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A COMPARATIVE LAW ANALYSIS OF U.S. JUDICIAL ASSISTANCE

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I. INTRODUCTION

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

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

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[1] Blocking statutes are enacted in many countries that impose criminal liability on residents that comply with U.S. judicial orders compelling discovery. *See generally* A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 79 -143 (1983) (presenting annotated collection of blocking statutes in English).

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

The Hague Evidence Convention governs the process by which courts in Member States can request evidence from other Member State courts by establishing a letter of request mechanism and mandating central authorities in Member States to send and receive letters of requests. Although the United States is a member of the Hague Evidence Convention, it has a separate paradigm for judicial assistance requests that exists concurrently with the Convention found at 28 U.S.C. §1782 ("§1782"). This statute substantially differs from other countries' judicial assistance schemes by allowing requests directly from "interested persons," including litigants and others, engaged in actual or potential foreign proceedings. For example, a litigant contemplating filing suit in French court who seeks information from a U.S. company or individual may petition a U.S. court with jurisdiction over the U.S. resident to compel the information. Importantly, §1782 allows individuals to directly petition U.S. courts without approval by the foreign tribunal in which the individual has instituted or is contemplating proceedings even before they have formally instituted foreign proceedings. Designed to spread U.S.-style discovery, §1782 liberally grants judicial assistance requests to interested persons, despite the fact that the discovery granted is often not allowed in the jurisdiction in which the foreign tribunal sits.

This article analyzes §1782 from a comparative point of view, and highlights problems with the statute that have become apparent when comparing the statute with its common law counterparts. I have chosen England and Canada as comparative jurisdictions because they are common law jurisdictions with at least some pre-trial discovery, judicial assistance statutes, and developed case law regarding these issues. As will be seen, even these close cousins have vastly different pre-trial discovery standards and judicial assistance schemes.

Section II compares the U.S. discovery system with Canada and England's discovery systems, illustrates the U.S.'s comparatively broad relevance standard and liberal use of several pre-trial discovery methods, and discusses the resulting global hostility toward U.S. discovery. It also discusses the policy considerations that underlie discovery systems, and evidence systems without pre-trial discovery, including efficiency, the quest for truth, cost, and privacy. Section III then analyzes §1782's history from its inception and subsequent amendments to the landmark Supreme Court case in 2004, *Intel v. Advanced Micro Devices*,[3] to post-*Intel* case law. This section discusses the evolution of the foreign discoverability requirement that arose in pre-*Intel* case law and was conclusively abolished in *Intel*, and analyzes trends in post-*Intel* case law, which has mushroomed substantially in the last three years. Section IV then looks at Canada's and England's judicial assistance statutes, and emphasizes those countries' domestic discoverability requirements based largely out of defensive postures against U.S. requests for assistance. This section also analyzes these courts'

[3] 542 U.S. 241 (2004).

insistence that requests come solely from tribunals themselves, as opposed to litigants or other persons.

Section V then critically analyzes §1782 from a comparative perspective, emphasizing three main points that emerge from a comparative analysis. First, the U.S. system's refusal to consider foreign discoverability ignores the important policy considerations underlying foreign discovery systems, and unnecessarily burdens foreign judges in contravention of the concept of comity on which judicial assistance is based. Second, §1782 is blatantly unfair to U.S. defendants in foreign proceedings, as they are subject to the use of §1782 by their opponents, and therefore subject to U.S. discovery obligations, while they can only utilize the comparatively limited discovery tools in the foreign jurisdiction where the suit is located. Finally, §1782, as interpreted by *Intel* and post-*Intel* decisions, ignores the worldwide call rejecting U.S. style discovery by injecting U.S. pre-trial discovery methods and standards into foreign proceedings in jurisdictions that have conclusively rejected the U.S. system.

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

II. DISCOVERY SYSTEMS AND UNDERLYING POLICY CONSIDERATIONS

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

A. Differences Between Civil Law and Common Law Generally

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

One of the main differences between civil law and common law jurisdictions is whether the judges or advocates have control over gathering evidence and presentation of legal issues. In common law systems, advocates pursue gathering evidence without oversight by the court.[5] The court is generally only involved when one party complains of an uncooperative opposing party or a need to limit or expand the scope or methods of discovery. Despite the court's lack of involvement, the parties pursue discovery with the force of the court's power behind them to compel or forbid discovery and impose sanctions for noncompliance.[6] In contrast, in civil law jurisdictions judges, as opposed to advocates, oversee evidence gathering and presentation of legal issues.[7]

Another important difference between civil law and common law systems is the nature of trials. In civil law systems, trials are made up of a series of short hearings, as opposed to common law systems that have one concentrated trial with a significant pre-trial period.[8] Once a common law trial has begun, the time for gathering evidence is over.[9] One explanation for the concentrated trial in common law jurisdictions is the jury system, in which "a group of lay people are required to take time out of their own work

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

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

[6] Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292 (2002). *See also* Lowenfeld, *supra* note 5, at 140. This balance between judges' and advocates' involvement varies within common law jurisdictions.

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

[8] UNIDROIT PTCP, *supra* note 4, at 6. *See also* Peter Schlosser, *Lectures on Civil Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 11 (1996) ("[i]n civil law countries, conducting a lawsuit consists of piecemeal litigation, which is primarily characterized by written elements"); Hein Kotz, *Civil Justice in Europe and the United States*, 13 DUKE J. OF COMP. & INT'L LAW 61, 72 (2003) ("European civil procedure . . . is wholly unfamiliar with, and knows nothing of, the idea of a 'trial' as a single, temporally continuous presentation in which all materials are made available to the adjudicator. Instead proceedings . . . may be described as a series of isolated conferences before the judge).

[9] Lowenfeld, *supra* note 5, at 140.

lives to hear and help decide a dispute" by deciding issues of fact.[10] Parties must prepare all evidence to present to the jury before the jury is assembled and its members' valuable time begins being usurped. This led to the trial as a "concentrated" event that occurred only after advocates had exchanged and distilled the evidence.[11]

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

B. Policy Considerations Underlying All Jurisdictions' Evidentiary Systems

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

1. Truth: Helping Courts and Advocates Figure Out What Really Happened

The most common argument in favor of broad pre-trial discovery is that forcing each party to exchange all relevant information allows the parties, and hence the court, to get to the truth of what happened.[15] Put plainly, "to

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

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

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

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

[14] *Id.*

[15] *See, e.g.*, Lowenfeld, *supra* note 5, at 145 ("American discovery is often oppressive, intrusive, expensive, time consuming; it does, however, aim to bring out the truth"); Robert G. Johnston & Sara Lufrano, *The Adversary System as a Means*

the extent that information and evidentiary material increase the likelihood of finding the historical facts, they promote the accuracy of adjudication."[16] Related to this is the idea that parties are entitled to a disclosure of all non-privileged relevant information in order to attempt to prove the truth, according to them.[17] Common law practitioners often marvel at the civil law's apparent "indifference" to truth, which they perceive as attainable only through pre-trial discovery.[18]

2. Efficient Adjudication: Making Litigation An Effective Dispute Resolution Mechanism

Because both parties and courts have limited time and resources, all legal systems acknowledge that accuracy must be balanced with efficiency.[19] One commonly espoused benefit to the pre-trial discovery system is that gathering pre-trial evidence narrows the contested issues resulting in increased efficiency during the trial.[20] An understanding of all potential evidence gained through extensive pre-trial discovery crystallizes exactly what each party will focus on and rely upon, and allows each party to craft specific arguments and tactics to respond.[21] On the other hand, common law discovery is intrinsically duplicative, and thereby, inefficient.[22]

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of Seeking Truth and Justice, 35 J. MARSHALL L.R. 147, 160 (2002) ("the scope of allowable discovery should be construed broadly in order to aid the search for truth"); MR. JUSTICE TODD L. ARCHIBALD & MR. JUSTICE RANDALL ECHLIN, ANNUAL REVIEW OF CIVIL LITIGATION 2005, CHAP. G, Introduction (discussing the importance of the Canadian discovery process for "ensuring that the court has before it all relevant information in its search for truth").

[16] Huang, *supra* note 7, at 39.

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

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

[19] Huang, *supra* note 7, at 39.

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

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

[22] Kotz, *supra* note 8, at 72 ("[w]itnesses are prepared, examined, and cross-examined during pre-trial, then prepared, examined, and cross examined again at trial").

3. *Cost: The Exorbitant Costs of Pre-Trial Discovery and its Effect on Settlements*

Critics of pre-trial discovery often point to the system's high cost burden on clients.[23] Conversely, one often-touted benefit of pre-trial discovery is that it encourages settlement, thereby ultimately decreasing trial costs.[24] Pre-trial discovery forces parties to "put their cards on the table,"[25] and allows each side to assess the relative strengths and weaknesses of the other side's evidence. They are able to engage in a risk analysis of success at trial, which often leads to successful settlement negotiations.[26]

4. Privacy: The Right to be Left Alone by Courts, Lawyers, and Litigants

One of the most noticeable aspects of extensive pre-trial discovery is the intrusion into an individual's or corporation's privacy. The more methods of pre-trial discovery that are available, the more parties and non-parties are obligated to produce evidence, and the broader the scope of discoverable evidence. In fact, one of the most "repugnant" aspects of common law, specifically, U.S. style discovery, to civilian lawyers is its intrusion into privacy.[27] Privacy is one reason all jurisdictions recognize various privileges and immunities that allow them to not produce otherwise required information.[28]

5. Proportionality: Striking a Balance Between Competing Considerations

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

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

[24] Platto, *supra* note 21, at 238; Grubbs, *supra* note 23, at 782.

[25] *See* Lowenfeld, *supra* note 5, at 144.

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

[27] Chase, *supra* note 6, at 293.

[28] *Accord* Huang, *supra* note 7, at 254-55.

point on the spectrum that best suits its needs.[29] Accordingly, both common law countries with pre-trial discovery systems and civil law countries without them justify their systems using the principle of proportionality.[30] While common law practitioners may criticize civil law systems for not placing enough emphasis on truth, civil law practitioners may view pre-trial discovery as ignoring cost and privacy. Ultimately, at the heart of both sets of criticisms is the idea that the other system is not striking a good balance of policy interests, and, therefore, is not observing the concept of proportionality.

B. Discovery Systems Within Common Law Jurisdictions: Variations on a Theme?

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

These systems are also vastly different. The U.S. system is often referred to as "exceptional" and in its own category given the varied methods of discovery and broad scope of discoverable information available to litigants.[31] The differences between these systems stem largely from their discrete standards of what categories of information are available to litigants during the pre-trial phase, and the methods available to litigants to obtain information. For example, while the U.S. system allows litigants to discover information that may lead to admissible evidence that might itself not be admissible at trial, England allows litigants to discover evidence only that they will rely upon, or that supports or adversely affects either party's case at trial. The most striking features of the U.S. system compared to other common law jurisdictions are parties' right to depose both parties and non-

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

[30] Huang, *supra* note 7, at 249-50. Indeed, the motivation underlying the England's 1998 reform of its civil procedure rules was to make disclosure costs and burdens proportional to the ultimate usefulness and value of the results in relation to the overall money involved in the case, and the importance and complexity of the case, the financial resources of the parties. The Civil Procedure Rules 1998, S.I. 1998 No. 3132 (L.17) 1.1(a)-(c); Matthews & Malek, *supra* note 26, at 5, 17 (arguing that narrowed pre-trial discovery results in "buying comparative speed and cheapness (and hence accessibility to courts) at the price of less perfect justice").

[31] *See, e.g.*, Chase, *supra* note 6; Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005).

parties without leave of court, and the right to request general categories of documents not known to exist.

1. The U.S. System of Broad Discovery

Despite a narrowing trend in U.S. discovery, the standard of discoverable evidence and scope of discovery methods available to parties is broader in the U.S. system than Canada or England.[32] Pursuant to the FRCP, parties must initially disclose information "that the disclosing party may use to support its claims or defenses."[33] This includes mandatory disclosure of the names and contact information of "each individual likely to have discoverable information," a copy or description of all "documents, data compilations, and tangible things" in possession or control of the disclosing party, a computation of damages claimed by the disclosing party, and any relevant insurance agreement regarding potential liability.[34]

a. The U.S. Standard: "Reasonably Calculated" to Lead to International Criticism

After initial mandatory disclosures, the U.S. system allows parties to obtain discovery "regarding any matter, not privileged that is relevant to the claim or defense of any party."[35] The U.S. federal rules define "relevant" to include information "reasonably calculated to lead to the discovery of admissible evidence," including information that would not be admissible at trial.[36] Discovery requests need not specify existing documents, but instead may consist of requests for categories of documents that are often quite broad.[37] For example, a discovery request may ask for "all documents relating to the 1998 transaction between parties." This characteristic has led many foreign practitioners and judges to see U.S. discovery requests as "fishing" expeditions.[38]

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[32] Matthews & Malek, *supra* note 26, at 12-13.

[33] Fed. R. Civ. P. 26(a)(1)(A).

[34] Fed R. Civ. P. 26(a)(1)(A)-(D).

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

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

[37] *See* Lowenfeld, *supra* note 5, at 142.

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

b. Methods of Discovery Available to Litigants: Everything but Waterboarding

The U.S. system allows parties to discover information by a variety of methods, including oral depositions, written depositions, written interrogatories, production of documents or tangible things, inspection of land and property, physical and mental examination, and requests for admission.[39] After the mandatory pre-trial "meet-and-confer" conference between parties, a party need not obtain leave of court to depose a party or non-party one time, unless the deponent is in prison.[40]

Although all of these methods are potentially available to litigants, it is important to note two categories of limitations on a party's ability to use them: limitations explicitly stated in the federal rule governing the method of and the court's discretion to limit discovery. For example, FRCP 33 limits litigants to propounding only twenty-five written interrogatories without a court order or stipulation by parties.[41] Similarly, FRCP 30 limits litigants to ten written and oral depositions combined without court order or stipulation,[42] and limits the length of depositions to seven hours each.[43] Another example is that the invasive method of mental or physical examination is only available if the physical or mental state of a party, or person in the custody of a party, is at issue.[44]

The U.S. federal rules also give judges discretion to limit discovery upon motion by a party for a protective order,[45] or on its own initiative.[46] The court's power to limit discovery is a manifestation of the federal rules' interest in proportionality.[47] A court may limit discovery if it determines that (1) the discovery sought is "unreasonably cumulative or duplicative," (2) may be obtained by more convenient and less expensive alternative methods, (3) the discovering party has had "ample opportunity" to discover the information requested, or (4) "the burden or expense of the proposed discovery outweighs its likely benefit" in light of the "needs of the case, the amount in controversy, the parties' resources, the importance of the issues at

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

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

[41] Fed. R. Civ. P. 33(a).

[42] Fed. R. Civ. P. 30(a)(2)(A).

[43] Fed. R. Civ. P. 30(d)(2).

[44] Fed. R. Civ. P. 35(a).

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

[46] Fed. R. Civ. P. 26(b)(2)(C).

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

stake in the litigation, and the importance of the proposed discovery in resolving the issues."[48] The court may limit discovery in a number of ways, including prohibiting the discovery or ordering that it be had on "specific terms and conditions," or only by certain methods.[49]

c. Discovery from Non-Parties

One aspect of the U.S. system that foreign practitioners find strange is the U.S. system's tolerance of non-party discovery. Like parties, non-parties are subject to discovery within the parameters of the FRCP without leave of court. Therefore, anyone in possession of discoverable information can be requested or compelled by the court if necessary, to make such information available.[50] Foreign practitioners often marvel at the U.S. discovery system's pre-trial use of oral depositions for parties, non-parties, and potential witnesses alike.[51] While a non-party can be orally deposed, required to produce documents, or to permit inspection of tangible objects or property,[52] parties cannot use written interrogatories to obtain information from non-parties.[53]

2. England's Discovery System: A Revamped and Narrowed Approach to Pre-trial Disclosure

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

a. The English Standard: Standard Disclosure

"Disclosure" is the term synonymous with "discovery" now used for pre-trial exchange of information in England.[54] Like mandatory initial disclosures in the United States, the English rules of civil procedure require each party to initially disclose documents on which it relies, the documents that adversely affect its own case or adversely affect or support another

[48] Fed. R. Civ. P. 26(b)(2)(C).
[49] Fed. R. Civ. P. 26(c)(1)-(8).
[50] *See* Lowenfeld, *supra* note 5, at 141.
[51] *See, e.g.*, Matthews & Malek, *supra* note 26, at 13.
[52] *See* Fed. R. Civ. P. 34 and Fed. R. Civ. P. 45. *See also* Huang, *supra* note 7, at 223.
[53] University of Texas at Austin v. Vratil, 96 F.3d 1337 (10th Cir. 1996). *See also* Wright, Miller & Marcus, *supra* note 17, §§ 2163, 2171.
[54] Matthews & Malek, *supra* note 26, at 3.

party's case.[55] Upon receiving orders for disclosure, a party may refuse to disclose certain documents on the basis that disclosure is not proportionate to the issues in the case.[56]

b. Methods Of Discovery Available to Litigants

Litigants in England have several methods of obtaining further information, including interrogatories, witness statements, depositions of witnesses, inspection of land or property, and physical or mental examinations of individuals.[57] After standard disclosure, however, a litigant must seek leave of court before attempting to utilize any of these methods.[58] This is the main and most crucial difference between the English system and the U.S. federal rules of civil procedure and some Canadian provinces' rules. For example, serving interrogatories on another party, which is allowed without court approval in the United States up to a certain number, is considered specific disclosure requiring court approval. If a litigant seeks specific disclosure of documents, it must specify the documents or class of documents it wants disclosed,[59] and cannot request large categories of documents that may or may not exist. Pre-trial depositions are also forbidden.[60] Oral examination before a trial is generally only allowed if the witness is likely to be unavailable to testify at the trial, and his testimony will be treated as part of the trial.[61]

c. Obtaining Discovery from Non-Parties: A Relative Emphasis on Privacy

In England, "traditionally only parties to litigation are obliged to give discovery; and generally discovery from a third party is not available."[62]

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

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

[57] Malek & Matthews, *supra* note 26, at 5-6.

[58] *Id.*, at 134-35.

[59] CPR 31.12.

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

[61] *Id.*

[62] Huang, *supra* note 7, at 223. *See* Ronald E. Myrick, *Obtaining Evidence Abroad for Use in United States Litigation*, 15 SUFFOLK TRANSNAT'L L.J. 1, 25 (1991) (stating that as a general rule "discovery is not permitted against a stranger to an English suit. A stranger to a suit may not be compelled to give oral evidence, except by subpoena, or to produce documents, except by subpoena *duces tecum*, and, in each case, only at the trial.")

Parties may not request information from non-parties without leave of court. As well-stated by one scholar: "The philosophy underlying this position is that the resolution of private disputes should not interfere with the peace and lives of other persons and should impose as little burden as possible on third parties."[63] Based on the new Civil Procedure Rules, a judge may order a non-party to disclose only those documents which are "likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings" and when disclosure is "necessary in order to dispose fairly of the claim or to save costs."[64]

3. Discovery in Canada: The Province of the Provinces

Like the United States and England, Canada's provinces allow advocates to gather pre-trial evidence. The law of civil procedure in Canada is made at the provincial level.[65] Despite the lack of a federal code of civil procedure, a discrete set of court rules do exist for Canadian federal courts. Accordingly, I discuss the approaches taken by the Canadian Federal Court Rules, and the civil procedure rules for the provinces of Ontario and British Columbia regarding judicial assistance to foreign courts.

a. The Standard: "Relating" to Any Matter in the Action

A party in any Canadian province will usually be required to disclose the existence of documents relating to any issue in the pending action.[66] For example, the Ontario Rules of Civil Procedure require parties to produce "[e]very document relating to any matter in issue in an action."[67] Similarly, the British Columbia Supreme Court Rules allow examination of a party, written interrogatories, and requests for documents "regarding any matter, not privileged, relating to a matter in question in the action," including contact information of all persons who might have such information.[68] In some provinces, this obligation arises upon the lapse of a certain amount of time after the close of pleadings, which is similar to the U.S. and English mandatory disclosure systems.[69] In other provinces, however, a party only becomes obligated to disclose documents after the other party requests such documents.[70]

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[63] Huang, *supra* note 7, at 223-24.
[64] CPR 31.17.
[65] *See* Platto, *supra* note 21, at 215-16.
[66] *Id.*
[67] R.R.O. 1990, Reg. 194, §30.02(1).
[68] B.C. Reg. 221/90, §§26(1), 27(22).
[69] Platto, *supra* note 21, at 216. *See, e.g.*, R.R.O., Reg. 194, §30.03.
[70] Platto, *supra* note 21, at 216. *See, e.g.*, B.C. Reg. 221/90, §221/90, §26(1). Quebec, however, has no mandatory disclosure of documents.

b. Methods of Discovery Available to Litigants: A Litigant's Right to Choose

After mandatory disclosure, where required, most Canadian provinces utilize various methods of discovery, including depositions and interrogatories, requests for admission, inspection of physical land, and mental or physical examination. The main difference between the United States and Canada is, while the U.S. system allows parties to utilize many or all of the methods concurrently, some Canadian provinces allow parties to utilize only certain methods and not others. While some Canadian provinces allow a party to utilize both written *and* oral examination,[71] others require a party to choose between methods. Examples of the latter system include the Federal Rules of Court and the province of Ontario, in which a party may examine another party *either* by written *or* oral examination.[72] A party may not examine a person by both written and oral examination without leave of court.[73]

Like the U.S. federal rules, a party may request a medical examination of an individual if the examinee's condition is an issue in the pending case.[74] Most Canadian provinces will also allow inspection of property. Unlike the U.S. federal rules, however, a court order is generally required before a party is entitled to inspect property.[75]

c. Obtaining Discovery from Non-Parties

Parties in Canadian courts generally may only examine or request documents from non-parties with leave of court.[76] Similar to the England, Ontario further limits non-party discovery by prohibiting a court from ordering discovery from non-parties unless it is satisfied that the moving party cannot obtain the information it seeks from other parties, that prohibiting non-party discovery would be "unfair" to the moving party, and that the examination will not unduly delay the trial, entail unreasonable expense, or "result in unfairness."[77]

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

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

[73] R.R.O. 1990, Reg. 194, §31.02(1).

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

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

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

[77] R.R.O. 1990, Reg. 194, §31.10(1)(a) & (b).

4. Resistance to U.S. Style Discovery

As noted above, the U.S. discovery system is often euphemistically termed "exceptional." One scholar has framed the controversy over different discovery systems as "not one pitting the common law against the civil law, but rather one pitting the United States of America against the rest of the world."[78] The U.S. discovery system is seen as unnecessarily broad, and providing parties a great opportunity to "disgorge information" from other parties.[79] Lord Diplock summed up a common view on U.S. discovery as follows: a "wide-roving search for any information that might be helpful."[80] As stated above, the term most widely used to characterize U.S. discovery is "fishing"[81] – suggesting that plaintiffs go fishing for information from defendants that they can use to build their case and support additional causes of action.

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

Section II analyzed the differences between discovery systems, and the policies behind states' evidentiary and discovery rules. With that context in mind, this section traces the evolution of judicial assistance in the United States with a focus on the issue of foreign discoverability.

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

Section 1782 of Title 28 of the United States Code ("§1782") is the statutory provision that grants U.S. district courts the authority to provide judicial assistance to international and foreign tribunals.[82] Congress first provided judicial assistance to foreign tribunals in 1855 through the use of

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[78] Lowenfeld, *supra* note 5, at 137.

[79] Grubbs, *supra* note 23, at 782.

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

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

[82] 28 U.S.C. §1782 (2004). For a comprehensive history of the evolution of §1782 from its inception in 1855 to the present, see the Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel v. Advanced Micro Devices, Inc.*, 2004 WL 214306 (Jan. 30, 2004). The Supreme Court decision in *Intel* also traces the evolution of the statute. 542 U.S. 241. *See also* Roger J. Johns & Anne Keaty, *The New and Improved Section 1782*: *Supercharging District Court Discovery Assistance to Foreign and International Tribunals*, 29 AM. J. TRIAL ADVOC. 649 (2006).

letters rogatory via diplomatic channels.[83] Over the next 100 years, amendments continually broadened U.S. courts' ability to provide judicial assistance by eliminating previous statutory requirements.[84] In the late 1950s, Congress noticed an increase in international commercial and financial transactions, [85] and created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to U.S. and foreign judicial assistance practices.[86] The revisions were meant to liberalize U.S. judicial assistance, "offer a model and invitation to foreign states to follow the American example," and "promote a better understanding and acceptance of American discovery purposes."[87]

In 1964, Congress adopted the Commission's suggested legislation, which resulted in a complete revision of §1782.[88] One notable amendment was that federal district courts could order the production of documents or testimony "for use in a proceeding in a foreign or international *tribunal*."[89] This quoted language replaced "judicial proceedings pending in any *court* in a foreign country with which the United States is at peace."[90] The 1964 Act's legislative history stated that Congress used the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but also extends to "administrative and quasi-judicial proceedings all over the world."[91] The courts have often interpreted §1782's legislative history to espouse the statute's "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and

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[83] Act of March 3, 1855, ch. 140, §2, 10 Stat. 630.

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

[85] S. Rep. No. 2392 (1958).

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

[87] Hans Smit, *Recent Developments in International Litigation*, 35 TEX. L. REV. 215, 229, 235 (1994). Professor Smit was a member of the commission, and has published numerous articles regarding the intent behind the 1964 amendments. *See* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 1, 9 (1998) ("[t]he revised section 1782 greatly liberalized assistance given to foreign and international litigants and tribunals" and "the purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals").

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

[89] 28 U.S.C. 1782(a) (emphasis added).

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

[91] S. Rep. No. 1580 (1964).

encouraging foreign countries by example to provide similar means of assistance to our courts."[92]

Another important change in §1782 included an expansion of who may request information. In early versions of the statute, only the foreign tribunal itself could request information, however, the 1964 amendments allowed "any interested persons" to bring a §1782 request.[93] The "interested person" need not have obtained authorization from the foreign tribunal before requesting judicial assistance. This change was designed to allow litigants to request information pursuant to §1782, as well as persons "designated by or under foreign law."[94]

The legislative history encouraged district courts to consider "the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country."[95] The senate report noted that §1782 "permits, but does not command, following the foreign or international practice" for gathering the requested information.[96]

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

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . 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. . . .[97]

B. The Concept of Foreign Discoverability in Pre-Intel Decisions

As is evident from the comparison of discovery methods and standards between common law jurisdictions in Section II, evidence discoverable in the United States is often not discoverable in other jurisdictions, such as

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

[93] S. Rep. No. 1580, at 3789.

[94] *Id.* The legislative history defines an "interested person" as "a person designated by or under a foreign law, or a party to the foreign or international litigation").

[95] *Id.* at 3788.

[96] *Id.* at 3789.

[97] 28 U.S.C. §1782(a).

third party depositions or document production of large categories of documents. Accordingly, if a U.S. court is limited to ordering discovery of information only discoverable in the foreign jurisdiction where the foreign tribunal sits, the methods and scope of discovery it can order are considerably less than if it is not so limited.

It was not until the late 1970s that U.S. courts started having to answer the question of whether §1872 contains a requirement that the requested documents be admissible or discoverable in the foreign tribunal. In the 1970s, the Ninth Circuit held repeatedly that when U.S. courts receive requests for discovery from foreign courts, they need not determine whether the requested evidence is admissible. In both the cases decided by the Ninth Circuit, the foreign tribunal itself was requesting evidence and not a party before a foreign tribunal.[98] Because letters rogatory were the predominant vehicle for requests for judicial assistance at this time, the common practice was that tribunals, as opposed to litigants before such tribunals, made §1782 requests.[99] Accordingly, discoverability was not a concern to U.S. courts because the tribunal itself was requesting the information.

Throughout the 1980s, both district and circuit courts interpreted §1782 with regard to foreign discoverability and admissibility, and made apparent the complexities that arose when a *litigant* before a foreign tribunal, as opposed to the tribunal itself, requested assistance. Courts were in general agreement that, where a litigant was requesting discovery for use in a foreign tribunal, as opposed to the tribunal itself, comity necessitated that the U.S. court determine whether the requested evidence was discoverable or admissible in the foreign jurisdiction.[100] In addition to comity concerns, courts expressed concern that, without a foreign discoverability requirement, foreign litigants would use §1782 to "circumvent foreign laws and

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[98] *In re* Letters Rogatory from the Tokyo District, Tokyo Japan, 539 F.2d 1216 (9th Cir. 1976); Request For Judicial Assistance from the Seoul District Criminal Court, Seoul Korea, 555 F.2d 720 (9th Cir. 1977).

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

[100] *See, e.g.*, *In re* the Court of the Commissioner of Patents for the Republic of South Africa, 88 F.R.D. 75, 77 (E.D. Penn. 1980) (finding that "[f]ew actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals"); *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151, 1156(11th Cir. 1988) ("[w]hile a district court generally should not decide whether the requested evidence will be admissible in the foreign court, . . . the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance."); *In re* Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992) (interpreting §1782 to not include a foreign discoverability requirement may lead other nations to conclude that "[U.S.] courts view their laws and procedures with contempt").

procedures."[101] Courts also expressed concern that reading §1782 without a foreign discoverability requirement would put U.S. parties at an unfair advantage by allowing the foreign party unlimited discovery while the U.S. party is confined to the restricted discovery allowed in the foreign jurisdiction.[102]

The Second Circuit was the first court to hold that §1782 did not have a foreign discoverability requirement, regardless of whether the requesting party was a foreign tribunal or litigant.[103] The court relied heavily on the text of the statute, concluding that "[t]he language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction," and "we are not free to read extra-statutory barriers to discovery into section 1782."[104] The Second Circuit also asserted that, although a court should respect "authoritative proof" by a foreign tribunal, it would reject the requested evidence, "we do not read the statute to condone speculative forays into legal territories unfamiliar to federal judges."[105] Hence, the court concluded that, if a party presented "authoritative proof" that a foreign tribunal did not want the evidence, then the U.S. court could not order the requested discovery, but short of such proof, a U.S. judge

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[101] *Id.* at 6; South African Patent Case, 88 F.R.D. at 77; *In re* Application for an order for judicial assistance in a foreign proceeding in the high court of justice, Chancery Division, England, 147 F.R.D. 223, 226 (C.D. Ca. 1993) (when a foreign tribunal requests information, "it is clear that the discovery sought is permitted and authorized by that body," but when a litigant requests information "federal courts must exercise caution to prevent the circumvention of foreign discovery provisions and procedures").

[102] *In re* Application of Asta Medica, S.A., 981 F.2d at 5 ("a [U.S.] party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the [U.S] party is confined to restricted discovery in the foreign jurisdiction).

[103] *In re* Application of Gianoli Aldunate, 3 F.3d 54 (2d Cir. 1993). For a discuss of the circuit split that *Aldunate* created, see Steven Saraisky, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127, 1141 (1994); Peter Metis, *International Judicial Assistance: Does 28 U.S.C. 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L.J. 332, 350-53 (1994); Cynthia Day Wallace, *'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judicial Overload?* 27 INT'L LAW 1055, 1061-64 (2003); Christopher Walker Sanzone, *Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. 1782*, 29 VAND. J. TRANSNAT'L L. 117 (1996).

[104] *Id.* at 59.

[105] In the Matter of the Application of Euromepa, *S.A* 51 F.3d 1095, 1099-1100 (2d Cir. 1995). For a detailed discussion of *Euromepa*, see Richard D. Haygood, *Note: Euromepa v. Esmerian: The Scope Of The Inquiry Into Foreign Law When Evaluating Discovery Requests Under 28 U.S.C. Sec. 1782*, 21 N.C. J. INT'L L. & COM. REG. 491 (1996).

should not attempt to determine foreign discoverability or admissibility, and should order the discovery.

After the Second Circuit's divergence, both the Fifth and Fourth Circuits considered whether §1782 contains a foreign discoverability requirement, and concluded that courts must make a foreign discoverability determination when the request comes from a private litigant, but not when a foreign tribunal is requesting the information.[106] The circuit split widened in 1998, when the Third Circuit decided to follow the Second Circuit, holding that "the lack of a finding of discoverability is an inadequate basis on which to deny a §1782 application."[107] The Third Circuit's decision created a presumption of discoverability by holding that "district courts should treat relevant discovery materials sought pursuant to §1782 as discoverable unless the party opposing the application can demonstrate facts sufficient to justify the denial of the application."[108]

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

As the above discussion of the various circuits' treatment of §1782 illustrates, clarity was needed by the time the U.S. Supreme Court considered whether either §1782 contained a foreign or domestic discoverability requirement in 2004.

1. EC Proceedings and the Nature of the EC Commission

In October 2000, Advanced Micro Devices, Inc. ("AMD") filed a complaint with the Directorate-General for Competition ("DG-Competition") alleging that Intel Corporation ("Intel") had abused its dominant position in the European market through various anticompetitive practices.[109] The DG-Competition investigates alleged violations of the European Union's competition laws in response to complaints filed by market actors, such as AMD, or on its own initiative.[110] After filing its

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[106] In re Letters Rogatory from the Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308 (5th Cir. 1995); *In re* Letter of Request from Amtsgericht Ingolstadt, Federal Republic of Germany, 82 F.3d 590 (4th Cir. 1996). *See also In re* Tyragg-Hansa Insur. Co., Ltd., 896 F.Supp. 624 (E.D. La. 1995).

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

[108] *Id*.

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

[110] A thorough description of the function and structure of the DG-Competition can be found in the Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, *Intel v. Advanced Micro Devices*, 2002 WL 32157391 (Nov. 15, 2002) [hereinafter First EC Brief], and the Brief of Amicus Curiae of the Commission of the European Communities Supporting Reversal, *Intel v. Advanced Micro Devices*, 2003 WL 23138389 (Dec. 23, 2003) [hereinafter Second EC Brief]. For a detailed discussion of the DG-Competition's procedures,

complaint with the DG-Competition, AMD recommended to the DG-Competition that it seek discovery of documents that Intel had produced in a U.S. private antitrust suit several years before.[111] The DG-Competition declined to act on AMD's recommendation, and, AMD subsequently petitioned the U.S. District Court for the Northern District of California for an order directing Intel to produce the documents pursuant to §1782.

2. Intel Lower Court and Appellate Court Decisions

The district court denied AMD's §1782 discovery request, holding that the DG-Commission was not an adjudicative body, and therefore, not a "tribunal" overseeing a "proceeding" within the meaning of §1782.[112] On appeal, the Ninth Circuit reversed the district court, reasoning that because the DG-Competition's recommendations are adopted by the EC Commission, "a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties" and because "EC decisions are appealable to the Court of First Instance and then the Court of Justice," the discovery was sought for a proceeding "leading to quasi-judicial proceedings."[113]

3. The High Court's Decision in Intel

Intel petitioned the U.S. Supreme Court for a writ of *certiorari*, which the high court granted.[114] A majority of the Court held that AMD could utilize §1782 because it was an "interested person," the DG-Competition was a "tribunal," and a reasonably contemplated "proceeding" existed. The Court also held that §1782 contained no threshold requirement that the information sought be discoverable in the foreign jurisdiction. The Court interpreted §1782's legislative history to leave the decision to the district courts' discretion, and noted that the district court could tailor its order in response to concerns about fairness or comity.[115]

The Court concluded that its holding did not offend principles of comity, relying on the U.S. government's assertion as *amicus curiae* that a foreign nation limits discovery "for reasons peculiar to its own legal

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see also Tony Reeves, Henk Albers & Russell Hunter, *A Closer Look at Intel v. AMD in Light of the EU Complaints Procedure*, 19 Fall-ANTITRUST 72 (2004).

[111] 542 U.S. at 250. The documents in the previous U.S. case, Intergraph Corp. v. Intel Corp., 3 F.Supp.2d 1255 (N.D. Ala. 1998), were subject to a protective order, and thus, not available for use outside that litigation.

[112] Advanced Micro Devices, Inc. v. Intel Corp., 2002 WL 1339088 (N.D. Ca. Jan. 7, 2002).

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

[114] Intel Corp. v. Advanced Micro Devices, Inc., 540 U.S. 1003 (Nov. 10, 2003).

[115] 542 U.S. at 260-261.

practices, culture, or tradition—reasons that do not necessarily signal objection to aid from [U.S.] federal courts."[116] The court also followed the U.S. government's reasoning that "[a] foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to §1782."[117] The Court even restated *verbatim* the U.S. government's argument that foreign tribunals often may want evidence that is not discoverable in their jurisdiction, and, in those situations, a foreign discoverability requirement would be "senseless."[118]

The Court also followed AMD and the U.S. government's suggestion that any parity or fairness concerns are assuaged by U.S. courts using discretion to tailor orders accordingly, or by foreign tribunals "placing conditions on the acceptance of information" to maintain parity.[119] The Court espoused four factors for district courts to consider when ruling on §1782 requests. The first factor distinguished between requests for a non-party to produce information and for a party to produce information. Because a foreign tribunal has jurisdiction over parties before it, the need for §1782 aid was not as great as when information from a non-party was requested, which may be outside the foreign tribunal's jurisdictional reach. Second, the Court restated §1782's legislative history that the court may take into account "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[120] Third, the court can consider whether the requesting party is attempting to circumvent foreign proof-gathering restrictions or policies. Fourth, district courts may reject or tailor "unduly intrusive or burdensome requests."[121]

The Court remanded to the district court, which applied the Court's four factor test and ultimately rejected AMD's §1782 request in its entirety, reasoning that the EC Commission had jurisdiction over Intel, as a party to its proceedings, and, therefore, U.S. judicial assistance was less necessary.[122] The district court also based its holding on the fact that the EC Commission clearly did not want the discovery, and AMD was attempting to circumvent the EC Commission's discovery proceedings.[123]

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

[117] 542 U.S. at 262.

[118] *Id.*

[119] *Id.*

[120] S. Rep. No. 1580, at 3788.

[121] 542 U.S. at 265.

[122] Advanced Micro Devices v. Intel Corp., 2004 WL 2282320 (N.D. Ca. Oct. 4, 2004).

[123] *Id.*

*D. Trends in the Post-*Intel *Case law*

In the last three years, many district courts have applied *Intel*'s four factor test in determining whether to grant §1782 requests. In fact, there has been a sharp increase in the number of §1782 requests since *Intel*. Given that any "interested party" can request information "for use" in a foreign or international tribunal, now quite broadly defined, even if that information is not discoverable pursuant to the tribunal's rules, this increase is not surprising. In the three years following *Intel*, there have been over twenty published opinions dealing with §1782 requests. When one considers that in the forty years between 1964, when §1782 was amended, and 2004, when *Intel* was decided there are approximately forty published opinions, the post-*Intel* increase is quite apparent. Another noteworthy aspect of post-*Intel* cases is the large proportion of requests granted by district courts. As a general rule, the district courts ordered the requested discovery.[124] The only decisions rejecting §1782 discovery requests did so because the foreign tribunal appeared before the district court explicitly asking the court to deny the discovery requests.[125] These cases are discussed below.

1. The "Authoritative Proof" Test

Prior to *Intel*, the Second Circuit in *Euromepa* held that no foreign discoverability requirement existed, and a district court should reject a §1782 request only if presented with "affirmative proof" that the foreign

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[124] *See, e.g.*, In the Matter of the Application of Kolomoisky, 2006 WL 2404332 (S.D.N.Y. Aug. 18, 2006); *In re* Application of Grupo Qumma, S.A. de C.V., 2005 WL 937486 (S.D.N.Y. Aug. 22, 2005); Fleischmann v. McDonald's Corp., 2006 WL 3530582 (N.D. Ill. Dec. 6, 2006); *In re* Application of Hill, 2005 WL 1330769 (S.D.N.Y. June 3, 2005); *In re* Application of IManagement Serv. Ltd., 2005 WL 1959702 (E.D.N.Y. Aug. 16, 2005); Lopes v. Lopes, 180 Fed. Appx. 874 (11th Cir. 2006); *In re* Application of Guy, 2004 WL 1857580 (S.D.N.Y. Aug. 19, 2004); *In re* the Application of Servicio Pan Americano de Proteccion, C.A., 354 F.Supp.2d 269 (S.D.N.Y. 2004); In the Matter of the Application of the Procter and Gamble Co., 334 F.Supp.2d 1112 (E.D. Wis. 2004); *In re* Application of Gemeinschafts-Praxis Dr. med. Schottdorf, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006); *In re* Application of Michael Wilson & Partners, Ltd., 2007 WL 2221438 (D. Colo. July 27, 2007); *In re* Application of Elizabeth Kang, 2007 WL 1879158 (S.D. Fla. June 26, 2007).

[125] One case was also denied based on the fact that the documents requested were located outside the United States, and, therefore, the district court did not have jurisdiction to compel production of them. Norex Petroleum Ltd. v. Chubb Insur. Co. of Canada, 384 F.Supp.2d 45 (D.D.C. 2005). This case is discussed in detail in Section V addressing the ramifications of *Intel* regarding foreign storage of documents by U.S. companies. Another judge rejected the requested discovery based on the lateness of the request in relation to the foreign proceeding. *In re* Application of Digitechnic, 2007 WL 1367697 (W.D. Wa. May 8, 2007).

tribunal would reject the evidence.[126] Post-*Intel* case law appears to have adopted *Europmepa*'s holding requiring that no foreign discoverability requirement exists, and a court may reject a §1782 request only if it is presented with "authoritative proof" that the foreign tribunal is opposed to the district court granting discovery, or would reject the information as evidence.

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

> The Second Circuit has instructed this Court to consider 'only authoritative proof' in considered these [discretionary] factors. . . . Such authoritative proof has been found to exist where the representative of a foreign sovereign has expressly and clearly made its position known. . . . By contrast, proof resting on unequivocal interpretations of foreign policy or law generally provides an insufficient basis to deny discovery . . . Rather, in such cases the Second Circuit has instructed that district courts generally should err on the side of permitting the requested discovery. . . . This liberal construct is owing to the availability of corrective measures abroad; for example, the foreign tribunal may simply choose to exclude or disregard the discovered material should that tribunal find that the district court overstepped its bounds in ordering the discovery.[127]

For example, in *In re Application of Grupo Qumma, S.A. de C.V.*, the district court judge ordered production of information requested for use in a Mexican judicial proceeding, despite claims that the Mexican court could not consider such evidence, based on a lack of "authoritative proof" that the Mexican court would reject the information.[128] The district court for the Eastern District of New York also granted a discovery request based on the fact that it did not have "authoritative proof" that the foreign court would reject the requested discovery as evidence.[129] This case is a particularly stunning application of the authoritative proof test, as the court found the test not satisfied despite a clear directive from the foreign court that is would not accept the requested discovery as evidence.

The Bank of New York ("BNY"), a defendant in a pending lawsuit in the Moscow City Arbitrazh Court, requested an order compelling deposition testimony and the production of related documents from three non-parties for use in the Russian action. Imanagement, the opposing party, filed an opposition to BNY's request, and submitted a ruling from the Russian court refusing to stay its proceedings while BNY pursued its §1782 request. The Russian court ruling submitted to the district court stated that the Russian court would not stay proceedings because, pursuant to Russian procedure rules, a transcript of witness testimony obtained without an order from the

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[126] 51 F.3d at 1099-1100.
[127] 2006 WL 3844464, at *6.
[128] 2005 WL 937486, at *3.
[129] *In re* Application of Imanagement Serv., 2005 WL 1959702.

Russian court may not "serve as due evidence."[130] BNY countered that it would attempt to introduce the requested deposition testimony as "other documents and materials" pursuant to Russian procedural rules.

The court held that "authoritative proof" that the Russian court would not consider the deposition testimony was required for it to reject BNY's request. The court then rejected the Russian Court's ruling as providing such proof because the ruling addressed only deposition testimony, and not "other documents and materials."[131] The court also noted Imanagement's intention to use the depositions to identify pertinent documents, which it had no "authoritative proof" that the Russian court would reject.[132]

Along these same lines, the only decisions rejecting a discovery request were issued by courts with authoritative proof in the form of a submission to the court directly from the foreign tribunal that it did not want the district court to grant the requested discovery. For example, in *Schmitz v. Bernstein Liebhard & Lifshift, LLP*, the Second Circuit affirmed a district court judge's denial of a discovery request for use in a German judicial proceeding.[133] Counsel for Deutsche Telekom AG ("DT"), a German corporation, had previously produced documents to the Public Prosecution Office in Bonn, Germany for use in pending criminal proceedings against DT. The Prosecution Office subsequently provided the documents to plaintiffs' counsel in a securities class action pending before the district court for the Southern District of New York. Plaintiffs in civil lawsuits pending against DT in German courts then sought production of the documents used in the American proceedings for use in Germany, which the Prosecution Office declined. The German plaintiffs then petitioned the district court for the documents pursuant to §1782.

DT submitted a letter to the district court from the Bonn District Attorney's office stating that "production of the documents 'would ultimately be a circumvention of the restrictions on the access to the pieces of evidence so far imposed by the Bonn District Attorney's Office.' "[134] The Germany Ministry of Justice also wrote a letter to the U.S. Deputy Attorney General stating that "disclosure of the documents concerned may jeopardize German sovereign rights," and that the Prosecutor only produced the documents to the U.S. plaintiffs with the understanding that they would only be used in that case, and that they were subject to a protective order.[135] Based on the submissions from the German government, the district court denied the German plaintiffs' request for documents. The circuit court affirmed the lower court's finding that "granting the request here 'would in fact encourage foreign countries to potentially disregard the sovereignty

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[130] *Id.* at *1.
[131] *Id.* at *4.
[132] *Id*.
[133] 376 F.3d 79 (2d Cir. 2004).
[134] 259 F.Supp.2d 294, 298 (S.D.N.Y. 2003).
[135] *Id*.

concerns of the United States and generally discourage future assistance to our courts.'"[136]

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

Microsoft requested all the documents in the DG-Competition's possession pertaining to communications between the Commission and third parties, such as Sun Microsystems, Inc., Novell, Inc., and Oracle Corporation. The DG-Competition informed Microsoft that it was entitled to non-confidential versions of the requested documents, but Microsoft also wanted further discovery, and, on March 2, 2006, Microsoft filed an application to the Commission for further discovery, requesting certain relevant material that might not be in the Commission's file. The following day, Microsoft filed *ex parte* applications pursuant to 28 U.S.C. § 1782 in three U.S. district courts — the Southern District of New York, the District of Massachusetts, and the Northern District of California—seeking permission to serve subpoenas *duces tecum* to third parties that might be holding such documents.[137]

Each court received submissions from the EC Commission explicitly stating its opinion that it was not receptive to receiving information from Microsoft obtained through §1782 requests, as such requests would allow Microsoft to circumvent its procedures. Accordingly, each district court rejected Microsoft's request. One district court reasoned that "[w]here, as here: the foreign tribunal can obtain the documents at issue and provide them to Microsoft; that [the] tribunal does not want the involvement of this court; and there is no showing of fundamental unfairness in the absence of intervention, considerations of comity strongly favor quashing the subpoena."[138]

Another court concluded that "[t]his situation involves a tribunal's specific order restricting a specific litigant's ability to gather evidence. Under these circumstances, the subpoenas constitute an attempt to circumvent specific restrictions the [EC] has placed on Microsoft's right to obtain certain kinds of information. This alone weighs heavily against

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[136] 376 F.3d at 84-85 (quoting the lower court's decision at 259 F.Supp.2d at 300).

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

[138] 2006 WL 1344091 at *4 (D. Mass April 16, 2006).

allowing the requested discovery."[139] That court also emphasized that because the EC "is *not* receptive to U.S. federal court judicial assistance in this case," "[a]s a matter of comity, this court is unwilling to order discovery when doing so will interfere with the [EC]'s orderly handling of its own enforcement proceedings."[140] Similarly, a third district court concluded that "[g]ranting discovery in the face of opposition from the foreign tribunal would undermine the spirit and purpose of the statute by discouraging that and other foreign tribunals from 'heeding similar sovereignty concerns posited by our governmental authorities to foreign courts.'"[141] These *Microsoft* decisions suggest that it is not just the Second Circuit that has adopted the "authoritative proof" standard.

2. Parties' Use of Foreign Law Experts

Despite the U.S. judges' concern regarding federal judges being forced to discern foreign law,[142] one result of its four factor test is the routine use of foreign law experts by parties to "help" courts determine the foreign tribunal's practices pursuant to the second discretionary factor, the nature and character of the tribunal and proceeding, and the tribunal's receptivity to assistance. District court judges have had a hard time determining the state of a foreign jurisdiction's law in the face of "battling affidavits." For example, the district court for the Southern District of New York characterized "[t]he competing affidavits offered by the parties" regarding Mexican discovery rules as "contradictory and difficult to understand."[143] In a recent case, that court was faced with competing affidavits regarding German law, and could only conclude that "in the end the Court is left without an answer as to which expert is correct. . . . This court is not expected to declare a winner in this 'battle-by-affidavit of international legal experts.' "[144]

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

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[139] 2006 WL 825250, at *3.

[140] *Id.*

[141] 428 F.Supp.2d at 194 (citing the district court opinion in *In re* Schmitz, 259 F.Supp.2d at 298). Similarly, the district court in Fleischmann v. McDonalds Corporation, which granted discovery, distinguished itself from Microsoft and Intel based on the fact that the party opposing discovery "had not shown that the [foreign] Court would be unreceptive to materials discovered here under 1782(a)" 2006 WL 3530582, at *10.

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

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

[144] *In re* Application of Gemeinschafts-Praxis Dr. Med. Schottdorf, 2006 WL 3844464, at *7.

to interpret foreign law."[145] In these cases, the district court judges were more inclined to leave it to the foreign court to decide, as they were not comfortable trying to discern the foreign law based on the evidence submitted by parties.

3. Courts' Reliance on Foreign Judges to Determine Whether to Admit the Evidence Received

District court judges granting §1782 requests repeatedly relied on foreign judges to decide whether they wanted to use the requested information when there was a question as to foreign discoverability or admissibility. As stated succinctly by the district court for the Southern District of New York, "[i]f in fact the [foreign] court opposes [U.S.] assistance, that court may simply choose to exclude the discovered material from evidence. . . . The availability of that corrective measure assuages any concern I may otherwise have had on the issue."[146] This reasoning is related to U.S. courts' view that, even though information may not be available in a foreign jurisdiction, the foreign tribunal may still be interested in receiving the information as evidence.

For example, in *In the Matter of the Application of Procter & Gamble Company*, the district court granted Procter & Gamble's request for discovery for use in patent infringement actions that Kimberly-Clark Corporation brought against it in several foreign jurisdictions, including the United Kingdom, France, The Netherlands, Germany, and Japan.[147] After concluding that the threshold requirements of §1782 were met, the court analyzed *Intel*'s four factors. With regard to Kimberly-Clark's argument that Procter and Gamble was attempting to circumvent foreign jurisdictions' discovery restrictions, the court reasoned as follows:

> Granting discovery under §1782(a) would not undermine the policies of foreign governments in favor of low discovery costs because as a general rule it imposes no costs on such governments or on their inhabitants. Section 1782 applies to litigants who reside or are found within the United States, i.e., litigants normally subject to American discovery procedures and their attendant costs. Further, foreign courts are not obligated to consider evidence obtained pursuant to §1782(a); thus allowing the discovery will not burden such courts with evidence that they deem irrelevant.[148]

Another district court that ordered discovery requested pursuant to §1782 addressed the nondiscoverability of the information pursuant to Venezuelan discovery rules.[149] In *Servicio Pan Americano de Proteccion*,

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[145] 2006 WL 3530582, at *6.
[146] 2006 WL 3844464, at *7.
[147] 334 F.Supp.2d 1112.
[148] *Id.* at 1116.
[149] 354 F.Supp.2d at 274.

C.A., Servicio Pan Americano de Protección ("Servicio"), a Venezuelan security firm, requested information for use in a proceeding brought against it by HSBC Bank in a Venezuelan civil court proceeding. Specifically, Servicio sought documents relating to HSBC's insurance claims. Servicio argued that, although evidence of HSBC's insurance claims would aid its defense, Venezuelan rules of civil procedure barred it from obtaining insurance documents without evidence that specific documents existed.

The court characterized the Venezuelan rules of civil procedures' prohibition on categorical discovery of documents not known to exist as a "technical limitation," and concluded that "Venezuelan courts would appear to readily accept [the documents] if properly authenticated."[150] The Court further stated that "[w]hile the United States' documentary discovery rules appear significantly more liberal than those of Venezuela, the Supreme Court recognized in [*Intel*] that a foreign court's procedural discovery limitations . . . should not prevent a district court from enabling a foreign litigant to obtain admissible evidence here."[151] The court concluded that "[s]ince the information would be useful to a Venezuelan court but potentially unobtainable under Venezuelan laws for *purely technical reasons*, application of a foreign discoverability rule in this case would be senseless."[152]

Likewise, in *In re Application of Grupo Qumma, S.A. de C.V.*, the court ordered the requested discovery, despite its nondiscoverability in the Mexican court, reasoning that "[o]f course, the Mexican court is free to deny the application."[153] The judge in *In re Application of Imanagement Services Ltd.* also left it to the Russian court to determine whether to consider the evidence obtained by §1782. The court noted that "it is unclear whether the Russian court has the authority to order discovery from non-parties who reside outside the court's jurisdiction, and resort to §1782 may be the only avenue by which Imanagement can obtain the discovery it seeks. The request for assistance may reflect a reasonable effort to overcome a *technical discovery limitation*."[154] Here again, the court considered itself doing a favor to both the requesting party and foreign tribunal by giving it evidence the tribunal may find quite useful, but could not order itself based on "technical" procedural rules of the foreign jurisdiction.

While an analysis of the impact of the *Intel* and post-*Intel* interpretations of §1782 follows in Section V, this section was designed to provide a thorough explanation of the evolution of U.S. case law regarding foreign discoverability, as well as detail the various issues involved. The next sections will address English and Canadian judicial assistance schemes, to further contextualize the U.S. judicial assistance scheme in concrete and global terms.

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[150] *Id.* at 275.
[151] *Id.*
[152] *Id.* (emphasis added).
[153] 2005 WL 937486, at *4.
[154] 2005 WL 1959702, at *5 (emphasis added).

IV. JUDICIAL ASSISTANCE BY ENGLISH AND CANADIAN COURTS

This section analyzes Canadian and English judicial assistance systems with an emphasis on foreign and domestic discoverability and admissibility. Specifically, this section illustrates that both England and Canada have a domestic discoverability requirement, consider the relevance of the information to the foreign proceeding, and take care not to impose undue burden on citizens within their jurisdiction when granting judicial assistance. Section 1782's need for a foreign discoverability requirement becomes more apparent when viewed in the context of its fellow common law jurisdictions.

U.S. judicial assistance schemes cannot be neatly juxtaposed with foreign judicial assistance schemes due to the fundamentally defensive nature of foreign schemes and the fundamentally offensive nature of the U.S. scheme.[155] The vast majority of letters of request in both Canada and England come from U.S. courts. U.S. courts generally have jurisdiction to order foreign *parties* to produce evidence, but do not have jurisdiction to order discovery from *non*-parties located outside the United States.[156] Hence, the vast majority of requests for evidence come from U.S. courts for oral examination and document production of non-parties.[157] With the

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

[156] *See* Fed. R. Civ. P. 45; S&S Screw Machine Co. v. Cosa Corp., 647 F. Supp. 600 (M.D. Tenn. 1986) ("because [U.S.] courts lack sovereign power to compel compliance [with discovery orders] by non-parties abroad, the [Hague Evidence Convention] perforce becomes the exclusive means to gather evidence from those persons"). *See also* Barry Donnelly & John Fellas, NEW YORK LAW JOURNAL, VOL. 228, NO. 36 (Aug. 22, 2002), at n.2 ("[i]f the person for whom discovery is sought is a party to the lawsuit, it is generally possible to seek discovery from such a person simply by relying on the Federal Rules of Civil Procedure, rather than having to follow the [Hague Evidence Convention] procedures"); Robert C. O'Brien, *Compelling the Production of Evidence by Nonparties in England Under the Hague Convention*, 24 SYRACUSE J. INT'L L. & COM. 77, 80 (1997). It should be noted that if the non-party present outside the United States is a U.S. national or resident, the U.S. court may order discovery pursuant to 28 U.S.C. §1783. *See id.*, at 89.

[157] *Accord* Peter Balasubramanian and Cynthia Tape, *Obtaining Evidence in Canada for Use in Foreign Proceedings: Principles and Practice*, NYSBA INT'L

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

A. England: English Judges and Their Frustrations with U.S. Lawyers and Judges

The jurisdiction of English judges to provide judicial assistance to foreign courts is statutory. The English statute dealing with judicial assistance is The Evidence (Proceedings in Other Jurisdictions) Act 1975 ("the 1975 Act").[158] The 1975 Act replaced The Foreign Tribunal Evidence Act 1856, and the Evidence By Commission Acts 1859 and 1885 to give effect to the United Kingdom's accession to the Hague Evidence Convention.[159] The United Kingdom's "qualified" Article 23 reservation was codified in section 4 of the 1975 Act, which forbids orders that require parties to respond to broad categorical document requests or requests for pre-trial discovery.[160]

Like §1782, The 1975 Act authorizes English courts to give judicial assistance to civil and criminal proceedings in foreign courts, as well as "international proceedings."[161] English judges can order a wide range of discovery methods, including the examination of witnesses, either orally or

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LAW PRACTICUM, Spring 2004, Vol. 17, No. 1, p. 20 ("the vast majority of letters of request in Canada deal with requests coming from the United States . . .").

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

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

[160] While many states entered "unqualified" declarations pursuant to Article 23 that effectively barred any pre-trial discovery of documents whatsoever, the United Kingdom entered a "qualified" declaration that it will not execute letters of request that require a person to produce "any document *other than particular documents specified*' in the request." *See* Donnelly & Fellas, *supra* note 156, at 1; O'Brien, *supra* note 156, at 84-86 ("The United Kingdom and almost every other contracting state made the declaration permitted under Article 23. However, unlike several European countries such as Germany, France and Italy, the United Kingdom did not make a blanket declaration refusing to execute all letters of request for documents").

[161] The 1975 Act, §§1(b), 5(1)-(3), 6(1)-(3).

in writing, the production of documents, the inspection of property, medical examinations, or the taking of blood samples.[162]

One of the most important differences between U.S. and English judicial assistance laws is that English courts consider requests for judicial assistance only "issued by or on behalf of a court or tribunal" and not from litigants before foreign courts.[163] In practice, however, foreign courts generally act merely as a conduit between litigants requesting information and the English court, with foreign judges rarely analyzing the letter of request presented to it by litigants before forwarding it onto English courts.[164] In fact, English courts have expressed frustration that U.S. judges in particular do not ensure that evidence requested by litigants in proposed letters of request comply with English civil procedure before sending them to the English Court.[165] The most salient differences for purpose of this article, are the foreign and domestic discoverability requirements found in the 1975 Act, as well as the fact that English courts only entertain judicial assistance requests by foreign courts directly.

1. Domestic Discoverability Requirement in England.

The 1975 Act specifically prohibits courts from ordering discovery of information that is not discoverable in similar proceedings in English courts.[166] The 1975 Act states that "[a] person shall not be compelled by virtue of an order under section 2 above to give any evidence which he could not be compelled to give . . . in civil proceedings in the part of the

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[162] *Id.* §2(2)(a)-(f).

[163] *Id.* §1(a).

[164] Gredd v. Busson, [2003] EWHC 3001 (Q.B.), ¶27(8) ("this court appreciates that orders for the issue of letters of request are normally made by the US judge without any real scrutiny. The order is normally made in the terms sought by the applicant without any (or any significant) amendment and without the judge being informed of the significant differences between US federal procedure and those of these courts").

[165] *See, e.g.*, Westinghouse Electric Corp., [1978] 1 All E.R. at 452(e); *Gredd*, [2003] EWHC 3001 at ¶24 ("[t]here is an important pertinent difference between US procedure and English procedure in civil cases that is, in my experience, frequently not known to litigation lawyers and judges in the USA"); Genira Trade & Finance Corp. v. Refco Capital Markets Ltd., [2001] EWCA Civ. 1733, ¶1 ("much time is taken up in our courts trying to give effect to Letters of Request, problems in relation to which could have been avoided if proper steps had been taken to bring to the attention of the foreign court the constraints under which the English court operates"). *See also* Donnelly & Fellas, *supra* note 156 (discussing *Refco* and English courts' frustration with U.S. letters of request).

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

United Kingdom in which the court that made the order exercises jurisdiction."[167] The 1975 Act also states that "[a]n order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for purposes of civil proceedings in the court making the order."[168]

The 1975 Act's codification of the United Kingdom's Article 23 declaration in the Hague Evidence Convention solidified its stance that pre-trial discovery would not be permitted because it was not part of England's civil procedure.[169] This includes not only oral and documentary pre-trial discovery, but discovery from third-parties generally.[170] Hence, English courts impose a domestic discoverability requirement on requested discovery. English judges have adopted defensive postures against "fishing," the term widely used to describe U.S. style discovery, defined as searching for information either by document requests or pre-trial depositions, that may lead to the ability to make factual allegations, as opposed to eliciting known evidence to support allegations of fact.[171]

a. Requests for Documents

The 1975 Act explicitly prohibits courts from ordering parties to respond to categorical document requests (*i.e.*, "all documents relating to . . . "). Specifically, the statute forbids requests that require an individual to "state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody, or power" or "produce any documents other than particular documents specified in the order . . ."[172] Not surprisingly, English courts have consistently denied or modified letters of request that include categorical document requests and/or documents not known to exist.[173] As explained by the House of Lords, document requests must specify "individual documents separately described" that are "actual documents, about which there is evidence which has satisfied that they exist, or at least that they did exist, and that they are likely to be in the respondent's possession."[174]

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[167] The 1975Act, §3(1)(a).
[168] *Id.* §2(3).
[169] *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶1.
[170] *Id.* at ¶¶1, 29.
[171] First American Corp. v. Al-Nahyan, [1998] 4 All E.R. 439.
[172] The 1975 Act §2(4)(a) & (b).
[173] *See, e.g.*, Asbestos Case, [1985] 1 All E.R. 716 (C.A.).
[174] Asbestos Case, ¶¶13-14. *See also* O'Brien, *supra* note 156, at 97-98 (discussing *Asbestos* holding by the House of Lords); Myrick, *supra* note 62, at 28 ("[a] Request may only seek production of documents which are sufficiently particularized, that is, individual documents separately described").

b. Requests for Oral Examination

Except under exceptional circumstances, parties are not entitled to pre-trial depositions or discovery from non-parties. The 1975 Act has been interpreted by English judges to prohibit both document requests and requests for oral examination for pre-trial discovery purposes.[175] Where a letter of request seeks testimony of far-reaching broadly defined topics, an English court will reject such a request.[176] Similarly, where a "U.S. style" pre-trial deposition is requested with no suggestion that such oral evidence will be used at trial, an English court will reject the request.[177] This rule stems in part from a desire to protect witnesses from "an oppressive request" such that they have some idea of the subjects on which they will be questioned.[178]

English judges have acknowledged that oral examination can be used both as a pre-trial deposition and presented as evidence at trial,[179] and, therefore, may allow pre-trial oral examination if the requesting party represents that it is also to be used at trial.[180] Further, unlike categorical document requests, it is not fatal to a requesting party to be unsure exactly what the potential deponent/witness knows and utilize background questions.[181] The reasoning behind these allowances is that under English civil procedure, a witness at trial is often asked background information, and trial testimony often leads to the discovery of more evidence.[182] That being said, timing is sometimes relevant, as an English court may be more prone

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[175] *Gredd*, [2003] EWHC 2001 at ¶2.

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

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

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

[179] *See also Gredd*, [2003] EWHC 3001 at ¶29.

[180] *See id.*; First American Corp., [1998] 4 All ER 439.

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

[182] First American Corp., [1998] 4 All E.R. 439. *See also Gredd*, [2003] EWGC 3001 at ¶¶28, 29. ("[w]e have all been in cases where answers in cross-examination or indeed in examination in chief have led to a search for further testimony or documents, notwithstanding that those answers were given at trial" and noting that asking preliminary questions of a witness "is not fishing," but "a normal technique of examination").

to grant requests for oral examination once the pre-trial evidence phase has ended or is wrapping up, and trial is imminent.[183]

c. Get Out the Blue Pencil: Modifying Letters of Request

English judges sometimes "blue pencil" or modify letters of request by striking those portions that they deem overbroad to comply with English civil procedure.[184] Because English judges want to aid foreign courts in keeping with their Hague Evidence Convention obligations and on comity grounds, modification of overbroad requests is a way for English judges to aid foreign courts while preserving the principle of domestic discoverability.[185] In the case of document requests, judges may strike categorical document requests and identify only particular documents.[186] In the case of requests for oral examination, judges may order restrictions such as eliciting testimony for trial only and limiting questions to those that could be asked at trial.[187]

When English courts receive a letter of request that is predominantly seeking pre-trial evidence via categorical document requests and related deposition testimony, some judges have declined to conduct such "substantive alteration."[188] With regard to document requests, it is often the case that categorical document requests simply cannot be modified to include only specific documents because categorical document requests do not presuppose the requested document actually exists.[189]

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[183] *See, e.g.*, Asbestos Case, [1985] 1 WLR 331 at ¶10. *See also* Myrick, *supra* note 62, at 27 ("[b]ecause an English court can honor only a Request for evidence, the timing of any Request to the English court is important. . . . If the Request is made too early, the requesting party is vulnerable to an accusation that the evidence is required for use other than at trial").

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

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

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

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

[188] *See, e.g., Gredd*, [2003] EWHC 3001 at ¶32; *Minnesota*, [1998] I.L.Pr. 170 at ¶¶50-52, 69. *See also* Loble, *supra* note 166, at 504 (discussing *Minnesota* and the judge's conclusion that he could not blue pencil the request).

[189] *Refco Capital Markets*, [2001] EWCA Civ. 1733 at ¶34-36. *See also* Donnelly & Fellas, *supra* note 156, at 3 (discussing the court's unwillingness to blue-pencil the request in this case).

2. Foreign Discoverability and Admissibility in England

Section 3 of the 1975 Act addresses foreign admissibility and discoverability. It provides that where the individual from whom evidence is requested includes a statement in his objection that he could not be compelled to produce the requested evidence in the foreign jurisdiction, the English court may not compel production of the evidence.[190] The English court may also not compel evidence that the applicant concedes may not be compelled by the foreign court.[191]

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

English courts have, on occasion, made tentative inquiries into whether the requested evidence is "relevant" to the foreign proceeding, but generally leave the determination to the foreign court to decide. [192] This is rarely problematic given that English courts accept requests only from tribunals themselves, and generally do not allow pre-trial evidence far removed from the time or subject matter of the pending proceeding.

B. Canadian Judicial Assistance

While Canadian statutory law regarding judicial assistance has remained generally unchanged for nearly forty years, Canadian courts' approach to judicial assistance has significantly shifted from a restrictive approach to a

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

[191] *Id.*

[192] First American Corp., [1998] 4 All ER 435. Quoted by *Gredd*, [2003] EWHC 2001 at ¶27(12). *See also* Refco Capital Markets, [2001] EWCA Civ. 1733 at ¶¶31, 40 (quoting Lord Keith in *Westinghouse*, [1978] A.C. 437 for the general principle that "the court of request should not be astute to examine the issues in the action and circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible"); Asbestos Cases, [1985] 1 WLR 331 ¶18.

more liberal approach.[193] Canada is not a member of the Hague Evidence Convention, therefore, unlike England, its courts are not under an international obligation to provide judicial assistance to foreign tribunals. Canadian courts, however, are quite willing to provide such assistance and often rely on the principles of international comity and reciprocity as motivating factors for providing judicial assistance to foreign tribunals.[194]

The Canada Evidence Act is the federal statute that gives Canadian courts discretion to provide judicial assistance to foreign courts.[195] The Act states, in part, as follows:

> If, on an application . . . any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within [the Canadian court's] jurisdiction, . . . the court or judge may, in its or their discretion, order the examination on oath on interrogatories . . . may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.[196]

Most provinces have similar legislation,[197] which governs requests to provincial courts for judicial assistance concurrently with the Canada Evidence Act.[198] The provincial statutes are largely similar to the federal

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

[194] *See* Zingre v. The Queen, [1981] 2 S.C.R. 392, ¶18 ("[i]t is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect."); Westinghouse Electric Corp. v. Duquesne Light Co., 16 O.R. (2d) 273, 78 D.L.R. (3d) 3, ¶35. *See also* Freedman & Harney, *supra* note 193, at 352-53.

[195] Canada Evidence Act, R.S.C., c. E-10, §43.

[196] *Id.* §46. It is well-established that the term "testimony" in the Act includes both documents and oral testimony. United States District Court v. Royal American Shows, [1982] 1 S.C.R. (2d) 414, §10. *See also* Freedman & Harney, *supra* note 193, at 357; Myrick, *supra* note 62, at 46.

[197] *See, e.g.*, the British Columbia Evidence Act, R.S.B.C. 1996, c. 124, §53. All provinces except New Brunswick, Newfoundland and Prince Edward Island have enacted legislation similar to the Canada Evidence Act. Balasubramanian & Tape, *supra* note 157, at 21-22.

[198] Freedman & Harney, *supra* note 193, at 356 ("[w]ith regard to letters rogatory relating to foreign civil matters, the general practice is to apply to the court pursuant to both federal and provincial legislation. A majority of the case law supports this approach and indicates that both federal and provincial legislation are

statute; therefore, the concurrent application is not problematic.[199] Like the federal statute, the provincial statutes also allow for both the production of documents and oral testimony.[200] This section focuses on Ontario and British Columbia, as the majority of decisions in this area come from these provinces.

1. Public Policy Considerations: The Canadian Answer to Domestic Discoverability

The Act states that "[n]o person shall be compelled to produce . . . any writing or other document that he could not be compelled to produce at a trial of such a cause."[201] Pursuant to this section, a court cannot compel the production of evidence that could not be compelled in a similar Canadian trial.[202] Early Canadian case law consistently held that information requested must be for trial purposes only, and requests for pre-trial discovery would not be granted.[203] In *Zingre*, however, the Canadian Supreme Court held that a request should not be rejected solely because it may be used as pre-trial discovery.[204] Instead, the court replaced that "inflexible rule" with a balancing test, with specific emphasis on whether granting the request would violate Canadian public policy or sovereignty.[205] As recently summarized by the Ontario Court of Appeals, the test includes analysis of the following factors:

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valid and applicable with regard to foreign civil matters."); Balasubramanian & Tape, *supra* note 157, at 21 (same). Michael Penny, *Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 AM. REV. INT'L ARB. 249, 250 (2001).

[199] Freedman & Harney, *supra* note 193, at 356.

[200] *Id.* at 357.

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

[202] *See* Friction Division Prod. Inc. v. Du Pont Nemours & Co., 51 O.R. (2d) 244, ¶34; JAY E. GRENIG AND JEFFREY S. KINSLER, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE §15.72 (2d. ed. 2004) ("questions posed cannot be broader than those allowed under Canadian law"); Penny, *supra* note 198, at 251 ("[t]he second requirement for the enforcement of a letter of request is that the evidence be for a purpose for which letters of request could be issued under the rules of the Canadian court"). *See also* the British Columbia Evidence Act, R.S.B.C. 1996, c. 124, §53(4)(b) (with a similar provision prohibiting courts from compelling evidence that could not be compelled in the B.C. Supreme Court); Ontario Evidence Act, R.S.O. 1990, c. E.23, s. 60(1) (with a similar provision allowing judges to compel evidence requested by foreign tribunals for "a purpose for which a letter of request could be issued under the rules of court").

[203] *See, e.g., Westinghouse*, 16 O.R. (2d) 283, at ¶21. Early case law also held that the requested material be "absolutely necessary," but that requirement has not survived the *Zingre* public policy test discussed below. *See* Myrick, *supra* note 62, at 45; Freedman & Harney, *supra* note 193, at 360-363; Penny, *supra* note 198, at 252.

[204] *Zingre*, 2 S.C.R. 392 at ¶22.

[205] *Id. See also* Freedman & Harney, *supra* note 193, at 365-367.

(1) the evidence sought is relevant;
(2) the evidence sought is necessary for trial and will be adduced at trial, if admissible;
(3) the evidence is not otherwise obtainable;
(4) the order is not contrary to public policy;
(5) the documents sought are identified with reasonable specificity;
(6) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here.[206]

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

> The interests of sovereignty have come into conflict with the principle of judicial comity in a number of situations and Canadian courts have refused to order the testimony of the individual for use in the foreign proceedings: for example (i) where a request for production was vague and general . . . and the Court held that if the litigation were being conducted in Canada the litigants would not be required to comply with such a request; (ii) when discovery was sought against an individual not a party to the litigation, in violation of local laws of civil procedure . . . ; (iii) when the main purpose of the examination was to serve as a 'fishing expedition', a procedure not allowed in English or Canadian courts . . . .[207]

This public policy consideration includes the impact on Canadian sovereignty, which encompasses "the imposition of an unfair burden, or prejudice to" the Canadian from whom information is requested.[208] Courts often look to provincial civil procedure to compare the burden on the witness pursuant to the request with the burden the witness would bear pursuant to local rules.[209] Where most of these factors weigh in favor of

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

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

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

[209] *See, e.g.*, A-Dec Inc. v. Dentech Prod. Ltd., [1988] 31 B.C.L.R. (2d) 320, ¶30-52; Fecht v. Deloitte & Touche, [1997] 97 O.A.C. 241, 32 O.R. (3d) 417, ¶¶8,9. *See also* Penny, *supra* note 198, at 253 ("[t]he scope of a letter of request is

compelling evidence (*i.e.*, specific documents are requested that are necessary and relevant), Canadian courts may compel the production of evidence that is solely sought for pre-trial purposes.[210] Requests for pre-trial discovery seeking information that may lead to admissible evidence, as opposed to potential evidence itself, however, remain problematic. Canadian courts continue to reject broad "fishing" requests for evidence, reasoning that "[a] wide-ranging 'fishing trip' type discovery imposes a greater burden than does simply providing known evidence for trial."[211] Canadian judges regularly "go behind" letters rogatory received from U.S. courts to determine whether, despite language that the testimony will be used at trial, the substance of the request is in fact pre-trial discovery.[212]

2. Modification of Requests for Evidence

Canadian judges have not expressed the same hesitancy as English judges to narrow what appear to be overbroad requests for evidence. Modification of requests for evidence is, in fact, a common tool used by Canadian judges to make overly burdensome requests less onerous for the individual within the court's jurisdiction.[213]

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

Like in England, a foreign discoverability requirement *per se* is generally unnecessary in Canada because the foreign tribunal itself is requesting the information. Further, because the vast majority of requests come from U.S. courts, it is generally assumed that the evidence requested is discoverable pursuant to the broad U.S. discovery rules. Built into the statute is language requiring that the foreign tribunal itself actually desires the requested information.[214] Like England, the tribunal itself, and not the

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measured against what the witness's obligations would be if the litigation had been conducted in Canada").

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

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

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

[213] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy Inc., [2006] A.W.L.D. 945, 385 A.R. 274 (limiting the topics on which the Canadian witness could be examined); *GST Telecommunications, Inc*. 2000 B.C.S.C. 72 (limiting both topics for oral examination and requests for document production); Peckarsky v. Lipton Wiseman Altbaum & Partners, [1999] 38 C.P.C. (4th) 170, 96 O.T.C. 178. *See also* Penny, *supra* note 198, at 252.

[214] *See* The Canada Evidence Act, R.S.C., C. E-10, §46. *Accord* De Havilland Aircraft of Canada Ltd., [1991] 1 C.P.C. (3d) 76, 3 O.R. (3d) 705 ("[t]he

litigants, must request the information, which is further insurance that it actually wants the requested evidence.

While Canadian judges, like English judges, have repeatedly stated that admissibility determinations should be left to the foreign judge requesting the information. Despite the fact that requests can only come from foreign tribunal themselves, Canadian courts often consider relevance when determining whether a request violates public policy and Canadian sovereignty.[215] Canadian courts often look to the broadness of the request when analyzing relevance, reasoning that narrower requests are likely more to be relevant than broad vague requests that may yield information not pertinent to the specific claims at issue in the foreign litigation.[216] As recently explained by Judge Goudge in the Ontario Court of Appeal, "[w]ithout some showing of relevance, the court may be sanctioning a fishing expedition and requiring one of its citizens to participate in a process that may be of no assistance to the foreign litigation."[217]

V. ANALYZING §1782 THROUGH A COMPARATIVE LENS

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

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prerequisites to the exercise of the discretion created by s. 46 were satisfied in this case: (1) it appeared that a foreign court was desirous of obtaining the evidence . . .").

[215] *See, e.g.*, Fecht v. Deloitte & Touche, [1997] 32 O.R. (3d) 417, 15 C.P.C. (4th) 293, ¶8. (affirming lower court's rejection of a request for evidence where there was "simply not a sufficiently substantially link to the foreign litigation"). *See also* Balasubramanian & Tape, *supra* note 157, at 23 ("[i]f the evidence sought is not shown to be relevant, the request for assistance may be refused, or 'read down' if it is overbroad . . . While Canadian courts may show deference to the foreign court's determination of relevance, they are not 'a "mere rubber-stamp" of an extra-judicial court.'"); Myrick, *supra* note 62, at 47; *Accord A-Dec, Inc.*, 31 B.C.L.R. (2d) 320 at ¶11; Penny, *supra* note 198, at 252 (In the absence of a showing that the evidence sought is relevant, the request for assistance will be refused, or 'read down' if it is overbroad.").

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

[217] *Id.* at ¶31.

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

When §1782 was amended in 1964, the United States was still convinced that other countries might want to adopt its liberalized style of discovery. Since 1964, the Hague Evidence Convention has been ratified and numerous blocking statutes have been enacted by foreign countries prohibiting residents from complying with discovery orders by U.S. judges. Foreign judges have repeatedly defensively denied requests for judicial assistance by U.S. courts seeking categorical document requests or pre-trial depositions. The recent narrowing of the allowable discovery pursuant to the U.S. Federal Rules of Civil procedure suggests that the United States itself is rethinking its previous approach to broad discovery. At this point, U.S. courts should stop attempting to spread U.S. liberal discovery at the expense of U.S. defendants and in the face of defensive foreign jurisdictions.

A. Comity Necessitates a Foreign Discoverability Requirement

Judicial assistance is premised on the concept of comity among courts.[218] The very term "judicial *assistance*" itself shows that assisting foreign courts is the purpose behind this service that courts provide to foreign tribunals. Despite the comity-based reasoning behind judicial assistance, §1782 aids litigants, or potential litigants, as opposed to tribunals directly, often when the tribunal has expressed no desire for the requested discovery, and the discovery is contrary to the rules of the jurisdiction in

[218] *See Zingre*, [1981] 2 S.C.R. 392, ¶18 ("[i]t is upon this comity of nations that international legal assistance rests. Thus the Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect."); *Gredd*, [2003] EWHC 3001, ¶27(1) ("[c]omity requires this court to view a letter of request issued by a foreign court for the purpose of civil proceedings before it benevolently"); U.S. v. Lopez, 688 F.Supp. 92, 97 (E.D.N.Y. 1988) ("[t]he execution of a request for judicial assistance by the foreign court is based, in the absence of a treaty, on comity between nations at peace"), Freedman & Harney, *supra* note 193, at 352 ("[t]he principle underlying the issuance and enforcement of letters rogatory is international comity").

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

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

1. Interpretation of Foreign Jurisdictions' Evidentiary Restrictions as "Technical Limitations"

Many U.S. judges have justified their holdings granting discovery that may not be discoverable in foreign jurisdictions by characterizing foreign jurisdictions' discovery limitations as "technical limitations."[219] These decisions refuse to acknowledge that a jurisdiction's rules regarding discovery and pre-trial evidence are premised on policy decisions made by that jurisdiction's lawmakers and courts, not simply technical limitations in countries that share the U.S. view on the usefulness of broad pre-trial discovery.[220]

As discussed in Section II, important policy considerations underlie countries' evidentiary rules. Such policy considerations include efficiency, "truth," privacy, and cost. Each country's unique approach to what is and is not discoverable or admissible is a result of that country's decision as to how to balance these factors.[221] Far from being "technical limitations,"

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[219] *See* the discussion at pp. 35-36.

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

[221] *Accord* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 625 (2001) ("[f]oreign systems have, of course, made very different policy judgments about the extent of discovery

these rules are an important part of the legal and cultural framework of foreign jurisdictions. When U.S. judges dismiss foreign jurisdictions' evidentiary limitations as "technical," they are undermining and undervaluing the importance of these rules.

2. *U.S. Courts Leave it to the Foreign Judge to Decide*

Instead of analyzing foreign discoverability or admissibility, U.S. judges now routinely grant judicial assistance requests and leave it to the foreign court to decide whether it wants to consider the requested evidence.[222] A corollary to this is U.S. judges' reasoning that a foreign court may still want to consider evidence that is not discoverable in its jurisdiction. U.S. judges avoid any comity concerns by labeling the foreign jurisdiction's laws prohibiting such discovery as merely technical limitations, and concluding that the U.S. judge is helping the foreign judge to circumvent jurisdictions' pesky limitations by providing potentially useful information.

The *Intel* holding and the U.S. government in its amicus brief to the court got the ball rolling by reasoning that foreign tribunals may want evidence that is not discoverable in their jurisdiction.[223] The U.S. government argued as follows:

> Even when the requesting entity is a private party, the unavailability of discovery under foreign law does not necessarily imply that foreign tribunals would take offense at a district court's decision to order discovery in this country. The foreign tribunal's laws may limit discovery within its borders out of concerns that are peculiar to its legal practices, culture, or traditions, but have no analogue in the United States. . . . . The application of a foreign discoverability rule would make little sense in that situation; rather, it would undermine Section 1782's objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons that have no bearing on international comity, they cannot obtain under their own laws.[224]

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

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allowed in civil cases" and "permitting a party to inspect documents and later determine whether they will or will not place them in evidence contradicts a core value of the civil law litigation and national judgments about what best serves the truth-finding process").

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

[223] *See* 542 U.S. at 261-262; Brief for the United States as Amicus Curiae Supporting Affirmance, 2004 WL 214306, at 24 (Jan. 30, 2004) [Brief for the U.S. Government].

[224] Brief for U.S. Government, *supra* note 214, at 24.

> A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). . . . When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless.[225]

In fact, foreign courts have no use for information that is not discoverable in their jurisdiction, and allowing litigants access to U.S. style discovery only muddles and obfuscates foreign tribunals' proceedings. Accordingly, many foreign courts' work hard to resist the spread of U.S. style discovery through defensive judicial assistance, as discussed in Section IV, blocking statutes, and lodging Hague Evidence Convention article 23 reservations.

As discussed above, pre-*Intel* case law largely concurred that a foreign discoverability requirement was necessary to avoid "offending the forum nation by furthering a scheme to obviate that nation's discovery rules."[226] Likewise, the First Circuit acknowledged that such a requirement was necessary to "avoid offending foreign tribunals," and expressed concern that to forgo a foreign discovery analysis would "lead some nations to conclude that [U.S.] courts view their laws and procedures with contempt."[227] Scholars have also voiced concern that "injection" of U.S. discovery into foreign proceedings will be inefficient and seen as U.S. legal imperialism.[228]

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

Intel and other cases rejecting a foreign discoverability requirement do not address this argument, but emphasize a textual argument that a requirement is simply not found in the statutory language of §1782. While the textual argument may be a reason to interpret §1782 in its current state as not including a foreign discoverability requirement, it does not solve the

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[225] 542 U.S. at 261-262.

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

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

[228] *See* Warner Lien, *supra* note 221, at 624 ("[t]he injection of American discovery procedures into foreign proceedings will otherwise be both counterproductive to efficiency interests in both forums and may well trigger charges of American interference, chauvinism, or legal imperialism").

problem of offense to foreign tribunals and undermining of the importance of foreign evidentiary limitations by U.S. judges. This reality necessitates a reading of §1782 that imposes a foreign discoverability requirement, or more desirable, amendment of §1782 to allow requests only by the tribunals themselves. As long as §1782 continues to grant individual litigants access to judicial assistance without a foreign discoverability requirement, the undermining of foreign evidentiary limitations will necessarily persist.

In a similar vein, U.S. courts are often overly sympathetic to parties seeking evidence via §1782. Courts have characterized §1782 as the only avenue by which the parties may be able to get the evidence they are looking for, and completely ignore the fact that the party has brought suit or submitted to the jurisdiction of a foreign court in which they are not entitled to that information.[229] U.S. style discovery is only available against defendants that a U.S. court can assert jurisdiction over and that the plaintiff has chosen to pursue claims against in U.S. court. If a plaintiff brings suit in another jurisdiction it is making a choice not to utilize U.S. courts as a vehicle to resolve its claims. A necessary consequence is that the defendant cannot be subject to U.S. style discovery.

3. U.S. Judges Avoiding Foreign Law Analyses

Another reason that courts have avoided foreign discoverability analyses is the undesirability of "speculative forays" into foreign law.[230] Both judges and scholars have expressed concern that a foreign discoverability requirement would force U.S. judges to interpret foreign law.[231] U.S. courts, however, utilize party-appointed biased expert witnesses for everything from damages in large-scale antitrust cases and economic analysis in class action certifications to technical aspects of technological advances in intellectual property cases. With regard to foreign law specifically, U.S. judges are regularly required to make foreign law determinations when deciding whether to dismiss cases on the basis of forum non conveniens and choice of law decisions.[232] What makes an inquiry into the admissibility or discoverability of evidence any more onerous or difficult than substantive law inquiries?

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

[230] 51 F.3d at 1099.

[231] *See, e.g.*, Application of Grupo Qumma, 2005 WL 937486 at *3; Application of Gemunschafts-Praxis Dr. med. Schottdorf, 2006 WL 3844464 at *7; *In re* Euromepa, 51 F.3d at 1099.

[232] *See, e.g., Gilstrap v. Randianz*, 443 F.Supp.2d 474 (S.D.N.Y. 2006) (analyzing English law prohibiting class actions). *But see* Kotz, *supra* note 8, at 61 ("comparing the machinery of civil justice in the common law and the civil law . . . was a subject fraught with greater risks of fundamental misunderstanding of foreign law than those which beset the comparative endeavors in substantive law").

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

B. Unfairness to U.S. Defendants

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

1. Asymmetrical Obligations and Privileges

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

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

> Allowing §1782 to be used in the manner it was used here will severely disadvantage American companies involved in disputes with foreign

> competitors who do not do substantial business in the United States. . . . [S]uch foreign competitors can obtain discovery from both U.S. firms and related third parties under broad American discovery rules, while remaining subject themselves only to the more limited rules of the jurisdiction where the foreign proceeding has been instituted.[233]

The First Circuit also pointed out the asymmetrical unfairness of §1782 without a foreign discoverability requirement by noting that "[a]ll the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the [U.S.] party is confined to restricted discovery in the foreign jurisdiction."[234]

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

Courts and scholars have also attempted to deal with unfairness concerns by acknowledging that U.S. courts have the discretion to limit orders compelling discovery pursuant to §1782, including imposing conditions on production, such as reciprocity.[235] While that is a nice idea, no U.S. judge has imposed a reciprocity requirement in any published decision regarding §1782. The likely reason for the absence of such conditions is that it is not really a viable or workable solution. It assumes that the U.S. defendant wants documents or testimony from the foreign plaintiff or related third-parties. It also triggers defenses such as blocking statutes and the Hague Evidence Convention reservation of the jurisdiction in which the reciprocal information is located. It also imposes continuing jurisdiction on the U.S. district court, as it is quite likely that continued

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[233] Brief of Amicus Curiae for the National Association of Manufacturers at 2002 WL 32157392, at 8 (Nov. 15, 2002) [hereinafter "NAM Brief"].

[234] *In re* Application of Asta Medica 981 F.2d at 5-6. *See also* NAM Brief, *supra* note 224, at 9 (citing this language).

[235] *See, e.g.*, *Intel*, 542 U.S. at 262 ("[c]oncerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an 'interested person,' a district court could condition relief upon that person's reciprocal exchange of information."); *In re* Bayer AG, 146 F.3d at 194. *See also* Smit, *supra* note 87, at 13 ("in order to create equality of treatment, an American court, when asked to compel production by a litigant before a foreign or international tribunal, may condition discovery on that litigant's agreeing to make the same extent of discovery available to its opponent").

fighting and requests for judicial relief or assistance would result in such situations. It simply is not done and is not workable.

Both of these approaches ignore the extreme time and expense that a U.S. party would have to go to in order to produce ultimately meaningless discovery. They also ignore the fact that the other party then has information to which it is not entitled and with which it can do what it wants, either to use to craft other causes of action in the jurisdiction it is in, or in other jurisdictions. Even if it is unable to use the information received directly to support a cause of action because the foreign tribunal will not admit the evidence, it can simply re-request documents now known to exist after bringing a cause of action. Information can be used to question witnesses regarding issues that the party would not have otherwise known about, or to recontextualize documents that can be used in the litigation. Lawyers will find ways to utilize the information received outside the channels of direct submissions to tribunals.[236] Unfairness to U.S. parties and non-parties occurs the moment that they are forced to produce discovery that they cannot, be forced to produce, in the jurisdiction in which the proceeding is occurring or contemplated.

2. Disregard for the Burden on U.S. Defendants by U.S. Lawmakers and Judges

As discussed in Section IV, both Canadian judges and English judges put great weight on the burden that judicial assistance causes citizens of their countries. The public policy test that has evolved in Canadian case law is primarily concerned with burden on Canadian citizens and companies. Canadian courts have stressed that judicial assistance is contrary to public policy when it would result in "the imposition of an unfair burden or prejudice to" the Canadian party or non-party from whom the request is sought.[237] Likewise, English judges have characterized requests for broad discovery requests as "oppressive" from the witness's perspective.[238]

It is strange that given the extreme burden that §1782, as interpreted by the Supreme Court, imposes on U.S. companies, the issue really does not come up in U.S. judicial decisions. In fact, the complete disregard of U.S. judges for the unfavorable position U.S. defendants are put in as a consequence of §1782 is quite noticeable when juxtaposed with foreign

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[236] *See* NAM Brief, *supra* note 224, at 14 ("[f]oreign prosecutors and private 'interested' parties could misuse information gathered via §1782 in any number of ways: to build an entirely different case against the U.S. firm, either in U.S. court or overseas; to blackmail certain persons within or related to the company; to profit by selling the information to other entities; or (in the case of a business rival) to compete more effectively against a U.S. firm").

[237] *See* DeHavilland Aircraft of Canada Ltd., 1 C.P.C. (3d) 76, ¶37.

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

judges' concern. This is likely because judges generally compare the burden of producing the requested information with the witness's burden pursuant to domestic discovery rules. The burden of foreign judicial assistance requests from U.S. courts is nearly always greater than what the burden would be in domestic proceedings. Conversely, U.S. parties' burden pursuant to §1782, when compared with their burden in U.S. proceedings, is no greater. This results in U.S. judges ignoring the fact that the U.S. defendant is not before a U.S. court, and should only be subject to the allowable scope of discovery in the state with jurisdiction over the case again it.

Procter v. Gamble illustrates this approach; compelling discovery reasoning "[§]1782 only applies to litigants who reside or are found within the United States, *i.e.*, litigants normally subject to American discovery procedures and their attendant costs."[239] Indeed, what is essentially needed is for U.S. judges to protect U.S. companies from U.S. discovery *abroad*, which is not an intuitive concern when viewed without the context of foreign jurisdictions' procedures. Foreign judges are used to the need to take a defensive stance against U.S.-style discovery, whereas U.S. judges have repeatedly interpreted §1782 as a mandate to spread U.S. liberal discovery to the world, ignoring the repercussions of that approach on U.S. defendants and U.S. non-parties.

The drafters of the 1964 amendments to §1782 hoped that spreading liberal discovery to the world would encourage other countries' to adopt U.S. style discovery, or at grow to view it more favorably.[240] It is clear that has not happened. The main result of the U.S. aggressive and liberal judicial assistance scheme is unfairness to U.S. defendants in foreign proceedings. Instead of continuing the failed mission of spreading U.S. discovery, U.S. judges and lawmakers should acknowledge that this policy is only hurting U.S. companies and individuals and putting them at a disadvantage in foreign proceedings.

3. The Asymmetry Between U.S. Defendants and Foreign Plaintiffs Violates the Principle of Equality Between Parties

Courts worldwide acknowledge that equality between parties is a fundamental principle of due process.[241] The fundamental nature of this

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[239] 334 F.Supp.2d at 1116.

[240] *See supra* pp. 20-21 (discussing §1782 drafters' intention to spread U.S. discovery to the world).

[241] *See, e.g.*, Parex Bank v. Russian Sav. Bank, 116 F.Supp.2d 415, 424 (S.D.N.Y. 2000) (noting that the Russian civil code "include[s] . . . the presumption of equality of parties, adversarial presentation of oral and written evidence, lifetime tenure for judges, and appellate review); Eurofood IFSC Ltd., 2006 E.C.R. I-3813, ¶66 (holding that in insolvency proceedings, creditors are entitled to the fundamental right of "equality of arms"); The Honorable Samuel L. Bufford, *Center Of Main Interests, International Insolvency Case Venue, And Equality Of Arms: The*

right is evidenced by Article 35(2) of the Statute of the International Court of Justice, which states that "[t]he conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, *but in no case shall such conditions place the parties in a position of inequality before the Court*."[242] When U.S. defendants are forced to litigate claims in foreign courts at a distinct disadvantage to the foreign litigant, they are being placed in a position of inequality that contradicts fundamental concepts of civil justice.

4. Ramifications of the Asymmetrical Burden on Foreign Defendant

Obligating U.S. defendants to produce information that is not discoverable in the foreign jurisdiction will encourage foreign plaintiffs to bring suit in foreign court using pretextual claims solely to utilize §1782.[243] If a foreign plaintiff could file suit against a U.S. company either in the United States or in a foreign jurisdiction, and it could obtain U.S. style discovery against the defendant without being subject to it itself in the foreign jurisdiction, then that is the preferable jurisdiction for the plaintiff to file suit. Indeed, when plaintiffs can bring claims in tribunals with no standing requirements, or pursuant to jurisdiction solely by means of a U.S. company's presence in a foreign market, bringing a claim against a competitor in order to benefit from §1782 becomes especially enticing.

It is currently not settled whether foreign plaintiffs can utilize §1782 to force U.S. defendants to produce documents located *outside* the United States. It is clear that §1782 can be used to require a company to produce documents located in, for example, a Texas office. It is unclear, however, whether §1782 can be used to force a U.S. company to produce documents located, for example, at its subsidiary in Germany. While the Southern District of New York has held that U.S. judges may force individuals or companies within its jurisdiction to produce documents located outside the United States,[244] the U.S. District Court for the District of Columbia has held that it may not force a U.S. company under its jurisdiction to produce documents located abroad.[245]

Eurofood Decision Of The European Court Of Justice, 27 NW. J. INT'L L. & BUS. 351 (2007) (discussing the E.C.J.'s use of the principle in a civil context).

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

[243] *See* Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioner, *Intel v. Advanced Micro Devices*, 2003 WL 23112943 (Dec. 31, 2003), at 15; Second EC Brief, *supra* note 110, at 4, 14.

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

[245] Norex Petroleum Ltd. v. Chubb Insur. Co. of Canada, 384 F.Supp.2d 45 (D.D.C. 2005). For a recent example of an approach between these two cases'

If subsequent case law follows the Southern District of New York's approach, the asymmetrical burden of §1782 on U.S. defendants could substantially worsen. If §1782 could be used to obtain information outside the United States, "American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world."[246] In the above example, an English plaintiff could sue a U.S. defendant in English court and use §1782 to obtain information located in England, while not subject to pre-trial obligations itself. Section 1782 was not designed to transform U.S. courts into vehicles for obtaining evidence located anywhere in the world pursuant to broad U.S. discovery rules.[247]

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

C. Incongruence with Global Hostility Toward U.S. Style Discovery

As discussed in Section II, global hostility exists toward U.S. discovery. This hostility is manifested in judicial opinions, such as *Minnesota v. Philip Morris*, in which the English Court of Appeal described U.S. discovery as "generat[ing] unnecessary costs and complexity" and termed it as "fishing" that allows "a roving inquiry . . . to obtain information which may lead to obtaining evidence in general support of a party's case."[248] Judicial hostility toward U.S. discovery is also seen in the defensive posture that Canadian and English judges have adopted toward U.S. requests for judicial assistance. Time and time again judges have written opinions explaining the differences between U.S. and domestic discovery, and narrowing or rejecting requests for pre-trial discovery based on these differences.

This hostility is also manifested in Article 23 of the Hague Evidence Convention, which allows members to proactively announce their refusal to grant letters of request issued for "the purposes of obtaining pretrial

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approaches, see *In re Application of Nokia Corp.*, 2007 WL 1729664 (W.D.Mich. June 13, 2007). In that case, the district court concluded that the fact that the requested documents were in Germany "tipped the scales" against granting a §1782 request when other factors weighed both in support of and against ordering discovery. *Id.* at *5.

[246] Smit, *supra* note 87, at 11.

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

[248] [1998] I.L. Pr. 170, ¶¶13, 15.

discovery of documents."[249] It is telling that nearly every country that ratified the Hague Evidence Convention made the declaration prohibiting judicial assistance for pre-trial discovery.[250]

It is also telling that many countries have enacted blocking statutes, which impose criminal penalties on residents that disclose information ordered by U.S. courts. These statutes are enacted for the purpose of protecting residents that are parties to U.S. court proceedings from U.S. discovery obligations.[251] Although these statutes come into play when foreign defendants are parties to U.S. proceedings, and U.S. judges have forced the defendants to produce information, as opposed to situations in which judicial assistance from foreign courts is requested, they are solid evidence of a general global sentiment regarding U.S. discovery.

Section 1782 currently allows "interested persons" to take full advantage of broad U.S.-style discovery in foreign jurisdictions that have expressly rejected and voiced distain for U.S.-style discovery. This "head in the sand" approach to U.S.-style discovery ignores the reality that U.S-style discovery will not be embraced by other countries, and indeed, has conclusively been rebuked. When §1782 was amended in 1964, the Hague Evidence Convention was not yet ratified, blocking statutes were not yet prevalent and little foreign judicial assistance case law had developed. In essence, the world had not yet concretely established its position rejecting U.S.-style discovery. Now, however, jurisdictions have conclusively rejected broad pre-trial discovery, and the purpose of the §1782's 1964 revisions, to "promote a better understanding and acceptance of American discovery purposes,"[252] has been squarely defeated. Hence, with a renewed aims and honest acceptance of other jurisdiction's attitudes toward U.S.-style discovery, it is now time to revisit the statute.

D. A Simple Solution – Allow Requests from Tribunals Only

Much of the scholarship and case law regarding §1782 revolves around the current wording of §1782 and whether or not a foreign discoverability requirement can be inferred in the text of current statute. In *Intel*, the Supreme Court clearly and definitely answered "no" to that question. Courts also look to the drafters' intent to determine how to interpret the statute, and find the clear directive to spread liberal U.S. discovery. Few scholarly discussions ask the question of whether the statute should be

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[249] Hague Evidence Convention, *supra* note 2, art. 23.

[250] *Id.* Only Barbados, Israel, Czechoslovakia and the United States did not make a declaration under article 23 of the Convention. *Graco*, 101 F.R.D. at 522 n. 26; O'Brien, *supra* note 156, at 84.

[251] For a detailed discussion of blocking statutes, see *supra* note 1; David Brewer, *Obtaining Discovery Abroad: The Utility Of The Comity Analysis In Determining Whether To Order Production Of Documents Protected By Foreign Blocking Statutes*, 22 HOUS. J. INT'L L. 525 (2000).

[252] Smit, *supra* note 87, at 229. Discussed above at p. 20.

amended and how it actually functions globally. Understandably, judges are not charged with criticizing a statute or drafters' intent, but simply interpreting it as accurately as possible.

When one steps away from the textual interpretation question, does not tacitly accept the drafters' intention to spread liberal U.S. discovery, and analyzes how the statute functions globally in relation to other jurisdictions' discovery systems and judicial assistance statutes, its shortcomings become clear. Section 1782 deviates from any other jurisdiction's judicial assistance statute by allowing any "interested persons" to request judicial assistance, as opposed to only tribunals themselves. This puts the device in the hands of advocates, as opposed to the tribunals that will or will not utilize the information. Section 1782 then pays no heed to the allowable discovery in the jurisdiction in which the foreign tribunal sits. Section 1782 does this all in the name of spreading U.S. style liberal discovery. Post-*Intel*, §1782 allows advocates to pursue evidence in situations where proceedings are merely contemplated in any range of tribunals worldwide.

It is now clear that advocates are abusing §1782 to the detriment of U.S. defendants in foreign proceedings and related non-parties. It is also clear that U.S. courts are spending more time than ever dealing with §1782 requests, and this trend will surely continue with *Intel*'s broad reading of the statute.[253] Despite *Intel*'s desire to avoid questions of foreign law, U.S. judges now routinely must oversee expert battles regarding foreign law in order to adequately apply *Intel*'s four-part test. All of this time and effort is being spent on obtaining evidence that is not discoverable in the vast majority of jurisdictions in which the foreign proceedings are pending or contemplated.

Instead of allowing U.S. defendants' and non-parties' time and resources to be unfairly wasted for the sake of textual interpretation, it is time to revisit the statute given the extreme change of circumstances globally regarding U.S. discovery. While yet another overhaul of §1782 may be appropriate, a simple amendment would vastly improve the current situation — removing the ability of "interested persons" to request judicial assistance, and placing that power solely in the tribunal itself, or appropriate government official in criminal proceedings. Judicial assistance is designed for one tribunal to help another, not as a tool for advocates with virtually no limits.

In the legislative history of §1782, the extremely aberrant change of allowing "interested persons" to request information is not explained, leading one to conclude that it was added as one of many steps toward

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

liberalizing judicial assistance. With the benefit of hindsight, this liberalization has not had the intended effect of global acceptance of U.S. style discovery, and has resulted in unfairly burdening U.S. defendants and non-parties, and putting U.S. defendants at a disadvantage in foreign proceedings.

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

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

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

VI. CONCLUSION

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

assistance to assist foreign courts and tribunals directly, and ignores the important policy reasons behind other countries' limited evidentiary rules.

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