety of related matters.¹⁴⁶ The court reviewing the request recognized that it met the requirements set by the four *Intel* factors. Nonetheless, it denied the discovery and subpoena requests based on consideration of non-*Intel* discretionary factors, giving special weight to the shareholders’ delay in filing the application.¹⁴⁷

In addition to the Second Circuit, the lower courts of the Seventh Circuit, the D.C. Circuit, and the Ninth Circuit have issued opinions supporting this view.¹⁴⁸ At this time, no courts have expressly

142. See *id.* at 348–52 (inserting a lengthy delay analysis between the third and fourth *Intel* factors); see also *In re ALB-GOLD Teigwaren*, 2019 U.S. Dist. LEXIS 148595, at *33–35. Other states’ courts have also declared that untimeliness can lead to denial of a request. See, e.g., *TJAC Waterloo, LLC ex. rel. Univ. of Notre Dame (USA) in Eng.*, No. 3:16-mc-9-CAN, 2016 U.S. Dist. LEXIS 56381, at *6–7 (N.D. In. Apr. 27, 2016) (“Even if jurisdiction existed, however, TJAC’s application for discovery is untimely and irrelevant.”).

143. *In re Hulley Enters.*, 358 F. Supp. 3d at 331.

144. See *id.* at 334–36.

145. The Russian Government’s defense alleged that even if the acquisition of Yukon by the government was in effect a creeping expropriation: the shareholders were not entitled to damages because Yukon’s privatization and the shareholders’ acquisition of shares in the corporation occurred through dubious methods, including bribes to public officials. See *id.* at 336–37.

146. See *id.* at 336–39. For a definition of “creeping expropriation,” see *Creeping Expropriation*, FREE DICTIONARY BY FARLEX: FIN. DICTIONARY, <https://financial-dictionary.thefreedictionary.com/Creeping+expropriation#:~:text=changes%20in%20la w.-,Creeping%20Expropriation,or%20business%20to%20own%20property> (last visited July 5, 2020) [<https://perma.cc/GWU9-U9M8>] (archived July 16, 2020) (“The continual restriction of private property rights gradually over time by a government . . .”).

147. See *In re Hulley Enters.*, 358 F. Supp. 3d at 345–52; see also J. Alexander Lawrence, *U.S. Courts Continue Reluctance Toward Foreign Discovery*, LAW360 (Sept. 25, 2019), <https://www.law360.com/articles/1202270/us-courts-continue-reluctance-toward-foreign-discovery> [<https://perma.cc/7M37-DVBK>] (archived July 19, 2020) (discussing the details of the *Hulley* case and the court’s reasoning).

148. See *TJAC Waterloo, LLC ex. rel. Univ. of Notre Dame*, 2016 U.S. Dist. LEXIS 56381, at *6–8 (using the court’s discretion to deem the § 1782 discovery request untimely and irrelevant because the petitioner litigated the issue for sixteen months before attempting to file the request); *In re Caratube Int’l Oil Co.*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010) (holding that the petitioner’s lack of justification on its delay in filing

pronounced against a court's ability to consider undue delay when deciding a § 1782 request. Consequently, although there is an increasing trend towards pondering delay as a factor against granting § 1782 applications, it is unclear whether the Second Circuit's reasoning will actually be embraced or adopted by other appellate courts.¹⁴⁹

D. *Courts' Ability to Compel Production of Confidential Documents in Possession of Third Parties, Including US Legal Counsel.*

28 U.S.C. § 1782(a) states that “[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.” The courts have engaged in some analysis as to the scope of this statement and the meaning of “privilege,” and seem to have taken a broad view of the issue.¹⁵⁰ However, courts still dispute whether a § 1782 applicant has the ability to obtain information, typically of a confidential nature, from a foreign party's US counsel.¹⁵¹ This issue has recurrently been framed by parties as a jurisdictional matter (that is, as part of *Intel's* initial statutory analysis)¹⁵²—tied to § 1782's statutory requirement that “the person from whom discovery is sought resides or is found in the district of the district court to which application is made”¹⁵³—but

the petition supported denying the petition); *In re Digitechnic*, No. C07-414-JCC, 2007 U.S. Dist. LEXIS 33708, at *14 (W.D. Wash. May 8, 2007) (holding a § 1782 request unduly burdensome due to the petitioner's “complete failure to justify the [delayed] timing of the request”).

149. See Lawrence, *supra* note 147 (discussing the impact of § 1782 applications on U.S.-based law firms through the facts of *In re Hulley*).

150. See, e.g., *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (discussing the journalist privilege); *United Kingdom v. United States*, 238 F.3d 1312 (11th Cir. 2001) (discussing the work-product doctrine); *Al Fayed v. United States*, 229 F.3d 421 (4th Cir. 2000) (discussing the national security privilege); *Chevron v. Shefftz*, 754 F. Supp. 2d 254 (D. Mass. 2010) (discussing the attorney-client privilege); *In re Vega*, 746 F. Supp. 2d 27 (D.D.C. 2010) (discussing foreign privileges).

151. See, e.g., *LaFreniere*, *supra* note 10 (discussing the problems underlying the current wording of the statute and addressing the *Cravath* and *Biomet* decisions).

152. See, for example, *Cravath's* formulation of the disputed issue:

Since jurisdiction under Section 1782 is subject to established limits on federal courts' power to compel production of privileged materials, a district court cannot order a law firm to produce client documents that would fall beyond the statutory reach of a subpoena if the documents had instead been maintained by the client.

Kiobel v. Cravath, Swaine & Moore, LLP, 895 F.3d 238, 243–44 (2d Cir. 2017).

153. *Cravath* found support for this argument in precedent discussing the extension of privileges and protections (provided by a court to a party) to its counsel.

This Court should not allow litigants to circumvent Section 1782's jurisdictional limitations so easily. Under longstanding precedent, documents that are beyond a court's subpoena power in a client's hands retain their protection from judicial process when they are transferred to an attorney for purposes of obtaining legal advice.

courts have disregarded such framing and have opted for disposing of the issue as part of the independent, discretionary authority of the court in adjudicating § 1782 requests.¹⁵⁴

The Second Circuit has taken the position that “an order compelling American counsel to deliver documents that would not be discoverable abroad, and that are in counsel’s hands solely because they were sent to the United States for the purpose of American litigation,” should not be granted because of several reasons.¹⁵⁵ First, when a party is seeking materials from a US-based law firm to use in foreign litigation against the firm’s client, the real party from whom the documents are sought is indeed the client, not the US-based law firm.¹⁵⁶ *Intel*’s first factor (whether the applicant is one of the parties to the foreign proceeding) makes clear that “when the person from whom discovery is sought is a participant in the foreign proceeding, the need for § 1782(a) aid generally is not as apparent as . . . when evidence is sought from a nonparticipant.”¹⁵⁷ Second, in certain occasions, a party’s § 1782 request is merely an attempt to avoid a foreign forum’s more cumbersome or more restrictive procedure, which might contravene *Intel*’s third factor (circumvention of domestic proof-gathering restrictions or public policies).¹⁵⁸ Additionally, the court considers other “pertinent issues arising from the facts of the particular dispute.”¹⁵⁹

An example of additional considerations that a court might entertain can be found in *Kiobel v. Cravath, Swaine & Moore LLP*.¹⁶⁰ In this case, the applicant filed a petition to obtain documents from the foreign defendant’s US counsel for use in litigation in The Netherlands.¹⁶¹ The documents requested were related to prior

That precedent . . . is fatal to *Kiobel*’s petition: Because Shell is not within the District Court’s subpoena power, its documents cannot be compelled from its attorney, Cravath.

Brief for Respondent-Appellant Cravath, Swaine & Moore LLP at 1, *Kiobel v. Cravath, Swaine & Moore, LLP*, 895 F.3d 238 (2d Cir. 2017) (No. 17-424-cv), 2017 WL 1373526, at *3.

154. See *In re Biomet Orthopaedics Switz. GmbH*, 742 F. App’x 690, 696 (3d Cir. 2018); *Cravath*, 895 F.3d at 244 (rejecting respondents’ contention that a law firm’s representation of a foreign client is a jurisdictional matter).

155. See *Cravath*, 895 F.3d at 241 (making an express reference to the fact that the documents were potentially not discoverable in the litigation forum, despite the *Intel*’s court reluctance to reading a foreign-discoverability rule into § 1782); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 253 (2004) (“We now hold that § 1782(a) does not impose such a [foreign-discoverability] requirement.”).

156. See *Cravath*, 895 F.3d at 245.

157. *Intel Corp.*, 524 U.S. at 264.

158. For example, in *Cravath*, *Kiobel*’s counsel stated that Dutch procedural rules provided a procedure to request the documents sought in American court, but that it was “hardly possible for a party to obtain evidence from another party pre-trial.” See *Cravath*, 895 F.3d at 245 n.3.

159. *Id.* at 245.

160. *Id.* at 238–48.

161. See *id.* at 240–41.

litigation the petitioner had commenced in the United States against that same defendant and were protected as confidential under a court order that limited their use to the United States.¹⁶² In this case, the court accounted for the importance of protecting attorney–client communications and relations, the existence of more restrictive discovery procedures in the Netherlands, and the respect owed to confidentiality orders in denying the § 1782 request.¹⁶³ The court placed particular weight on the principle that “when a client is privileged from producing documents, so too is the client’s counsel,” which derives from the American legal system’s overarching goal to encourage “open communications between lawyers and their clients.”¹⁶⁴ A second case, *In re Effecten-Spiegel AG*, pondered instead the relationship between the nonparticipant from which the information was being requested and the defendant (finding relevant that the nonparticipant was a corporate affiliate of the applicant’s adversary), as well as the lack of significant connections between another nonparticipant and the events at issue in litigation (in other words, § 1782 cannot be used as a “fishing expedition” tool), finding these circumstances to weigh against issuing a discovery order.¹⁶⁵ In particular, the court emphasized the importance of respecting corporations’ separate corporate identities and the unlikelihood that the discovery sought was available to the nonparticipants.¹⁶⁶

Overall, the Second Circuit’s analysis seems at least partially at odds with the Supreme Court’s interpretation of the statute, which made clear that although § 1782 “expressly shields privileged material,” it does not limit a court’s “production-order authority” solely to documents and materials that would be otherwise discoverable in the foreign jurisdiction.¹⁶⁷

Additionally, the Third Circuit’s reasoning in *In re Biomet Orthopaedics Switzerland GmbH*, shows a different understanding of *Intel*’s first (nature of the parties) and third (circumvention of domestic proof-gathering restrictions or public policies) factors as they relate to

162. See *id.* at 241. The previous litigation in the United States ultimately resulted in a well-known Supreme Court decision: *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013).

163. See *Cravath*, 895 F.3d at 248.

164. *Id.* at 246. In making this pronouncement, the court was following a line of previous cases, including *In re Sarrio*, which applied reasoning from the Supreme Court’s case of *Fisher v. United States*. See *In re Sarrio*, S.A., 119 F.3d 143, 146 (2d Cir. 1997) (citing *Fisher v. United States*, 425 U.S. 391, 404 (1976)).

165. See *In re Effecten-Spiegel AG*, No. 18mc93, 2018 U.S. Dist. LEXIS 135837, at *5 (S.D.N.Y. Aug. 10, 2018) (discussing a number of considerations affecting the petition in addition to the traditional *Intel* factors).

166. See *id.* at *5–7 (responding to the plaintiff’s request to obtain all documents held by any Merrill Lynch entity that could bear a relation to Merrill Lynch’s financial relationship to Porsche, the defendant in the foreign litigation giving rise to the § 1782 request).

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

the production of confidential information held by third parties.¹⁶⁸ In this case, a corporation sought discovery for use in German litigation concerning misappropriation of trade secrets.¹⁶⁹ The district court, exercising its discretionary power, denied the application despite it fulfilling the *Intel* requirements.¹⁷⁰ In particular, the court focused on the apparent unreceptiveness of the German court towards the requested discovery.¹⁷¹ The Third Circuit reviewed the decision.¹⁷² In relation to *Intel*'s first factor, the court saw as permissible a § 1782 application requiring the production of confidential discovery for a proceeding in Germany when the “real” party from whom discovery was sought was neither the US-based law firm nor its client, but instead a German company.¹⁷³ In opposition to the Second Circuit, the court here seemed to view the request for materials in a favorable light due to the applicant's impossibility to obtain such discovery in Germany.¹⁷⁴ Furthermore, the court made clear that it has never endorsed an interpretative approach that limits § 1782 requests to parties who have already sought the discovery in the foreign forum, to materials that would be welcomed by the foreign tribunal, or to a very limited and specific request.¹⁷⁵ The Third Circuit's statement as to amenability of a foreign tribunal to receive a given piece of discovery seems particularly relevant because it points towards a different interpretation of *Intel*'s second factor (foreign court's amenability to United States' assistance), and in particular, of what it means to

168. See generally *In re Biomet Orthopaedics Switz. GmbH*, 742 F. App'x 690 (3d Cir. 2018) (noting that the district court below improperly placed the burden on the applicant to show that the foreign tribunal would “welcome” discovery under the third *Intel* factor).

169. See *id.* at 692–94.

170. The Third Circuit said that “The District court assumed *arguendo* that the § 1782 statutory factors had been met, but concluded that the discretionary *Intel* factors (set out below) for granting a § 1782 application ‘weigh[ed] against enforcing the subpoena.’” *Id.* at 694 (internal quotations omitted) (alteration in original).

171. See *id.* Interestingly, the German court accepted the discovery and eventually found in favor of the applicant, in part based on information arising from the U.S.-obtained discovery. See Folkman, *supra* note 134 (discussing the outcome of the case and the events that unfolded).

172. See *In re Biomet*, 742 F. App'x at 694.

173. See *id.* at 696–97 (noting that the information sought was from a German company).

174. See *id.* at 696 (citing *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 596 (7th Cir. 2011)).

175. *Id.* at 698 (contrasting the Third Circuit's approach with that of the Ninth Circuit). *Contra In re del Valle Ruiz*, 939 F.3d 520, 533–34 (2d Cir. 2019) (concluding that the *Intel* factors plainly weighed in favor of discovery against respondents because they were not a party to the foreign proceedings, there was no evidence that the foreign proceedings would be unreceptive to the evidence, and respondents had failed to argue that petitioners were attempting to procure documents that they could not have obtained in the foreign proceeding).

consider “the receptivity of the foreign government, court or agency to federal-court judicial assistance.”¹⁷⁶

E. *A Summary of the Existent Postures*

Legal scholarship, in its normative approach, plays a relevant role in “influenc[ing] judges, lawyers, legislators or regulators to reform, interpret, or preserve existing law.”¹⁷⁷ The scholarship also aids national and transnational legal systems by interpreting existing laws and advancing proposals for legal reform.¹⁷⁸ Therefore, this subpart seeks to advance some noteworthy proposals that discuss the interpretation, construction, and reform of 28 U.S.C. § 1782 and that are relevant to this Note’s proposed solution. Most of the cited authors focus solely on one of the issues discussed in Part III, subparts A through D, although some authors take a broader scope and assess the current language of § 1782 with the intent to solve several of its interpretative issues at once.¹⁷⁹

Tyler B. Robinson¹⁸⁰ takes issue with the effect of § 1782 in arbitration procedures, looking at the issue from a perspective concerning the extraterritorial application of the statute.¹⁸¹ Robinson first looks at the plain text of the statute, which he contends prescribes a clear, default rule “that the production of documents [and testimony] ‘shall be . . . in accordance with the Federal Rules of Civil Procedure.’”¹⁸² Hence, Robinson concludes that “the extent of [documentary and] testimonial evidence a US court is authorized to provide under § 1782 is equal to that authorized under the Federal Rules of Civil Procedure.”¹⁸³ This means that the plain language of the statute allows extraterritorial application so long as the documents or

176. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004). While the Second Circuit seems to interpret this consideration in a positive way (that is, whether the foreign court would accept the requested documents), the Third Circuit has a negative approach to the inquiry (whether the foreign tribunal would reject the discovery).

177. See Danielle K. Citron & Robin West, *On Legal Scholarship*, ASS’N AM. L. SCHS. (2014), <https://www.aals.org/current-issues-in-legal-education/legal-scholarship/> [<https://perma.cc/74H2-NFZQ>] (archived July 17, 2020) (discussing the strengths and weakness of legal scholarship).

178. See *id.* (noting the ways in which legal education aides in legal interpretation).

179. See *supra* Part III.A–D.

180. Tyler Robinson is an international commercial litigation and arbitration partner at the London office of Simpson Thacher & Bartlett LLP. See *Tyler Robinson Firm Biography*, SIMPSON, THACHER & BARTLETT, LLP, <https://www.stblaw.com/our-team/partners/tyler-b-robinson> (last visited Aug. 24, 2020) [<https://perma.cc/PQY2-JMAT>] (archived Aug. 24, 2020).

181. See Robinson, *supra* note 13, at 138 (explaining that § 1782 arbitration can be seen from the perspective of extraterritorial application of US law).

182. See *id.* at 144.

183. See *id.* at 139.

testimony sought are subject to protection under the Federal Rules of Civil Procedure.¹⁸⁴ He further maintains that the legislative intent and policy objectives underlying § 1782 support this position.¹⁸⁵ However, in his reading of the statute, he makes a key distinction between the results of this interpretation in obtaining documents as opposed to testimony: “whereas a person may be served with a subpoena commanding the production of documents he controls somewhere else, [w]hat a person will testify to is located wherever that person is found.”¹⁸⁶ In conclusion, a literal interpretation of § 1782 would not preclude a party from obtaining discovery outside of the United States so long as the person or entity providing the discovery is found or resides within the United States, while obtaining of testimony under the statute is limited because “U.S. court[s] cannot issue a subpoena that contemplates the deposition of a non-party to be taken outside the United States.”¹⁸⁷

Daniel J. Rothstein¹⁸⁸ also discusses the impact of § 1782 in arbitration and international commercial litigation.¹⁸⁹ Rothstein maintains that there is ample evidence supporting the fact that § 1782 was not drafted for use in private arbitration.¹⁹⁰ In particular, Rothstein points toward the United States’ failure to ratify the New York Convention on the Recognition of Foreign Arbitral Awards until 1970; the lack of proposals regarding the inclusion of a provision providing for arbitration assistance in the Hague Evidence Convention; and the apparently inexistent discussion of this issue in the professional literature of the time.¹⁹¹ Although Rothstein recognizes that “it would be desirable for US law to allow courts to require the production of evidence for use in a foreign private arbitration,” he believes that interpreting the current wording of § 1782 to that extent would create further legal issues.¹⁹² In particular, Rothstein worries that a holding conceding that § 1782 applies to

184. *See id.* at 143 (noting that the plain language of the statute affords discretion to district courts).

185. *See id.* (noting that courts have turned to, among other things, the legislative intent of § 1782).

186. *See id.* at 154.

187. *Id.* at 155.

188. Daniel Rothstein is a New York-based attorney who focuses on issues arising in the international commercial litigation context. *See Professionals*, BALLON STOLL BADER & NADLER, P.C., <http://www.ballonstoll.com/professionals/> (last visited Sept. 8, 2020) [<https://perma.cc/V5XF-DQRH>] (archived Sept. 8, 2020) (under “Partners,” scroll to the right to Mr. Rothstein’s name; then click on his name to bring up his biography).

189. *See generally* Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT’L ARB. 61 (2008).

190. *See id.* at 61–62 (discussing how the state of United States’ law on international arbitration at the time of § 1782’s enactment shows that Congress did not intend to open this avenue of discovery for use in arbitral tribunals).

191. *See id.* at 68–77.

192. *See id.* at 88–89.

private arbitration would be both inconsistent and in conflict with the Federal Arbitration Act's provisions governing international arbitration.¹⁹³ He thus proposes an amendment of § 1782 that includes, among others, a rule requiring arbitrators' approval before a request is submitted, court deference to an arbitrator's decision, a definition of international arbitration, and a provision limiting § 1782 to foreign proceedings.¹⁹⁴ From an opposite perspective, Arthur Rovine¹⁹⁵ contends that the Supreme Court adopted Hans Smit's definition of tribunal in *Intel* and that this definition included arbitral tribunals.¹⁹⁶ He further contends that the wording of § 1782 ("foreign or international tribunals") is "sufficiently broad to include both private and state-sponsored tribunals."¹⁹⁷

Laura Malament¹⁹⁸ takes a different approach, generally accepting that private arbitration proceedings can be within the scope of § 1782 and proposing a four-step framework for courts to determine whether they should grant a discovery request.¹⁹⁹ In a nutshell, courts should first determine "whether the arbitral body is a 'foreign or international tribunal' under § 1782(a) according to Intel's functional definition of tribunal"; if the answer is yes, the court should then analyze (1) who made the request and (2) who has to fulfill it, (3) the applicable discoverability procedures, and (4) "whether the request is unduly intrusive or burdensome," following *Intel's* guidance.²⁰⁰

From yet another perspective, Lauren Ann Ross²⁰¹ advocates for a restrictive reading of the statute based on the repercussions the use of this mechanism has in foreign litigation.²⁰² Ross argues that the current judicial interpretation of § 1782 mostly fails to account for key

193. See *id.* at 77–78 (describing the confusion and inconsistencies that would come out of this approach).

194. See *id.* at 79–83.

195. Arthur Rovine is a former attorney at Baker & McKenzie and has since, among other functions and position, served as an international arbitrator under ICSID, NAFTA, PCA and AAA/ICDR. See *Curriculum Vitae*, ARTHUR ROVINE, <http://www.arthurwrovine.com/> (last visited Aug. 27, 2020) [<https://perma.cc/ABC5-E9PJ>] (archived Sept. 8, 2020).

196. See Rovine, *supra* note 105, at 471–72 ("In my judgment, there is much to suggest that the Supreme Court was adopting Hans' definition of 'tribunal.'").

197. *Id.* at 464.

198. Laura E. Malament is an antitrust attorney. See *Laura Malament, CONCURRENCES*, <https://www.concurrences.com/en/authors/lmalament-jonesday-com> (last visited Aug. 27, 2020) [<https://perma.cc/L93V-HW2N>] (archived Sept. 8, 2020).

199. Malament, *supra* note 104, at 1217, 1237–44.

200. *Id.*

201. Lauren Ann Ross is an attorney at the firm Covington & Burling. *Laura Ann Ross Firm Biography*, COVINGTON & BURLING, <https://www.cov.com/en/professionals/r/lauren-ross> (last visited Aug. 24, 2020) [<https://perma.cc/RWW3-LNVK>] (archived Aug. 24, 2020).

202. See Lauren Ann Ross, *A Comparative Critique to U.S. Courts' Approach to E-Discovery in Foreign Trials*, 11 DUKE L. & TECH. REV. 313, 314 (2012) ("A provision like § 1782 . . . should be examined in light of its repercussions in *foreign* litigation rather than treated as a normal request under the FRCP in U.S. domestic litigation.").

procedural differences in the obtaining and discoverability of documents within a number of countries.²⁰³ This failure to account for differences between common and civil law systems, she contends, causes burdens both for the foreign court and the US litigant.²⁰⁴ Therefore, courts interpreting § 1782 and the *Intel* factors should (1) “carefully differentiate between . . . discovery requests that originate from the foreign court and those that arise from other sources” and (2) read the *Intel* factors “through a comparative lens,” examining the usage of the discovery obtained through the statute in the foreign procedure.²⁰⁵

A review of scholarship dealing with 28 U.S.C. § 1782 reveals a number of issues:

1. Interpretation of the statute has been confronted mostly by practitioners, with little contribution from law school professors and nonpracticing researchers, who normally have more time and focused resources to find suitable alternatives to normative problems.
2. The authors, probably due to the nature of their work and their professional interests, tend to focus on a single issue presented by the statute, as opposed to engaging in a comprehensive review of § 1782’s current drafting defects.
3. The nuanced approach taken by some of the authors discussing § 1782 might be an impediment to finding a solution that actually makes the statute clearer and more workable.

In conclusion, this nuanced approach and a failure to examine the many facets of judicial interpretation of § 1782 are likely the reason why current legal scholarship has been unable to provide a concrete, substantial proposal that results in a successful reform of the troubled statutory language.

IV. REFORMING 28 U.S.C. § 1782 TO AFFORD ASSISTANCE IN EVERY POSSIBLE INSTANCE WHILE ESTABLISHING SAFEGUARDS TO PRESERVE THE INTEGRITY OF OUR ADVERSARIAL SYSTEM

The final Part of this Note discusses a number of alternatives available to Congress in order to cure the defects present in 28 U.S.C.

203. *See id.* at 315 (“Different countries have different legal systems, which typically have different perceptions of privacy, different views on the amount of information discoverable in civil proceedings, and different evidentiary standards.”).

204. In particular, Ross maintains that foreign courts will be overwhelmed by a flood of discovery materials that judges are forced to review due to a lack of standards limiting admissibility of evidence, and that foreign parties will be able to obtain much more information about a United States-based party than *vice versa*. *See id.* at 324–25.

205. *Id.* at 328.

§ 1782's current drafting.²⁰⁶ First, this Part explores and, for the most part, rejects the models adopted by other common and civil law countries due to the effect that implementing any of those systems would have on the adversarial model.²⁰⁷ Then, it moves on to propose a statutory reform of 28 U.S.C. § 1782 (including a new definitional section and codification of a modified *Intel* analysis), which would be respectful of our current litigation system while providing clear guidance to courts in deciding whether to accept a discovery production request for use in a foreign proceeding.²⁰⁸ In making this proposal, this Note focuses on crafting a formula that can both afford assistance to parties in every possible instance,²⁰⁹ while establishing appropriate safeguards that limit judicial discretion and avoid undue prejudice to American parties, the judicial system, and sovereignty interests.²¹⁰

A. *Other Jurisdictions' Frameworks as Alternatives.*

Since the issues arising from 28 U.S.C. § 1782 have a clear transnational impact, the procedures by which foreign jurisdictions grant discovery to be used in other forums might be useful to frame the approach our domestic legislature ought to take. Furthermore, the steady growth of globalization and international transactions over the last few decades has created a push for legal harmonization that has motivated countries around the world to change their domestic practice in accordance with multilaterally agreed rules and standards in a variety of commercial and economic matters.²¹¹ But, should this legal harmonization trend extend to the regulation of discovery, whether domestic or transnational? If so, what would be the potential downsides to making such changes to our legal system? And, would they be worth it?

As previously discussed, the United States' understanding of discovery is broad and tends to be at the most generous extreme of the spectrum of currently available legal approaches, while other common

206. For a discussion of § 1782's drafting defects, see *supra* Parts II–III.

207. See *infra* Part IV.A.

208. See *infra* Part IV.B.

209. See Smit, *American Assistance*, *supra* note 14, at 2 (reiterating that the § 1782 should be read in accordance with its liberal spirit and insisting that is not the drafting of the statute, but the reluctance of courts to appropriately read the statute that is leading to interpretative issues).

210. See WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 243 (1968) (“[E]ffective judicial administration is necessary to implement the goals and letter of the rules. . . . Effective judicial supervision requires a consensus on the meaning of the rules throughout the judicial system.”).

211. See Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 IND. J. GLOBAL LEGAL STUD. 119, 120 (2007) (“[D]iverging national laws create significant obstacles to cross-border transactions, such that efforts toward the harmonization of national legal principles through the production of a ‘set of global substantive rules’ are more than welcome.”).

law systems, most notoriously that of the United Kingdom, take a more neutral stance.²¹² At the same time, a majority of European countries concentrate at the opposite end of the spectrum, in part due to the reduced role of discovery in the civil law system.²¹³ Due to the particularities of these two legal systems, it is convenient to separate countries by the system to which they belong when analyzing their foreign discovery legal frameworks and whether any of those frameworks should be followed by the United States.

1. Common Law Approaches

Generally speaking, common law jurisdictions tend to have a more liberal view of discovery, and hence, are more willing to allow foreign parties to pursue discovery for use in another country.²¹⁴ Just as the United States deals with these requests through 28 U.S.C. § 1782, the United Kingdom²¹⁵ and Canada²¹⁶ have their own statutes regulating

212. See, e.g., Melinda F. Levitt, 'Discovery' in the United States, DATAGUIDANCE (Nov. 1, 2011), <https://www.foley.com/-/media/files/insights/publications/2011/11/discovery-in-the-united-states/files/discovery-in-the-united-states/fileattachment/levittusa.pdf> [https://perma.cc/XB9Q-DEKY] (archived July 18, 2020) ("Perhaps one of the most controversial—and disdained— aspects of the legal system in the United States is the very broad and extensive concept of 'discovery' in civil lawsuits.")

213. See, e.g., Lukas Holub, *Discovery Abroad: An Overview of European Blocking Statutes and the Hague Convention on the Taking of Evidence Outside the U.S.—Part One of Two*, NITA, <https://www.nita.org/blogs/discovery-abroad-an-overview-of-european-blocking-statutes-and-the-hague-convention-on-the-taking-of-evidence-outside-the-uspart-one-of-two> (last visited July 18, 2020) [https://perma.cc/8PRY-B56M] (archived July 18, 2020) ("One of the areas where the common law and civil law systems diametrically differ is the process of obtaining evidence in expectation of trial or during trial. . . . The process of obtaining evidence in civil law countries is significantly different. The use of the term 'discovery' is not appropriate, because the pre-trial discovery as understood in the U.S. practically does not exist.")

214. But see GLASER, *supra* note 210, at 233–34 (arguing that although the expansion of discovery in common law countries is a result of the relaxation of the adversarial model of litigation, it is the adversarial model that has guided how discovery works in practice in these jurisdictions); see also HARKNESS, MOLOO, OH & YIM, *supra* note 26, at 61 (indicating that Australia does not permit pre-trial discovery under its domestic laws and has entered a reservation under the Hague Evidence Convention barring discovery cooperation when the discovery would be employed for pre-trial purposes). A Hague Evidence Convention reservation is related to Article 23 of the Hague Evidence Convention, which recognizes the right of a Contracting State not to execute Letters of Request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries." Hague Convention on the Taking of Evidence Abroad, *supra* note 47, art. 23.

215. The United Kingdom has enacted the Evidence (Proceedings in Other Jurisdictions) Act 1975 ("EPOJA"), which enables United Kingdom courts to assist both domestic and foreign parties in the obtention of evidence for proceedings in foreign courts. See Evidence (Proceedings in Other Jurisdictions) Act 1975, c. 34, §§ 1-9 (U.K.).

216. The rule governing extraterritorial discovery in Canada is the Canada Evidence Act ("CEA"), supplemented by additional statutes regulating rules of evidence

the foreign discovery issue. The three legal systems (1) impose statutory prerequisites to the issuance of discovery for use in third countries and (2) allow for judicial discretion,²¹⁷ with the Canadian system closely resembling that of the United States.²¹⁸ At the same time, the United Kingdom's legal scheme for discovery presents some key differences when compared to the American and Canadian frameworks. In particular, the United Kingdom's statute, Evidence

provincially. See Canada Evidence Act, R.S.C. 1985, c C-5, s 43–51; HARKNESS, MOLOO, OH & YIM, *supra* note 26, at 63 (providing an overview of the CEA).

217. EPOJA allows courts to exercise discretion in whether to grant a discovery request and imposes few limitations to the way in which a court decides to approach a request. However, the statute limits the use of this procedure in relation to international proceedings. As a result, submission of a letter of request compliant with EPOJA or voluntary compliance by the party having to fulfill the request are necessary for a United Kingdom court to grant discovery. See Evidence (Proceedings in Other Jurisdictions) Act §§ 2, 6(3); see also Steven Loble, *UK: Guide to Obtaining Evidence in England for Use in Proceedings in the United States of America*, MONDAQ (Mar. 27, 2008), <http://www.mondaq.com/uk/x/57600/Federal+Law/Guide+To+Obtaining+Evidence+In+England+For+Use+In+Proceedings+In+The+United+States+Of+America> [<https://perma.cc/CZ7M-D7VL>] (archived July 18, 2020); Richard Marshall & Kim Stephenson, *Transatlantic Litigation: Obtaining Evidence from a UK Entity for Use in US Court Proceedings*, PENNINGTONS MANCHES COOPER (Sept. 7, 2018), <https://www.penningtonslaw.com/news-publications/latest-news/2018/transatlantic-litigation-obtaining-evidence-from-a-uk-entity-for-use-in-us-court-proceedings> [<https://perma.cc/Y2EJ-KB8V>] (archived July 18, 2020). Under the CEA, a Canadian court will issue a production of discovery order after receiving a letter rogatory from a foreign court in relation to a “civil, commercial, or criminal matter [that] is pending.” Canada Evidence Act s 51(2). As a result, a “Canadian court will generally give effect to foreign requests for judicial assistance out of deference and respect for the comity of nations.” Vincent M. de Grandpre & Alyssa Brierly, *What You Should Know About Enforcing Foreign Letters Rogatory in Canada*, CAN. B. ASS'N, http://www.cba.org/cba/cle/PDF/IP10_deGrandpre_paper.pdf (last visited July 18, 2020) [<https://perma.cc/49AQ-AMVY>] (archived July 18, 2020) (citing Morguard Investments, Ltd. v. De savoye, [1990] 3 S.C.R. 1077 (Can.); Zingre v. The Queen, [1981] 2 S.C.R. 392 (Can.); AstraZeneca, LP v. Stephen Wolman, 2009 CarswellOnt 7787 (S.C.J.); Presbyterian Church of Sudan v. Rybiak, [2006] 275 D.L.R. 4th 512 (Can. Ont. C.A.)). Generally, a court will give full force to foreign requests so long as they are not contrary to public policy or prejudicial to Canada's sovereignty. See *id.* Although review of these requests varies province-by-province, Ontario's (and other provinces) judicial review of foreign discovery requests is, at least structurally, very similar to our § 1782 test. See HARKNESS, MOLOO, OH & YIM, *supra* note 26, at 64 (discussing a four-step process under the CEA).

218. Approval of a discovery request for use in another country in Canada involves the fulfilment of four statutory pre-conditions and a six-factor discretionary analysis by the court. The four statutory preconditions are: (1) the party from whom evidence is sought is within the Ontario court's jurisdiction; (2) the foreign court has a desire to obtain the evidence or has otherwise authorized its obtention; (3) the evidence is related to a civil, commercial, or criminal matter pending in a foreign court; and (4) the foreign court is “a court of competing jurisdiction.” Pamela D. Pengelley, *A Compelling Situation: Enforcing American Letters Rogatory in Ontario*, 85 CANADIAN B. REV. 345, 350–53 (2006). The factors affecting exercise of a court's discretion are: (1) the discovery is relevant and (2) necessary, (3) not otherwise obtainable, (4) not contrary to public policy, (5) it has been identified with reasonable specificity, and (6) it is not unduly burdensome. See, e.g., *id.* (enumerating the statutory preconditions to enforcing a letter rogatory in Ontario and summarizing the balancing test crafted by the courts of Ontario).

(Proceedings in Other Jurisdictions) Act (EPOJA), requires that the forum court agree to the request or submit the request on behalf of the party (an *ex-ante* approach that lessens comity and foreign discoverability concerns);²¹⁹ the scope of discovery permitted is much more limited since UK courts' rules with regard to discovery are restrictive and preclude the use of discovery request to engage in "fishing expeditions" or investigatory procedures;²²⁰ and the statute contains a definitional section that expressly defines the term "international proceedings."²²¹ While the Canadian and American systems of evaluating foreign discovery requests are too similar for the Canadian system to be of much help in solving the issues present in our system,²²² differences in the United Kingdom's approach provide useful guideposts to redefine the scope of § 1782. In particular, imitating EPOJA's incorporation of a definitional section could prove useful to our system because a curated set of definitions would clarify the overall legislative mandate,²²³ reduce uncertainty for the parties,

219. Having the approval of the court where litigation will take place is a necessary but, however, not sufficient, condition to having a foreign discovery request granted by a court in the United Kingdom. If the United Kingdom-based court considers that such approval has not undergone "real scrutiny," it conserves the ability to examine "questions of relevance and oppression" before granting the discovery request. See Ian McDonald & Catherina Yurchyshyn, *English High Court Clarifies the Position on English Courts Assisting in Obtaining Evidence for Use in Foreign Court Proceedings*, LEXOLOGY (June 5, 2018), <https://www.lexology.com/library/document.ashx?g=09f0a3b0-7a7f-433f-8e2e-360990dbfb12> [<https://perma.cc/G4TU-V5PF>] (archived July 18, 2020) (discussing the main takeaways of a recent case involving EPOJA).

220. See Marshall & Stephenson, *supra* note 217 (noting that UK discovery procedures are comparatively more restrictive). In addition to their domestic discovery rules barring discovery requests that could potentially entail fishing expeditions, the United Kingdom, a signatory to the Hague Evidence Convention, also executed an Article 23 reservation to its cooperation commitments under the Convention. See Hague Conference on Private International Law, *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, 7 ¶ 29, <https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf> (last visited Sept. 8, 2020) [<https://perma.cc/G3GK-74GH>] (archived Sept. 8, 2020).

221. In relevant part, the Act states:

[I]nternational proceedings' means proceedings before the International Court of Justice or any other court, tribunal, commission, body or authority (whether consisting of one or more persons) which, in pursuance of any international agreement or any resolution of the General Assembly of the United Nations, exercises any jurisdiction or performs any functions of a judicial nature or by way of arbitration, conciliation or inquiry or is appointed (whether permanently or temporarily) for the purpose of exercising any jurisdiction or performing any such functions.

Evidence (Proceedings in Other Jurisdictions) Act § 6(3).

222. See *supra* notes 220–21.

223. See *supra* note 221 and accompanying text.

and assist the judiciary in understanding the purpose and spirit of the statute.²²⁴

2. Civil Law Approach

Most European countries share a similar approach towards international cooperation in pretrial matters. These restrictive approaches are justified by the absence of pretrial procedures (at least, in the sense understood by common law jurisdictions),²²⁵ the institution of an inquisitorial, as opposed to adversarial, judicial system,²²⁶ and the existence of a principle of judicial cooperation within the European Union (including mutual recognition of judgments, exchange of documents, and taking of evidence)²²⁷ that reduces the number of instances in which a European jurisdiction will be required to request international cooperation.²²⁸ Most states present legal frameworks that either do not contemplate pretrial discovery at all²²⁹

224. See Ankita Singh, *Interpretation of Statutes*, ACADEMIKE (Nov. 13, 2015), <https://www.lawtopus.com/academike/interpretation-statutes/> [<https://perma.cc/2BFR-8VC3>] (archived July 18, 2020) (discussing the benefits of incorporating a definitional section into a statute).

225. See, e.g., Marissa L. P. Caylor, Note, *Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation*, 28 B.U. INT'L L.J. 341, 363–68 (2010) (discussing the structural differences of civil litigation in common and civil law jurisdictions and advocating for the need of a unified definition of “pre-trial” to overcome the hurdles that these structural differences have imposed in international judicial cooperation).

226. See generally Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185 (2002) (comparing the values proposed by the adversarial and inquisitorial systems and how these systems reflect on the judicial procedure and outcomes).

227. See Iwona Miedzińska, *Judicial Cooperation in Civil Matters in the European Union*, in VILNIUS UNIVERSITY FACULTY OF LAW, INTERNATIONAL CONFERENCE OF PHD STUDENTS AND YOUNG RESEARCHERS: THE INTERACTION OF NATIONAL LEGAL SYSTEMS: CONVERGENCE OR DIVERGENCE? 202–07 (2013) (describing the basic framework of judicial cooperation in civil matters within the European Union and its underlying goals).

228. Reciprocity is a strong incentive for countries engaging in extensive judicial cooperation (see, for example, the goals of the United States in engaging in international cooperation as reflected by the twin aims of 28 U.S.C. § 1782). Therefore, when sovereigns no longer have a sense of urgency in obtaining access to discovery in foreign jurisdictions, their motivation to grant foreign parties to their judicial systems is diminished. For a better understanding of the European judicial cooperation process and how it can change the system of motivations and incentives of the Union, see *Judicial Cooperation*, EUR. UNION, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation_en (last visited Feb. 26, 2020) [<https://perma.cc/7SX9-ZBDW>] (archived July 18, 2020) (“Judicial cooperation in Europe aims to help people resolve administrative or legal issues in other EU countries as easily as at home.”).

229. The German judicial system does not contemplate pre-trial discovery of documents and “there is no general obligation to produce documents to assist the opposing party.” HARKNESS, MOLOO, OH & YIM., *supra* note 26, at 68. As a result,

or curtail the availability of such discovery through the enactment of “blocking statutes.”²³⁰ Although most European countries have assumed an obligation to cooperate in discovery matters pursuant to the Hague Evidence Convention, many of them have, in accordance with the spirit of their domestic procedural rules, filed a reservation under Article 23 severely limiting international judicial cooperation in discovery matters when the discovery’s purpose is related to pretrial matters.²³¹ A number of European Union regulations further limit

German courts will assist parties in a foreign proceeding only (1) after a court’s issuance of a Letter of Request in a civil or commercial proceeding that has a pending or contemplated trial, (2) when the party from whom the discovery is requested provides such discovery willingly, or (3) when the party from whom the discovery is sought is a national or permanent resident of the jurisdiction seeking the discovery. *See Obtaining Evidence from Germany for Use in a U.S. Civil or Commercial Trial*, REED SMITH (Feb. 2006), https://www.reedsmith.com/-/media/files/perspectives/2006/02/legal-update/files/obtaining-evidence-from-germany-for-use-in-a-us-ci/fileattachment/german_witnesses.pdf [<https://perma.cc/U2NX-S6E8>] (archived July 18, 2020) (noting the circumstances in which German courts will assist parties in foreign proceedings).

230. In 1986, France expressed its “intention for the [Hague] Convention to be the ‘sole means by which discovery demands emanating from other signatory countries would be carried out in French soil.’” Elena del Valle, *Obtaining Evidence in France for Use in the United States*, 1 U. MIAMI INT’L & COMP. L. REV. 266, 272 (1991) (citing Brief for the Republic of France as Amicus Curiae Supporting Petitioners at 23, *In Re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986) (No. 85-1695)). Although France will generally cooperate with foreign authorities in the obtention of discovery under the Hague Convention, it will only do so in limited circumstances in the case of “pre-trial discovery of documents . . . in Common Law countries.” *French Republic Declaration/Reservation/Notification*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=501&disp=resdn> (last visited Feb. 27, 2020) [<https://perma.cc/5XNK-RZJF>] (archived July 19, 2020). In particular, the reservation “does not apply when the requested documents are enumerated limitatively in the Letter of Request and have a direct and precise link with the object of the procedure.” *Id.* French courts’ approach to requests for discovery based on the provisions of the Hague Evidence Convention (including its Article 23 reservation) is further understood by examining the French Civil Procedure Code in combination with the Law No. 80-538, also known as the “blocking statute.” *See* CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 733–48 (Fr.); Loi 80-538 du 16 juillet 1980 relative a la communication de documents ou renseignements d’ordre economique, commercial ou technique a des personnes physiques ou morales etrangeres [Law 80-538 of July 16, 1980 Related to the Communication of Documents or Information of an Economic, Commercial or Technical Order to Foreign Natural or Legal Persons], art. 1 *bis*, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799. Through these provisions, France “prohibits the gathering of business-related information to be used in foreign litigation” and imposes criminal sanctions in case of violations, making a single exception for discovery pursued in accordance to the Hague Evidence Convention. Laurent Martinier & Ozan Akyurek, *The Perils of Taking Discovery to France*, 20 PRAC. LITIGATOR 39, 40 (2009).

231. Among others, France, Germany, Greece, Italy, Portugal, and Spain have executed Article 23 reservations partially (France) or fully (all others) excluding assistance in relation to pre-trial discovery of documents. *See Table Reflecting Applicability of Articles 15, 16, 17, 18 and 23 of the Hague Evidence Convention*, HCCH (June 2017), <https://assets.hcch.net/docs/627a201b-6c7a-4dc2-86ad-c1da582447d4.pdf>

Member States' domestic courts' ability to cooperate with foreign parties in discovery matters.²³² In conclusion, in civil law-based European countries, courts are either (1) barred from considering pretrial litigation discovery requests for use in a foreign venue or (2) severely limited in their ability to consider such requests, to the extent that international cooperation will rarely occur.²³³

Overall, it would be unwise for the United States to shift its approach to discovery to resemble that of the European nations since Europe's position stems from its nonexistent pretrial process and its judges' fact-finding role;²³⁴ further, such a posture would undermine the effectiveness of the Hague Evidence Convention and stand in opposition to the liberal spirit of a variety of discovery-related statutes enacted by Congress.²³⁵ Additionally, an exceedingly restrictive position towards issuance of discovery could arguably go against the very principles underlying the American adversarial system.²³⁶ Liberal discovery grants have become key to the current operation of the American litigation system: although at times liberal discovery gives tools for parties to inappropriately extend the life expectancy of their cases, it has also reduced the role of courts in litigation by

[<https://perma.cc/7QAN-WBXM>] (archived July 19, 2020) (noting discrepancies between countries' treatment of these discovery procedures).

232. In particular, Article 5(1) of Council Regulation (EC) No. 2271/96 of 22 November 1996 precludes compliance with discovery requests based on certain United States' laws allowing for extraterritorial application. *See* Council Regulation 2271/96, art. 5(1), 1996 O.J. (L 309) 1, 2 (EC); HARKNESS, MOLOO, OH & YIM., *supra* note 26, at 67 (describing Article 5(1)). Additionally, Article 25(1) of the Directive 95/46/EC of the European Parliament and of the Council of 25 October 1995 precludes judicial assistance unless the receiving jurisdiction can ensure that personal data will receive appropriate treatment and protection. *See* Council Directive 1995/46, 1995 O.J. (L 281) 31, 45 (EC); HARKNESS MOLOO, OH & YIM, *supra* note 26, at 67 (describing Article 25(1)).

233. *See generally* Edmund M. O'Toole & David N. Cinotti, *E-Discovery in Cross-Border Litigation: Taking International Comity Seriously*, Fall 2010 INT'L DISP. RESOL. NEWS 1, 21 (discussing a number of reasons why European jurisdictions have decided to limit pretrial disclosure of information).

234. *See supra* Part IV.A.2.

235. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2018); The Hague Convention on the Taking of Evidence Abroad, *supra* note 47, pmbl.

236. The adversarial system gives the parties ample control over the proceeding, making them responsible for pre-trial matters and allowing them to assemble the strongest possible case for presentation to the court. If the parties did not have broad access to information through discovery tools, the procedure would be seriously undermined. *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) (“In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter. . . .”); *see also* E. Allan Lind, John Thibaut & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1130 (1973) (“The adversary system presupposes that the most effective means of determining truth is to place upon a skilled advocate for each side the responsibility for investigating and presenting the facts from a partisan perspective.”).

increasing the possibility of cases settling between the parties.²³⁷ More importantly, the United States' liberal discovery rules are directly related to some of the main interests underlying the adversarial system, such as finding the truth or providing the parties to a dispute with an equal opportunity to succeed on the merits of a case.²³⁸ These interests permeate the main regulatory framework governing the United States' contemporary litigation process (the Federal Rules of Civil Procedure).²³⁹ At the same time, the narrowness of discovery rules in other jurisdictions is not only explained by the structural differences of their legal systems, but also by cultural differences. Such differences have caused those jurisdictions' legal frameworks to take paths that are divergent from that of the United States and to assign preeminence to values that might not be as relevant to American society; for example, in contrast to the United States' primacy of truth-seeking, the United Kingdom "emphasize[s] proportionality in pretrial disclosure of information," and the European Union puts a premium on data privacy.²⁴⁰ Therefore, dramatically narrowing the scope and availability of discovery for use in foreign procedures in the United States would not only go against the principles upon which the American litigation system is built, but would also be in contraposition to virtually every other discovery rule and the longstanding case law discussing the matter.

B. *Amending 28 U.S.C. § 1782*

As discussed above, blindly adopting another jurisdiction's discovery rules with regard to foreign discovery issues seems incongruent and incompatible with the overall spirit of our litigation system and the letter of the Rules of Civil Procedure.²⁴¹ At the same

237. Kuo-Chang Huang, *Does Discovery Promote Settlement? An Empirical Answer*, 6 J. EMPIRICAL LEGAL STUD. 241 (2009) (discussing the results of an empirical study about the number of settlements in civil cases in Taiwan pre- and post-enactment of pre-trial discovery rules and extrapolating those result to the American experience).

238. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (the purpose of our discovery rules is "for the parties to obtain the fullest possible knowledge of the issues and facts before trial."); Warren F. Schwartz & Abraham L. Wickelgren, *Credible Discovery, Settlement, and Negative Expected Value Suits*, 40 RAND J. ECON. 636, 636–37 (2009) ("The actual legal process, however, has many devices that enable parties to substantially reduce or eliminate these informational asymmetries. . . . To the extent there is asymmetric information, this state is not fixed and final. Rather, the uninformed party has the choice to undertake discovery to equalize the informational imbalance.").

239. See FED. R. CIV. P. 26, 34, 45 (governing the discovery process).

240. See O'Toole & Cinotti, *supra* note 233, at 22–24 (discussing the divergence in value that each jurisdiction assigns to different principles and rights due to their underlying regulatory contexts); see also *supra* note 232 (discussing a number of European Union regulations curtailing member states' ability to internationally cooperate in discovery issues, in part, due to privacy concerns).

241. See *supra* Part IV.A (discussing the main features of alternative discovery frameworks adopted in a variety of common and civil law countries).

time, there are troublesome consequences of allowing 28 U.S.C. § 1782's drafting to remain in its current state, most notoriously, a lack of homogeneity in the courts' response to requests.

In finding a satisfactory solution to this issue, a number of countervailing interests that play a role in how we should approach cross-border discovery requests should be considered when amending § 1782. On the one hand, there is a myriad of incentives to encourage a construction of § 1782 that fosters international judicial cooperation and a liberal approach towards issuing discovery, including (1) the spirit of the Federal Rules of Civil Procedure;²⁴² (2) the spirit and goals set forth by the Hague Evidence Convention and the New York Convention, as well as its implementing statute, the Federal Arbitration Act;²⁴³ (3) the legislative history and evolution of 28 U.S.C. § 1782;²⁴⁴ (4) the United States' interest in promoting its adversarial system;²⁴⁵ and (5) notions of equity and justice.²⁴⁶ On the other hand, there are equally important values that point towards circumscribing the courts' discretion with regard to those requests, including (1) the protection of domestic parties and interests;²⁴⁷ (2) international comity

242. An early court identified the liberal spirit of American discovery rules and described the duty of courts when interpreting them as follows:

These Rules should not be whittled away by strained judicial interpretations. They should be interpreted broadly and liberally. The purpose of the examination contemplated by these Rules is to narrow the issues, promote justice, and thus not make the trial of a law suit a game of change or of wits. It is in that spirit that these new Rules should be construed.

Holtzoff, *supra* note 32, at 208 (quoting *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80, 81–83 (E.D.N.Y. 1938)).

243. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (declaring that the Federal Arbitration Act was born out of a “liberal federal policy favoring arbitration agreements”) (internal quotations omitted); Neil Kaplan, *New Developments on Written Form*, in UNITED NATIONS, ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 17, 19 (1999) (“[M]ore and more judges in various jurisdictions are recognizing the existence of an international arbitration culture and are increasingly taking a more liberal and international approach. . .”); see also *supra* Part II.B (discussing the Hague Evidence Convention).

244. See *supra* Part II.A (discussing the historical evolution of the statute and its progressive broadening).

245. For a discussion providing some of the reasons why the adversarial system (particularly in criminal procedure) is endorsed by the United States, see David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009).

246. See Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71, 72 (2012) (discussing the benefits of discovery, such as balancing information asymmetries and allowing parties to assess the strength and weakness of their cases and how they affect the outcome of a case).

247. The Supreme Court has recognized the relevancy of both foreign and domestic interests in matters of transnational discovery. For a discussion (and critique) of the Supreme Court's assessment of party and national interests, see Hannah L. Buxbaum, *Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lesson from Aerospatiale*, 38 TEX. INT'L L.J. 87, 89–93 (2003).

and respect to the nature of foreign procedures;²⁴⁸ (3) preservation of key features of the adversarial system that guard a close relationship to the nature of the legal profession;²⁴⁹ and, to some extent, (4) equity and justice towards the defendants or nonparticipants.²⁵⁰ In subparts B.1 and B.2, this Note introduces a proposed amendment to the statute that includes (1) a change in the current wording of the statute, (2) the addition of a definitional section (inspired by the United Kingdom's EPOJA), and (3) the codification of a modified judicial balancing test. These modifications, when taken together, should clarify the legislative mandate to courts and give them guidance about the exact boundaries of a § 1782 request.

1. The Statutory Language Portion

As previously discussed, the statutory-language amendment portion of this Note's proposed solution seeks to maintain the liberal character of the statute, while circumscribing the courts' ability to issue diverging interpretations on a common issue. Ideally, this solution, when paired with the codification of the modified *Intel* analysis, will preclude courts from inserting discretionary considerations into their § 1782 analysis and provide them with a strong inference of the outcome desired by Congress.

i. Changes to Existing Statutory Language

As part of the statutory amendment, slight changes should be made to the current language of § 1782(a). In particular, this Note makes two proposals with regard to the current statutory language: (1) doing away with the language allowing usage of foreign practices and procedures and (2) adding language specifying rules that are particularly important to the court's understanding of the statute. As a result, the language of the statute would be 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 criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request

248. See *id.* at 88–89 (discussing the concept of comity in the context of cooperation agreements).

249. See GLASER, *supra* note 210, at 120 (discussing the findings of a survey on adversary's discovery and finding that attorneys often complain that opposing counsel is trying to obtain access to privileged information).

250. See, e.g., David R. Hague, *Fraud on the Court and Abusive Discovery*, 16 NEV. L.J. 707, 711–17 (2016) (discussing abusive discovery practices and their impact on parties and the judicial process).

made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure for taking the testimony or statement or producing the document or other thing. *In all cases, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure, and in particular, in accordance with Rules 26, 34, and 45.*

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.²⁵¹

These changes, when considered in tandem, seek to eliminate a factor providing undue discretion to courts and which might potentially cause diverging outcomes in cases with similar fact patterns. This is so because the original language, by first giving discretion to courts to apply “in whole or part the practice and procedure of the foreign country or the international tribunal,” and later directing courts to

251. Compare with the original language:

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

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

28 U.S.C. § 1782(a) (2018).

otherwise conduct their actions “in accordance with the Federal Rules of Civil Procedure” opened the field to unnecessary disputes as to whether courts should account for the practices and procedures of the foreign litigation’s forum or instead apply the familiar federal rules.

There are several reasons that support this proposal. First, if the concern moving Congress to include such language was international comity and due respect to foreign judicial systems, that concern is overstated. Courts could consider international comity when denying a request under their Rule 26 discretionary powers anyway, and a foreign court could reject the discovery obtained through § 1782 if not within the scope of its own procedural rules.²⁵² Furthermore, *Intel* has already indicated that courts should not give undue credit to a foreign jurisdiction’s discovery rules; although a court can take into account “the receptivity of the foreign government, court, or agency to federal-court judicial assistance,” there is no foreign discoverability rule embedded in either § 1782 or the *Intel* analysis.²⁵³ Finally, this proposal promotes simplicity and bolsters uniformity of decision-making throughout different jurisdictions within the United States.²⁵⁴ This amendment will also lead to more accurate, legally correct, and just outcomes since it does not require judges to apply foreign and unfamiliar procedures.²⁵⁵

ii. Addition of a Definitions Section

To further strengthen the position of 28 U.S.C. § 1782, this Note also proposes reorganizing § 1782 and including a new section which provides a set of definitions that would give support to the otherwise vague wording of current § 1782 (a).²⁵⁶ These definitions would precede the already existing provisions (that is, § 1782 (a) and (b) would become § 1782 (b) and (c)) and solve at once several of the current interpretative conflicts faced by the circuit courts. In particular, definitions for the concepts of (1) “residing” or “being found” in the

252. See *In re Biomet Orthopaedics Switz. GmbH*, 742 F. App’x 690, 694 (3d Cir. 2018) (detailing the process of discovery under German law); *In re Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992) (noting that the district court’s goal was minimizing the discovery burdens in the Hungarian courts); *In re 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008) (noting the advantages and disadvantages of cooperation with foreign courts).

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

254. Uniformity is furthered by the new wording precluding the issuance of orders prescribing parties to apply the procedures of foreign courts, which might be in opposition to the Federal Rules of Civil Procedure.

255. See, e.g., Ernest G. Lorenzen, *Renvoi Theory and Application of Foreign Law*, 10 COLUM. L. REV. 190 (1910) (this canonical article discusses the difficulties faced by courts required to apply foreign laws after being confronted with situations requiring choice of law analysis. The same difficulties would be present if a court has to follow the procedure of a foreign jurisdiction).

256. See 28 U.S.C. § 1782.

jurisdiction, (2) “tribunal,” (3) “foreign or international,” and (4) “interested person” should be provided. Therefore, the proposed section would be drafted as follows:

(a) For the purposes of this section—

(1) a person or entity will be considered to “reside” or “be found” in a district if a court could otherwise have personal jurisdiction over said person or entity;²⁵⁷

(2) a “tribunal” includes conventional courts, agencies and other organizations with administrative and quasi-judicial powers, and *ad hoc* and private arbitral panels and tribunals with power to issue decisions binding the parties, regardless of whether this power has been conferred through provisions contained in an international convention or agreement, a domestic statute, or a contractual agreement;²⁵⁸

(3) a tribunal will be “foreign or international” when the tribunal is established anywhere outside the United States or is created under the laws of a foreign country or international law;²⁵⁹

(4) “interested person” includes litigants before foreign or international tribunals; foreign and international officials; and any other person or entity, whether designated by foreign law, international convention, or otherwise having a reasonable interest in obtaining assistance of the court.²⁶⁰

The inclusion of these proposed definitions in the body of 28 U.S.C. § 1782 would have the effect of precluding judicial input as to the meaning of foreign or international tribunals, discussed in Part III.B. It would also severely limit the exercise of judicial discretion with regard to the extraterritorial application of the statute, by clarifying that the focus of a § 1782(a) inquiry is in where the party from whom discovery is sought “is found” or “resides,” and not on the documents’ location.²⁶¹ Therefore, so long as the party fulfills the “residency”

257. This approach is respectful of the Supreme Court’s view that under the American judicial system and out of “traditional notions of fair play and substantial justice,” a court should not entertain a case unless there is a somehow substantial relationship with the forum, as indicated by the presence of certain minimum contacts. *See, e.g., Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

258. *See Smit, American Assistance*, *supra* note 14, at 5 (“The [use] of the word ‘tribunal’ . . . was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions. Clearly, private arbitral tribunals come within the term the drafters used.”); *Intel Corp.*, 542 U.S. at 258 (describing the word “tribunal”).

259. *Smit, American Assistance*, *supra* note 14, at 8.

260. This definition of interested person was formulated by Hans Smit. *See Smit, International Litigation*, *supra* note 1, at 1027; *Intel Corp.*, 542 U.S. at 257 (discussing documents sought by an “interested person”).

261. *Sergeeva v. Tripleton Int’l Ltd.*, 834 F.3d 1194, 1198 (11th Cir. 2016).

requirement as defined by the statute, extraterritorial application is appropriate. The requirement that there are substantial connections between the party producing the documents and the court deciding to grant the discovery application would only provide further support to the permissibility of applying the statute extraterritorially.

In conclusion, amending the statute would, by itself, largely address the issues labeled by this article as (1) extraterritorial application, addressed in Part III.A, and (2) meaning of “foreign or international tribunals,” addressed in Part III.B. Although the currently disrupted political process may call into question the feasibility of passing any kind of legislative measure, the amendment to 28 U.S.C. § 1782 seems a good candidate for bipartisan support as it plays a role in encouraging the creation of adequate resolution processes in the field of international commercial transactions; increases the role and influence of United States courts in international litigation and dispute resolution processes, including how they are handled and resolved; and provides (paired with the codification of a modified judicial balancing test, discussed below) renewed protections to domestic parties and interests.

2. The Judicial Discretion Portion: Codifying a Modified *Intel* Test.

The second prong of this Note’s proposed solution addresses those issues that cannot be solved expressly through the previous changes to the statute’s language. It also intends to function as a safety net to ensure that, should any interpretative issues persist or a new nature of conflicts arise, there is a framework that can be employed by courts to uniformly decide the outcome of § 1782 requests. In particular, this Note advocates for codifying a limited *Intel* analysis. A limited approach is appropriate because it would constrict the courts’ exercise of discretion, which in turn promotes predictability and fairness, without completely precluding the courts from exercising some flexibility in their analysis in the event they are presented with new facts and issues that cannot be adequately addressed by mere reference to the language of the statute. The codification of this limited *Intel* analysis would look as follows:

(d) In determining whether a request for discovery under the present statute should be granted, the following factors shall provide a basis to deny discovery:

(1) one or more requirements set forth in § 1782(b) have not been fulfilled;²⁶² or

262. The solution’s proposed § 1782(b) would correspond to § 1782(a) under the current version of the statute. *See supra* Part IV.B.1.ii.

(2) the person from whom discovery is sought is a participant in the foreign proceeding. A person or entity will be considered to be a participant in the foreign proceeding if the person or entity is an “interested person” under the definition provided in subsection (a) of this provision, or is a person or entity that guards a close and material relationship to any such “interested person”;

(3) the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. A request will be deemed to attempt to circumvent foreign or domestic policy when obtention of discovery pursuant to such request:

(i) is contrary to a foreign rule expressly banishing obtention of discovery of the kind requested; or

(ii) clearly undermines the public policy of the United States, including ethical rules and privileges governing the conduct of domestic counsel.

(4) the request is unduly intrusive or burdensome. Whether a request is unduly intrusive or burdensome shall be decided by reference to the Federal Rules of Civil Procedure, and in particular, Rule 26(b);

(5) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of foreign government or the court or agency abroad to US federal court judicial assistance counsel against granting discovery. In no circumstance will this factor, by itself, provide sufficient reason to deny a discovery request under this statute.

First, this revised codified version of *Intel* maintains the initial statutory-compliance analysis, which would now require courts to evaluate the three statutory requirements in light of the definitions proposed in Part IV.B.1.ii. and in accordance with the goals set by Federal Rules of Civil Procedure, and in particular, Rules 26, 34, and 45.²⁶³ Failure to fulfill any of those requirements would translate into immediate denial of the request for discovery.

In those cases in which the requirements are met, the court would engage in a limited evaluation of the four *Intel* factors, transitioning from the current nonexhaustive approach to an exhaustive approach. Listing the factors in the order in which they appear in the current *Intel* analysis, the first factor, namely, “whether the person from whom discovery is sought is a participant in the foreign proceeding,” would remain as is. However, the statute would provide a definition to the term “participant” that would help courts determine when a person or

263. These rules are specifically included due to their particular and concrete impact on some of the § 1782 issues, especially with regard to the extraterritoriality issue.

entity would qualify as such. Issuing this kind of guidance would delimit the proper scope and understanding of the word as it operates in § 1782 and avoid undue or excessive exercises of discretion by lower courts. At the same time, it would allow the court to set forth an understanding of the word that curtails any potential “fishing expeditions.”²⁶⁴

The second factor, “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of foreign government or the court or agency abroad to US federal court judicial assistance” should be deemed as the weakest factor, working only to the effect of “untying” situations in which it is unclear whether the court should grant or deny an application.²⁶⁵ This interpretation would leave untouched a court’s ability to take into consideration comity concerns but would discount their importance, allowing them to play a role only in “coin-toss” situations in which there would be separate, more relevant rationales motivating the denial of a request.²⁶⁶ The third factor, whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States” should be read to only preclude obtaining discovery in those situations in which obtention of discovery would either (i) be contrary to a foreign rule expressly banishing obtention of discovery of the kind requested or (ii) clearly undermine the public policy of the United States, including ethical rules and privileges governing the conduct of domestic counsel.²⁶⁷ Restricting the reading of the third factor would increase the instances in which applicants can benefit from the application of § 1782. It would also avoid domestic court interpretation of foreign procedural and evidentiary rules, unless such foreign rule unequivocally prohibits the applicant from obtaining the discovery. Finally, it would allow courts to restrict requests seeking to obtain documents that implicate an attorney–client relationship, the work-product doctrine, confidentiality, and other similar concerns. Finally, the fourth requirement, “whether the request is unduly intrusive or burdensome” should be refined through the specification of particular categories of requests that are considered either unduly intrusive, burdensome, or both. By tying the definition of “unduly intrusive” and “burdensome” to the Federal Rules of Civil Procedure, and specifically, Rule 26, the courts would be directed to treat these considerations in a

264. See *supra* Part IV.A.1 (discussing EPOJA’s limitation on discovery requests, motivated by local dislike of expansive discovery orders).

265. *Intel Corp.*, 542 U.S. at 264.

266. See generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflicts of Laws*, 44 U.C. DAVIS L. REV. 11 (2010) (criticizing the unbridled use of comity by courts and proposing a new approach to the issue that would avoid applying the concept in situations where it is unnecessary).

267. *Intel Corp.*, 542 U.S. at 265.

transnational litigation context in the same way they treat them when the case is purely domestic. As part of this categorization, the court could include untimeliness, so long as it has been unreasonably caused by the applicant. The changes in this fourth factor would do away with the issue discussed in Part III.C, applicant delay.

V. CONCLUSION

Throughout the last century, the United States has recognized the importance of international transactions and has accordingly developed a system of international judicial cooperation. This system gradually strengthened through the subscription to international agreements and implementation of domestic statutes and regulations, including 28 U.S.C. § 1782, granting parties access to the system of American discovery for use in foreign litigation and dispute resolution. In line with the liberal spirit of American discovery, Congress has continuously broadened § 1782, with the Supreme Court accordingly adopting an extensive interpretation of the statute's scope in its landmark decision *Intel Corp. v. Advanced Micro Devices, Inc.*

As disagreements over the interpretation of 28 U.S.C. § 1782 and *Intel* continue to arise in lower courts, it has become clear that reforming the statute's current wording is necessary. This Note suggests an approach that includes a new Definitions Section inspired by the United Kingdom's EPOJA, paired with the codification of a restrictive interpretation of *Intel's* balancing test. Such a solution might prove the best way of achieving an American-driven system of international judicial cooperation that preserves the integrity of our adversarial system and protects domestic interests. Although ambitious in its requirements of bipartisan cooperation and coordinated action among the three branches, this approach could lead to greater uniformity, and consequently, more just decisions in the context of discovery-related assistance to foreign parties and courts.

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