NOTES

DISCOVERY FOR FOREIGN PROCEEDINGS AFTER INTEL V. ADVANCED MICRO DEVICES: A CRITICAL ANALYSIS OF 28 U.S.C. § 1782 JURISPRUDENCE

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ABSTRACT

The Supreme Court’s decision to bar the foreign discoverability requirement 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(a). Because Intel gave district courts no guidelines for evaluating foreign tribunals’ receptivity to discovery acquired in the United States, § 1782(a)’s goals of fostering international judicial cooperation and providing efficient resolutions of foreign cases have gone unfulfilled.

I. INTRODUCTION

When a person or entity involved in a foreign legal proceeding seeks to take discovery in the United States for use in that proceeding, 28 U.S.C. § 1782(a) authorizes a federal district court to order a person who resides or

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is found in the district to provide such discovery. Courts granting § 1782 requests risk offending nations with more restrictive civil procedure systems because the statute allows documents and information to be obtained according to the expansive discovery norms provided by the Federal Rules of Civil Procedure ("Federal Rules"). A district court deciding whether to grant a § 1782 request for discovery assistance usually evaluates the foreign tribunal’s receptivity to the discovery because a § 1782 request granted in the face of opposition from the foreign tribunal violates principles of comity and hinders international judicial cooperation.

The circuits were split on how to evaluate foreign receptivity until the Supreme Court’s decision in Intel Corp. v. Advanced Micro Devices, Inc.,¹ the first time the Court had occasion to interpret the interplay between § 1782 and foreign tribunals’ feelings about receiving discovery obtained under the Federal Rules. Before Intel, several circuits took the view that a court evaluating a § 1782 request had to find that the requested discovery would be discoverable under the applicable foreign law. Other circuits found that this “discoverability” requirement should not be read into the statute and that requiring district courts to assess foreign discoverability was problematic because U.S. judges are ill equipped to interpret foreign law. These circuits instead found that courts had significant discretion in deciding whether to grant a § 1782 request. Despite their concerns about U.S. judges’ ability to interpret foreign law properly, they explained that an assessment of discoverability could be of some relevance in guiding a district judge’s exercise of discretion under the statute.

The Supreme Court resolved the circuit split in Intel, finding no discoverability requirement in the statute. The Court felt that requiring district courts to determine discoverability before granting a § 1782 request was dangerous because of the significant risk that U.S. courts might misinterpret foreign law and base their § 1782 decisions on such faulty interpretations. Intel gave district courts wide discretion in deciding whether to grant a § 1782 request and noted that discoverability could be a relevant factor in a judge’s exercise of discretion. The Court also found that imposing extra-statutory barriers on § 1782 discovery assistance was inconsistent with both the statute’s text and its legislative history; Congress intended to allow interested parties and participants in foreign litigation to conduct discovery unless the foreign tribunal clearly opposed it.

The main purpose of this Note is to evaluate post-Intel § 1782 jurisprudence in order to determine whether Intel’s analytical framework

was a proper interpretation of the statute and whether it furthered the statute's legislative goals. Most academic criticism of the Intel decision has focused primarily on the benefits of the threshold discoverability standard and a concern that Intel gave judges too much discretion for evaluating § 1782 requests. This Note takes a different approach from past scholarship because it does not focus on whether the discoverability standard is appropriate in deciding § 1782 requests. Instead, this Note will focus on three reasons why Intel made it more difficult for district courts to assess foreign receptivity accurately and why Intel fails to promote § 1782's goals of providing efficient assistance to participants in foreign litigation and promoting international judicial cooperation. These reasons are as follows: (1) Intel's ruling allowing district courts to use discoverability as a discretionary method for evaluating foreign receptivity leaves in place most of the problems associated with a mandatory discoverability analysis; (2) Intel kept in place the Second Circuit's problematic method for evaluating § 1782 requests, which has spawned a number of unpredictable and inaccurate standards for evaluating foreign receptivity; and (3) Intel downplayed the importance of foreign receptivity and imposed too strong a presumption in favor of granting § 1782 requests, generating § 1782 decisions that are likely to offend foreign tribunals.

Part II will explain how § 1782 operates and describe its statutory requirements. Part III will put the statute into context by comparing the discovery regimes of the United States, the United Kingdom, and two civil law countries, Germany and France. This comparison provides the basis for analyzing why foreign receptivity is important to § 1782 analysis: many civil law nations find America's discovery system to be intrusive and fundamentally inconsistent with their own. Part IV will analyze pre-Intel jurisprudence and the many standards that developed for evaluating foreign receptivity to American discovery. This Note will then analyze the Intel

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decision and the Supreme Court's reasoning for striking down the discoverability standard, as well as its use of legislative history to justify its decision. Part V, in which post-Intel jurisprudence is examined, presents the basis for the argument that Intel's holding has created unpredictability and is likely to hinder international judicial cooperation. This part will focus on two patterns observed in post-Intel § 1782 decisions, the first being the way district courts have downplayed the importance of foreign discovery laws, and the second being that district courts are imposing a very high threshold on foreign tribunals that want to express that they are not receptive to discovery acquired under the Federal Rules. This part will also survey the different and surprising methods that courts are using to evaluate foreign receptivity in place of the now-defunct threshold discoverability standard.

Part VI will specifically focus on the ways in which Intel's approach gives insufficient weight to the fundamental differences between American and civil law discovery by giving district courts too much power to grant § 1782 requests in the face of a foreign tribunal's opposition. This part will focus on Intel's reasons for rejecting the discoverability standard and show that the Court's criticisms of discoverability apply even when district courts are conducting discretionary, as opposed to mandatory, evaluations of discoverability to assess foreign receptivity. This part will harmonize the discussion of foreign discovery law and the current state of § 1782 jurisprudence to show that American courts are doing a poor job of fostering international judicial cooperation and are sending foreign tribunals discovery that they neither want nor can use.

Lastly, this Note will propose a solution in Part VII: the imposition of a requirement that any § 1782 requestor who is a party to a foreign case first file a discovery request with the foreign tribunal before seeking discovery assistance in the United States. This solution is guided by the

5. Several solutions to Intel's problematic interpretation have been proposed, but none have gone through a thorough survey of post-Intel decisions in arriving at their conclusions. The least realistic of these solutions is bringing back the threshold foreign discoverability requirement that Intel struck down. See Patel, supra note 2, at 318. After Intel, it is unlikely the Supreme Court will read a threshold discoverability standard into the statute, given that the Court's decision was 7-1. Another proposal aimed at the problem that district courts do not necessarily have to take foreign receptivity into account is to require that courts read a "foreign receptivity" requirement into the statute. See Sun, supra note 3, at 302. A foreign receptivity requirement, however, lacks teeth if neither the Court nor the statute provides any standards for how district courts should evaluate foreign receptivity. A third proposal is to abandon § 1782 jurisprudence as too fundamentally flawed and to support a legislative response that would impose some limitations on the statute. See Mousa Zalta, Case Note, 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,
most significant problem with current §1782 jurisprudence: U.S. courts give insufficient weight to foreign discovery laws and impose too high a burden on foreign tribunals seeking to resist discovery acquired through §1782.

II. THE MECHANICS OF 28 U.S.C. §1782

Section 1782 allows a district court to compel discovery for use in a foreign legal proceeding pursuant to a request from a person with an interest in that proceeding. An interested person or a foreign tribunal can directly petition a district court in the district in which the person who will produce the evidence is found to order the production of evidence if the statute’s requirements are met. The statute states:

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 . . . . 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.⁶

Prior to granting a request for discovery under §1782, the district court must make several findings to ensure the request complies with all of §1782’s statutory requirements.⁷ In order for a district court to grant a §1782 request, it must find that

(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign tribunal, and

(3) the application is made by a foreign or international tribunal or any interested person.  

The first of these restrictions allows district courts to compel discovery only of evidence or testimony found within their districts. To have the power to compel discovery from a person, the district court must find sufficient links between the person and the district in which the court is located. The burden of proof is on the requesting party, which must prove that the individual or corporation being compelled to produce evidence has a sufficient connection to the district. Similarly, a district court could not allow a requesting party to seek production of documents held outside the United States. Thus, not only must there be a sufficient connection between the producing party and the forum district, but there is also an additional requirement that the evidence requested be physically present in the United States.

The second restriction has two distinct prongs, the first requiring that the evidence be for use in a foreign proceeding. District courts may order discovery when a foreign legal proceeding is either pending or "within reasonable contemplation." The Supreme Court and many commentators have taken the view that because § 1782 requestors are often seeking evidence for legal proceedings quite dissimilar from U.S. trials, it would be imprudent to impose strict requirements that the proceedings be at a certain stage before allowing the discovery. Second, the district court must make a determination as to whether the foreign proceeding is sufficiently adjudicative in nature to fall within the statute’s scope. Most judicial or

8. Marubeni Am. Corp. v. LBA Y.K., 335 F. App’x 95, 96 (2d Cir. 2009). See also In re Clerici, 481 F.3d 1324, 1331–32 (11th Cir. 2007).
9. The U.S. government is not a “person” within the meaning of the statute. See Al Fayed v. CIA, 229 F.3d 272, 275–76 (D.C. Cir. 2000).
10. See In re Godfrey, 526 F. Supp. 2d 417, 419–22 (S.D.N.Y. 2007) (suggesting the use of continuous and systemic contacts to determine whether a party is “found” in the district for § 1782 purposes); In re Nokia Corp., No. 1:07-MC-47, 2007 U.S. Dist. LEXIS 42883, at *4, *8–9 (W.D. Mich. June 13, 2007) (holding that Nokia could not compel discovery from a corporation headquartered in Germany that “does not maintain offices or manufacturing or production facilities in Michigan, neither owns nor leases real property in Michigan, and essentially has no other connection with Michigan”).
quasi-judicial proceedings fall within the statute’s scope; the crucial component is that there must be some adjudicative function performed by the tribunal.\textsuperscript{16} Foreign bankruptcy proceedings,\textsuperscript{17} foreign criminal proceedings,\textsuperscript{18} and proceedings before certain foreign investigative bodies are within the statute’s scope.\textsuperscript{19} Since \textit{Intel}, however, the main source of conflict has been whether courts should grant § 1782 requests where the evidence is for use in private or government-sponsored arbitrations.\textsuperscript{20}

The final relevant restriction in § 1782 restricts who can file a request for discovery under the statute to foreign tribunals and “any interested person.”\textsuperscript{21} The phrase “interested person” reflects Congress’s desire to allow requests from individuals or agencies that are not traditional parties to litigation as are found in the United States.\textsuperscript{22} It has been interpreted to allow government officials conducting investigations to use § 1782 as a means to gather evidence even if no formal charges have been filed.\textsuperscript{23} This expansive view is intended to reflect the differences inherent in different legal systems as well as the different ways that evidence obtained pursuant to § 1782 can be used in a foreign tribunal.\textsuperscript{24} Under the statute, U.S. courts can entertain requests for discovery under § 1782 if the requestor is either a party to a foreign litigation, a foreign tribunal itself, or an “interested person”—a term encompassing not only foreign government officials, but also “any other person whether he be designated by foreign law or

\textsuperscript{16} Lancaster Factoring Co. v. Mangone, 90 F.3d 38, 41 (2d Cir. 1996) (citing \textit{In re Letters Rogatory Issued by the Dir. of Inspection of India}, 385 F.2d 1017, 1021 (2d Cir. 1967) (overturning a grant of discovery to a foreign tax collecting authority whose function was to assert governmental interests)).

\textsuperscript{17} \textit{Id.} at 42 (holding that bankruptcy proceedings are within the scope of the statute because they require adjudication of the debtor’s estate).

\textsuperscript{18} \textit{In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan}, 539 F.2d 1216, 1219 (9th Cir. 1976); \textit{In re Letter Rogatory from the Justice Court, Dist. of Montreal, Can.}, 523 F.2d 562, 565 (6th Cir. 1975).

\textsuperscript{19} See \textit{Intel}, 542 U.S. at 258 (holding that the Directorate-General for Competition of the Commission of the European Communities was a “tribunal”).


\textsuperscript{22} \textit{Intel}, 542 U.S. at 257.

\textsuperscript{23} \textit{See In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago}, 848 F.2d 1151, 1155 (11th Cir. 1988) (holding that “a foreign official properly designated under foreign law may fall within the definition of ‘interested person’ even when a proceeding is not pending at the time of the request”), \textit{overruled on other grounds by Intel}, 542 U.S. 241.

international convention or merely possess a reasonable interest in obtaining the assistance."\textsuperscript{25}

These three statutory restrictions create the primary guidelines for filing a request for discovery under § 1782. These restrictions create a statutory scheme that allows a broad class of individuals to seek broad, U.S.-style discovery for use in a variety of judicial and quasi-judicial proceedings that may be pending at the time of the request, but need only be in reasonable contemplation. This expansive statutory framework has been theoretically reigned in after the Supreme Court’s decision in \textit{Intel}, but district courts still have wide latitude to grant § 1782 requests that conform to the statute’s requirements. The statute’s relatively liberal requirements coupled with the discretion afforded district courts in § 1782 cases\textsuperscript{26} have created a system in which district courts face few significant hurdles in granting § 1782 requests when the statute’s three requirements are met. The ramifications of this permissive framework become clear when analyzing the significant differences between civil law systems and the U.S. legal system because an American court’s decision to allow discovery to be conducted for use in a foreign legal proceeding has significant ramifications for the forum in which that legal proceeding is taking place.

III. A SURVEY OF FOREIGN DISCOVERY SYSTEMS

A U.S. district court’s decision whether to grant a § 1782 request might have substantial implications for a foreign forum because such discovery can conflict with the forum’s substantive and procedural rules. If the discovery is produced for use in the foreign proceeding pursuant to the Federal Rules, there is a significant chance that it will be undiscoverable or inadmissible under the foreign nation’s procedural rules.\textsuperscript{27} Further, a party’s access to and introduction of such discovery may prejudice other parties in the foreign proceeding or be an affront to the forum nation’s judicial system.\textsuperscript{28} It is important, therefore, to analyze other nations’ discovery laws to see why so many foreign tribunals view America’s

\begin{itemize}
\item \textsuperscript{25} \textit{Intel}, 542 U.S. at 256–57 (quoting Smit, supra note 15, at 1027).
\item \textsuperscript{26} \textit{Id.} at 260 (citing Foden v. Gianoli Aldunate (\textit{In re Gianoli Aldunate}), 3 F.3d 54, 59 (2d Cir. 1993)).
\item \textsuperscript{28} \textit{See}, e.g., Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84–85 (2d Cir. 2004); \textit{In re Microsoft Corp.}, 428 F. Supp. 2d 188, 194–95 (S.D.N.Y. 2006).
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discovery process as burdensome and undesirable, and why district courts that grant § 1782 requests without assessing their impact on the foreign tribunals risk undermining the legislative goals of § 1782 and hindering international judicial cooperation.

A. THE UNITED STATES OF AMERICA

American discovery differs from that of nearly every other nation in both procedure and substance.\textsuperscript{29} Rule 26 of the Federal Rules,\textsuperscript{30} which governs discovery in the federal court system, permits a party to obtain discovery that is relevant to any party’s claim or defense, or on any subject matter relevant to the litigation.\textsuperscript{31} While a court has the power to limit discovery pursuant to Rule 26(b)(2), the wide scope of American discovery is unparalleled.\textsuperscript{32} Geoffrey C. Hazard has described discovery as one of the central features of American civil procedure: “Broad discovery is thus not a mere procedural rule. Rather it has become...a procedural institution perhaps of virtually constitutional foundation.”\textsuperscript{33} American discovery is more expansive than other nations’ in almost every way, not only giving requesting parties access to significantly more information than is available in civil discovery systems, but also allowing discovery to be taken from nonparties that may have evidence relevant to litigation.\textsuperscript{34}

Under the Federal Rules, litigants control most aspects of discovery while the judge’s role is limited to defining the outer boundaries of the proof-gathering process while avoiding active participation.\textsuperscript{35} Under Rule 26(a)(1), parties must make a number of disclosures to one another without

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\item \textsuperscript{30} \textit{FED. R. CIV. P. 26}.
\item \textsuperscript{31} \textit{FED. R. CIV. P. 26(b)} (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense...[T]he court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).
\item \textsuperscript{32} \textit{See Bolt & Wheatley, supra note 29, at 7; Marcus, supra note 27, at 162–64} (chronicling the history of the Federal Rules and their expansive nature).
\item \textsuperscript{33} Geoffrey C. Hazard, Jr., \textit{From Whom No Secrets Are Hid}, 76 TEX. L. REV. 1665, 1694 (1998).
\item \textsuperscript{34} Peter Ashford, \textit{Documentary Discovery and International Commercial Arbitration}, 17 AM. REV. INT’L ARB. 89, 92–93 (2006); Bolt & Wheatley, \textit{supra} note 29, at 8–10 (discussing the limitations of German discovery rules).
\item \textsuperscript{35} \textit{See Patrick Higginbotham, Foreword, 49 ALA. L. REV. 1, 4–5} (1997). \textit{See also MAIN, supra note 27, at 35} (noting that, unlike the system in the United States, judges in civil systems are at the center of the proof-gathering process).
\end{itemize}
any judicial compulsion. In addition, a party seeking discovery may serve a request directly on the opponent, who must comply unless he or she has a valid objection, on which the judge will rule. The judiciary's generally hands-off approach to discovery combined with the notice-pleading requirement of Rule 8(b) "permits plaintiffs broad access to the judicial system." This broad access often features "requests for 'all documents, correspondence or memoranda . . . ' without specification" as well as substantial discovery from nonparties. While there have been amendments to Rule 26 limiting the scope of discovery, the U.S. discovery system's fundamental features are intact and its scope remains far broader than its foreign counterparts.

For all of the changes American discovery has gone through, it has not changed in ways that reflect foreign frustration with its expansive nature. America's response to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Hague Convention"), which sought to simplify and streamline discovery processes so that parties conducting discovery in a foreign nation could avoid numerous procedural hurdles, is instructive. The Supreme Court, when faced with a situation in which the Hague Convention restricted a U.S. party's access to discovery under the Federal Rules, limited the Hague Convention's applicability in the United States and held that it is not controlling when its provisions would unjustly limit a party's access to U.S. discovery procedures. While

37. FED. R. CIV. P. 26(b); Scirica, supra note 36, at 520.
38. FED. R. CIV. P. 8(b).
39. Scirica, supra note 36, at 520.
40. See Marcus, supra note 27, at 155–56 (alteration in original) (quoting Andreas Lowenfeld, Introduction: The Elements of Procedure: Are They Separately Portable?, 45 AM. J. COMP. L. 649, 652–54 (1997)) (commenting on how this type of broad, vague discovery has been rejected by most civil law nations).
41. See generally id. (discussing the history of attempts to restrict Rule 26 and make it less burdensome).
42. Scirica, supra note 36, at 521–23.
there are ongoing attempts to amend the Federal Rules to make the discovery process more cost effective and less burdensome, and thus more compatible with civil law systems, the fundamental features of U.S.-style discovery—expansive pretrial discovery, the ability to take discovery from nonparties, and the lack of judicial involvement—have gone mostly unchanged.\textsuperscript{46} America’s unwillingness to commit to international discovery regimes “creates friction with foreign countries, foreign companies, and other foreign entities” and discourages foreign nations from providing discovery assistance to the United States.\textsuperscript{47}

B. CIVIL LAW NATIONS

Germany and France, leaders of the civil law tradition, continue to express their opposition toward the U.S. system of discovery.\textsuperscript{48} In fact, “No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”\textsuperscript{49} The primary reason for conflict is that the privatization of discovery in the U.S. system, a key feature of America’s expansive discovery process, directly conflicts with the civil law conception of judicial power and control over discovery.\textsuperscript{50} The perceived intrusiveness of American discovery has led civil law nations to enact blocking statutes or other legal obstacles to American encroachment on their legal systems.\textsuperscript{51}

1. Germany

German discovery law is guided by the principle that “[a] party is not obliged to give the weapons into the other party’s hands.”\textsuperscript{52} As a result, there is no common law pretrial discovery in the German trial process.\textsuperscript{53} Instead, the judge guides discovery\textsuperscript{54} and the process takes place

\textsuperscript{46} See Marcus, \textit{supra} note 27, at 164–74.
\textsuperscript{47} Scirica, \textit{supra} note 36, at 523.
\textsuperscript{49} RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 reporter’s n.1 (1987).
\textsuperscript{51} See Marcus, \textit{supra} note 27, at 153–54.
\textsuperscript{52} OSCAR G. CHASE ET AL., \textit{CIVIL LITIGATION IN COMPARATIVE CONTEXT} 222 (Oscar G. Chase & Helen Hershkoff eds., 2007) (quoting Bundesgerichtshof [BGH] [Federal Court of Justice] June 11, 1990, 43 Neue Juristische Woche(n)schrift [NJW] 3151, 1990 (F.R.G.)).
\textsuperscript{53} Id.; Langbein, \textit{supra} note 50, at 831.
\textsuperscript{54} ABA SECTION OF ANTITRUST LAW, \textit{supra} note 44, at 127–28 (explaining the pleading and
throughout the entire litigation, not just before trial. The judge is in complete control of the discovery process, guiding both its scope and substance. German judges try to resolve cases as efficiently as possible and are “constantly looking for the jugular—for the issue of law or fact that might dispose of the case,” hoping to resolve the case without having to analyze every possible issue. Consistent with these goals, German judges have shown disdain for broad U.S.-style discovery, comparing it to a “fishing expedition” that serves only to waste time and divert the judicial process from a quick and inexpensive resolution of the case.

Germany’s restrictions on discovery operate within a system in which “each party presents its case to the court on the basis of the facts known, quite often working on assumptions only.” However, unlike the notice-pleading regime in Rule 8 of the Federal Rules, German law requires that parties plead “in significant detail” at an early stage in the adjudicative process in order to present a valid claim or defense. Thus, the combination of a high evidentiary threshold at the pleading stage and the difficulties of obtaining discovery from the opposing party makes prosecution of a claim difficult and has the possible side effect of deterring prosecution. Discovery as it is known in the United States simply does not exist in Germany. A requesting party has no procedural right to obtain information from the other party unless there is both personal knowledge that the material is in the other party’s possession and substantial factual allegations that the evidence is relevant. An order for disclosure of

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56. Bolt & Wheatley, supra note 29, at 8–9 (explaining that in Germany judges are the ones who propound discovery requests on the parties); Langbein, supra note 50, at 830–31 (describing how German judges exercise total control over the sequence of discovery).
57. Langbein, supra note 50, at 830.
59. See id. (discussing how other countries “avoid and condemn discovery ‘fishing expeditions’”); Bolt & Wheatley, supra note 29, at 6–8; Langbein, supra note 50, at 833–34.
60. ABA SECTION OF ANTITRUST LAW, supra note 44, at 128.
62. ABA SECTION OF ANTITRUST LAW, supra note 44, at 129. The fact that losing parties have to pay the costs for both sides also contributes to deterring the prosecution of claims. Id.
63. Id. at 128; Langbein, supra note 50, at 830–32 (discussing how broad discovery is required in the United States to avoid any risk of surprise at trial, while in Germany, the “conference method” ensures there will be no surprise without the need for expensive pretrial discovery by bringing the attorneys together in a conference setting to avoid the theatrics and personal ambitions of American litigation).
documents is rarely enforceable against a party. A judge may take a party’s noncompliance into consideration when deciding the case, but the judge has no independent way of compelling production.

“Germany views gathering evidence as an act of national sovereignty and its general prohibition of party-driven discovery is based on its disdain for fishing expeditions. Although a signatory to the Hague Convention, Germany continues to worry that foreign parties will impose broad U.S.-style discovery on its judicial system. German judges exercise very strict control over the sequence of proof gathering, so the introduction of evidence acquired in the United States risks disrupting the German judge’s well-defined process for receiving and evaluating discovery. Because of these and other concerns, Germany has filed a reservation to its participation in the Hague Convention indicating that German courts “will not implement letters of request for evidence in pretrial discovery.” Even where German courts have allowed limited pretrial discovery to take place pursuant to the Hague Convention, such discovery has been limited to taking depositions and has specifically excluded documentary pretrial discovery.

2. France

France, like Germany, is a civil law nation whose discovery process is
far narrower in scope than America's. The French are "hostile to U.S.-style discovery" and the court, not the parties, controls discovery in French legal proceedings. French litigants are expected to have most of the evidence they will use in their possession before proceedings begin. Discovery is generally limited to evidence in the parties' possession, though a judge may summon additional witnesses and order them to provide discovery to the parties. The French discovery system is so controlled by the court that "[t]he U.S. practice of parties exchanging and responding to interrogatories, requests for production of documents . . . and depositions . . . is conceptually alien to France's civil law practice and is viewed as dangerous." 

France showed that its hostility toward U.S. discovery was more than just lip service when it enacted a blocking statute in 1980. The blocking statute does not address the § 1782 situation of U.S. litigants' wanting to use U.S. discovery in a French proceeding, but instead focuses on scenarios in which litigants in a U.S. proceeding want to engage in U.S.-style discovery in France. The blocking statute does, however, illustrate that the French view their discovery system to be meaningfully different from the U.S. system, which they perceive to be uniquely intrusive. The blocking statute restricts the kinds of evidence that individuals can acquire in France for use in foreign litigation to evidence that does not "threaten French sovereignty, security or essential economic interests or public order." The statute has been interpreted by French courts to prevent French nationals faced with discovery requests from a U.S. party from complying with them. There have been few prosecutions for violating the blocking statute, but the statute's greatest impact is that it has in some

74. Id. at 105.
75. See id. at 107 (noting that French judges have "broad discretionary power" over discovery "and cannot be compelled to make any . . . orders" requested by the parties).
77. ABA SECTION OF ANTITRUST LAW, supra note 44, at 107.
78. Id. at 108 (emphases added).
80. See id.
81. Id. at 109 (quoting Law No. 80-538 of July 16, 1980) (translation based on cited author's interpretation).
82. See id. at 111 (indicating that French nationals cannot conduct U.S.-style discovery in France even if faced with an order from a U.S. court demanding such discovery).
83. Seeing American Litigation, supra note 76 (noting that the first criminal conviction for violating the blocking statute was upheld by the French supreme court in 2007).
cases caused U.S. courts to restrict the scope of discovery to more closely conform to that which would be allowed in France. 84

France’s blocking statute illustrates its concerns regarding U.S. discovery, and recent prosecutions for violating the blocking statute may alter the way U.S. courts analyze French resistance to U.S. discovery. 85 For many years, U.S. courts have held that France’s blocking statute did not justify a foreign party’s resistance to U.S. court-ordered discovery. 86 The Supreme Court’s Société Nationale Industrielle Aérospatiale v. U.S. District Court decision relied in part on the belief that the French blocking statute was a “paper tiger,” as there had not been a single conviction for violating the statute for thirty years. 87 Following Aérospatiale, many courts have used this “paper tiger” argument as a basis for requiring French parties to comply with U.S. discovery orders regardless of whether the French judiciary has approved. 88 The French supreme court’s recent decision to affirm a €10,000 fine for violating the blocking statute potentially undermines Aérospatiale’s reliance on France’s nonprosecution of blocking statute violations. 89 The decision to prosecute violations of the blocking statute is consistent with France’s growing frustration with U.S.-style discovery intruding on its judicial processes. If France continues to prosecute violators of the blocking statute, U.S. courts will need to reassess the Aérospatiale analysis, which relied on nonprosecution as indicating that France did not treat violations of the blocking statute seriously. 90 The French disdain for U.S.-style discovery has not abated and will likely only increase as the quantity and depth of international litigation increases.

87. Gottridge & Rouhette, supra note 85 (analyzing the reasoning of Aérospatiale).
88. Id. (citing In re Vivendi Universal, S.A., No. 02 Civ. 5571 (RJH) (HBP), 2006 U.S. Dist. LEXIS 85211, at *14–15 (S.D.N.Y. Nov. 13, 2006)).
89. Id.
90. Id. ("If such an argument prevails, the requesting party will find discovery in France under the Hague Convention considerably more limited, and cumbersome, than under the Federal Rules of Civil Procedure. Requests for documents may be presented to the French authorities through letters of requests issued by American courts, but French law requires that the documents requested be identified with reasonable specificity and bear a definite link to the dispute. A request for documents lacking a limitation period can be categorized as a ‘fishing expedition’ and be held invalid.").
C. THE UNITED KINGDOM

Despite also being a common law country, the United Kingdom limits discovery far more than the United States does. Recent changes in British discovery law have, however, expanded the scope of discovery. Supreme Court Order 24 governed discovery in British judicial proceedings until 1998, and restricted discovery to after the close of the pleadings stage, by which point the key issues in the case were already identified. In 1998, the newly enacted Civil Procedure Rules (“CPR”) 31 and 32 superseded Order 24 and now control modern British discovery. CPR 31.10 details the standard disclosure process, which involves the creation of lists stating whether the documents requested exist or existed. While CPR 31.3 creates a right of inspection for the requesting party, that right can be overcome if the opposing party can show that allowing inspection would be disproportionate to the issues of the case. In general, however, discovery can often be fairly broad as applied to the parties, but most cases are limited to “standard disclosure, which effectively includes only documents of direct relevance to the issues.”

The CPR regime has left unchanged one important feature of Order 24: discovery is essentially limited to the parties to the litigation. Under CPR 31.17, a nonparty is required to make a disclosure “only where—(a) the documents of which disclosure is sought are likely to support the case of the applicant... and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.” The scope of discovery that can be obtained from the other party to the litigation remains much broader than the materials that can be obtained from nonparties.

While British discovery law remains narrower than its American...
counterpart, the British were, for a time, unique in their acceptance of U.S. evidence for use in British proceedings. In the landmark case *South Carolina Insurance Co. v. Assurantie Maatschappij De Zeven Provincien* N.V., the House of Lords overturned two lower court decisions and held that discovery acquired for use in British proceedings did not violate British judicial sovereignty just because the evidence would not be discoverable under applicable British law. The *Assurantie* decision was under the older and more limited Order 24 discovery regime, but the House of Lords nonetheless felt that admitting discovery obtained from nonparties would not necessarily compromise the British judicial process. *Assurantie* held that in order to exclude a piece of evidence obtained in a § 1782 request, a British court must find that its admission would be “unconscionable” or “inva[de] ... a legal or equitable right” of a party in the proceeding. This holding placed a significant hurdle in front of British courts’ attempting to exclude discovery acquired under § 1782, requiring them to find that admitting the discovery would be “oppressive or vexatious or [that it would interfere] with the due process of the court.”

This high unconscionability standard was the House of Lords’ way of enforcing its belief that the domestic nondiscoverability of evidence alone is an insufficient basis for rejecting discovery acquired abroad because it felt that in many cases the discovery’s introduction would not prejudice any parties or offend the judicial sovereignty of the British courts.

While *Assurantie* is still good law in England, subsequent British decisions have expanded the criteria that can make the admission of certain evidence “unconscionable” and increased British resistance to admitting discovery acquired in the United States. In *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera*, the British courts have begun to apply a more rigorous test for the admission of § 1782 evidence, requiring a higher showing of unconscionability than *Assurantie*. This trend reflects a broader shift in British law towards a more nuanced approach to the admission of foreign evidence, taking into account the specific circumstances of each case.

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105. *Assurantie*, 1 A.C. at 41–44.

106. *Id.* at 40.

107. *Id.* at 41.

108. *Id.* at 41-44. See Chukwumerije, *supra* note 4, at 668; 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, 13 (1998) (stating that the *Assurantie* decision exemplifies “that foreign courts are increasingly recognizing that nondiscoverability under their own laws should not preclude recourse to Section 1782”).

v. PT Dharmala Sakti Sejahtera, the Commercial Court held that the admission of evidence obtained in a § 1782 request was unconscionable because the evidence was inadmissible under the CPR. The unconscionability standard has been expanded further and British courts have excluded discovery acquired abroad where its admission creates "a risk that such conduct will interfere with and prejudice preparation for the trial or the trial itself." Where the discovery is overly expensive, burdensome, or duplicative, British courts have been adamant in opposing it. Post-Assurantie jurisprudence is in line with England's decreasing tolerance for U.S. discovery, and lower British courts that actually handle discovery acquired under the U.S. system are frustrated by its breadth.

IV. THE EVOLUTION OF 28 U.S.C. § 1782 JURISPRUDENCE

Section 1782 allows district courts to "take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country" in order to ensure that the discovery produced for use in the foreign proceeding does not offend the forum country. U.S. courts have acknowledged that many of the foreign tribunals receiving discovery acquired under § 1782 are in nations with more restrictive discovery systems that are often very resistant to U.S. discovery. Thus, reconciling the interests of requesting parties and foreign tribunals is critical to § 1782 analysis because there is a real risk that other nations will find discovery acquired from the United States to be intrusive and prejudicial to their litigation processes. In their attempt to come up with efficient and accurate ways to evaluate foreign

110. Id. at 255–56 (noting that the evidence's admission "threaten[ed] to involve very wide oral depositions as well as very onerous discovery").
111. Omega Group Holdings Ltd. v. Kozeny, [2002] C.L.C. 132, 135 (Q.B. 2001) (Eng.); Ashford, supra note 34, at 110 (noting that Kozeny followed Assurantie but "restrain[ed] U.S. proceedings which sought to depose witnesses in circumstances where the same witnesses were due to tender witness statements and attend for cross-examination in the English proceedings").
112. Marcus, supra note 27, at 154 ("Even England, which has its own discovery regime, reportedly championed the inclusion of Article 23 in the Hague Convention on the Taking of Evidence as an escape valve with regard to American document discovery."); Subrin, supra note 58, at 307 (noting that the House of Lords has called the U.S. discovery process a "fishing expedition").
116. See, e.g., Bolt & Wheatley, supra note 29, at 6–10 (comparing German and American discovery laws).
receptivity, the circuits began to adopt different standards for deciding whether the foreign tribunal would be receptive to receiving discovery under § 1782. While most courts recognize the importance of not imposing evidence on a foreign tribunal when the tribunal is unreceptive, determining whether a foreign tribunal is not receptive to § 1782 discovery remains a great challenge for U.S. courts.

A. THE CIRCUIT SPLIT

Until 2004, the circuits were split and had created three primary ways of evaluating a foreign tribunal’s receptivity to § 1782 discovery assistance, adopting different approaches as to whether the evidence sought in a § 1782 request needed to be discoverable in the foreign jurisdiction. Many courts realized that defining the scope of discovery required them to impose some boundaries on the kinds of evidence that could be given to the foreign tribunal without offending it. While many different standards developed over the years, only the approaches developed by the Second and Third Circuits of rejecting a blanket discoverability standard are still valid after the Supreme Court’s decision in *Intel*.

The First and Eleventh Circuits interpreted § 1782 to require a district court to make a prima facie finding of discoverability in order for the evidence to be considered “for use in” a foreign proceeding. These courts were not using their discretion under the statute to impose this barrier to discovery, but were explicitly holding that the statute mandated that a district court considering a § 1782 request must find that the discovery requested would be discoverable under applicable foreign law. These circuits used a rule-based approach and sought to promote greater predictability and stability in § 1782 jurisprudence. The First and Eleventh Circuits found that allowing parties to introduce evidence that was undiscoverable under the foreign nation’s civil procedure allowed

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118. This is the “discoverability” standard.
120. *In re Asta Medica, S.A.*, 981 F.2d 1, 6–7 (1st Cir. 1992) (emphasizing that Congress’s intent to liberalize § 1782 did not justify allowing discovery that would infringe on the other nation’s judicial sovereignty), overruled by *Intel*, 542 U.S. 241; *Borieri v. Fiat S.P.A.*, 763 F.2d 17, 19 (1st Cir. 1985) (noting that for civil law countries with more limited discovery, U.S.-style discovery is an “affront to [a] nation’s judicial sovereignty”); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), overruled by *Intel*, 542 U.S. 241.
122. *In re Asta Medica*, 981 F.2d at 6; *In re Trin. & Tobago*, 848 F.2d at 1156 (“[T]he district court must decide whether the evidence would be discoverable in the foreign country before granting assistance.” (emphasis added)).
123. See *In re Asta Medica*, 981 F.2d at 5.
§ 1782 requestors to circumvent the foreign tribunal’s procedural rules and restrictions. The First Circuit emphasized the need to impose limits on the scope of discovery acquired for use in foreign proceedings in order to further the statute’s goals, acknowledging that the comparative breadth of U.S. discovery, when forced on unreceptive foreign tribunals, troubled and frustrated them.

A more limited view of discoverability took hold in the Fourth and Fifth Circuits. While upholding the prudence of the discoverability requirement as applied to litigants and interested parties, these circuits held that discoverability analysis was not appropriate where the foreign tribunal itself was requesting evidence from a U.S. court. These circuits distinguished the blanket discoverability requirement in the First and Eleventh Circuits, which imposed discoverability regardless of whether the requestor was an interested party or the tribunal itself. The Fourth Circuit found that because the foreign court was the “arbiter of what is discoverable under its procedural rules,” U.S. courts should give great deference to a foreign tribunal’s request. The Fifth Circuit, in In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela, made its approval for discoverability analysis as applied to litigants clear while maintaining that a finding of discoverability is not necessary where the district court is hearing a request from the foreign tribunal itself, as there are no risks of nonreceptivity or offense to the foreign tribunal. In upholding the discoverability standard as applied to litigants and interested parties, both the Fourth and Fifth Circuits emphasized the need to restrict the kinds of discovery obtained for use in

124. Id. at 6–7.
125. Id. The Asta Medica case involved patent litigation in France, Belgium, England, and the Netherlands between Pfizer and a number of European pharmaceutical companies, including Asta Medica. Id. at 2–4. Asta Medica sought discovery from Pfizer’s American employees for use in the European litigation. Id. Pfizer opposed the litigation on the basis that none of the European countries had pretrial discovery processes that would allow for the depositions of the Pfizer employees to be admitted. Id. at 3.
126. United States v. Morris (In re Letter of Request from Amtsgericht Ingolstadt, F.R.G.), 82 F.3d 590, 592 (4th Cir. 1996); In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venez., 42 F.3d 308, 310–11 (5th Cir. 1995).
127. Morris, 82 F.3d at 592. The Fourth Circuit did state that discoverability analysis addressed “persuasive” concerns without issuing a holding on whether discoverability was appropriate for private litigants. Id.
128. In re Caracas, Venez., 42 F.3d 308.
129. Id. at 310 (“The reason for this [discoverability requirement] is to avoid assisting a foreign litigant who desires to circumvent the forum nation’s discovery rules by diverting a discovery request to an American court.”).
130. Id. at 310–11.
foreign legal proceedings to ensure comity and reduce the risk of offending foreign tribunals with unwanted and unusable discovery.  

The Second, Third, and Ninth Circuits took a totally different approach, holding that a discoverability requirement was neither explicitly nor implicitly mandated by the statute’s text and that such a requirement improperly put U.S. courts in a position of interpreting foreign law. The Third Circuit in John Deere Ltd. v. Sperry Corp. found that because the statutory text was silent on the discoverability issue, at most § 1782 gave a district court the discretion to consider the receptivity and the nature of foreign proceedings on a case-by-case and nondeterminative basis. These circuits also rejected the argument from Asta Medica that a prima facie discoverability requirement was necessary to further the goals of the statute, finding instead that requiring district courts to interpret foreign discovery law poses a more significant risk of offending foreign tribunals because of the likelihood that the U.S. court will misinterpret a foreign nation’s laws.

In 1995, the Second Circuit’s decision in Euromepa S.A. v. R. Esmerian, Inc. clarified and limited the discoverability requirement further, creating a concrete standard for when a district court should evaluate foreign receptivity. Euromepa held that a district court could properly

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131. Id. at 310; Morris, 82 F.3d at 591–92.
132. The Second Circuit has come to be regarded as the most important circuit for decisions on § 1782, likely because of the large amount of international litigation flowing out of New York City. See Jay Lawrence Westbrook, International Judicial Negotiation, 38 Tex. Int’l L.J. 567, 570 (2003) (indicating the importance of the Second Circuit in advancing the modern international comity doctrine).
133. Malev Hungarian Airlines v. United Techs. Int’l Inc. (In re Malev Hungarian Airlines), 964 F.2d 97, 100 (2d Cir. 1992) ("[W]e note that district courts issuing discovery orders pursuant to 28 U.S.C. § 1782 may . . . not impose extra-statutory barriers to obtaining discovery . . . ."). See also Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 668–69 (9th Cir. 2002) ("We find nothing in the plain language or legislative history of Section 1782 . . . to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding.")., aff’d, 542 U.S. 241 (2004); John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3d Cir. 1985) ("To require that a district court undertake a more extensive inquiry into the laws of the foreign jurisdiction would seem to exceed the proper scope of section 1782.").
135. In re Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1993), overruled by Intel, 542 U.S. 241.
136. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099–1100 (2d Cir. 1995) (holding that it is inappropriate "for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law"); John Deere, 754 F.2d at 136 (holding that "federal courts should neither decide technical questions of foreign law relating to the subject-matter jurisdiction of foreign tribunals, nor determine the admissibility before such tribunals of the evidence sought").
137. Euromepa, 51 F.3d at 1100. Euromepa reversed a district court decision denying a § 1782
deny a § 1782 request where "authoritative proof" existed that the foreign tribunal would not be receptive to the requested evidence.\textsuperscript{138} Authoritative proof was limited to "a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures."\textsuperscript{139} While this standard was a marked departure from the Second Circuit's decision in \textit{Foden v. Gianoli Aldunate (In re Gianoli Aldunate)} or any prior case law,\textsuperscript{140} it nonetheless became the most popular method of evaluating foreign receptivity.\textsuperscript{141} Courts following \textit{Euromepa} have interpreted "authoritative proof" narrowly, requiring an explicit statement from the foreign tribunal stating that the specific evidence at issue is undiscoverable and would offend the tribunal.\textsuperscript{142} While \textit{Euromepa} was the standard in the Second and Third Circuits, it was not until the Supreme Court resolved the circuit split in 2004 that the authoritative proof analysis gained more widespread acceptance.

The final standard developed, whether the requested discovery would be admissible in the foreign tribunal,\textsuperscript{143} bears mentioning only because it received near-universal condemnation from the first time it was advocated. As early as 1977, courts of appeals were rejecting this standard, which called for district courts to analyze whether the discovery would be ultimately admissible under the laws of the foreign tribunal to determine request for use in French litigation. \textit{Id.} at 1102. In that litigation, "[t]he underlying dispute involve[d] a claim that [Euromepa] breached its duty as an insurance agent by failing to inform its insured, Esmerian's intermediary jewelry dealer, that a proposed gem courier was untrustworthy." \textit{Id.} at 1097. Euromepa sought to depose Esmerian, a New York jeweler, even though French judicial procedure only allowed depositions to be initiated by the court. \textit{Id.}

\textsuperscript{138} \textit{Euromepa}, 51 F.3d at 1100 (authoritative proof standard), with \textit{Intel}, 292 F.3d at 668–69 (rejecting the threshold discoverability requirement without stating when discoverability could be considered on a discretionary basis).

\textsuperscript{139} \textit{Euromepa}, 51 F.3d at 1100.


\textsuperscript{141} \textit{Euromepa}, 51 F.3d at 1100.

\textsuperscript{142} \textit{Euromepa}, 51 F.3d at 1100.


\textsuperscript{144} See, e.g., \textit{In re Michael Wilson}, 2007 U.S. Dist. LEXIS 54624, at *13 (requiring the foreign tribunal to intercede directly). See also \textit{In re Imagination Servs. Ltd.}, No. Misc. 05-89 (FB), 2005 U.S. Dist. LEXIS 17025, at *11–14 (E.D.N.Y. Aug. 15, 2005) (finding that a court's decision not to stay its proceedings pending the § 1782 matter was not authoritative proof that the court objected to the evidence). \textit{But see} Haygood, \textit{supra} note 140, at 505 n.152 (noting that the \textit{Euromepa} court found a statement by the House of Lords in a separate opinion to be sufficiently authoritative).

\textsuperscript{145} This is the "admissibility" standard.
whether the foreign tribunal would be receptive to the discovery.\textsuperscript{144} Even the First and Eleventh Circuits, which upheld the discoverability standard, felt that admissibility was an inappropriate way to evaluate § 1782 requests because it was deemed too difficult to resolve.\textsuperscript{145} By 2004, admissibility was so universally discarded as a standard for evaluating foreign receptivity that the Supreme Court did not even address its validity as a method for analyzing § 1782 requests in the \textit{Intel} opinion.

\textbf{B. \textit{Intel} Resolves the Split}

In \textit{Intel}\textsuperscript{146} the Supreme Court resolved the conflict between the circuits on the discoverability issue and fundamentally changed the way in which district courts could interpret § 1782.\textsuperscript{147} Advanced Micro Devices ("AMD") sought discovery from Intel and its corporate headquarters for use in proceedings before the European Union Competition Commission, evidence that was beyond the scope of the Commission's discovery powers.\textsuperscript{148} \textit{Intel} affirmed the Ninth Circuit's reversal of the Northern District of California's denial of AMD's § 1782 request\textsuperscript{149} and explicitly overturned \textit{Asta Medica} and its progeny.\textsuperscript{150} The Court found that discoverability was not a threshold requirement for a district court to grant a § 1782 request.\textsuperscript{151} The majority found that a district court's authorizing the discovery of materials undiscoverable in a foreign jurisdiction would not necessarily offend the foreign tribunal because the tribunal could limit the evidence's admissibility after receiving it.\textsuperscript{152}

\textsuperscript{144} \textit{In re} Request for Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, 555 F.2d 720, 723 (9th Cir. 1977). \textit{See also} John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136–37 (3d Cir. 1985).

\textsuperscript{145} \textit{In re} Asta Medica S.A., 981 F.2d 1, 7 n.6 (1st Cir. 1992), overruled by \textit{Intel Corp. v. Advanced Micro Devices, Inc.}, 542 U.S. 241 (2004); \textit{In re} Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), overruled by \textit{Intel}, 542 U.S. 241.

\textsuperscript{146} The case involved an antitrust lawsuit, filed by Advanced Micro Devices ("AMD") with the DG-Competition of the European Commission, to stop Intel from continuing to use its dominant market position to push out other microchip competitors. \textit{Intel}, 542 U.S. at 250.

\textsuperscript{147} \textit{id.} at 259–60. The decision also resolved a number of other circuit splits about the law, including what the definition of a "tribunal" is, \textit{id.} at 257–58, and how imminent a proceeding has to be to qualify as "pending," \textit{id.} at 258–59.

\textsuperscript{148} \textit{See id.} at 251.

\textsuperscript{149} \textit{id.} at 251–54.

\textsuperscript{150} \textit{id.} at 256.

\textsuperscript{151} \textit{id.} at 261–62.

\textsuperscript{152} \textit{id.} (citing \textit{In re} Bayer AG, 146 F.3d 188, 194 (3d Cir. 1998) ("[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use."); S.C. Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V., (1987) 1 A.C. 24 (H.L. 1986) (appeal taken from Eng.) (U.K.).)
The *Intel* decision is framed by Justice Ginsburg's comprehensive discussion of § 1782's legislative history. The opinion tracks the statute's evolution from Congress's initial attempts to provide assistance to foreign legal proceedings when it only allowed discovery for use in "suit[s] for the recovery of money or property depending in any court in any foreign country . . . and in which the government of such foreign country shall be a party or shall have an interest." In 1948, Congress codified § 1782, which allowed "[t]he deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country." In 1964, Congress substantially overhauled § 1782 by broadening the definition of "foreign tribunal" and allowing "any interested person" to seek discovery assistance under the statute. According to the Court, the 1964 amendments exemplified Congress's goal to broaden the statute's scope with "the twin aims of providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." The amendments did not, however, impose any requirements on the way in which the discovery process would proceed under § 1782, giving full discretion to the district court to follow either the rules of the foreign tribunal's code of procedure or the Federal Rules. Further, the Court read the statute's declaration that "[t]he [§ 1782] 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 mean that a district court is not bound by the applicable foreign law unless

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153. *Id.* at 247-49.


157. *S. REP. NO. 88-1580, at 7* (stating that the requesting party needs to be an "interested person," but need not be the tribunal itself or even a "litigant" as understood in American civil procedure).


159. *Id.* at 252 (internal quotation marks omitted). *See also* Malev Hungarian Airlines v. United Techs. Int'l Inc. (*In re Malev Hungarian Airlines*), 964 F.2d 97, 100 (2d Cir. 1992).

160. *S. REP. NO. 88-1580, at 8-9* ("It permits, but does not command, following the foreign or international practice. If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed . . . ").

the district judge feels that following such procedures would further the statute’s goals.\footnote{162}{Intel, 542 U.S. at 260.}

After determining that neither the statute’s text nor its legislative history justified a threshold discoverability requirement,\footnote{163}{Id. at 260–61.} the Court proceeded to substantively criticize the discoverability standard, citing the difficulty district courts would have determining foreign discoverability as its primary flaw.\footnote{164}{See id. at 263 (“[Section 1782] does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.”).} The Court was primarily concerned with the problems that would arise if district courts were forced to interpret foreign discovery law for the purposes of assessing discoverability and foreign receptivity.\footnote{165}{Id. at 263 n.15–16.} The Court feared that district courts would struggle to properly interpret the discovery laws of nations whose legal systems substantially differed from America’s.\footnote{166}{Id. at 263.} While the Court emphasized that discoverability cannot be properly applied as a prima facie requirement and that district courts should actively avoid engaging in discoverability analysis,\footnote{167}{Intel, 542 U.S. at 264–65 (“[T]he grounds Intel urged for categorical limitations on § 1782(a)’s scope may be relevant in determining whether a discovery order should be granted in a particular case.”).} it did leave open the possibility that district courts could assess discoverability if they were doing so under their discretionary power to evaluate foreign receptivity.\footnote{168}{Id. at 264. After Intel, some district courts have interpreted the first discretionary factor more broadly, considering “[w]hether the documents or testimony sought are within the foreign tribunal’s jurisdictional reach, and thus accessible absent § 1782 aid.” In re Microsoft Corp., 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006).}

While the Court’s view on the value of discretionary discoverability analysis was ambiguous, it unequivocally found that discoverability was not a statutory requirement in § 1782.\footnote{169}{Id. at 263.}

After striking down discoverability as a statutory barrier to taking discovery for use in a foreign proceeding, the Court suggested four discretionary factors district courts can consider when determining whether to grant a § 1782 request if the request meets all statutory requirements: (1) whether the party “from whom discovery is sought is a participant in the foreign proceeding”;\footnote{170}{Id. at 264.} (2) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court
judicial assistance”; (3) whether the request appears to be an attempt to circumvent the proof-gathering procedures of the foreign court; and (4) whether the request is overly intrusive or burdensome. The Court stressed that these factors are neither exhaustive nor mandatory and that district courts have substantial latitude in deciding whether to grant § 1782 requests if the request meets all statutory requirements. The Court did not, however, suggest any specific guidelines for how district courts should go about evaluating either the receptivity or the circumvention factors, leaving it to district courts to formulate standards under their statutorily prescribed discretionary powers.

Justice Breyer issued the sole dissent in Intel, emphasizing the injustice and foreign resentment that removing the discoverability requirement could create. Justice Breyer focused on the significant differences between American discovery and the discovery systems in most other nations and how allowing U.S. discovery to be forced on unwilling foreign tribunals was likely to offend them and prejudice their judicial processes. While supporting the liberal view of § 1782, he felt that some categorical limit had to be placed on discovery requests in “instances in which it is virtually certain that discovery (if considered case by case) would prove unjustified.” Breyer did not endorse a blanket discoverability standard, instead opting for a two-part test incorporating discoverability and the applicant’s status in the foreign proceeding. Justice Breyer’s primary concern was about invasive, harassing discovery that would add costs to the litigation but not be admissible in the foreign tribunal. He felt that relying on discretionary analysis would give district courts too much latitude and could undervalue the international judicial relations and comity that were at stake in how courts interpreted the

172. See id. at 264 (“We note below factors that bear consideration in ruling on a § 1782(a) request.”). These factors have been widely employed in the years since the Supreme Court’s decision. In re Kulzer, No. 3:09-MC-08 CAN, 2009 U.S. Dist. LEXIS 29771, at *8-9 (N.D. Ind. Apr. 8, 2009) (noting that “since Intel Corp., numerous courts, undertaking an analysis under 28 U.S.C. § 1782, have chosen to apply the factors”).
173. See Intel, 542 U.S. at 260-61. See also Patel, supra note 2, at 318-19 (contending that Intel reached the wrong conclusion because the Court’s holding left too much discretion to district courts in their analyses).
174. Intel, 542 U.S. at 267-69 (Breyer, J., dissenting) (noting the conflict the Intel opinion might create with the judicial systems of Israel and Great Britain).
175. Id. at 269.
176. Id. at 270 (“[A] court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, and (2) the discovery would not be available under domestic law in analogous circumstances.”).
177. Id. at 268-70.
V. CONTRASTING APPROACHES AFTER INTEL

While Intel admonished the circuits that used discoverability as a prima facie standard for § 1782 requests, the Supreme Court did not provide any concrete standards for solving the problem underlying the discoverability issue: how district courts should assess the receptivity of foreign tribunals. Because the Court acknowledged that the foreign tribunal’s receptivity is relevant to § 1782 analysis, yet rejected the imposition of extra-statutory tests to assess whether the foreign tribunal would want the discovery, Intel’s progeny has spawned many new and often complicated standards for evaluating foreign receptivity. The “authoritative proof” standard established in the Second Circuit’s Euromepa decision has been the most popular method for evaluating Intel’s receptivity factor, but variability in the types of evidence that have been held to be authoritative proof has created inconsistency in how § 1782 is interpreted.

This part will focus primarily on the Second Circuit’s doctrine as established in Euromepa, as this is the predominant framework for evaluating foreign receptivity post-Intel. First, Part V.A will address Euromepa’s doctrinal roots and how it was a significant departure from prior § 1782 decisions in the Second and Third Circuits. Parts V.B and C will analyze a number of post-Intel decisions applying the authoritative proof standard to illustrate how district courts have struggled to decide what constitutes authoritative proof. Part V.D discusses an unusual development in the Second Circuit, in which several judges have revived the long-dismissed foreign admissibility standard and have been applying it as a way to determine foreign receptivity. Primarily, this part will show that current § 1782 jurisprudence in the Second Circuit and beyond has become unpredictable because district courts are struggling to find accurate ways to assess foreign receptivity in a manner consistent with Intel.

178. Id. at 269–70.
179. The “receptivity” factor directly addresses this issue, while the “circumvention” factor is also relevant because the circumvention factor addresses the differences between the proof-gathering mechanisms and whether a party is trying to exploit those differences in its § 1782 request.
180. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1100 (2d Cir. 1995) (explaining that authoritative proof comes from “a forum country’s judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures”).
181. See supra note 141 and accompanying text (noting the many jurisdictions that have adopted Euromepa either implicitly or explicitly).
A. THE DOCTRINAL ORIGINS OF EUROMEPA

The foundations of Euromepra's "authoritative proof" standard lie in the Second Circuit's decision in Foden v. Gianoli Aldunate (In re Gianoli Aldunate), decided just two years earlier. In that case, the Second Circuit affirmed a district court's grant of discovery for use in a Chilean businessman's competency hearing in Santiago, Chile. The Gianoli Aldunate court explicitly rejected a discoverability requirement, finding that such a prerequisite was neither in § 1782's text nor a reasonable interpretation of Congress's intent for how the statute should be interpreted. After making this finding, the court limited its disapproval of discoverability to its use as a threshold requirement because "district judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782." The Second Circuit, in affirming the district court's grant of the § 1782 request, relied on the district judge's finding that "litigants in Chile are not prohibited from gathering evidence through methods that are lawful in the place where those methods are undertaken" and presenting such evidence in Chilean court. Euromepra narrowed Gianoli Aldunate's holding by raising the threshold for when a district court could properly consider discoverability for the purposes of deciding whether to grant a § 1782 request. The Second Circuit held that discoverability was "a factor whose relevance we have held to be quite limited under the statute" for the purposes of...
assessing foreign receptivity, and restricted discoverability inquiries to cases in which a district court was presented with “authoritative proof” of nondiscoverability and the foreign tribunal’s lack of receptivity. Euromepa found support for its holding from the Third Circuit’s John Deere decision, which distinguished § 1782’s language allowing for district courts to “take into account the nature and attitudes of the government of the country from which the request emanates” from any requirement of a threshold finding of discoverability.

While Gianoli Aldunate emphasized how discoverability could be a useful test to smoke out attempts to circumvent the foreign tribunal’s discovery limitations, Euromepa’s “authoritative proof” standard took a far less favorable view of the discoverability inquiry’s value in assessing foreign receptivity and imposed a significant barrier to district courts engaging in discretionary discoverability analysis. While the Gianoli Aldunate court reviewed and affirmed the district judge’s findings that the discovery would not offend the Chilean tribunal, the Euromepa court refused to review the district judge’s substantive decision because no authoritative proof of nondiscoverability was presented in the district court proceeding. Euromepa’s departure from Gianoli Aldunate went further, as the court held that even authoritative declarations of nonreceptivity do not always require that a district court deny a discovery request. Instead, a district court faced with such authoritative proof “would still have to

190. Id. at 1100.
192. Id. at 136 n.3 (quoting S. REP. NO. 88-1580, at 7 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788) (alteration in original omitted). Accord Cryolife, Inc. v. Tenaxis Med., Inc., No. C08-05124 HRL, 2009 U.S. Dist. LEXIS 3416, at *8–9 (N.D. Cal. Jan. 13, 2009) (comparing situations in which requests are denied “where the foreign tribunal expressly states that it does not need or want the information sought” with scenarios in which discovery is granted because parties only present expert opinions on the evidence’s discoverability or admissibility before the foreign tribunal).
193. John Deere, 754 F.2d at 136; Haygood, supra note 140, at 504–05.
194. Foden v. Gianoli Aldunate (In re Gianoli Aldunate), 3 F.3d 54, 60 (2d Cir. 1993) (noting that a discoverability requirement might aid in “preventing circumvention of foreign restrictions on discovery” but refusing to read such a requirement as mandatory under § 1782). See also Haygood, supra note 140, at 504–05 (asserting that John Deere also recognized the value of some level of discoverability analysis when evaluating whether a petitioner’s request sought to circumvent the proof-gathering rules of the host forum).
195. Gianoli Aldunate, 3 F.3d at 62; Haygood, supra note 140, at 503.
197. Id. at 1100 & nn.3–4 (noting the holding in South Carolina Insurance Co. v. Assurantie Maatschappij “De Zeven Provincien” N.V. (1987) 1 A.C. 24 (H.L. 1986) as an example of how nondiscoverability in a foreign jurisdiction does not always mean that production of that evidence would cause offense). The reference to Assurantie, when combined with the contention that foreign tribunals can simply exclude unwanted evidence, is part of the current analysis finding that district courts should strongly err on the side of granting § 1782 requests. See id. at 1101.
compare the facts of the case then currently before the court to the foreign precedent cited by the party opposing the § 1782 petition and determine whether the two contexts are sufficiently analogous to warrant a denial of discovery.\textsuperscript{198} Euromepa marked a substantial paradigm shift from prior Second Circuit precedent because of how it changed the nature of the discoverability inquiry.\textsuperscript{199} Discoverability in itself was no longer a dispositive factor in § 1782 cases; its relevance was instead restricted by the Second Circuit’s belief that discoverability was not an effective way to determine if the district court’s granting the § 1782 request would be an affront to the foreign tribunal.\textsuperscript{200} This reinterpretation limited discoverability to being a mere proxy for receptivity instead of an important stand-alone reason for granting or denying a § 1782 request.\textsuperscript{201} Coupled with Euromepa’s substantive restriction of discoverability by requiring authoritative proof, the Second Circuit’s limitations substantially reduced discoverability’s role in the foreign receptivity inquiry beyond the restrictions imposed in Gianoli Aldunate and John Deere.\textsuperscript{202}

**B. POST-INTEL DISTRICT COURT STRUGGLES APPLYING EUROMEPA**

Euromepa’s authoritative proof standard appeared to be a clear evidentiary threshold for analyzing foreign discoverability, but the subsequent jurisprudence shows that district courts have evaluated the second part of the Euromepa analysis—the comparison of the facts to the foreign precedent—inconsistently and with little regard for the importance of foreign procedural laws.

Perhaps no recent case illustrates the troubling Euromepa analysis that district courts are engaging in better than the decision in In re Servicio Pan Americano de Proteccion, C.A.,\textsuperscript{203} one of the first § 1782 cases following

\textsuperscript{198} Id. at 1100 n.4 (emphases added).
\textsuperscript{199} Id. at 1103–04 (Jacobs, J., dissenting). See also Minatec Fin. S.a.r.l. v. SI Group Inc., No. 1:08-CV-269 (LEK/RFT), 2008 U.S. Dist. LEXIS 63802, at *21–22 (N.D.N.Y. Aug. 18, 2008) (noting that Euromepa is a more taxing standard than Intel calls for).
\textsuperscript{200} Euromepa, 51 F.3d at 1099.
\textsuperscript{201} Compare Haygood, supra note 140, at 504–05 (noting that Euromepa limited the relevancy of a nondiscoverability finding with respect to a § 1782 request), with In re Asta Medica, S.A., 981 F.2d 1, 6–7 (1st Cir. 1992) (finding that a determination of nondiscoverability alone was sufficient to deny the request without any further receptivity inquiry), overruled by Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
\textsuperscript{202} The Third Circuit’s affirmation of its John Deere decision in In re Bayer AG, 146 F.3d 188, 192–95 (3d Cir. 1998), does not mention Euromepa’s authoritative proof restriction.
\textsuperscript{203} In re Servicio Pan Americano de Proteccion, C.A., 354 F. Supp. 2d 269 (S.D.N.Y 2004).
In that case, HSBC Bank contracted for Pan Americano to deliver $5.6 million to two Venezuelan banks. After HSBC filed suit because a Pan Americano employee allegedly stole the money, Pan Americano sought discovery of documents in New York City detailing whether HSBC’s loss was insured. In Venezuela, a party whose loss is compensated by insurance lacks standing to sue, so whether HSBC was insured was central to Pan Americano’s defenses. During the § 1782 proceedings before the Southern District of New York, Pan Americano admitted that it would be unable to obtain any documents about HSBC’s insurance status under Venezuela’s rules of civil procedure. This was primarily because of a “technical peculiarity” of Venezuelan discovery, a law forbidding a party from obtaining copies of insurance documentation unless the requestor had “evidence that specific documents related to [the insured’s] hypothetical coverage and payment actually existed.” Both parties also introduced experts in Venezuelan law; Pan Americano’s expert asserted that Venezuela’s procedural laws would preclude the insurance discovery from ever being admitted in court, while HSBC’s expert claimed that the evidence could possibly be admitted.

The district court ruled in favor of Pan Americano’s § 1782 motion, finding that the importance of the information to its defenses justified allowing the discovery and that there was no authoritative proof that the Venezuelan court was unreceptive. Without assessing the opinions of the parties’ competing experts on Venezuelan law, the court found that providing the discovery would promote the twin aims of the statute—to

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204. Id. at 270.
205. Id. at 271 (HSBC sued in Venezuelan civil court).
206. Id. at 272.
207. Id.
208. Id.
209. Id. “According to HSBC’s own expert, Article 436 of the Venezuelan Code of Civil Procedure requires that a party already have a document, or knowledge of the data contained in the document, in order to obtain it from another party.” Id.
210. Id. at 271 n.1, 272 & n.2.
211. Id. at 272–73.
212. Id. at 272 n.2. While the district court held otherwise, it seems that a blanket rule forbidding a party from obtaining insurance evidence could arguably be a “legislative declaration” meeting the Euromepa standard. This possibility has not yet been discussed in the courts, as most judges seem to want a rejection specific to the evidence requested, not a general prohibition. Compare Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84–85 (2d Cir. 2004) (refusing a § 1782 request because the applicable foreign government made specific requests to the district court judge that the discovery request be denied), with Esses v. Hanania (In re Esses), 101 F.3d 873, 876–77 (2d Cir. 1996) (affirming the approval of a § 1782 request where the opposing party failed to provide evidence that the discovery request in that specific case would “trench[] upon foreign law or . . . otherwise interfer[e] with the [foreign] proceedings”).
“provide ‘efficient means of assistance to participants in international litigation in our federal courts’ and to encourage ‘foreign countries by example to provide similar means of assistance to our courts’”—because it could allow the suit to be quickly disposed of if Pan Americano discovered evidence that HSBC’s loss was insured.213 Furthermore, the district court concluded that Venezuela’s proceedings “do not appear to differ in most respects from analogous legal proceedings in the United States, in which the discovery Pan Americano is seeking would be readily available.”214 In determining that Pan Americano was not seeking to circumvent Venezuela’s rule restricting a party’s access to insurance information, “[t]he court instead underst[ood] Pan Americano’s application as a reasonable effort to overcome a technical limitation of Venezuelan discovery.”215

The reasoning of In re Pan Americano illustrates some important problems with Euromepa, both because of how the district court analyzed Venezuela’s discovery laws, and how it concluded that discovery would serve the twin aims of § 1782.216 Venezuela is a civil law nation,217 and its heightened requirements for discovery are commonly found in civil law systems.218 Venezuela’s reasons for imposing heightened evidentiary burdens on insurance discovery are its own; the district court’s reference to Venezuela’s discovery laws as mere “technical limitations” improperly downplays the importance of Venezuela’s policy restricting access to insurance discovery. It is unlikely that forcing the Venezuelan court to deal with evidence that by its procedural rules is both undiscoverable and inadmissible will increase Venezuela’s desire to provide judicial assistance to the United States in return. Moreover, the district court’s reliance on the “technical limitation” language is unfounded and thoroughly unexplained.


214. Id. at 274. The relevance of this statement is unclear. The court acknowledged that the discovery was not available in Venezuela, so the most feasible interpretation is that the similarity of the proceedings decreased the likelihood that the Venezuelan tribunal would be unreceptive to the discovery.

215. Id. at 274–75 (emphasis added).

216. The district judge applied the Euromepa analysis:

Because there is no “authoritative proof that [the Venezuelan] tribunal would reject [the requested] evidence obtained with the aid of Section 1782,” this Court will not speculate further regarding the complexities of Venezuelan law, or permit its decision to be influenced by a “battle-by-affidavit of international legal experts.”

Id. at 272 n.2 (quoting Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099–1100 (2d Cir. 1995)).


218. See supra text accompanying notes 48–51.
The court provided no definition of a "technical" as opposed to a presumably "substantive" limitation, and cited no cases that support a meaningful difference between technical and substantive discovery restrictions. Even if such a definitional distinction exists, the court presented no reason why a technical limitation is due any less deference than any other discovery law, or why technical discovery limitations are less important to the Venezuelan proceedings or its court's judicial sovereignty.

While the In re Pan Americano court followed the Euromepa line of reasoning that opposes "speculative forays" into foreign law, it still made largely unjustified assumptions about Venezuelan courts' receptivity to the evidence. The judge stated that Pan Americano was seeking to take discovery that "Venezuelan courts would appear to readily accept if properly authenticated." For this statement to be true, the judge must have either believed Pan Americano's assertion that authentication alone would make the evidence admissible or conducted at least some inquiry into Venezuelan law and its stance on the importance of authentication. The district court refused to decide the case based on the experts' battling affidavits on the evidence's discoverability, but simultaneously deferred to Pan Americano's expert's statements about the ultimate willingness of the Venezuelan court to admit the evidence. There is no evidence that the judge received any "authoritative" pronouncement from Venezuela saying that authentication was either an evidentiary requirement or that authentication could overcome the nondiscoverability of the evidence. As there were no other possible sources of information about authentication, the district judge either decided the case on the basis of an expert's assessment of foreign law, reliance on which he had just criticized, or engaged in exactly the type of analysis that Euromepa condemned, and granted Pan Americano's request in reliance on unfounded assumptions about the Venezuelan tribunal's receptivity.

220. Id. at 272 n.1.
221. The judge stated that he had heard no authoritative proof as defined in Euromepa. See id. at 272 n.2.
222. Id. at 271 n.1 ("According to Pan Americano, a Venezuelan court will admit foreign documents such as the insurance-related documentation it seeks into evidence only if they are legalized under the procedures established by the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents . . . ").
1. Comparing *In re Schottdorf* with *In re Microsoft Corp.*

Since *Intel* left the authoritative proof standard relatively unscathed, subsequent applications of *Euromepa* have been varied and inconsistent, both in terms of what a district court considers authoritative proof of nonreceptivity and how such authoritative proof is weighed against factors favoring the discovery request. Two cases decided in the Southern District of New York, *In re Microsoft Corp.* and *In re Gemeinshcaftspraxis Dr. Med. Schottdorf,* illustrate how differently judges are analyzing *Intel's* receptivity and circumvention factors under *Euromepa.*

In *In re Microsoft Corp.*, the European Competition Commission fined and ordered Microsoft to remedy its European Union antitrust violations by “supplying interoperability information to interested undertakings on reasonable and non-discriminatory terms.” A year later, Microsoft was charged with not complying with the Commission’s order and sought discovery to prepare for a new hearing before the Commission. Microsoft filed a discovery request before the Commission for “any material submitted by its adversaries to the Trustee and [the Commission’s technical advisers], even if such documents are not in the Commission’s file.” One day after this request, Microsoft filed an *ex parte* application with the Southern District of New York, pursuant to § 1782, seeking permission to serve subpoenas on parties “to produce . . . documents and testimony concerning communications with third parties, and documents relating to any potential violation by Microsoft of European competition laws.” Microsoft later limited its discovery somewhat and claimed that the requested documents were relevant to its defenses before the Commission because the Commission’s decisions relied in part on the recommendation of the trustee and the technical advisers in rendering its

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227. *Id.* at 190.
228. *Id.* (internal quotation marks omitted). The 2004 Commission decision established a monitoring trustee to ensure Microsoft’s compliance with its order. *Id.* Technical advisors aided the monitoring. *Id.*
229. *Id.* at 191.
enforcement.230

Judge McMahon granted the respondents’ motion to quash Microsoft’s discovery request under the discretionary analysis from Intel.231 The Commission, through a letter given to one of the respondents, stated its opposition to the district court’s granting discovery for use in its proceedings.232 The court viewed the Commission’s letter of opposition to the discovery as authoritative proof of its nonreceptivity to the evidence.233 The court found that the Commission’s contention that Microsoft’s request was “unduly intrusive and totally at odds with the European rules on access to file, [and] that disclosure of the requested documents [wa]s apt to seriously harm the Commission’s investigation process and circumvent the European rules on access to file.”234 Because there was a parallel discovery request pending before the Commission, Judge McMahon found that “if the commission granted the request, the § 1782 application would be moot, and that if it denied the request, the § 1782 application would constitute a clear circumvention of the commission’s procedures.”235 The court denied the request and concluded that “§ 1782 was not intended . . . as a vehicle to avoid or appeal an unfavorable discovery decision by the Commission.”236

In contrast to the deference Judge McMahon gave the Commission’s opposition to Microsoft’s discovery request, Judge Jones’s decision in In re Schottdorf interpreted a German court’s denial of discovery as insufficiently authoritative to deny a § 1782 request.237 In separate decisions, both the Munich Social Court and the Dusseldorf Appellate Social Court denied Schottdorf’s petition to take discovery from McKinsey Co.238 Unable to conduct discovery in Germany,239 Schottdorf sought help in the Southern District of New York, where McKinsey is headquartered.240

230. See id. at 191–92.
231. See id. at 192–96.
232. Spiro & Mogul, supra note 225.
234. Id. at 194 (internal quotation marks omitted).
237. See Spiro & Mogul, supra note 225.
238. In re Gemeinschaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *2–8 (S.D.N.Y. Dec. 29, 2006). McKinsey compiled and presented a report to the German Federal Association, which regulated insurance reimbursement. Id. at *2. “[A] new rule provided for a 20% reduction in fees for all tests conducted by a laboratory exceeding 450,000 within a quarter year.” Id. Schottdorf, a German laboratory, sued to oppose the “20% Rule” and sought discovery from McKinsey. Id.
239. Id. at *7. “[T]he Dusseldorf Court dismissed the action on several grounds, including the absence of legal privity between Schottdorf and McKinsey, and the lack of any viable tort theory to hold McKinsey accountable for Schottdorf’s alleged harm.” Id.
Judge Jones ruled against McKinsey's motion to quash Schottdorf's discovery because there was no authoritative proof that the German court would be unreceptive to the discovery despite the fact that two German courts had already denied Schottdorf's requests.240

Further, the Southern District of New York found that the German courts' decisions to deny Schottdorf's discovery did not mean that those courts would be offended by the discovery if the district court granted it.241 Both parties had German legal experts who interpreted the significance of the German courts' decisions to deny the discovery, but Judge Jones refused to substantively analyze those expert opinions, erring on the side of granting the discovery and letting the German court exclude the evidence if necessary.242 Despite acknowledging that Schottdorf's motion was a "last resort" attempt to obtain evidence that it could not acquire in Germany,243 Judge Jones felt that Schottdorf's motion was made in good faith and that the German courts could prevent any procedural problems by excluding the evidence after the fact, an argument that district courts have often relied on when granting § 1782 requests in the face of opposition from the foreign tribunal.244

In re Microsoft Corp. and In re Schottdorf illustrate the problem that district courts have interpreting the decisions of foreign tribunals. Since § 1782 applications often occur when the foreign tribunal denies or significantly limits the discovery available to the requesting party, district judges must decide whether the foreign court's denial or limitation of discovery implies hostility to accepting similar evidence obtained through U.S. discovery. The primary disagreement in the two prior cases is whether a foreign court's ability to order discovery coupled with a decision not to order such discovery illustrates opposition to the evidence.245 While these two decisions do not answer how district courts interpret foreign discovery

240. Id. at *21–23, *28 ("[P]roof resting on equivocal interpretations of foreign policy or law generally provides an insufficient basis to deny discovery.").


244. In re Schottdorf, 2006 U.S. Dist. LEXIS 94161, at *24–25. See also Cryolife, 2009 U.S. Dist. LEXIS 3416, at *9 ("If the German court decides that it does not need or want the discovery sought, it no doubt has the authority to exclude the material from evidence.").

245. Spiro & Mogul, supra note 225.
rulings, they illustrate the difficulty that district courts have in analyzing foreign decisions and determining whether they are “authoritative proof” under Euromepa.

2. The Close Case of In re Imanagment

In In re Imanagment Services Ltd., the Eastern District of New York faced a § 1782 request to obtain evidence for use in Russian civil litigation where the Moscow court had refused to stay its proceedings to wait for the outcome of the § 1782 proceeding.246 The Bank of New York (“BNY”), opposing the § 1782 request, introduced the testimony of an expert on Russian procedural law, who stated that a Russian court would not admit the evidence.247 Imanagment, knowing the Russian rules of civil procedure, had not attempted to conduct discovery in Russia and filed a request in the United States first.248 It presented its own expert, who contended that such evidence would be admissible at the Russian court’s discretion.249 The district court also received a translation of the Russian court’s response to Imanagment’s motion to stay its proceedings to await the outcome of the § 1782 case, which “refused to stay the Russian proceedings because, pursuant to Russian procedural rules, a transcript of witness testimony obtained without an order from the Russian court may not ‘serve as due evidence.’”250

The district court, after finding that Imanagment’s request met all statutory requirements of § 1782, ruled against BNY’s motion to prevent the discovery process from continuing.251 The court opined that the Russian court’s ruling and accompanying statement were insufficiently authoritative to meet the Euromepa standard,252 while at the same time conceding that the Russian court’s declaration “more closely approximates the type of ‘authoritative proof’ regarding receptivity to evidence” that the court

247. Id. at *3 (“[T]he court will not accept the written testimony of a person residing outside the Russian Federation, except pursuant to an order issued by the Russian court.”).
248. Id. at *17. Other courts have commented that the failure to avail oneself of the foreign discovery process may be evidence of an attempt to circumvent that process, especially where there is evidence that the information sought in the § 1782 request is available through the foreign discovery process. See In re Fischer Advanced Composite Components AG, No. C08-1512RSM, 2008 U.S. Dist. LEXIS 103220, at *11 (W.D. Wash. Dec. 11, 2008).
250. Id. at *4 (emphasis added).
251. Id. at *22–23.
252. Id. at *13–14.
should consider in its discretionary analysis.\textsuperscript{253} The court distinguished the Russian court’s clear statement that the depositions cannot serve as evidence in its proceedings by favoring Imanagement’s contention that it intended to use the discovery only as a basis to identify other admissible documents.\textsuperscript{254} Finding no authoritative proof rejecting the use of the transcript testimonies specifically to identify possibly admissible evidence, the district court granted the § 1782 request. Further, it found no evidence of nonreceptivity or an attempt by Imanagement to circumvent Russian procedural rules.

The \textit{In re Imanagement} court faced a clearer and more specific statement of opposition from the foreign tribunal than the Southern District courts did in \textit{In re Pan Americano} and \textit{In re Schottdorf}. The Russian court had not denied Imanagement the discovery because Imanagement never tried to use the Russian discovery process, but had instead commented on its unwillingness to wait for the § 1782 proceeding to finish precisely because of the evidence’s inadmissibility. By its ruling and response to the Russian court’s statement, the Eastern District court in \textit{In re Imanagement} signaled that foreign tribunals have to be very careful, forceful, and particular when they react to § 1782 proceedings. The \textit{In re Imanagement} court acknowledged that the Russian court’s statement was essentially authoritative proof, but ordered the discovery anyway because Imanagement claimed it would be using the discovery only to find other potentially admissible evidence—a use not explicitly mentioned or prohibited in the Russian court order. Thus, \textit{In re Imanagement} takes \textit{In re Pan Americano} and \textit{In re Schottdorf}’s analyses of § 1782 further by finding that not only does the foreign court have to make specific statements rejecting the kind of evidence the moving party wants to discover, but also that the foreign tribunal must state that it is not receptive to any foreseeable use of the evidence. Since there is no requirement that a party first seek the discovery abroad,\textsuperscript{255} a foreign court not familiar with the discovery request may be hard pressed to predict all possible uses for evidence that it does not know about yet.

3. More Surprises in the Second Circuit: Admissibility Reborn?

While the inconsistent and often contradictory decisions in the Second

\textsuperscript{253} Id. at *14.

\textsuperscript{254} Id. at *14–15.

\textsuperscript{255} This is called a “quasi-exhaustion requirement” and has been rejected as a threshold standard in cases in which it has been proposed. \textit{E.g.}, Malev Hungarian Airlines v. United Techs. Int’l Inc. (\textit{In re Malev Hungarian Airlines}), 964 F.2d 97, 100 (2d Cir. 1992).
Circuit following Intel are troubling, there is no phenomenon more surprising than the revival of admissibility as a legitimate factor in § 1782 analysis. After lying unused for decades after its universal rejection,256 the admissibility standard was reborn in the Southern District of New York when District Judge Chin257 used it as a tool for analyzing foreign receptivity in In re Grupo Qumma, S.A. de C.V.258

As in In re PanAmericano, the In re Grupo Qumma court rejected both discoverability and admissibility as threshold standards,259 but found that “the admissibility of the evidence in the Mexican proceedings is a relevant consideration” for assessing the foreign tribunal’s receptivity.260 The district court was faced with a request for discovery for use in Mexican litigation and was, as in many § 1782 cases, bombarded with battling affidavits from experts in Mexican law.261 The district court took the novel step of applying Euromepa’s authoritative proof standard to admissibility analysis. The court focused on a ruling from the Mexican court stating, among other things, “that the evidence period to proffer evidence in this current proceedings [sic] expired and that the sole and exclusive missing evidence to be proffered is the foreign testimonial.”262 The court, however, found such proof lacking because it found the ruling to be difficult to understand and not authoritative.263

The admissibility analysis in In re Grupo Qumma was quite limited, and the court found it improper to deny a § 1782 request without authoritative proof of inadmissibility, believing that the Mexican court

256. See In re Asta Medica, S.A., 981 F.2d 1, 7 & n.6 (1st Cir. 1992) (rejecting an admissibility requirement while upholding discoverability on the grounds that ultimate admissibility was often too difficult for U.S. courts to determine and therefore beyond their province), overruled on other grounds by Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004); John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3d Cir. 1985); In re Request for Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, 555 F.2d 720, 723 (9th Cir. 1977).
257. Judge Denny Chin’s decision to employ the “admissibility” test may have a significant impact because he has been confirmed to fill Justice Sotomayor’s vacant seat on the Second Circuit. See Hurdles Loom for Obama’s Choice for Appeals Court, BOSTON GLOBE, May 14, 2010, at 8.
259. Id. at *5, 6 n.1.
260. Id. at *7. See also In re Imanagement Servs. Ltd., No. Misc. 05-89 (FB), 2005 U.S. Dist. LEXIS 17025, at *10 (E.D.N.Y. Aug. 16, 2005) (noting that although “the admissibility of evidence is not a statutory barrier to the authorization of discovery assistance under § 1782, it may appropriately be considered by the district court in determining whether to exercise its discretion”).
262. Id. at *7–8 (internal quotation marks omitted). The “foreign evidence” at issue was not the discovery at issue in the § 1782 proceeding, but was “limited to two depositions on written questions” being conducted in Mexico. Id. at *8 (internal quotation marks omitted).
263. Id. at *8.
should be the final arbiter of admissibility unless such proof was available. After *In re Grupo Qumma*, the use of admissibility as a way to evaluate foreign receptivity increased in the Second Circuit. Both *In re Imanagement* and *In re Schottdorf* cited admissibility as an important consideration in determining foreign receptivity, though neither engaged in a particularly deep discussion of the standard. These courts have applied the authoritative proof standard in evaluating admissibility, and no court applying the standard has denied a § 1782 request to this point.

For now, admissibility has appeared in only a handful of cases in the Second Circuit, but its resurrection is surprising because most criticisms of the admissibility standard are substantive and applicable regardless of whether admissibility is a discretionary or mandatory standard. Judge Denlow of the Northern District of Illinois offered lucid criticism of foreign admissibility in his opinion in *Fleischmann v. McDonald's Corp.*, contending that Intel's reasons for opposing discoverability were as applicable, if not more applicable, to admissibility. Judge Denlow reviewed the case law and found two substantive criticisms of admissibility: (1) that some of the proceedings included in § 1782 necessarily require the use of inadmissible materials and (2) that U.S. courts should avoid substantive interpretations of foreign law. These criticisms apply regardless of whether judges are evaluating admissibility as a discretionary factor or as a required prima facie issue because they are focused on the difficulty of evaluating admissibility. The notion that “American courts should avoid complex, costly, and inefficient issues such as determining the admissibility in a foreign court” is applicable when courts are engaging in discretionary admissibility analysis. Current precedent in the Second Circuit complicates the problem, as *Euromepa* calls for a judge to engage in comparative analysis, weighing the significance of a foreign declaration of nonreceptivity and the “foreign precedent cited” in determining whether

264. *Id.* at *9–10.
268. *See id.* Judge Denlow mentioned two other criticisms: that admissibility is not found in the statute and that the historical liberalization of § 1782 counsels against an admissibility analysis. *Id.*
269. *Id.* at 1028; *In re Asta Medica, S.A.*, 794 F. Supp. 442, 446 n.9 (D. Me.), rev'd on other grounds, 981 F.2d 1 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 117 F.R.D. 177, 179 (S.D. Fla. 1987).
to deny this request.\textsuperscript{270} Thus, a district court presented with proof of nonadmissibility would still have to assess whether the proof is sufficiently authoritative and whether the proof, when weighed against factors favoring the discovery, justifies denying the § 1782 request.\textsuperscript{271} Such analysis, where evidence of inadmissibility is presented, requires a district court following \textit{In re Grupo Qumma} to engage in the very substantive analysis that Judge Denlow and every circuit that has rejected the admissibility standard condemn. That district judges are engaging in the new \textit{Euromepa} comparative analysis instead of the substantive analysis that \textit{Intel} condemned is hardly reassuring, as \textit{Euromepa}'s doctrine suffers from many of the same interpretive difficulties and reliance on U.S. interpretations of foreign law that \textit{Intel} sought to eliminate.

\textbf{VI. WHY INTEL IS TO BLAME FOR THE CURRENT STATE OF § 1782 JURISPRUDENCE}

\textit{Intel} attempted to walk a fine line by acknowledging the importance of foreign receptivity in § 1782 analysis while at the same time instructing lower courts to avoid substantive analysis of foreign law. To date, \textit{Intel} has been generally viewed favorably in academia.\textsuperscript{272} Most criticism that has arisen has been limited to support for reinstating the discoverability standard.\textsuperscript{273} Despite its good intentions, \textit{Intel}'s fundamental flaw is that it provided no functional guidance on how district courts should evaluate foreign receptivity as compared to the other discretionary factors. The Supreme Court's attempt to allow receptivity analysis without substantive assessments of foreign law has created three related but distinct problems: (1) \textit{Intel}'s ruling allowing district courts to use discoverability as a discretionary factor for evaluating foreign receptivity leaves in place most of the problems of threshold discoverability analysis; (2) \textit{Intel} kept in place the Second Circuit's problematic \textit{Euromepa} standard for evaluating § 1782 requests, which has spawned a number of unpredictable standards of evaluating foreign receptivity that are both inaccurate and difficult to

\textsuperscript{270} Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1100 & n.4 (2d Cir. 1995).  
\textsuperscript{271} Id. There is another potential problem, which is that the admissibility standard is completely inconsistent with the view from \textit{John Deere} and other courts that the foreign tribunal should be the ultimate arbiter of admissibility. Under \textit{Euromepa}, authoritative proof can come from any number of sources, "judicial, executive or legislative." \textit{Id.} at 1100. This opens up the possibility that an authoritative statement from a legislative or executive source could be used to deny a § 1782 request and thus deny the foreign tribunal the opportunity to be the ultimate arbiter of admissibility. \textit{See id.} at 1100 & n.4.  
\textsuperscript{272} \textit{See} Chukwumerije, \textit{supra} note 4, at 684–85; Smit, \textit{supra} note 4, at 298, 332 (predicting \textit{Intel}'s outcome and agreeing with it); Zabbo, \textit{supra} note 4, at 154–55.  
\textsuperscript{273} Patel, \textit{supra} note 2, at 318.
assess; and (3) Intel downplayed the importance of foreign receptivity and imposed too strong a presumption in favor of granting § 1782 requests, generating § 1782 decisions that are likely to offend foreign tribunals.

A. POST-INTEL FOREIGN RECEPTIVITY ANALYSIS POSES THE SAME PROBLEMS AS A THRESHOLD DISCOVERABILITY REQUIREMENT

The Intel Court, while condemning district courts that used discoverability as an extra-statutory barrier to § 1782 requests, stated that discoverability could have a place in the discretionary analysis of foreign receptivity. 274 This statement, while opening the door for discretionary discoverability analysis, is at odds with the Court’s citation of the Assurantie decision to support the idea that nondiscoverability does not mean that the foreign tribunal is unreceptive to the discovery. 275 It is perplexing that the Court would spend significant time substantively criticizing how difficult discoverability is to determine and how it is not a good gauge of foreign receptivity only to bless its use in discretionary foreign receptivity analysis. The Court’s decision to favor discretionary analysis makes little sense because it suffers the same problems as mandatory discoverability analysis and, according to the Court, is not an accurate way to evaluate foreign receptivity. 276 When combined with a lack of guidance about how district courts should evaluate foreign receptivity, Intel’s ambiguity on the validity of discoverability analysis has caused district courts, in their search for effective ways to evaluate the Intel factors, to revive previously condemned standards for evaluating receptivity.

274. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004) ("[T]he grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case.").

275. These statements are perhaps not totally contradictory, but they do seem to reflect opposing policy goals. On the one hand, the Court cites Assurantie in order to minimize discoverability’s importance, thus justifying striking it down as a statutory barrier. Id. at 261–62. If the Court is correct that nondiscoverability does not necessarily evidence that the foreign tribunal is unreceptive to the discovery, the Court’s decision to bless the use of discoverability in discretionary analysis is puzzling when combined with the Court’s substantive criticisms about the difficulty of discoverability analysis. See id. at 263–64.

276. Id. at 262. The Court took it further by stating that § 1782 is designed to be used precisely in cases in which the discovery sought could not be obtained in the foreign tribunal. The Court stated:

When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless. The rule in that situation would serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.

Id.
Intel's distinction between discretionary discoverability analysis and statutorily required discoverability analysis is based on the incorrect premise that district courts can correctly identify when discoverability is a good measure of foreign receptivity. The Court recognized the importance of foreign receptivity by having two of the four discretionary factors address the relationship between § 1782 and foreign discovery laws. While finding that foreign receptivity is important to § 1782 analysis, Intel provided no concrete guidelines for how district courts should evaluate it. Nevertheless, it conceded that a court may look to foreign discoverability or other standards the judge feels are a good measure of receptivity. When district courts have not had the benefit of authoritative declarations of nonreceptivity, they have struggled to analyze foreign laws and judicial proclamations. When there is no authoritative proof of nonreceptivity, district courts seem to give up trying to assess whether the foreign tribunal would be offended by the discovery, contending that it is too difficult to ascertain receptivity and that engaging in such analysis risks offending the foreign tribunal more than just granting the request and allowing the foreign tribunal to exclude the evidence if it wants to do so.

Because of Intel's lack of guidance and its blessing for discretionary analysis, district court evaluations of foreign receptivity have become more

277. The fourth factor, whether the request is "unduly intrusive or burdensome," is more of an equitable "catch all" than a concrete factor to be assessed. See id. at 265. Therefore, it is fair to conclude that foreign receptivity is ostensibly the most important factor in deciding a § 1782 request. In most cases, the "burdenomeness" factor will cause the court to limit the scope of discovery, not to forbid it altogether. See, e.g., Cryolife, Inc. v. Tenaxis Med., Inc., No. C08-05124 HRL, 2009 U.S. Dist. LEXIS 3416, at *12–14 (N.D. Cal. Jan. 13, 2009) ("trimming" a § 1782 request found to be unduly burdensome). But see In re Marano, No. CV-09-08002-MISC-DLJ, 2009 U.S. Dist. LEXIS 20060, at *8–10 (N.D. Cal. Feb. 25, 2009) (using the "burdensome" factor to deny a § 1782 request altogether).


279. See Cryolife, 2009 U.S. Dist. LEXIS 3416, at *10–12; In re Michael Wilson, 2007 U.S. Dist. LEXIS 54624, at *12–13 ("Absent the foreign tribunals' intercession in this case, this Court believes that neither court would be hostile to this discovery . . . ."); In re Schottendorf, 2006 U.S. Dist. LEXIS 94161, at *21.
complicated after Intel. Judges now not only evaluate discoverability or other standards, but also must determine to what extent their chosen standard is an accurate measure of the foreign tribunal's receptivity. Both parts of this analysis can be substantively difficult for district courts for many of the same reasons that prompted the Second and Third Circuits to restrict the importance of the discoverability requirement significantly.  

Before Intel, a district court finding that the evidence was not discoverable in the foreign tribunal denied the § 1782 request and conducted no further analysis because discoverability was considered to be the best standard for assessing both whether the foreign tribunal would be receptive and whether it would actually review the discovery.  

Now, district courts must engage in a far more complex process: choose and justify a standard that accurately assesses foreign receptivity—such as admissibility, discoverability, or some other standard—and then evaluate whether the requested discovery meets that standard, while at the same time determining whether the evidence presented about the foreign tribunal's receptivity is authoritative proof.

The need to find a proxy standard to evaluate foreign receptivity under Intel's discretionary analysis has created another significant problem that did not exist pre-Intel: district courts are now using many different standards for evaluating receptivity. Judges in the Southern District of New York have revived foreign admissibility, a standard that had been universally condemned as too substantively difficult to evaluate. In the Western District of Washington, the court used the oft-condemned "quasi-exhaustion" standard, which requires the § 1782 requestor to have first attempted to obtain the discovery in the foreign tribunal as a central part of its receptivity analysis. Despite the valid criticisms of the discoverability standard, it was at least predictable and applied uniformly, while post-Intel § 1782 requestors and foreign tribunals now face any number of standards for evaluating foreign receptivity. Foreign judges may

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280. See In re Bayer AG, 146 F.3d 188, 195 (3d Cir. 1998); Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099–1100 (2d Cir. 1995).

281. See In re Asta Medica, S.A., 981 F.2d 1, 6–7 (1st Cir. 1992), overruled by Intel, 542 U.S. 241.

282. See supra text accompanying notes 264–65.


284. See In re Bayer AG, 146 F.3d at 195–96; Euromepa, 51 F.3d at 1098.

not know what standard they have to meet to show authoritatively that they are not receptive to the U.S. discovery and may not be able to tailor their authoritative declarations properly. For example, if the foreign tribunal states that the requested discovery would be undiscoverable in the foreign tribunal and the district court feels that admissibility is the best way to evaluate foreign receptivity, the court may grant a § 1782 motion if it feels that a statement on discoverability is not authoritative proof that the foreign tribunal is unreceptive because it could admit the evidence despite its being nondiscoverable.\textsuperscript{286} Section 1782 has thus shifted from having a predictable—if flawed—prima facie standard to allowing any number of analytical tools to serve as proxies for foreign receptivity, which itself must be weighed against Intel's other discretionary factors under \textit{Euromepa}'s "comparative analysis" framework.

B. \textit{Intel} Drove District Courts to Engage in "Comparative Analysis" of Foreign Declarations, Which Has the Same Flaws as Substantive Analysis of Foreign Law

Intel's second and more fatal mistake was that it did not really force district courts to refrain from substantive analysis of foreign law, but only shifted the focus of that analysis. The Supreme Court tried to stop district courts from engaging in substantive interpretations of foreign laws in assessing foreign receptivity ("substantive analysis"), but by doing so inevitably drove them to have to interpret the significance of a foreign statute or judicial proclamation as compared to the other Intel discretionary factors ("comparative analysis"). District court judges now must make substantive assessments comparing the relative importance of foreign procedural laws with the importance of the requested discovery to the § 1782 requestor's claims.\textsuperscript{287} These judges are still making substantive assessments in the sense that they are interpreting the weight and importance of a foreign procedural law, as in \textit{In re Pan Americano}, or a judicial proclamation, as in \textit{In re Imanagement}. It is inconceivable that the Supreme Court did not foresee that "comparative analysis" would become the norm, as \textit{Euromepa} was already ten years old and explicitly called for district courts to compare the relative importance of foreign statements and

\textsuperscript{286} Because the judge's choice of a standard to evaluate foreign receptivity is under the judge's discretion, there is no guarantee that prior precedent will bind any given judge's choice.

\textsuperscript{287} \textit{Euromepa}, 51 F.3d at 1100 n.4. For an example of such analysis, see \textit{In re Servicio Pan Americano de Proteccion, C.A.}, 354 F. Supp. 2d 269, 272 (S.D.N.Y. 2004). This type of analysis is widespread, taking place in the many courts that follow \textit{Euromepa}. \textit{See supra} note 141.
proclamations with the interests of the requesting party. If the Supreme Court felt that there was some difference between substantive interpretations of foreign laws and comparative evaluations of the importance of foreign laws, it did not articulate this distinction in *Intel*.

The Supreme Court’s decision not to analyze the *Euromepa* standard is surprising because the problems *Intel* identifies in substantive analysis are just as prevalent in *Euromepa’s* comparative analysis. In both cases, the district court is in a poor position to analyze foreign law because U.S. discovery operates entirely differently from discovery in civil law nations. In the case of substantive analysis, the problem is that district courts risk misinterpreting foreign law and therefore rendering an improper decision on whether to grant the § 1782 request. In comparative analysis cases, the district courts face similar risks of misinterpretation: they must interpret the significance of a foreign declaration or procedural law, and they must also interpret the policy rationale behind the law. The analysis district judges must engage in after *Intel* is no simpler, and in many ways is more complicated and less predictable, than was the discoverability standard.

The judges in *In re Pan Americano* and *In re Imanagement*, for example, both made comparative evaluations of the presented proof of nonreceptivity, finding that the potential benefits of granting the discovery outweighed the risks of offending the foreign tribunal. In both cases, the judges referred to a foreign discovery law as a “technical limitation,” using this language to bolster their holdings that the potential for the discovery to resolve the foreign case quickly justifies giving little weight to the foreign procedural rule. These statements are the very definition of a substantive assessment: a U.S. judge is interpreting a foreign law and evaluating how important the law is based on what kind of discovery it restricts and for what reasons. Given that district court judges are

288. *Euromepa*, 51 F.3d at 1100 n.4 (“Even when such a foreign declaration exists, a district judge, in properly exercising discretion, would still have to compare the facts of the case then currently before the court to the foreign precedent cited by the party opposing the section 1782 petition and determine whether the two contexts are sufficiently analogous to warrant a denial of discovery.”).

289. The discussion of technical versus substantive discovery restrictions from *Pan Americano* is instructive. The district court classified the foreign discovery restrictions as “technical” with the result that these laws were not important enough to justify denying the discovery. See supra text accompanying notes 207–15.


291. *In re Pan Americano*, 354 F. Supp. 2d at 274–75. The *In re Imanagement* court distinguished between limitations on what kinds of discovery can be taken as a substantive restriction and limitations on whom discovery can be taken from as a technical restriction. *In re Imanagement*, 2005 U.S. Dist. LEXIS 17025, at *17–18.
admittedly not experts in foreign law, judges finding that a foreign discovery law is "technical" must rely either on expert testimony or their own interpretation of the foreign statute. Reliance on expert testimony and judicial interpretations are, however, precisely the kinds of evidence that are explicitly condemned in *Euromepa* and its progeny. The judges in *In re Imanagement* and *In re Servicio Pan Americano*, in coming to their respective conclusions about the relative unimportance of the foreign law rendering the evidence requested undiscoverable locally, relied on precisely the kinds of evidence that they criticized in making substantive analyses about whether a law is "technical" and relatively unimportant, or "substantive" and therefore deserving of deference.

C. **POST-INTER § 1782 ANALYSIS RISKS UPSETTING OTHER NATIONS' LEGAL SYSTEMS**

The Court's attempt to prevent district courts from interpreting foreign law by causing a shift from substantive to comparative analysis worsens the problems the Court sought to solve. The continued application of the *Euromepa* standard and its focus on authoritative proof and comparative analysis of that proof risks hindering the statute's goals of improving international judicial cooperation and efficiently resolving legal disputes. By no longer requiring courts to decline § 1782 requests in which parties present convincing evidence of nonreceptivity, the court risks alienating foreign tribunals by imposing evidence they find offensive on them. Many district courts have understated the risks of offending foreign tribunals by arguing that the receiving court can simply exclude the evidence. This argument does not take into account the time and expense of conducting discovery and the risk of disrupting foreign legal proceedings, and it undervalues the fact that continued application of the *Euromepa* standard will hurt international judicial cooperation and offend

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292. See supra text accompanying notes 213-16.


294. See Patel, supra note 2, at 319 (noting that a "threshold foreign discoverability requirement on all foreign litigants and interested parties" would advance the principal objectives of § 1782).

295. Id. at 319–20; Marcus, supra note 27, at 153–54 (explaining that foreign nations are frustrated with American discovery because of its extraterritorial applications that impose on their legal systems).

foreign tribunals by forcing American discovery onto unwilling foreign tribunals.

The first problem with current § 1782 jurisprudence is that it requires foreign tribunals to review generally overbroad U.S. discovery orders, which is both wasteful and inefficient.297 The brunt of the cost will be on the party opposing § 1782 assistance, who will be forced to produce substantial amounts of evidence even though there may be substantial evidence that the foreign tribunal neither wants nor is able legally to review or admit it. Even if the foreign judge does review the evidence, however, it is almost inevitable that the evidence will be beyond the narrow scope of pretrial discovery in civil law nations such as Germany and France, forcing the judge to engage in subsequent admissibility determinations. This problem is compounded by the fact that U.S. district judges generally ignore the fact that many civil law systems feature “evidentiary stages,” after which discovery issues are no longer analyzed.298 Civil law judges exercise significant control over the sequence of discovery, and due to the “eleventh hour” nature of many § 1782 requests,299 the foreign judge’s ability to resolve the case efficiently is compromised if the discovery is provided.300 Thus, foreign judges who do not suspend their proceedings to wait for the outcome of a § 1782 case risk having unusable evidence thrust on them at a stage in their proceedings in which it is inappropriate under their procedural rules to analyze its discoverability or admissibility.301

297. See Patel, supra note 2, at 322.
298. In re Servicio Pan Americano de Proteccion, C.A., 354 F. Supp. 2d 269, 272 (S.D.N.Y. 2004) (noting that the Venezuelan proceedings had not yet progressed to the “evidentiary stage”). See also In re Fischer Advanced Composite Components AG, No. C08-1512, 2008 U.S. Dist. LEXIS 103220, at ¶11 (W.D. Wash. Dec. 11, 2008) (focusing on another timing problem: the request was made too early, before British courts could conduct discovery); In re Digitechnic, No. C07-414-ICC, 2007 U.S. Dist. LEXIS 33708, at ¶13 (W.D. Wash. May 8, 2007) (finding that Digitechnic’s failure to seek discovery until a “late stage” of French litigation was indicative of an attempt to circumvent French discovery laws); In re Schmitz, 259 F. Supp. 2d 294, 300 (S.D.N.Y. 2003) (holding that the court was justified in denying a § 1782 request where it was made at a time when the discovery phase in the foreign proceeding had not yet completed).
299. See, e.g., In re Digitechnic, 2007 U.S. Dist. LEXIS 33708, at *3, *13 (describing an “eleventh-hour discovery application” made a mere five days before its French appeal brief was due). There are other issues that arise in § 1782 requests. See, e.g., In re Kulzer, No. 3:09-MC-08 CAN, 2009 U.S. Dist. LEXIS 29771, at *12–13 (N.D. Ind. Apr. 8, 2009) (noting that a discovery request was filed too early, before the defendants in the German action had even received notice of the complaint); In re Microsoft Corp., 428 F. Supp. 2d 188, 195 (S.D.N.Y. 2006) (focusing on the improper timing of Microsoft’s request).
300. See Langbein, supra note 50, at 830–31 (describing the importance of a civil law judge’s control over the sequence of discovery and that civil law judges like to resolve cases with as little discovery as possible).
301. See In re Imanagement, 2005 U.S. Dist. LEXIS 17025, at *4, *22–23. In In re Imanagement, a Russian court refused to stay its proceedings to wait for the results of a § 1782 proceeding. Id. at *4.
Instead of engaging in a pointed analysis to ensure that the discovery provided to the foreign tribunal will be usable and timely provided, district courts impose a substantial burden on foreign tribunals to parse through unfamiliar discovery and engage in time-consuming and expensive admissibility proceedings.\footnote{2010}{

A second risk associated with Intel's implicit blessing for the comparative analysis used in \textit{Euromepa} is that some foreign tribunals may lack the resources to intercede in § 1782 matters. Authoritative proof under \textit{Euromepa} requires a direct statement from the foreign tribunal stating its nonreceptivity to the particular discovery being requested.\footnote{302} Applying the authoritative proof standard, one district court concluded that "[a]bsent the foreign tribunals' intercession in this case, this Court believes that neither [foreign] court would be hostile to this discovery."\footnote{304} The burden of this requirement is heightened by the lack of a statutory quasi-exhaustion requirement, meaning that a § 1782 requestor need not seek the discovery in the foreign tribunal prior to requesting assistance in a U.S. district court.\footnote{305} Thus, unless the foreign tribunal has the resources to monitor the parties' activities thoroughly and to quickly craft a very specific and authoritative response, it may be unable to act in time to inform the U.S. court of its nonreceptivity.\footnote{306} The presumption in favor of granting § 1782 requests is so strong that foreign tribunals may need to deliver authoritative declarations stating not only that the tribunal is unreceptive to the evidence, but also that it is unreceptive to any potential uses of the evidence, as
happened in *In re Imanagement*. Combined with most courts’ rejection of a quasi-exhaustion requirement, *Euromepa*’s high evidentiary standard imposes a substantial and unjustified burden on foreign tribunals to both predict the nature and scope of discovery that a party may request and quickly prepare a forceful and specific response to it.

The third problem is that many countries with dependent relationships with the United States will be disinclined to reject discovery orders from American courts. Countries that rely on U.S. aid or military support will perceive pressure to acquiesce to U.S. judicial requests, especially in perceptually important cases, even if the United States does not exercise such pressure. If a foreign tribunal opposes the evidence but withholds its objection, granting the § 1782 request hurts international comity and will cause “[r]esentment[,] . . . and those countries may retaliate by withholding cooperation in other matters.” Thus, the lack of an authoritative statement from the foreign tribunal may not mean that the tribunal approves of the discovery; the foreign court may just feel that opposing the discovery order will cause international judicial tension. This problem is compounded because in most cases, the foreign tribunal whose receptivity matters is not a high court, but a trial court that may feel it lacks the clout to oppose the United States or to embroil itself in a potentially politically charged situation. In this case, granting a § 1782 request would go against one of the “twin aims” of fostering an international judicial relationship in which foreign tribunals will assist U.S. courts in doing discovery abroad, by imposing discovery on unwilling foreign tribunals.

Lastly, it is necessary to address many courts’ questionable reliance on the *Assurantie* decision, which has been the most common citation supporting that nondiscourability is not evidence of a lack of foreign receptivity. Courts citing *Assurantie* have failed to note that more recent British courts have taken a broad view of *Assurantie*’s “unconscionability” standard, undercutting the *Intel* interpretation. If, as in *Bankers Trust*,

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307. *Id. Accord In re Michael Wilson*, 2007 U.S. Dist. LEXIS 54624, at *13 (requiring the foreign tribunal to intercede directly to show nonreceptivity).
309. See *id.*
310. *Id.*
proof of inadmissibility meets the unconscionability standard, then the introduction of inadmissible evidence under § 1782 would be an "affront" to British courts. More importantly, because the United Kingdom's discovery system resembles America's, it is less likely that its legal system will be offended by receiving U.S.-style discovery. It is inappropriate for courts to infer that England's more accommodating view of U.S. discovery is shared by civil law nations, who have made their disdain for U.S. discovery far clearer by enacting blocking statutes and responding to many § 1782 requests with a wide variety of negative responses.

VII. IN SEARCH OF SOLUTIONS

Possible solutions to the troubling state of § 1782 jurisprudence come in two varieties: judicial or legislative. Judicial solutions focus on creating standards to evaluate foreign receptivity that both reflect the feelings of the foreign court and which district courts can apply consistently and accurately. Some suggested solutions include a return to the discoverability standard, or to have Congress amend § 1782 to add some additional statutory protections. It is highly unlikely that § 1782 will ever be interpreted to have a threshold discoverability requirement after the Supreme Court's 7-1 decision in Intel. Coupled with the authoritative proof standard’s dominant position among the analytical methods for evaluating § 1782 requests, discoverability as a threshold barrier to foreign judicial assistance is dead. Because there have not been any substantial changes to the statute in recent decades, courts have crafted their own ways of evaluating receptivity, some of which may represent good ways to avoid some of the problems plaguing post-Intel jurisprudence.

A. IN RE DIGITECHNIC: REVIVING QUASI-EXHAUSTION

Judge Coughenour's opinion in In re Digitechnic used a quasi-
exhaustion requirement to evaluate whether a § 1782 requestor was attempting to circumvent the foreign tribunal’s discovery procedures.\textsuperscript{319} The quasi-exhaustion analysis was admittedly within the discretionary confines of \textit{Intel}, but marked the revival of a standard unused since the Second Circuit condemned it in \textit{Malev Hungarian Airlines v. United Technologies International Inc. (In re Malev Hungarian Airlines)}.\textsuperscript{320} Judge Coughenour interpreted Digitechnic’s decision not to seek discovery in France before filing a § 1782 request as a sign of its attempt to avoid France’s more stringent discovery requirements.\textsuperscript{321} The judge was not convinced “that Digitechnic [could not] obtain any of the discovery it [sought]... via French discovery procedures. More importantly, Digitechnic ha[d] not even \textit{tried} to obtain any of the discovery sought ... by way of French discovery tools.”\textsuperscript{322} Combined with the fact that the French litigation was at a late stage, Judge Coughenour interpreted Digitechnic’s not seeking discovery in France and petitioning for assistance under § 1782 as a clear attempt to circumvent the French court’s control over the discovery in the case.

B. QUASI-EXHAUSTION: A MODEST SOLUTION

Imposing a quasi-exhaustion requirement on § 1782 requestors who have access to the foreign tribunal’s discovery processes would be an efficient and simple way to decrease the risk of offending foreign tribunals. A quasi-exhaustion requirement would improve current § 1782


\textsuperscript{320} Malev Hungarian Airlines v. United Techs. Int’l Inc. (\textit{In re Malev Hungarian Airlines}), 964 F.2d 97, 100 (2d Cir. 1992). \textit{Accord Marubeni Am. Corp. v. LBA Y.K.}, 335 F. App’x 95, 97–98 (2d Cir. 2009) (affirming that there is no quasi-exhaustion requirement).

\textsuperscript{321} \textit{In re Digitechnic}, 2007 U.S. Dist. LEXIS 33708, at *11–13 (applying something similar to a quasi-exhaustion requirement as a way to test the \textit{Intel} “circumvention” factor). \textit{Accord Marubeni}, 335 F. App’x at 97–98 (affirming the district court’s refusal to impose an exhaustion requirement as a way to test the “circumvention” factor, as proposed by the attorney for the responding party).

\textsuperscript{322} \textit{In re Digitechnic}, 2007 U.S. Dist. LEXIS 33708, at *10. \textit{Accord In re Kulzer}, No. 3:09-MC-08 CAN, 2009 U.S. Dist. LEXIS 29771, at *12–13 (N.D. Ind. Apr. 8, 2009) (finding that although there is no exhaustion requirement in the statute, requesting discovery in a U.S. court before other parties in a German action had even been served with a complaint evidenced the requestor’s attempt to circumvent the German proof-gathering procedures); \textit{In re Fischer Advanced Composite Components AG}, No. C08-1512RSM, 2008 U.S. Dist. LEXIS 103220, at *11–12 (W.D. Wash. Dec. 11, 2008) (holding that the filing of a § 1782 request before the completion of the discovery process in the foreign proceeding can be dispositive as to whether a court grants or denies the request). Courts considering § 1782 requests have used the terms “quasi-exhaustion requirement” and “exhaustion requirement” interchangeably. See \textit{Malev Hungarian Airlines}, 964 F.2d at 100; \textit{In re Kulzer}, 2009 U.S. Dist. LEXIS 29771, at *12–13.
jurisprudence in three ways: (1) by giving foreign tribunals proper notice that an interested person is seeking discovery from the U.S. and allowing the tribunal to make an "authoritative" statement about their receptivity to the discovery; (2) by giving U.S. courts a standard requiring no substantive analysis to judge foreign receptivity; and (3) by reducing the likelihood that the district court will order overbroad or unnecessary discovery. The requirement would be applied so as to give the foreign tribunal reasonable time to decide whether or not to grant the discovery and give reasons for its decision.

The quasi-exhaustion requirement would be a good step toward solving the problem of foreign tribunals' not having proper notice that they may be the recipients of U.S.-style discovery. Because of the high standard many courts, most notably the Second Circuit, require for a foreign statement to be authoritative proof, many foreign tribunals cannot meet this burden because they do not know the exact scope of discovery the § 1782 requestor is seeking. The difficulty of making an authoritative statement without any notice of the discovery's scope is worsened by the fact that many § 1782 requests are filed at late stages in the foreign litigation. Requiring the requesting party to seek the discovery in the foreign tribunal first reduces the risk of surprise because it forces the requesting party to disclose the details of the requested discovery to the foreign tribunal.

Second, the quasi-exhaustion requirement is superior to both the threshold discoverability requirement and the current discretionary receptivity analysis because it does not require district courts to engage in any substantive analysis of foreign law. Because the quasi-exhaustion requirement gives the foreign tribunal an opportunity to render an opinion on the discovery request, the district court examining a § 1782 request will have the benefit of an authoritative statement from the foreign tribunal if the foreign tribunal wishes to provide one. Current jurisprudence requires district courts to glean receptivity from foreign discovery laws or ambivalent judicial statements, like the Russian court's decision in In re Imanagement not to wait for the conclusion of the § 1782 proceeding. Such

323. See In re Imanagement Servs. Ltd., No. Misc. 05-89 (FB), 2005 U.S. Dist. LEXIS 17025, at *4, *13–15 (E.D.N.Y. Aug. 16, 2005) (holding that a direct statement by a Russian court that the evidence sought under § 1782 would not be admissible was not authoritative proof of nonreceptivity because the moving party did not intend to use the requested discovery as evidence in the proceeding).

324. See, e.g., In re Digitelnic, 2007 U.S. Dist. LEXIS 33708, at *3, *10–11, *13 (describing an "eleventh-hour discovery application" made "a mere five days before its French appeal brief was due").

325. See, e.g., In re Fischer, 2008 U.S. Dist. LEXIS 103220, at *11–12 (questioning the § 1782 requestor's good faith in bringing the discovery request because it did not even try to seek the discovery in the foreign tribunal).
analysis is inherently imperfect and risks ordering discovery that the foreign tribunal will find unhelpful or inadmissible. Giving the foreign tribunal the first say on the discovery’s acceptability minimizes the risk that a U.S. court will order discovery that is inadmissible or unusable in the foreign proceeding. The quasi-exhaustion requirement allows district courts to avoid the analyses of foreign law that the Supreme Court felt were so "fraught with danger." 326

Lastly, the quasi-exhaustion requirement allows § 1782 discovery orders to be more cost-effective by reducing the incentive for the § 1782 requestor to seek overbroad discovery and removing the need for foreign tribunals to hold subsequent admissibility proceedings. The foreign tribunal reviewing the discovery request will be able to define the limits of acceptable discovery. Because American discovery rules are far more liberal than those of other nations, the foreign tribunal will almost certainly order more limited discovery than a U.S. court. Therefore, the quasi-exhaustion requirement requires district courts to grant § 1782 orders which do not contain extraneous materials because the foreign court will already have indicated the appropriate boundaries for discovery, making the discovery process more time- and cost-effective for both the producing party and the foreign tribunal at which the discovery will ultimately be used.

C. OVERCOMING MALEV’S CRITICISMS OF QUASI-EXHAUSTION

Because the Second Circuit struck down the quasi-exhaustion requirement in 1992, revive it requires that courts distinguish or disagree with Maiev’s criticisms. Those critiques, while strong, are primarily focused on the lack of statutory authority for imposing an extra-statutory quasi-exhaustion requirement. 327 Although this argument has been persuasive in Intel and other cases evaluating discoverability, it is not a substantive reason for rejecting the quasi-exhaustion standard. The Maiev court felt it would undermine the twin aims of the statute to impose extra-statutory barriers on § 1782, given Congress’s intention of liberalizing the statute and allowing easier access to U.S. discovery for use in foreign proceedings. 328 Implicit in this argument is the idea that extra-statutory barriers necessarily hinder the statute’s goals of providing efficient resolution to foreign litigation and encouraging international judicial

327. Maiev Hungarian Airlines, 964 F.2d at 100–02.
328. Id. at 100–01.
cooperation, but it has in fact been the lack of extra-statutory protections that has led §1782 jurisprudence down its current troubled path. Restrictions on the flow of discovery out of the United States ensure that U.S. courts are not issuing §1782 orders that impose overbroad and unusable discovery on foreign tribunals, and can further the statute’s twin aims.

Malev’s more substantive criticism of quasi-exhaustion was that the restriction would hinder international judicial cooperation. Primarily, restrictions on foreign parties seeking discovery “would undermine the policy of improving procedures for assistance to foreign and international tribunals . . . [and] undermine the policy of prompting foreign courts to act similarly based on our own generous example.”329 To say that these statements are unsupported in the opinion is generous because the Second Circuit provided no explanation of how a quasi-exhaustion requirement would hinder any of §1782’s legislative goals. To the contrary, the Malev court admitted that the district court’s application of the quasi-exhaustion standard furthered legitimate goals and that the primary problem was its nondiscretionary application.330 The Malev court also conceded that district courts retain supervisory power under Federal Rule 26(b)(2), which the court conceded would allow for the imposition of a functional quasi-exhaustion requirement under the guise of the Federal Rules:

[T]he district court could require Malev to prepare a discovery plan, make a showing that the discovery is “not obtainable from some other source that is more convenient, less burdensome, or less expensive,” such as the Hungarian court, and then require Malev to take the discovery plan before the Hungarian court for a determination as to which requests are relevant before coming to the United States district court for actual discovery.331

The Malev court’s opposition to the quasi-exhaustion requirement wilted when faced with the real policy concerns underlying U.S. discovery assistance to foreign tribunals. The criticisms of the quasi-exhaustion requirement were focused on its name and its characterization as an extra-statutory barrier to discovery while implicitly recognizing the potential value of the elements of the requirement.

329. Id. at 100.
330. Id. ("[W]e note that district courts issuing discovery orders pursuant to 28 U.S.C. § 1782 may impose conditions to minimize the compliance burdens, so long as those conditions do not impose extra-statutory barriers to obtaining discovery such as an exhaustion requirement.").
331. Id. at 102 (quoting FED. R. CIV. P. 26(b)(1)(i) (amended 2000)).
D. THE LIKELIHOOD OF A QUASI-EXHAUSTION REQUIREMENT

Despite the benefits of a quasi-exhaustion requirement, it is unlikely that a district court ruling that imposes a threshold quasi-exhaustion requirement would survive appeal. Intel’s pronouncements against extra-statutory barriers in § 1782 almost certainly apply to the quasi-exhaustion requirement. District courts have been very explicit in couching their uses of standards to evaluate receptivity in the discretionary language of Intel. The Supreme Court has essentially foreclosed the possibility of any substantial judicial change to the doctrine by frowning on the imposition of any extra-statutory barriers to § 1782 discovery assistance. Yet, the current state of § 1782 jurisprudence shows that district courts are hungry for answers and will continue to seek out new ways to measure foreign receptivity in the absence of any guidance from the Supreme Court.

Because of Intel and its progeny, courts cannot solve the fundamental problems with § 1782. Thus, the best mechanism to change § 1782 is by legislative amendment. Amending the statute to impose some requirements on the kinds of materials that can be obtained in § 1782 requests or require requestors to seek discovery in the foreign tribunal first will supersede judicial interpretations of current law and allow the statute to promote international judicial cooperation instead of hindering it. In the absence of such amendments, § 1782 jurisprudence will continue down its present path of having multiple measures of foreign receptivity and comparative analysis of foreign laws, neither of which promote the statute’s laudable twin aims.

VIII. CONCLUSION

Though § 1782 is a well-intentioned statute designed to help interested persons get access to discovery and improve relations between American and foreign judiciaries, it has been exploited by requesting parties to impose unwanted and often inadmissible discovery on foreign tribunals. The Supreme Court’s interpretation in Intel has led district courts to look for ways to evaluate foreign receptivity, creating unpredictable standards and complex, multitiered analyses. District courts, poor evaluators of foreign laws, now engage in complicated analyses of foreign declarations. The Supreme Court provided no guidance on how courts should evaluate

332. See Fleischmann v. McDonald’s Corp., 466 F. Supp. 2d 1020, 1027–28 (N.D. Ill. 2006) (applying Intel to foreign admissibility and finding that Intel’s reasoning condemns other extra-statutory barriers).
either foreign receptivity or whether a § 1782 request circumvents foreign
proof-gathering methods. District courts are likely to come up with new
ways of evaluating Intel's discretionary factors, but will continue to
struggle because § 1782 jurisprudence deemphasizes the opinions of the
foreign tribunal in favor of a mechanistic loyalty to the statute's text.

While solutions to these problems exist, it is unlikely that any of them
will be adopted any time soon. It will probably take a substantial
deterioration in international judicial relations to bring about meaningful
change. In the meantime, foreign judges will continually monitor district
court dockets to make sure they are prepared to present an authoritative
response should a party in their case petition for § 1782 assistance. Without
a quasi-exhaustion requirement, they may not know when such discovery
will be thrust on them. Further, there is a substantial likelihood that the
discovery will be far broader than what is allowable under the foreign
discovery laws, further complicating matters and making foreign judges do
more work. U.S. courts will continue to believe that foreign tribunals are
not offended by such expansive discovery, justifying such beliefs by
belittling foreign discovery laws as "technical" and not worthy of
decence. In the end, § 1782's goals of international comity and
cooporation will go unfulfilled, as U.S. judicial hubris stampedes over other
nations' legal systems.