SUPREME COURT EXPANDS THE ROLE OF U.S. COURTS IN FOREIGN DISCOVERY PROCEEDINGS

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On June 21, 2004, the Supreme Court handed down a decision likely to have a significant impact on any party involved in a foreign litigation, investigation or administrative proceeding. In *Intel Corporation v. Advanced Micro Devices, Inc.*,[1] the Supreme Court broadly interpreted 28 U.S.C. § 1782(a), granting district courts extensive authority to order discovery in U.S. courts to assist in a variety of foreign proceedings. In reaching this decision, the Court emphasized that district courts have discretion to deny unwarranted discovery requests, laying out a variety of factors a district court must consider before granting a § 1782(a) application. While it is certainly possible that a company or individual may attempt to take advantage of the *Intel* Court's broad interpretation of § 1782(a), the extensive guidelines set forth by the Supreme Court appear to protect against such abuses.

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1. 124 S. Ct. 2466 (2004). Justices Ginsburg, Stevens, Kennedy, Souter, Thomas, and Chief Justice Rehnquist formed the majority. Justice Scalia concurred.

I.
BACKGROUND

The dispute in *Intel* arose after Advanced Micro Devices ("AMD") filed an antitrust complaint with the Directorate General-Competition (the "DG-COMP") of the Commission of the European Union (the "Commission").[2] In its complaint, AMD alleged that Intel Corporation, its main competitor, violated Articles 81 and82 of the Treaty Establishing the European Community (the "EC Treaty") by abusing its dominant position in the semiconductor market.[3] After filing its complaint, though, AMD did not remain a direct party to the proceeding. According to EC procedure, when a complaint is submitted to the DG-COMP, a preliminary investigation is typically initiated by the Commission.[4] This serves as an opportunity for the DG-COMP to both gather information and decide whether more formal action should be taken on the complaint. If the DG-COMP chooses not to proceed with a more formal action, the complainant may seek review by the Court of First Instance and, ultimately, the European Court of Justice. On the other hand, if the DG-COMP does choose to pursue a formal action, it will then serve the target with a formal "statement of objections" and advise the target of its intention to recommend a decision finding an antitrust violation.[5]

If a target is served with a formal statement of objections, it is entitled to a hearing before an independent officer who, in turn, provides a report to the DG-COMP with his or her findings. After reviewing such report, the DG-COMP makes its own recommendation. It can either dismiss the complaint or issue a formal decision holding the target liable and imposing penalties on it. This decision is then subject to review, first in the Court of First Instance and then in the European Court of Justice.[6]

Throughout this process, the complainant does not retain formal "litigant" status. However, the complainant is afforded significant procedural rights. Specifically, the complainant can submit relevant information to the DG-COMP and seek

2. *Id.* at 2474.
3. *Id.* at 2475.
4. *Id.* at 2477.
5. *Id.*
6. *Id.*

judicial review of the DG-COMP's decision.[7] Here, as complainant, AMD recommended to the DG-COMP that it seek discovery of documents that Intel had produced in a private antitrust suit that was brought in a district court in Alabama.[8] However, the DG-COMP decided not to pursue judicial assistance in the United States to get the documents. In response, AMD took matters into its own hands.

AMD Seeks Help From U.S. Court

On October 1, 2002, AMD applied to the District Court of the Northern District of California for discovery of Intel's documents, pursuant to § 1782(a) of Title 28 of the United States Code. Section 1782(a) provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

Section 1782(a), however, does not define "proceeding," "tribunal" or "interested person." Similarly, it does not express whether there is a "discoverability" requirement attached to the statute, limiting such discovery to situations where the material would be discoverable in the foreign jurisdiction.

The district court found that AMD's request was outside the scope of § 1782(a) and, therefore, denied its application. The district court emphasized that the matter before the Commission was merely "in the initial stage of preliminary inquiry"—and the Commission, for its part, "performs the functions of investigator, prosecutor and decision-maker without

7. *Id.*

8. *Id.* at 2475. *See also* Intergraph Corp. v. Intel Corp., 3 F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated by* Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999).

any separation."[9] Consequently, the district court concluded that the Commission investigation was not adjudicative in nature and, thus, could not be considered a "proceeding" under the terms of § 1782(a).[10]

The Ninth Circuit Reverses

The Ninth Circuit reversed the lower court, finding that the Commission's preliminary investigation did constitute a "proceeding" before a foreign "tribunal."[11] The Ninth Circuit addressed the issue on two levels. It first explained that the scope of § 1782(a) includes matters before "bodies of a quasi-judicial or administrative nature," as the language of the statute does not require that the proceeding be "pending."[12] Further, it noted that the likely outcome of this particular proceeding would be judicial in character.[13] It explained that "[The European Commission is] a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties. [The Commission's] decisions are appealable to the Court of First Instance and then to the [European] Court of Justice. Thus, the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings."[14]

The Ninth Circuit also rejected a separate argument by Intel that § 1782(a) contained a "foreign discoverability requirement." Intel argued that § 1782(a) required a showing that the documents AMD was seeking would be similarly discoverable if those documents were located within the European Union.[15] The Ninth Circuit, however, found "nothing in the plain language or legislative history of § 1782, including its 1964 and 1996 amendments, to require a threshold showing [by] the party seeking discovery that what is sought be discoverable in the foreign proceeding."[16]

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9. Advanced Micro Devices, Inc. v. Intel Corp., No. C-01-7033, 2002 WL 1339088, at *1 (N.D. Cal. Jan. 7, 2002).

10. *Id.*

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

12. *Id.* at 667.

13. *Id.*

14. *Id.*

15. *Id.* at 668.

16. *Id.* at 669.

Beyond this, the Ninth Circuit warned that a foreign discoverability requirement would disserve § 1782(a)'s aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts."[17] On these grounds, the Ninth Circuit remanded the case to the district court with instructions that it consider the merits of AMD's discovery request.[18] After the Ninth Circuit's decision was handed down, Intel filed a petition for a writ of certiorari, which the Supreme Court granted.[19]

The Supreme Court Affirms

The Supreme Court considered the issue of foreign discoverability—an issue that was, in fact, the subject of a circuit court split.[20] The Court also chose to review two additional issues. First it addressed the question of whether § 1782(a) made discovery available to complainants such as AMD who do not have the status of private "litigants" and are not sovereign agents.[21] Second, it chose to consider whether a "proceeding" before a foreign "tribunal" needs to be either "pending" or "imminent" in order for an applicant to fall within the ambit of § 1782(a).[22]

"Interested Person" Requirement

The Court first turned to what constitutes an "interested person" under § 1782(a). Intel argued that the only parties that can be considered "interested person[s]" under the statute are "litigants, foreign sovereigns, and the designated agents of those sovereigns."[23] Intel argued that AMD should be excluded from this group, as the company was merely a complainant before the Commission, and had only limited rights.[24] The Court, however, found § 1782(a) to contain a much broader scope than Intel argued, explaining that a party

17. *Id.*
18. *Id.*
19. Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 531 (2003).
20. *Intel Corp.*, 124 S. Ct. at 2476.
21. *Id.*
22. *Id.* at 2476-77.
23. *Id.* at 2478.
24. *Id.*

does not have to be an actual litigant to the proceeding to benefit from § 1782(a).

In coming to its conclusion, the Court first looked to the text of § 1782(a). The text states that § 1782(a) is available "upon the application of *any* interested person."[25] Reading such text, the Court found that it "plainly reaches beyond the universe of persons designated 'litigant.'"[26] Specifically, in the case at bar, the term 'interested person' may be seen to encompass a complainant, such as AMD, that triggers a Commission investigation. The Court noted that AMD, like all complainants before the Commission, is afforded a significant role in the investigatory process.[27] The complainant prompts the investigation, has the right to submit information to the DG-COMP for consideration and may seek further relief through the court system if the DG-COMP discontinues the investigation or dismisses the complaint. Because the complainant retains such rights, the Court held that the company "possess[es] a reasonable interest in obtaining [judicial] assistance,' and therefore qualifies as an 'interested person' within any fair construction of that term."[28]

"Proceeding in a Foreign or International Tribunal"

The Court next considered whether the proceeding in which the documents were being sought met the statute's definition of a "foreign or international tribunal." Turning first to the legislative history of the statute, the Court found that Congress expressed a clear desire to have the statute apply to situations beyond the standard judicial proceeding.[29] This desire is evident from an earlier incarnation of § 1782(a), which limited its applicability to "any judicial proceeding." When § 1782(a) was modified in 1964, however, those words were changed to include "proceeding[s] in a foreign or international tribunal"—a clear shift to more inclusive language. The Court explained, therefore, that "Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance

25. 28 U.S.C. § 1782(a) (emphasis added).
26. *Intel Corp.*, 124 S. Ct. at 2478.
27. *Id.*
28. *Id.*
29. *Id.* at 2479.

in connection with [administrative and quasi-judicial proceedings abroad.]'"[30]

The Court went on to reject Intel's argument that § 1782(a) did not apply because AMD's complaint had not progressed beyond the investigative stage and no adjudicative action had yet been taken on it.[31] The Court explained that § 1782(a) did not limit itself to "pending" adjudicative actions. When the previously mentioned modifications to the statute were made, eliminating the requirement that the proceeding be "judicial," the requirement that the proceeding be "pending" was also eliminated.[32] The Court found instead that § 1782(a) "requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation."[33]

Foreign Discoverability Requirement

Last, the Court turned to the question whether § 1782(a) contained a foreign discoverability requirement. It is this point on which the lower courts were previously divided. Turning to the text of the statute, the Court first made clear that nothing in the language of the statute shows that § 1782(a) limits a district court's production order to materials that would be discoverable themselves if the materials were located in the foreign jurisdiction in question.[34] It further noted that if Congress had intended such a restriction, it would have included statutory language to that effect at the time of amendment.[35] Congress, however, never took such steps.

The Court also rejected two separate policy arguments made by Intel in support of a foreign discoverability requirement. First, Intel argued that the Court should avoid offending foreign governments and should focus on maintaining parity between litigants. The Court explained that it did not believe that foreign governments would be offended by a statute that permitted, but did not require, judicial assistance to

30. *Id.*
31. *Id.* at 2479-80.
32. *Id.*
33. *Id.* at 2480.
34. *Id.*
35. *Id.*

their court system.[36] Furthermore, the Court explained that a foreign court may limit discovery within its own jurisdiction due to the foreign court's legal practices, culture or traditions, none of which necessarily signify an objection to U.S. assistance.[37] Beyond that, the Court deemed it "senseless" to apply a discoverability requirement to situations, like the present one, where the foreign tribunal readily accepts relevant evidence obtained pursuant to a § 1782(a) request.[38]

Intel's concern about maintaining parity was similarly rejected by the Court. The Court reasoned that when information is being sought from one party under § 1782(a), the district court could very well condition such a request upon a reciprocal exchange of information or other measures of fairness.[39]

The Supreme Court Provides Further Guidance

Emphasizing that a district court is not obligated to grant a § 1782(a) discovery application under the language of the rule, the Court provided a number of factors for district courts to consider when deciding whether a § 1782(a) request is permissible. The Court first explained that when the entity from which discovery is being sought (here, Intel) is a direct participant in the foreign proceeding, the need for § 1782(a) assistance is not as clear as when the evidence is sought from a non-participant in the matter arising abroad.[40] In the former situation, the foreign tribunal itself can order the party to produce the evidence in question. In the latter situation, though, non-participants in the foreign proceeding may be outside the reach of the tribunal's jurisdiction—and this evidence may be obtainable only through the assistance of § 1782(a).

The Court suggested that district courts weigh a number of additional considerations as well, including: the nature of the foreign tribunal, the character of the proceedings in that tribunal, the receptivity of the foreign government, court or agency to U.S. judicial assistance and whether the § 1782(a) request is really an attempt to circumvent foreign proof-gath-

36. *Id.* at 2481.
37. *Id.*
38. *Id.* at 2481-82.
39. *Id.* at 2482.
40. *Id.* at 2483.

ering restrictions.[41] The Court further instructed district courts to reject or trim any request that they find to be unduly intrusive or burdensome.[42] In the case at bar, the Supreme Court directed the district court to scrutinize the merits closer: "Having held that § 1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to assure an airing adequate to determine what, if any, assistance is appropriate."[43]

Justice Breyer Dissents

Justice Breyer was the sole dissenter. Justice Breyer's objection was grounded in a number of considerations. He was concerned with the expense, cost and delay that discovery-related proceedings inevitably involve, as well as the effect that a large number of § 1782(a) requests would have on domestic dockets.[44] He also believed that a broad application of § 1782(a) could promote disharmony between national and international authorities. As a result, such an application could lead to results contrary to what a foreign authority may have intended.[45]

In response to these concerns, Justice Breyer suggested two limitations he believed the Court should adopt. First, Justice Breyer suggested that domestic courts pay closer attention to the foreign entity's own view of their court's "tribunal" or non-"tribunal"-like status—in particular when those characteristics are not immediately apparent to the domestic judge.[46] Second, Justice Breyer proposed that the Court "should not permit discovery where both of the following are true: (1) a private person seeking discovery would not be entitled to that discovery under foreign law, *and* (2) the discovery would not be available under domestic law in analogous circumstances."[47] In this particular case, Justice Breyer's restrictions would require dismissal of the discovery proceeding. He believed that the Commission's status as a tribunal was questiona-

41. *Id.*
42. *Id.*
43. *Id.* at 2484.
44. *Id.* at 2485.
45. *Id.*
46. *Id.* at 2486.
47. *Id.*

ble, especially in light of how the Commission viewed itself.[48] In addition, Justice Breyer argued that neither AMD, nor any comparable party, would be able to obtain the type of discovery it seeks as a non-litigant under applicable U.S. or E.U. law.[49]

III.
INTEL'S AFTERMATH

In the months following the Supreme Court's decision in *Intel*, five opinions have come down interpreting § 1782(a) based upon the guidelines laid out by the Supreme Court. Of the five, two decisions denied § 1782(a) petitions[50] and three granted them.[51]

The remanded *Intel* case was among the decisions denying a § 1782(a) application. Upon reconsideration, the United States District Court for the Northern District of California denied AMD's § 1782(a) petition based upon a variety of the factors promulgated by the Supreme Court.[52] The district court first explained that, practically speaking, AMD did not need U.S. assistance to gain the evidence in question. Intel was a participant in the Commission proceedings, and thus the Commission had jurisdiction over Intel and could instruct Intel to produce the discovery directly without § 1782(a) aid. The district court next pointed out that the Commission itself did not want U.S. judicial assistance. The Commission had explained to the district court, through amicus briefs it filed, that it "[did] not need or want" the U.S. court's aid in obtaining Intel's documents. The district court further believed that AMD's request represented an attempt to circumvent the Commission's decision not to pursue the Intel discovery. Be-

48. *Id.* at 2487.

49. *Id.*

50. Advanced Micro Devices, Inc. v. Intel Corp., No. C 01-7033, 2004 WL 2282320 (N.D. Cal. Oct. 4, 2004); Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79 (2d Cir. 2004).

51. *In re* Application of Servicio Pan Americano de Proteccion, C.A. 354 F. Supp. 2d *269* (S.D.N.Y. 2004); *In re* Application of Guy, No. M 19-96, 2004 WL 1857580 (S.D.N.Y. Aug. 19, 2004); *In re* Application of Procter & Gamble Co., 334 F. Supp. 2d 1112 (E.D. Wis. 2004).

52. *Advanced Micro Devices, Inc.*, 2004 WL 2282320 at *1.

yond all this, the district court believed that the documents sought by AMD were both unduly intrusive and burdensome.[53]

Similarly, the Second Circuit affirmed the denial of a § 1782(a) request in *Schmitz v. Bernstein Leibhard & Lifshitz*.[54] In *Schmitz*, the Second Circuit held that the district court did not abuse its discretion by denying an application for § 1782(a) assistance, based heavily on two of the Supreme Court's factors: the foreign government in question was adverse to such help, and the discovery in question could have been sought directly from the party in question, since it was a participant in the proceeding.[55]

Section 1782(a) discovery was permitted in three other instances. In the *Application of Guy*, the Southern District of New York allowed claimants in an action in the United Kingdom to take discovery through the U.S. judicial system. In making its determination, the district court noted that it had no reason to believe that the government of the United Kingdom would have any objection to the discovery. However, it limited discovery to requests that were within the scope of the United Kingdom proceeding.[56]

In the *Application of Procter & Gamble Company*, the Eastern District of Wisconsin permitted a petitioner to obtain discovery in connection with a series of patent infringement suits commenced in the United Kingdom, France, the Netherlands, Germany and Japan. The district court granted such discovery based upon a number of the factors set forth by the Supreme Court. The court ruled that the request was not an attempt to circumvent the policies of any of the countries involved, the application was not unduly burdensome, and it would be both inefficient and ineffective to attempt to gain access to the relevant documents in the respective home countries.[57]

In the *Application of Servicio Pan Americano de Proteccion, C.A.*, the Southern District of New York again exercised its discretion to grant a discovery request under § 1782(a), in this case to produce documents located in the U.S. for use in legal

53. *Id.* at *2-3.

54. *Schmitz*, 376 F.3d at 85.

55. *Id.* at 84-85.

56. *In re* Application of Guy, 2004 WL 1857580, at *3-4.

57. *In re* Application of Procter & Gamble Co., 334 F. Supp. 2d, at 1114-1119.

proceedings underway in Venezuela. The district court found that the Petitioner complied with the three statutory requirements set forth in *Intel*: (1) the party from whom the discovery was sought was located in the district to which the application was made; (2) the discovery was for use before a Venezuelan tribunal; and (3) Petitioner, who was a defendant in the Venezuelan suit, qualified as an "interested person" under § 1782(a).[58] The court also concluded that Petitioner's application would advance the purpose of the statute by providing assistance to participants in international litigation in U.S. federal courts and encouraging foreign courts to do the same. The grant of the § 1782(a) request would permit the Venezuelan tribunal to quickly determine whether the suit could be disposed of, and establish whether the scope of the litigation could be limited in some way.[59] It would also encourage Venezuelan tribunals to act in a reciprocal fashion in future situations where a U.S. litigant may request Venezuelan-based discovery.[60] The district court also rejected an argument that Petitioner should be required to wait until the "evidentiary stage" of the Venezuelan proceeding, first seeking discovery from a Venezuelan court, before applying for relief under § 1782(a). In so doing, the court explained that, in accordance with *Intel*, "Section 1782 may be invoked even where foreign legal proceedings are not even underway, provided that 'a dispositive ruling' by the Venezuelan tribunal is 'within reasonable contemplation.'"[61] In addition, the court concluded that the Petitioner satisfied three other *Intel* considerations: (1) the person from whom discovery was sought is a participant in the foreign proceeding; (2) the nature of the Venezuelan suit, the character of the suit and the receptivity of Venezuelan courts to U.S. federal judicial assistance all counsel in favor of granting the § 1782 application; and (3) Petitioner's application does not represent an attempt to sidestep Venezuelan proof-gathering policies or restrictions, or to comprise an unduly intrusive or burdensome request.[62]

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58. *In re* Servicio Pan Americano, 354 F. Supp. 2d, at 273.

59. *Id.*

60. *Id.*

61. *Id.* at 274 (citing Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466, 2480 (2004)).

62. *Id.* at 274-75.

IV.

INTEL: A REASONABLE SOLUTION TO A DIFFICULT PROBLEM

The matter addressed by *Intel* is a challenging one. A potential flood of foreign discovery requests could produce enormous costs to any company involved in a foreign litigation, investigation or administrative proceeding. The impact on an already overflowing federal docket may also be substantial. Many of these concerns were justifiably raised by Justice Breyer in his dissent. His concern about disharmony between national and international authorities would seem to be a legitimate one. In spite of these threats, though, the majority in *Intel* appears to have come to a practical resolution of the issue.

The *Intel* majority set forth an extensive series of factors that form a relatively tight framework within which a district court can make a § 1782(a) determination. This framework, though broadly construing the language of § 1782(a), provides significant guarantees against systemic abuse. U.S. district courts are able to limit application of § 1782(a) to worthy cases that do not offend the foreign entities involved, by evaluating the receptivity of foreign governments, courts or tribunals to U.S. judicial assistance; and by determining whether the § 1782(a) request represents a covert attempt to circumvent foreign proof-gathering restrictions. .The Court's mandate that district courts reject or trim any unduly burdensome or intrusive request further enables those courts to tailor § 1782(a) applications in situations where abuse may be apparent.

An overview of the recent case law interpreting the *Intel* decision seems to support the notion that the guidelines set forth by the Court have prevented a flood of cases from emerging. In the nine months since *Intel* was decided, only five published opinions have interpreted the decision. Each opinion has followed the guidelines laid out by the *Intel* Court, denying applications that were deemed outside the scope of the statute based upon the *Intel* factors. Indeed, in every instance where the district court found the foreign authority to be adverse to U.S. federal judicial assistance, the § 1782(a) application was denied. Similarly, where attempts at circumventing foreign discovery restrictions were uncovered, § 1782(a) applications were disallowed.

V.
CONCLUSION

The *Intel* decision grants district courts broad authority to order domestic discovery for use in foreign proceedings. This broad authority, though, is tempered by a number of considerations a district court must assess in coming to its final determination. Though it is certainly possible that Justice Breyer's fears could play out, opening up broad and costly discovery for U.S. companies conducting business abroad, the recent post-*Intel* trend in case law has not supported this outcome. While the true impact of the *Intel* decision will not be known until there is a sufficient body of case law applying the High Court's guidance in *Intel*, the early indicators do not support Justice Breyer's concerns.