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## Recent Interpretation of 28 U.S.C. § 1782(A) by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*: The Effects on Federal District Courts, Domestic Litigants, and Foreign Tribunals and Litigants

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# RECENT INTERPRETATION OF 28 U.S.C. § 1782(A) BY THE SUPREME COURT IN *INTEL CORP. V. ADVANCED MICRO DEVICES, INC.*: THE EFFECTS ON FEDERAL DISTRICT COURTS, DOMESTIC LITIGANTS, AND FOREIGN TRIBUNALS AND LITIGANTS

Mousa Zalta†

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## I. INTRODUCTION

Since the mid-nineteenth century Congress has recognized the role that federal courts may play in strengthening the legal and diplomatic relations with other countries by assisting international tribunals in acquiring evidence located in the United States.<sup>1</sup> In 1855, Congress passed the Act of March 2, 1855 (Act of 1855), setting forth a procedure for obtaining evidence located within the United States for use in foreign tribunals.<sup>2</sup> In addition, Congress passed the following Acts: Act of 1863, 1948

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<sup>1</sup> See, e.g., Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855); see also Brian Eric Bomstein & Julie M. Levitt, Comment, *Much Ado About 1782: A Look at Recent Problems with Discovery in the United States for use in Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429 (1989).

<sup>2</sup> *Id.*

and 1949. In 1958, Congress formed a commission to "investigate and study present practices in judicial assistance and judicial cooperation between the United States and Foreign Countries, and to make recommendations for the improvement of international legal practice and methods of procedure."<sup>3</sup> In forming the commission, Congress was less concerned with strengthening the legal and diplomatic relations with foreign countries than it was with focusing on the expansion of business activity between U.S. citizens and foreign nations and citizens.<sup>4</sup> Congress sought to further facilitate international business activity by providing legal procedures by which U.S. citizens and foreigners could settle their disputes.<sup>5</sup>

In 1964, Congress amended 28 U.S.C. § 1782(a) to broaden the scope of the statute.<sup>6</sup> However, rather than serving as a bright line rule for federal courts, the statute became the subject of debate, and the source of various interpretations by different circuits.<sup>7</sup> In *Intel Corp. v. Advanced Micro Devices* ("AMD"),<sup>8</sup> the United States Supreme Court took the opportunity to settle the conflicting interpretations of the statute by de-

<sup>3</sup> Commission on International Rules of Judicial Procedure - Establishment, 1958 U.S.C.C.A.N. 5201 [hereinafter Commission Establishment].

<sup>4</sup> See Ryan J. Earl, *Tightening Judicial Standards for Granting Foreign Discoverability Requests*, 1993 B.Y.U. L. REV. 343 (1993).

<sup>5</sup> See Commission Establishment, *supra* note 3, at 5201-03.

<sup>6</sup> See *infra* text accompanying notes 17-20 (the Act of 1855 was superseded by the Act of 1863. The Act of 1863 was codified under the United States Code and renumbered 28 U.S.C. § 1782(a). See Hans Smit, *International Litigation Under the United States Code*, 65 COLUM L. REV. 1015, 1026 (1965) (explaining that 28 U.S.C. § 1782(a) was intended to accomplish Congress' aim of "eliminating former uncertainties and liberalizing the assistance that may be given" to foreign tribunals and litigants). Hans Smit, a professor at Columbia University, served as Reporter to the Commission and Advisory Committee on International Rules of Judicial Procedure.

<sup>7</sup> See, e.g., *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (holding that § 1782(a) does not require a proceeding to be pending for a litigant seeking discovery in the United States. Rather, the proceeding must be "imminent"); see also *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993) (holding that § 1782(a) does not contain a foreign discoverability requirement); *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992) (holding that foreign litigants requesting assistance in obtaining discovery in the United States for use in a foreign proceeding pursuant to 28 U.S.C. § 1782(a) must show that the information sought would be discoverable in the foreign jurisdiction); *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988) (holding that "Congress's elimination of the word pending [in § 1782(a)] almost compels [the court] to conclude. . . that a pending proceeding is not absolutely necessary").

<sup>8</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

fining the requirements of “interested person” and “tribunals” set forth by the statute.<sup>9</sup> In addition, the Court held that a proceeding need not be pending to successfully invoke § 1782(a), nor did the statute impose a foreign discoverability requirement.<sup>10</sup> In its holding, the Court resolved the divergence among the circuits as to whether a proceeding must be pending or at least imminent to invoke the statute, and whether there is a foreign discoverability requirement.<sup>11</sup> In doing so, the Court broadened the scope of foreign discovery requests which accorded foreign litigants a powerful tool to use against U.S. litigants in foreign proceedings.<sup>12</sup> Moreover, the decision left domestic litigants to speculate whether a district court would find that a request by a foreign tribunal or litigant was unduly intrusive or burdensome.

Part II of this Note will explore the history of discovery in the United States for use in foreign tribunals and the various interpretations of § 1782(a), entitled “Assistance to Foreign and International Tribunals and to Litigants Before such Tribunals,”<sup>13</sup> by lower federal courts. Part III will discuss the facts, holding and reasoning of *Intel Corp. v. AMD*. Part IV will provide an analysis of *Intel Corp. v. AMD* and demonstrate that the United States Supreme Court correctly interpreted the statute. Part V will conclude that, while the Court in *Intel Corp. v. AMD* correctly interpreted the statute, its possible effects on domestic litigants may compel Congress to amend the statute to include a foreign discoverability requirement and require federal courts to give deference to the opinions of foreign tribunals.

## II. LEGISLATIVE HISTORY AND APPLICATION OF THE STATUTE

### A. Legislative History

In 1855, Congress passed, for the first time, an act pertaining to discovery for use in foreign proceedings.<sup>14</sup> The Act provided that federal courts were permitted, upon request through letters rogatory, to grant judicial assistance to foreign tribunals

<sup>9</sup> See *id.* at 2478-79 (2004).

<sup>10</sup> *Id.* at 2479, 2481; see also *infra* note 43, at 3789.

<sup>11</sup> See *Intel Corp.*, 124 S. Ct. at 2480.

<sup>12</sup> See *id.* at 2484-85.

<sup>13</sup> 28 U.S.C. § 1782(a) (2004).

<sup>14</sup> See Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855).

and litigants in obtaining evidence located within the United States.<sup>15</sup> However, due to recording and indexing errors, the statute was omitted from the index of the federal code for several years, which left the courts powerless to exercise their power under the statute.<sup>16</sup>

Eight years following the enactment of the Act of 1855, Congress passed a second statute concerning judicial assistance to foreign countries.<sup>17</sup> Rather than expanding the scope and reach of the Act of 1855, the Act of March 3, 1863 (Act of 1863) severely limited the use of letters rogatory.<sup>18</sup> Subsequently, federal courts disregarded the Act of 1855 and declined to provide judicial assistance to foreign tribunals relying instead upon the Act of 1863.<sup>19</sup> The courts' application of the Act of 1863, however, was not left unhindered by the legislature. Congress responded by amending the Act of 1863, which was codi-

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<sup>15</sup> The Act provides in relevant part, "where letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States. . . shall be empowered to compel the witness to appear and depose in the same manner as to appear and testify in court." *Id.*

<sup>16</sup> See Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L. J. 515, 540 (1953).

<sup>17</sup> See Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769-70 (1863).

<sup>18</sup> A letter rogatory is defined as "[a] document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction, and (2) return the testimony or proof of service for use in a pending case. Bryan A. Garner, ed., BLACK'S LAW DICTIONARY 735 (7th ed. 2000); Compare Act of March 3, 1863, § 1, 12 Stat. 769-70 with the Act of March 2, 1855, § 2, 10 Stat. 63 (the Act of March 3, 1863 added three requirements before a request may be granted. The requirements added were (i) that the suit is for the recovery of money or property (ii) that the requesting country must be at peace with the United States and (iii) the foreign country requesting the aid be a party or have an interest in the suit).

<sup>19</sup> See, e.g., *In re Letters Rogatory from Examining Magistrate of Tribunal of Versailles, France*, 26 F. Supp. 852 (D. Md. 1939) (the court denied the request for assistance by relying on the Act of March 3, 1863 which the court interpreted to be limited to civil rather than criminal suits); see also *In re Letters Rogatory of Republic of Colombia*, 4 F. Supp. 165 (S.D.N.Y. 1933) (the court denied request for assistance for the reason that the request was not for obtaining discovery to be used in a suit rather for investigative purposes); *In re Spanish Consul's Petition*, 22 F. Cas. 854 (S.D.N.Y. 1867) (No. 13,202) (the court relied upon the Act of March 3, 1863 and denied the request for assistance); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 601 (1990).

fied under the United States Code and renumbered 28 U.S.C. § 1782(a).<sup>20</sup>

The amendments of 1948 expanded the scope of § 1782(a) by eliminating the requirement that the foreign country requesting assistance be a party or have an interest in the proceedings and by permitting judicial assistance to cover “any civil action pending in any court in a foreign country.”<sup>21</sup> Section 1782(a) was further broadened by the amendments of 1949.<sup>22</sup> The 1949 amendment eliminated the word “residing” from the statute and replaced the words “civil action” with “judicial proceeding.”<sup>23</sup> Although the amendments of 1948 and 1949 lessened the restrictions for seeking judicial assistance in the United States, Congress still desired further modifications to § 1782(a), and in 1964 it passed an amendment.<sup>24</sup>

After World War II, the U.S. saw a significant expansion in international, commercial and financial activities.<sup>25</sup> Investments in foreign countries by U.S. businesses as well as private citizens multiplied.<sup>26</sup> In addition, the United States government implemented “trade aid programs of considerable magnitude.”<sup>27</sup> The scale of these developments was “unparalleled in [the] history” of the United States.<sup>28</sup> However, the expansion of international business activities was not accompanied by modifications to the legal procedure by which U.S. citizens and foreign litigants could use to adjudicate their disputes.<sup>29</sup> Recognizing that this expansion could lead to numerous litigations involving U.S. litigants in foreign tribunals, Congress enacted a bill to establish a Commission on International Rules of Judi-

<sup>20</sup> See Act of June 25, 1948, ch. 646, § 1782(a), 62 Stat. 869 (1948).

<sup>21</sup> The Act of June 25, 1948, in relevant part, provides: “The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken. . . .” *Id.*

<sup>22</sup> See Act of May 24, 1949, ch. 139, sec. 93, 63 Stat. 89 (1949).

<sup>23</sup> The Act states that “Section 1782(a) of title 28, United States Code, is amended by striking out ‘residing’ . . . and striking out . . . the words ‘civil action’ and in lieu thereof inserting ‘judicial proceeding.’” *Id.*

<sup>24</sup> See Judicial Procedure - Litigation with International Aspects, 1964 U.S.C.C.A.N. 3782, 3788 [hereinafter *Litigation with International Aspects*].

<sup>25</sup> See Commission Establishment, *supra* note 3, at 5201.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

cial Procedure.<sup>30</sup> The Commission was created to “investigate and study present practices in judicial assistance and judicial cooperation between the United States and foreign countries, and to make recommendations for the improvement of international legal practice and methods of procedure.”<sup>31</sup>

In 1964, following the submission of the Commission’s proposal, Congress passed an act to amend § 1782(a).<sup>32</sup> The primary purpose of the amendment, Congress stated, was to “clarify[ly] and liberaliz[e] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States.”<sup>33</sup> Congress hoped that the enactment would encourage foreign countries to “similarly adjust their procedures.”<sup>34</sup> Congress reinforced the amendments’ twin aims when it stated that the amendment to § 1782(a) was “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.”<sup>35</sup> Unlike the Act of 1863, the legislature, through the 1964 amendment, aimed at broadening the assistance to foreign tribunals with no intention of constricting it.<sup>36</sup>

The 1964 amendment significantly expanded judicial assistance under § 1782(a). First, discovery requests were no longer limited to compelling testimony and statements.<sup>37</sup> Rather, litigants were able to request the production of documents and other tangible evidence as well as oral testimony.<sup>38</sup> Second, the words “in any court in a foreign country” were replaced with “in a foreign or international tribunal.”<sup>39</sup> Thus, litigants seeking judicial assistance were no longer obliged to demonstrate that the discovery request was for a proceeding before a conventional

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<sup>30</sup> *See id.* at 5202-03.

<sup>31</sup> *Id.* at 5201.

<sup>32</sup> *See* Litigation with International Aspects, *supra* note 24, at 3788.

<sup>33</sup> *Id.* at 3788.

<sup>34</sup> *Id.* at 3783.

<sup>35</sup> Litigation with International Aspects, *supra* note 24, at 3788.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 3788.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

court.<sup>40</sup> A showing that a proceeding was before an administrative tribunal or quasi-judicial agency was sufficient to request judicial assistance under the amended § 1782(a).<sup>41</sup> Third, the provision restricting judicial assistance to countries with which the United States was at peace was taken out of the statute.<sup>42</sup> Fourth, the word “pending” was removed from the statute.<sup>43</sup> Therefore, it was no longer required that a proceeding be pending to invoke § 1782(a). Fifth, courts were empowered upon request to grant judicial assistance to foreign tribunals or any interested person.<sup>44</sup> Thus, foreign tribunals and litigants were authorized to make their discovery requests directly to a federal court without the need for a letter rogatory. Sixth, a court has complete discretion in determining whether to grant or reject discovery requests, or to “impose conditions it deems desirable.”<sup>45</sup> In determining whether, and to what extent, to honor a discovery request a court may take into consideration the nature and attitudes of the requesting government and the character of the proceedings.<sup>46</sup>

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<sup>40</sup> *See id.*

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 3789.

<sup>43</sup> Compare 28 U.S.C. § 1782(a) (2004) with Act of June 25, 1948, ch. 646, § 1782(a), 62 Stat. 869 (1948) (the word “pending” was omitted from the 28 U.S.C. § 1782(a)).

<sup>44</sup> The statute states in relevant part that “[t]he order may be made pursuant to a letter rogatory issued, or request made, by foreign or international tribunal or upon the application of any interested person.” 28 U.S.C. § 1782(a).

<sup>45</sup> *Litigation with International Aspects*, *supra* note 24, at 3788-89.

<sup>46</sup> *See id.* at 3788. In 1996 Congress amended § 1782(a) to include discovery requests for “criminal proceedings conducted before formal accusations.” 1996 Amendments, Pub. L. No. 104-6, § 1342(b) (1996). Subsequent to the 1996 amendment, the statute read as follows:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or 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 . . . by a foreign or international tribunal or upon the application of any interested person . . . . A person may not be compelled to give his testimony or statement or produce a document or other thing in violation of any legally applicable privilege.

28 U.S.C. § 1782(a).

### B. *Judicial Interpretation of § 1782(a)*

It is undisputed that the 1964 amendment to § 1782(a) was intended to expand and "liberalize" the statute.<sup>47</sup> However, federal courts lacked a consistent interpretation as to the extent to which judicial assistance was permitted under § 1782(a). The debate among courts focused primarily on two issues: (1) whether § 1782(a) contained an implied foreign discoverability requirement, and (2) whether the party invoking § 1782(a) was required to demonstrate that the evidence it sought was for use in a *pending* proceeding.<sup>48</sup>

Some circuits have held that a party seeking judicial assistance under § 1782(a) must show that the evidence sought is discoverable in the foreign forum country.<sup>49</sup> In *In re Asta Medica*,<sup>50</sup> Asta Medica and three other pharmaceutical companies<sup>51</sup> brought a patent suit in Europe against Pfizer, Inc. While the litigation was pending in Europe, Asta Medica filed an application under 28 U.S.C. § 1782(a) requesting judicial assistance in obtaining evidence located in the United States.<sup>52</sup> The magistrate judge granted Asta's request and issued a subpoena.<sup>53</sup> Pfizer then moved to quash the subpoena on the ground that the information sought would not be available and could not be used by Asta in the foreign proceeding.<sup>54</sup> The magistrate determined that the information was not discoverable in

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<sup>47</sup> See *Litigation with International Aspects*, *supra* note 24, at 3788.

<sup>48</sup> See, e.g., *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001); see also *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993); *In re Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); See *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

<sup>49</sup> See, e.g., *In re Asta Medica*, 981 at 6; see also *In re Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d at 1156.

<sup>50</sup> *In re Asta Medica*, 981 F.2d at 1.

<sup>51</sup> The pharmaceutical companies were Laboratories Sarget, Dagra and Napp Laboratories. *Id.*

<sup>52</sup> See generally *In re Asta Medica*, 981 F.2d at 1. Plaintiffs alleged that Pfizers' patented process of the production of doxycycline is unpatentable since the process was in public domain prior to Pfizers' application for a patent. Plaintiffs asserted that Pfizer derived the invention between 1971 and 1972 from Ankerfarm, an Italian company, while negotiating a proposed joint venture. *Id.* Asta Medica sought to obtain the testimony and production of documents from a retired employee of Pfizer which Asta Medica believed to be involved in Pfizer's transactions with Ankerfarm. *Id.* at 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

the foreign jurisdiction and granted Pfizer its motion.<sup>55</sup> The district court reversed and held that a showing of foreign discoverability was not necessary to invoke § 1782(a).<sup>56</sup>

Upon review, the Court of Appeals for the First Circuit considered two significant policy issues when determining whether § 1782(a) contained an implicit foreign discoverability requirement.<sup>57</sup> The court held that a ruling that foreign discoverability was not a necessary requirement under § 1782(a) would place U.S. litigants at a "substantial disadvantage"<sup>58</sup> and Congress did not intend to place domestic litigants in a more "detrimental position than their opponents when litigating abroad."<sup>59</sup> In addition, it ruled that granting judicial assistance without placing a foreign discoverability restriction allows foreign litigants to "circumvent foreign law and procedures,"<sup>60</sup> thereby offending foreign tribunals.<sup>61</sup> Thus, the appellate court held that § 1782(a) contained an implicit foreign discoverability requirement.<sup>62</sup>

Similarly, in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, the Court of Appeals for the Eleventh Circuit held that a foreign discoverability requirement was necessary to successfully invoke judicial assistance under § 1782(a).<sup>63</sup> In this case, the Court of Appeals resolved four issues concerning the interpretation of § 1782(a). It held that § 1782(a) did not require a proceeding to be pending prior

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *See id.* at 5-6.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 5 (The court relied on the Senate Report which stated "adjust those procedures to the requirements of foreign practice and procedure" as one of the rationales for the 1964 amendment).

<sup>60</sup> *Id.* at 6.

<sup>61</sup> The court held that "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." *Id.*

<sup>62</sup> *In re Asta Medica*, 981 F.2d at 7.

<sup>63</sup> *See In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Minister of Legal Affairs of Trinidad and Tobago filed a request for judicial assistance in obtaining authenticated copies of bank records of Joseph Azar in connection with a criminal investigation. The district court granted the request and issued a subpoena. *Id.* Subsequently, Azar filed a motion to quash the subpoena which was denied by the district court. *Id.* at 1152.

to granting a discovery request.<sup>64</sup> In addition, the court found that the Minister of Legal Affairs, the requesting party, was an "interested person" within the meaning of § 1782(a),<sup>65</sup> and that the evidence requested for the criminal investigation was "for use in a proceeding" within the meaning of § 1782(a).<sup>66</sup> Lastly, akin to the court in *Asta Medica*, the Court of Appeals for the Eleventh Circuit held that judicial assistance under § 1782(a) was limited to evidence that would be discoverable in the foreign country.<sup>67</sup>

The holding that § 1782(a) contained a foreign discoverability requirement, however, was not unanimously accepted. Other circuit courts, when faced with this issue, have held that parties requesting judicial assistance under § 1782(a) were not required to show that the evidence they sought to obtain was discoverable in the foreign country where the proceeding was taking place.<sup>68</sup> One of the leading cases on this issue is *In re Gianoli Aldunate*.<sup>69</sup> In that case, plaintiffs Silvia Gianoli Aldunate and Jose Miguel Barriga Gianoli requested from the court assistance in discovery pursuant to 28 U.S.C. § 1782(a).<sup>70</sup> In its analysis, the Second Circuit Court of Appeals first noted the twin aims of the 1964 amendments.<sup>71</sup> It said that Congress, in passing the amendments, intended to clarify and liberalize

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<sup>64</sup> The court noted that the word "pending" was deleted from § 1782(a) following the 1964 amendments. The court stated, "We believe that Congress' elimination of the word 'pending' almost compels us to conclude the 'opposite result' - - that a pending proceeding is not absolutely necessary." *Id.* at 1155.

<sup>65</sup> Since the minister is legally responsible for the enforcement of the law, the court held that the minister was an interested party under § 1782(a). *Id.*

<sup>66</sup> The court found that there was evidence that showed that the information obtained in the United States would eventually be used in a criminal prosecution against Azar. The court held that the imminent criminal prosecution fulfilled the condition "for use in a proceeding" as set forth by § 1782(a). *Id.* at 1155-56.

<sup>67</sup> *Id.* at 1156.

<sup>68</sup> See, e.g., *Four Pillars Enterprises Co., LTD, v. Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002); see also *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993).

<sup>69</sup> *In re Gianoli Aldunate*, 3 F.3d at 54.

<sup>70</sup> *Id.* at 55. Aldunate and Gianoli asked the court to issue a subpoena requiring Maria and Edward Foden to produce documents and appear for depositions. The district court granted the request and denied the Fodens' subsequent motion to quash the subpoena. On appeal, the Fodens argued that § 1782(a) implicitly required a showing that the information sought be discoverable in the foreign country. *Id.* at 55-56.

<sup>71</sup> *Id.* at 57.

the existing procedures and encourage other countries to enact similar statutes.<sup>72</sup> The court then declared the long established rule that a statute must be interpreted based on its plain meaning.<sup>73</sup> Applying the plain meaning interpretation to the statute, the court held that § 1782(a) did not contain or make any reference to a foreign discoverability requirement.<sup>74</sup> Therefore, the court found that the text of § 1782(a) did not include an explicit foreign discovery requirement.<sup>75</sup>

Unable to find an explicit foreign discoverability requirement, the court then went on to determine whether § 1782(a) contained an implicit foreign discoverability requirement. Relying on legislative history, the court was unable to find any evidence tending to show an implicit foreign discoverability requirement.<sup>76</sup> It held that “if Congress had intended to impose such a sweeping restriction on the district court’s discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect.”<sup>77</sup> Disregarding the rationale set forth in *Asta Medica*,<sup>78</sup> the court held that § 1782(a) contained neither an explicit nor an implicit foreign discoverability requirement.<sup>79</sup>

Two other circuit courts have held that § 1782(a) lacked a foreign discoverability requirement. In *Four Pillars Enterprises v. Avery Dennison*,<sup>80</sup> the Court of Appeals for the Ninth Circuit

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<sup>72</sup> *Id.* at 58.

<sup>73</sup> See *id.* (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)). The court noted that an exception to the plain meaning interpretation is found in cases in which the plain meaning interpretation clearly contradicts the intentions of the drafters. *Id.*

<sup>74</sup> *Id.* at 59.

<sup>75</sup> *Id.*

<sup>76</sup> See *id.*

<sup>77</sup> *Id.*

<sup>78</sup> The court considered the rationale set forth in *Asta Medica* for a finding of an implicit foreign discoverability requirement in § 1782(a). *Id.* at 60. It stated that “maintaining the balance between litigants that each nation creates within its own judicial system, preventing circumvention of foreign restrictions on discovery and avoiding offense to foreign tribunals” were the policy considerations behind the *Asta Medica* decision. *Id.* The court held that while the concerns considered in *Asta Medica* were “legitimate policy considerations,” incorporating a foreign discoverability requirement was supported by neither the plain text meaning of the statute nor the legislative history. *Id.*

<sup>79</sup> *Id.* at 62.

<sup>80</sup> See *Four Pillars Enterprises Co., LTD, v. Avery Dennison Corp.*, 308 F.3d 1075, 1075 (9th Cir. 2002).

rejected the notion that § 1782(a) contained a foreign discoverability requirement and granted judicial assistance.<sup>81</sup> Similarly, the court in *In re Bayer AG* granted a request to obtain information for use in proceedings in a foreign tribunal. Declining to accept the arguments presented by other circuits courts<sup>82</sup> for incorporating a foreign discoverability requirement, the court held that “imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and the spirit of the statute.”<sup>83</sup> The *Bayer* decision clearly illustrated the clash between the circuits as to whether § 1782(a) imposed a foreign discoverability requirement. The disagreement between the circuits, however, was not restricted to the foreign discoverability requirement. The issue of whether § 1782(a) required the foreign proceeding to be pending formed yet another basis for a dispute between the circuits as to the interpretation of § 1782(a).<sup>84</sup>

The question of whether § 1782(a) required that a foreign proceeding be pending arose in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*. There, the Court of Appeals for the Eleventh Circuit held that the deletion of the word “pending” from § 1782(a) was not a “mistake” by Congress, but rather it was Congress’ intent to permit judicial assistance to foreign tribunals or parties for both pending and non-pending proceedings.<sup>85</sup> Similarly, the Court of Appeals for the District of Columbia determined that the judicial proceeding need not be pending.<sup>86</sup> Rather, the court held that the pro-

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<sup>81</sup> See *id.* at 1080. In *Four Pillars Enterprises*, a Taiwanese corporation sought discovery pursuant to 28 U.S.C. § 1782(a) for use in the courts of the People’s Republic of China and in the Republic of China-Taiwan. The district court granted limited discovery and upon appeal, Avery argued that the request should be denied on the grounds that the information was not discoverable in the foreign state. *Id.* at 1076-77.

<sup>82</sup> See, e.g., *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992); see also *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

<sup>83</sup> See *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998).

<sup>84</sup> See, e.g., *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001); see also Letter of Request from the Crown Prosecution Serv. of the United Kingdom, 870 F.2d 686, 690 (D.C. Cir. 1989); *In re Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d at 1155.

<sup>85</sup> *In re Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d at 1155.

<sup>86</sup> See Letter of Request from the Crown Prosecution Serv. of the United Kingdom, 870 F.2d at 691.

ceeding must be "within reasonable contemplation."<sup>87</sup> The Court of Appeals for the Second Circuit, however, disagreed. In *In re the Ishihara Chemical Co., LTD*<sup>88</sup> the Court of Appeals for the Second Circuit was asked to determine whether § 1782(a) required a proceeding to be "pending."<sup>89</sup> In that case, Ishihara, a Japanese corporation, instituted an action challenging the validity of certain patents of Shipley Company, a U.S. business, before the Japanese Patent Office (JPO).<sup>90</sup> Ishihara sought and was granted judicial assistance pursuant to 28 U.S.C. § 1782(a).<sup>91</sup> Upon appeal, Shipley argued that the evidence sought by Ishihara could not and will not be used in the proceeding before the JPO.<sup>92</sup> Therefore, Shipley argued, Ishihara should not be permitted to seek discovery under § 1782(a).<sup>93</sup> Although the court determined that § 1782(a) did not require a proceeding to be actually pending, it did require that the proceeding be "very imminent—very likely to occur and very soon to occur."<sup>94</sup> Once more, the decision in *Ishihara Chemical* demonstrated the divergence between the circuits as to the interpretation of § 1782(a).

In the years following the legislation of the 1964 amendment, further difficulties in the interpretation of § 1782(a) arose.<sup>95</sup> Some courts reviewing judicial assistance requests

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<sup>87</sup> *Id.*

<sup>88</sup> *In re Ishihara Chemical Co., LTD*, 251 F.3d at 120.

<sup>89</sup> *Id.* at 124.

<sup>90</sup> *Id.* at 125.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 123.

<sup>93</sup> *In re Ishihara Chemical Co., LTD*, 251 F.3d at 123. Ishihara responded by claiming that the evidence it sought would be used in one of two ways: Ishihara would attempt to introduce the evidence in the proceeding pending before the JPO or if it is unable to do so, it would institute a second proceeding where it would be able to introduce the evidence. *Id.* at 124.

<sup>94</sup> *In re Ishihara Chemical Co., LTD*, 251 F.3d at 125 (*quoting In re Request for Int'l Judicial Assistance for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991). The court held that the JPO had completed the evidentiary hearing. *Id.* at 126. In addition, under Japanese law, new evidence may not be introduced after the evidentiary hearing is completed unless the JPO requests such evidence. The court held that it was unlikely that Ishihara will be able to introduce the evidence sought before the JPO. Since the use of the evidence was not "imminent," it denied discovery. *Id.*

<sup>95</sup> See, e.g., *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001); see also *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993); *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988).

were asked to determine what type of "use" constitutes "for use in a proceeding."<sup>96</sup> Other courts were required to determine the meaning of "foreign or international tribunal" and "interested person" set forth by § 1782(a).<sup>97</sup> In *Intel Corp. v. AMD*, the Supreme Court granted certiorari in an attempt to end the debate between the circuits, resolve the issues and, clarify the ambiguities that have arisen in the course of interpreting §1782(a).<sup>98</sup>

### III. INTEL CORP. V. AMD, INC.

#### A. *The Majority Opinion*

Intel and AMD were worldwide competitors in the development and sale of microprocessors.<sup>99</sup> In October 2000, AMD filed a complaint with the Directorate-General for Competition (DG-Competition) of the European Commission.<sup>100</sup> In its complaint, AMD alleged that Intel had "abused its dominant position in the European market through loyalty rebates, exclusive purchase agreements with manufacturers and retailers, price discrimination, and standard-setting cartels."<sup>101</sup> AMD suggested that the DG-Competition seek discovery of documents presented by Intel in a separate case in Alabama.<sup>102</sup> The DG-Competition declined to seek judicial assistance in discovery, and pursuant to 28 U.S.C. § 1782(a), AMD sought judicial assistance in the discovery of the documents from the District Court for the Northern District of California.<sup>103</sup> The district court de-

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<sup>96</sup> See, e.g., *In re Ishihara Chemical Co., LTD.*, 251 F.3d at 125; see also *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993); *In re Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d at 1155-56.

<sup>97</sup> See, e.g., *In re Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d at 1155; see also *In re Gianoli Aldunate*, 3 F.3d at 62 (determining whether the discovery requested was for "proceeding in a foreign. . . tribunal").

<sup>98</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2474 (2004).

<sup>99</sup> See *Intel Corp.*, 124 S. Ct. at 2474.

<sup>100</sup> The European Commission was the executive and administrative organ of the European Communities. *Id.* (citing Brief for Commission of Commission of European Communities as *Amicus Curiae* at 1 [hereinafter *EC Amicus Curiae*]). One of the many subjects that the Commission exercised its power over is anti-competition. See *id.* The DG-Competition was the European Union's anti-trust law enforcer. *Id.* at 2475 (citing *EC Amicus Curiae* at 2).

<sup>101</sup> *Intel Corp.*, 124 S. Ct. at 2474.

<sup>102</sup> *Id.* The case that AMD was referring to was *Intergraph Corp. v. Intel Corp.*, 3 F.3d 1326 (N.D. Ala. 1998).

<sup>103</sup> *Id.*

nied AMD's petition for discovery and held that § 1782(a) did not authorize AMD's requested discovery.<sup>104</sup>

AMD appealed the lower court's decision to the Court of Appeals for the Ninth Circuit.<sup>105</sup> After considering three significant matters, the Court of Appeals reversed and remanded the case to the lower court.<sup>106</sup> The court first determined that the European Commission was, at a minimum, a body of a quasi-judicial or administrative nature.<sup>107</sup> It then held that § 1782(a) did not require the proceeding to be pending.<sup>108</sup> Lastly, the court concluded that § 1782(a) did not contain a foreign discoverability requirement.<sup>109</sup> Therefore, AMD was not required to show that the documents would have been discoverable in the European Union.<sup>110</sup> Intel appealed the Court of Appeal's decision to the Supreme Court, which granted certiorari.<sup>111</sup>

The Supreme Court first decided the issue of whether the DG-Competition qualified as a tribunal, administrative tribunal or quasi-judicial agency.<sup>112</sup> The rule, stated the Court, was that a party requesting judicial assistance under § 1782(a) was not required to show that the proceeding consisted of litigants or parties.<sup>113</sup> A proceeding was before a tribunal if the body hearing the proceeding "acts as a first instance decision-maker."<sup>114</sup> Furthermore, a showing that a proceeding included

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Intel Corp.*, 124 S. Ct. at 2475.

<sup>107</sup> *Id.* at 2475-76. The court noted that the Commission was authorized to enforce the European Union and Treaty Establishing European Community [hereinafter EU Treaty], which regulates competition. The court further noted that the Commission's decisions were binding, enforceable through fines and penalties and appealable to the Court of First Instance and then to the European Court of Justice.

<sup>108</sup> *Id.* at 2475.

<sup>109</sup> *Intel Corp.*, 124 S. Ct. at 2476.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2477. The requirement that a proceeding was before a tribunal was set forth in the text statute. See 28 U.S.C. § 1782(a). However, legislative history shows that a proceeding need not be before a tribunal. Rather a showing that the proceeding was before an administrative tribunal or quasi-judicial agency was sufficient. See *Litigation with International Aspects*, *supra* note 24, at 3788. It is important to note that, in its *amicus curiae*, the DG-Competition told the Court that it was not a "tribunal within the meaning of § 1782(a)." See *EC Amicus Curiae*, *supra* note 100, at 2.

<sup>113</sup> *Intel Corp.*, 124 S. Ct. at 2477.

<sup>114</sup> *Id.* at 2472-73.

a complainant was sufficient so long as the complainant had a "significant procedural right."<sup>115</sup> The right of the complainant to submit information in support of its allegations and appeal a decision may evidence that the proceeding was before a body that qualified as a tribunal under § 1782(a).<sup>116</sup> The Court held that DG-Competition's entitlement to pursue or decline to pursue a complaint, serve formal statements and objections and make recommendations was sufficient proof that it constituted a tribunal within the meaning of § 1782(a).<sup>117</sup> In addition, the Court held that while AMD's formal status is neither a party nor a litigant, its status as complainant, with rights to submit to the DG-Competition evidence in support of its allegations and appeal the decision arrived at by the DG-Competition, further demonstrated that the DG-Competition constituted, at a minimum, a quasi-judicial agency.<sup>118</sup>

The Court then directed its attention to Intel's argument that AMD was excluded from seeking assistance under § 1782 (a) because, as a complainant with limited rights, it did not qualify as a litigant, foreign sovereign or a designated agent of a sovereign as required by the caption of § 1782(a).<sup>119</sup> Disposing of Intel's argument, the Court cautioned that the caption of a statute "cannot undo or limit that which the [statute's] text makes plain," and declined to read the caption as to convey any limitations on the statute.<sup>120</sup> The Court defined "interested person" to mean a person "with reasonable interest in obtaining judicial assistance."<sup>121</sup> It held that complainant's participation rights such as triggering an investigation, submission of evidence for consideration and appeal qualified the complainant as

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<sup>115</sup> *Id.* at 2477.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Intel Corp.* at 2477. The Court analyzed the role that the DG-Competition played in the disposition of competition complaints. It found that the DG-Competition's "overriding responsibility was to conduct investigations into alleged violations of the European Union's competition prescriptions." The court further held that any subsequent appeal will be held before a tribunal within the meaning of § 1782(a). *Id.*

<sup>119</sup> Intel argued that the words "any interested person" must be limited to persons described in the caption of the statute (litigants and foreign tribunals not complainants). *Id.* at 2478.

<sup>120</sup> *Id.* (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947)).

<sup>121</sup> *Intel Corp.*, 124 S. Ct. at 2478.

an “interested person” within the meaning of § 1782(a) because the complainant had a reasonable interest in obtaining judicial assistance.<sup>122</sup> The Court held that since AMD was entitled to those rights in the proceeding before the DG-Competition and had a reasonable interest in obtaining assistance from the DG-Competition, AMD was an interested party under § 1782(a).<sup>123</sup> Furthermore, the Court determined that the documents sought by AMD were intended to be used in the proceedings before the DG-Competition<sup>124</sup> and, upon appeal, in the Court of First Instance and the European Court of Justice.<sup>125</sup> Thus, the Court held, AMD satisfied § 1782(a)’s requirement that the evidence sought was for use in proceeding before a foreign or international tribunal.<sup>126</sup>

While the issues of what constituted a “tribunal” or “interested person” and whether the evidence sought was “for use in a proceeding before a foreign tribunal” were important issues in the interpretation of § 1782(a), the split between the circuits has primarily surrounded two other central issues: 1) whether § 1782(a) required a proceeding to be pending prior to the grant of assistance and 2) whether § 1782(a) contained a foreign discoverability requirement.<sup>127</sup> In *Intel Corp v. AMD*, the Supreme Court first addressed the issue of whether § 1782(a) required a pending proceeding. Intel argued that § 1782(a) required an imminent or pending adjudicative action.<sup>128</sup> It contended that since AMD’s complaint was in its investigative stage and no adjudicative action was in progress or even immi-

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2479. The Court noted that the term ‘tribunal’ included “investigating magistrate, administrative and arbitral tribunals, and quasi judicial agencies, as well as the conventional civil, commercial, criminal, and administrative courts.” *Id.* (quoting Hans Smit, *supra* note 6, at 1026-27, nn. 71 & 73). Thus, the Court properly determined, that the DG-Competition was a tribunal within the meaning of § 1782(a). See *Intel Corp.*, 124 S. Ct. at 2479.

<sup>125</sup> *Intel Corp.*, 124 S. Ct. at 2479. The Court held that, clearly, the Court of First Instance as well as the European Court of Justice constituted tribunals within the meaning of § 1782(a). *Id.*

<sup>126</sup> *Id.*; see also 28 U.S.C. § 1782(a).

<sup>127</sup> See *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001); see also *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *In re Gianoli Aldunate*, 3 F.3d 54, 62 (2d Cir. 1993); *In re Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); See *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

<sup>128</sup> *Intel Corp.*, 124 S. Ct. at 2479.

nent, AMD should not be permitted to invoke § 1782(a).<sup>129</sup> In its analysis of the issue, the Court divided Intel's argument into two distinct issues: 1) whether an adjudicative action was required for judicial assistance and 2) whether a requesting party was required to show that a proceeding was pending or imminent prior to the granting of judicial assistance.<sup>130</sup>

The Supreme Court first examined the legislative history of § 1782(a) to determine whether § 1782(a) required an adjudicative action. It found in the Senate Report that Congress intended for the courts to provide assistance "whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature."<sup>131</sup> Given that the legislative history confirmed that an investigative proceeding was sufficient to invoke § 1782(a), the Court held that an adjudicative action was not required to invoke § 1782(a).<sup>132</sup>

The Court then addressed the issue of whether § 1782(a) required a pending proceeding. It found that in its 1964 amendment, Congress removed the requirement that a proceeding be "judicial" and "pending."<sup>133</sup> The Court then affirmed the rule that "when Congress acts to amend a statute, we presume its amendment to have real and substantial effect."<sup>134</sup> Accordingly, the Court determined that by removing the word "pending" from § 1782(a), Congress intended that a proceeding need not be pending for a party to request assistance under § 1782(a).<sup>135</sup> Furthermore, the Court relied on the legislative history of the 1964 amendment, which showed that Congress intended to expand the scope of assistance under § 1782(a).<sup>136</sup> This, the Court held, further demonstrated that § 1782(a) did not require a pending proceeding.<sup>137</sup> Therefore, the Court held that § 1782(a) did not require the proceeding to be pending or immi-

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (quoting S. REP. NO. 1580, at 9 (1964)).

<sup>132</sup> *Intel Corp.*, 124 S. Ct. at 2480.

<sup>133</sup> *Id.* at 2479-80.

<sup>134</sup> *Id.* at 2479 (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).

<sup>135</sup> *Id.* at 2480.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

ment; rather, it required merely a *dispositive ruling be within reasonable contemplation*.<sup>138</sup>

The last, and most significant issue that the Supreme Court decided was whether § 1782(a) imposed a foreign discoverability requirement. Intel argued that § 1782(a) required AMD to demonstrate that the evidence sought would have been discoverable in the foreign jurisdiction.<sup>139</sup> Prior to its analysis, the Court emphasized that § 1782(a) expressly shielded the production of privileged materials.<sup>140</sup> The Court then examined § 1782(a) and held that there was nothing in the text of § 1782(a) that tended to show that the district court's order for production was limited to material that could be discovered in the foreign jurisdiction.<sup>141</sup> Subsequently, the Court looked at the legislative history to determine whether § 1782(a) implicitly contained a foreign discoverability requirement.<sup>142</sup> The Court was unable to find any evidence in the legislative history that indicated that Congress intended to impose a foreign discoverability requirement.<sup>143</sup> Consequently, the Court held that § 1782(a) contained neither an implicit nor an explicit foreign discoverability requirement.<sup>144</sup>

Intel's argument that § 1782(a) contained a foreign discoverability requirement, however, was not limited to the text of § 1782(a) and its legislative history. Intel maintained that

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<sup>138</sup> *Id.* Compare *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1151 (11th Cir. 1988) (holding that a proceeding need not be pending) with *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (see discussion Part II.B.) See also *In re Request for Int'l Judicial Assistance for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

<sup>139</sup> *Intel Corp.*, 124 S. Ct. at 2480.

<sup>140</sup> *Id.* Section 1782(a) clearly states, "A person may not be compelled to give his testimony or statement or produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C. § 1782(a) (2004).

<sup>141</sup> *Intel Corp.*, 124 S. Ct. at 2480.

<sup>142</sup> *Id.* at 2481.

<sup>143</sup> *Id.* The Court found that the evidence showed that the district court had complete discretion in granting a request which further demonstrated that a foreign discoverability requirement could not have been contemplated by Congress. *Id.* (citing S. REP. NO. 1580, at 7 (1964)).

<sup>144</sup> *Id.* at 2480-81. In its holding, the Court affirmed past decisions: See *In re Gianoli Aldunate*, 3 F.3d 54, 54 (2d Cir. 1993); *Four Pillars Enterprises Co., LTD, v. Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). It overruled the holding in *In re Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992), and *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1151 (11th Cir. 1988).

§1782(a) contained an implicit foreign discoverability requirement by reason of two policy considerations.<sup>145</sup> Intel asserted that granting a discovery request to obtain evidence not discoverable under a foreign state's laws would offend foreign governments and place foreign parties in a more advantageous position than U.S. parties.<sup>146</sup> As for the argument that granting a discovery request would offend foreign governments, the Court held that a foreign nation's limitations on discovery within its own territories cannot serve as a basis for a finding that it opposes aid from United States courts.<sup>147</sup> Furthermore, it held that a foreign tribunal's reluctance to request aid from U.S. courts may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a).<sup>148</sup> Therefore, the Court concluded that the policy issue of avoiding offense to foreign governments is insignificant in a case where a foreign tribunal was willing to accept the evidence discovered in the United States.<sup>149</sup>

The second policy consideration that the Court reviewed was maintaining parity between the litigants.<sup>150</sup> In its review of the second policy consideration, the Court held that district courts as well as foreign tribunals were able to maintain parity among the parties.<sup>151</sup> First, the Court determined that district courts were able to maintain parity by conditioning the relief upon the requesting party's reciprocal exchange of information.<sup>152</sup> Second, the Court held that foreign tribunals were capable of maintaining parity between the parties by placing conditions on the information they accept.<sup>153</sup> Therefore, the

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<sup>145</sup> *Intel Corp.*, 124 S. Ct. at 2481.

<sup>146</sup> *Id.* These policy issues were raised and accepted in *Asta Medica* as valid arguments for a finding of a foreign discoverability requirement. See *supra* text accompanying notes 58-59. However, they were rejected by the court in *In re Gianoli Aldunate*. See *supra* text accompanying note 78.

<sup>147</sup> *Intel Corp.*, 124 S. Ct. at 2481 (citing *In re Bayer*, 146 F.3d at 194).

<sup>148</sup> *Id.* Interestingly enough, the Commission in this case stated in its *amicus curiae* briefs that it did not need or want the assistance of U.S. courts. *Id.* at 2484. The Supreme Court was reluctant to accept this statement as an absolute refusal because the Commission did not state that if the information was obtained it would not allow AMD to present the evidence during the proceeding. *Id.* at 2481.

<sup>149</sup> *Id.* at 2482; see also *Gianoli Aldunate*, 3 F.3d at 59-60 (where the court upheld the ruling on this issue). Whereas, it abrogated the holding in *In re Asta Medica*, 981 F.2d at 7.

<sup>150</sup> *Id.* at 2481.

<sup>151</sup> *Intel Corp.*, 124 S. Ct. at 2482..

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Court held that since parity will be maintained by district courts as well as foreign tribunals, the policy of maintaining parity cannot serve as grounds for a finding that § 1782(a) imposed a foreign discoverability requirement.<sup>154</sup>

Lastly, the Supreme Court emphasized that § 1782(a) authorized, but did not require, a district court to grant discovery requests.<sup>155</sup> In determining whether and to what extent to honor a discovery request, the Court held that a court “may take into consideration the nature of the foreign tribunal, the character of proceedings abroad, and the receptivity of the foreign government of the court or agency abroad to U.S. federal court judicial assistance.”<sup>156</sup> In addition, a court may take into consideration whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States,”<sup>157</sup> and whether the request was unduly intrusive or burdensome on the requested party.<sup>158</sup> In short, the Court declined to incorporate requirements into § 1782(a) that were clearly removed or existed in neither the statute itself nor the legislative history.<sup>159</sup> For every assistance request, the Court held, a district court was required to take caution to make certain that a request was a legitimate request,<sup>160</sup> and for the purpose of using the evidence obtained in a proceeding in a foreign tribunal.<sup>161</sup> Upon completion of its analysis of the case, the Supreme Court affirmed the holding of the Ninth Circuit Court of Appeals and remanded the case to the lower court for further consideration utilizing the guidelines set forth in its decision.<sup>162</sup>

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<sup>154</sup> *Intel Corp.*, 124 S. Ct. at 2481. The Court declined to accept the policy consideration of maintaining parity as a basis for a finding of a foreign discoverability requirement. Thus, it affirmed the ruling in *Gianoli Aldunate*, see *supra* text accompanying note 78, and overruled the holding in *Asta Medica*. See *supra* text accompanying notes 58-59.

<sup>155</sup> *Id.* (citing *U.K. v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001)).

<sup>156</sup> *Id.* at 2483; see also *Litigation with International Aspects*, *supra* note 24, at 3788.

<sup>157</sup> *Intel Corp.*, 124 S. Ct. at 2483.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2472.

<sup>160</sup> *Id.* (requests that were neither used to circumvent the evidence gathering restrictions or policies of that foreign jurisdiction or the United States nor simply made for obtaining information from competitors).

<sup>161</sup> *Id.* at 2484.

<sup>162</sup> *Intel Corp.*, 124 S. Ct. at 2484.

## B. *The Dissenting Opinion*

Justice Breyer wrote a dissenting opinion and argued that the majority's opinion expanded the scope of § 1782(a) beyond Congress' intentions.<sup>163</sup> Justice Breyer found that in some countries private citizens were able to ask a court to review a criminal prosecutor's decision not to prosecute, or decisions made by a variety of non-prosecutorial, non-adjudicative bodies.<sup>164</sup> According to the majority's opinion, Justice Breyer argued, those private citizens were able to obtain evidence from the United States pursuant to § 1782(a) so long as they could show that the tribunal was reviewing a decision made by a "*first-instance decisionmaker*."<sup>165</sup> Instead, Justice Breyer proposed an interpretation of § 1782(a) that was subject to two categorical limitations.<sup>166</sup> First, if there was a serious doubt as to the characterization of an entity as a tribunal, an entity's characterization of its own functions should be given great deference by the reviewing court.<sup>167</sup> Second, discovery was not permitted if "(1) [a] private person seeking discovery would not be entitled to that discovery under foreign law, and (2) the discovery would not be available under domestic law in analogous circumstances."<sup>168</sup>

Application of either of the two principles would prevent the Court from granting assistance to AMD.<sup>169</sup> Justice Breyer first questioned the characterization of the DG-Competition by

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<sup>163</sup> *Intel Corp.*, 124 S. Ct. at 2485-86.

<sup>164</sup> *Id.* at 2487.

<sup>165</sup> *Id.* at 2486; see also *supra* notes 114, 117. Justice Breyer gave an example of the problem that may arise under the majority's interpretation of § 1782(a). He stated that, under the majority's opinion, "a British developer, hoping to persuade the British Housing Corporation to grant it funding to build a low-income housing development, could ask an American court to demand that an American firm produce information designed to help the developer obtain the British grant." *Id.*

<sup>166</sup> *Intel Corp.*, 124 S. Ct. at 2486. The dissent could not show that § 1782(a) implicitly contained the proposed limitations. *Id.* Thus, he urged the Court to exercise its supervisory powers which allowed the Court to proscribe rules of evidence and procedure that are binding on federal courts. *Id.* at 2487-88 (citing *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985)).

<sup>167</sup> *Id.* Justice Breyer argued that he was unable to find any reason why Congress would have intended for the courts to avoid giving any deference to the foreign entity's self-characterization.

<sup>168</sup> *Id.* The dissent believed that the second limitation which allowed district courts to consider the Federal Rules of Civil Procedure will prevent "discovery battles launched by firms simply seeking information from competitors."

<sup>169</sup> See *id.*

the Court as a tribunal.<sup>170</sup> He argued that the DG-Competition resembled a prosecuting authority that assigned the determination of whether to prosecute to non-judges.<sup>171</sup> This, Justice Breyer argued, was a strong indication that the DG-Competition was not a tribunal.<sup>172</sup> Furthermore, Justice Breyer was troubled by the Court's refusal to give deference to the European Commission's brief regarding its characterization as a non-tribunal. In its brief as *amicus curiae*,<sup>173</sup> the European Commission told the Court that it was not a "tribunal" under § 1782 (a) and if the Court determined that it was a tribunal "its ability to carry out its governmental responsibilities will be seriously threatened."<sup>174</sup> Justice Breyer wrote that the majority disregarded the European Commission's opinion and held that the DG-Competition was in fact a tribunal within the meaning of § 1782(a).<sup>175</sup> Justice Breyer argued that deference should be given to the European Commission's own opinion regarding its characterization as a tribunal or non-tribunal.<sup>176</sup> He declared that the majority, by ignoring the European Commission's opinion, incorrectly found that the DG-Competition was a tribunal within the meaning of § 1782(a).<sup>177</sup>

Justice Breyer further argued that applying his second limiting principle would compel the majority to dismiss the case.<sup>178</sup> Justice Breyer noted that AMD could not obtain the evidence in Europe, had it been located there, because all that AMD was able to do was file a complaint.<sup>179</sup> The investigation was con-

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<sup>170</sup> See *id.*; *Intel Corp.* at 2487-88.

<sup>171</sup> *Id.* at 2486-87. Justice Breyer failed to clarify whether an entity that lacks judges could ever constitute a tribunal within the meaning of § 1782(a).

<sup>172</sup> *Id.* at 2487.

<sup>173</sup> See *EC Amicus Curiae supra* note 100, at 1-2. The brief submitted to the Court was on behalf of the Commission as well as the DG-Competition.

<sup>174</sup> *Intel Corp.*, 124 S. Ct. at 2487 (citing *EC Amicus Curiae* at 2).

<sup>175</sup> *Id.* at 2477. Justice Breyer was concerned that by ignoring the Commission's opinion, the Court undermined the comity interest § 1782 was designed to serve, *Id.* at 2487, and disregarded "the maxim that we [the Court] construe statutes so as to help the potentially conflicting laws of different nations work together in harmony. . . ." *Id.* (quoting *F. Hoffmann-LaRoche Ltd. v. Empagran S. A.*, 124 S. Ct. 2359, 2366 (2004)) (internal quotation omitted).

<sup>176</sup> *Id.* at 2487.

<sup>177</sup> *Id.* at 2486.

<sup>178</sup> *Id.* at 2487.

<sup>179</sup> *Intel Corp.* at 2487.

ducted by the DG-Competition and not by AMD.<sup>180</sup> Furthermore, AMD, as a non-litigant, was not able to obtain the documents in the United States since AMD did not meet the conditions by which non-litigants may obtain the documents that AMD sought.<sup>181</sup> Therefore, Justice Breyer concluded, that Congress' intent may only be satisfied by interpreting § 1782(a) to include, at a minimum, the two principle limitations proposed.<sup>182</sup>

#### IV. ANALYSIS OF INTEL V. AMD

Prior to analysis, it is important to emphasize two aspects of the legislative history of § 1782(a). First, since Congress' initial legislation<sup>183</sup> in support of assisting foreign tribunals and litigants in obtaining information located within the territories of the United States, Congress has continuously enacted legislation to broaden the scope of this assistance.<sup>184</sup> Second, the dual aims of the 1964 amendment to § 1782(a) were to "clarify] and liberaliz[e] existing U.S. procedures for assisting foreign tribunals and litigants" in obtaining evidence located in the United States<sup>185</sup> and, Congress *hoped* that its legislation would encourage foreign countries to enact similar statutes.<sup>186</sup> Bearing in mind these two aspects, as well as the statute and its legislative history, it is evident that the Supreme Court in *Intel Corp. v. AMD* correctly interpreted § 1782(a).

First, the Supreme Court defined a "tribunal" to include any adjudicative body that "acts as a first instance decision-maker."<sup>187</sup> The Court further held that the rights of the complainant to submit to the adjudicative body information in

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<sup>180</sup> *Id.* AMD was restricted to filing a complaint. The investigative stage was performed by the DG-Competition.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 2486.

<sup>183</sup> See Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855); see also *supra* notes 14-16 and accompanying text.

<sup>184</sup> The Act of March 3, 1863 was the only Act passed by Congress that restricted the assistance to foreign tribunals. See Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769-70 (1863). The 1948, 1949 and 1964 amendments clearly demonstrated Congress' intent to expand the scope of § 1782(a). See *supra* notes 20, 22, 32-34 and accompanying text.

<sup>185</sup> Litigation with International Aspects, *supra* note 24, at 3788 and accompanying text.

<sup>186</sup> *Id.* at 3783.

<sup>187</sup> *Intel Corp.*, 124 S. Ct. at 2472-73.

support of its allegations and appeal its decision may serve as proof that the proceeding was before a body that qualifies as a tribunal under §1782(a).<sup>188</sup> The legislative history demonstrates that Congress intended to remove the requirement that a proceeding must be before a conventional court prior to the granting of assistance.<sup>189</sup> Indeed, Congress unequivocally stated that judicial assistance extended to administrative tribunals as well as quasi-judicial agencies.<sup>190</sup> In addition, there is no evidence to indicate that Congress intended to limit the assistance to adjudicative bodies that were comparable to conventional courts. Therefore, in light of the legislative history, the Court correctly held that an adjudicative body that “*acts as a first instance decision maker*” was a tribunal within the meaning of § 1782(a).<sup>191</sup>

Second, prior to the 1964 amendment, § 1782(a)’s judicial assistance was limited to requests made by foreign tribunals.<sup>192</sup> Congress, through its 1964 amendment to § 1782(a), extended the reach of assistance under § 1782(a) by permitting requests made by “any interested person.”<sup>193</sup> The Supreme Court interpreted an “interested person” to mean a person “*with reasonable interest in obtaining judicial assistance*.”<sup>194</sup> It held that a complainant’s participation rights such as triggering an investigation, and submission of evidence for consideration and appeal qualified the complainant as an “interested person” within the meaning of § 1782(a).<sup>195</sup> Since Congress intended to clarify and liberalize existing U.S. procedures for assisting foreign and international tribunals and litigants,<sup>196</sup> and the lack thereof of

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<sup>188</sup> *Id.* at 2477.

<sup>189</sup> *Litigation with International Aspects*, *supra* note 24, at 3788 and accompanying text. Congress removed the requirement that a proceeding must be “in any court in a foreign country” and replaced it with “in a foreign or international tribunal.” *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Intel Corp.*, 124 S. Ct. at 2472-73 (emphasis added).

<sup>192</sup> See Act of June 25, 1948, ch. 646, § 1782(a), 62 Stat. 869 (1948) (the Act allowed assistance to requests by foreign courts only).

<sup>193</sup> Compare Act of June 25, 1948 *supra* note 20, with 28 U.S.C. § 1782(a), *supra* note 13.

<sup>194</sup> *Intel Corp.*, 124 S. Ct. at 2478 (emphasis added).

<sup>195</sup> *Intel Corp.*, 124 S. Ct. at 2478.

<sup>196</sup> See *Litigation with International Aspects*, *supra* note 24, at 3783. Congress intended to liberalize the statute by expanding its scope.

any evidence to the contrary,<sup>197</sup> it cannot be said that the Court in *Intel Corp. v. AMD* improperly held that an interested person denoted a person “with reasonable interest in obtaining judicial assistance.”<sup>198</sup>

Third, judicial assistance was permissible only if the discovery requested was “for use in a proceeding in a foreign or international tribunal.”<sup>199</sup> The Court held that since the DG-Competition was a tribunal within the meaning of § 1782(a) and AMD intended to use the documents in the proceeding before the DG-Competition, AMD’s intended use constituted “for use in a proceeding” under § 1782(a).<sup>200</sup> Furthermore, the Court found that if AMD appealed to the Court of First Instance or the European Court of Justice, AMD was limited to presenting evidence that was before the DG-Competition. It held that the restriction placed on the nature<sup>201</sup> of evidence that may be presented before the Court of First Instance and the European Court of Justice served as an additional ground for a finding that the evidence sought was “for use in a proceeding before a foreign or international tribunal.”<sup>202</sup>

On the issue of whether the evidence was “for use in a proceeding,” the Court correctly held that AMD’s intent to use the evidence in the proceeding before the DG-Competition was “for use in a proceeding” under § 1782(a).<sup>203</sup> The Court’s second line of reasoning, that the evidence is for use in a proceeding because upon appeal, AMD could only present evidence that was before the DG-Competition, obscured the requirement of “for use in a proceeding.” The Court implied that in the event that the DG-Competition was not a tribunal under § 1782(a), AMD

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<sup>197</sup> There is no evidence that Congress intended to restrict the assistance afforded by § 1782(a) to “litigants” or “parties.” In actuality, Congress did not use the words litigant or party in the text of the statute. See, e.g., 28 U.S.C. § 1782(a). This goes to indicate that Congress intended to permit assistance to persons who were not litigants or parties per se. See *Litigation with International Aspects*, *supra* note 24, at 3782; see also, *supra* notes 119-122 and accompanying text (where the Court declined to accept Intel’s argument that the word “litigant” in the caption of § 1782(a) limited the assistance to litigants).

<sup>198</sup> *Intel Corp.*, 124 S. Ct. at 2478 (emphasis added).

<sup>199</sup> *Id.* at 2474; see also 28 U.S.C. § 1782(a).

<sup>200</sup> *Intel Corp.*, 124 S. Ct. at 2479.

<sup>201</sup> A determination of the nature of evidence turns on whether the evidence was presented before the DG-Competition. *Id.* at 274.

<sup>202</sup> *Id.* at 2474.

<sup>203</sup> *Id.*

may nonetheless seek judicial assistance under § 1782(a) because AMD was entitled to an appeal and would have *inevitably used* the evidence in a proceeding before an entity that qualified as “tribunals” under § 1782(a). Furthermore, the Supreme Court appeared to express the opinion that if AMD was unable to present the evidence before the DG-Competition, AMD was entitled to assistance even prior to an appeal.<sup>204</sup> While the Court properly found that the evidence AMD sought was “for use in a proceeding,” its second premise, however, left lower courts with ambiguities as to the interpretation of “for use in a proceeding.”<sup>205</sup>

Fourth, the Court held that § 1782(a) did not require a proceeding to be pending or imminent.<sup>206</sup> It determined that § 1782(a) necessitated “*a depositive ruling be within reasonable contemplation.*”<sup>207</sup> On this issue, legislative history does not show Congress’ motive for removing the word “pending” from the statute.<sup>208</sup> Congress’ omission of the word “pending” from the statute and its failure to supplement it with another limiting statement could only lead to the conclusion that Congress intended to remove the “pending” requirement from § 1782

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<sup>204</sup> The second issue is distinguishable from the first. The first issue concerns a proceeding before a foreign entity in which the tribunal did not meet the requirements of a tribunal under § 1782(a). The second issue, however, deals with a foreign entity that was a tribunal within the meaning of § 1782(a). But the requesting party was unable to present the evidence before the entity due to procedural issues (it is irrelevant why the requesting party was unable to present the evidence).

<sup>205</sup> The proper reading of the statute should be that the evidence sought must be for use in a *current* proceeding. Therefore, the right to appeal to a tribunal should not by itself entitle the requesting party to judicial assistance. Rather, the Court should be required to determine whether the requesting party met the requirements of § 1782(a) for the *current* proceeding. While AMD was permitted to seek judicial assistance under § 1782(a), it was improper for the Court to hold that AMD was entitled to judicial assistance under its second premise. See 28 U.S.C. § 1782(a) (the plain meaning of the statute reads “for use in a proceeding” which leads a reasonable person to conclude that the use must be in the current proceeding).

<sup>206</sup> *Intel Corp.*, 124 S. Ct. at 2480.

<sup>207</sup> *Id.* (emphasis added).

<sup>208</sup> Compare 28 U.S.C. § 1782(a) *supra* note 13, with Act of June 25, 1948, ch. 646, § 1782(a), 62 Stat. 869 (1948) (the word “pending” was omitted from the 28 U.S.C. § 1782(a)).

(a).<sup>209</sup> Therefore, the Court correctly held that § 1782(a) did not impose a requirement that the proceeding be pending for a successful invocation of the statute.

Fifth, the Supreme Court held that § 1782(a) did not include a foreign discoverability requirement compelling the requesting party to show that the evidence sought was obtainable in the foreign jurisdiction.<sup>210</sup> An examination of the legislative history as well as the text of the statute confirms that Congress did not intend to impose a blanket foreign discoverability rule. Neither the statute nor its legislative history indicated that a party seeking judicial assistance under § 1782(a) was required to show that the evidence sought would have been discoverable in the foreign country where the proceeding was taking place.<sup>211</sup> Thus, the Court properly concluded that § 1782(a) did not impose a foreign discoverability requirement. However, the Court improperly declined to give deference to the Commission's opinion when determining whether the Commission was a tribunal within the meaning of § 1782(a).

In its *amicus curiae*, the Commission stated that it was not a "tribunal" within the meaning of § 1782(a) and if the Court determined that it was a tribunal "its ability to carry out its governmental responsibilities will be seriously threatened."<sup>212</sup> The Court ignored the Commission's determination of its own characterization as a non-tribunal and held that it was a tribunal under § 1782(a).<sup>213</sup> The Court held that federal lower courts should not give deference to the opinion of a foreign entity if the foreign entity was willing to accept the evidence.<sup>214</sup> However,

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<sup>209</sup> See *Intel Corp.*, 124 S. Ct. at 2479-80; see also *In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1151 (11th Cir. 1988).

<sup>210</sup> *Intel Corp.*, 124 S. Ct. at 2480-81.

<sup>211</sup> There is nothing in the text of the statute to indicate that § 1782(a) contained a foreign discoverability requirement. The only indication that such a requirement existed is in the legislative history which states that Congress *hoped* that by enacting the 1964 amendment, foreign countries will enact similar statutes. See *Litigation with International Aspects* text accompanying note 32. This, however, cannot serve as a basis for finding a foreign discoverability requirement since it clearly shows that Congress *hoped* that other countries would follow suit. It did not, however, limit the assistance to countries that actually enact similar statutes. 28 U.S.C. § 1782(a) (2004).

<sup>212</sup> *Intel Corp.*, 124 S. Ct. at 2487 (citing EC *Amicus Curiae* at 2).

<sup>213</sup> *Id.* at 2487.

<sup>214</sup> *Id.* at 2484.

federal lower courts should give deference to a foreign entity's opinion if the entity indicated that it will not accept the evidence obtained pursuant to § 1782(a).<sup>215</sup> Deference should be given to an entity's opinion so long as a foreign entity declined to accept the evidence and the requesting party did not intend to appeal a foreign entity's decision not to accept the evidence.<sup>216</sup> Should a requesting party indicate that it intended to appeal a foreign entity's decision, the Court held, federal lower courts should decline to give deference to a foreign entity's opinion.<sup>217</sup>

The Court's ruling that deference should not be given unless a foreign entity declines to accept the evidence and the requesting party did not intend to appeal the foreign entity's decision offends foreign courts and governments. Federal lower courts should be permitted to consider a foreign entity's opinion regarding the entity's own characterization as a tribunal or non-tribunal. Permitting federal lower courts to give some deference to a foreign entity's opinion reduces the risk of U.S. courts offending foreign tribunals and governments and, promotes Congress' aim of reciprocity intended in its enactment of the 1964 amendment to §1782(a).<sup>218</sup>

Lastly, the Court's decision with regards to the policy consideration of maintaining parity among litigants placed foreign countries and tribunals in a detrimental position. The Court assigned the duty of maintaining parity to district courts and foreign tribunals.<sup>219</sup> The Court held that a district court may maintain parity between the parties by conditioning the relief it grants.<sup>220</sup> In addition, the Court held that foreign tribunals may play a role in maintaining parity by placing limitations on the evidence they accept.<sup>221</sup> This holding, however, required

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<sup>215</sup> *Id.* at 2479. An entity's refusal to admit evidence raises the question of whether a foreign tribunal's refusal to accept evidence obtained in the US prevents the requesting party from obtaining judicial assistance because it was clear that it was not "for use in a proceeding."

<sup>216</sup> *Id.* at 2478.

<sup>217</sup> *Id.*

<sup>218</sup> The concern was that offending foreign countries will prevent them from enacting statutes similar to § 1782(a). See *Litigation with International Aspects*, *supra* note 24, at 3783.

<sup>219</sup> *Intel Corp.*, 124 S. Ct. at 2482.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

foreign tribunals to discriminate between litigants,<sup>222</sup> or in the alternative, foreign countries to alter their rules of evidence.<sup>223</sup> Delegation of the task of maintaining parity between litigants to foreign tribunals will directly collide with Congress' intent in passing the 1964 amendment: encouraging foreign countries to enact similar laws.<sup>224</sup>

While the Supreme Court's interpretation of § 1782(a) was accurate, a more careful consideration of policy issues would have been appropriate.<sup>225</sup> Deference should be given to a foreign entity's determination of its characterization as tribunal or non-tribunal.<sup>226</sup> In addition, federal lower courts must pay careful attention to the impact that its characterization of a foreign entity may cause on the entity.<sup>227</sup> Furthermore, although a foreign entity's reluctance to seek assistance should not determine the outcome of a federal court's determination of whether to grant assistance, federal courts must take into account a foreign entity's motive for declining to seek assistance. Lastly, the

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<sup>222</sup> The Court requested from foreign tribunals to maintain parity by conditioning their acceptance of evidence. *Id.* In some instances, the Court asked foreign tribunals to limit their acceptance of evidence obtained pursuant to § 1782(a). Therefore, if a party obtained evidence pursuant to § 1782(a), it exposed itself to a risk that the foreign tribunal would decline to accept the evidence. However, had the party obtained the same evidence from another source the evidence would be admissible. This policy creates the possibility of discrimination between a litigant who obtains the evidence pursuant to § 1782(a) and a litigant who obtains the same evidence by other means.

<sup>223</sup> Foreign countries may be required to alter their rules of evidence to differentiate between evidence obtained pursuant to § 1782(a) and other methods of obtaining evidence as to avoid discrimination between litigants in similar situations. Note that the only difference is that one received evidence pursuant to § 1782(a).

<sup>224</sup> The Court's policy may create resentment against U.S. courts. In such a case, it will be unlikely that foreign countries will enact similar laws as the United States. See *Litigation with International Aspects*, *supra* note 24, at 3783.

<sup>225</sup> Although the Court disregarded the Commission's opinion, it is important to note the rationale behind the Court's decision. The Court seemed to express the opinion that giving deference to foreign tribunals' opinions was akin to permitting foreign tribunals to interpret § 1782(a). Interpreting § 1782(a), the Court indicated, was assigned solely to federal, not foreign courts.

<sup>226</sup> Giving deference to a foreign tribunal's determination of its status will further the goal of Congress: to encourage foreign countries to enact similar laws.

<sup>227</sup> If federal lower courts work in concert with foreign tribunals, foreign countries will be more likely to enact similar laws to assist U.S. litigants in litigating claims against foreign litigants in U.S. Courts.

task of maintaining parity should be delegated solely to federal lower courts and not foreign entities.<sup>228</sup>

## V. CONCLUSION

The Supreme Court interpreted 28 U.S.C. § 1782(a) to permit a district court, through its discretionary powers, to grant assistance in obtaining evidence located within the territories of the United States to foreign and international tribunals and any person with reasonable interest in obtaining judicial assistance, for use in a proceeding before an adjudicative body acting as a first-instance decision-maker. The Court further held that 28 U.S.C. § 1782(a) did not require a pending proceeding; rather only that a dispositive ruling be within reasonable contemplation. Nor did § 1782(a) require a showing that the evidence sought would have been discoverable in the foreign country.

The *Intel Corp. v. AMC* decision considerably broadened the availability of discovery in aid of foreign proceedings. For foreign litigants, the decision has given them a powerful tool in obtaining evidence located in the United States. In contrast, for U.S. litigants, the decision has exposed them to the possibility of numerous intrusive and burdensome discovery requests by competitors, and placed them in a more detrimental position than their opponents when litigating abroad. Federal courts were required to determine whether and to what extent to grant discovery requests while foreign tribunals were asked not to interfere. In light of the Court's interpretation of § 1782(a), the legislature may be compelled to amend the statute by incorporating into § 1782(a) a foreign discoverability requirement to provide more protection for U.S. litigants, and require federal courts to give deference to the opinions of foreign tribunals to further encourage foreign countries to pass similar statutes.

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<sup>228</sup> Assigning the task of maintaining parity to federal courts only will remove the burden on a foreign tribunal to choose between its own laws and maintaining parity among the parties.