

# 'Extraterritorial' Discovery and U.S. Judicial Assistance: Promoting Reciprocity or Exacerbating Judiciary Overload?

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## I. Introduction

The great majority of discovery requests from foreign parties appearing before U.S. courts—including pre-trial discovery—have been carried out without provoking jurisdictional conflict or international confrontations, and without necessitating resort to the Hague Convention on the Taking of Evidence Abroad (Hague Evidence Convention).<sup>1</sup> Most of these discovery requests were conducted no differently than as if domestic parties had been involved. Those requests that predated the *Restatement (Third) of Foreign Relations Law of the United States*<sup>2</sup> in its definitive form, or failed to espouse the Restatement's approach that such discovery should be initiated by court order, did not require the intervention of courts or other authorities outside U.S. territory.<sup>3</sup> Nonetheless, the 'extraterritorial' application of domestic economic legislation, particularly U.S. export controls, antitrust, and related discovery orders, continues to arouse concern at the level of foreign governments and is an ongoing challenge to the international legal community. The recent decision of the United States Court of Appeals for the Ninth Circuit in *Advanced Micro Devices*,

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1. Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (replacing art. 8 of the Civil Procedure Convention of 1896, and arts. 8–16 of the Conventions of 1905 and 1954). See also Cynthia Day Wallace, 'Extraterritorial' Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment, 5 J. INT'L ECON. L. 353, 362–92 (2002).

2. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT (THIRD)].

3. See Guy Miller Struve, *Discovery from Foreign Parties in Civil Cases Before U.S. Courts*, 16 N.Y.U. J. INT'L L. & POL. 1101–03, 1105, 1107, 1113 (1984).

*Inc. v. Intel Corporation*<sup>4</sup> should help to reassure foreign tribunals and litigants that U.S. courts continue to expand their tradition of lending assistance to foreign jurisdictions in international discovery, even at some cost to themselves.

In *AMD v. Intel*, the Ninth Circuit held for the first time that a U.S. federal district court could order discovery on behalf of a complainant in an antitrust investigation of the Commission of the European Communities (EC). Reversing the district court, the Ninth Circuit based their decision on grounds that an EC Commission investigation is related to a quasi-judicial or judicial proceeding and thus qualifies as a 'proceeding before a tribunal' within the meaning of section 1782 of Title 28 of the United States Code.

This reasoning clearly has far-reaching implications for future competition investigations by the EC Commission involving U.S. parties, because it opens the door to the use of U.S. courts by the EC to obtain U.S.-based documents and other evidence by complainants ("any interested person") in EC antitrust investigations and by the EC Commission (the tribunal) itself. Under EC rules, the complainant would himself have no evidence-gathering powers—no compulsory means of directly obtaining documents or other information from the other parties, either in the European Community or in the United States. And yet discovery under section 1782 holds no specific requirement for its application that similar discovery must be allowable under the foreign jurisdictions' rules, and this is still not a settled question among the courts of appeal, which have applied different interpretations on this question. The Ninth Circuit has, by its latest *AMD v. Intel* decision, tipped the balance, perhaps even decisively, toward the non-necessity of proving discoverability in the foreign forum as a prerequisite to judicial assistance by a U.S. court in related foreign proceedings. The present article looks at both sides of the foreign-discoverability debate in the tradition of judicial assistance to foreign discovery in U.S. courts.

## II. U.S. Assistance to 'Extraterritorial' Discovery in American Courts

While the groundswell of opposition to broad U.S. discovery practices gives a high profile to U.S. jurisdictional reach abroad, clearly not all extraterritorial reach emanates from U.S. courts. Observers have even remarked that foreign blocking statutes—promulgated precisely to frustrate foreign (read "U.S.") discovery orders—themselves are being applied extraterritorially:

A double standard of enforcement is unacceptable. The U.S. cannot give preferential treatment to foreign investors [. . . or] accord foreign investors a privilege of secrecy that it does not recognize for its own citizens [. . . or] permit foreign investors to violate its laws with impunity while holding its citizens accountable for violations of the same laws [.] The securities laws apply to anyone engaged in conduct in the U.S. capital markets. Investors who come into the U.S. and take advantage of [her] markets cannot expect the protections of secrecy or blocking laws to follow them.

It is unacceptable that the secrecy or blocking laws of one nation will apply to a transaction that occurs within another nation. *This would constitute an extraterritorial application of the secrecy of blocking nation's laws.* [Investors] cannot have both the benefits of one nation's markets and of another nation's secrecy laws.<sup>5</sup>

4. *Advanced Micro Devices v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002).

5. John M. Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 INT'L LAW. 89, 92 (1984) (Emphasis added).

In addition to the increasing use of extraterritorial reach by some of those nations who protected themselves against the same by means of blocking statutes, little fanfare is given to the fact that the liberality of U.S. discovery laws has been extended to assist foreign parties to achieve discovery in the United States. Apart from certain protected areas such as security-related export controls and business confidentiality, any person within the United States is at liberty to “voluntarily giv[e] his testimony or statement, or produc[e] 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.”<sup>6</sup> This guarantee is codified in section 1782,<sup>7</sup> whose legislative history clarifies that it merely affirms a “pre-existing freedom.”<sup>8</sup> This freedom is explicitly and almost verbatim re-affirmed in the Uniform Interstate and International Procedure Act,<sup>9</sup> “in order to stress the large degree of freedom existing in this area.”<sup>10</sup>

Since as early as 1855, U.S. federal courts have been empowered by federal statute<sup>11</sup> to grant judicial assistance to foreign tribunals and litigants in obtaining evidence located within U.S. territory.<sup>12</sup> In 1964, in order to clarify, liberalize, and enhance such assistance to foreign investigations, section 1782 of the U.S. Code, along with rule 28(b) of the Federal Rules of Civil Procedure,<sup>13</sup> was substantially amended.<sup>14</sup> The Code’s section 1782 provision, entitled “Assistance to foreign and international tribunals and to litigants before such tribunals” was broadened under the 1964 amendments to include the production of documents as well as simply the giving of testimony, as was the case previous to the amendments. In addition, the 1964 amendments replaced the words “foreign court” by the words “foreign and international tribunals,”<sup>15</sup> wording that eventually may have proved decisive to the EC Commission’s success in applying section 1782 in *AMD v. Intel*.

The 1964 amendments also eliminated the word “pending” as a prerequisite to the rendering of disclosure assistance to a proceeding in a foreign or international tribunal and

6. FED. R. CIV. P., 28 U.S.C. § 1782(b) (2003).

7. *Id.* §§ 1781–1782, amended by the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96–349, 94 Stat. 1156 (1980) (amendment did not affect this provision).

8. S. REP. No. 88–1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3789–90.

9. Uniform Interstate and International Procedure Act § 302(b), 13 U.L.A. 492 (1980).

10. *Id.* at cmt.

11. 10 Stat. 630, ch. 140 s.2 (Mar. 2, 1855).

12. See RESTATEMENT (THIRD), *supra* note 2, § 474 (discussing international judicial assistance in taking evidence in the United States in aid of foreign proceedings). See also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 921–34 (3rd ed. 1996); 10 Stat. 630, ch. 140 s.2 (Mar. 2, 1855), at 893–94 (discussing discovery pursuant to customary international judicial assistance generally).

13. FED. R. CIV. P., 28 U.S.C. § 1782(b) (2003).

14. See S. REP. No. 88–1580 (for the legislative history of the amendments); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989) (providing a summary of these amendments). See also *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988); Tariq Mundiya, *US Court Invites Foreign Litigants to use US Discovery Laws*, 42 INT’L & COMP. L.Q. 356 (1993) (providing an excellent summary of current practice and case law on section 1782, and much of the material on which the following analysis is based); Gilbert Fouché & Elliott E. Polebaum, *Discovery in the US in Aid of Foreign Litigation Under Section 1782*, 24 INT’L BUS. LAW. 415 (1996).

15. 28 U.S.C. § 1782(a), app. H (2003). See Morris H. Deutsch, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. 1782 for Use in a Foreign or International Tribunal*, 5 B.C. INT’L & COMP. L. REV. 175, 182–88, 192–93 (1982) (giving an analysis of the “tribunal” issue—why the term was selected by Congress and how its interpretation is ambiguous).

broadened the discretion of district courts to act on foreign assistance requests. Further, "any interested person" was added to the previously solely entitled foreign court (now "tribunal"), thus permitting private parties and foreign officials to make application for a discovery order.

The declared objective of the amendments was to improve judicial procedures for "[o]btaining evidence in the United States in connection with proceedings before foreign and international tribunals."<sup>16</sup> The legislative history states another objective as being to "adjust [ . . . ] [American] procedures to the requirements of foreign practice and procedure"<sup>17</sup> and, although the statute contains no reciprocity clause, to prompt other countries to follow the lead of the United States and adjust their own procedures.<sup>18</sup>

As currently understood, section 1782 "permits a district court to compel a person to give testimony or produce documents for use in a proceeding in a foreign tribunal."<sup>19</sup> U.S. federal courts have a reasonable degree of discretion in determining whether to grant the assistance sought under section 1782 and whether to actually issue an order.<sup>20</sup> At the same time, they traditionally tended to interpret their discretion as tempered by an implicit requirement that a foreign litigant may seek such discovery only if the information requested would also be discoverable under the law of the foreign forum. Indeed, a majority of the federal courts have interpreted the legislative history in this manner.<sup>21</sup>

Contrary to the majority of case law on the subject, however, some courts have held that section 1782 discovery did *not* require discoverability of the evidence in the foreign forum prior to a U.S. court granting assistance. Notably in *Application of Asta Medica, S.A.*,<sup>22</sup> the district court, rejecting the contrary decisions, stated that:

There is absolutely no evidence in the statute, the legislative history or the academic commentary explaining the statute's enactment that suggests any congressional desire to impose on American courts the burden of investigating foreign law on matters such as admissibility of the evidence, its discoverability in the American or any other sense, or the authority of foreign tribunals to order such testimony or documents in aid of their own judicial proceedings.<sup>23</sup>

The United States Court of Appeals for the First Circuit reversed the district court decision, however, reconfirming the prevailing notion that the information sought should be shown to be discoverable if it were located in the forum of the primary proceedings. The court pointed out the dangers of a ruling that would expand the scope of discovery for foreign litigants in the United States, while restricting the American litigant abroad to the narrower foreign discovery practices.<sup>24</sup> Moreover, in the opinion of the circuit court,

16. S. REP. NO. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782.

17. See *id.* at 3788. See also *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5 (1st Cir. 1992).

18. See S. REP. NO. 88-1580, reprinted in 1964 U.S.C.C.A.N. 3782, at 3783.

19. *In re Jenoptik AG*, 109 F.3d 721, 723 (Fed. Cir. 1997).

20. See S. REP. NO. 88-1580, reprinted in 1964 U.S.C.C.A.N. 3782, at 3788.

21. See, e.g., *In re Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75 (E.D. Pa. 1980); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985); *In re Application of Sumar*, 123 F.R.D. 467, 469 (S.D.N.Y. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156.

22. *In re Application of Asta Medica, S.A.*, 981 F.2d at 5.

23. *In re Application of Asta Medica, S.A.*, 794 F. Supp. 442, 446 (D. Me. 1992) *rev'd*, 981 F.2d 1 (1st Cir. 1992).

24. See *In re Application of Asta Medica, S.A.*, 981 F.2d at 5.

such a ruling could lead to the use of section 1782 by foreign litigants to circumvent their own national laws and procedures and thereby obtain information not available in the foreign forum, opening the door to potential international conflict at the legislative level.<sup>25</sup> The First Circuit accordingly held that a court's discretion is limited by a discoverability analysis under the relevant foreign law,<sup>26</sup> arguing that the discretion available under section 1782 should be governed by an *implicit* requirement that the information sought by the foreign litigant must be discoverable in the foreign forum. Other courts of appeals, notably the Eleventh Circuit in *In re Letter of Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*,<sup>27</sup> have similarly held that a threshold showing of discoverability must be shown by a foreign applicant under section 1782.<sup>28</sup>

Even the circuit courts of appeals, however, are not all in agreement on this position. The United States Court of Appeals for the Second Circuit has found the requirement to show discoverability in the foreign proceeding not accurately to reflect either the text or the legislative history of the statute, and has accordingly adopted the opposite view to that in the ultimate *Asta Medica* decision, expressly rejecting any threshold requirement for discoverability, in support of the liberalization objectives of section 1782. The Second Circuit has emphasized that since the creation of the 1964 amendments, the clear statutory language imposes only three prerequisites to section 1782 discovery, and these pertain to (1) the location of the person from whom discovery is sought, (2) the intended use of the discovery, and (3) the suitability of the applicant.<sup>29</sup> The position of the Second Circuit is perhaps best illustrated by the 1992 decision, *In re Application of Malev Hungarian Airlines*.<sup>30</sup> This case has important general implications for section 1782 applications.

In *United Technologies International, Inc. v. Malev Hungarian Airlines*,<sup>31</sup> Pratt & Whitney, a U.S. aircraft engine producer, brought a breach-of-contract action against Malev Hungarian Airlines in a Hungarian court for non-performance of an alleged multimillion-dollar sales contract. Malev, relying on the amended section 1782, in accordance with the U.S. Federal Rules of Procedure, quickly made application for a "broad United States-style discovery"<sup>32</sup> order in the jurisdiction of the American plaintiff, giving no prior notice to either the Hungarian court or Pratt & Whitney. The Connecticut federal district court denied the request, but this response was overruled by the Second Circuit over the strong dissent of Judge Feinberg.

The Second Circuit majority held that nothing in the text of section 1782 appeared to support a "quasi-exhaustion" of discovery requirements of the foreign forum,<sup>33</sup> and it was not disposed to implying extra-statutory restrictions.<sup>34</sup> In the reasoning of the majority, the clear wording of section 1782 did not require that a foreign court first be approached for

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25. *See id.* at 6.

26. *See id.*

27. Request for Assistance, *supra* note 14.

28. *See Fouché & Polebaum, supra* note 14, at 417 (providing a number of such cases).

29. *See In re Application of Aldunate*, 3 F.3d 54 (2d Cir. 1993), *cert. denied sub nom.* Foden v. Aldunate, 114 S. Ct. 443 (1993).

30. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), *cert. denied sub nom.* United Technologies Int'l v. Malev Hungarian Airlines, 506 U.S. 861 (1992).

31. *United Technologies Int'l*, 506 U.S. at 861.

32. *See In re Application of Malev Hungarian Airlines*, 964 F.2d at 105.

33. *See id.* at 100.

34. *See Fouché & Polebaum, supra* note 14, at 418.

such an order, as required by the district court. Neither did it require that the Hungarian court itself make the request, since "the application of any interested person" has been allowed subsequent to the 1964 revision, not only in the precise wording of the statute, but also in the legislative history, case law, and critical commentaries.<sup>35</sup> The majority also reasoned that the twin purposes of section 1782, as articulated in the legislative history—that of supporting a policy of "improving procedures for assistance to foreign and international tribunals. . ." and that of "prompting foreign courts to act similarly based on [the United States'] own generous example"<sup>36</sup>—would not be served if the discovery request were denied. Lastly, the appellate majority found the district court erred in assuming that it would be responsible for overseeing reciprocal discovery from *Malev* based on the argument that reciprocity conditionality was never the intent of Congress.<sup>37</sup>

The main controversy that ensued, embodied in dissenting Judge Feinberg's reasoning, revolved largely around three basic concerns. First, was the fact that the *Malev* decision could lead to the result that "any interested person" eligible to apply for a discovery order directly under section 1782 could abuse that privilege to circumvent the relevant foreign (and characteristically less liberal) laws, and thus bypass available discovery practice and procedures in the jurisdiction in which the main action is being litigated, perhaps even "supplanting" the foreign procedures.<sup>38</sup>

The second concern was that American parties to such proceedings could be put at a serious disadvantage *vis-à-vis* their foreign counterparts, since U.S. courts do not limit discovery to information that can be presented as evidence at trial, but open it up to all information that appears "reasonably calculated to lead to the discovery of admissible evidence."<sup>39</sup> This reasoning could mean that, following *Malev*, U.S. courts would be bound to compel the production of documents for a foreign tribunal in cases where the very materials sought were not discoverable under the law of that forum.<sup>40</sup> Much the same reasoning as that expressed by dissenting Judge Feinberg in *Malev* in fact went into the decision of the First Circuit Court of Appeals the same year in *Asta Medica*.<sup>41</sup>

Even the *Malev* majority noted that the Federal Rules of Civil Procedure allow the court to prescribe the nature and manner of discovery.<sup>42</sup> It suggested that the district court might consider requiring *Malev* to show that the discovery was unobtainable by other more expedient means, such as through the Hungarian court itself, which might in turn be required to make a determination as to which requests were truly relevant prior to seeking discovery in a U.S. district court.<sup>43</sup> Presumably, the district court was similarly empowered to require *Malev* to show that the discovery sought was actually necessary and that such discovery would in fact be admissible under the *lex fori*.

35. See *In re Application of Malev Hungarian Airlines*, 964 F.2d at 101.

36. *Id.* at 100.

37. See *id.* at 101. See also *In re Application of Asta Medica, S.A.*, 981 F.2d at 1; *In re Application of Asta Medica*, 794 F. Supp. at 446.

38. See *In re Application of Malev Hungarian Airlines*, 964 F.2d at 105.

39. FED. R. CIV. P., *supra* note 6, rule 26(b)(1).

40. See, e.g., *In re Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. at 75 (U.S. court holding denying discovery sought under section 1782 on grounds that it had not been established that the materials requested were discoverable under South African law).

41. See *In re Application of Asta Medica, S.A.*, 981 F.2d at 1. See also *Mundiya*, *supra* note 14, at 365-66.

42. See FED. R. CIV. P., *supra* note 6, rules 26(b)(1), 26(c). See *In re Application of Malev Hungarian Airlines*, 964 F.2d at 102.

43. See *In re Application of Malev Hungarian Airlines*, 964 F.2d at 102.

The third major concern over the *Malev* decision was that U.S. courts, with already burdensome caseloads, could become the "discovery masters" of the world. These courts could be called upon by all to do their discovery work worldwide, wherever an American manufacturer or other party was subject to the jurisdiction of U.S. courts. Any "interested person" could "simply come in and ask for almost unlimited disclosure and discovery . . . under the supervision of the courts of this country which would bring with it a burden beyond present contemplation."<sup>44</sup> In addition, in order for the U.S. court to determine discoverability and admissibility of evidence under the foreign law, it would have to assume enormously burdensome supplementary investigatory research into "the authority of foreign tribunals to order such testimony or documents in aid of their own judicial proceedings."<sup>45</sup> In Judge Feinberg's forceful dissent, submitting that the *Malev* decision was unprecedented, he stated: "This appears to be the only reported decision requiring a United States court generally to supervise imposition of United States procedures with respect to evidence that is all subject to the jurisdiction of the foreign court."<sup>46</sup>

*Malev* represents a sort of potential 'turnabout', in that it does not involve the extraterritorial reach of a U.S. statute in the matter of discovery but rather accepts a type of exploitation of the United States' broad powers of discovery to the benefit of foreign litigants and foreign tribunals. The fear has even been expressed that, following *Malev*, "once a litigant in a foreign litigation is subject to US discovery laws there is no reason why future courts faced with section 1782 requests will not compel litigants to produce documents located outside the United States for use in litigation in yet a third country."<sup>47</sup>

Thus, while it is indeed desirable for one national jurisdiction to render judicial assistance to another (foreign) forum in gathering evidence for use in its legal proceedings, the *Malev* decision caused some concern that parties engaged in foreign litigation could have *carte blanche* to import the broad U.S. discovery laws in order to capitalize on the liberality of American disclosure and utilize U.S. courts to oversee and supervise discovery for cases in which jurisdiction over the main action is elsewhere.

This concern was to some extent borne out by two subsequent cases, *In re Application of Aldunate*<sup>48</sup> and *Matter of Application of Euromepa S.A.*,<sup>49</sup> also decided by the Second Circuit Court of Appeals in 1993 and 1994 respectively, consistent with the *Malev* ruling. In *Aldunate*, the Second Circuit directly addressed the issue of whether an applicant must first demonstrate that requested evidence is discoverable in a foreign jurisdiction before it can seek documents or evidence, for use in foreign proceedings, from a U.S. court under section 1782. The court, rejecting the First Circuit's "implicit requirement" reasoning in *Asta Medica*, maintained that "[t]he language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction."<sup>50</sup> In *Euromepa*, citing both *Malev* and *Aldunate*, the Second Circuit went further in stating that, in the absence of some "authoritative proof" that the foreign tribunal would *reject* evidence obtained under section 1782, the statute should generally be applied to provide some form of discovery assistance,

44. *Id.* at 104.

45. *In re Application of Asta Medica, S.A.*, 794 F. Supp. at 446.

46. See *In re Application of Malev Hungarian Airlines*, 964 F.2d at 102-03, 105.

47. Mundiya, *supra* note 14, at 364.

48. *In re Application of Aldunate*, 3 F.3d at 54.

49. *In re Application of Euromepa, S.A.*, 51 F.3d 1095 (2d Cir. 1995), *rev'g* 155 F.R.D. 80 (S.D.N.Y. 1994).

50. *In re Application of Aldunate*, 3 F.3d at 58-59.

even if "closely tailored."<sup>51</sup> Again, the Second Circuit set no requirement that the applicant demonstrate the discoverability in the foreign forum of the materials sought. Instead, it held that the discoverability of requested material under foreign law is but one factor to be considered in a district court judge's exercise of discretion.<sup>52</sup>

According to section 1782(a), the district court, like any federal court, has discretion to refuse to issue an order or to impose conditions. In exercising this discretionary power, a court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country. The district court withheld discovery assistance based largely on this discretion in the case of *Euromepa*, particularly in deference to "the nature and attitudes' of France toward discovery."<sup>53</sup> It concluded that to grant a petition for discovery when the foreign party had made no attempt whatsoever to avail itself of France's own discovery procedures "would undeniably infringe on the power that the French legislature has bestowed on its courts."<sup>54</sup> For example, the court found the foreign party had patently used section 1782 "as a substitute for discovery in France rather than as an aid and supplement to the procedures of a French tribunal."<sup>55</sup> Because non-exhaustion of domestic discovery options had already been explicitly rejected in *Malev*, the district court emphasized the role of non-exhaustion in the case of *Euromepa* in its own discretionary analysis of the 'nature and attitudes' of France toward discovery.

In reviewing the district court's *Euromepa* judgment for abuse of discretion, the Second Circuit cited *Malev* in reaffirming once again the "twin aims" of section 1782 of "providing efficient means of assistance to participants in international litigation in [U.S.] federal courts and encouraging foreign countries by example to provide similar means of assistance to [U.S.] courts."<sup>56</sup> At the same time, the court emphasized the unconditional nature of section 1782: "It grants wide assistance to others, but demands nothing in return."<sup>57</sup> (Indeed, since the "generous example" of the United States in 1964, no foreign state has followed the U.S. model and granted reciprocal treatment,<sup>58</sup> yet U.S. courts have been consistent in interpreting section 1782 as imposing no reciprocity requirement.<sup>59</sup>) The Second Circuit Court thus reversed the district court's denial of the French petitioner's section 1782 request in *Euromepa* and remanded the case for further proceedings.

In 1998, the Third Circuit Court of Appeals adopted the Second Circuit's fundamental reasoning in *In re Bayer AG*,<sup>60</sup> in similarly holding that discoverability in the foreign court is not crucial to discovery in the United States under section 1782. In this case, the German

51. *In re Application of Euromepa, S.A.*, 51 F.3d at 1102.

52. *See id.* at 1098 (citing to *In re Application of Aldunate*, 3 F.3d at 60).

53. *In re Application of Euromepa, S.A.*, 51 F.3d at 1098 (quoting S. REP. No. 88-1580).

54. *Id.* at 1097 (quoting the district court decision in *In re Application of Euromepa, S.A.*, 155 F.R.D. 80, 83 (S.D.N.Y. 1994)).

55. *In re Application of Euromepa, S.A.*, 51 F.3d at 1103 (Circuit Judge Jacobs, dissenting).

56. *See In re Application of Malev Hungarian Airlines*, 964 F.2d at 100.

57. *Id.* at 101 (quoting Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad* (Notes and Comments), 51 A.B.A. J. 650, 651 (1965)).

58. *See BORN, supra* note 12, at 933.

59. This stands in contrast with traditional letters rogatory that have promised reciprocal treatment.

60. *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998). *See also In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997) (holding that it was an error to refuse to authorize discovery in the United States on the ground that the information sought was not discoverable under German law: "[w]e have rejected any requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding."



drug manufacturer *Bayer AG* sought appellate review of an order from a U.S. district court that had denied its application, pursuant to section 1782(a), to obtain discovery from a New Jersey pharmaceutical corporation, BetaChem, Inc., for use in a patent infringement action pending in the Court of First Instance in Spain. The Third Circuit Court, vacating the decision and remanding the case to the district court, invoked principles of comity to take into account cases where discovery would be privileged in the foreign jurisdiction, and it emphasized the importance "of providing equitable and efficacious discovery" in international contexts.<sup>61</sup> Here the Court placed the burden of proof on the party opposing discovery to demonstrate the circumstances that would justify its denial,<sup>62</sup> going on to give the lower court discretion in this regard.<sup>63</sup> One commentator noted that "[w]hile this view gives more weight to the policies and procedures of foreign courts than *Euromepa*, it is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired."<sup>64</sup>

The huge disparity in the approach taken by the Second Circuit (as exemplified in *Malev*, *Aldunate*, and *Euromepa* and followed by the Third Circuit in *Bayer*) in contrast to the First Circuit's approach (as exemplified in *Asta Medica* and reflected in the Eleventh Circuit's *Trinidad and Tobago* ruling and those of a number of other U.S. circuit courts<sup>65</sup>) was not immediately resolved. Ultimately, such a disparity can only be resolved by the U.S. Supreme Court. Meanwhile, the Ninth Circuit Court, by its *AMD v. Intel* decision, strengthened the position consistently maintained by the Second Circuit.

The question is not always so clearly defined. Several courts of appeals have applied a slight variant to the *Asta Medica* rule, distinguishing between requests from individual litigants and those from tribunals, suggesting that in the latter case, "it is clear that the discovery sought is permitted and authorized by that body."<sup>66</sup> The Fourth, Fifth, and Eleventh Circuits have each made such a distinction between discovery requests from private parties, in which case a foreign discoverability requirement was imposed, and those from a foreign tribunal, in which case it was not imposed. For example, in *Lo Ka Chun v. Lo To*,<sup>67</sup> the Eleventh Circuit Court imposed the requirement that the discovery request must be examined under the foreign tribunal's discovery rules when the request is from a private litigant. In contrast, the Second Circuit in *In re Application of Gianoli*<sup>68</sup> made no such distinction between a tribunal and a private party in refusing to require that the litigant's request be examined under the foreign tribunal's discovery rules.

The Fourth Circuit, in *In re Letter of Request from Amtsgericht Ingolstadt*,<sup>69</sup> addressed the question of processing a letter of request issued by a German court pursuant to the Hague

61. *In re Bayer AG*, 146 F.3d at 195.

62. *Id.*

63. *Id.*

64. Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 519, 619 (2001).

65. E.g., the Third, Fifth, Ninth, Eleventh, and District of Columbia Circuits. See, e.g., *In re Request From Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692-93 n.7 (D.C. Cir. 1989); *Lo Ka Chun*, 858 F.2d at 1566; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156; *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

66. *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England*, 147 F.R.D. 223, 226 (C.D. Cal. 1993).

67. *Lo Ka Chun*, 858 F.2d at 1564.

68. *In re Application of Gianoli*, 3 F.3d 54 (2d Cir. 1993), cert. denied, 510 U.S. 965 (1993).

69. *In Re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590 (4th Cir. 1996).

Convention concerning judicial assistance in obtaining a blood sample from a putative father, who was a U.S. resident, in connection with a German paternity suit.<sup>70</sup> The district court deemed it was not necessary for the U.S. court to first determine whether German law would have permitted discovery in like circumstances, based on the fact that the request came from the German tribunal.<sup>71</sup> It found that “[t]he fact that the [foreign court] found sufficient grounds to order the blood test should end this court’s inquiry in this regard.”<sup>72</sup> The Fourth Circuit Court of Appeals upheld the lower court’s ruling, stating that considerations of comity, cooperation, and reciprocity made it inappropriate to “second-guess” the evidentiary request of a foreign court based on that forum’s national discovery rules.<sup>73</sup> The appeals court concluded that the Hague Convention envisions substantial cooperation among signatory states with respect to processing discovery requests and thus affirmed the judgment of the district court.<sup>74</sup>

Similarly, in the ruling of the Fifth Circuit in *In re Letter Rogatory from the First Court of First Instance In Civil Matters, Caracas, Venezuela, in the Matter of Electronic Data Systems Corporation [EDS]*,<sup>75</sup> in which the U.S.-based parent company EDS unsuccessfully argued that a letter rogatory from the Venezuelan court, for the purpose of eliciting information regarding its Venezuelan subsidiary involved in a local labour dispute, should not be honoured because the information sought was not discoverable under Venezuelan law, it was argued that “the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules. . . . For an American court to double-check the foreign court’s request to determine whether it is proper under the foreign nation’s rules would be exactly the kind of slight that 1782 seeks to avoid.”<sup>76</sup> The Fifth Circuit thus affirmed the district court’s ruling on the basis that “to question the discoverability of the subject matter in the subpoena would thwart international cooperation and invite retaliation.”<sup>77</sup>

In light of these U.S. cases and the inconsistency among the appellate courts, together with largely unaltered foreign discovery practices (particularly noticeable in civil law countries), it has been suggested that neither of the objectives of the 1964 amendments to section 1782 have been fully achieved.<sup>78</sup> With regard to the first goal—that of facilitating the district courts’ handling of foreign requests for discovery of evidence located in the United States—the federal courts clearly have not been able to agree fundamentally on the grounds for permissibility of applications. With regard to the second goal—that of encouraging other nations, by example, to facilitate U.S.-style discovery abroad through adjusting their own procedures—no such adjustments have materialized. In retrospect, since the scope for evidence-gathering in the United States is well recognized to be far broader than in most other jurisdictions, it is not entirely surprising that other governments did not expedite

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70. *Id.* at 592.

71. *Id.*

72. *In re Letter of Request from the Boras District Court*, 153 F.R.D. 31, 34 (E.D.N.Y. 1994).

73. *In re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996).

74. *Id.* at 591.

75. *In re Letter Rogatory from First Court, Caracas*, 42 F.3d 308, 310 (5th Cir. 1995).

76. *Id.* at 311.

77. *Id.* at 308.

78. See Fouché & Polebaum, *supra* note 14, at 415; Philip W. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 651–52 (1969) (discussing more on the 1964 amendments to rule 28b and section 1782).

similar legislation. The same governments have not been hesitant, however, to make use of section 1782, and have increasingly done so in international civil litigation.

Indeed, it was largely the absence of the desired spontaneous foreign response that gave rise to reciprocity requirements being given statutory force in the 1994 International Antitrust Enforcement Assistance Act,<sup>79</sup> at least for the priority area of antitrust discovery. This law was enacted to "facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis."<sup>80</sup>

Yet the application of section 1782 is still fraught with ambiguity. In a 1997 patents infringement case, *In re Jenoptik AG*,<sup>81</sup> the German party requesting assistance succeeded in obtaining evidence for use in the German action that was undiscoverable under German law.<sup>82</sup> Neither the majority nor the dissent in *Jenoptik* cited to the suite of section 1782 cases argued by the Second Circuit<sup>83</sup> in which the court had attempted to establish the non-necessity of showing discoverability in the foreign forum. They determined rather that the discoverability considerations in section 1782 cases were not applicable, arguing that this was not an action governed by that statute.<sup>84</sup> The Federal Circuit in *Jenoptik* did not in fact have at hand any decisions or statutes that it considered to be directly on point and was thus forced to extrapolate related information from relevant sources such as *Beckman Industries, Inc. v. International Insurance Company*.<sup>85</sup> The Ninth Circuit in *Beckman* had stated that "precedent strongly favors disclosure to meet the needs of parties in pending litigation."<sup>86</sup>

The Federal Circuit in *Jenoptik* reasoned that production of the documents sought by the German party for use in the German court did not circumvent German law since the material at issue was seen to be already discovered, its use in Germany being precluded only by the protective order.<sup>87</sup> This reasoning sidestepped the concerns aired in the earlier section 1782 cases, precisely that foreign parties might misuse the liberal U.S. judicial assistance to circumvent the foreign discovery rules and procedures of the forum state.

By releasing evidence that would not be discoverable in the forum state, *Jenoptik* set a precedent that any litigant may obtain information that is not discoverable in a foreign forum, by filing a related suit in a U.S. court.<sup>88</sup> Some observers have expressed that the potential for circumvention of foreign law through parallel lawsuits in American courts is too great and violates the spirit of U.S. law and public policy.<sup>89</sup> Now, with the added pre-

79. International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212 (1994).

80. International Antitrust Enforcement Assistance Act of 1994, Pub. L. No. 103-438, 108 Stat. 4597 (1994) (codified as amended at 15 U.S.C. §§ 6201-6212 (1994)).

81. *In re Jenoptik AG*, 109 F.3d at 721. See Suzanne G. Collins, *In re Jenoptik AG: The Fine Line Between Judicial Assistance and Circumvention of Foreign Law in International Discovery*, 23 N.C.J. INT'L L. & COM. REG. 691 (1998) (giving the facts and analysis of the case).

82. See *In re Jenoptik AG*, 109 F.3d at 724 (Newman, J., dissenting).

83. See Collins, *supra* note 81, at 703.

84. See *In re Jenoptik AG*, 109 F.3d at 723. See also Collins, *supra* note 81, at 697.

85. *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992).

86. *Id.*

87. See *In re Jenoptik AG*, 109 F.3d at 723. See also Collins, *supra* note 81, at 707.

88. See Collins, *supra* note 81, at 708.

89. See, e.g., *id.* at 694.

cedent of *AMD v. Intel*, U.S. courts have opened the door to accepting an even greater workload, even though already overburdened, in the ongoing interest of providing essentially unilateral foreign judicial assistance.

### III. Conclusion

No one disputes the fact that broad assertions of 'extraterritorial' discovery power on the part of the United States have been responsible for countermanding blocking legislation in Europe (and elsewhere, notably Canada<sup>90</sup>), as well as for resort to diplomatic and private protests.<sup>91</sup> Less attention has been given to assistance to foreign tribunals and even private parties by U.S. courts in matters of foreign discovery.

The question might still be raised as to whether more official measures should be sought for reciprocity in the type of judicial assistance afforded by U.S. courts. This question takes on a heightened profile as some of those countries that have most vehemently resisted 'extraterritorial' U.S. discovery have become increasingly adept at using U.S. discovery practices to their advantage, as most recently seen in *AMD v. Intel*. A legitimate corollary question is whether this is not one step closer to the concerns expressed over the *Malev* ruling, namely, that U.S. courts, already over-burdened, could become the "discovery masters" of the world.

Finding the *juste milieu* between reasonable comity considerations and exorbitant judicial assistance becomes an increasing challenge, particularly in the virtual absence of international discovery reciprocity. At the same time, since U.S. discovery is already widely viewed as exceeding the scope of most other regimes, such assistance on the part of the United States may be deemed necessary to promote goodwill and to continue the quest for mutual co-operation in international discovery. Enhancing the spirit of cooperation among signatory countries of the Hague Convention, which already serves to supplement pre-existing general principles of comity among countries, still has some way to go.

The Doha Development Agenda, launched by the Fourth Ministerial Meeting of the World Trade Organization in 2001, offered an opportunity to include the issue of "competition" on the agenda for the first time in a multilateral trade round. This would have allowed the question of international co-operation in 'extraterritorial' discovery and related reciprocity—at least with regard to antitrust investigations, the most fertile ground for such requests—to be substantially addressed. The recent failure of the Fifth WTO Ministerial in Cancun to achieve a consensus among its Member States to confirm this issue as a part of the current trade round, and its abandonment as an agenda item by its strongest proponent (the European Union), does not bode well for an early global solution. But one thing is certain: competition/antitrust issues will not die. Their profile has been irrevocably raised. The challenge is still great and the opportunity ripe.

90. See CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION* ch. XIV, § 2(b)(i) (2002).

91. See *id.* at ch. XIV, § 3(c). See also Michael Akehurst, *Jurisdiction in International Law*, 46 *BRIT. Y.B. INT'L L.* 31, 176 (1972-1973).