OBSERVATIONS AT THE QUINCEAÑERO OF *INTEL CORP. V. AMD, INC.* ON INTERNATIONAL COMITY IN DOMESTIC DISCOVERY FOR FOREIGN ANTITRUST MATTERS

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ABSTRACT

Courts that exercise comity doctrines have no way of communicating with foreign counterparts on any of the issues other than through their decisions. Assuming a foreign court wants to cooperate (a very big, undefended assumption), how often or carefully does it pay attention to what other nations' courts are doing? Assuming it pays attention and cares, how does it identify an act of restraint by the U.S. court, and how will it know how to reciprocate? Unless the parties to a cooperative scheme have a clear sense of what counts as cooperation and what counts as defection, the scheme will break down if the parties are rational.[1]

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1. Jack Goldsmith, *Sovereign Difference and Sovereign Deference on the Internet*, 128 YALE L.J. F. 818, 823–24 (2019).

I. INTRODUCTION

In 2004, the U.S. Supreme Court decided a pair of cases concerning comity in antitrust that garnered considerable attention.[2] The second, *Intel Corp. v. Advanced Micro Devices, Inc.*, centered on the applicability of 28 U.S.C. § 1782, a law permitting parties to foreign disputes to compel discovery in U.S. courts, to the European Commission (EC).[3] The case raised not only objections from the petitioner but from the Commission itself.[4] Questions of international comity thus advanced to the forefront, especially in a spirited dissent offered by Justice Stephen Breyer.[5] Although many courts had previously addressed § 1782, it had not raised significant international hackles. *Intel*, however, pertained to antitrust—an area where the United States has clashed with other nations for the better part of a century.[6] And since *Intel*, skirmishes over antitrust discovery have persisted, both under § 1782 and alternate means afforded by the Federal Rules of Civil Procedure (FRCP).[7] Examining the results and reasoning in these cases suggests some relatively simple solutions to the persistent problems *Intel* did not resolve. Some aspects of these solutions, indeed, were fleshed out by commentators not long after *Intel*, and subsequent practice has borne out their prescience.[8] Given long-standing tensions in transnational competition law, bringing greater consistency and comity to discovery may provide meaningful relief in future antitrust practice.

Part II of the Article briefly sketches an essential backdrop: the protracted history of U.S. interventionism (and foreign resistance thereto) in the sphere of transnational antitrust conduct—especially with respect to

2. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004); *see generally* Calvin S. Goldman, Chris Hersh & Crystal L. Witterick, *Comity After* Empagran *and* Intel, ANTITRUST, Summer 2005, at 6.

3. *Intel Corp.*, 542 U.S. at 259–65.

4. *Id.*

5. *Id.* at 267–73 (Breyer, J., dissenting).

6. *See id.* at 250–52.

7. *See infra* Part IV.

8. *See, e.g.*, Anand Suryakant Patel, *International Judicial Assistance: An Analysis of* Intel v. AMD *and Its Affect on § 1782 Discovery Assistance*, 18 FLA. J. INT'L L. 301 (2006); Roger J. Johns & Anne Keaty, *The New and Improved Section 1782: Supercharging Federal District Court Discovery Assistance to Foreign and International Tribunals*, 29 AM. J. TRIAL ADVOC. 649 (2006).

discovery. Part III then turns to the more specific realm of discovery, detailing the development of the statutes permitting U.S. courts to order discovery at the behest of foreign claimants, leading to the seminal *Intel Corp. v. AMD, Inc.*[9] In *Intel*, the Supreme Court endorsed both an exceedingly broad view of which applicants and foreign proceedings could qualify for assistance under § 1782 together with what would be known as the *Intel* factors for channeling discretion in granting relief to qualified applicants.[10] The central Part IV turns to the state of transnational antitrust discovery in the 15-odd years since *Intel*, thoroughly analyzing cases depending upon § 1782, as well as those that eschewed the statute in favor of alternative procedural means—perhaps even including forum shopping. Part V seeks to consolidate the various rationales and results of the cases and commentators to critique the present structure of transnational discovery assistance in antitrust matters. Part VI then offers some suggestions of how judicial standards in disputed discovery might better serve comity, courtesy, and cooperation amongst nations. Finally, the Article emphasizes again why comity is of such transcendental importance in transnational competition law enforcement in an ever more globalized economy—and thus why the United States must continue to improve jurisprudence in this historically fraught arena.

II. A BRIEF HISTORY OF COMITY AND LACK THEREOF IN TRANSNATIONAL ANTITRUST LAW

This Article is decidedly not the first (or likely the last, alas) to document a certain lack of comity in the history of competition law internationally, and accordingly, it does so briefly. In its birth pangs, antitrust offered no appearance of implicating grand geopolitical concerns.[11] Even prior to the revolutionary Sherman Antitrust Act of 1890, at least 12 states had already passed laws addressing the same concerns—well over a quarter of those then-admitted.[12] It is far beyond the scope of this Article to analyze

9. *Intel Corp.*, 542 U.S. 241.

10. *Id.*

11. *See* David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 148 (1990) (quoting STEVEN L. PIOTT, THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST 4 (1985)) ("Steven Piott, who has written a history of popular resistance to the rise of big business, states: 'Most antitrust activity began not at the national level, but rather at the state and local level. And the impetus for that activity came not from "above," but rather from the daily experiences of ordinary people "below."'")).

12. *See id.* at 146 (citing 12 states); Daniel E. Rauch, *Sherman's Missing*

why the constituent states of the United States proved the testing ground for competition law, while others have made it their focus.[13] Other articles have studied how and why the Sherman Act affected state versus federal responsibility for antitrust law.[14] Many also opine on why the United States as a whole was such a pioneer.[15] But whatever the reason, "[u]ntil the mid-twentieth century, the United States was virtually the only nation in the world with an antitrust regime."[16]

A. *Development of the Extraterritorial Reach of the Sherman Act*

The United States first had to put its own house in order, which presented difficulties given the terse dictates of the Sherman Act. The Supreme Court thus adopted a policy of broad judicial exegesis of congressional purpose to give sinew to the statutory skeleton. At first, these embellishments were unassertive on the international stage.[17] In 1909's *American Banana Co. v. United Fruit Co.* (*ABC*), the U.S. plaintiff objected to monopolization, price-setting, and expropriation of his banana enterprise in Costa Rica and the newly-independent Panama by the more-or-less state-sponsored incumbent.[18] Justice Oliver Wendell Holmes wrote for the Court that such a proposed extraterritorial reach was "startling"—repeating the word twice—for "[a]ll legislation is prima facie territorial."[19] And the Sherman Act did not purport to go further than that default: "not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not

"Supplement": Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism, 68 CLEV. ST. L. REV. 172, 179 (2020) (citing 13 states).

13. *See, e.g.*, Rauch, *supra* note 12, at 177–79; Millon, *supra* note 11, at 142–48.

14. *See* Rauch, *supra* note 12, at 180–81 nn.47–52 (citing studies).

15. *See, e.g.*, Millon, *supra* note 11, at 148–49.

16. Russell W. Damtoft & Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT'L LAW. 137, 138 (2009); *see* Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 IND. J. GLOB. LEGAL STUD. 433, 435 (2002); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 160–61 (1999).

17. *See* Molly Askin & Randolph W. Tritell, *International Antitrust Cooperation: Expanding the Circle*, *in* ANTITRUST IN DEVELOPING COUNTRIES 169 (N.Y.U. School of Law Concurrences 2015, Eleanor M. Fox, Harry First, Nicolas Charbit & Elisa Ramundo eds.) (collection of 2014 conference papers) (discussing Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)); Earl A. Brown, *Evolution in Antitrust Law*, 16 DALL. B. SPEAKS 129, 139 (1953–1954).

18. *Am. Banana Co.*, 213 U.S. at 354–55.

19. *Id.* at 355–56, 357.

torts at all, however contrary to the ethical and economic postulates of that statute."[20] That the foreign country permitted the economic acts committed there foreclosed Sherman Act liability.[21] Two years later, *United States v. American Tobacco Co.* hewed to *ABC* in affirming dismissal as to the foreign defendants in a Sherman Act case because "the contracts to which they were parties were made in Great Britain and were valid under the laws of Great Britain, and . . . the Sherman Anti-Trust Act has no extraterritorial effect."[22] Yet the Court thereafter clarified *ABC*'s extraterritoriality principle had no bearing on domestic actions, even if nominally sustaining its central holding: "If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."[23] In 1927, *ABC* was eroded further in *United States v. Sisal Sales Corp*.[24] On allegations of monopolization of sisal[25] exports from Mexico facilitated by a favorable change in law procured by the defendants, the lower court had dismissed, believing itself constrained by *ABC*.[26] The Court reversed, finding the situation "radically different" from *ABC*, where the acts of expropriation were solely abroad by foreign actors.[27] In *Sisal*, by contrast, the Court found the conspirators resided domestically and, although "aided by discriminating legislation" by a foreign government, nonetheless "by their own deliberate acts, here *and elsewhere*, they brought about forbidden results within the United States."[28] This was the case even if Mexican law was not offended but rather promoted the monopoly at issue.[29] If the domestic effects of legal foreign behavior (the "elsewhere"

20. *Id.*

21. *Id.* at 359 ("A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.").

22. 221 U.S. 106, 134 (citing *Am. Banana Co.*, 213 U.S. 347).

23. United States v. Pac. & Arctic Ry. & Navigation Co., 228 U.S. 87, 98–99 (1913) (rejecting defendants' argument based on *ABC*). *See id.* at 100; *see* Thomsen v. Cayser, 243 U.S. 66, 88 (1917) (rejecting invocation of *ABC* as to domestic conspirators and acts).

24. 274 U.S. 268, 275–76 (1927).

25. *Id.* at 272 ("Sisal is the fiber of the henequen plant, a native of Mexico, and from it is fabricated more than eighty per centum of the binder twine used for harvesting our grain crops. The annual requirements of the United States are from 250,000,000 to 300,000,000 pounds.").

26. *Id.* at 271–72.

27. *Id.* at 275–76.

28. *Id.* at 276 (emphasis added).

29. *See id.* at 274 ("The old Comision Reguladora del Mercado de Henequen was

quoted above) were germane to domestic parties, *ABC* was then cabined to the proposition that antitrust law did not reach foreign parties operating legally under foreign law.[30] Indeed, this focus on effects would prove the crucial crack in the dam.

By the 1930s, the Court's view of the Sherman Act's ambit generally began to expand dramatically,[31] and the extraterritoriality bulwark continued to crumble.[32] In 1945, the enfeebled distinction between foreign and domestic parties surviving *United States v. Pacific & Arctic Railroad & Navigation Co.*, *Thomsen v. Cayser*, and *Sisal* gave way in *United States v. Aluminum Co. of America* (*Alcoa*), decided by the Second Circuit.[33] Much of Judge Learned Hand's lengthy opinion focused on the domestic defendants,[34] but a Canadian corporation and other foreigners were also implicated.[35] Pretermitting *ABC*, the court declared it "settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[36] Judge Hand admitted his opinion trod further

revived as the Comision Exportadora de Yucatan and again became the active agent for buying and selling in Mexico. Laws were solicited and passed which gave it advantages over all others. Under these, and by the use of funds supplied by the banks, it soon became the sole buyer of sisal from the producers.").

30. *Id.* at 276 ("Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein.").

31. *E.g.*, Brown, *supra* note 17, at 129 ("The earlier decisions of the Supreme Court, in construing the act, limited its scope and coverage to a much greater degree than the decisions of recent years. One would think that the Supreme Court in the years immediately following the passage of the act would be in a better position to determine what Congress intended to cover than the court as constituted some fifty years later. Yet commencing some fifteen years ago our Supreme Court began to reject its prior decisions and by the use of its judicial divining rod has discovered a number of 'intentions' on the part of the Congress of 1890, of which the court of those prior years was not aware.").

32. *See, e.g.*, *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1252–53 (7th Cir. 1980) ("The jurisdictional reach of the Sherman Act to conduct outside the United States was not favorably received at the outset. However, that view was later eroded, and the Act was applied to conduct outside the United States so long as some of the acts occurred within the United States and the parties were American.") (citations omitted).

33. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

34. *See id.* at 422–39.

35. *See id.* at 439–45.

36. *Id.* at 443–44 ("Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two.

than *Pacific Arctic*, *Thomsen*, or even *Sisal*, for there a domestic party was under review; those at issue now were foreign.[37] But the court found this a difference without a distinction, for "an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means."[38] Nor did legality in the forum of the actions matter: "Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."[39] Were *Alcoa* wholly embraced, *ABC* would be distinguished away entirely: foreign parties would be susceptible to U.S. antitrust law for any act, anywhere, however legal where taken, when aimed at affecting U.S. economics.[40]

The Supreme Court's immediate reaction was mild, approving a district court's finding of lack of jurisdiction over the foreign coconspirators to monopolize global titanium product markets,[41] whilst affirming application of the Sherman Act to a domestic corporation that had conspired with affiliates abroad to cartelize foreign trade in bearings.[42] The Court was not quite so audacious as *Alcoa* 15 years later in *Continental Ore Co. v.*

Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they had no effect upon them. That situation might be thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here.").

37. *Id.* at 444 ("It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement . . . .").

38. *Id.* (Judge Hand added: "besides, only human agents can import and sell ingot").

39. *Id.*

40. *See id.*

41. United States v. Nat'l Lead Co., 332 U.S. 319, 342–43 (1947) ("Other companies throughout the world joined in carrying out this program to restrain international commerce and to establish an international combination or conspiracy in restraint of trade . . . . The District Court recognized that it did not have jurisdiction over such co-conspirators . . . .").

42. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951) ("We also reject the suggestion that the Sherman Act should not be enforced in this case because what appellant has done is reasonable in view of current foreign trade conditions."), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

Union Carbide Corp.[43] Justice Byron White's opinion dismissed *ABC* in favor of the growing line of precedent focusing on domestic effects, particularly *Sisal*.[44] As the Court now described the latter case, "Since the activities of the defendants had an impact within the United States and upon its foreign trade, *American Banana* was expressly held not to be controlling."[45] Critically, however, *Union Carbide* focused on the fact that defendants and their acts were largely domestic, as were their effects, even if Canadian entities and machinery of government had been enlisted in their aid.[46] The holding was thus more the progeny of *Sisal* in that foreign approval or assistance could not immunize otherwise illegal domestic behavior.[47] Indeed, this approach would resonate in later decisions of the Court, as when finding in analogous contexts "that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties."[48]

Fifteen years later still, in 1976, the Ninth Circuit tried its hand at reconciling the unsettled state of extraterritorial antitrust law in *Timberlane Lumber Co. v. Bank of America*.[49] The district court had found the foreign actions—judicial orders from Honduran courts impeding the defendants' Honduran timber competitors—insulated the allegations from U.S. antitrust law.[50] The Ninth Circuit distinguished between foreign behavior compelled by foreign law and that the foreign state merely approved of or was involved

43. 370 U.S. 690 (1962).

44. *Id.* at 704–05 ("But in the light of later cases in this Court respondents' reliance upon *American Banana* is misplaced.").

45. *Id.* at 705.

46. *Id.* at 706 ("As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.").

47. *Id.*; *see also* United States v. Watchmakers of Switz. Info. Ctr., Inc., 1963 Trade Cases ¶ 70,600 (S.D.N.Y. 1962) ("They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.").

48. Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

49. 549 F.2d 597, 600–01 (9th Cir. 1976) ("This action raises important questions concerning the application of American antitrust laws to activities in another country, including actions of foreign government officials.").

50. *Id.* at 605.

in, looking to *Sisal*.[51] Whilst conceding *ABC*'s language had rejected extraterritorial antitrust jurisdiction, the court found "subsequent cases have limited *American Banana* to its particular facts, and the Sherman Act—and with it other antitrust laws—has been applied to extraterritorial conduct."[52] Yet the court also recognized *Alcoa*'s far-reaching holding had been "roundly disputed," even if all now agreed *some* extraterritorial reach existed but without consensus as to how far.[53] Eliding judicial disputes over tests of direct effects, substantial effects, or both, the court found a pure effects test "incomplete because it fails to consider other nations' interests."[54] Rather, "[a] tripartite analysis seems to be indicated,"[55] of which effect was only one part, limning three prongs:

> Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[56]

Under this new analysis, which for the first time expressly looked to comity of nations,[57] the Ninth Circuit found jurisdiction notwithstanding "at least a few" defendants were foreigners, "most of the activity took place in Honduras," and "the most direct economic effect was probably on Honduras," resting heavily on the lack of evidence of conflict with Honduras's sovereign prerogatives.[58] In some subsequent cases, however—including in a later stage of *Timberlane* itself[59]—the Supreme Court and

51. *See id.* at 606–07.

52. *Id.* at 608–09; *see id.* at 608 n.12 ("The only case lost on appeal on this ground was *American Banana Co. v. United Fruit Co.*, a decision which is today considered largely obsolete.") (citations omitted).

53. *Id.* at 610.

54. *Id.* at 611–12.

55. *Id.* at 613.

56. *Id.* at 615.

57. *See id.* at 612 ("American courts have, in fact, often displayed a regard for comity and the prerogatives of other nations and considered their interests as well as other parts of the factual circumstances, even when professing to apply an effects test. To some degree, the requirement for a 'substantial' effect may silently incorporate these additional considerations, with 'substantial' as a flexible standard that varies with other factors.").

58. *Id.* at 615.

59. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984), *overruled by* Mujica v. AirScan, Inc., 711 F.3d 580 (9th Cir. 2014).

inferior courts alike refused claims where the anticompetitive conduct and effects occurred abroad.[60]

The *Timberlane* factors proved popular, and so matters stood another 15 years,[61] until the Supreme Court took up comity in *Hartford Fire Insurance Co. v. California* in 1993.[62] Plaintiffs alleged a group boycott or cartelization of the reinsurance industry whilst a subset of London defendants urged dismissal based on international comity.[63] Piling dirt on *ABC*'s grave, the Court declared it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States."[64] Indeed, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) had seemingly codified that extraterritoriality test of a "direct, substantial, and reasonably foreseeable effect" in statute.[65] The district court found legitimate comity concerns raised by conflict with British law outweighed by the severity of domestic effects and intent to do so per *Timberlane*.[66] But the Court merely assumed that comity might support a decision to decline jurisdiction in the

60. *See id.* at 1384–86; *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n.6 (1986) (finding the Sherman Act did not reach cartel and effects within Japan); O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 451–52 (2d Cir. 1987) (Sherman Act did not reach Colombian preferences for its state-owned cargo line); McElderry v. Cathay Pac. Airways, Ltd., 678 F. Supp. 1071, 1079 (S.D.N.Y. 1988) (finding the Sherman Act did not reach baggage charges' legality abroad on wholly foreign routes); Joseph P. Griffin, *Pitfalls in Litigating International Antitrust Cases*, 29 WASHBURN L.J. 306, 309–11, 313 (1990) (discussing cases).

61. *See, e.g.*, R. LEA BRILMAYER, JACK L. GOLDSMITH, ERIN O'HARA O'CONNOR & CARLOS VÁZQUEZ, CONFLICT OF CASES 600 (Wolters Kluwer 8th ed. 2019) ("The *Timberlane* approach had been widely adopted by the Courts of Appeals, and was the prevailing approach to antitrust territoriality until the *Hartford Fire* decision in 1993."); *see also* Griffin, *supra* note 60, at 308 ("The Third, Fifth, and Tenth Circuits have accepted the *Timberlane* mode of analysis while the D.C. and Seventh Circuits have questioned its validity.").

62. 509 U.S. 764, 769–70 (1993).

63. *Id.* at 764, 769–70, 796 ("Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect.").

64. *See id.* at 796.

65. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 290, § 402, 96 Stat. 1246 (providing, if such an effect is present, an exception to the FTAIA's dictate that the general Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations"); *see Hartford Fire Ins. Co.*, 509 U.S. at 796 n.23.

66. *Hartford Fire Ins. Co.*, 509 U.S. at 797–98.

right case, discerning no true conflict at bar.[67] Even if defendants were complying scrupulously with the United Kingdom's "comprehensive regulatory regime" for reinsurance, no conflict could arise because British law did not *require* them to act as they did.[68] Comity thus did not circumscribe the Sherman Act's reach where compliance with both foreign and domestic law was not impossible—though the Court did leave undecided whether comity might matter in other contexts.[69]

Another decade brought *F. Hopfmann-La Roche Ltd. v. Empagran S.A.* to the Court in 2004.[70] The foreign defendants to claims of price-fixing in global vitamin markets had obtained dismissal under the FTAIA, arguing a lack of substantial domestic effect; the D.C. Circuit reversed.[71] Itself reversing, the Court found that the scheme affected both domestic and foreign customers, but the effects were severable: that is, foreign defendants' price-fixing injured only foreigners, and thus the FTAIA precluded jurisdiction.[72] Writing for a unanimous Court,[73] Justice Breyer repeated "the basic question" twice: "Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*?"[74] As is often the case, to ask the question is to answer it.[75] Struggling in these cases to decide comity concerns, case-by-case was "too complex to prove

67. *Id.* at 798.

68. *Id.* at 798–99.

69. *Id.* at 799. Four justices dissented, for after surveying the factors measuring extraterritorial reach under the law of nations, they concluded that "[r]arely would these factors point more clearly against application of United States law . . . . Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion." *Id.* at 819 (Scalia, J., dissenting).

70. 542 U.S. 155 (2004).

71. *Id.* at 159–60.

72. *See id.* at 163–64.

73. Justices Antonin Scalia and Clarence Thomas concurred in the judgment only. *Id.* at 176 (Scalia, J., concurring in the judgment).

74. *Id.* at 166 (repeating question from *id.* at 165).

75. *Cf., e.g.*, Sykes v. United States, 564 U.S. 1, 32–33 (2011) (Scalia, J., dissenting), *overruled by* Johnson v. United States, 576 U.S. 591 (2015); Smith v. Texas, 233 U.S. 630, 641 (1914); Collins v. O'Neil, 214 U.S. 113, 122 (1909); *In re* Debs, 158 U.S. 564, 581 (1895); Heald v. Rice, 104 U.S. (14 Otto) 737, 755 (1882).

workable."[76] Rather, comity flatly forbids such an arrogation, however theoretically sound the U.S. policy might seem to domestic eyes:

> Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.[77]

Despite the rhetorically stirring defense of international comity generally,[78] the holding left glaring lacunæ. Most gapingly, in global markets it is easy to plead that foreign conduct aggravated domestic effects, thus avoiding dismissal before fact-finding.[79] The Court also endorsed restraints on foreign parties as part of a global remedy to governmental rather than private antitrust suits.[80] All the same, *Empagran* establishes that comity is a concept to be considered under modern antitrust law,[81] even dubbing *Timberlane* "a leading contemporaneous lower court case."[82] In any event, the Court has not since returned to the subject.

B. *Antagonism Abroad to Application of U.S. Antitrust Law*

Foreshadowing Justice Breyer's disavowal of legal imperialism, the Ninth Circuit in *Timberlane* observed in the United States' bicentennial:

76. *Empagran S.A.*, 542 U.S. at 170.

77. *Id.* at 169.

78. *E.g.*, *id.* at 165 ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

79. *See, e.g.*, *id.* at 175 (remanding to consider that alternative argument); *see also id.* at 171–72 (distinguishing an extraterritorial case where the "foreign injury was dependent upon, *not independent of*, domestic harm").

80. *See id.* at 170–71 ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission.").

81. *See id.* at 165–66, 169.

82. *Id.* at 173. The citation was not for its comity analysis.

> Extraterritorial application is understandably a matter of concern for the other countries involved. Those nations have sometimes resented and protested, as excessive intrusions into their own spheres, broad assertions of authority by American courts. Our courts have recognized this concern and have, at times, responded to it, even if not always enough to satisfy all the foreign critics.[83]

There have been many critics abroad of overweening U.S. antitrust adventurism, whose philosophical and prudential objections have been much discussed elsewhere.[84] Almost from the moment *Alcoa* issued in 1945, the extraterritorial effects doctrine began a reign of mounting terror, at least as narrated at a high-profile 1985 antitrust symposium featuring U.S. and British lawyers seeking to probe their differences.[85] Ironically, the welcome efflorescence of antitrust laws around the world in the latter part of the twentieth century "is considered to be a direct rebuttal to the United States' extraterritorial enforcement. Indeed, a primary function of these counter legislations is to frustrate or resist foreign enforcement actions in their territories."[86]

Sprawling litigation in the late 1970s concerning cartelization of global uranium markets paints a poignant portrait at a pivotal point.[87] After a domestic firm complained that numerous competitors had fixed prices and allocated the markets for uranium ore, nine of the foreign defendants failed to appear and the court entered default judgments.[88] The Seventh Circuit entertained an interlocutory appeal from the answering defendants that they would be prejudiced by the preemptive default judgments.[89] This appeal

83. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 609 (9th Cir. 1976) (citations omitted).

84. *See generally, e.g.*, Griffin, *supra* note 60, at 314–24, 314 n.48 (cataloguing a lengthy list of authorities doing so); *Jurisdictional Conflicts Arising from Antitrust Enforcement Panel Discussion*, 54 ANTITRUST L.J. 729 (1985) [hereinafter *Panel Discussion*].

85. *See* John H. Shenefield, *Remarks on Jurisdictional Conflicts Arising from Antitrust Enforcement: An American View*, 54 ANTITRUST L.J. 715, 716–18 (1985).

86. Najeeb Samie, *Extraterritorial Enforcement of U.S. Antitrust Laws: The British Reaction*, 7 MD. INT'L TRADE L.J. 58, 61 (1981).

87. Askin & Tritell, *supra* note 17, at 171–72; *see In re* Uranium Antitrust Litig., 617 F.2d 1248, 1254 (7th Cir. 1980).

88. *Uranium Antitrust Litig.*, 617 F.2d at 1250–51.

89. *Id.* at 1251–52. The defendants pointed to Supreme Court precedent in *Frow v. De La Vega,* 82 U.S. (15 Wall.) 552 (1872), vacating such a default judgment, but the

provided a forum for Australia, Canada, South Africa, and the United Kingdom to argue as amici curiae that the court lacked or should not exercise jurisdiction over the foreign defendants.[90] After dismissing *ABC* and endorsing *Alcoa*'s intended effects test,[91] the court faced amici's contention that more recent law had superseded *Alcoa*.[92] Quoting the *Timberlane* decision three years earlier, the United Kingdom urged that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests."[93] But, the Seventh Circuit "d[id] not read *Timberlane* so broadly," reconciling the holding with *Alcoa* to mean that after jurisdiction is found under a pure effects test, the question of whether to discretionarily abstain remains.[94] As for that, the Seventh Circuit roundly defended the district court's discretion, scolding the foreign parties that "contumaciously refused to come into court."[95] Moreover, wrote the panel, "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction."[96] For good measure, the panel also upheld the district court's wide-ranging injunctions preventing the defaulters from transferring assets out of the United States without approval, noting the "extraordinary" circumstances and at least one defaulter's efforts to ignore and circumvent the court's defense of its judgments.[97]

To borrow the Seventh Circuit's term, the foreign amici did not suffer defeat subserviently, taking particular umbrage because it was the United States' unilateral embargo of foreign uranium that spurred them to organize the offending price controls and allocations abroad.[98] The British government had previously taken the position that the effects doctrine should not suffice for jurisdiction, and now put some teeth to its stance.[99]

Seventh Circuit proved unimpressed with *Frow*'s applicability and ultimately denied relief. *Uranium Antitrust Litig.*, 617 F.2d at 1252–53.

90. *Uranium Antitrust Litig.*, 617 F.2d at 1253.

91. *Id.* at 1253–54.

92. *Id.* at 1254–55.

93. *Id.* at 1255 (quoting Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 611–12 (9th Cir. 1976)).

94. *Id.* Accordingly, it relegated the seemingly decisive quote bandied by the United Kingdom to mere "obiter dicta." *Id.* at 1255 n.25.

95. *Id.* at 1255–56.

96. *Id.*

97. *Id.* at 1258–61.

98. *See* Griffin, *supra* note 60, at 321; *Panel Discussion*, *supra* note 84, at 736 (comments of Paul Egerton-Vernon).

99. *See* Samie, *supra* note 86, at 63.

One month after the *In re Uranium Antitrust Litigation* decision, the United Kingdom enacted the Protection of Trading Interests Act (POTIA), including a unique clawback provision creating a cause of action to recoup non-compensatory damages paid in antitrust judgments from the awardee.[100] This provocative clause was clearly "directed at treble damage suits in the United States," aiming to undo awards made by its courts.[101] Under POTIA, moreover, British courts were forbidden to enforce treble damages, nor could they levy any foreign antitrust award should the government file an objection.[102] Arguing for the Act even as the Seventh Circuit deliberated, the British Secretary of State for Trade excoriated the "pernicious extraterritorial effects doctrine" and the penal imposition of treble damages.[103] Undoubtedly, the catalyst for POTIA was *Uranium*, though the case was seen abroad more as the capstone of steady U.S. encroachments on British businesses under the rubric of vigilance against anticompetitive practices.[104] The United Kingdom's fellow amici in Canada and Australia followed suit with their own POTIA analogues.[105]

More popular were "blocking" provisions intended to impede antitrust discovery within a nation's borders.[106] POTIA authorized, in its first section, the Secretary of State to address by order any attempts to compel or punish British citizens "under the law of any overseas country for regulating or controlling international trade," and, in its second, to prohibit any production of documents to foreign authorities.[107] The second section also

100. Protection of Trading Interests Act 1980, ch. 11, § 6, 1 HALS STAT. 8 (Eng.); *see generally* Samie, *supra* note 86.

101. WILLIAM L. FUGATE & LEE H. SIMOWITZ, FOREIGN COMMERCE AND THE ANTITRUST LAWS 129 § 2.16 (Aspen, 5th ed. 1997).

102. Protection of Trading Interests Act 1980, ch.11 §§ 4–5, 1 HALS STAT. 8 (Eng.).

103. Samie, *supra* note 86, at 63 (quoting 973 Parl Deb HC (1979) col. 1533–91).

104. *See id.* at 63–64.

105. *See* Griffin, *supra* note 60, at 314 n.52 (citing Foreign Extraterritorial Measures Act, ch. 49 (1985), *reprinted in* 24 I.L.M. 794 (1985) (Canada) and Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3, Austl. Acts (1984), *reprinted in* 23 I.L.M. 1038 (1984) (Australia)); *id.* at 314 n.53 ("The Australian and Canadian statutes also contain 'clawback' provisions.").

106. *See* Askin & Tritell, *supra* note 17, at 172; *Panel Discussion*, *supra* note 84, at 736–37 (comments of Mark Joelson) ("The confrontation was already at full intensity insofar as the resentment of the foreign nations was concerned. Perhaps they felt that—as in the case of the proverbial mule—they had to hit the U.S. over the head with a two-by-four just to get its attention. The blocking statutes perform this function.").

107. Protection of Trading Interests Act 1980, ch. 11 §§ 1–2, 1 HALS STAT. 8 (Eng.) (Section 3 provides for penal fines for those violating the first two sections).

directed courts to refuse discovery requests if they would traduce jurisdictional, security, or diplomatic British prerogatives.[108] France, too, enacted a blocking law in 1980,[109] likewise "inspired to impede enforcement of United States antitrust laws."[110] To be fair, the simultaneity was coincidental: the French law was inspired by an earlier international antitrust melee in the 1970s.[111] As in Britain, French legislators were especially hostile to the treble damages remedy, believing it had been deployed cynically to protect U.S. industry at others' expense.[112] The law criminalized communicating or seeking any economic, commercial, industrial, financial or technical matters for use in a foreign judicial proceeding,[113] and to any communications with foreign authorities—proceeding or not—that might compromise French security or economic interests.[114] These efforts are only exemplary, of course: Canada enacted the very first blocking law in 1947, two years after *Alcoa*.[115] Other nations enacting blocking laws have included Australia, the Netherlands, Belgium, South Africa, and Switzerland.[116]

Yet, the Supreme Court held long ago that blocking statutes—even those imposing criminal liability—do not necessarily excuse failure to comply with a valid U.S. order of production, setting up inevitable collisions of comity.[117] In a precursor to *Uranium* itself, the district court had mandated

108. *Id.* § 2(2)–(3).

109. Bate C. Toms III, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585, 585–86 (1981) (reprinting in translation Law No. 80-538 of July 16, 1980, concerning the communication to foreign entities or individuals of documents and information relating to economic, commercial, or technical matters, [1980] J.O. 1799).

110. *Id.* at 586.

111. *See id.* at 588.

112. *See id.* at 589 nn.12, 15.

113. *Id.* at 593–94.

114. *Id.* at 591.

115. *See* Griffin, *supra* note 60, at 314 n.50.

116. *See* Askin & Tritell, *supra* note 17, at 172; *e.g.*, Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 14–15 (1st Cir. 2004) (discussing use of Belgium blocking statute); Remington Prods., Inc. v. N. Am. Philips Corp., 107 F.R.D. 642, 643, 646 (D. Conn. 1985) (discussing application of the Dutch Economic Competition Act of June 28, 1956, art. 39); *see generally* Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L.J. 612 (1979).

117. *See* Societe Internationale Pour Participants Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204–06 (1958); *accord* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987)

discovery despite the dictates of blocking statues.[118] Some courts during this period were relatively lenient in declining to order compliance or sanctions.[119] Others, however, were severe, especially where they perceived foreign parties to be interposing blocking statutes in bad faith.[120] In a 1985 suit, N.V. Philips, a Dutch company embroiled in U.S. antitrust litigation, resisted discovery based on a Netherlands blocking statute, which the Dutch government refused to waive after N.V. applied for dispensation.[121] The Special Master found, "There is no doubt . . . that the purpose of Article 39 is to frustrate the enforcement of U.S. antitrust law with respect to Dutch companies" and provided no excuse, given the article had never been used in an actual prosecution.[122] Although the parties ultimately resolved the issue amicably, the court levied nearly $200,000 in discovery costs, cautioning that "a far more harsh sanction than the award of expenses would have been appropriate" absent the rapprochement.[123] In rare cases, courts even issued so-called "anti-suit" injunctions preventing a U.S. litigant from utilizing a foreign statute defensively, as in the famed *Laker Airways Ltd. v. Sabena,*

(applying the principle to the French blocking statute and prescribing a balancing test for whether to impose sanctions).

118. *See In re* Uranium Antitrust Litig., 480 F. Supp. 1138 (N.D. Ill. 1979).

119. *See, e.g.*, *In re* Westinghouse Elec. Corp. Uranium Conts. Litig., 563 F.2d 992, 999 (10th Cir. 1977) (reversing contempt citation after Canada refused to waive its blocking statute); Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 40–41 (2d Cir. 1972) (affirming district court discretion to not order banks to seek waiver of Swiss law); *In re* Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978, 93 F.R.D. 840, 843 (N.D. Ill. 1982) (finding good faith compliance with French blocking statute and declining to find default).

120. *See, e.g.*, United States v. Vetco Inc., 691 F.2d 1281, 1287–91 (9th Cir. 1981) (affirming civil contempt where no good faith shown nor that Switzerland criminalized compliance); United States v. First Nat'l City Bank, 396 F.2d 897, 904–05 (2d Cir. 1968) (affirming civil contempt where German banking secrecy laws were non-criminal); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117–19 (S.D.N.Y. 1981) (finding bad faith given Swiss defendants "fully expect[ed] to use foreign law to shield it from the reach of our laws"); Gen. Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 299–307 (S.D. Cal. 1981) (finding bad faith given Canadian defendant "court[ed] legal impediments" by deliberately storing documents in Canada and their "destruction or disappearance" from the United States, and ordering factual presumptions as remedy).

121. Remington Prods., Inc. v. N. Am. Philips Corp., 107 F.R.D. 642, 645–46 (D. Conn. 1985).

122. *Id.* at 647.

123. *Id.* at 644. N.V. did not take up the court's offer of an evidentiary hearing to challenge the court's accounting of the costs, which were ultimately paid as part of the judgment. *See* Remington Prods., Inc. v. N. Am. Philips Corp., 763 F. Supp. 683, 684 (D. Conn. 1991).

Belgian World Airlines litigation where recourse to POTIA was enjoined.[124] And in the seminal 1987 *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* case, the Supreme Court lent its imprimatur by rejecting the French blocking law as a viable excuse, viewing it as an encroachment on U.S. interests,[125] albeit endorsing, via an amorphous multi-factor test, the need to assess comity as well.[126]

At the 1985 Transatlantic Antitrust Symposium cited at the outset,[127] lead U.S. speaker John Shenefield declared in his introductory remarks:

> I do not think it an exaggeration to say that [POTIA], with its sole theme . . . being the frustration of our system of justice, has become a separate and independent irritant in our relations . . . because it seems to us a step of overreaction and obstruction.[128]

For the British side, Sir Alan Neale rejoined, "[I]f the effects doctrine were not the threat that it is, chiefly through the private treble damages action, I think that much less use would be made of blocking statutes."[129] Yet, at base, the broader popularity of blocking statutes likely signals a more fundamental disagreement with the U.S. system of discovery and private antitrust enforcement.[130] As described by Timothy Walker, QC, at the same panel, the British Bar was mildly aghast at the relatively freewheeling practice of U.S. fishing expeditions in discovery[131]—particularly with the penalty of treble damages lurking should litigants land a big one. Indeed, British antagonism in the *Uranium* litigation, ultimately leading to the provocative

124. 731 F.2d 909, 915–16 (D.C. Cir. 1984).

125. 482 U.S. 522, 544 n.29 (1987).

126. *Id.* at 544–46, 546 n.28.

127. Lead U.S. speaker John Shenefeld was the former Assistant Attorney General leading the Antitrust Division, whilst lead U.K. speaker Sir Alan Neale was then Deputy Chairman of the United Kingdom Monopolies and Merger Commission. *See* Hon. Kingman Brewster, *Introductory Remarks*, 54 ANTITRUST L. J. 713, 713 (1985).

128. Shenefield, *supra* note 85, at 720.

129. Sir Alan Neale, *Remarks on Jurisdictional Conflicts Arising from Antitrust Enforcement: A British View*, 54 ANTITRUST L.J. 723, 727 (1985).

130. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496, at *4 (N.D. Cal. Oct. 23, 2014) (citing Diana Lloyd Muse, Note, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U. L. REV. 1073, 1073–78 (1989)); Griffin, *supra* note 60, at 319–20, n.86; *Panel Discussion*, *supra* note 84, at 733–34 (comments of Timothy Walker, QC).

131. *Panel Discussion*, *supra* note 84, at 734 (comments of Timothy Walker, QC).

reprisals of POTIA, had its genesis in objections to the scope of discovery.[132] So, too, was the French law inspired by U.S. imperiousness in antitrust discovery matters.[133]

Undeniably, matters have improved since the fraught times of the 1970s and 1980s. In 2014, Molly Askin and Randolph W. Tritell of the Federal Trade Commission's (FTC) Office of International Affairs provided a sketch of progress over the last 40 years.[134] They describe how efforts to standardize competition law through the World Trade Organization foundered in the 1990s and 2000s, with the working group eventually dissolving.[135] Instead, antitrust doyens at the FTC and Department of Justice (DOJ) moved to craft bilateral and multilateral arrangements with foreign competition authorities (FCAs), as well as to include provisions for antitrust cooperation in trade agreements, all of which have multiplied in the intervening years.[136] Crucially, however, these intergovernmental ententes do not address the burdens posed abroad by private antitrust suits seeking sweeping discovery under the threat of treble damages,[137] whilst U.S. courts continue to affirm that "enforcement through private civil actions . . . is a critical tool for encouraging compliance with the country's antitrust laws."[138] Those courts thus continue to face resistance to discovery taken abroad in antitrust cases under blocking statutes,[139] and continue to rely on those statutes' patent hostility to U.S. law in disallowing them as a good faith excuse.[140] Some still issue injunctions on foreign laws where they feel it

132. *See id.* at 733 (citing Rio Tinto Corp. v. Westinghouse Elec. Corp., 2 All E.R. 434 (H.L. 1977)); Neale, *supra* note 129, at 727; Samie, *supra* note 86, at 314–17.

133. *See* Muse, *supra* note 130, at 1090; Toms, *supra* note 109, at 587–90.

134. Askin & Tritell, *supra* note 17.

135. *Id.* at 172–73.

136. *See id.* at 173–78.

137. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496, at *4 (N.D. Cal. Oct. 23, 2014) ("Perhaps no single law better illustrates the gulf between American and civil law countries' attitudes toward pre-trial discovery than the [French] Blocking Statute."); *id.* at *6.

138. *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010) (citing Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972)); *accord Cathode Ray*, 2104 WL 5462496, at *6 ("[E]nforcement of the antitrust laws through private civil actions is an important part of encouraging compliance with those laws.").

139. *See, e.g.*, *Cathode Ray*, 2014 WL 5462496, at *4–7 (ordering discovery despite French blocking statute); *In re* Photochromic Lens Antitrust Litig., No. 8:10–MD–2173–T–27EAJ, 2012 WL 12904331, at *2–3 (M.D. Fla. May 2, 2012) (same); *Air Cargo*, 278 F.R.D. at 50–52 (same).

140. *See, e.g.*, *Air Cargo*, 278 F.R.D. at 53–54 (quoting Bodner v. Banque Paribas,

necessary.[141] POTIA and its brethren blocking statutes, meanwhile, remain in force to this day.[142]

III. U.S. AID IN FOREIGN REQUESTS FOR PRODUCTION AND TESTIMONY

Turning then to discovery more broadly, U.S. legal adventurism has not been limited to antitrust. Rather than seeking foreign discovery for domestic litigation, moreover, U.S. courts have long had the prerogative to provide domestic assistance (or "assistance," depending on one's perspective) in evidence-gathering for foreign disputes.[143] Roger J. Johns and Anne Keaty, a pair of business school professors, began an article in 2006 with the observation: "Since 1855, United States federal courts have had some degree of statutory authority to respond to the discovery needs of courts of foreign countries."[144] Back in those early days, however, the process was triggered only by formal letters rogatory for testimony to a U.S. circuit court issued by a foreign court,[145] and in 1863, the generalist language was tightened when Congress limited letters rogatory to a small set of cases to which a foreign government was party.[146] But as Johns and Keaty narrate,

202 F.R.D. 370, 375 (E.D.N.Y. 2000)) ("As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court."); Adidas (Canada) Ltd. v. SS Seatrain Bennington, Nos. 80 Civ. 1911, 82 Civ. 0375, 1984 WL 423, at *3 (S.D.N.Y. May 30, 1984) ("The legislative history of the statute gives strong indications that it was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts."); United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984) ("The French statute . . . is apparently intended to protect French businesses from excessive discovery in hostile foreign litigation.")); *see also, e.g.*, *Cathode Ray*, 2014 WL 5462496, at *6 (citing similar).

141. *E.g.*, Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004).

142. *E.g.*, *Protection of Trading Interests Act 1980*, https://www.legislation.gov.uk/ukpga/1980/11/contents [https://perma.cc/RSR4-QMQU]; *see Panel Discussion*, *supra* note 84, at 736 (comments of Paul Egerton-Vernon) ("Blocking legislation has been introduced in the United Kingdom, it has been introduced in France, it has been introduced in Canada. In order to have that blocking legislation rescinded, it seems to me that there have to be either bilateral agreements or multilateral agreements between the United States and between, in my submission in the first instance, the European Community, so far as the U.K. is concerned.").

143. *See* Johns & Keaty, *supra* note 8, at 649.

144. *Id.*

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

146. Act of March 3, 1863, ch. 95, §§ 1-4, 12 Stat. 769.

thereafter the ambit of U.S. courts has expanded over time.[147] In 1948, Congress renumbered the provision as § 1782 and greatly expanded the universe of cases that would apply;[148] the following year, it further loosened the definition of a qualifying foreign proceeding.[149] The Sixth Circuit provided a fine summary of this meandering history in 1975:

> Traditionally, the United States has enacted statutes to provide judicial assistance for courts in other countries. . . . The original enactment authorizing federal courts to assist foreign tribunals was the Act of March 2, 1855. This statute granted broad powers to the United States courts to compel the testimony of witnesses to assist foreign courts. Apparently its passage was initiated to aid a French court in a criminal proceeding. Primarily because of misindexing, the Act passed into obscurity and later was crippled by a subsequent statute.
>
> This country's early begrudging attitude in granting assistance to foreign courts was evidenced by the Act of March 3, 1863, a law that largely undercut the 1855 legislation. The 1863 Act permitted the federal courts to take testimony "for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. . . ." It was not until 1948 that the requirement that the foreign government be a party or have an interest was deleted. The 1948 amendment also expanded the statute to encompass "Any civil action pending in any court in a foreign country." One year later the restrictive phrase "civil action" was changed to read "Any judicial proceeding pending in any court in a foreign country."
>
> The narrow scope of these statutes was underscored and reinforced by the decisions of federal courts. For instance in *Janssen v. Belding Corticelli, Ltd.*, 84 F.2d 577 (3rd Cir. 1936), the court declared that the only power it had regarding letters rogatory was that granted to it by the Constitution or by statute. Under the statutes then in force, the district court could neither issue a subpoena duces tecum to secure documentary evidence nor could it conduct a "roving oral examination" of the witnesses in the absence of interrogatories.[150]

147. Johns & Keaty, *supra* note 8, at 649–50.

148. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949.

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

150. *In re* Letter Rogatory from the Just. Ct., Dist. of Montreal, Can., 523 F.2d 562, 564–55 (6th Cir. 1975) (citations omitted).

A. *The Enactment of a Meddlesome Law: Current 28 U.S.C. § 1782*

Yet as the Sixth Circuit hastened to add, a final set of amendments in 1964 installing the present form of § 1782,[151] had veered sharply from the road of incremental expansion:

> The 1964 amendments, however, were a significant departure by Congress from its cautious approach to international judicial assistance over the past century. The revisions were the result of proposals submitted by the Commission on International Rules of Judicial Procedure. Congress created the Commission in 1958 and authorized it to study and evaluate all the federal code provisions and rules, both civil and criminal, relating to international judicial assistance. The goal of the Commission was to revise the law in order to provide "(w)ide judicial assistance . . . on a wholly unilateral basis." As the legislative history reveals, the purpose behind the proposals was to prod other nations into following the lead of the United States in expanding procedures for the assistance of foreign litigants. The current § 1782 represents in part the changes made by the 1964 amendments.[152]

The current statute now reads:

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

151. Act of Oct. 3, 1964, Pub. L. 88-619, § 9, 78 Stat. 997. The only significant further amendment was the National Defense Authorization Act for Fiscal Year 1996, in which the text of the statute was amended to "includ[e] criminal investigations conducted before formal accusation." Pub. L. No. 104–106, § 1342(b), 110 Stat. 486; *see also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 249 (2004) (discussing such legislative history); *cf. infra* notes 183–184 (discussing case where applicability of § 1782 to criminal cases was at issue).

152. *Montreal*, 523 F.2d at 565 (citations omitted).

> practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.[153]

1. *Guidance by the New Rule's Drafters*

Philip Amram, the chairman of the Commission behind the law, offered a searching explanation of the motivations behind the new § 1782.[154] Eschewing false humility, he described the expansion as "an enlightened and far-reaching policy" that makes "wide and important changes, by the United States, of judicial assistance to foreign tribunals and litigants."[155] Although the second section of the law reaffirms the traditional freedom to provide testimony or documents in a foreign matter voluntarily, the first section is, in essence, allowing for judicial orders "where voluntary testimony or production fails or is inadequate and where compulsion of the witness is needed."[156] No longer was discovery in foreign cases limited to depositions;[157] not only documents but any tangible object could now be sought.[158] In remarkably bald language, Amram summarized the new statute's intended

153. 18 U.S.C. § 1782.

154. Philip W. Amram, *Public Law No. 88-619 of October 3, 1964—New Development in International Judicial Assistance in The United States of America*, 32 J. BAR ASS'N D.C. 24 (1965).

155. *Id.* at 28.

156. *Id.* at 30–31.

157. *See Montreal*, 523 F.2d at 565 ("Under the statutes then in force, the district court could [not] issue a subpoena duces tecum to secure documentary evidence . . . .").

158. 28 U.S.C. § 1782(a) ("The district court of the district in which a person resides or is found may order him . . . to produce a document or other thing . . . .").

breadth: "The grant of power is unrestricted, but entirely within the discretion of the court."[159]

Employing this discretion, the court may entertain requests in whatever form they arrive rather than only hoary letters rogatory; may prescribe any procedure or protocol it wishes in discovery; may impose any costs it thinks reasonable; and may invest anyone at all with the powers of oath-taking to oversee the discovery.[160] The definition of the foreign proceedings was intentionally left expansive by employing the term "tribunal" rather than "court," for Amram contended that "assistance should be available, in the court's discretion, in connection with criminal proceedings abroad before investigating magistrates and in connection with administrative and quasi-judicial proceedings abroad."[161] Professor Hans Smit, another key drafter of the law, reporter to the Commission, and frequently cited authority,[162] expounded on the breadth of the new protocol, extending to any sort of evidence that might "eventually" be used in any sort of proceeding before any sort of tribunal.[163] As for what constituted a tribunal, Smit opined in a footnote that § 1782 not only allows for assistance to judges as those of the EU's Court of Justice but also "permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers."[164] The only restriction evident is the text that no discovery may be had in violation of

159. Amram, *supra* note 154, at 31.

160. *Id.*

161. *Id.* at 32.

162. *See, e.g.*, *In re* Bayer AG, 146 F.3d 188, 194 (3d Cir. 1998) (noting him as "one of the principal forces behind the 1964 revisions"); *In re* Request for Assistance from Ministry of Legal Affs. of Trin. & Tobago, 848 F.2d 1151, 1153–54 & n.5 (11th Cir. 1988) (noting him as reporter to the Commission), *abrogated in unrelated part by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004); *Montreal*, 523 F.2d at 566; Advanced Micro Devices, Inc. v. Intel Corp., No. C-01-7033, 2002 WL 1339088, at *1 (N.D. Cal. Jan. 7, 2002) (noting him as "one of the draftsmen"), *rev'd*, 292 F.3d 664 (9th Cir. 2002).

163. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965) ("The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal. It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.").

164. *Id.* at 1027 n.73.

applicable privilege law.[165] That caveat aside, this is a wholly unrestricted discretion indeed.[166]

Although the 1964 amendments were far-reaching, one aspect was most striking of all and was announced in the new title given § 1782: "Assistance to foreign and international tribunals *and to litigants before such tribunals*."[167] Earlier incarnations of the law had provided that intervention was only permissible where the foreign government itself was a party at interest in the proceeding abroad and the court sought assistance.[168] With the amendment, either letters rogatory or a less formal request from a foreign or international tribunal still qualify to invoke the U.S. court's jurisdiction.[169] But now, for the first time, the U.S. court could also order discovery in connection with a foreign case "upon the application of any interested person"[170]—most plausibly, as the title suggests, at the behest of a litigant without any action or approval of the foreign tribunal.[171] Beyond litigants, Smit acknowledged that any foreign functionary that expressed an interest could qualify.[172] Amram, meanwhile, wrote hopefully that "the court, in exercising its discretion whether to grant any order for assistance of any kind in any case, may consider the nature and attitudes of the foreign government,

165. 28 U.S.C. § 1782(a); *see* Amram*, supra* note 154, at 31–32.

166. *See* Smit, *supra* note 163, at 1032–33; Amram*, supra* note 154, at 31.

167. 28 U.S.C. § 1782 (title) (emphasis added).

168. Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769 (providing that "the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit," but that the district court's involvement is only triggered if "a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending").

169. 28 U.S.C. § 1782(a).

170. *In re* Request for Assistance from Ministry of Legal Affs. of Trin. & Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988) ("[T]he 1964 amendments allowed, for the first time, an 'interested person' as well as a foreign tribunal to request judicial assistance."), *abrogated in unrelated part by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

171. *See id.* ("The legislative history stated that an 'interested person' can be a 'person designated by or under a foreign law, or a party to the foreign or international litigation.'"); 28 U.S.C. § 1782(a); *see also* Amram, *supra* note 154, at 31 (noting that an order to a witness may be predicated on "a direct application to the court by an interested party" as an example of the discretion afforded the U.S. court).

172. Smit, *supra* note 163, at 1027; *see also Trin. & Tobago*, 848 F.2d at 1154 (quoting Smit).

the standards of its procedures and the nature of the proceedings abroad."[173] Smit, too, thought district courts' discretion would be deferential.[174] Yet the new statute still opened a broad new avenue for collisions of comity:[175] federal courts were now vested with "unrestricted" discretion to insert themselves into a broad array of foreign matters any time an "interested person" might like.[176]

Courts generally agreed that Congress intended the statute to be capacious, but approached that capacity gingerly.[177] In the opinion quoted above, the Sixth Circuit rebuffed a litigant arguing for a cramped reading that excluded criminal cases: "the ever-expanding reach of our laws on the subject is meaningful. This evolutionary process has extended progressively from suits 'for the recovery of money or property,' to 'any civil action,' to 'any judicial proceeding,' and finally, to 'a proceeding in a foreign or international tribunal.'"[178] Yet returning to the subject in 1994, Smit took umbrage at the judiciary's "remarkable reluctance" to apply § 1782 as broadly as he had envisioned and its "impos[ing] undue limits upon the liberality intended by the reforms."[179] Some courts had found administrative agencies beyond the scope of a tribunal,[180] whilst others interposed questions of discoverability and admissibility under foreign law.[181] Speaking as the rule's drafter, Smit remonstrated with apparent pique that "proper judicial disposition should be to assist foreign officials in the discharge of their duties to the fullest possible extent. The judicial search should be for the most

173. Amram, *supra* note 154, at 32.

174. *See* Smit, *supra* note 163, at 1029.

175. *Cf. In re* Application of Asta Medica, S.A., 981 F.2d 1, 6 (1st Cir. 1992), *abrogated by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (referring to a potential "collision course with foreign tribunals" occasioned by a liberal interpretation of § 1782).

176. Amram, *supra* note 154, at 31.

177. *See, e.g.*, *In re* Gianoli Aldunate, 3 F.3d 54 (2d Cir. 1993); *In re* Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992); *In re* Crown Prosecution Serv. of the U.K., 870 F.2d 686 (D.C. Cir. 1989).

178. *In re* Letter Rogatory from the Just. Ct., Dist. of Montreal, Can., 523 F.2d 562, 565 (6th Cir. 1975).

179. Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 231–40 (1994).

180. *See id.* at 233–34 (discussing *In re* Letters Rogatory Issued by the Dir. of Inspection of the Gov't of India, 385 F.2d 1017 (2d Cir. 1967)).

181. *See id.* at 234–38.

liberal construction. That was the intent of the drafters of the statute, and it is that intent the courts should implement."[182]

2. *Interpretation in the Courts of Appeals*

The courts of appeals, with which Smit differed, provided its own reasoning. In 1988, the Eleventh Circuit in *In re Ministry of Legal Affairs of Trinidad and Tobago* affirmed the grant of a § 1782 subpoena against challenges that the criminal prosecution to which it pertained had not yet commenced but was only a prospective possibility.[183] In that case, the Attorney General and Minister for Legal Affairs of Trinidad and Tobago had submitted the request, attenuating any concerns the request ran athwart of the foreign nation's interests, even if not issued by a formal tribunal.[184] Importantly, however, the court of appeals held that despite the permissive standard of review afforded by the broad discretion the statute affords,[185] "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance," although affirming

182. *Id.* at 234. Smit's umbrage was evident elsewhere as well, for example, taking issue with Judge Jon Newman of the Second Circuit:

> In his opinion, Judge Newman rejected my commentary as not controlling: "Though Professor Smit was undoubtedly in a good position to know what the congressional committees had in mind, we do not believe it appropriate in this case to accept his commentary as persuasive evidence of the meaning of the statute that the Congress ultimately enacted." His comment may be contrasted with the Government's brief in the Ward case, which held that my observations had the force of an act of Congress. I should note that the author of the law review article and the texts adopted by the Senate and House Committees was the same, that the Congress enacted the proposed legislative reforms without change, and that it seems most likely that, if I had put more of the elaborate detail contained in my law review article into the explanatory texts accompanying the statute, the Congress would readily have adopted that too. In any event, if the search is for what was intended by the drafter of the statute, my law review article, as does this article, properly reflects the legislative intent. Furthermore, my article is not in any way at variance with the plain statutory text and formal legislative history. It is entirely in accord with, and only elaborates upon, the statute and its formal history.

Id. at 234 n.91 (citations omitted).

183. *In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1155 (11th Cir. 1988), *abrogated in unrelated part by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

184. *Id.* at 1152.

185. *Id.* at 1154.

because it was under Trinidadian law.[186] Moreover, the court recognized the "great responsibility" laded upon U.S. courts in determining whether to grant relief, and "[t]o prevent abuse, the district judge should carefully examine and give thoughtful deliberation to any request for assistance submitted by an 'interested person' before a judicial proceeding has begun."[187]

The First Circuit agreed four years later in *In re Application of Astra Medica, S.A.* that discoverability of the evidence sought was a prerequisite for relief under § 1782.[188] There, the district court concluded there was no discoverability requirement and ordered domestic discovery over the defendant's objections that the materials sought would be unobtainable and inadmissible in the relevant fora in France, England, Belgium, and the Netherlands.[189] The court briefly noted the disparity this kind of rule would impose between domestic and foreign adversaries in jurisdictions with stingy discovery rules: the foreign party could gain expansive discovery through § 1782, whilst the U.S. party seeking discovery abroad could not.[190] More importantly, however, "foreign litigants may use Section 1782 to circumvent foreign law and procedures," and "Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation."[191] To "avoid offending foreign tribunals," § 1782 must be read to disallow such circumventions of their rules, as the Eleventh Circuit and several other courts had previously held.[192] In sum, the district court wrongly "viewed Congress' purported intent in amending Section 1782 as demonstrating an absolute indifference to international comity," despite Congress's stated

186. *Id.* at 1156.

187. *Id.*

188. 981 F.2d 1, 7 (1st Cir. 1992), *abrogated by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

189. *Id.* at 2–3.

190. *Id.* at 5–6 ("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 United States party is confined to restricted discovery in the foreign jurisdiction. Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad.").

191. *Id.* at 6.

192. *Id.* (citing *Trin. & Tobago*, 848 F.2d at 1156; Lo Ka Chun v. Lo To, 858 F.2d 1564, 1566 (11th Cir. 1988); John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3d Cir. 1985); *In re* Court of the Comm'r of Patents for Republic of S. Afr., 88 F.R.D. 75, 77 (E.D. Pa. 1980); *In re* Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992)).

purpose; accordingly, a nondiscretionary requirement of discoverability was implicit in the law's dictates.[193]

Other panels strayed from the strict requirement of the First and Eleventh Circuits in mingling the concepts of what constituted a proceeding and what would be admissible or discoverable.[194] The Second Circuit, for example, in *In re Ishihara Chemical Corp.*[195] found discovery was not permitted under § 1782 because the current Japanese patent proceeding would no longer accept evidence into the record[196]—even if that discovery might provide the basis for initiating a new adjudicative proceeding on its own strength, because that latter proceeding was too uncertain.[197] The panel relied on its earlier holding in *Euromepa, S.A. v. R. Esmerian, Inc.* to conclude the dispute for which discovery was sought did not qualify as a proceeding because it represented only the execution of a judgment rather than the adjudication itself; the mere *possibility* of reviving a judicial proceeding if new evidence were discovered did not warrant facilitating "discovery to justify the reopening of already completed foreign litigation."[198] Even if not under the First Circuit's rubric, courts were chary of making themselves instigators of new burdens on foreign judicial systems absent any indication the foreign tribunal wanted their help.[199]

Yet there were strident dissidents from the notion that U.S. assistance to litigants might affront foreign courts.[200] The Third Circuit responded at

193. *Id.* at 6–7.

194. *See, e.g.*, *In re* Int'l Assistance (Letter Rogatory) for the Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991), *abrogated by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004); *In re* Letter of Request from the Crown Prosecution Serv. of the U.K., 870 F.2d 686, 691 (D.C. Cir. 1989); *In re* Letters Rogatory Issued by Dir. of Inspection of Gov't of India, 385 F.2d 1017, 1020–22 (2d Cir. 1967).

195. 251 F.3d 120 (2001), *abrogated by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

196. *Id.* at 125–27 ("Accordingly, as it is evident that the discovery could not be 'for use in' the current JPO proceeding, Ishihara has not satisfied § 1782's requirements with this argument, and the appeal, therefore, is moot.") (citing Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24, 29 (2d Cir. 1998)).

197. Technically, the court of appeals declined to consider the question of whether the possibility of introducing the evidence at a new proceeding might give rise to § 1782 jurisdiction because it had not been raised in the court below and the relevant question on appeal had been mooted, but its citation of *Euromepa* appears telling. *Id.*

198. *Euromepa*, 154 F.3d at 28–29.

199. *See id.*; *Ishihara Chem.*, 251 F.3d at 125–27.

200. *See, e.g.*, Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 668 (9th Cir. 2002), *aff'd*, 542 U.S. 241 (2004); *In re* Gianoli Aldunate, 3 F.3d 54, 58 (2nd Cir.

length to the First Circuit's policy rationale for a discoverability requirement only four years later:

> It appears that the decision in *Asta Medica* was based on the unavailability of pretrial discovery from non-party witnesses in the countries in which the foreign patent litigation was pending. However, there is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use. Professor Hans Smit, one of the principal forces behind the 1964 revisions to § 1782, has stated, "although a foreign court might not compel production of the evidence in the manner employed by an American court, it might very well, and ordinarily would, readily accept and rely on the evidence obtained with the help of the American court." In *John Deere*, we declined to preclude the testimony merely because "the Canadian court may question its own power to devise and grant an order for the discovery of a corporate employee resident outside its jurisdiction."
>
> The opinion of the House of Lords in *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24 (1986) (appeal taken from Court of Appeal), is informative. There, a party involved in a reinsurance lawsuit pending in the English Commercial Court filed a § 1782 application in the Western District of Washington seeking to obtain discovery from two Seattle-based companies not parties to the English litigation. Before the application could be heard, the Commercial Court enjoined the parties before it from pursuing the application on the ground that "the English court should retain the control of its own procedure and the proceedings that are before it." On appeal, the House of Lords reversed.
>
> First, it found that the availability of discovery under § 1782 posed no "interference with the [English] court's control of its own process." Despite the court's inability to compel the discovery, the information could be obtained by a party if the possessor voluntarily produced it. Thus, the mere fact that the English court could not compel the production at issue did not mean that it would be offensive to the court if a party obtained it.
>
> Second, the House of Lords rejected the argument that by submitting to the jurisdiction of the English court, the parties were

1993); *In re* Request from Can. Pursuant to Treaty Between the U.S. & Can. on Mut. Legal Assistance in Crim. Matters, 155 F. Supp. 2d 515, 519 (M.D.N.C. 2001); *In re* Sarrio S.A. for Assistance Before Foreign Tribunals, 173 F.R.D. 190, 194 (S.D. Tex. 1995).

> bound to accept its procedures. It held that the parties to an English litigation were entitled to prepare their case by obtaining documents in a foreign country and this included the right to seek discovery under § 1782. Moreover, because England's proscription of discovery from parties not before the court was intended to protect the non-parties rather than the litigating parties, it would make little sense to extend the protection of the English courts to American non-parties subject to discovery under the laws of the United States. Finally, the House of Lords rejected the notion that resort to American discovery procedures would cause increased cost and delay. It reasoned that such effects were essentially self-imposed by the party's decision to oppose and fight a § 1782 application.
>
> The analysis used by the House of Lords, reflecting as it does the view of a foreign country with less liberal discovery procedures and applied in a real case, is an effective response to the First Circuit's assumption that a grant of discovery not available in the foreign jurisdiction would offend that jurisdiction's courts.[201]

In any event, international kerfuffles over § 1782 itself did not materialize in the waning years of the twentieth century,[202] likely by some combination of foreign tribunals taking no issue with § 1782—the Third Circuit's view; U.S. courts' exercise of prudent discretion in contentious cases—closer to the Eleventh Circuit's view; and strict appellate limits on the outer bounds of that discretion—the First Circuit's rule.[203]

B. *The Decisions in a Troublesome Case:* Intel Corp. v. AMD, Inc.

Nevertheless, with courts of appeals lining up on multiple sides of the question of when § 1782 might be invoked, the intervention of the Supreme Court was predictable.[204] Nor should it surprise that the case chosen was one

201. *In re* Bayer AG, 146 F.3d 188, 194–95 (3d Cir. 1998) (citations omitted).

202. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 n.17 (2004) (quoting 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, 19–20 (1998) [hereinafter Smit, *American Assistance*]).

203. *See generally* Smit, *supra* note 179 (discussing the state of § 1782 in 1994 and advocating for liberal construction of the statute); Smit, *American Assistance*, *supra* note 202.

204. *See* Smit, *supra* note 179, at 238 ("Since there now exists a conflict among the circuits, the Supreme Court may decide to resolve it."); *see also* SUP. CT. R. 10(a).

involving an antitrust inquiry, given historical umbrage taken abroad at the United States' perceived overreach.[205]

Advanced Micro Devices (routinely known as AMD) lodged a complaint with the Directorate-General for Competition (self-shortened to DG COMP[206]) of the EC under the Treaty of Rome,[207] alleging a litany of wrongs against Intel in the market for microprocessors: "loyalty rebates, exclusive purchase agreements, price discrimination, and standard setting cartels."[208] In support of its complaint, AMD invited DG COMP to order the production of documents supplied by Intel in another antitrust lawsuit, *Intergraph Corp. v. Intel Corp*., but DG COMP declined.[209] Despite the directorate's pointed refusal, AMD was determined to have the materials considered as part of its case, and thus filed suit in a district court in California to compel production under § 1782.[210]

The district court, however, held the statute did not apply.[211] In a terse two-page opinion, the court demolished AMD's case for relief: the EC melded the features of an investigator, prosecutor, and adjudicator all in one; the proceedings against Intel were highly preliminary and no Statement of Objections that would trigger a formal hearing had been issued; and the EC itself stated that "its procedures relating to restrictive practices and abuse of dominant position is administrative and not judicial; it must not be turned into a trial."[212] Against this stood the view of AMD's counsel that the EC was comparable to the FTC in probing antitrust claims, together with that of Professor Smit that the EC "exercises quasi-judicial powers and that § 1782

205. *See supra* Part II.

206. *See, e.g.*, *Competition*, EUROPEAN COMM'N, https://ec.europa.eu/info/departments/competition_en [https://perma.cc/DRQ3-7V4X].

207. *See* Consolidated Version of the Treaty on European Union and Consolidated Version of the Treaty Establishing the European Community art. 82, Mar. 25, 1957, Feb. 7, 1992, Oct. 2, 1997, 37 I.L.M. 56 at 94 (1998) ("Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market . . . .").

208. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 250 (2004).

209. *Id.*

210. *Id.*; *see* Advanced Micro Devices, Inc. v. Intel Corp., No. C-01-7033, 2002 WL 1339088 (N.D. Cal. Jan. 7, 2002), *rev'd*, 292 F.3d 664 (9th Cir. 2002).

211. *Advanced Micro Devices*, 2002 WL 1339088, at *1–2.

212. *Id.* ("The Commission, in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation. In the instant case no Statement of Objections has been issued. The case is in the initial stage of preliminary inquiry.").

is applicable to proceedings in which those powers are exercised."[213] But Smit's view did not carry the day, as the court relied on the requirement that the proceeding be adjudicative in nature, and testimony that the EC's "investigative and enforcement procedures are not at all comparable to the adjudicatory functions of the Federal Trade Commission and lack the qualities that make a proceeding 'adjudicative.'"[214] AMD's application was rejected.[215]

1. AMD *in the Ninth Circuit*

AMD appealed.[216] The Ninth Circuit observed that the question of § 1782's applicability to the EC was one of first impression, discerning two questions—whether DG COMP's preliminary inquiry qualified as a proceeding, and "if so, whether Section 1782 requires a showing that the information sought would be discoverable or admissible in that proceeding."[217]

As to the first question, the Ninth Circuit spent considerably more time than the district court determining exactly how a competition inquiry in the European Union unfolds; the diagram below roughly summarizes the court's explanation:[218]

213. *Id.* (quoting Smit, *supra* note 163, at 1026 n.71, 1027 n.73).

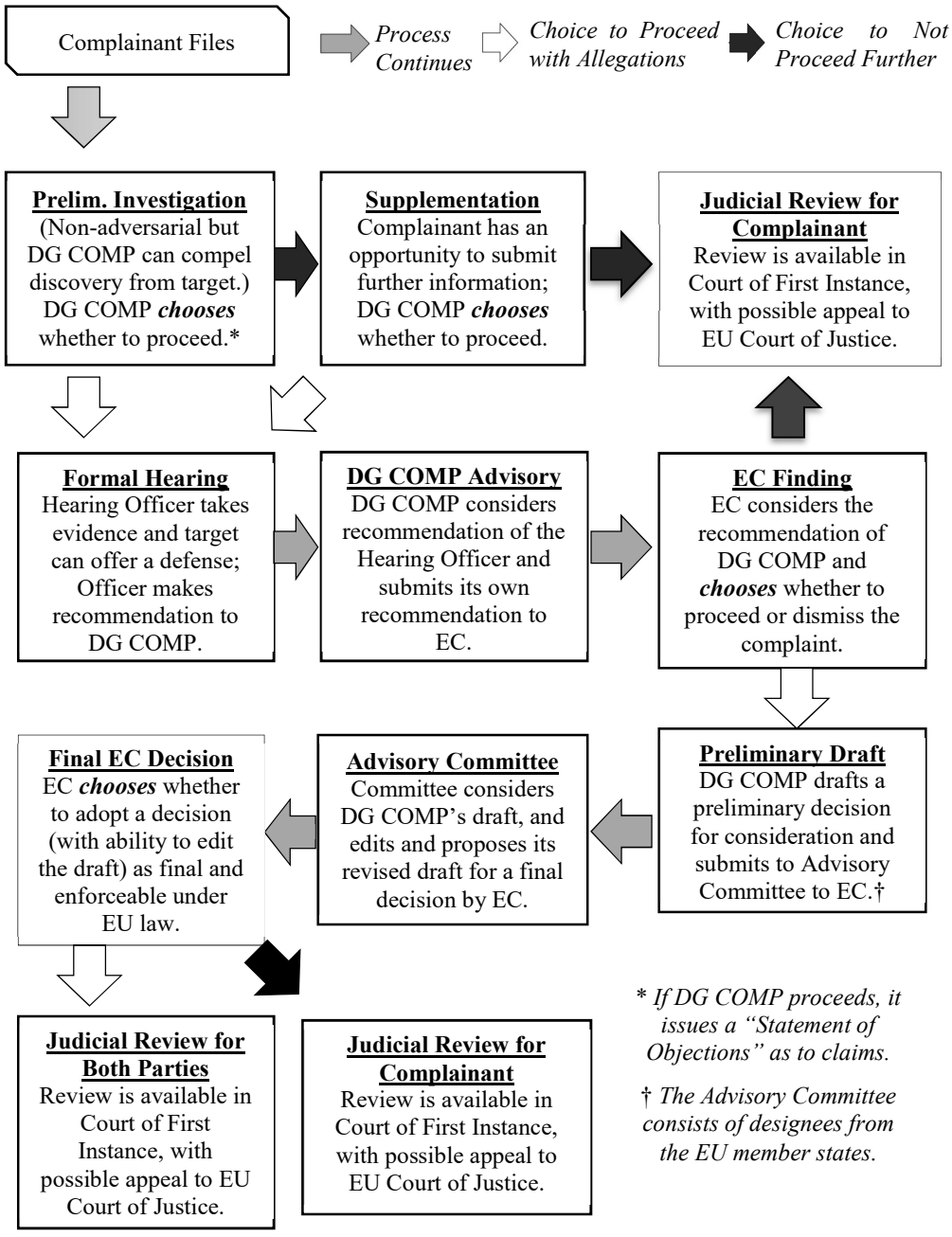
214. *Id.* at *1–2 ("A 'proceeding' within the meaning of § 1782 means one in which an 'adjudicative function is exercised.'" (quoting Lancaster Factoring Co., Ltd. v. Mangone, 90 F.3d. 38, 41 (2nd Cir. 1996))).

215. *Id.* at *2.

216. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 666 (9th Cir. 2002), *aff'd*, 542 U.S. 241 (2004).

217. *Id.* at 665. The latter question was not raised in the district court, but the Ninth Circuit found it necessary to reach, given it disagreed with the district court's ruling on the first question, and advisable to decide as guidance to the lower court. *Id.*; *see also* Johns & Keaty, *supra* note 8, at 654 ("The discoverability issue, raised by the second question, was not reflected in the district court's opinion.").

218. *Advanced Micro Devices*, 292 F.3d at 666–67. It must be noted that the following chart seeks not to describe the Commission's functions as they *are*, but rather as the Ninth Circuit described them to be.


Complainant Files
Process Continues
Choice to Proceed with Allegations
Choice to Not Proceed Further
Prelim. Investigation
(Non-adversarial but DG COMP can compel discovery from target.) DG COMP *chooses* whether to proceed.*
Supplementation
Complainant has an opportunity to submit further information; DG COMP *chooses* whether to proceed.
Judicial Review for Complainant
Review is available in Court of First Instance, with possible appeal to EU Court of Justice.
Formal Hearing
Hearing Officer takes evidence and target can offer a defense; Officer makes recommendation to DG COMP.
DG COMP Advisory
DG COMP considers recommendation of the Hearing Officer and submits its own recommendation to EC.
EC Finding
EC considers the recommendation of DG COMP and *chooses* whether to proceed or dismiss the complaint.
Preliminary Draft
DG COMP drafts a preliminary decision for consideration and submits to Advisory Committee to EC.†
Advisory Committee
Committee considers DG COMP's draft, and edits and proposes its revised draft for a final decision by EC.
Final EC Decision
EC *chooses* whether to adopt a decision (with ability to edit the draft) as final and enforceable under EU law.
Judicial Review for Both Parties
Review is available in Court of First Instance, with possible appeal to EU Court of Justice.
Judicial Review for Complainant
Review is available in Court of First Instance, with possible appeal to EU Court of Justice.
* If DG COMP proceeds, it issues a "Statement of Objections" as to claims.
† The Advisory Committee consists of designees from the EU member states.

The diagram should speak for itself regarding the convoluted manner by which various bodies interact and judicial review is available, but the Ninth Circuit sliced through the ramifications in a few short pages with superficial ease.[219] Intel argued that as the proceedings were at the most preliminary stage—investigating whether any matter subject to judicial attention was even at issue—§ 1782 did not apply.[220] The Ninth Circuit had, after all, rejected the law's invocation where an inquiry sought evidence only for a bureaucratic process with no judges in sight.[221] But the panel held that was not the case here: even if DG COMP only recommended an initial finding to EC, the Commission was at least a quasi-adjudicatory body, able to adjudge and enforce fines, as well as other penalties on malfeasants.[222]

That the current inquiry preceded the EC's ultimate jurisdiction did not dictate otherwise: "Nor need the proceedings be imminent, as Congress made clear through the elimination of the requirement that the proceeding be 'pending.' Here [DG COMP's] investigation will lead to a decision whether to proceed."[223] The Advisory Committee to the EC, who provided the final draft decision to the EC, and whose membership was not within the purview of the EC itself, ensured the Commission was not merely ratifying the results of its own inquests via DG COMP.[224] And most importantly, European courts waited in the wings to intervene if needed, as any final decision adverse to the complainant or the target under suspicion enjoyed review in an undeniably judicial forum in the EU Court of First Instance and ultimately the Court of Justice.[225] Rejecting any qualms that the EC might be biased toward the prosecution, the Ninth Circuit reversed the holding

219. *Id.* at 667–68.

220. *Id.* at 667.

221. *Id.* (citing *In re* Letters of Request to Examine Witnesses from Ct. of Queen's Bench for Man., Can., 488 F.2d 511, 512 (9th Cir. 1973)).

222. *Id.*

223. *Id.* (citation omitted).

224. *Id.* at 667–68 ("The EC process, however, takes care to permit both complainant and alleged infringer an opportunity for input to the eventual recommendation and inserts an independent entity—the EC Advisory Committee—between the Directorate's recommendation that a formal complaint be issued and the EC's decision to file a final enforceable decision.").

225. *Id.* ("A decision not to go forward would be appealable to the Court of First Instance, thus 'leading to a judicial proceeding.' A decision to proceed with a complaint would lead to hearings that are at least quasi-judicial in nature and then to an enforceable, judicially reviewable decision.").

below stating, "Although preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782."[226]

With the tribunal authenticated, the question of whether discoverability constrained § 1782 became inescapable.[227] The court catalogued that the First and Eleventh Circuits had insisted as much, and the Second and Third had not,[228] whilst other circuits confronting the issue distinguished between requests from a public tribunal and an interloping private litigant.[229] (The last approach, of course, comports with international comity neatly.[230]) But the Ninth Circuit was already largely in the most restrictive camp:

> We have previously rejected a requirement regarding admissibility in the foreign tribunal. For good and sound policy reasons, we now reject such a requirement with respect to discoverability, be the request from a private party or foreign tribunal. We find nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments,[231] to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding. Had Congress wished to impose such a requirement on parties, it could have easily done so. Judge McKeown's analysis with respect to any requirement that the foreign proceedings be "imminent" is persuasive in this regard.
>
> Finally, allowance of liberal discovery seems entirely consistent with the twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.[232]

226. *Id.* at 668.

227. *Id.* at 668–69.

228. *Id.* at 668 (citing *In re* Application of Asta Medica, 981 F.2d 1, 5–7 (1st Cir. 1992); *In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988); *In re* Malev Hungarian Airlines, 964 F.2d 97, 101–02 (2d Cir. 1992); Euromepa, SA v. R. Esmerian, Inc., 154 F.3d 24, 28 (2d Cir. 1998); *In re* Bayer AG, 146 F.3d 188, 193 (3d Cir. 1998)).

229. *Id.* (citing *In re* Letter of Request from Amtsgericht Ingolstadt, Fed. Republic of Ger., 82 F.3d 590, 592–93 (4th Cir. 1996); *In re* Letter Rogatory From First Ct. of First Instance in Civ. Matters, Caracas, Venez., 42 F.3d 308, 310–11 (5th Cir. 1995)).

230. *See infra* Part V.

231. As the Ninth Circuit suggests, the 1996 amendments did nothing of relevant substance and are not otherwise discussed here.

232. *Advanced Micro Devices*, 292 F.3d at 668–69 (citations omitted).

A contemporary journal on competition law noted first the striking effect of the Ninth Circuit's ruling: "It paves the way for parties to proceedings before foreign competition authorities [FCAs] to seek to obtain documents and testimony provided in proceedings, including private antitrust litigation, in the US."[233] The author[234] observed that if any potentially incriminatory conduct occurred in the United States, litigants or complainants before the EC or other FCAs would be well advised to invoke the "often far broader" discovery available in the United States.[235] Interestingly enough, the case inverted some of the concerns of comity, noting FCAs might marshal U.S. courts against international corporations, even where the United States has declined to pursue an investigation.[236] Importantly, however, the decision was that of a single circuit court and went contrary to several of its peers; its "potential impact" thus depended critically on whether it was ultimately adopted more broadly.[237]

2. Intel *in the Supreme Court*

The note proved prescient; the Supreme Court granted certiorari and affirmed the Ninth Circuit's judgment as the law of the land.[238] Preliminarily, the Court rejected Intel's claim that AMD was not an interested person as a non-litigant: although litigants were listed in the statute's title and the most obviously interested, the complainant in the DG COMP process enjoyed considerable rights and thus interest in vindicating those rights.[239] Next, the Court addressed whether AMD's application was "for use" in a tribunal.[240] The only way to have evidence in the record on review by the Court of First Instance was to adduce it to the EC; thus AMD's application was literally

233. Christopher Withers, Advanced Micro Devices, Inc v Intel Corporation, 1 COMPETITION L.J. 352, 356 (2002).

234. That author, Christopher Withers, then an associate at Davis Polk & Wardwell, wrote in a case note in the inaugural edition of the Competition Law Journal. *Id.* at 352 n.1.

235. *Id.* at 356.

236. *Id.* at 356–57.

237. *Id.* at 356 ("The Ninth Circuit's decision, should it be followed by other courts, has several important implications from the standpoint of foreign competition regulators . . . .").

238. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 267 (2004).

239. *Id.* at 256–57.

240. *Id.* at 257–58.

for use in the court.[241] And the Court thought Congress had contemplated that quasi-judicial bodies, like the EC, would qualify when revising the law, looking to legislative history and the ubiquitous Smit to conclude the EC was a tribunal "to the extent that it acts as a first-instance decisionmaker."[242] Third, the Court rejected any requirement the judicial proceeding be pending or imminent: Congress deliberately deleted the word "pending" from the statute and recognized the statute applied to investigations in the criminal context without suggesting anything might differ in civil matters.[243] The Court thus held, "[Section] 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation," abrogating *Ishihara*'s demand for strict imminence and instead citing *Trinidad and Tobago*'s looser rule.[244]

This friendly treatment to the First Circuit's *Trinidad and Tobago* holding did not extend to discoverability, however, the main question on which the Court had granted review.[245] As Amram emphasized, the only textual limit was on privileged matters—from which the Court reasoned Congress would have added a discoverability requirement were one intended.[246] Nor did Intel's proffered concerns about comity of nations and parity of parties merit an atextual amendment.[247] Citing *In re Bayer AG* on comity,[248] the Court doubted whether foreign tribunals really took affront at § 1782, reasoning reticence to order discovery did not imply they would not welcome the resulting evidence gathered elsewhere—if so, then the gloss Intel sought would be "senseless" and "serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information."[249] As for parity, the district court could condition discovery on reciprocity between the parties, or the foreign tribunal might place conditions on its receipt.[250]

241. *Id.* at 257.

242. *Id.* at 258.

243. *Id.* at 259.

244. *Id.* (citing *In re* Ishihara Chem. Co., 251 F.3d 120, 125 (2d Cir. 2001); *In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1155, n.9 (11th Cir. 1988)).

245. *See id.* at 253 ("We granted certiorari in view of the division among the Circuits on the question whether § 1782(a) contains a foreign-discoverability requirement.") (citations omitted).

246. *Id.* at 260; *see* Amram*, supra* note 154, at 31–32.

247. *Intel*, 542 U.S. at 261–63.

248. *Id.* at 261.

249. *Id.* at 262.

250. *Id.*

Nor did § 1782 demand discoverability under U.S. law: foreign tribunals had their own unique demands and comparisons between the rules of different fora would be "fraught with danger."[251] In the end, the unlimited discretion Amram extolled was the necessary safety valve: district courts could be trusted to account for the burden of discovery requested, nature of the tribunal, character of proceedings, and any hints of circumvention or fishing expeditions in crafting relief.[252]

Only Justice Breyer dissented.[253] Cataloguing a parade of horribles whereby the system might be abused, he deplored the "expensive, time-consuming battles about discovery" that would eventuate even if district courts diligently refused such abuses.[254] Amram's nigh-unlimited authority must therefore be modestly pruned in categories where "it is virtually certain that discovery (if considered case by case) would prove unjustified."[255] Justice Breyer then set forth two categories relevant to the matter at hand.[256]

Looking to the question of the case, he found § 1782 inapplicable where private parties sought evidence that would be undiscoverable in both foreign and domestic fora:

> Where there is benefit in permitting such discovery, and the benefit outweighs the cost of allowing it, one would expect either domestic law or foreign law to authorize it. If, notwithstanding the fact that it would not be allowed under either domestic or foreign law, there is some special need for the discovery in a particular instance, one would expect to find foreign governmental or intergovernmental authorities making the case for that need. Where none of these circumstances is present, what benefit could offset the obvious costs to the competitor and to our courts? I cannot think of any.[257]

The other category sounded in the comity of nations.[258] Noting tangentially *Chevron* and *Skidmore* deference to agency interpretations,

251. *Id.* at 263.

252. *Id.* at 264–65.

253. *Id.* at 267 (Breyer, J., dissenting). Justice Antonin Scalia concurred only in the judgment, apparently because the majority opinion had relied, at least in part, on legislative history. *Id.* at 267 (Scalia, J., concurring in the judgment).

254. *Id.* at 268–69 (Breyer, J., dissenting).

255. *Id.* at 269.

256. *Id.*

257. *Id.* at 270.

258. *Id.* at 269.

Justice Breyer proposed courts, likewise, ought to defer to a foreign tribunal's view that it was *not* a tribunal under § 1782, given its superior understanding of its own workings.[259] The Ninth Circuit's and the majority's amateur dissections of the Commission's constituent organs seemed gratuitous when the Commission itself had provided the answer.[260] The majority's failure to defer to that answer again left him at a loss: "I can think of no reason why Congress would have intended a court to pay *less* attention to the foreign entity's view of the matter than courts ordinarily pay to a domestic agency's understanding of the workings of its own statute."[261] As might be expected, applying his proposed rules of decision, Justice Breyer found Intel should have prevailed under each.[262]

This was highlighted by the Commission's respectful but resolute insistence, both in briefs and at oral argument as amicus curiae, that it could not and should not be subject to § 1782.[263] Its briefing explained at length its role and the impossibility of imagining it to be a judicial tribunal rather than an executive or prosecutorial body, at the grave risk of impairing the discharge of its essential duties and discouraging those wishing to cooperate with prosecutors from doing so.[264] Because of that role, moreover, any

259. *Id.* ("Like American administrators, foreign administrators are likely to understand better than American courts their own job and, for example, how discovery rights might affect their ability to carry out their responsibilities.").

260. *Id.*; *see id.* at 254–55 (majority opinion) ("To place this case in context, we sketch briefly how the European Commission, acting through the DG–Competition, enforces European competition laws and regulations."); Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 666–67 (9th Cir. 2002) (conducting similar analysis).

261. *Intel*, 542 U.S. at 269–70 (Breyer, J., dissenting).

262. *Id.* at 270–73.

263. *Id.* at 271–73.

264. Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal at 4, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2003 WL 23138389 ("A contrary reading would have serious adverse consequences for the Commission, and thus should also be rejected in the interests of comity. Permitting discovery requests on the grounds endorsed by the court below would undermine the European Community's carefully balanced policies regarding the disclosure of confidential information, by allowing complainants to obtain via Section 1782 documents that they are not permitted to review under European law. Notably, the discovery sought by AMD is information that the Commission has thus far declined to seek on its own behalf. Such a rule could encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782, wasting the Commission's scarce resources. In addition, characterizing the Commission as a 'tribunal' poses serious threats to its anti-cartel Leniency Program by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it."); *id.*

business might lodge a pretextual complaint to gain access to expansive and otherwise unobtainable discovery of a competitor via § 1782 if the opposite view were to be adopted.[265] The Commission was more plangent in its ultimate entreaty at oral argument:

> The last thing in the world the commission really wants is to have 800 district courts deciding this issue on a case-by-case basis exercising their discretion. It seems to us that that is an intolerable burden to impose on the commission. It cannot monitor all litigation in the United States in order to make its interests and concerns known. And, therefore, it is terribly important that this Court announce a rule, either as a supervisory matter or as a matter of statutory construction, that will limit the ability of the commission to be used, as I say, as a pawn in this discovery effort.[266]

The majority downplayed the stakes of the plea: "The European Commission has stated . . . that it does not need or want the District Court's assistance. It is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say 'never' or 'hardly ever' to judicial assistance from United States courts."[267] Relief was denied.

at 6–9 (describing process of the EC).

265. *Id.* at 13 (noting "the very real risk that unless its preferred, narrow reading of 'tribunal' prevails, the Commission's competition law enforcement programs will be placed in jeopardy"); *id.* at 14 ("As the Court of Justice explained, '[a]ny other solution would lead to the unacceptable consequence that [a competitor] might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets.'").

266. Transcript of Oral Argument at 24, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572) (references to the European Commission in minuscule in the original).

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

C. *The Opinions of the Quarrelsome Set:*[268] *Scholarly Responses to* Intel

The Supreme Court notoriously accepts few antitrust cases, and thus the proclamation from the mount of a new rule relevant to competition law inspires much hullabaloo amongst the scholarly set. *Intel* was no exception.[269] And with the Court divided, the rumpus could only be louder.

The earliest article, in the Autumn 2004 issue of the ABA's *Antitrust* magazine, observed that historically the use of § 1782 in antitrust cases had been nonexistent; *Intel* was the first case applying it in that context.[270] "It will be interesting," the authors commented, "to see whether Justice Breyer's prediction that the Court's decision would greatly encourage Section 1782(a) application will prove true in the context of EC or other foreign antitrust investigations."[271] The authors also predicted the targets in foreign antitrust investigations might now negotiate preemptively with the complainant and FCA to limit the materials provided, given they were now potentially discoverable in U.S. courts via § 1782: exactly the prospect the Commission

268. Being one of the "quarrelsome set" of writers, this Author can only observe that quarrelsomeness can be a positive trait; the crucible provided by the marketplace of ideas, *see* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), may be best served when those trading at the market are a bit bumptious. *Cf.* Richard Henry Stoddard, *The English Laureates*, 14 COSMOPOLITAN 314, 321–22 (1893) ("Nearly two centuries have passed since [Dryden's] death, and the verdict of the world today is that he was the foremost man of letters of his time. He had his faults, of course, and they were manifest in his conduct of life, which was disturbed by petty squabbles, and darkened by bitter enmities. The dramatists from Jonson down were a quarrelsome set, for as Jonson had his Marston and his Dekker, Dryden had his Settle and his Shadwell, who had been a fellow-worker with him, and who had as much right to the laurel as he.").

269. *E.g.*, Russell Zimmerer, Casenote, *Antitrust Issues in the European Union: Intel*, 42 INT'L LAW. 1199 (2008); Peter C. Thomas & Christina Hioureas, *US Discovery in Aid of International Legal Proceedings: Developments Since the* Intel *Decision Under Section 1782*, 31 DAJV NEWSL. 177 (2006); Johns & Keaty, *supra* note 8; E. Morgan Boeing, Note, *Majority and Dissent in* Intel*: Approaches to Limiting International Judicial Assistance*, 29 HASTINGS INT'L & COMP. L. REV. 381 (2006); Patel, *supra* note 8; Goldman, Hersh & Witterick, *supra* note 2, at 6; Timothy M. Zabbo, Case Comment, *Evidence - No Extra Statutory Barriers to Obtaining Discovery Under 28 U.S.C. Sec. 1782 (a)* - Intel Corp. v. Advanced Micro Devices, Inc., 29 SUFFOLK TRANSNAT'L L. REV. 147 (2005); Tony Reeves, Henk Albers & Russell Hunter, *A Closer Look at* Intel v. AMD *in Light of the EU Complaints Procedure*, ANTITRUST MAG., Sept. 1, 2004, at 72; Neil Motenko & Rebecca Shuffain, Intel v. Advanced Micro Devices: *The Court's Permissive Approach to U.S. Discovery in Aid of Foreign Proceedings*, ANTITRUST MAG., Sept. 1, 2004, at 66.

270. *See* Motenko & Shuffain, *supra* note 269, at 69–70.

271. *See id.*

feared.[272] A companion article in the same issue was more measured, concluding that although *Intel* "may lead to further applications, it is unlikely to open the floodgates."[273] Reflexive prophecies of "an avalanche of pretextual complaints" were likely overblown, given the numerous levers the Commission wields to swiftly dispose of such complainants before they could invoke § 1782.[274] Momentum, moreover, suggested district courts would continue to exercise their discretion sparingly.[275] Rather, the authors thought, the new rules were likelier to spur forum shopping in service of finding the tribunal most amenable to expansive discovery.[276]

A third article in *Antitrust* the following year sounded the alarm more stridently.[277] Noting new uncertainty in whether negotiations over pleas and immunity in foreign antitrust cases would be held discoverable in the United States, the authors discerned "some disincentive for companies and individuals considering making an amnesty application or entering a guilty plea outside the United States."[278] Those who proceed may seek to insist that the FCA hold the only copies of key or compromising documents in an effort to avoid susceptibility to § 1782, which can only introduce inefficiencies to investigations.[279] And the district courts' newly minted power to summarily override FCAs on discovery matters "may create new issues regarding the degree to which multilateral or bilateral frameworks for information sharing in cartel investigations can be pursued."[280] The authors thought it vital that

272. *Id.* at 70.

273. Reeves, Albers & Hunter, *supra* note 269, at 78.

274. *Id.* at 77 ("The Commission has a wide array of means at its disposal to reject pretextual and spurious complaints. Consequently, many of these may never reach the stage where 28 U.S.C. § 1782(a) proceedings can create havoc for the Commission."); *e.g.*, *id.* at 73 (noting the possibility of immediate rejection on formal ground); *id.* at 75 (theorizing "it would not be unreasonable to infer that the Commission could consider that there is no Community interest in pursuing a complaint which only serves to allow a complainant to initiate a 28 U.S.C. § 1782(a) application," and thus rejected it).

275. *See id.* at 77–78.

276. *See id.* at 77.

277. Goldman, Hersh & Witterick, *supra* note 2.

278. *Id.* at 7.

279. *See id.* ("Those who want to seek amnesty or plead guilty may now go to some length to ensure that neither they nor their counsel retain, or possibly even create, copies of key documents, which in many cases makes the amnesty/plea negotiation process more protracted and difficult. Some applicants may rely on the enforcement officials to keep the only notes or record of meetings, discussions, or proposed terms until a final document is executed.").

280. *Id.*

questions of competing interests in antitrust enforcement be addressed in the posture of nations engaging as equals to install arrangements for accommodation and comity.[281] In empowering every district court to chart the path, *Intel* thus pointed in the wrong direction:

> We submit that it is not for national courts, even those as experienced in antitrust matters as those in the United States, unilaterally to assume the mantle of international arbiter or decision maker. Such judicial activism may serve to deter the adoption of enforcement norms and may actually impede the international enforcement cooperation that has been so successful in detecting and pursuing transborder cartels.
>
> Those who advocate the application of U.S. antitrust law to redress injury sustained outside the United States as a necessary measure to ensure that conduct, such as price fixing, is adequately sanctioned may actually serve to decrease effective international antitrust enforcement. Similar negative effects can arise from a U.S. "long-arm" reach in the context of compelling the production of documents that would otherwise be protected in foreign jurisdictions. These issues are not easy to resolve, but must be addressed.[282]

By 2006, analyses were appearing in academic law reviews, and the passage of time had evidently assuaged some initial fears. Anand Patel addressed a number of concerns in his article.[283] To those foreseeing unrestrained "fishing expeditions," Patel responded calmly that the requirement that discovery be "for use" in a foreign proceeding "should inherently weed out the majority of frivolous requests" as *Intel* requires an applicant to identify a foreign proceeding in reasonable contemplation and how the discovery is relevant to obtain relief.[284] And the interested person requirement forecloses a flood of applications from scholars, journalists, or other bystanders with no dog in the hunt seeking to recruit courts to slake their curiosities.[285] Patel did believe *Intel* erred in rejecting any discoverability rule:[286] permitting district courts to flout foreign law at the

281. *See id.* at 9–10.

282. *Id.* at 10.

283. Patel, *supra* note 8.

284. *Id.* at 308.

285. *See id.* at 313–16.

286. *See id*. at 318 ("The Court issued the wrong ruling. It should not have completely eliminated a foreign discoverability requirement on all § 1782 requests. Contrary to the Court's opinion, such a ban will produce the opposite result than what

instigation of ex parte litigants would "show a blatant disregard for the sovereign's decision on how to enforce and how not to enforce its laws."[287] Should a foreign tribunal desire U.S. help in obtaining evidence for which local rules do not provide, it may lodge the § 1782 request itself—with no bar on a *tribunal's* request based on discoverability—neatly ensuring plenary assistance to foreign courts who actually welcome it and cultivate comity.[288]

The aforementioned article by Johns and Keaty was also skeptical of the potential for abuse,[289] though raising a question analogous to Patel as to whether "a district court could order discovery of information that would be undiscoverable under the laws of any jurisdiction," presumably mindful of the same concerns.[290] Johns and Keaty did express qualms about the replacement of a standard of temporal proximity ("imminent" or "soon to occur") with the more indeterminate question of whether a reasonable observer would contemplate a proceeding to be forthcoming,[291] but noted optimistically that appellate courts had already suggested standards to make these assessments.[292] And a student note by E. Morgan Boeing later that year preferred the majority's permissive approach to the forbidden categories of Justice Breyer,[293] eagerly anticipating the more precisely articulated supervisory rule promised by *Intel* following "further experience with § 1782(a) applications in the lower courts."[294]

IV. TACTICS IN DOMESTIC DISCOVERY FOR FOREIGN ANTITRUST MATTERS AFTER *INTEL*

Even as the earliest of these exegeses were being penned, the *Intel* case itself returned to the district court to apply the wisdom of the Supreme Court

§ 1782 was created to achieve.").

287. *See id.* at 319–23.

288. *See id.* at 324 ("In other words, the foreign tribunal is the best interpreter of its own nation's laws. It is this quality that makes it unnecessary to apply a discoverability rule on a sovereign's § 1782 request. Imposing such a requirement would foster animosity, because the district court would essentially be second-guessing the tribunal on the interpretation of its own laws.").

289. *See* Johns & Keaty, *supra* note 8, at 683–84.

290. *Id.* at 675.

291. *See id.* at 677–78.

292. *See id.* at 678–79.

293. Boeing, *supra* note 269, at 398–404.

294. *Id.* at 404 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004)).

to the case at bar.[295] The lower court for the first time identified that "the Supreme Court delineated four main factors that 'bear consideration' in ruling on a § 1782 request."[296] These were: (1) whether and in what capacity the target of the subpoena was a "participant" in the foreign litigation, making the need for § 1782 less obvious; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) the degree to which the request circumvents the procedures or policies of the foreign tribunal; and (4) whether the discovery sought was "unduly intrusive or burdensome" and thus may need to be "rejected or trimmed."[297] Under these factors, AMD merited rejection: Intel was a party and the Commission could readily gain the discovery sought under its own rules; the EC had exhorted the U.S. courts not to interfere; and AMD's request was thus manifestly an attempt to circumvent the Commission's decision.[298] With the first three factors so clearly adverse, the court thought it "largely unnecessary and purely academic" to assess intrusiveness or burden, but for completeness opined that AMD's request was clearly overbroad and beyond the scope of the Commission's investigation.[299] The application for discovery was denied in full.[300]

A. *The Prevailing Trend of Denials Under § 1782 in Antitrust Cases*

1. *Further Attempts to Encroach on the European Commission*

Setting aside the denouement of *Intel* itself, the first antitrust matter to invoke the new standards there announced arrived two years later in the Northern District of California in *In re Microsoft Corp.*[301] Microsoft was subject to enforcement orders from the Commission based on antitrust violations dating to 2004 and 2005.[302] Sun Microsystems filed a DG COMP

295. Advanced Micro Devices, Inc. v. Intel Corp., No. C 01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004).

296. *Id.* at *2 (quoting *Intel*, 542 U.S. at 264).

297. *Id.* (quoting *Intel*, 542 U.S. at 264–65).

298. *Id.* at *2–3.

299. *Id.* at *3.

300. *Id.*

301. *In re* Microsoft Corp., No. C-06-80038, 2006 WL 825250 (N.D. Cal. Mar. 29, 2006) [hereinafter *Microsoft-California* in the main text to distinguish it from the later identically-captioned case, *see infra* note 311].

302. *Id.* at *1.

complaint alleging non-compliance, and the Commission agreed, ordering that Microsoft submit or face penalties.[303] In its defense, Microsoft sought communications between the Commission and third parties, such as Sun and other relevant technology companies, and the Commission hearing officer granted the application as to some but not all of the requested material.[304] Dissatisfied, Microsoft turned to § 1782 in U.S. courts to compel Sun and Oracle to divulge the remainder, which the court granted subject to the recipients' right to move to quash, which both did.[305] On review, the court found *Intel* meant it had the power to command discovery—but it need not.[306] Rather, the *Intel* factors strongly counseled rejection: given the officer's denial of the discovery sought, "the subpoenas constitute an attempt to circumvent specific restrictions the European Commission has placed on Microsoft's right to obtain certain kinds of information," which "weighs heavily against allowing the requested discovery";[307] the Commission had stated in writing it was "*not* receptive" to receiving assistance in the case;[308] and "[a]s a matter of comity, this court is unwilling to order discovery when doing so will interfere with the European Commission's orderly handling of its own enforcement proceedings."[309] The subpoenas were quashed.[310]

The *Microsoft-California* court's approach is illustrative of the greater majority of holdings in antitrust § 1782 applications over the past 15 years. The companion case decided a month later in the Southern District of New York (where Microsoft was also seeking § 1782 subpoenas for competitors

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at *2 ("Thus, this court has the authority to order Sun and Oracle, both of whom are located in this district, to produce the requested documents and testimony. However, 'a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.'") (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004))).

307. *Id.* at *3.

308. *Id.* at *3, n.5 ("The DG Competition sent a memorandum to Sun's and Oracle's attorneys setting forth his position regarding the discovery Microsoft seeks. In paragraph 23, with regard to communications between third parties and the Trustee related to the current Statement of Objections, he states the subpoenas are 'not objectively necessary but rather an attempt to circumvent the established rules on access to file in proceedings before the Commission.'").

309. *Id.*

310. *Id.* at *4.

located there) reached the same result on similar reasoning.[311] The Commission likewise informed the court that the discovery was "unduly intrusive and totally at odds with the European rules on access to file" and "apt to seriously harm the Commission's investigation process and circumvent the European rules on access to file";[312] the court, thus, found the application a "blatant end-run" that would "divest the Commission of jurisdiction over this matter[,] replace a European decision with one by this Court," and "contravene the purpose of § 1782 by pitting this Court against the Commission" and thus "violate established principles of comity."[313] The court offered a further rationale: Microsoft was not seeking documents unavailable to the EC but rather attempting to circumvent the disallowance of documents known to the EC already.[314] "The relevant inquiry," noted the court, "is whether the evidence is available to the foreign tribunal," not the litigant, and thus § 1782 was an "improper" vehicle.[315]

In re Intel Corp. Microprocessor Litigation, the next case, was, on the whole, a rather comical affair.[316] The Union Federale des Consommateurs—Que Choisir described itself as a consumer organization authorized by the French Ministry of Justice to bring claims on behalf of French consumers, as well as by the Commission to appear as an interested party in the Intel antitrust inquiry.[317] On that basis, Que Choisir sought a § 1782 subpoena against Intel.[318] Intel resisted, producing correspondence from the Commission reaffirming its stance in *Intel*: "[T]he EC does not need the assistance of the United States Courts."[319] More saliently, observed Intel, Que Choisir's involvement in the Commission's inquiry had actually ended.[320] Undeterred, Que Choisir advanced a new, "convoluted, bordering

311. *In re* Microsoft Corp., 428 F. Supp. 2d 188 (S.D.N.Y. 2006) [hereinafter *Microsoft-New York* in the main text to distinguish it from the earlier identically-captioned case, *see supra* note 301], *abrogated in part by In re* del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019).

312. *Id.* at 194.

313. *Id.* at 195–96.

314. *Id.* at 193–94.

315. *Id.* at 194.

316. *In re* Intel Corp. Microprocessor Antitrust Litig., No. 05–1717–JJF, 2008 WL 4861544 (D. Del. Nov. 7, 2008) [hereinafter *Microprocessor* in the main text to distinguish it from the Supreme Court's *Intel* holding].

317. *Id.* at *1–2.

318. *Id.* at *1.

319. *Id.* at *2–3.

320. *Id.* at *2.

on incomprehensibly vague, argument"[321] that it "intends to initiate litigation against Intel in a collective action either in London, England or Lisbon, Portugal on behalf of French consumers (and either English or Portuguese consumers), as soon as possible after an expected adverse European Commission ('EC') decision against Intel."[322] Intel promptly objected that Que Choisir lacked any authority to do so outside of France.[323]

The court agreed, finding Que Choisir could not be an interested person as its purported plan was farfetched at best,[324] and in any event no relevant proceeding was within the "reasonable contemplation" demanded by *Intel* for the obvious reason that Que Choisir could not demonstrate it was even able to bring suit in England or Portugal.[325] Even if it could bring suit, its "efforts to articulate a plan to secure § 1782 evidence for use in a reasonably contemplated litigation devolves into its own subjective wish to bring some action against Intel, somewhere, on behalf of unknown persons, at some unknown future time."[326] This vagueness amounted to nothing more than speculation, especially given Que Choisir itself admitted the possibility of its suit depended upon an as-yet unmade adverse decision by the Commission, as well as that decision's surviving judicial appeal.[327] The court thus denied the § 1782 application, declining to further consider the *Intel*

321. *Id.* at *5.

322. *Id.* at *4. The special master did not think much of Que Choisir's ambivalent attitude to the forum in which it might litigate, noting:

> [I]n abandoning any expectation that it would pursue litigation in France on behalf of French consumers, QC simply dropped what could be characterized as a tongue in cheek footnote stating that: "As Intel notes there may be significant difficulties in bringing a claim of this nature in France in the current legislative context. QC has decided that for purposes of its Intel case, such an action is not the most appropriate option in the interests of its members and those it will represent."

Id.

323. *Id.* at *6.

324. *Id.* at *6–7.

325. *Id.* at *12–15.

326. *Id.* at *15.

327. *Id.* at *17–18 ("The single primordial fact in this context is that QC can not bring a follow on collective damages action before there is an adverse decision by the EC against Intel. Moreover, the Special Master is mindful that any such ruling would not be final until Intel exhausts its rights of appeal. Without more, the Special Master concludes that the view if 'this occurs, then this can occur' necessarily becomes too speculative, and too remote and not 'within reasonable contemplation.'" (citations omitted)).

factors, as Que Choisir's erratic course of argument meant that "a meaningful discussion of the discretionary factors on the record, as it now stands, would not be possible."[328]

2. *Proceedings Outside the European Union*

In re Cathode Ray Tube (CRT) Antitrust Litigation trod farther abroad, to a South Korean tribunal, whilst returning to the United States in the Northern District of California.[329] Parallel antitrust actions had been lodged in both fora with Sharp Corporation as plaintiff in Korea.[330] Evidently seeking a shortcut, Sharp obtained an ex parte § 1782 subpoena against the U.S. lead plaintiff's counsel, Saveri & Saveri, calling for all discovery they had received from the U.S. defendants regarding CRT; counsel moved to quash.[331] Turning to the *Intel* factors,[332] the Korean tribunal had not made its inclination to the proposed evidence clear, which the special master found to mean "that court has *not* shown its receptiveness to such a volume of discovery from the United States."[333] Moreover, discovery procedures in Korea were notably limited, and Sharp's choice to eschew them for § 1782 could thus only be seen as an "attempt to circumvent the proof-gathering policies of Korea."[334] Disgorging the roughly five million documents called for would be highly burdensome on Saveri,[335] place the confidentiality of the

328. *Id.* at *18.

329. *In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944 SC, 2012 WL 6878989, at *1 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

330. *Id.*

331. *Id.*

332. *Id.* at *2.

333. *Id.*

334. *Id.* at *3 ("It also seems self-evident that Sharp's use of the § 1782 subpoena in this case is an attempt to circumvent the proof-gathering policies of Korea. As stated, Sharp made no attempt to use the discovery processes that are available in the Korean courts, even though Korea was the venue chosen by Sharp in preference to the venue of this court. That and the different scopes of permitted discovery demonstrate that use of United States generated discovery would circumvent the limitations of proof-gathering in existence in the Korean court.").

335. *Id.* ("It is interesting to speculate whether the statute would have been passed if the Congress had known that it would be applied to a request for some 5,000,000 documents in one case. And the special master is unaware of any case that supports the use of § 1782 for the wholesale taking of all of the discovery in a large antitrust case. The burdens of this subpoena fall initially upon Saveri & Saveri.").

U.S. defendants' documents in peril,[336] and grant Sharp an advantage unavailable to the foreign defendants—even though Sharp had opted against participation in the U.S. case in favor of its Johnny-come-lately parallel Korean complaint.[337]

With all factors in alignment, the special master's report recommended quashing, and the district court agreed in adopting the report.[338] Sharp argued in large part that the special master had erred in imposing a foreign discoverability requirement *sub silentio*, in defiance of *Intel*.[339] The district court did not think so: although the special master had noted the potential inadmissibility of the materials and Sharp's failure to invoke foreign discovery rules, these were undeniably probative of the nature of the foreign tribunal and whether Sharp was attempting to circumvent its process, both of which were acknowledged factors under *Intel*; no absolute bar had been applied.[340] Nor had the special master erred in considering the history and scope of § 1782 is evaluating burden, rejecting rather than curtailing Sharp's requests, and indeed in considering policy concerns beyond *Intel* such as discouraging forum-shopping: the factors there were "neither exclusive nor mandatory" but rather "guidelines."[341] In the end, the special master was right, and Sharp was wrong.[342]

336. *Id.* at *4 ("The defendants in the present case, whose information would be disclosed to Sharp by the production under this subpoena to Sharp, will have no opportunity to object to the production of particular documents that are included within the large volumes requested from Saveri & Saveri. And there is no way to anticipate all of the ways in which their confidential documents, which are now protected by an order of this court, could become exposed and not protected in Korea, and might become available for public use in business matters.").

337. *Id.* at *3 ("In addition, the defendants in the Korean case would have no right to reciprocal discovery to obtain evidence to oppose these documents and no right to participate in any depositions that have already been taken. Also, the defendants in Korea would have much less access to discovery for their defense, compared with what Sharp would get through this § 1782 proceeding, a very unfair balance in that court.").

338. *Id.* at *4; *see In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2013 WL 183944, at *4 (N.D. Cal. Jan. 17, 2013) (adopting the special master's recommendation and quashing).

339. *Id.* at *3.

340. *Id.*

341. *Id.* at *4.

342. *Id.*

South Korea featured again in *In re Qualcomm Inc.*,[343] where its Fair Trade Commission (the KFTC) had charged Qualcomm with violating antitrust law in connection with the licensing of patents.[344] Under Korean law, however, Qualcomm was not entitled to any of the third-party materials the KFTC relied upon, and thus it turned to § 1782 to extract them from the third parties directly, along with additional information that could be of use.[345] The KFTC's process was not dissimilar from that of DG COMP and the Commission:

> Like many of its international counterparts, the KFTC often depends on the cooperation of third parties when investigating alleged antitrust violations. To encourage third parties to provide complete submissions and protect their sensitive and confidential information, Article 62 of the MRFTA mandates that third party submissions be kept confidential. If a preliminary investigation shows that there is reason to believe that an examinee's conduct violated the MRFTA, an Examiner's Report is sent to the KFTC General Counsel's office and the examinee. The General Counsel then dockets the case for hearing before the KFTC Committee, which makes the final ruling on whether there has been an antitrust violation.[346]

Crucially, the examinee is automatically entitled to a copy of the report presenting antitrust allegations, but not the evidence cited or underlying the allegations.[347] Those documents can only be obtained by application to the KFTC, which weighs the countervailing interests and may choose to produce in full, redact, or withhold any materials sought.[348] Thus when Qualcomm, or any other examinee, appears at the ensuing hearing to defend itself against the Examiner (who acts as the prosecutor), it may well lack access to all of the evidence against it.[349]

The court was sympathetic to Qualcomm's plight and found it eligible for relief under the statutory requirements.[350] But the *Intel* factors were

343. *In re* Qualcomm Inc., 162 F. Supp. 3d 1029 (N.D. Cal. 2016) [hereinafter *Qualcomm-Korea* in the main text to distinguish it from the later identically-captioned case, *see infra* note 392].

344. *Id.* at 1031.

345. *Id.* at 1031–32.

346. *Id.* at 1032–33.

347. *Id.* at 1033.

348. *Id.*

349. *Id.*

350. *Id.* at 1036–38.

arrayed against it:[351] "Constrained in its discretion by the factors set forth by the Supreme Court, the court must deny Qualcomm's application."[352] Unclear as to Korean procedure, the court found the first factor neutral.[353] But the KFTC had filed an amicus brief asking the court to "deny Qualcomm's applications in their entirety as a matter of comity" and confirming "the KFTC has no need or use for the requested discovery."[354] Qualcomm objected that the brief had been signed by the Examiner prosecuting the case rather than the adjudicatory Committee, but as the letter itself both appeared and explicitly purported to represent the views of the KFTC, the court felt constrained to accept the amicus brief as the KFTC's position under the second factor.[355] As to the third factor, the KFTC asserted the desired discovery would "improperly bypass Korean legal procedures" and "subvert the KFTC's power to control when and how confidential investigatory materials are released," at grave cost to its ability to balance Korean policy goals with confidentiality if an examinee "could run to the U.S. courts and obtain all materials provided to the KFTC (along with other materials)."[356]

Qualcomm argued in its defense that it was not seeking some transparent end-run of the KFTC's decision to disclose only certain materials, but rather sought far more than the documents cited because the Examiner's report would likely not cite *exculpatory* documents, and thus Qualcomm required the subpoena to develop its defense beyond the prosecution's case.[357] But the court still demurred, however different that was from U.S. norms: the KFTC had balanced various priorities in

351. *Id.* at 1038 ("Second, the *Intel* factors nonetheless collectively weigh against granting Qualcomm's applications.").

352. *Id.* at 1032 (intra-sentence majuscules rendered in miniscule).

353. *Id.* at 1039–40.

354. *Id.* at 1040.

355. *Id.* at 1040–41 ("Be that as it may, the court must take the amicus brief at face value. While it is true that the brief is signed by Gyu-Ha Chai, the Examiner investigating Qualcomm, there is no indication that it represents his own views and not the KFTC's as a whole, or that he is speaking only in his capacity as an Examiner and not for the KFTC. The brief is on KFTC letterhead. The first paragraph states that '[t]he Korea Fair Trade Commission (the "KFTC") respectfully submits this letter,' and the brief repeatedly states the positions of 'the KFTC.' Qualcomm cites no previous case where a court disregarded the stated position of the tribunal that it did not want the discovery sought. Without any concrete reasons to reject these markers of authenticity, the court must accept the amicus brief as representing the KFTC's position.").

356. *Id.* at 1041.

357. *Id.* at 1042.

developing a system to encourage the third party cooperation it needed,[358] and the court refused to accept Qualcomm's invitation to investigate "methods for addressing the KFTC's policy concerns" because "principles of comity direct this court not to substitute its own judgment for the KFTC's on how to best manage its affairs."[359] Furthermore, the breadth itself of the material Qualcomm sought weighed against it under the fourth factor, as the subpoenas were "not limited to documents or information connected to the KFTC proceedings at issue or to activity in or affecting Korea" and would inevitably place heavy burdens on its recipients, if only to laboriously determine they had no responsive documents.[360] Taken together, the factors "strongly weigh[ed]" against granting discovery, and none followed.[361]

B. *The Anatomy of Success in a § 1782 Antitrust Subpoena*

Nonetheless, applicants under § 1782 do prevail on occasion. What makes them different? Through 2019, there appears but a single successful case sounding in antitrust: the 2016 decision in *In re Pro-Sys Consultants*.[362] Pro-Sys Consultants (Pro, to use the court's succinct abbreviation) had persuaded a Canadian court to certify a class action against Microsoft, alleging anticompetitive conduct in the markets for operating systems and other software dating back to 1988.[363] Pro identified one Jean-Louis Gassée as a key witness, for he was a former executive at Apple and creator of the BeOS operating system,[364] and believed Gassée could provide first-hand evidence of Microsoft's abusive behavior to competing operating systems, pointing to articles "by and about" Gassée, as well as findings from the District of Columbia antitrust action against Microsoft.[365] Pro accordingly filed an ex parte application for an order under § 1782 for Pro's counsel to depose Gassée in the Northern District of California, where it believed Gassée resided.[366]

358. *Id.* ("In essence, the KFTC states that it has a system for protecting its investigatory enforcement capabilities, third party interests, and a target's right to obtain information to defend itself, and allowing U.S. discovery would upset that delicate balancing act.").

359. *Id.*

360. *Id.* at 1043–44.

361. *Id.* at 1044–45.

362. No. 16-mc-80118-JSC, 2016 WL 3124609 (N.D. Cal. June 3, 2016).

363. *Id.* at *1.

364. *Id.*

365. *Id.*

366. *Id.* at *1–2.

Pro clearly satisfied the statutory requirements: Gassée could be found in San Francisco, the discovery was for use in an ongoing Canadian lawsuit, and Pro, as the lead plaintiff there, was a paradigmatic interested person.[367] The court found Gassée, as a foreign non-party to the Canadian litigation, would not be available to that court absent § 1782; moreover, the Canadian court had entered an order demonstrating its receptiveness to assistance via § 1782 and its view that no local procedure or policy would be evaded by the assistance.[368] As for the fourth factor, the requested subpoena appeared narrowly tailored to develop evidence highly material to the case—BeOS and the effect of Microsoft's conduct—and "d[id] not seek to inquire broadly into Mr. Gassée's business or personal matters but only his role as founder and creator of Be and BeOS."[369] The court accordingly granted the subpoena, although ordering that Gassée have 30 days after service to contest the subpoena before its return date, should he object.[370] (Perhaps evidencing that the deponent agreed the burden was reasonable, no motion to quash ensued.)

It is readily apparent why Pro prevailed and the various other technology companies of the preceding section did not. Most obviously, the Canadian court not only did not resist the discovery but avowedly welcomed it, and thus there was no circumvention concern or comity of nations at stake.[371] And the *Pro-Sys* tribunal was an ordinary court rather than the antitrust regulatory agency protesting in *Intel*,[372] both *Microsoft*,[373]

367. *Id.* at *3 ("Applicants are parties to the foreign proceedings underlying this case; indeed, they are the plaintiffs that seek to challenge Microsoft's alleged anticompetitive conduct. Accordingly, Pro has a 'reasonable interest' in obtaining judicial assistance and, therefore, may apply for judicial assistance pursuant to Section 1782.") (citation omitted).

368. *Id.*

369. *Id.* at *4.

370. *Id.*

371. *Id.* at *3.

372. *See* Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal at 4, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2003 WL 23138389, at *1.

373. *See In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), *abrogated in part by In re* del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250, at *3, n.5 (N.D. Cal. Mar. 29, 2006).

Microprocessor,[374] and *Qualcomm-Korea*.[375] *Pro-Sys*'s closest analogue is thus *Cathode Ray*, where another private antitrust plaintiff sought discovery to assist its claims in a foreign court of general jurisdiction.[376] And there, alone amongst the cases of denial, no evidence was adduced that the foreign tribunal objected to the discovery.[377] There, however, the similarities end. Sharp sought not a circumscribed deposition of patent import to the case but rather wholesale disclosure of millions of documents produced in a U.S. case, obviously sidestepping Korean proof-finding rules entirely in favor of importing U.S. discovery, and thus raising comity fears even if the foreign tribunal had not.[378] So, too, the deposition differed from the unmoored fishing expedition eventually sought in *Microprocessor* (assuming the would-be plaintiff there found some way to even lodge a suit).[379]

Two more courts granting discovery of evidence relevant to antitrust claims and defenses faced more ambivalent factors and analyses.[380] Apple was the defendant in patent infringement lawsuits Ericsson had filed in the United Kingdom, Germany, and the Netherlands,[381] and sought a § 1782 subpoena against Qualcomm to discover any licenses Ericsson had granted it, together with any related communications,[382] "for use in establishing at least the defenses of license, unfair competition, and/or antitrust violations."[383] The court ordered notice given to Qualcomm and Ericsson; neither filed any opposition.[384] Thus unopposed, Apple readily met the statutory requirements.[385] As the discovery sought was equally available

374. *See In re* Intel Corp. Microprocessor Litig. (*Microprocessor*), No. 05–1717–JJF, 2008 WL 4861544, at *2–3 (D. Del. Nov. 7, 2008).

375. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016).

376. *In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944 SC, 2012 WL 6878989, at *1–2 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

377. *Id.* at *3.

378. *Id.* at *3–4.

379. *Microprocessor*, 2008 WL 4861544.

380. *In re* Qualcomm Inc., No. 18-mc-80104-VKD, 2018 WL 3845882 (N.D. Cal. Aug. 13, 2018); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606 (S.D. Cal. Oct. 7, 2015).

381. *Apple*, 2015 WL 5838606, at *1.

382. *Id.*

383. *Id.* at *2.

384. *Id.* at *1.

385. *Id.* at *2–3.

from Ericsson, a party abroad, the first *Intel* factor was negative for Apple.[386] As no evidence appeared of foreign opposition, and information akin to what Apple sought was often received in complex patent litigation like that at hand, the court held the second factor positive.[387] The third factor was again held negative because Apple had not explained why it could not use foreign discovery procedures.[388] Finally, Apple contended the discovery was narrow and relevant, but the court found the fourth factor neutral for lack of information about the burden.[389] Nonetheless, even though some factors weighed against discovery, the court exercised its discretion for Apple because "the potentially complex nature of the foreign proceedings supports granting the application," especially given Qualcomm's opting not to oppose the application.[390]

What was sauce for the goose was sauce for the gander[391] when Qualcomm sought a § 1782 subpoena against Apple in its own parallel infringement claims in the German forum.[392] As expected, Apple had asserted "counterclaims challenging Qualcomm's alleged anticompetitive licensing practices" and argued, "Qualcomm's infringement claims were asserted to punish Apple for fostering competition and as a means of forcing Apple to obtain chips only from Qualcomm."[393] After quickly confirming

386. *Id.* at *4.

387. *Id.*

388. *Id.* ("Specifically, while nothing suggests that the Ex Parte Application 'conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States,' *Intel* [*Corp. v. Advanced Micro Devices*], 542 U.S. [241] 265 [(2004)], Applicant 'has not addressed the availability of this information from [Ericsson] utilizing the discovery procedures of the host courts.'") (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004); *In re* LG Elecs. Deutschland GmbH, No. 12cv1197–LAB (MDD), 2012 WL 1836283, at *2 (S.D. Cal. May 21, 2012)).

389. *Id.* at *4–5.

390. *Id.* at *5.

391. A delightfully hoary phrase, its usage has persevered into even the most recent court rulings, including that of the Supreme Court. *See* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) ("If the employer's motive (and in particular the facts as the employer reasonably understood them) is what mattered in *Waters*, why is the same not true here? After all, in the law, what is sauce for the goose is normally sauce for the gander.").

392. *In re* Qualcomm Inc., No. 18-mc-80104-VKD, 2018 WL 3845882 (N.D. Cal. Aug. 13, 2018) [hereinafter *Qualcomm-Germany* in the main text to distinguish it from the earlier identically-captioned case, *see supra* note 343].

393. *Id.* at *1.

statutory eligibility, the court turned to the *Intel* factors.[394] Qualcomm could not explain why it needed § 1782, other than the bald assertion it could not obtain the discovery needed to rebut Apple's claims in the German forum.[395] Yet, given Apple itself had already sought relief under § 1782 in the German litigation, as related above, the court held the first factor could only be called neutral.[396] Without any evidence the German court was unreceptive, the second factor was found positive.[397] By contrast, as Qualcomm had also offered little to show it was not circumventing German discovery rules, the court found the third factor "at best, neutral."[398] Finally, although Qualcomm's requests were capacious, they seemed on their face to be relevant to defending against Apple's antitrust claims, and thus the court found the fourth factor positive.[399] With two ostensibly neutral and two positive factors, the court granted the application—but took Qualcomm to task for its sparse arguments, allowing Apple to dispute any particular request, which would then be held in abeyance until the objection was resolved.[400]

This leaves only the 2012 court addressing *In re North American Potash, Inc.* to discuss.[401] The Canadian cases at issue centered around a group of potash investors who had fallen out; although most claims sounded in contract, allegations were also laid that one had used shell companies "to

394. *Id.* at *2.

395. *Id.* at *2–3.

396. *Id.* at *3.

397. *Id.* at *4 ("Nothing in the record before this Court indicates whether the German tribunals would or would not be receptive to the information Qualcomm seeks in discovery from Apple. However, in the absence of evidence that the tribunals object to this particular information or that they object more generally to the judicial assistance of U.S. federal courts, this Court finds that this factor weighs in favor of authorizing service of the subpoena.").

398. *Id.*

399. *Id.* at *4–7 ("The Court is satisfied that the subpoena includes some requests for information relevant to the German proceedings, although it cannot determine without more information which requests, if any, are unduly burdensome or intrusive. This factor weighs in favor of authorizing service of the subpoena.").

400. *Id.* at *7 ("However, given the limited nature of Qualcomm's showing on the Intel factors, including its failure to explain the relevance of each of its document requests and deposition testimony to the German proceedings, this order does not foreclose a motion to quash or modify the subpoena by Apple following service. If Apple disputes any portion of the discovery sought in the subpoena, compliance with the disputed portion is not required until resolution of the dispute.").

401. No. 12-20637-CV, 2012 WL 12877816 (S.D. Fla. Nov. 19, 2012).

suppress competition in the industry by utilizing the court system to prevent the sale of potash permits."[402] The movants satisfied the § 1782 statutory requirements, throwing the decision to the discretion of the court.[403] Defendants argued that with discovery underway in the Saskatchewan court, simultaneous recourse to the more liberal U.S. discovery rules "may undermine the stated objectives of § 1782"; indeed, they had a request lodged in Saskatchewan for the court's views and thought the subpoenas should be quashed pending that opinion.[404] The U.S. court was unperturbed, finding the "bald assertion that the Court may not be receptive, without more, fails to persuade."[405] It was "clear" to the court it "must consider only 'authoritative proof' that the foreign jurisdiction would reject the § 1782 request for assistance."[406] In other words, absent instances "where the representative of a foreign sovereign has expressly and clearly made its position known," the *Intel* factor assessing of the foreign tribunal's views would favor disclosure.[407] This was so, apparently, even when a petition was pending before the sovereign to provide that express and clear position.[408]

Defendants further argued under the third *Intel* factor that U.S. discovery was sought to circumvent the Canadian rule that discovery in its courts was subject to an "implied undertaking" that the evidence not be further disclosed outside the specific litigation; this was not a hypothetical possibility given the pendency of several related actions in arbitral fora in which the evidence could be useful indeed.[409] But the court replied brusquely that there were exceptions to the rule, and then embarked on a discursive survey of Canadian cases that "clearly evince the Canadian courts' favorable views toward discovery obtained via § 1782."[410] Moreover, there was no prerequisite after *Intel* that the evidence sought be discoverable in the foreign jurisdiction—an observation seemingly irrelevant to whether

402. *Id.* at *3.

403. *Id.* at *6 ("Having determined that the threshold requirements have been satisfied, the Court turns to the discretionary *Intel* factors.").

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at *6–7 ("In their view, the real motive behind the Application is to 'get around' the confidentiality rules and use the resulting discovery in Medge's deposition in the arbitration claim against him in Miami.").

410. *Id.* at *8.

evasion of the implied undertaking rule was afoot.[411] The court did, however, think irrelevant the defendants' arguments that the § 1782 request evinced an "ulterior motive" to shirk Canadian procedures, citing its own precedent where the responsibility for policing any abuse would lie with the tribunal in which the evidence was improperly adduced.[412] That responsibility disclaimed, the court approved the application for discovery.[413]

C. *An Alternative Route Under F.R.C.P. 24(b)*

Even with occasional (and problematic) successes in cases involving collateral antitrust issues, the litany of denials under § 1782 in core antitrust proceedings might lead litigants to look elsewhere for relief. One workaround lay in the Federal Rules of Civil Procedure, as a successful motion in *In re Linerboard Antitrust Litigation* illustrated immediately after *Intel*.[414] The captioned class-action multi-district lawsuit, which had been ongoing for many years, concerned U.S. manufacturers conspiring to restrain trade in linerboard in violation of the Sherman Act.[415] Five years in, La Cie McCormick Canada Co. sought to intervene as a party for the sole purpose of modifying the relevant protective order to obtain documents produced to the American plaintiffs for use in its parallel suit in an Ontario court in Canada.[416] Long before *Intel*, it had been recognized that Rule 24(b), governing permissive intervention, provided a basis to do so, and indeed, "'courts have been willing to adopt generous interpretations of Rule 24(b)' to facilitate an 'effective mechanism for third-party claims of access to information generated through judicial proceedings.'"[417] The court thus easily found La Cie qualified for access to the documents, including

411. *Id.* ("Even assuming for the sake of argument that the requested information was not discoverable in the foreign proceedings, same would not necessarily serve as a bar to the application either.").

412. *Id.* ("Lastly, on a related note, it is worth mentioning that similar 'ulterior motive' and 'ulterior use' arguments, such as those made by Respondents, have been rejected by certain federal courts.").

413. *Id.* at *9.

414. 333 F. Supp. 2d 333 (E.D. Pa. 2004).

415. *Id.* at 335–37.

416. *Id.* at 337–38 ("Movant asserts that its suit is similar to the instant matter with the exception that its suit is brought on behalf of linerboard purchasers, both direct and indirect, who are located in Canada. Movant seeks access to discovery plaintiffs have collected in MDL 1261 that is the subject to the Court's December 14, 2000 Confidentiality Order.").

417. *Id.* at 338–39 (quoting E.E.O.C. v. Nat'l Children's Ctr., Inc., 146 F.3d 1042, 1045 (D.C. Cir. 1998)).

demonstrating it was a bona fide litigant in Canada and submitting itself to the jurisdiction of the court for purposes of the order.[418]

1. *Discovery Allowed as Minimizing International Inefficiency*

The defendants argued, however, that La Cie's motion should nonetheless be denied because it represented an impermissible end run under § 1782.[419] "Specifically, defendants assert movant is attempting to 'circumvent the proof-gathering restrictions or other policies' of Canada in two respects," explained the court: first, that discovery was not even available until after Canadian class certification occurred; and second, that, even afterward, the Ontario Rules of Civil Procedure would never permit the breadth of discovery La Cie sought.[420] As to the broader question, § 1782(a) did not by its terms foreclose a motion under Rule 24(b); to the contrary, La Cie simply wished the protective order be modified so the American plaintiffs could voluntarily share what they had received—just as § 1782(b) expressly allowed.[421] Nor was this application of Rule 24(b) a novel invention to be viewed askance, as the court could cite two recent cases in which judges managing multidistrict litigation had entertained motions for permissive intervention by Canadian plaintiffs in order to harvest the fruits of U.S. discovery.[422]

But those earlier cases lacked the benefit of the new *Intel* factors, specifically the one inquiring whether the discovery would circumvent the procedures of the foreign tribunal, as the defendants argued La Cie's motion would.[423] La Cie conceded its request exceeded what Ontario would allow,[424]

418. *Id.* at 339–40.

419. *Id.* at 340 ("Defendants argue that the relief movant seeks under Rule 24(b) is improper and argue that McCormick should have invoked 28 U.S.C. § 1782.").

420. *Id.*

421. *Id.* at 340–41 ("'This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.' 28 U.S.C. § 1782(b). That is precisely what movant seeks—the voluntary production by plaintiffs, not defendants, of the discovery documents and deposition transcripts in their possession. Only the Court's confidentiality order prevents plaintiffs from providing movant with these materials.").

422. *Id.* at 341 (discussing *In re* Vitamins Antitrust Litig., MDL No. 1285, 2001 WL 34088808 (D.D.C. Mar. 19, 2001); *In re* Baycol Prods. Litig., MDL No. 1431, Pretrial Order No. 77 (D. Minn. May 6, 2003)).

423. *Id.* at 341–42.

424. *Id.* at 341.

but *Intel* had looked to deliberate circumvention of a tribunal's policy or position, rejecting a rote discoverability requirement.[425] La Cie thus pointed to the decision of the Ontario Superior Court in a recent antitrust case, *Vitapharm Canada Ltd. v. F. Hoffman-Laroche, Ltd.*[426] The facts there were close indeed: Canadian plaintiffs sought to modify a U.S. protective order to obtain relevant discovery, and the Canadian defendants moved for an injunction to prevent it.[427] Observing that § 1782 inquired into the receptivity of the foreign tribunal, it thought Ontario courts had addressed the question: "A Canadian court generally will be reluctant to prevent someone from gathering evidence extraterritorially, as its ultimate admissibility in a Canadian proceeding will be determined by the Canadian courts," and therefore plaintiff's "access to discovery evidence which they believe necessary to prepare their case in Canada, a request made through means lawful in the United States, does not violate the rules and procedure of this court. There is no consequential unfairness to the defendants in the Canadian class proceedings."[428] The Ontario appellate court agreed, although emphasizing the plaintiff sought only the existing fruits of discovery, not to propound new requests, which might raise different concerns.[429] Thus informed, the *Linerboard* court readily concluded that denying intervention could only raise needless roadblocks to a foreign litigation and foment duplicative wastefulness—just what § 1782 sought to avoid.[430] La Cie's motion and discovery were granted.[431]

Later antitrust litigants could and did follow the roadmap sketched in *Linerboard*. The desirous intervenor fared equally well in *In re Ethylene*

425. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261–65 (2004).

426. *Linerboard*, 333 F. Supp. 2d at 341 (citing Vitapharm Can. Ltd. v. F. Hoffman-Laroche, Ltd., No. 99-GD-46719 (Ont. Sup. Ct. Jan. 26, 2001), *appeal dismissed*, No. 82/2001 (Ont. Sup. Ct. April 10, 2002)).

427. *Id.*

428. *Id.* at 342 (quoting *Vitapharm*, No. 99-GD-46719 at *13–14).

429. *Id.*

430. *Id.* ("Finally, the Court notes that although McCormick has not moved pursuant to Section 1782, one of the goals of that legislation is to provide 'efficient means of assistance to participants in international litigation in our federal courts and encourage foreign countries by example to provide similar means of assistance to our courts . . .'. The Court concludes that granting McCormick's motion promotes that end.") (quoting *In re* Euromepa S.A. v. Esmerian, Inc., 51 F.3d 1095, 1097 (2d Cir. 1995)).

431. *Id.* at 342–43.

Propylene Diene Monomer (EPDM) Antitrust Litigation.[432] The posture was near-identical: American plaintiffs had instituted a multi-district class action antitrust litigation against American EPDM manufacturers, and now came the lead plaintiff (Stone Paradise) in a parallel antitrust class action in the Ontario courts seeking intervention to modify a protective order to allow it the fruits of the American plaintiffs' discovery.[433] As in *Linerboard*, the Canadian plaintiff sought to avoid the expense of duplicative discovery, agreed to abide by the protective order, and submitted to the jurisdiction of the U.S. court for that purpose.[434] Defendants once again argued the attempt was "an 'end run' around Canadian discovery rules," and plaintiff again countered that Ontario courts were amenable to sorting out any issues at the admissibility stage.[435] And once again, the court readily found the Canadian plaintiff met the standard for intervention, given the existence of the pending and parallel litigation concerning precisely the same international antitrust conspiracy.[436]

The trickier question was whether Stone Paradise was entitled to the discovery.[437] Most circuits (including *Linerboard*'s Third Circuit) presume modification of a protective order is appropriate for parties to collateral litigation to avoid redundancy absent a showing of tangible prejudice.[438] The Second Circuit, however, imposes a presumption against modification absent "improvidence" in the original order or "extraordinary circumstance

432. 255 F.R.D. 308 (D. Conn. 2009).

433. *Id.* at 313–14.

434. *Id.* at 314.

435. *Id.* ("The defendants further argue that under Canadian discovery rules, many of the documents and depositions would be inadmissible and that Stone Paradise is seeking to do an 'end run' around Canadian discovery rules by retrieving materials produced in the U.S. litigation. Stone Paradise counters that in similar cases, U.S. courts have granted access to the discovery materials, but allowed the Canadian courts to sort through the admissibility of the individual documents and depositions in the Canadian litigation.").

436. *Id.* at 315–17.

437. *Id.* at 317 ("Having determined that Stone Paradise may intervene in the pending EPDM litigation, it is necessary to determine whether the Protective Order should be modified and, if so, how extensive the modification should be.").

438. *Id.* (discussing United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990); Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 789–90 (3d Cir. 1994) (rejecting Second Circuit approach); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 475–76 (9th Cir. 1992) (same); Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 791 (1st Cir. 1988) (same)).

or compelling need."[439] Rebutting the presumption, however, the *EPDM* court found the equities favored a limited allowance of discovery for Stone Paradise.[440] The court observed that whilst avoidance of duplication was a virtue, "if the intervenor is seeking to circumvent limitations on its ability to conduct discovery in its own case or to gain access to materials it would otherwise have no right to access, a court should refuse."[441] Yet the evidence seemed only to support burden-reduction rather than circumvention, as discovery was ongoing in Ontario.[442] Moreover, the Ontario court would presumably refuse to admit any inadmissible evidence.[443] And looking to *Vitapharm*, courts apparently welcomed the passive "evidence-gathering" at issue: simply receiving a copy of an already made production, excluding litigation materials such as depositions or interrogatories.[444] With these exclusions, the court granted Stone Paradise's motion.[445]

Other courts had greater qualms about the Rule 24(b) two-step.[446] *Linerboard* and *EPDM* accepted the foreign litigant's submission to district court jurisdiction as sufficient to ensure compliance with the protective order,[447] but the court in *In re New Motor Vehicles Canadian Export Antitrust Litigation* was not so sanguine.[448] There the American class action plaintiffs asserted a conspiracy to prevent the import of Canadian automobiles to artificially inflate domestic prices; a parallel class suit was filed in Ontario

439. *Id.* (quoting S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 (2d Cir. 2001)).

440. *Id.* at 318–24.

441. *Id.* at 324.

442. *Id.* at 324–25.

443. *Id.* at 325.

444. *Id.*

445. *Id.*

446. To wit, step one: move to intervene under permissive standards; step two: move to accede to the protective order and gain access to the desired materials.

447. *See EPDM*, 255 F.R.D. at 324–25 (finding "concerns are resolved by requiring Stone Paradise to be bound by the protective order's use and disclosure requirements; to submit to the personal jurisdiction of this court for purposes of enforcement; to request that the Canadian courts seal all materials obtained through this process; and to decline to offer materials if the Canadian court refuses to grant them confidentiality"); *In re* Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 339–40 (E.D. Pa. 2004); *see also EPDM*, 255 F.R.D. at 318 (citing *Linerboard* for the proposition that "[a]ny legitimate interest the defendants have in keeping the materials filed under the protective order out of public hands can be accommodated by placing the intervening party under the same use and disclosure restrictions contained in the original order").

448. *See In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485 (D. Me. Mar. 26, 2009).

alleging a reciprocal bar on exports from the United States to Canada.[449] Faced with a Rule 24(b) motion, the district court followed the same path as the contemporaneous *EPDM* in finding intervention was warranted.[450] As before, defendants claimed that "to allow access would circumvent discovery restrictions imposed by Canadian law" because no discovery was available there until the class was certified.[451] To this, the Canadian plaintiffs had a "reassuring response," trotting out *Vitapharm* once again to prove Canadian acquiescence in premature foreign evidence-gathering.[452] The court found *Vitapharm* highly persuasive[453] and further rejected the Second Circuit's requirement of extraordinary circumstances to modify a protective order, finding the logic of avoiding transnational duplication of effort as a matter of course to be compelling.[454] But there was "one remaining hurdle": the court was skeptical that submission to its jurisdiction could deter protective order violations by a foreign party with no domestic claim and immunity to contempt.[455] Again looking to *Vitapharm*, therefore, the district court conditioned discovery on entry of an (enforceable) order in the Ontario court effectuating the protective order.[456]

2. *Intervention and Discovery Denied*

Not all would-be intervenors in antitrust cases have been so successful. One need look no further than *Microprocessor*, where the hapless Que Choisir not only sought a § 1782 subpoena but also Rule 24(b) intervention.[457] Having denied the § 1782 application, the special master

449. *Id.* at *1.

450. *Id.* at *2–6.

451. *Id.* at *5.

452. *Id.* at *5–6.

453. *Id.* at *6 ("I find that Judge Cumming's decision in *Vitapharm* undermines the Non–Settling Defendants' argument that the Intervenors are attempting to circumvent Canadian law pertaining to the timing of discovery in Canadian litigation.").

454. *Id.* at *7–8.

455. *Id.* at *8 ("It is not clear that making the Intervenors subject to the MPO based on their voluntary submission to this Court's jurisdiction offers sufficient protection to the parties against a breach of confidentiality in Canada. The specter of being sanctioned under Rule 37(b) has little or no meaning where the Intervenors have no abiding claim in this Court. Consequently, violation of the protective order would have to be remedied through an exercise of contempt powers. The Supreme Court of Canada has held that Canadian courts may not enforce contempt orders issued by the courts of the United States.") (citations omitted).

456. *Id.*

457. *In re* Intel Corp. Microprocessor Litig. (*Microprocessor*), No. 05–1717–JJF,

could easily do the same with the Rule 24(b) motion, for without a § 1782 subpoena, Que Choisir had no mechanism to obtain the desired discovery.[458] Unlike *Linerboard*, on which Que Choisir misguidedly relied, no party in the *Microprocessor* case was willing to voluntarily satisfy its request, with only a protective order standing athwart.[459] The *Microprocessor* parties instead strenuously opposed discovery, for they had relied upon an order that would mutually foreclose their highly confidential trade secrets to interloping third parties; the special master had thus recommended the order forbid the use of these confidential documents even in other related matters pending at the time.[460] And as Que Choisir was unable to identify any proceedings in which the discovery would be used, *a fortiori* it could not assure confidentiality in those imaginary proceedings.[461] Even if intervention was permissible, Que Choisir would merit no modification of the order.[462]

The movants in *In re Static Random Access Memory (SRAM) Antitrust Litigation* were less feckless but no more successful.[463] The basic posture was familiar: the plaintiffs in a Canadian (this time British Columbia) antitrust lawsuit sought Rule 24(b) intervention to access certain discovery developed in the parallel U.S. antitrust law.[464] Here, however, the request was narrow—plaintiffs sought only unredacted versions of expert reports from the litigation—and plaintiffs had actually gone to the British Columbia court first to obtain the evidence.[465] The Canadian court, although finding the reports properly "within the scope of limited discovery" it had allowed,

2008 WL 4861544, at *1 (D. Del. Nov. 7, 2008).

458. *Id.* at *18 ("Here, it appears that QC believes that a modification of the protective order would, in and of itself, provide it access to the documents. Modification of a protective order, rather, merely removes the barrier to access by means of some other method of discovery. Because the Special Master has concluded that QC is not entitled to documents pursuant to its § 1782 request, QC lacks standing to seek a modification of the protective order because it has no basis for obtaining the documents even if the barrier of the protective order were lifted.").

459. *Id.* at *20.

460. *Id.* at *19.

461. *Id.* at *20 ("As discussed above in the context of the § 1782 request, however, QC has not identified what action it seeks to use the documents in, what parties it might be representing or what other organizations might be associating with it for purposes of litigation. QC also has failed to provide the necessary assurances regarding how the confidentiality of the documents in question could be maintained in this context.").

462. *Id.*

463. No. 07-md-01819 CW, 2011 WL 5193479 (N.D. Cal. Nov. 1, 2011).

464. *Id.* at *1.

465. *Id.*

nonetheless denied the request and deferred to its U.S. counterpart, reasoning that it and the parties therein "better understood the nature of the information sought, the provisions of the protective order, and the numerous third party interests implicated in the disclosures sought."[466]

The defendants resisted intervention primarily on the grounds it was untimely in that their case had already been settled three years before.[467] Surprisingly, the court accepted this objection over the contrary authority of *Linerboard* and other cases permitting intervention even after settlement for the limited purpose of obtaining extant discovery.[468] Noting tersely that "these cases are not controlling," the court reasoned obligating the parties to police the dissemination of their confidential documents for many years after the end of litigation—perhaps indefinitely—in fact imposed a prejudicial burden upon their interests in finality in settling the case.[469] Even if intervention was permissible, moreover, the court found modification unwarranted.[470] Facially, many factors favored the movants: they proposed to maintain the reports' strict confidentiality; "disclosure to meet the needs of parties in pending litigation is strongly favored" and the information sought clearly met that standard; and "their motion does not attempt to circumvent Canadian procedures and discovery limitations."[471] But the defendants' reliance interests were weightier. They reasonably believed the reports "would be barred from public access and not subject to use in other litigation outside of the United States. The need to police dissemination of their confidential information in three different Canadian cases as well as in this Court would prejudice Defendants and third-parties."[472]

Finally, the court was brief in *In re Hydrogen Peroxide Antitrust Litigation,* but the ruling is unique in many ways.[473] As was the case in the other motions discussed, plaintiffs in a Canadian class action sought to intervene in the U.S. analogue with the support of their fellow plaintiffs, and opposed by defendants, sought modification of a protective order to gain

466. *Id.*
467. *Id.* at *3.
468. *Id.*
469. *Id.*
470. *Id.* at *4.
471. *Id.* at *5–6.
472. *Id.* at *6.
473. MDL No. 1682, 2006 U.S. Dist. LEXIS 101198, at *1 (E.D. Pa. July 31, 2006).

discovery.[474] But the court made exceedingly short work[475] of denying the motion because "it would appear that movants here seek to bypass the rules of the Canadian court system."[476] Discovery remained in the distance in Canada, and movants' attempts thus represented an attempt to gain evidence earlier than would be permissible abroad.[477] The movants appealed to principles of justice and efficiency: "Defendants doubtless would like to prevent Movants . . . from obtaining any evidence until after class certification some time in 2007 or later, and then require them laboriously to pursue discovery in Canada. But where is the justice in that?"[478] The court had an answer faithful to international fair play: "The 'justice' lies in comity with courts in a neighboring country that, we are sure, care as much about their laws as we do about ours."[479]

What accounts for the differences in outcome of these Rule 24(b) motions? Not concerns about circumvention of the prerogatives of foreign tribunals: aside from *Hydrogen Peroxide*, each of the cases (for better or worse) found the discovery sought would not traduce international comity, usually relying upon the alleged position of the foreign jurisdiction.[480] Nor was the timeliness of the request dispositive: *Linerboard* and *SRAM* parted ways sharply in their treatment of requests for discovery, reopening long-settled matters.[481] Rather, the decisive factor was the foreign movant's ability to assuage concerns about confidentiality raised by the domestic parties. In *Linerboard* and *EPDM*, the U.S. plaintiffs were amenable to voluntarily providing the discovery, and the court was appeased by the foreign party's submission to its jurisdiction in enforcing further confidentiality.[482] In *Motor*

474. *Id.* ¶¶ at (a)-(e).

475. The opinion consisted only of 12 short sentences enumerated (a) to (l). *Id.*

476. *Id.* ¶ (j).

477. *See id.* ¶¶ (g)-(i) ("In light of the infancy of the Canadian action, movants themselves concede, 'Permitting Movants to obtain access to these materials now will facilitate development of their case at an early stage and will allow them to focus their discovery efforts when discovery begins in Canada.'").

478. *Id.* ¶ (k).

479. *Id.* ¶ (l).

480. *See In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2011 WL 5193479, at *6 (N.D. Cal. Nov. 1, 2011); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 324–25 (D. Conn. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485, at *5–6 (D. Me. Mar. 6, 2009); *In re* Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 341–42 (E.D. Pa. 2004).

481. *SRAM*, 2011 WL 5193479, at *3 (noting difference of opinion).

482. *See supra* note 448 (discussing *Linerboard* and *EPDM*).

Vehicles, the court went further yet to address its own doubt that confidentiality might not be maintained abroad.[483] Meanwhile, in *Microprocessor*, the movant's scheme was so fantastical it could not possibly be trusted to ensure the confidentiality of highly sensitive competitive information,[484] and in *SRAM*, the parties' fears—long after their own case had ended—of indefinitely monitoring compliance with confidentiality in multiple foreign actions were given credence.[485] With comity concerns ostensibly satisfied (again, excepting *Hydrogen Peroxide*), these Rule 24(b) cases rose or fell on the traditional weighing of enlarged discovery burdens against the prejudice to reliance interests in confidentiality.

D. *The Spectre of Forum Shopping in Transnational Antitrust Claims*

A final posture remains to consider: what results after *Intel* when an ostensibly domestic claimant seeks the fruits of foreign antitrust evidence-gathering in a domestic case? This context might seem outside the scope of foreign litigants seeking domestic discovery, but the cases show that foreign parties who, for example, might have chosen (and surely been rebuffed by) the EC as a forum for transnational antitrust violations may avoid those protections abroad by instituting an action in the United States and seeking discovery here.[486]

So it seemed in *In re Rubber Chemicals Antitrust Litigation*.[487] The court set the stage:

> In 2002, attorneys representing defendant Flexsys N.V. met with officials of the European Commission. Flexsys N.V. disclosed the existence of anti-competitive practices in the rubber chemicals industry and solicited immunity from fines for Flexsys N.V. pursuant to the Commission's Leniency Program. Over the next three years the Commission, through its Directorate-General for Competition carried out an extensive investigation during which there were communications between the Commission and its counsel and Flexsys N.V. and its counsel. At the conclusion of its investigation, the Commission issued

483. *Motor Vehicles*, 2009 WL 861485, at *8 (quoted *supra* note 455).

484. *In re* Intel Corp. Microprocessor Litig. (*Microprocessor*), No. 05–1717–JJF, 2008 WL 4861544, at *20 (D. Del. Nov. 7, 2008).

485. *SRAM*, 2011 WL 5193479, at *6.

486. *See* Reeves, Albers & Hunter, *supra* note 269, at 77; *cf.* Withers, *supra* note 233, at 356 (noting incentive of liberal discovery to file in the United States under the Ninth Circuit's view of § 1782).

487. *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1078 (N.D. Cal. 2007).

> its 106-page Decision containing highly detailed findings of fact based on specific evidence, including evidence that was submitted by Flexsys N.V.
>
> In 2006, Plaintiff Korea Kumho Petrochemical Co., Ltd. filed this complaint against defendant Flexsys America L.P., its affiliate Flexsys N.V., and others, alleging that defendants engaged in unlawful conduct to exclude Kumho from the U.S. rubber chemicals market. Kumho then served Flexsys, but not Flexsys N.V., with requests for documents related to investigations of suspected antitrust violations in the rubber chemicals industry that were conducted by the governments of the United States, Canada, and the European Union.[488]

Flexsys ultimately agreed to produce much of what was sought, but persevered in withholding the materials relating to its participation of the Leniency Program, citing EU law.[489] For its part, the Commission submitted a letter opposing discovery.[490]

Quite properly, the court recognized its discretion under Federal Rule of Civil Procedure 26 was circumscribed by international comity; indeed, "courts, in supervising pretrial proceedings, should exercise special vigilance to demonstrate due respect for any sovereign interest expressed by a foreign state."[491] In response to Kumho's audacious argument, the EU warranted no comity at all as a transnational, rather than sovereign, entity, the court pointed to *Intel* itself, which had at least recognized the Commission's views were worthy of comity.[492] And to the equally impudent suggestion that the letter from Kirtikumar Mehta, the head of DG COMP, was merely the opinion of a "bureaucrat," the court remonstrated that Mehta was analogous to the head of the Department of Justice's Antitrust Division and patently provided the views of the EC.[493] Facile objections set aside, the court turned to the Supreme Court's *Aérospatiale* factors to weigh comity concerns outside § 1782: "(1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information"; and (5) whether

488. *Id.* at 1080–81 (citations omitted).
489. *Id.* at 1081.
490. *Id.* at 1081, n.2.
491. *Id.* at 1081.
492. *Id.* at 1081–82
493. *Id.* at 1082.

nondisclosure would undermine U.S. interests or disclosure would undermine foreign interests.[494]

Applying the factors, the court ruled against discovery.[495] Flexsys had already produced all other records relevant to the antitrust claims, and the Commission documents pertained to European conduct rather than that salient to the case.[496] On the other hand, the request was highly specific, weighing in favor of production.[497] By definition, the documents were created abroad for purpose of a foreign antitrust proceeding, weighing against.[498] Although at first glance the material might seem unique, the court thought it was more properly cumulative of information already in Kumho's possession, particularly as Flexsys had already disclosed the far more relevant case files in connection to the Department of Justice.[499] Most importantly, the Commission raised a "strong objection," pleading disclosure would "undermine its ability to initiate and prosecute future investigations by creating disincentives to cooperate with the Commission and would prejudice future investigations."[500] Indeed, the court recognized compelling disclosure over the Commission's dissent might well "impact U.S.–E.U. cooperation in the enforcement of the antitrust laws"—presumably in a negative fashion.[501] In the end, any evidentiary benefit to Kumho was outweighed when a "foreign entity has taken a clear position and articulated reasons why it believes production of the requested documents would harm its interests."[502]

Alas, *Rubber Chemicals* was not an isolated foray against DG COMP's prerogatives in the age of *Intel*. But the Commission has usually succeeded in its attempts to protect records of its investigations and decisions,[503] with

494. *Id.* (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 (1987)).

495. *Id.* at 1082–84.

496. *Id.* at 1082–83.

497. *Id.* at 1083.

498. *Id.*

499. *Id.*

500. *Id.* at 1084.

501. *Id.*

502. *Id.*

503. *See In re* Int. Rate Swaps Antitrust Litig., No. 16-MD-2704 (PAE), 2018 WL 5919515, at *3 (S.D.N.Y. Nov. 13, 2018) ("The Court therefore, like other U.S. courts presented with similar disputes, upholds the application of the EC's confidentiality requirements for documents created as part of EC investigations, even after such investigations have terminated."); *e.g.*, *In re* Cathode Ray Tube (CRT) Antitrust Litig.,

Rubber Chemicals serving as a powerful precedent explaining why.[504] U.S. courts have agreed the Commission's policy and promise of confidentiality is a vital element in its encouragement of lawbreakers to voluntarily confess and cooperate.[505] Perhaps even more importantly, the guarantee of confidentiality encourages third parties to willingly turn over sensitive trade secrets and business information.[506] And even when DG COMP must resort to compulsory process, assurance that their secrets will remain secret may spur less willing third parties to not mount legal resistance and provide fuller or more useful assistance.[507] It need hardly be said that "the interest the United States always has in preventing anticompetitive behavior by enforcing its own antitrust laws" is compelling,[508] but ultimately most courts have concluded that interest could be served by the numerous sources of

MDL No. 1917, 2014 WL 1247770 (N.D. Cal. Mar. 26, 2014); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M:07-cv-01827-si, 2011 WL 13147214 (N.D. Cal. Apr. 26, 2011); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *Rubber Chems.*, 486 F. Supp. at 1078.

504. *See Payment Card*, 2010 WL 3420517, at *8 ("The case most helpful to the defendants is probably *In re Rubber Chemicals*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007).").

505. *E.g.*, *In re Cathode Ray*, 2014 WL 1247770, at *3 ("In terms of policy, the DG Competition Letter states that even though its investigation as to these Defendants is over for purposes of the Decision, it objects to the Decision's disclosure because its leniency program 'is a cornerstone of its cartel detection and enforcement,' whose 'optimal functioning requires that a party that comes forward and cooperates with the Commission does not find itself worse-off visà-vis the non-cooperating cartel members as a result of doing so.'"); *In re TFT-LCD*, 2011 WL 13147214, at *6 ("The agencies' main concern is basically that the leniency programs have been fertile avenues for enforcement of antitrust laws, and that parties would be dissuaded from applying and furnishing information if they feared that the information would be made available in private antitrust actions in the United States."); *Payment Card*, 2010 WL 3420517, at *9 ("Moreover, the confidentiality of the investigative and adjudicative process is also important to encourage candor by the targets of the investigation. That the proceedings are secret encourages free and open participation by the parties under investigation, which in turn serves the Commission's interest in detecting and punishing violations of its laws.").

506. *E.g.*, *Payment Card*, 2010 WL 3420517, at *9 ("Most importantly, confidentiality encourages third parties to cooperate with the Commission's investigations. The Commission relies on information provided by complainants and other third parties, including business secrets and other information that the third parties often want to keep confidential.").

507. *E.g.*, *id.* ("But even when the Commission compels third parties' participation, the assurance of confidentiality tends to make their participation fuller and more open.").

508. *Id.*

evidence not hijacked from a fellow sovereign's enforcement of its own antitrust law—however helpful piggybacking on the EC's competition law work might be to prosecutors or plaintiffs.[509] To blithely disrespect FCAs' procedures could very well jeopardize transnational cooperation in antitrust enforcement matters.[510]

Yet even armed with such powerful arguments, FCAs have not always prevailed.[511] *In re Vitamin Antitrust Litigation* serves as an early and alarming example in 2002[512]—just as the Ninth Circuit was announcing the Commission would also be susceptible to § 1782, as it happened.[513] Prior to *Vitamin*, the foreign defendants had cooperated with a laundry list of FCAs spanning the globe: Brazil, Switzerland, New Zealand, Mexico, Japan, Australia, and, of course, the EC.[514] Years later, plaintiffs in the new U.S. suit sought to discover all proffers, witness statements, and written responses provided to those FCAs as well as the results of any internal investigations conducted at the time; defendants understandably resisted.[515] Defendants argued confidentiality was essential to FCAs, and disclosure would have a "chilling effect on cooperation and would seriously undermine these foreign governments' abilities to regulate their own citizens."[516] Lending support, the Australian Competition and Consumer Commission and the EC filed

509. *E.g.*, *In re TFT-LCD*, 2011 WL 13147214, at *6 ("Although it is possible that the documents could disclose an additional witness, or a previously undetected meeting of conspirators, or a new nuance of an admission by Hitachi, that possibility in this case is slim and thus pales in comparison to the likely damage that mandating disclosure could do to the enforcement regimes of Japan and Europe."); *Payment Card*, 2010 WL 3420517, at *9 ("The Statement of Objections and Oral Hearing, though they might be helpful to the plaintiffs, are secondary to any unlawful conduct alleged to give rise to a cause of action.").

510. *E.g.*, *In re Cathode Ray*, 2014 WL 1247770, at *3 ("The EC also relies on cooperation from United States law enforcement agencies, including the Department of Justice, and while the Letter does not say as much, the cooperation of United States and EU agencies is an aspect of comity.").

511. *See, e.g.*, *In re* Cathode Ray (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014); *see also In re* Cathode Ray (CRT) Antitrust Litig., 3:07-cv-05944SC, 2015 WL 13756255 at *6–7 (N.D. Cal. Oct. 22, 2015) ("The undersigned is not aware of any foreign antitrust authority having objected to this discovery.").

512. *In re* Vitamin Antitrust Litig., MDL No. 1285, 2002 WL 35021999 (D.D.C. Jan. 23, 2002).

513. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002), *aff'd*, 542 U.S. 241 (2004).

514. *Vitamin*, 2002 WL 35021999, at *4–13.

515. *Id.* at *2–3.

516. *Id.* at *19–20.

strenuous objections, which the court thought sufficient to demand an analysis of comity over contentions that the EC at least warranted no such thing: the Commissions stated in no uncertain terms that "they rely on voluntary cooperation, including submissions of information and documents, by targets of their investigations; and that, if such submissions were discoverable in U.S. civil litigations, this cooperation would dry up."[517]

The court was unpersuaded, to put it mildly.[518] It believed the guarantee of confidentiality was not much of a guarantee at all: both Commissions warned third parties that their information could be disclosed in certain circumstances.[519] Therefore, the court "question[ed] whether disclosure to the plaintiffs would significantly undermine important interests," such as those the Commissions had identified.[520] Even crediting the Commissions' view that confidentiality was essential to their law enforcement duties, the court did not care: "the interests of these foreign governmental authorities are not more important than the interests of the United States in open discovery and enforcement of the antitrust laws."[521] And seizing the foreign records was essential, the court thought, because the plaintiffs claimed the defendants had been assiduous in avoiding documentation of their conduct otherwise, and the relevant witnesses would invoke the Fifth Amendment if subpoenaed to testify.[522] (Only by pilfering copies of the Commissions' investigation files, apparently, could the witnesses' constitutional rights be effectively evaded?[523]) All told, "the comity analysis favor[ed] disclosure."[524]

517. *Id.* at *33–34.

518. *Id.* at *34–35.

519. *Id.* at *35.

520. *Id.*

521. *Id.*

522. *Id.* ("The Court has acknowledged plaintiffs' allegations that their search for the facts respecting the alleged conspiracy is hampered because the participants assiduously avoided keeping records of their activities or destroyed what records existed and went to great lengths to hide their activities and meetings from others. Moreover, most persons identified by defendants as having participated in the conspiracy or having had contemporaneous knowledge will plead the Fifth Amendment.") (citation omitted).

523. *Cf. id.* ("Thus, discovery of these submissions remains important to the plaintiffs' investigation.").

524. *Id.*

V. YANKEE GO HOME: COMPROMISING COMITY, COURTESY, AND COOPERATION

It may strike some that calling such a discussion a "comity analysis" does violence to the legal meaning of the word comity.[525] Encouragingly, however, *Vitamin* slightly predates the Supreme Court's promulgation of the *Intel* factors endorsing a searching analysis of respecting and deterring evasion of foreign policies, and its unique brand of comity has not made a reappearance thereafter.

A. *Disserving Comity by Domestically Defining Foreign Tribunals*

Comity nonetheless may be hard to come by where international practices seem particularly (ahem) foreign to American eyes. The Supreme Court was openly incredulous that the Commission might actually be declining the United States' generous offer to mobilize the formidable machinery of its courts in service of foreign antitrust claims.[526] Perhaps, reasoned the Court, the Commission did not *fully understand* what a munificent and beneficial gift it had been given.[527] Considered in light of the history of transnational antitrust enforcement, instinctive foreign wariness of even well-intentioned U.S. interventionism is not only understandable but almost inescapable.[528] Indeed, the avowed purpose of § 1782 is to propose a broader discovery scheme like that of the United States, at least in part to

525. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 (1987) ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.") (citing Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)); Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 360 (8th Cir. 2007) ("Although comity eludes a precise definition, its importance in our globalized economy cannot be overstated."); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081 (N.D. Cal. 2007) ("It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.") (citing *Aérospatiale*, 482 U.S. at 544); *see also Comity* def. 2(a), OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The courteous and friendly understanding, by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests.").

526. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 243–44 (2004) ("Moreover, the court questions whether foreign governments would be offended by a domestic prescription permitting, but not requiring, judicial assistance."); *id.* at 265.

527. *See id.* at 265.

528. *See supra* Part II.

encourage other nations to conform to those U.S. standards.[529] The statute's framers imagined this might happen via a virtuous spirit of reciprocity by foreign jurisdictions, but that at least has been slow in coming.[530] FCAs have maintained stalwart opposition to unasked-for discovery through the present.[531] Instead, the compulsory process of § 1782(a) does something quite different; it allows disgruntled foreign litigants to replace local evidence-gathering procedures without so much as a fare-thee-well to their local agencies or courts.[532]

That is, of course, if U.S. district courts let them; the court in *Intel* ultimately did not, giving the EC the ultimate victory it sought, if by a more circuitous path than it wished.[533] Hearteningly, that result has not varied where district courts confronted applicants from abroad seeking § 1782 discovery over the protests of the relevant FCA.[534] Such uniformity suggests U.S. district courts are indeed doing their job under the *Intel* factors of according the objections of foreign tribunals due weight—indeed, controlling weight; one observed in 2016 that there was no precedent for a court overruling the objecting tribunal and granting discovery under § 1782.[535] On the other hand, foreign litigants in more traditional judicial fora

529. *See In re* Letter Rogatory from the Just. Ct., Dist. of Montreal, Can., 523 F.2d 562, 565 (6th Cir. 1975); Amram, *supra* note 154, at 28, 33; *see also* Smit, *supra* note 163, at 1046.

530. *See* Smit, *supra* note 163, at 1034 ("This statutory re-affirmation of the large degree of freedom existing in this area in the United States sets an example worthy of imitation by foreign countries."); *id.* at 1046; Amram, *supra* note 154, at 28–29.

531. *See supra* Part II; Section IV.A; *e.g.*, *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081 n.2 (N.D. Cal. 2007).

532. One need look no further than *Intel* itself, where the matter arose because AMD was dissatisfied with DG COMP's decision not to seek the evidence in question. *See* Advanced Micro Devices, Inc. v. Intel Corp., No. C-01-7033, 2002 WL 1339088 (N.D. Cal. Jan. 7, 2002), *rev'd*, 292 F.3d 664 (9th Cir. 2002).

533. Advanced Micro Devices, Inc. v. Intel Corp., No. C 01-7033, 2004 WL 2282320, at *3 (N.D. Cal. Oct. 4, 2004).

534. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029 (N.D. Cal. 2016); *In re* Intel Corp. Microprocessor Litig. (*Microprocessor*), MDL No. 05–1717–JJF, 2008 WL 4861544 (D. Del. Nov. 7, 2008); *In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188 (S.D.N.Y. 2006); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250 (N.D. Cal. Mar. 29, 2006).

535. *Qualcomm-Korea*, 162 F. Supp. 3d at 1041.

have regularly succeeded,[536] albeit with the rare exception.[537] Since *Intel*, courts have likewise claimed to apply a similar comity analysis deferring to the foreign jurisdiction's views under the alternative route of FRCP 24(b) in determining whether to allow intervention in antitrust cases.[538] And *Vitamin* aside,[539] they have *usually* deferred to the relevant FCA in domestic suits where a foreign party seeks to thwart the FCA's procedures and infringe its guarantee of confidentiality.[540]

With near inevitability, therefore, discovery has been granted in antitrust proceedings before traditional courts and denied in proceedings implicating unwilling FCAs. Justice Breyer, therefore, may have had the right of it in prescribing a more categorical exclusion from § 1782 for an FCA—asseverating it was *not* a tribunal of the sort the statute should be read to encompass.[541] True, district courts have denied applications implicating

536. *See In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104-VKD, 2018 WL 3845882 (N.D. Cal. Aug. 13, 2018); *In re* Pro-Sys Consultants, No. 16-mc-80118-JSC, 2016 WL 3124609 (N.D. Cal. June 3, 2016); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606 (S.D. Cal. Oct. 7, 2015); *In re* N. Am. Potash, Inc., No. 12-20637-CV, 2012 WL 12877816 (S.D. Fla. Nov. 19, 2012).

537. *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-5944 SC, 2012 WL 6878989 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

538. *See In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2011 WL 5193479, at *6 (N.D. Cal. Nov. 1, 2011); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 324–25 (D. Conn. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485, at *5–6 (D. Me. Mar. 6, 2009); *In re* Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 341–42 (E.D. Pa. 2004.

539. *See In re* Vitamin Antitrust Litig., MDL No. 1285, 2002 WL 35021999 (D.D.C. Jan. 23, 2002); Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664 (9th Cir. 2002), *aff'd*, 542 U.S. 241 (2004).

540. *See In re* Int. Rate Swaps Antitrust Litig., No. 16-MD-2704 (PAE), 2018 WL 5919515, at *3 (S.D.N.Y. Nov. 13, 2018) ("The Court therefore, like other U.S. courts presented with similar disputes, upholds the application of the EC's confidentiality requirements for documents created as part of EC investigations, even after such investigations have terminated."); *e.g.*, *In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2014 WL 1247770 (N.D. Cal. Mar. 26, 2014); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M:07-cv-01827-si, 2011 WL 13147214 (N.D. Cal. Apr. 26, 2011); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *Rubber Chems.*, 486 F. Supp. at 1078.

541. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 269 (2004) (Breyer, J., dissenting) (suggesting that "when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word 'tribunal' is in serious doubt,

FCAs on a "case by case" basis and thus safeguarded comity—but given the predictability of rejection where unwilling FCAs are involved, why even entertain the application?[542] As Justice Breyer explained, "[D]iscovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes."[543] An FCA, of course, is disserved by allowing such applications: "They deflect the attention of foreign authorities from other matters those authorities consider more important; they can lead to results contrary to those that foreign authorities desire; and they can promote disharmony among national and international authorities, rather than the harmony that § 1782 seeks to achieve."[544] Nor are U.S. interests served: "They also use up domestic judicial resources and crowd our dockets."[545] The evidence of real-world practice and results reinforces the advantage of Justice Breyer's approach to assessing what a tribunal is—and thus that the DG COMP process at the EC is not.

But, the textualist might object, what of the *truth* of what the Commission *really* is, at its core? U.S. courts understood DG COMP to make only one decision: whether to proceed, before or after supplementation, to a formal hearing.[546] Once that passes, its role is reduced to recommendations to the EC or the advisory committee thereto for purposes of competitive analysis.[547] To the extent DG COMP serves a prosecutorial role, it achieves something loosely akin to an indictment and then is subject to the decisional body above it; this is just as a prosecutor in the United States might be described.[548] The same might be observed of the KFTC: as Qualcomm protested, the original investigation and indeed prosecution is undertaken by the KFTC Examiner's office, whose role is to develop and refer allegations against (alleged) miscreants.[549] Yet the KFTC acts formally

then a court should pay close attention to the foreign entity's own view of its 'tribunal'-like or non-'tribunal'-like status.").

542. *Id.* ("Those limits should rule out instances in which it is virtually certain that discovery (if considered case by case) would prove unjustified.").

543. *Id.* at 268.

544. *Id.* at 268–69.

545. *Id.* at 269.

546. *See* Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 6–9.

547. *See id.*

548. *See id.*

549. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016).

through its commissioners, who also serve as the decision-making body.[550] Similar structures characterize numerous FCAs,[551] and "un-American" structure may obfuscate their function to American eyes.[552] Oddly enough, to complain that these competition-regulating bodies amalgamate the executive and judicial functions questions the role of the grand jury, which is likewise a creature of the judicial system under prosecutorial direction.[553] True, in the United States, a grand jury of the accused's peers is thought to temper the prerogative of the state to prosecute,[554] but that is an idiosyncrasy of the U.S. legal system rather than a requirement of justice—especially given the grand jury's British inventor abolished them in 1933.[555] U.S. state indictments may constitutionally proceed upon a prosecutor's information alone, eschewing the grand jury entirely, and yet remain part of a judicial process.[556]

550. *See id.*

551. *See, e.g.*, *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 271–73 (3d Cir. 1983) (describing Japanese Fair Trade Commission), *rev'd*, Matsusuhita Elec. Indus. Co. v. Zenith Radio Corp., 471 U.S. 1000 (1985).

552. *See id.* at 273–75 (reversing district court that had excluded the Commission's evidence because of concerns about reliability).

553. *See* Charles Doyle, *The Federal Grand Jury in U.S. H.R., Comm. on the Judiciary, Hearings on H.J. Res. 46, H.R. 1277 and Related Bills 672*, 672–73 (Appendix V) (1976) ("In order to fully appreciate the federal grand jury system it is necessary to understand the relationship between the grand jury and the court and between the grand jury and the attorney for the United States: 'The grand jury is an arm or agency of the court by which it is appointed. The grand jurors are officers of the court. The United States Attorney, his assistants, the United States Marshal and his deputies and bailiffs, appointed by him to guard their deliberations and, modernly the reporters who record their proceedings are likewise officers of the court. Thus there can be no support for the position that the grand jury is an independent planer [sic] divorced from the court.'").

554. *See* Swain v. Alabama, 380 U.S. 202, 205–07 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986); Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 308–09 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

555. *See, e.g.*, Ocampo v. United States, 234 U.S. 91, 98 (1914) (finding no grand jury right in Philippines territory); Dorr v. United States, 195 U.S. 138, 144–45 (1904) (basing that exclusion in deference to civil law precedent in preexisting law); *see also* Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3, 3 (1938) ("The obituary of the English grand jury might well read: 'Born in 1166 to increase accusations of crime, lived to be termed the palladium of justice, and died in 1933 of inutility on a wave of economy.'"); *id.* at 22 ("We took a long time to perform the necessary operation ourselves, so we must not be critical of other communities for delay, though it is an odd fact that more antiquated English legal procedure survives in America than here.").

556. *See* McDonald v. City of Chi., 561 U.S. 742, 765 n.13, 784 n.30 (2010); Hurtado

As sophistic argumentation illustrates, the question of whether the EC or KFTC embody some platonic ideal of tribunals thus misses the mark (and may be irresoluble): under § 1782's text alone, perhaps they are and perhaps they are not.[557] The language approved by Congress was intentionally nebulous so multifarious bodies might qualify, but those that can at best be described as "quasi-judicial" surely lie in the hinterlands of that realm of juridical twilight.[558] Where that twilight falls, deference to the illuminating self-evaluation of the purported tribunal ought to be at its zenith.[559] Whilst American courts are duty-bound to apply Congress's dictates as they are written,[560] nonetheless application of law to the facts of an undeniably complex foreign body should be informed by the unrivalled expertise of the foreign body itself where it is available.[561] As the Supreme Court's majority has cautioned, the business of parsing and interpreting foreign legal practice is "fraught with danger,"[562] is generally prone to error through inexperience and lack of institutional capacity,[563] and therefore U.S. courts should decline the invitation to do so[564]—even if the Court paradoxically failed to follow its own advice in accepting such an invitation in the selfsame opinion.[565]

v. California, 110 U.S. 516 (1884). *Contra Hurtado*, 110 U.S. at 538–58 (Harlan, J., dissenting).

557. *Contra* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment).

558. *See* Amram, *supra* note 154, at 32. *But see* Smit, *supra* note 179, at 230 n.73.

559. *See Intel*, 542 U.S. at 269–70 (Breyer, J., dissenting).

560. *See id.* at 267 (Scalia, J., concurring in the judgment) ("As today's opinion shows, the Court's disposition is required by the text of the statute. None of the limitations urged by petitioner finds support in the categorical language of 28 U.S.C. § 1782(a). . . . Accordingly, because the statute—the only sure expression of the will of Congress—says what the Court says it says, I join in the judgment.").

561. *See id.* at 267 (Breyer, J., dissenting).

562. *See id.* at 263.

563. *Cf., e.g.*, Medellín v. Texas, 552 U.S. 491, 511 (2008) (finding an International Court of Justice decision not automatically enforceable as domestic law); Sosa v. Alvarez-Machain, 542 U.S. 692, 746 (2004) (Scalia, J., dissenting) (finding the creation of "new federal common law of international human rights" questionable); *cf. also* Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CAL. L. REV. 1568 (2016) (noting international law passing into the U.S. legal system should do so "in a manner consistent with domestic constitutional values"). *But cf.* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1765 (2009) (noting "the Constitution is supreme over international law" in the United States).

564. *See Intel*, 542 U.S. at 260–63.

565. *Compare id.* at 263 (rejecting the notion "that a § 1782(a) applicant must show

B. *The Discourtesy of Sidestepping Foreign Jurisdictions* in Absentia

The preceding discussion assumes the foreign polity enjoys the opportunity to make its views known. An even more fundamental precept of comity is that FCAs and foreign courts should not be circumvented *in absentia*, which has greater relevance to the interlocking questions under *Intel* of discoverability, receptivity, and circumvention than meticulously parsing the word "tribunal."

1. *Structural Problems with Ex Parte § 1782 Applications and 24(b) Motions*

It is reassuring, at first glance, that in § 1782 cases where an FCA has made its views known to the district court (in the negative), the results have been unanimous and discovery has been denied in conformity with those views.[566] And there is a splendid example of proper practice in the other direction: in *Pro-Sys*, the district court gladly granted a circumscribed request under § 1782 for an obviously relevant deposition after taking note that the British Columbian court for which it was destined had entered an order that approved of the deposition sought and found no potential for circumvention of Canadian procedure.[567]

Yet other courts considering § 1782 applications in antitrust matters enjoyed no such enlightening assistance, and the rationales and results there have been far more equivocal. In *Cathode Ray*, the district court saw no evidence one way or another of the Korean tribunal's views on receptivity.[568] Swayed, perhaps, by its own conclusion that non-discoverability and thus circumvention was "self-evident,"[569] it inferred the tribunal would *not* be receptive and held the *Intel* factor to be negative,[570] ultimately denying discovery.[571] Meanwhile, the *Apple*, *Qualcomm-Germany*, and *Potash* courts drew no negative inference from the lack of information about the foreign

that United States law would allow discovery in domestic litigation analogues to the foreign proceeding"), *with id.* at 264–65 (stating "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so").

566. *See* discussion *supra* at notes 534–41.

567. *In re* Pro-Sys Consultants, No. 16-mc-80118, 2016 WL 3124609, at *3 (N.D. Cal. June 3, 2016).

568. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944, 2012 WL 6878989, at *2 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

569. *Id.* at *3 (quoted *supra* note 335).

570. *See id.* at *2.

571. *Id.* at *4.

court's receptiveness.[572] These results contradict *Cathode Ray*, which placed the burden on the applicant to affirmatively prove the tribunal's attitude, inferring a negative result if proof was not offered.[573] Indeed, these later courts drew a *positive* inference from silence, pointing to a growing trend in the precedent:

> Courts have denied requests for discovery where the foreign tribunal or government expressly says it does not want the U.S. federal court's assistance under § 1782. . . . However, absent "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782, courts tend to err on the side of permitting discovery." *In re Varian Med. Sys. Int'l AG*, 2016 WL 1161568 at *4 [(N.D. Cal. Mar. 24, 2016)] (internal quotations and citation omitted) (concluding that this factor weighed in favor of discovery because there was "no evidence or case law suggesting that the Mannheim District Court would be unreceptive to the discovery Varian seeks."); *see also, e.g., In re Eurasian Natural Resources Corp., Ltd*., No. 18-mc-80041-LB, 2018 WL 1557167, at *3 (N.D. Cal., Mar. 30, 2018) (concluding that the second *Intel* factor weighed in favor of discovery because there was "no information that a U.K. court would reject information obtained through Section 1782 discovery."); *In re Google, Inc.*, No. 14-mc-80333-DMR, 2014 WL 7146994, at *3 (N.D. Cal., Dec. 15, 2014) (concluding that the second *Intel* factor favored discovery where the applicant stated that the Düsseldorf Regional Court in Germany could be expected to be receptive to the information sought in connection with a pending patent infringement matter); *Cryolife, Inc.* [*v. Tenaxis Med., Inc.*, No. C08-05124-HRL], 2009 WL 88348 at *3 [(N.D. Cal. Jan. 13, 2009)] (concluding that the second *Intel* factor weighed in favor of discovery where there was "no basis to conclude that the German court would be unreceptive to the information requested by [the applicant]."). [574]

572. *See In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104-VKD, 2018 WL 3845882, at *3 (N.D. Cal. Aug. 13, 2018); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606, at *4 (S.D. Cal. Oct. 7, 2015); *In re* N. Am. Potash, Inc., No. 12-20637-CV, 2012 WL 12877816, at *6 (S.D. Fla. Nov. 19, 2012).

573. *See Cathode Ray Tube (CRT)*, 2012 WL 6878989, at *2 ("The Korean court has not made any statement or other indication on the merits as to whether it would or would not welcome such discovery. And there is no indication that the Korean court has been advised of the volume of the discovery being asked for . . . . In the Ninth Circuit, courts have generally placed the burden on the requesting party, here Sharp, to provide facts showing that the foreign court would welcome the proposed discovery.").

574. *Qualcomm-Germany*, 2018 WL 3845882, at *3.

Concluding the foreign tribunal opposes discovery is often the dispositive factor in the *Intel* analysis, as one court emphasized in observing the applicant in an antitrust case could "cite[] no previous case where a court disregarded the stated position of the tribunal that it did not want the discovery sought."[575] The placement of the burden is thus of key importance—and yet the § 1782 cases are vague or contradictory as to where the burden lies, what quantum of proof is required, and the effect of a lack of evidence adduced by whomever bears the burden.[576]

But the problems with § 1782 run deeper than what conclusions to draw from the absence of evidence. In *Apple*, the judge faced an ex parte request from Apple with no input from the target, Qualcomm, and accordingly ordered notice served to permit Qualcomm to respond.[577] With pleasing symmetry, the court in the companion case *Qualcomm-Germany* confronted a request from Qualcomm with no input from Apple.[578] Acknowledging that the ex parte process left it ill-informed, the court emphasized Apple's prerogative to challenge any provision of the subpoena it was issuing, which would then be held in abeyance.[579] Yet, for all this solicitude to absent parties, neither court questioned the absence of perhaps the most important party in interest to the proceedings: the foreign tribunal for which the information was sought.[580] And in *Potash*, the court was not merely indifferent to the absence of the foreign court; it affirmatively rejected the opportunity to get its opinion.[581] In doing so, it cited several other courts—including the Second Circuit—that it believed foreclosed a deferential approach.[582] But the court's refusal only underscores a serious flaw in the

575. *In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1041 (N.D. Cal. 2016).

576. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2013 WL 183944, at *3 (N.D. Cal. Jan. 17, 2013) ("Sharp cites a series of cases that it claims '[make] clear that the burden is on the party *opposing* the § 1782 discovery to demonstrate a lack of receptivity in the foreign court.' That claim is not so clear. None of the cases Sharp cites are binding on this Court. Further, none of these cases precisely states which party bears the burden on receptivity.") (citations omitted); *Potash*, 2012 WL 12877816, at *6 ("*Intel* did not resolve or clarify which party must 'demonstrate receptivity or . . . non-receptivity of a foreign tribunal.'") (quoting *In re* Mesa Power Grp., 878 F. Supp. 2d 1296, 1304 (S.D. Fla. 2012)).

577. *See Apple Inc.*, 2015 WL 5838606, at *1.

578. *Qualcomm-Germany*, 2018 WL 3845882, at *4.

579. *See id.* at *7 (quoted *supra* note 401).

580. *See id.* at *3; *Apple Inc.*, 2015 WL 5838606, at *4.

581. *Potash*, 2012 WL 12877816, at *6.

582. *Id.* (citing Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24 (2d Cir. 1998);

procedures implementing § 1782 not required by its text: the current practice of ex parte applications for § 1782 orders, excluding not just the target of the subpoena but the foreign tribunal, would seem to undermine the international reciprocity that Congress ostensibly sought to advance.[583] A tribunal unaware of proffered aid, after all, can hardly appreciate or emulate it.[584]

It is with good reason ex parte proceedings are "strongly disfavored" in U.S. jurisprudence.[585] "[S]ituations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party," the Ninth Circuit has explained.[586] "Absent such compelling justification, ex parte proceedings are anathema in our system of justice."[587] In antitrust cases spanning many years and straddling national borders, there is surely no need for breakneck speed in discovery proceedings—or at least, there ought not be.[588] Nor could there be any rationale for concealing a § 1782 request from the foreign tribunal it is presumably intended to assist. No "compelling justification"—or any logical

In re Gushlak, No. 11-MC-218 (NGG), 2011 WL 3651268, at *5 (E.D.N.Y. Aug. 17, 2011)).

583. *See generally* Amram, *supra* note 154; Smit, *supra* note 163.

584. *See* Goldsmith, *supra* note 1, at 823–24.

585. *In re* Sch. Asbestos Litig., 977 F.2d 764, 789 (3d Cir. 1992) ("For obvious reasons of adversarial fairness, ex parte communications between judge and litigant are strongly disfavored. They are tolerated of necessity . . . ."); *see* Carroll v. Pres. & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) ("The value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."); United States v. Thompson, 827 F.2d 1254, 1258–29 (9th Cir. 1987); State v. Byrd, 967 A.2d 285, 306 (N.J. 2009) ("Proceedings in which the judge acts as the sole inquisitor are, with rare exception, foreign to our adversarial system.").

586. *Thompson*, 827 F.2d at 1258.

587. *Id.* at 1258–59.

588. *But see In re* N. Am. Potash, Inc., No. 12-20637-CV, 2012 WL 12877816, at *6 (S.D. Fla. Nov. 19, 2012) (citing the proposition that "requiring Petitioner to wait for the outcome of discovery proceedings in the foreign tribunal would be tantamount to forcing the exhaustion of discovery prior to filing a § 1782 application" as support for pretermitting foreign input).

justification at all—is apparent for either passively[589] or purposely[590] leaving the foreign tribunal without a voice.

Applications in the FRCP 24(b) posture are typically not ex parte in a formal sense: both sides in the domestic action have weighed in, and their input on the burden to domestic parties has usually proven dispositive in whether to grant the motion.[591] But once again, the foreign tribunal whose case undergirds the motion is absent. In its place, the district court is usually to be found speculating about what attitude the missing foreign court might have toward the evidence sought by virtue of the intervention.[592] To be sure, the foreign tribunal is not a party to a motion for intervention, but, equally certain, a court considering the implications abroad of allowing discovery would benefit greatly from the foreign tribunal's input. What benefit is there to speculation when an answer from the horse's mouth is only a phone call or letter away? The *Linerboard* series of cases demonstrate that foreign tribunals are more than willing to provide their views on U.S. discovery affecting their proceedings when they are aware of the issue; the EC noted in one filing it "feels so strongly about this issue that it has filed briefs amicus curiae in two other cases in which similar issues have arisen."[593] But no court, foreign or domestic, can be expected to reliably intuit out of the ether that its intervention is needed without someone bringing the question to its attention.[594]

589. *E.g.*, *In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104-VKD, 2018 WL 3845882, at *4 (N.D. Cal. Aug. 13, 2018); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606, at *1 (S.D. Cal. Oct. 7, 2015); *In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944-SC, 2012 WL 6878989, at *2 (N.D. Cal. Oct. 22, 2012), *adopted*, No.C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

590. *E.g.*, *Potash*, 2012 WL 12877816, at *6.

591. *See* text accompanying *supra* notes 480–85.

592. *See, e.g.*, *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 324–25 (D. Conn. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485, at *5–6 (D. Me. Mar. 6, 2009); *In re* Hydrogen Peroxide Antitrust Litig., MDL No. 1682, 2006 U.S. Dist. LEXIS 101198, at ¶¶ (k)–(l) (E.D. Pa. July 31, 2006); *In re* Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 341–42 (E.D. Pa. 2004).

593. *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1082 (N.D. Cal. 2007); *accord In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010) ("In recent years, the Commission has filed briefs in several district courts seeking to vindicate that interest.").

594. *See* Transcript of Oral Argument, *supra* note 266, at 24 (quoted *supra* note 267); Brief of Amicus Curiae the Commission of the European Communities Supporting

2. *The Fallacies of Inferring Acquiescence or Reading Foreign Tea Leaves*

It is thus unsurprising the procedures of § 1782 and FRCP 24(b) have yielded numerous cases where the foreign tribunal has not provided any views, one way or the other, in matters of competition law. And if it is reassuring to see how deferential U.S. district courts are when foreign opposition is known, it is disquieting to survey the prevailing approach when the foreign tribunal has said nothing at all in the case at bar. The modern trend of presuming a warm welcome aboard, and thus pretermitting the possibility of discoverability, receptivity, or circumvention concerns, gives short shrift to the promise of respect for foreign prerogatives.[595]

Potash explained that only "authoritative proof" should be taken as evidence of discoverability, receptivity, or the lack of circumvention,[596] and authoritativeness accrues "*only* where the representative of a foreign sovereign has expressly and clearly made its position known."[597] This follows from the Supreme Court's mandate that U.S. courts not speculate about foreign jurisprudence and attitudes: that, after all, is precisely what the Court refused to do as it was "fraught with danger" in rejecting a strict discoverability rule in *Intel*.[598] And yet the Court then went on to prescribe that the circumstances of the foreign proceeding, the receptivity of the foreign tribunal, and the potential for circumvention of foreign procedures must all be taken into account in determining whether to exercise the discretion § 1782 grants.[599] How can these two commands be reconciled?

The *Cathode Ray* court threaded the needle by assuming a lack of receptivity and finding the potential for circumvention, absent clear

Reversal, *supra* note 264, at 12–15.

595. *See supra* notes 574–76 and accompanying text.

596. *In re* N. Am. Potash, Inc., No. 12-20637-CV, 2012 WL 12877816, at *6 (S.D. Fla. Nov. 19, 2012) (quoting *In re* Gemeinshcasftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *6 (S.D.N.Y. Dec. 29, 2006)).

597. *Id.* (citing Schmitz v. Bernstein, Liebhard, & Lifshitz, LLP, 376 F.3d 79, 84–85 (2d Cir. 2004)).

598. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 (2004); *see also* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 552–54 (1987) (Blackmun, J., concurring in part and dissenting in part) ("As this Court recently stated, it has 'little competence in determining precisely when foreign nations will be offended by particular acts.'" (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983))).

599. *See Intel*, 542 U.S. at 264–65.

evidence put forth by the foreign tribunal itself.[600] And the majority of the § 1782 antitrust cases went the opposite way: in declining to parse foreign law and practice, they inclined to assume the foreign tribunal was willing and desirous of the discovery.[601] In either case, multiple *Intel* factors become a nullity—either assumed negative or positive without proof—when the foreign tribunal's voice was silent, disregarding the court's second command.

The courts entertaining motions for intervention under FRCP 24(b) opted to violate the first imperative. Instead, they attempted to read the tea leaves of Canadian jurisprudence when guidance from the actual tribunal at issue was lacking.[602] (One § 1782 case following the same route must be added.[603]) Based on their interpretation of precedent abroad, the district courts came to the conclusion that their Canadian counterparts would welcome the evidence at issue—finding the question of comity thereby satisfied and permitting the discovery to be taken.[604] But the fact that one 24(b) case found just the opposite of Canadian courts aptly exposes the fallacy of this approach.[605] Only in one case was there *actually* proof that the foreign tribunal would welcome any discovery thought appropriate by the U.S. court, for there the Canadian court had already held the discovery proper under Canadian law but deferred to a U.S. finding to allow U.S. parties' interests in confidentiality to be accommodated.[606] After considering those interests, the U.S. court duly denied discovery to protect domestic

600. *See In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944 SC, 2012 WL 6878989, at *2 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

601. *See, e.g.*, *In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104-VKD, 2018 WL 3845882, at *4 (N.D. Cal. Aug. 13, 2018); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606 (S.D. Cal. Oct. 7, 2015); *Potash*, 2012 WL 12877816, at *6; *see also*, *e.g.*, *Qualcomm-Germany*, 2018 WL 3845882, at *3 (collecting cases inferring acquiescence, quoted *supra* note 574).

602. *See supra* Section IV.C.

603. *Potash*, 2012 WL 12877816, at *7–8.

604. *See In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2011 WL 5193479, at *6 (N.D. Cal. Nov. 1, 2011); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 324–25 (D. Conn. 2009); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485, at *5–6 (D. Me. Mar. 6, 2009); *In re* Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 341–42 (E.D. Pa. 2004).

605. *See generally In re* Hydrogen Peroxide Antitrust Litig., MDL No. 1682, 2006 U.S. Dist. LEXIS 101198 (E.D. Pa. July 31, 2006).

606. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 2011 WL 5193479, at *1.

concerns despite avowed foreign receptivity.[607] These results turn comity on its head: U.S. courts grant discovery on the strength of their own analyses of Canadian law without any guidance from the Canadian courts themselves, but deny it to a welcoming foreign court because of domestic concerns.

What, then, is the answer to the question of how to reconcile, on the one hand, a command against U.S. courts assaying foreign law with, on the other, *Intel* factors and FRCP 24(b) comity analysis inquiring into just that? Only one can square the circle: no subpoena should issue under § 1782 nor intervention be granted under FRCP 24(b) without obtaining or at least soliciting a statement one way or another as to the views of the tribunal overseeing the proceeding at issue—the authoritative proof of *Potash*.[608] The tribunal may decline to make its opinion known—to insist otherwise would only exacerbate the impingement on its prerogatives—but it must be given every fair chance to weigh in. At the very least, that chance must involve notice of any application under § 1782 or motion under FRCP 24(b) and ample time to formulate and file a response. Courts facing ex parte applications under § 1782 have ordered that notice be served on the parties affected to afford them an opportunity to answer; there is no logistical barrier to giving the same opportunity of notice and response to the tribunal whose proceedings are the very basis for § 1782 jurisdiction or FRCP 24(b) intervention in the first place.[609] Such notice to the foreign tribunal seems the minimum that comity recommends.

Courts and commentators alike have suggested that the burden on U.S. courts of determining a foreign jurisdiction's position on discoverability, receptivity, and circumvention is prohibitive.[610] Moreover, they suggest,

607. *See id.* at *6.

608. *Potash*, 2012 WL 12877816, at *6 (quoting *In re* Gemeinshcasftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *6 (S.D.N.Y. Dec. 29, 2006)).

609. *See In re* Apple Inc., No. 15cv1780, 2015 WL 5838606, at *1 (S.D. Cal. Oct. 7, 2015).

610. *See, e.g.*, *Intel*, 542 U.S. at 263; *Potash*, 2012 WL 12877816, at *6; Smit, *supra* note 179, at 235 ("[T]he drafters realized that making the extension of American assistance dependent on foreign law would open a veritable Pandora's box. They definitely did not want to have a request for cooperation turn into an unduly expensive and time-consuming fight about foreign law. That would be quite contrary to what was sought to be achieved. They also realized that, although civil law countries do not have discovery rules similar to those of common law countries, they often do have quite different procedures for discovering information that could not properly be evaluated without a rather broad understanding of the subtleties of the applicable foreign system. It would, they judged, be wholly inappropriate for an American district court to try to

these issues are better addressed abroad, as the foreign tribunal is free to reject evidence it does not want or thinks inappropriate.[611] But these arguments fail to convince for three main reasons. First, U.S. courts can hardly complain about burdens if they do not bother to ask the foreign tribunal its opinion:[612] that, at least, is no great burden.[613] Yet, U.S. courts have shown little interest in these kinds of inquiries, inclining instead to a presumption of foreign acquiescence.[614] Second, it is rather rich for U.S. courts to disclaim the burden of deciding foreign discoverability, receptivity, and circumvention when doing so shunts that burden back to the foreign tribunal, which did not ask that this unneeded onus be assigned it by U.S. courts.[615] Bluntly, if U.S. courts make a mess, they should clean it up[616]—or, better still, not make the mess.[617] Third, and most importantly, in many cases

obtain this understanding for the purpose of honoring a simple request for assistance.").

611. *See, e.g.*, *Intel*, 542 U.S. at 262 ("Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate."); *Potash*, 2012 WL 12877816, at *7; Smit, *supra* note 179, at 235–36 ("Since foreign courts could always rule upon the propriety of reliance on evidence obtained through the cooperation extended by American courts when it was presented to them, the drafters of § 1782 regarded it as both unnecessary and undesirable to let the propriety of discovery with the aid of an American court depend on discoverability and admissibility under foreign law.").

612. *See*, *e.g.*, *Potash*, 2012 WL 12877816, at *6 (rejecting request to quash pending resolution of a request with the Canadian tribunal to make its views known and instead deciding the court would be receptive itself after examining Canadian law).

613. *See, e.g.*, *Apple Inc.*, 2015 WL 5838606, at *1 (ordering notice be served after receiving an ex parte application).

614. *E.g.*, *In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104-VKD, 2018 WL 3845882, at *6 (N.D. Cal. Aug. 13, 2018); *Apple Inc.*, 2015 WL 5838606, at *4; *see also* cases cited *supra* note 481 (collecting cases relying on their own analyses of Canadian precedent to conclude discovery would be welcome). *But see In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2013 WL 183944, at *3 (N.D. Cal. Jan. 17, 2013) (quoted *supra* note 577).

615. *E.g.*, *Potash*, 2012 WL 12877816, at *7–8. *But see also In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2011 WL 5193479, at *1 (N.D. Cal. Nov. 1, 2011) (denying discovery where a Canadian court referred the question to the U.S. court to decide).

616. *Cf.* Lawson v. Trowbridge, 153 F.3d 368, 377 (7th Cir. 1998) ("He could have asked his mother for the money, or his brothers William and Steve, or his sisters Shawn and Kelly, or his step-father. What about all of these people, the government asked him. Lawson responded that he was uncomfortable asking others to bail him out (literally)—in his words, 'if you make a mess you clean it up.'").

617. *See* Patel, *supra* note 8, at 322; *Cf.* Bates v. Jones, 131 F.3d 843, 856 (9th Cir. 1997) ("Moreover, as a practical matter, disagreement between a federal district court (or this court) and the California Supreme Court would make a mess of California

the very act of disclosure makes the mischief: by compromising the confidentiality on which many FCAs depend for their law enforcement duties,[618] or by evading protections imposed under foreign discovery rules.[619]

True, more mischief may be meliorated if inadmissible materials are disallowed abroad after U.S. courts shirk the responsibility,[620] but that result only makes meaningless the immediate injuries flowing from a disclosure ordered for no countervailing benefit at all.[621] And any discovery subsequently rendered useless abroad necessarily involves financial costs—often substantial—for the party complying.[622] As the Supreme Court pronounced: "When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign discoverability rule would be senseless."[623] True enough, but what if it would *not* readily do so? Then, presumably, *non-application* of a discoverability condition would be equally senseless, for all the good reasons Justice Breyer explained.[624] What is sauce for the goose, as has been said, is sauce for the gander.[625] Without knowing for certain which is which—and that means asking tribunals whether or not they want the discovery to proceed—neither rule seems workable a priori.

Foundationally, the readiness, if not eagerness, to infer foreign tribunals will welcome U.S. intervention is distressingly presumptuous. As noted above, it appears to stem from incredulity that anyone could disagree with the benefits of the U.S. system.[626] Tellingly, Smit admitted, "[P]erhaps most importantly, [§ 1782's drafters] realized that, although foreign law might not have discovery rules similar to the United States, foreign procedural systems would generally quite readily accept and welcome the

elections. This is why *Rooker-Feldman* instructs that a federal district court lacks jurisdiction to start down this path.").

618. *See, e.g.*, *supra* notes 503–10 and accompanying text.

619. *See, e.g.*, *Potash*, 2012 WL 12877816, at *6–8.

620. *See id.*

621. *See id.* at *8 ("In other words, the foreign court can easily protect itself from the effects of any discovery order by a district court that inadvertently offends its practice.").

622. *See* Patel, *supra* note 8, at 322.

623. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 262 (2004).

624. *See id.* at 268–69 (Breyer, J., dissenting) (quoted *supra* notes 544–46); *see also* Patel, *supra* note 8, at 321–22.

625. *See supra* note 391.

626. *See, e.g.*, *Intel*, 542 U.S. at 261–62, 265 (2004); *In re* Bayer AG, 146 F.3d 188, 194–95 (3d Cir. 1998) (quoted *supra* note 201); Smit, *supra* note 179, at 235.

assistance American courts might grant."[627] This "realization"—or more properly described, an optimistic prediction—has undergirded the rationale of courts willing to disregard discoverability as a concern, up to and including *Intel* itself.[628] And it presumably has also influenced courts who have blithely assumed the foreign tribunal would be receptive to assistance with little inquiry, holding that *Intel* factor to favor discovery without querying what the foreign tribunal in question actually thinks.[629] Yet the consistency with which FCAs—most notably, the EC—have announced U.S. interference is not welcome in § 1782 applications and other discovery cases suggests that Smit's optimistic prediction and the presumption of receptivity in proceedings implicating FCAs are deeply mistaken.[630] As for traditional courts in antitrust matters, the jury is still out.

C. *Discouraging Cooperation Amongst Antitrust Authorities*

To recur then whither this Article began, there remains a distinct odor of "legal imperialism" in the mission, structure, and interpretation of § 1782.[631] The emphatically unilateral nature of the United States' obliging offer and the hope-*cum*-expectation that other nations will fall into line reperforms the timeworn trope of the United States seeking to steamroll

627. Smit, *supra* note 179, at 235.

628. *E.g.*, *Intel*, 542 U.S. at 261–62 (citing Smit and *Bayer*); *Bayer*, 146 F.3d at 194–95.

629. *See, e.g.*, *In re* Qualcomm Inc. (*Qualcomm-Germany*), No. 18-mc-80104, 2018 WL 3845882, at *6 (N.D. Cal. Aug. 13, 2018); *In re* Apple Inc., No. 15cv1780, 2015 WL 5838606, at *4 (S.D. Cal. Oct. 7, 2015).

630. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016); *In re* Intel Corp. Microprocessor Antitrust Litig. (*Microprocessor*), No. 05-1717-JJF, 2008 WL 4861544, at *2–3 (D. Del. Nov. 7, 2008); *In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), *abrogated in part by In re* del Valle Ruiz, 939 F.2d 520 (2d Cir. 2019); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250, at *3, n.5 (N.D. Cal. Mar. 29, 2006); Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 4; *see also In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2014 WL 1247770, at *1 (N.D. Cal. Mar. 26, 2014); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M:07-cv-01827-si, 2011 WL 13147214, at *6 (N.D. Cal. Apr. 26, 2011); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *6 (E.D.N.Y. Aug. 27, 2010); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081 n.2 (N.D. Cal. 2007); *In re* Vitamin Antitrust Litig., MDL No. 1285, 2002 WL 35021999, at *33–34 (D.D.C. Jan. 22, 2002).

631. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (quoted *supra* note 78).

over foreign practices in antitrust matters.[632] Underlying the idea that § 1782 will spur emulation, imitation, or reciprocity is the assumption that the U.S. system of liberal discovery is so far superior to different rules in place elsewhere that its manifest benefits will teach foreigners the error of their ways and encourage adoption of more enlightened U.S. thinking.[633] Introducing the new law to the legal community, Amram sermonized:

> The philosophy behind these sections is the point to be stressed. Wide judicial assistance is granted on a wholly unilateral basis. No reciprocity is required. As the House and Senate Reports state:
>
> > Enactment of the proposed bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.
> >
> > *It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.*
>
> This is an enlightened and far-reaching policy.[634]

So, too, Smit extolled U.S. innovation in discovery as a veritable light unto the nations:

> The adoption of the Act marks the completion of the program of domestic reform of procedures of international cooperation in litigation initiated by the Commission and the Project. . . . However, there is no doubt that liberalization of foreign procedures along the lines indicated by American reforms would render international cooperation even more flexible and efficient, and inspiration of imitative tendencies on the part of foreign governments is an important goal of the reform program developed by the Commission and the Project. Achievement

632. *See supra* Part II.B.

633. *See* Smit, *supra* note 179, at 235 ("Thus, the United States would communicate to the world at large what it regarded as the proper example to emulate in extending international cooperation and, in the process, promote better understanding and acceptance of American discovery practices."); Smit, *supra* note 163, at 1034; Amram, *supra* note 154, at 28.

634. Amram, *supra* note 154, at 28 (emphasis by Amram).

> of this goal would serve not only the increasingly pressing interests of litigants all over the world—it could also make a significant contribution towards the establishment of an atmosphere of understanding and cooperation that promotes peaceful intercourse among nations generally.[635]

A navel-gazing conception of comity and cooperation is not helpful to either ideal, for it supposes that both arrangements will—or at least should—involve foreign actors adopting U.S. norms rather than vice versa.[636] Such a regime is one of conformity rather than comity, co-optation rather than cooperation, conjuring not the comraderie of respectful equals but the subservience of pupils before their tutor.[637] Seldom would such sidekicks be as enthusiastic partners in combatting the very real challenges posed by transnational antitrust law.[638]

Beginning the fraught decade of the 1980s, the *Uranium* court's upbraiding and rebuffing of the foreign government amici[639] instigated a minor diplomatic crisis, leading the U.S. State Department to seek a communique apprising the Seventh Circuit of the damage it had done.[640] In 1983, the Third Circuit was obliged to reverse a district court decision that had excluded and thus ignored the entirety of competition law proceedings abroad by the Japanese Fair Trade Commission "because all were untrustworthy" given the Commission's un-American amalgamation of prosecutorial and decisional apparatus within one agency (not unlike the EC).[641] And the *Aérospatiale* court in 1987 dismissed—in a footnote—

635. Smit, *supra* note 163, at 1046.

636. *See* Smit, supra note 179, at 235; Smit, *supra* note 163, at 1034, 1046; Amram, *supra* note 154, at 28.

637. *Cf., e.g.*, *Emmanuel Macron on Europe's Fragile Place in a Hostile World*, THE ECONOMIST (Nov. 7, 2019), https://www.economist.com/briefing/2019/11/07/emmanuel-macron-on-europes-fragile-place-in-a-hostile-world [https://perma.cc/9L5X-5ZRB] ("Germany is not alone. In other European capitals there is unease at the prospect of French leadership, and a feeling that Mr Macron is all for co-operation, as long as it is on French terms. Such misgivings were exposed by his recent veto over the start of accession talks with North Macedonia and Albania. Fellow Europeans roundly condemned this as exactly the sort of failure of geostrategic thinking that Mr Macron accuses others of.").

638. *See, e.g.*, *Panel Discussion*, *supra* note 84, at 733–34 (comments of Timothy Walker, QC).

639. *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255–56 (7th Cir. 1980) (quoted and discussed *supra* notes 95–96).

640. *See* Griffin, *supra* note 60, at 324, 332 & n.149.

641. *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 271–75 (3rd Cir. 1983),

France's invocation of its blocking statute protecting its sovereign interests because it was offensive to U.S. prerogatives.[642] Curiously, however, that same *Aérospatiale* Court also instructed the positions of foreign sovereigns be given studious respect:

> Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.[643]

Unfortunately, it seems the Court's prescription of comity is proving as inconsistently observed in the new millennium as it was in the 1980s. Zealous petitioners may be forgiven some audacity, as when in 2007, the *Rubber Chemicals* district court facing opposition from the EC had to confront the movant's argument that the EC warranted no comity at all given it was not technically a nation, and the head of DG COMP was merely a "bureaucrat" whose stated views should garner little deference.[644] Petitioners in *Qualcomm-Korea* similarly urged in 2016 that the KFTC's amicus brief be accorded no deference because of its author.[645] Yet the court stated in *Vitamin* it did not believe the briefs of the European and Australian FCAs and announced starkly that "the interests of these foreign governmental authorities are not more important than the interests of the United States in open discovery and enforcement of the antitrust laws."[646] And in *Intel* itself, of course, the Supreme Court gave a decidedly short shrift to the expansive briefing of the EC and its pleas as amicus at oral argument.[647]

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rev'd Matsusuhita Elec. Indus. Co. v. Zenith Radio Corp., 471 U.S. 1000 (1985).

642. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987).

643. *Id.* at 546 (citation omitted).

644. *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081–82 (N.D. Cal. 2007).

645. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1041 (N.D. Cal. 2016).

646. *In re* Vitamin Antitrust Litig., MDL No. 1285, 2002 WL 35021999, at *35 (D.D.C. Jan. 22, 2002) (discussed *supra* at text accompanying notes 514–24).

647. *See supra* notes 261–67 and accompanying text.

Happily, with some such exceptions aside, courts have indeed respected the objections of FCAs—when they have registered their opinions.[648] But *Aérospatiale*'s robust exhortation for deference and comity is made meaningless when the foreign tribunal is denied any voice at all, as is too often the case.[649] The four-Justice *Aérospatiale* minority of 1987 was less sanguine than the majority, and its views have proven more prescient in the foreign discovery context:

> [C]ourts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own. Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood. As this Court recently stated, it has "little competence in determining precisely when foreign nations will be offended by particular acts." A pro-forum bias is likely to creep into the supposedly neutral balancing process and courts not surprisingly often will turn to the more familiar procedures established by their local rules. In addition, it simply is not reasonable to expect the Federal Government or the foreign state in which the discovery will take place to participate in every individual case in order to articulate the broader international and foreign interests that are relevant to the decision whether to use the [Hague] Convention. Indeed, the opportunities for such participation are limited. Exacerbating these shortcomings is the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions.[650]

A court or country seeking cooperation rather than co-optation is not well served by reposing this "delicate task of adjudication"[651] solely in district judges who have "little competence in determining precisely when foreign nations will be offended by particular acts," operating in splendid solitude.[652]

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648. *See In re Qualcomm Inc.* (*Qualcomm-Korea*), 162 F. Supp. 3d at 1040–41; *In re* Intel Corp. Microprocessor Antitrust Litig. (*Microprocessor*), No. 05-1717-JJF, 2008 WL 4861544, at *2–3 (D. Del. Nov. 7, 2008); *In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), *abrogated in part by In re* del Valle Ruiz, 939 F.2d 520 (2d Cir. 2019); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250, at *3, n.5 (N.D. Cal. Mar. 29, 2006).

649. *See supra* Part V.B.

650. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 552–54 (1987) (Blackmun, J., concurring in part and dissenting in part) (citations omitted).

651. *Id.* at 546 (majority).

652. *Id.* at 553–54 (Blackmun, J., concurring in part and dissenting in part) (quoting

Nor is the U.S. Executive Branch, ordinarily entrusted with judgments of diplomacy, well situated to interpose itself in every private antitrust matter.[653] Foreign nations and their institutions are, quite naturally, the most obvious parties to opine on whether their interests will be offended by the discovery at hand and seem willing to say so if given the opportunity.[654] If true cooperation in antitrust matters is to be fostered, U.S. institutions must maintain open channels with their counterparts—and that means, at a bare minimum, opening a line of communication in the first place.[655] As Justice Harry Blackmun wrote, and the EC reaffirmed two decades later in *Intel*, the reality is that foreign governments cannot monitor all private litigation for potential impingements on their sovereign competitive interests.[656] The succession of post-*Intel* cases needlessly lading that burden on foreign governments reifies the Commission's fears and damages the prospects of international cooperation in antitrust matters.

VI. A NEW, YET OLD, FRAMEWORK FOR INTERNATIONAL COMITY IN ANTITRUST DISCOVERY

One hopes all agree that if comity means anything, it is that the proceedings of foreign tribunals should not be burdened with undesired and extralegal discovery because litigants or other interlopers dissatisfied with foreign law hasten to U.S. courts. This principle is most clearly applicable to DG COMP proceedings before the EC, which has maintained that it does not want discovery that represents an abuse of its carefully balanced procedures, and that it should not be considered a tribunal at all given its *sui*

Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)); *see* Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 360 (8th Cir. 2007) ("We also note, the Congress and the President possess greater experience with, knowledge of, and expertise in international trade and economics than does the Judiciary.").

653. *See Aérospatiale*, 482 U.S. at 553–54 (Blackmun, J., concurring in part and dissenting in part); *Panel Discussion*, *supra* note 84, at 738 (comments of Paul Egerton-Vernon) ("So we are left with the dilemma that (a) the executive branch by all rights should be the entity that makes the determination of whether a private suit should be dismissed for foreign policy reasons, but (b) the Executive would be a very reluctant dragon in playing this role.").

654. *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081–82, n.2 (N.D. Cal. 2007).

655. *Cf. generally* Goldsmith, *supra* note 1 (quoted in the epigram).

656. *Aérospatiale*, 482 U.S. at 554; Transcript of Oral Argument, *supra* note 266, at 24 (quoted *supra* note 266); Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 12–15.

generis structure.[657] The vague text of § 1782 itself does not demand that view be ignored—a position only Justices Antonin Scalia and Clarence Thomas adopted.[658] Even if district courts actively solicited and respected the opinion of the EC in every case, why should it be forced into the bare formalism of reiterating the uniform stance it has maintained throughout litigation under § 1782 and other discovery requests?[659] Yet that is just what the Commission has had to do under *Intel*.[660] It would respect comity far better to take the Commission (and any other FCA disavowing tribunal status) at its word. *Intel*'s paternalistic concern that the Commission might inadvertently deny itself a fruitful future avenue of investigation is misplaced.[661] The EC is a mature institution that can balance and articulate its own interests[662]—and

657. Transcript of Oral Argument, *supra* note 266, at 24 (quoted *supra* note 266); Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 12–15. As the preceding Article has narrated, the EC and other FCAs have weighed in in numerous other cases as well. *See supra In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016); *In re* Intel Corp. Microprocessor Antitrust Litig. (*Microprocessor*), No. 05-1717-JJF, 2008 WL 4861544, at *2–3 (D. Del. Nov. 7, 2008); *In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), *abrogated in part by In re* del Valle Ruiz, 939 F.2d 520 (2d Cir. 2019); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250, at *3, n.5 (N.D. Cal. Mar. 29, 2006); Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 4; *see also In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 2014 WL 1247770, at *1 (N.D. Cal. Mar. 26, 2014); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. M:07-cv-01827-si, 2011 WL 13147214, at *6 (N.D. Cal. Apr. 26, 2011); *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *6 (E.D.N.Y. Aug. 27, 2010); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081 n.2 (N.D. Cal. 2007); *In re* Vitamin Antitrust Litig., MDL No. 1285, 2002 WL 35021999, at *33–34 (D.D.C. Jan. 22, 2002).

658. *Compare* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment) *with id.* at 265 (majority), *and id.* at 268–70 (Breyer, J., dissenting).

659. *See id*. at 268–70 (Breyer, J., dissenting) (discussed *supra* Part V.A). The Supreme Court has held squarely that foreign sovereigns may be held to court rules of discovery, even if onerous, when it enters the court as a plaintiff. *See* Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126, 134, n.2 (1938); *see also Foreign Nondisclosure Laws*, *supra* note 116, at 612 n.1. But to insist a sovereign's FCA bestir itself to defend what should be a foregone conclusion in a case brought by private litigants solely to satisfy U.S. protocol is a horse of a very different color.

660. *See, e.g.*, *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 (JG)(JO), 2010 WL 3420517 (E.D.N.Y. Aug. 27, 2010); *In re* Rubber Chems. Antitrust Litig., 486 F. Supp. 2d 1078, 1081–82, n.2 (N.D. Cal. 2007).

661. *See Intel*, 542 U.S. at 265.

662. *See, e.g.*, Transcript of Oral Argument, *supra* note 266, at 24, (quoted *supra* note

can hope those interests are respected by a court faithful to *Aérospatiale*'s prescription of comity.[663]

As for more traditional foreign courts considering antitrust matters, the discussion earlier concluded the only way to square the circle of competing demands under § 1782 and FRCP 24(b) comity analyses is to obtain the foreign court's position.[664] If the result evinces a lack of receptivity, then denial of discovery should follow apace in all but the most extraordinary of cases.[665] And if the court declines to answer a request for its disposition, as is surely its right, then the U.S. court may presume it is uninterested if not unreceptive and treat the non-response as a refusal of the evidence.[666] Contrarily, if the court welcomes the discovery, then the district court may proceed to consider the other factors that might counsel against assisting courts abroad, such as burdensomeness, reliance, or confidentiality interests.[667] In this latter analysis, it is fair and proper to expect U.S. courts take the liberalized approach the drafters of § 1782 wished (and Congress presumptively endorsed),[668] for with the blessing of the foreign court bestowed, the legislative purpose to grant all reasonable assistance to international proceedings can be given its intended beneficent effect.[669]

266); Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *supra* note 264, at 12–15. And, of course, the EC might one day reconsider the manner in which it proceeds in competition cases that reverse its position on tribunal status, a prerogative it surely retains, as well.

663. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 546 (1987) (quoted *supra* note 643).

664. *See supra* Part V.B.2.

665. *See In re* Qualcomm Inc. (*Qualcomm-Korea*), 162 F. Supp. 3d 1029, 1040–41 (N.D. Cal. 2016) (finding no contrary § 1782 case); *In re* Intel Corp. Microprocessor Antitrust Litig. (*Microprocessor*), No. 05-1717-JJF, 2008 WL 4861544, at *2–3 (D. Del. Nov. 7, 2008); *In re* Microsoft Corp. (*Microsoft-New York*), 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006), *abrogated in part by In re* del Valle Ruiz, 939 F.2d 520 (2d Cir. 2019); *In re* Microsoft Corp. (*Microsoft-California*), No. C-06-80038, 2006 WL 825250, at *3, n.5 (N.D. Cal. Mar. 29, 2006).

666. *See* Patel, *supra* note 8, at 321; *cf., e.g.*, *In re* Cathode Ray Tube (CRT) Antitrust Litig., Nos. 07-5944-SC, 2012 WL 6878989, at *2–3 (N.D. Cal. Oct. 22, 2012), *adopted*, No. C-07-5944-SC, 2013 WL 183944 (N.D. Cal. Jan. 17, 2013).

667. *See, e.g.*, *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 CW, 2011 WL 5193479, at *6 (N.D. Cal. Nov. 1, 2011); *see supra* notes 447, 482–85 and accompanying text (analyzing confidentiality analyses in the 24(b) cases).

668. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256–59 (2004) (citing repeatedly Smit's writings regarding liberality of construction in determining Congress's intent).

669. *See* Smit, *supra* note 179, at 231–40, n.91 (quoted *supra* note 182). *But see*

These parallel prescriptions suggest a solution to the muddle that § 1782 and parallel discovery attempts have made in antitrust cases. Prior to the 1964 amendments, domestic discovery required the foreign tribunal to issue the request and did not entertain wholly ex parte applications from any so-called interested party.[670] There is no better way to ensure foreign tribunals approve of the discovery sought than to demand ex ante that any application or motion has their blessing. This need not mean the tribunal act *sua sponte* or issue a formal letter rogatory passed through ambassadorial channels or require the countersignature of foreign ministers as in the olden days. Interested parties abroad desirous of discovery in U.S. courts might prepare a letter detailing the discovery for the foreign tribunal's consideration, with no more than a signature required to approve of the request if uncontroversial. (As practitioners are aware, no small number of orders in U.S. courts proceed on a stipulated or "so-ordered" basis.[671]) So doing: (a) ensures the foreign tribunal is fully informed and—if it approves—able to register its approval; (b) apprises the U.S. district court of any qualifications the foreign court may have by means of the application itself; and (c) places the onus on the litigants or other interested parties to draft and secure input upon the desired application—but to secure it from the foreign forum, not before the U.S. interloper. A similar procedural expectation that an FRCP 24(b) motion for discovery intervention annex an order or statement of the foreign tribunal would achieve the same purpose.

This modest protocol would shoot the straits between the Scylla of excessive laxity in § 1782 and other discovery tactics that may threaten international comity and the Charybdis yawning in the notoriously byzantine and time-consuming strictures of discovery under the Hague Convention.[672] Many of the cases involving U.S. discovery abroad and blocking statutes

SRAM, 2011 WL 5193479 (denying discovery for a receptive foreign court under 24(b) based on domestic burden and confidentiality concerns).

670. *See In re* Letter Rogatory from the Just. Ct., Dist. of Montreal, Can., 523 F.2d 562, 564–65 (6th Cir. 1975) (quoted *supra* note 150); Johns & Keaty, *supra* note 8, at 449–50; *see generally supra* Part III.

671. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 376–77 (1994); *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355–57 (11th Cir. 1987) (per curiam); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986); Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1118–23 (3d Cir. 1986).

672. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa, 482 U.S. 522, 542 (1987) ("In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.").

centered on whether recourse to the Hague Convention was required, as various foreign countries urged,[673] with *Aérospatiale* providing the Convention was not mandatory but one tool in a quiver of discovery options commended to the district court's discretion.[674] The Court recognized there that U.S. parties were unlikely to favor the Convention when its strictures remained more time-consuming than domestic procedures.[675] It is clear § 1782 was meant to ensure foreign parties need not employ such complex protocols in U.S. courts,[676] but interpretation of the statute has thrown the baby of foreign comity out with the bathwater of unwanted procedural pomp and circumstance. Rebalancing the scales with the foreign tribunal's input would do much to promote the values § 1782 sought to uphold—not only expediting but standardizing transnational discovery practice.[677]

Moreover, there is a method ready at hand for achieving these improvements. Intel maintained in *Intel* that if the statute did not unambiguously exclude the EC—as all in the majority, as well as Justice Breyer, agreed it did not[678]—then the Court "should exercise [its] supervisory authority to adopt rules barring § 1782(a) discovery here."[679] The authority resembles that which Justice Breyer invoked in proposing a pair of such rules to streamline the processing of denials where FCAs or foreign law stood in opposition.[680] The majority, however, declined to do so, concluding, "Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts."[681] Importantly, the *Intel* Court in 2004 found no evidence of delays and costs imposed by § 1782.[682] Neither, it observed, was the EC, nor presumably anyone else, obliged to incur the burden of intervening in these discovery disputes, nor did there

673. *See, e.g.*, Salt River Project Agric. Improvement & Power Dist. v. Trench Fr. SAS, 303 F. Supp. 3d 1004 (D. Ariz. 2018); Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014); Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548 (S.D.N.Y. 2012); Milliken & Co. v. Bank of China Ltd., 758 F. Supp. 2d 238 (S.D.N.Y. 2010); *In re* Perrier Bottled Water Litig., 138 F.R.D. 348, 355 (D. Conn. 1991).

674. *Aérospatiale*, 482 U.S. at 539–46.

675. *Id.* at 542, n.26.

676. *See generally* Amram, *supra* note 154; Smit, *supra* note 163.

677. *See* Patel, *supra* note 8, at 321–24.

678. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 269–71 (2004) (Breyer, J., dissenting).

679. *Id.* at 265 (majority).

680. *Id.* at 270–72 (Breyer, J., dissenting).

681. *Id.* at 265 (majority).

682. *Id.* at 265 n.17.

seem to be great interest in doing so; the EC had not done so until *Intel* reached the Supreme Court.[683] But as this Article has surveyed, much has changed in the intervening 15 years, and this further experience in antitrust cases calls out for the supervisory rules the Court perhaps prudently opted against promulgating prematurely in 2004. In the interim, district courts are free to adopt similar rules, albeit necessarily on a more piecemeal basis.[684]

Even two years after *Intel*, as judicial uncertainty continued to evolve, one commentator enthusiastically anticipated the greater confidence the standards would provide.[685] Other contemporaries also foresaw some of the problems that have evolved since. Johns & Keaty, for example, laid out a premonition of the potential problems occasioned by U.S. courts ordering discovery in derogation of foreign law.[686] Patel, in particular, has proven prescient in his methodical critique of the Supreme Court's ruling on the invariant discoverability rule for § 1782.[687] His recommended solution in 2006 that private litigants demonstrate receptivity abroad, whilst the foreign tribunal itself may act of its own accord, closely parallel the remedies suggested by the practical results that have transpired since:

> With little effort, the requesting party can seek a foreign court official's permission, via an affidavit or other court authorized document, to seek discovery. . . . In exchange for this small effort, district courts can ensure that they are still advancing § 1782's chief goal of international comity. Demanding the requesting party to prove that the foreign court authorizes the use of the contested discovery is in itself a sign that the district court respects the other nation's discovery rules. Likewise, a foreign court's refusal to grant written permission can be interpreted as a signal that it does not place a high value on the requested evidence. Therefore, rejecting the applicant's § 1782 request in this scenario is also consistent with promoting international comity.[688]
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> . . . .
>
> The similar comity argument is not present in the case where the applicant is a foreign tribunal, because the tribunal is presumably an expert in its discovery rules. In other words, the foreign tribunal is the

683. *Id.*
684. *See* Patel, *supra* note 8, at 318–21
685. *See* Boeing, *supra* note 269, at 403–04.
686. *See* Johns & Keaty, *supra* note 8, at 475.
687. *See* Patel, *supra* note 8, at 318–24.
688. *Id.* at 321.

> best interpreter of its own nation's laws. It is this quality that makes it unnecessary to apply a discoverability rule on a sovereign's request. Imposing such a requirement would foster animosity, because the district court would essentially be second-guessing the tribunal on the interpretation of its own laws. Such a scenario is especially damaging considering that § 1782 was specifically designed to foster relationships with foreign countries in order to encourage them to grant reciprocal discovery assistance to the United States in the future.[689]

VII. CONCLUSION

With much due respect, Professors Amram and Smit and the commission delegated by Congress were mistaken back in 1964 when it comes to the demesne of antitrust, albeit with the best of intentions. They imagined a glorious future of well-accepted U.S. hegemony in discovery procedures. But that brand of hegemony is fundamentally incompatible in the antitrust context with the comity of nations and the prerogatives of the numerous FCAs that exist today, as illustrated by the inglorious history of transnational disputes over competition law enforcement and discovery thereto in particular.[690]

Hegemony would be easier. There is no doubt that is so, and the United States has every right to promulgate a vision of discovery in its own interests. But those interests include the insurance that international corporations that do harm to U.S. consumers within the reach of the Sherman Act cannot evade the reach of U.S. justice by sleight of hand in foreign registration or operation abroad. Nor do the United States' peers abroad have any less incentive to secure their citizens against the abuses of anticompetitive U.S.-based corporations. In our global economy, nation-states must agree on a manner of holding to task those economic interests that attack rather than advance the collective benefit of humanity. Transnational competition law enforcement is the foremost manner in which the league of credible nations accomplishes that goal. The current application of § 1782 and other discovery gambits in the antitrust context impedes that goal, for it makes enemies of the United States' natural friends. To be at odds so regularly with Brussels—not to mention London, Paris, The Hague, Bern, Seoul, Tokyo, Canberra, and elsewhere—should signal a more fundamental problem.

The absence of foreign participants from U.S. proceedings supposedly undertaken to enhance comity can only lead to judicial conjecture and

689. *Id.*

690. *See supra* Part II.B.

international friction. In May 2020, Justice Neil Gorsuch, writing for a unanimous Court, summarized parallel developments in the greatest forum of international comity, sovereign immunity:

> In the mid-20th century, the State Department started to take a more restrictive and nuanced approach to foreign sovereign immunity. Sometimes, too, foreign sovereigns neglected to ask the State Department to weigh in, leaving courts to make immunity decisions on their own. "Not surprisingly" given these developments, "the governing standards" for foreign sovereign immunity determinations over time became "neither clear nor uniformly applied."[691]

Justice Gorsuch then narrated that the resulting diplomatic disarray was addressed by Congress's passage of the watershed Foreign Sovereign Immunities Act, laying down definitive rules and standards for comity in the immunity arena.[692] Similarly definitive standards in evaluating discovery requests in antitrust matters are achievable without even congressional action, and thus a mutually agreeable solution in this vital area of international comity is not so elusive today as it seemed 40 years ago.[693] At the turn of the millennium, the Superior Court of Ontario wrote about discovery in the much-manhandled *Vitapharm*: "As a result of the inexorable forces of globalization and expanding international free trade and open markets, there will be an ever-increasing inter-jurisdictional presence of corporate enterprises. This is seen particularly in respect of U.S. and Canadian business activity, given the extent of cross-border trade."[694] It added: "If both societies are to maximize the benefits of expanding freer trade and open markets, the legal systems of both countries must recognize and facilitate an expeditious, fair and efficient regime for the resolution of litigation that arises from disputes in either one or both countries."[695] U.S. courts considering discovery disputes have agreed: "[W]orld economic interdependence has highlighted the importance of comity, as international

691. Opati v. Republic of Sudan, 140 S. Ct. 1601, 1605 (2020) (citations omitted) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)).

692. *Id.* at 1604–05.

693. *See Panel Discussion*, *supra* note 84, at 734 (comments of Timothy Walker, QC) ("The second part of my brief was to suggest solutions. I don't think there are any solutions—and, in any event, solutions to jurisdictional conflicts are bad for business.").

694. Vitapharm Can. Ltd. v. Hoffman–La Roche Ltd., [2001] O.T.C. 47 ¶ 27 (quoted in *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., MDL No. 03-md-1532, 2009 WL 861485, at *6 (D. Me. Mar. 6, 2009)).

695. *Id.*

commerce depends to a large extent on 'the ability of merchants to predict the likely consequences of their conduct in overseas markets.'"[696]

Justice Breyer did not merely dissent from the holding in *Intel* in 2004, but also wrote the majority opinion in the unanimously decided *Empagran*, offering a throaty defense of comity in antitrust cases.[697] Pointedly, the former quoted the latter directly: by "so ignoring the Commission, the majority undermines the comity interests § 1782 was designed to serve and disregards the maxim that we construe statutes so as to 'hel[p] the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.'"[698] It is to be hoped, for the sake of comity in antitrust discovery at least, that *Empagran*'s principle proves the more persistent of the two in the long run.

696. Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 19 (1st Cir. 2004) (quoting Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992)).

697. F. Hopfmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165–69 (2004) (quoted *supra* notes 76–77).

698. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 271–72 (2004) (Breyer, J., dissenting) (quoting *Empagran*, 542 U.S. at 165–66).