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Discovery in a Global Economy

Maurice Stucke

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MAURICE E STUCKE*

I. Introduction

This chapter addresses two issues: to what extent can (i) antitrust litigants before foreign tribunals seek discovery within the United States and (ii) antitrust litigants in US federal courts obtain discovery abroad? The Hague Convention, of course, prescribes certain procedures by which a judicial authority in one country under the treaty may request evidence located in another member country.[1] This chapter addresses two mechanisms that US federal courts frequently use to order discovery, namely, a federal statute, 28 United States Code section 1782, and the Federal Rules of Civil Procedure.

Part II of this chapter addresses when litigants in foreign proceedings seek evidence from firms in the US under section 1782(a). Part III considers when private litigants in US proceedings seek discovery of evidence located abroad under the Federal Rules of Civil Procedure. Under both scenarios, the US courts eschew bright-line rules and instead engage in a two-part inquiry: first does the US court have statutory authority to order the requested discovery? Second, if it does, the US court then weighs several factors to determine whether it should exercise its authority to permit such discovery. Part IV of this chapter discusses several criticisms expressed about the United States' liberal discovery mechanisms for foreign litigants.

II. Litigants Abroad Who Seek Discovery in the US

Rather than rely on the Hague Convention's more formal procedures, foreign litigants can opt for section 1782 to obtain evidence from persons located in the United States.[2]

* Associate Professor, the University of Tennessee College of Law; Senior Fellow, American Antitrust Institute. The author wishes to thank Daniel A Crane, Kenneth Davidson, Jay L Himes, Thomas J Horton, Mark A Lemley, Christopher Leslie, Christopher L Sagers, John L Sobieski Jr, Gregory M Stein, Henry Thaggert, Spencer Weber Waller, Wouter Wils, Diane Wood and the participants of the Research Seminar on International Litigation and Competition Law for their helpful comments.

[1] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, 18 March 1970 and entered into force between the United States and France on 6 October 1974, 23 UST 2555, TIAS No 7444 (codified at 28 USC s 1781); *Société Nationale Industrielle Aérospatiale v US District Court for the Southern District of Iowa* 482 US 522, 524 (1987).

[2] WB Stahr, 'Discovery under 28 USC § 1782 for Foreign and International Proceedings' (1990) 30 *Virginia Journal of International Law* 597.

Prompted by the growth in international commerce, Congress in 1964 completely revised section 1782, which now provides:

> Assistance to foreign and international tribunals and to litigants before such tribunals
>
> a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.[3]

A. When Does the US Court Have Statutory Authority to Order Discovery under Section 1782(a)?

An 'interested person' files with the US district court an application for an order seeking discovery under section 1782(a).[4] As a threshold matter, the applicant must show:

1. the person from whom discovery is sought *resides* or *is found* in the US judicial district[5] where the application is made;[6]
2. the discovery is *for use* in a *proceeding* before a foreign or international *tribunal*; and
3. the application is made by a foreign or international tribunal or *any interested person*.[7]

Absent this showing, the US court lacks statutory authority to order discovery under section 1782(a). Once discovery is authorised under section 1782(a), the district court can

[3] Section 1782(b) provides: 'This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him'.

[4] A foreign tribunal can request judicial assistance through the issuance of a letter rogatory.

[5] There are 94 federal judicial districts, including at least one district in each State, the District of Columbia and Puerto Rico. See www.uscourts.gov/uscourts/images/CircuitMap.pdf.

[6] See *Re Yukos Hydrocarbons Investments Ltd* Civ Act No 5:09-MC-0078, 2009 WL 5216951 (ND NY 30 December 2009) (person is 'found' within the judicial district for purposes of s 1782(a) when the person is physically present in the judicial district and is served with a subpoena); *Re Godfrey* 526 F Supp 2d 417, 422 (SD NY 2007) (corporation must either be incorporated, headquartered, or engaged in systematic and continuous activity in judicial district); *Re Microsoft Corp* 428 F Supp 2d 188, 193 (SD NY 2006) (Dutch partner of New York law firm who resides and works full-time in Brussels does not reside in the district where application under s 1782(a) was made); *Re Oxus Gold PLC* No Misc 06-82, 2006 WL 2927615 (D NJ 11 October 2006) 5 (finding insufficient evidence that person resided or was found in judicial district); *Re Kolomoisky* No M19-116, 2006 WL 2404332 (SD NY 18 August 2006) 3 (same).

[7] *Schmitz v Bernstein, Liebhard & Lifshitz LLP* 376 F 3d 79, 83 (2d Cir 2004); *Re Esses* 101 F 3d 873, 875 (2d Cir 1996); *Re Order for Labor Court of Brazil* 466 F Supp 2d 1020, 1026 (ND Ill 2006).

prescribe the 'practice and procedure' for taking the testimony or statement or producing the document or other thing.[8]

The US Supreme Court in *Intel Corp v Advanced Micro Devices Inc*,[9] resolved several disputes as to the statute's interpretation.[10] Advanced Micro Devices Inc (AMD) filed with the European Commission an antitrust complaint against Intel. In connection with its complaint, AMD sought under section 1782(a) discovery in the US from Intel.[11] Specifically, AMD asked a US district court to order Intel to produce documents and testimony elicited in discovery in a private US antitrust case.[12] The district court denied AMD's application for a discovery order. The district court reasoned that the European Commission's procedure was not a 'proceeding' within the meaning of section 1782, as the EC did not exercise an 'adjudicative function'. After the US Court of Appeals for the Ninth Circuit reversed the district court, the Supreme Court granted *certiorari*.

The Supreme Court in *Intel* addressed four questions: (i) who can seek discovery under section 1782; (ii) what foreign proceedings qualify under section 1782; (iii) when can the interested person seek discovery under section 1782; and (iv) what kind of discovery is available under section 1782?

i. Who Can Seek Discovery Under Section 1782?

Section 1782(a) affords discovery to a 'foreign or international tribunal or . . . any interested person'. Does section 1782(a) then limit discovery to private litigants, a foreign sovereign, and the sovereign's designated agents? The Supreme Court responded no. The category of 'interested persons' within section 1782(a) is broader than private litigants and includes complainants who trigger an investigation by the European Commission.

Complainants before the European Commission possess, in the Court's view, 'significant procedural rights': complainants may prompt the investigation, have the right to submit information for the consideration of the EC's Directorate General for Competition,[13] and may proceed to the Court of First Instance if the European Commission discontinues its

[8] If the district court does not prescribe the practice and procedure, then s 1782(a) provides the Federal Rules of Civil Procedure as the default practices and procedures. The Federal Rules of Civil Procedure supplement the mechanisms for obtaining the discovery, and do not independently limit the discovery authorised under s 1782. *Re Patricio Clerici* 481 F 3d 1324, 1336 (11th Cir 2007) (holding that Fed R Civ P 69(a) does not bar discovery under s 1782); *Weber v Finker* 554 F 3d 1379, 1385-85 (11th Cir 2009); S Rep No 88-1580 (1964), reprinted in (1964) *United States Code Congressional and Administrative News (USCCAN)* 3789 (statute 'permits, but does not command, following the foreign or international practice. If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature').

[9] *Intel Corp v Advanced Micro Devices Inc* 542 US 241 (2004).

[10] One irony is that the Supreme Court of late has been hostile to antitrust plaintiffs in US litigation. More than 16 years had passed until 2010 when the Supreme Court decided an antitrust case in plaintiff's favour. Over that stretch, defendants were 18–0. Over a longer timeframe, the Court has shifted from ruling in the antitrust plaintiff's to the defendant's favour. M Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 42 *UC Davis Law Review* 1375, 1458.

[11] *Advanced Micro Devices Inc v Intel Corp* Civ Act No C-01-7033 MISC WAI, 2002 WL 1339088 (ND Cal 7 January 2002).

[12] *Intergraph Corp v Intel Corp* CV-97-N-3023 NE.

[13] The DG Competition investigates possible violations of the European competition law and makes proposals to the European Commission, which is empowered under the EC Treaty to take decisions, such as imposing fines. See Submission by the Directorate General for Competition of the European Commission to the US Antitrust Modernization Commission (6 April 2006) http://govinfo.library.unt.edu/amc/public_studies_fr28902/international_pdf/060406_DGComp_Intl.pdf.

investigation or dismisses the complaint.[14] As such, although complainants lack formal 'party' or 'litigation' status in European Commission proceedings, complainants nonetheless have a reasonable interest in obtaining judicial assistance.

Although complainants before the European Commission can seek discovery under section 1782(a), it remains unclear who else would qualify as an 'interested person'. After *Intel*, one lower court declined to extend 'interested person' to an applicant who identified itself solely as a potential litigant and who failed to demonstrate its ability to litigate the antitrust claim.[15]

ii. What Foreign Proceedings Qualify Under Section 1782(a)?

Section 1782(a) applies to 'proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation'. The parties in *Intel* agreed that the Court of First Instance and the European Court of Justice were foreign or international tribunals under section 1782(a). The disputed issue was whether the European Commission itself was a 'tribunal'. The European Commission, as amicus, argued it was not a 'tribunal' under section 1782(a). If the US Supreme Court found the contrary, warned the European Commission, then the EC's '"ability to carry out its governmental responsibilities" will be seriously threatened'.[16]

Despite the European Commission's protestations, the US Supreme Court held that the European Commission was a 'tribunal' when it acted as a first-instance decision-maker.[17] The Court examined the legislative history of section 1782. As a Senate Report explained, Congress deleted the term 'judicial proceeding' from the statute to authorise discovery in connection with administrative and quasi-judicial proceedings abroad.[18] The Court in *Intel* did not delineate the contours of a 'quasi-judicial' proceeding, but found that the antitrust proceeding before the European Commission qualified as a 'quasi-judicial' proceeding. The European Commission, unlike the US Department of Justice (DOJ), has authority to determine liability and impose penalties, 'dispositions that will remain final unless overturned by European courts'.[19] Moreover, to use evidence before the Court of First Instance, the antitrust complainant must submit the evidence to the European Commission in its current, investigative stage.[20]

One issue that has divided the lower US courts is whether a private arbitration tribunal qualifies as a 'tribunal' under section 1782(a). Several lower courts have held that the Supreme Court's construction of section 1782(a) generally and 'tribunal' specifically in *Intel* is sufficiently broad to encompass all arbitral tribunals.[21] Other courts disagree, and

[14] *Intel* (n 9) 256.

[15] *Re Intel Corp Microprocessor Antitrust Litigation* MDL Docket No 05-1717-JJF, 2008 WL 4861544, 10 (D Del 7 November 2008) (finding French consumer association failed to demonstrate its legal ability to be a litigant outside of France).

[16] *Intel* (n 9) 271 (J Breyer, dissenting) (quoting Brief for Commission of European Communities as Amicus Curiae 2).

[17] ibid 246–47.

[18] ibid 258 (quoting S Rep No 1580, pp 7–8).

[19] ibid 255 fn 9.

[20] ibid 257; see also *Re Minatec Finance Sàrl* Civ Act No 1:08-CV-269 (LEK/RFT), 2008 WL 3884374 (ND NY 18 August 2008) (German tax audit qualifies as proceeding within s 1782(a)).

[21] See, eg, *Comisión Ejecutiva, Hidroeléctrica Del Rio Lempa v Nejapa Power Co LLC* No 08-135-GMS, 2008 WL 4809035 (D Del 14 October 2008) 1 (Court's decision in *Intel* (and post-*Intel* decisions from other district courts) indicate that s 1782(a) does apply to private foreign arbitrations), appeal dismissed as moot, No 08-3518 (3d Cir 3 August 2009); *Re Babcock Borsig AG* 583 F Supp 2d 233, 238–40 (D Mass 2008) (finding the ICC a 'first-instance

hold that discovery is unavailable under section 1782(a) for foreign arbitral tribunal proceedings.[22] Under a third approach, some courts have held that the statutory term 'tribunal' excludes purely private arbitral tribunals, which represent private contractual alternatives to State-sponsored tribunals, but includes State-sponsored arbitral tribunals, such as those authorised by foreign governments to adjudicate disputes under their treaties or business ventures.[23] Neither the Supreme Court nor Congress has resolved this dispute.

iii. When Can an Interested Person Seek Discovery under Section 1782?

Section 1782(a) simply provides that the requested discovery must be 'for use' in the foreign proceeding, which includes 'criminal investigations conducted before formal accusation'. So to obtain discovery in the US, must the foreign proceeding progress beyond the investigative stage? The Supreme Court responded no.

The foreign proceeding for which discovery is sought under section 1782(a) need not be pending or imminent, only in 'reasonable contemplation'.[24] Thus, section 1782(a) only requires that a 'dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation'.[25]

The Supreme Court did not provide a temporal limit of 'reasonable contemplation'. Indeed it would have been unrealistic for the Supreme Court to provide a specific time period for a dispositive ruling – as antitrust litigation under the rule-of-reason standard in the US courts can drag on for years, if not decades.[26]

After *Intel*, the lower courts have had few opportunities to clarify the meaning of 'reasonable contemplation'.[27] Most applicants easily satisfy this requirement as they are already litigants in a pending foreign proceeding. After *Intel* one court in interpreting 'reasonable contemplation' required 'reliable indications of the likelihood that proceedings will be instituted within a reasonable time'.[28] Thus an allegation that a potential litigant 'may bring

decisionmaker' that conducts proceedings which lead to a dispositive ruling, so that the ICC is a 'tribunal' within s 1782); *Re Hallmark Capital Corp* 534 F Supp 2d 951, 956–57 (D Minn 2007) (rejecting an 'inflexible rule that would categorically exclude all private arbitrations from the definition of "tribunal"', and instead concluding that a private Israeli arbitral body was a 'tribunal' under s 1782); *Re Roz Trading Ltd* 469 F Supp 2d 1221, 1226–28 (ND Ga 2006) (finding the term 'tribunal' not ambiguous: 'Where a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of "tribunal", the reasoning of *Intel*, and the scope of [s] 1782(a), regardless of whether the body is governmental or private').

[22] See, eg, *El Paso Corp v La Comisión Ejecutiva Hidroeléctrica Del Río Lempa* No 08-20771, 2009 WL 2407189, 3 (5th Cir 6 August 2009) (expressing concern that awarding discovery under s 1782, which authorises broader discovery than what is authorised for domestic arbitration, would generate disputes as to whether arbitration is foreign or domestic and thwart arbitration's principal advantage of speedily, economically and effectively resolving disputes); *Re Operadora DB Mexico SA DE CV* No 6:09-cv-383-Orl-22GJK, 2009 WL 2423138 (MD Fla 4 August 2009).

[23] *Ukrnafta v Carpatsky Petroleum Corp* No 3:09 MC 265(JBA), 2009 WL 2877156, 4 (D Conn 27 August 2009) (accepting *in dictum* distinction in *Oxus*); *Re Arbitration between Norfolk Southern Corp, Norfolk Southern Ry Co and General Sec Ins Co and Ace Bermuda Ltd* 626 F Supp 2d 882, 885 (ND Ill 2009) (accepting distinction in *Oxus*); *Oxus Gold* (n 6) 6 (arbitration conducted under United Nations Commission on International Law for purpose of adjudicating disputes under countries' bilateral investment treaty).

[24] *Intel* (n 9) 259; *Re Wilhelm* 470 F Supp 2d 409, 411 (SD NY 2007) (gently requesting government prosecutors to update their applications for legal assistance under s 1782(a) to reflect *Intel*'s more lenient requirement of 'reasonable contemplation').

[25] *Intel* (n 9) 259.

[26] Stucke, 'Rule of Reason' (n 10) 1460–65.

[27] *Re Intel Corp Microprocessor Antitrust Litigation* (n 15) 12.

[28] ibid 11 (quoting *Re Letter of Request from Crown Prosecution Service of United Kingdom* 870 F 2d 686, 692 (DC Cir 1989)).

suit in either one or two different forums, on behalf of a group of unidentified plaintiffs, for unknown claims, at some point in the future, if (and only if) there is an adverse decision by the EC' against the defendant was not within 'reasonable contemplation'.[29]

iv. What Kind of Discovery Is Available under Section 1782(a)?

Section 1782(a) requires that the requested discovery must be 'for use' in a foreign proceeding. Does the statute then limit the scope of permissible discovery to evidence discoverable under the law governing the foreign proceeding? Does section 1782(a) require that the requested discovery be actually admissible in the foreign proceeding? Before *Intel*, the US lower courts were divided over these issues.[30] The Supreme Court in *Intel* held that other than information protected by a legally applicable privilege,[31] the statute leaves the scope of discovery within the district court's discretion.[32]

Thus the statute permits the district court to order discovery that is otherwise unavailable under foreign law, inadmissible in the foreign jurisdiction, or unavailable or inadmissible under US law in analogous circumstances.[33] As a result, an antitrust complainant before the European Commission conceivably could obtain more discovery under section 1782(a) than it could as a plaintiff in the US under the liberal Federal Rules of Civil Procedure.[34] Nor must the applicant under section 1782(a) first try to obtain the discovery in the foreign proceeding,[35] or prove as a threshold matter that the requested discovery is admissible in the foreign proceeding.[36]

If the phrase 'for use' in the foreign proceeding does not require that the section 1782(a) discovery be discoverable or admissible in the foreign proceeding, what does it mean? One US district court after *Intel* construed it liberally to 'discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action'.[37] A couple of courts found the discovery 'for use' when the applicant

[29] ibid 15.

[30] *Intel* (n 9) 259–60.

[31] The law of privileges in the United States is a mixture of constitutional (eg, Fifth Amendment privilege against self-incrimination), statutory, and common law. Under Federal Rule of Evidence 501, the federal common law of privileges (rather than State law privileges) applies in federal criminal cases and most federal question cases. Some of the more popular privileges include the lawyer-client privilege and privilege for confidential marital communications. See K Broun (ed), *McCormick on Evidence*, 6th edn (St Paul, Thomson West, 2006) 130–304.

[32] *Intel* (n 9) 246–47.

[33] ibid 263 fn 15; see also *Marubeni America Corp v LBA YK* 335 Fed Appx 95, 2009 WL 1738509 (2nd Cir 2009) (Supreme Court expressly declined to adopt a rule requiring parties seeking discovery under s 1782(a) to demonstrate that the information would be discoverable in the foreign jurisdiction); *Re Servicio Pan Americano de Proteccion* 354 F Supp 2d 269, 275 (SD NY 2004) (since discovery sought under s 1782(a) will be useful to foreign tribunal but potentially unobtainable under foreign law for purely technical reasons, application of the foreign discovery rules 'would be senseless'); American Bar Association (ABA) Section of Antitrust Law, *Antitrust Law Developments*, vol II, 6th edn (Chicago, ABA, 2007) 1245.

[34] *Intel* (n 9) 263.

[35] *Labor Court of Brazil* (n 7) 1031; *Kang v Nova Vision Inc* No 06-21575-CIV, 2007 WL 1879158 (SD Fla 26 June 2007) 2 (availability of discovery in foreign tribunal is irrelevant); *Roz Trading* (n 21) 1229 (no statutory exhaustion requirement); *Re Procter & Gamble* 334 F Supp 2d 1112, 1116 (ED Wisc 2004); ABA, *Antitrust Law Developments* (n 33) 1245.

[36] *Minatec Finance* (n 20) 6 (calling parties' 'cannonade of legal affidavits' on admissibility and discoverability of requested evidence in foreign proceeding 'meaningless'); *Labor Court of Brazil* (n 7) 1028 (warning that US courts 'should avoid complex, costly, and inefficient issues such as determining the admissibility in a foreign court of a specific piece of evidence for a specific case').

[37] *Labor Court of Brazil* (n 7) 1029; see also *Kang v Noro-Moseley Partners* 246 Fed Appx 662, 664 (11th Cir 2007) (affirming lower court's denial under s 1782(a) of irrelevant discovery); *Re Apotex Inc* Misc No M12-160, 2009 WL 618243, 4 (SD NY 9 March 2009) (as discovery concerns a legal theory unavailable in foreign country,

intended to offer the evidence to the foreign tribunal.[38] Generally, the less relevant the requested discovery, and the costlier the discovery request, the less inclined the US court will be to order discovery under section 1782(a).[39]

B. When Will the US Courts Exercise Their Discretion and Permit Discovery under Section 1782?

After determining that it has the authority under section 1782(a) to order discovery, the US district court next determines whether to exercise its authority. 'Once the statutory requirements are met, a district court is free to grant discovery in its discretion'.[40] Section 1782(a) 'authorises, but does not require, a federal district court to provide assistance to' the person seeking discovery.[41]

A critical issue is how much discretion should the US district courts be afforded? One US appellate court observed that the district court's discretion is 'not boundless':

> district courts must exercise their discretion under Section 1782 in light of the twin aims of the statute: 'providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'[42]

But these vague factors do not significantly mitigate rule-of-law concerns.

Moreover the discovery process under section 1782(a) creates a greater risk of inconsistent results than civil antitrust discovery. An antitrust plaintiff brings a federal civil action in one judicial district, and in many districts, one judge oversees any discovery disputes.[43] In contrast the 'interested person' under section 1782(a) cannot always procure its discovery in one US judicial district. Instead the applicant must go wherever the persons who control the documents are found or reside. So if the applicant seeks discovery from five different firms, all of whom reside in five different US judicial districts, then the applicant must make discovery applications in the five different judicial districts before five different judges. Section 1782 sets the stage for similar discovery requests simultaneously made before different district courts across the United States. This does not mean each judge is unaware of her fellow judges' decisions. Some discovery applications are resolved quicker in some judicial districts than in others.[44] So one district court can benefit in learning how

discovered information is not relevant or useful to foreign tribunal); *Cryolife Inc v Tenaxis Medical Inc* No C08-05124 HRL, 2009 WL 88348, 4 (ND Cal 13 January 2009) (applicant need only show that information will be useful); *Procter & Gamble* (n 35) 1115 (need only consider whether requested discovery would be useful or designed merely to burden an opponent).

[38] *Re Imanagment Services Ltd* No Civ A 05-2311(JAG), 2006 WL 547949, 3 (D NJ 3 March 2006); *Re Grupo Qumma SA* No M 8-85, 2005 WL 937486, 2 (SD NY 22 April 2005).

[39] *Babcock Borsig* (n 21) 241 (if foreign tribunal would not make any use of the requested evidence, 'it may be irresponsible for a district court to order discovery, especially where it involves substantial costs to the parties involved').

[40] *Intel* (n 9) 264 (quoting *Re Metallgesellschaft AG* 121 F 3d 77, 78 (2d Cir 1997)).

[41] *Intel* (n 9) 255.

[42] *Schmitz* (n 7) 84 (quoting *Metallgesellschaft* (n 40) 79).

[43] Moreover, when multiple private antitrust actions are pending in different federal districts involving one or more common questions of fact, then these civil actions can be transferred to one federal district for coordinated or consolidated pretrial proceedings. 28 USC s 1407. This statute's aim is to avoid duplication of discovery, prevent inconsistent pre-trial rulings, and conserve the resources of the parties, their counsel and the judiciary.

[44] Time permitting, an applicant under s 1782(a) may stage the filing of applications, starting first with the judicial districts where a favourable result is more likely, and use this precedent in the other judicial districts.

a sister court adjudged a similar section 1782(a) application.[45] Nonetheless the greater the discretion, the greater the risk of different district courts reaching inconsistent determinations as to whether, and to what extent, to afford discovery under section 1782(a).[46]

Moreover, when reviewing the district court's decision regarding discovery under section 1782, the US appellate courts do not reweigh the factors for granting or denying discovery. They instead apply an 'extremely limited and highly deferential' abuse of discretion standard.[47]

Although section 1782(a) poses a greater risk of inconsistent discovery decisions, the Supreme Court in *Intel* declined to adopt supervisory rules to expressly limit the discretion of 975 full-time and senior district court judges across the 94 US judicial districts.[48] The Supreme Court recognised that such categorical limits could minimise the expensive, time-consuming battles of discovery. But the Supreme Court felt specific supervisory rules were premature: there was no indication that applications for discovery under section 1782(a) were indeed imposing significant costs on the parties or foreign tribunal or that the district courts were reaching inconsistent results.[49]

The Supreme Court, however, did not leave the lower courts' discretion wholly unchecked. It identified the following four factors for the district courts to consider when exercising their discretion.[50]

i. Is the Person from whom Discovery Is Sought a Participant in the Foreign Proceeding?

When the documents or testimony sought under section 1782(a) are within the foreign tribunal's jurisdictional reach, then the need for section 1782(a) aid is not as apparent as when the evidence is sought from a non-participant outside the foreign tribunal's jurisdictional reach.[51]

[45] eg, in connection with the EC antitrust proceeding, Microsoft on 3 March 2006 filed three similar applications under s 1782(a) for discovery in three different judicial districts. All three courts denied discovery under s 1782(a). The federal district court in the Northern District of California was the first to quash Microsoft's subpoenas, *Re Microsoft* 2006 WL 825250 (ND Cal 29 March 2006), followed several weeks later by the district court in the District of Massachusetts, *Re Microsoft Corp* 2006 WL 1344091 (D Mass 19 April 2006), followed one day later by the district court in the Southern District of New York, *Re Microsoft Corp* (n 6) 188, 191 fn 3 (citing *Re Microsoft Corp* 2006 WL 825250 (ND Cal 29 March 2006)).

[46] eg, two circuit courts, on the same facts in decisions rendered within the same week, reached different holdings as to whether the appeal of the district court's denial of discovery under s 1782(a) was moot. cp *Comisión Ejecutiva, Hidroeléctrica Del Río Lempa v Nejapa Power Co LLC* No 08-3518, 2009 WL 2358694 (3d Cir 3 August 2009) (rejecting applicant's re-opening theory, and holding appeal moot) with *El Paso* (n 22) 3 (accepting applicant's re-opening theory so appeal not moot, but holding that s 1782(a) does not authorise discovery for proceeding before private arbitral tribunal).

[47] *Clerici* (n 8) 1331 (quoting *United Kingdom v United States* 238 F 3d 1312, 1319 (11th Cir 2001)); see also *Marubeni America Corp v LBA YK* (n 33) 1; *Kang v Noro-Moseley Partners* (n 37) 662. The district court's interpretation of the statute, on the other hand, is reviewed *de novo*.

[48] In 2008, there were 651 active federal district court judges and 324 senior judges. Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts* (Washington, US Government Printing Office (USGPO), 2009) 38, www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/front/JudicialBusinespdfversion.pdf.

[49] *Intel* (n 9) 265 fn 17.

[50] These factors are similar to those found in s 1782's legislative history. S Rep No 88-1580 (n 8) 3788 (noting how a district court in exercising its discretionary power '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, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it').

[51] *Intel* (n 9) 264; *Labor Court of Brazil* (n 7) 1031 (while wholly-owned subsidiary a party in the foreign proceeding, American parent company had not shown that foreign tribunal could order it to respond to discovery request).

ii. Comity Considerations

The second factor involves 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to US federal-court judicial assistance'.[52] Comity considerations often play a significant, if not decisive, role in the district court's analysis.[53]

When the foreign tribunal expressly and clearly objects to the applicant's discovery request under section 1782, then, as one US court observed, granting such discovery 'would undermine the spirit and purpose of the statute by discouraging that and other foreign tribunals from "heeding similar sovereignty concerns posited by our governmental authorities to foreign courts"'.[54] US courts generally will deny discovery under section 1782(a) when there is authoritative evidence that such discovery 'would interfere with the foreign tribunal, not assist it'.[55] Such is the case when granting discovery under section 1782(a) would pre-empt or contradict the foreign tribunal's decision on confidentiality, which carefully balanced the need for third-party cooperation against the need to preserve a defendant's rights to defence.[56] US courts after *Intel* also routinely deny discovery under section 1782(a) when the foreign tribunal affirmatively states it would interfere with the foreign tribunal's 'orderly handling of its own enforcement proceedings'.[57]

On the other hand, the US court is more likely to grant discovery under section 1782(a) when the foreign tribunal is silent, or absent clear evidence that the foreign government or tribunal is unreceptive to US judicial assistance under section 1782(a).[58] At times the litigants try to fill this void with competing affidavits by legal experts familiar with the foreign tribunal. These experts opine whether the foreign tribunal would likely admit the US discovery into evidence. But the US district courts generally dismiss these expert affidavits. Absent clear evidence from the foreign tribunal itself (or some other relevant government authority), the US courts generally do not attempt to predict whether the sought-after evidence would be admissible in the foreign proceeding.[59] The ensuing speculative, 'costly, time-consuming, and inherently unreliable' foray into the foreign tribunal's receptivity to the discovered evidence, while lucrative for the competing foreign law experts, does not promote the aims of section 1782(a).[60]

[52] *Intel* (n 9) 264.

[53] *Re Microsoft Corp* (n 6) 188, 194; *Re Microsoft Corp* (D Mass) (n 45) 4; *Re Microsoft Corp* (ND Cal) (n 45) 3; *Advanced Micro Devices Inc v Intel Corp* No C 01-7033, 2004 WL 2282320, 2 (ND Cal 4 October 2004) (noting how the EC did not consider it necessary to request or even subsequently review the documents sought under s 1782).

[54] *Re Microsoft Corp* (n 6) 188, 194 (quoting *Re Schmitz* 259 F Supp 2d 294, 298 (SD NY 2003)).

[55] *Re Microsoft Corp* (D Mass) (n 45) 4.

[56] *Re Microsoft Corp* (n 6) 196 ('In short, § 1782 was not intended-and Microsoft cannot invoke it as a vehicle to avoid or appeal an unfavorable discovery decision by the Commission').

[57] *Re Microsoft Corp* (ND Cal) (n 45) 3; see also *Schmitz* (n 7) 84–85 (deferring to the German government's request to deny discovery under s 1782); *Re Microsoft Corp* (n 6) 194–96 (expressing concern of pitting US court against EC); *Advanced Micro Devices* (n 53) 2–3.

[58] *Cryolife* (n 37) 3; *Re Carsten Rehder Schiffsmakler und Reederei Gmbh & Co* No 6:08-mc-108-Orl-35DAB, 2008 WL 4642378 (MD Fla 17 October 2008) 2 (while unclear whether Chinese court is receptive to evidence, no evidence that discovery is futile); *Minatec Finance* (n 20) 7–8 (noting absence of dispositive German authority objecting to requested discovery under s 1782(a) and no showing that applicant is pursuing discovery in bad faith); *Re Sveaas* 249 FRD 96, 107 (SD NY 2008); *Labor Court of Brazil* (n 7) 1032 (distinguishing cases where EC opposed discovery under s 1782); *Re Gemeinschaftspraxis Dr Med Bernard Schottdorf* No Civ M19-88 (BSJ), 2006 WL 3844464 (SD NY 29 December 2006) 6 (court can consider only 'authoritative proof' when the representative of a foreign sovereign expressly and clearly makes its position known); *Imanagment Services* (n 38) 3 (distinguishing cases where foreign tribunal had authoritative proof from foreign tribunal of its receptivity).

[59] *Grupo Qumma* (n 38) 3, quoting *Re Euromepa SA* 51 F 3d 1095, 1099–100 (2d Cir 1995).

[60] *Re Michael Wilson Partners Ltd* No 06-cv-02575-MSK-PAC (MEH), 2007 WL 2221438, 4 (D Colo 27 July 2007); *Schottdorf* (n 58) 7. Although the battle by expert affidavit over foreign discovery and evidentiary law may be costly, time-consuming and inherently unreliable, it is not unique to s 1782. See Fed R Civ P 44.1: 'In determining foreign

Some US courts go a step further and infer the foreign tribunals' receptivity to the evidence from the existence of treaties that facilitate cooperation between the US and that foreign country.[61] Ultimately, when the receptivity of the foreign government or tribunal to US judicial assistance is unknown, many US courts allow the discovery under section 1782(a) and leave it to the foreign tribunal to either admit or exclude the discovered information.[62]

The fact that the foreign tribunal elects not to pursue such discovery, while informative, is not always determinative.[63] Besides assisting the foreign tribunal, section 1782(a) also seeks to assist any 'interested person' in that foreign proceeding, which may include the litigants. For example, in *Intel*, the European Commission as amicus curiae said it did not want or need the US courts' assistance.[64] But such opposition did not automatically preclude a complainant from obtaining discovery under section 1782(a). This may reflect the reality of the litigants' and tribunal's divergent interests. Although a foreign tribunal could obtain the sought-after documents and provide them to the interested party, it could decline to do so. Similarly, the complainant before the foreign tribunal at times may have greater incentives to pursue investigatory leads than a governmental agent. Competition authorities in the US or abroad, while earnest, are fallible and at times may miss an important aspect of the case. Moreover governmental agencies are not beyond being captured by political, financial or ideological interests.[65] Incriminatory (or exculpatory) evidence submitted by the complainant (or defendant) may make it more difficult for the foreign tribunal to justify its terminating (or prosecuting) its antitrust investigation.

So even in cases where the foreign tribunal formally opposes discovery under section 1782, the US district court must still consider the interests of the interested party. Thus, one district court noted that Microsoft made 'no showing of fundamental unfairness' if its discovery requests were denied under section 1782(a).[66] Presumably, if the applicant makes such a strong showing of fundamental unfairness, then, despite the protestations of the foreign tribunal, the US court could weigh the second discretionary factor in the applicant's favour.

iii. Is the Applicant's Discovery Request under Section 1782(a) an Attempt to Circumvent Foreign Proof-Gathering Restrictions or Other Policies of a Foreign Country or the United States?

Here again principles of comity and fair play come to the fore.[67] If the defendant in the foreign proceeding seeks to 'circumvent the procedures for and limitations on proof-

law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence'.

[61] *Imanagment Services* (n 38) 4 (noting both US and Russia are parties to Hague Evidence Convention); *Servicio Pan Americano* (n 33) 274 (Venezuela indicated its receptivity to federal judicial assistance by its signature of treaties facilitating such cooperation). Another basis to infer the receptivity of the foreign government and tribunal to US judicial assistance is when they themselves seek discovery under s 1782. See, eg, *Clerici* (n 8) 1324 (Panamanian court); *Re Czech Republic* No 3:08-mc-001-J-33TEM, 2008 WL 179263 (MD Fla 17 January 2008) (Czech prosecutor office seeking evidence under statute and treaty for criminal investigation); *Re United Kingdom* No 3:07-mc-46-J-32MCR, 2007 WL 3286689 (MD Fla 5 November 2007) (UK); *Re Letter of Request from Costa Rica* No 07-20037-CIV-SEITZ/MCALILEY, 2007 WL 141155 (SD Fla 16 January 2007).

[62] See, eg, *Cryolife* (n 37) 3; *Carsten* (n 58) 2; *Schottdorf* (n 58) 7; *Grupo Qumma* (n 38) 3.

[63] *Kang v Nova Vision* (n 35) 2 (fact that German court neither requested nor indicated that it will use the discovery is not decisive).

[64] *Intel* (n 9) 265.

[65] See, eg, *Roz Trading* (n 21) 1222 (applicant alleging that foreign government violently seised applicant's interest in joint venture, and fearful of its employees' lives, applicant cannot return to foreign country to retrieve documents).

[66] *Re Microsoft Corp* (D Mass) (n 45) 4.

[67] *Intel* (n 9) 265.

gathering established by the laws of the European Community'[68] by obtaining under section 1782(a) documents from third-party complainants, discovery is denied.

On the other hand, the mere fact that the applicant is seeking discovery under section 1782, as opposed to using other means (such as the foreign tribunal's discovery mechanisms), is not viewed negatively.[69]

iv. Is the Discovery Request Unduly Intrusive or Burdensome?

In assessing whether the discovery request is 'unduly intrusive or burdensome',[70] the district court considers the requested information's 'relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which documents are described and the burden imposed' as well as the subject's 'status as a nonparty to the litigation'.[71] Section 1782's flexibility enables the courts to 'be creative in fashioning relevant discovery mandates'.[72]

The US courts look favourably on discovery requests that are 'short, simple and well-defined',[73] such as discovery relating to insurance coverage for a single loss on a single day.[74] On the other hand, the US courts look unfavourably on discovery requests perceived as overly broad and unduly burdensome.[75] This will likely be the case if the discovery request lacks reasonable limitations as to the time, place or subject matter[76] or involves hard-to-locate dated documents.[77]

The district court can trim the discovery request to something more manageable or dismiss the application, with leave for the applicant to file a more reasonable discovery request.[78] The district court can issue protective orders to protect confidential business information,[79] require a 'reciprocal exchange of information' to lend parity to the disclosure

[68] *Re Microsoft Corp* (D Mass) (n 45) 4; see also *Re Microsoft Corp* (ND Cal) (n 45) (denying discovery under s 1782(a) when Microsoft sought to circumvent specific discovery restrictions the EC placed on Microsoft); *Re Microsoft Corp* (n 6) 188, 192 (deferring to EC's claim that European rules adequately protected Microsoft's 'rights of defense' in accessing files, and Microsoft's s 1782(a) application was 'not objectively necessary but rather an attempt to circumvent the established rules on access to file in proceedings before the Commission').

[69] *Schottdorf* (n 58) 7; *Grupo Qumma* (n 38) 3.

[70] *Intel* (n 9) 265.

[71] *Re Heraeus Kulzer GmbH* No 09-MC-00017, 2009 WL 2981921, 4 (ED Pa 11 September 2009) (quoting *Lady Liberty Trans Co v Philadelphia Parking Authority* No 05-1322, 2007 WL 707372, 9 (ED Pa 1 March 2007)); see also *Re Fischer Advanced Composite Components AG* No C08-1512RSM, 2008 WL 5210839, 4 (WD Wash 11 December 2008) (finding that when discovery is equally available in foreign or US jurisdiction, and the source or recipient of the requested discovery is a litigant in a foreign proceeding then s 1782(a) application is duplicative, and unduly intrusive and burdensome to the American parent company).

[72] *Minatec Finance* (n 20).

[73] *Carsten* (n 58) 2.

[74] *Servicio Pan Americano* (n 33) 275.

[75] *Re Blue Oil Trading Ltd* No 3:09MC152-RJC, 2009 WL 3247854, 2–3 (WDNC 5 October 2009) (denying discovery request, but leaving applicant opportunity to amend application to topics relevant to foreign proceeding); *Re Marano* No CV-09-80020-MISC-DLJ, 2009 WL 482649, 3 (ND Cal 25 February 2009) (denying overly broad, unduly burdensome discovery request).

[76] *Heraeus Kulzer* (n 71) 2 ('vague and overbroad' discovery requests going back to 1996); *Kang v Nova Vision* (n 35) 2 (discovery requests span more than seven years and are located at seven sites); *Re Degitechnic* No C07-414-JCC, 2007 WL 1367697, 5 (WD Wash 8 May 2007) (denying broadly-worded discovery requests over seven-year period made only days before applicant's appellate brief was due in foreign proceeding).

[77] *Apotex* (n 37) 3–4 (denying unduly intrusive and burdensome discovery request for nearly 30-year-old documents).

[78] *Roz Trading* (n 21) 1230 (trimming overbroad discovery requests which lacked reasonable limitations as to time, place or subject matter).

[79] *Cryolife* (n 37) 5; *Re Michael Wilson Partners Ltd* No 06-cv-02575-MSK-KLM (MEH), 2007 WL 3268475 (D Colo 30 October 2007) (person seeking a protective order, which rests within the court's discretion, must show

mix,[80] shift significant discovery costs from the non-party to the section 1782(a) applicant,[81] and require the applicant to advance some of the anticipated discovery costs.[82] Alternatively if the recipient of the subpoena does not have any responsive discovery, that is not a basis to deny a section 1782(a) request. The recipient must still reply accordingly (namely by attesting that it has no information responsive to the discovery request).[83]

III. When Can Private Litigants in the US Seek Discovery Abroad?

Similar to the inquiry described above, the US district courts also engage in a two-part inquiry in determining when litigants in civil US proceedings seek discovery abroad. First, the US courts inquire whether they have statutory authority to order the requested discovery. This answer will depend on whether the US court can exercise personal jurisdiction over the person who has control over the sought-after discovery. If the court has statutory authority to order discovery, it next determines whether it should exercise its authority.

A. Does the US Court Have the Statutory Authority to Order the Requested Discovery?

Civil litigants in US federal court can seek (i) discovery for documents (including computer data);[84] (ii) to depose individuals (including videotaped depositions);[85] (iii) party interrogatories;[86] (iv) physical and mental examinations;[87] and (v) requests for admissions.[88] The litigants may obtain discovery 'regarding any non-privileged matter that is relevant to any party's claim or defense'.[89] The sought-after discovery need not be admissible at trial 'if the discovery appears reasonably calculated to lead to the discovery of admissible evidence'.[90]

The litigants in the US mainly determine the discovery they require. The person from whom discovery is sought can object to the discovery request. If the parties cannot resolve their discovery dispute, then one party can motion the court, and the district court will determine whether or not the discovery must be produced.

'The jurisdiction of American courts is unquestioned when they order their own nationals to produce documents located within this country', observed one US district court. 'But

under Fed R Civ P 26(c) and (c)(7) good cause, to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense', and can include an order 'that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way').

[80] *Minatec Finance* (n 20) 9.

[81] *Mirana v Battery Tai-Shing Corp* No C 08-80142 MISC JF (RS), 2009 WL 290459, 3–4 (ND Cal 5 February 2009); S Rep No 88-1580 (n 8) 3788 (noting how US court may order 'fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers of the testimony and similar provisions').

[82] *Kang v Nova Vision* (n 35) 2–3 (ordering applicant to cover up to $10,000 of the discovery expenses).

[83] *Kolomoisky* (n 6) 2.

[84] Fed R Civ P 26.

[85] ibid 27–32.

[86] ibid 33.

[87] ibid 35.

[88] ibid 36; T Main, *Global Issues in Civil Procedure* (St Paul, Thomson West, 2006) 33–34.

[89] Fed R Civ P 26(b)(1).

[90] ibid.

jurisdiction is less certain when American courts order a defendant to produce documents located abroad, especially when the country in which the documents are situated prohibits their disclosure'.[91]

i. Federal Rules of Civil Procedure Versus the Hague Convention

In seeking discovery abroad, the party, as a threshold issue, must decide whether to obtain civil discovery under the traditional route (the Federal Rules of Civil Procedure) or under the Hague Convention.[92]

If the US federal court lacks personal jurisdiction over the person from whom discovery is sought (or the non-party is geographically beyond service of process), then the US litigant lacks this option. The litigant can opt for the Hague Convention's procedures (if the country where the foreign national resides is a party)[93] or otherwise can seek discovery by letters rogatory.[94]

But if the US district court has personal jurisdiction and subpoena power over the foreign person, then, as the Supreme Court held in *Société Nationale*, the litigant and district court have a choice. The Hague Convention procedures are not the exclusive means for US litigants to obtain discovery abroad.[95] Nor must US litigants first resort to the Hague Convention's procedures whenever discovery is sought from foreign nationals.[96] Instead, the Supreme Court left the choice between the two options to the litigants' and ultimately the district court's discretion.

In exercising its discretion, the district court, besides weighing the Restatement's comity factors, which are discussed below,[97] 'must supervise pretrial proceedings particularly closely to prevent discovery abuses' and 'exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position'.[98] Moreover, the district court must 'demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operation, and for any sovereign interest expressed by a foreign State'.[99] Some US courts consider the non-party status of the person subject to discovery in their comity analysis.[100]

[91] *Re Uranium Antitrust Litigation* 480 F Supp 1138, 1144 (ND Ill 1979).

[92] *Société Nationale* (n 1) 522, 524.

[93] For means to secure evidence located abroad through international assistance see ss 473–74 Restatement (Third) of the Foreign Relations Law of the United States.

[94] 11 CFR Section 92.54; US Department of State, Preparation of Letters Rogatory, http://travel.state.gov/law/judicial/judicial_683.html.

[95] *Société Nationale* (n 1) 524.

[96] ibid 542.

[97] ibid 544 fn 28 (quoting s 437(1)(c) Restatement of Foreign Relations Law of the United States (Revised) (Tentative Draft No 7, 1986)).

[98] *Société Nationale* (n 1) 546; see also s 442 cmt a Restatement (Third) of the Foreign Relations Law of the United States (before compelling production, court should scrutinise discovery request more closely than comparable discovery requests in the US).

[99] *Société Nationale* (n 1) 546.

[100] See, eg, *First American Corp v Price Waterhouse LLP* 154 F 3d 16, 21 (2d Cir 1998) (non-party status is considered in comity analysis); *Gap Inc v Stone International Trading Inc* No 93 Civ 0638 (SWK), 1994 WL 38651 (SD NY 4 February 1994) 1 (in determining whether to apply the Hague Convention's discovery procedures or those of the Federal Rules, 'courts commonly look to the status of the person from whom discovery is sought as one factor in determining whether to apply the provisions of the treaty'); *Minpeco SA v Conticommodity Services Inc* 116 FRD 517, 526–27 (SD NY 1987) (noting that historically 'restrictive' Second Circuit law on ordering disclosure in the face of foreign disclosure laws probably evolved because the cases concerned non-parties and that 'it is . . . important to focus on the status in the litigation at hand of the party resisting discovery').

Generally, US courts opt for the more familiar Federal Rules of Civil Procedure over the Hague Convention.[101]

ii. Personal Jurisdiction

To order discovery under the Federal Rules of Civil Procedure, the US court must have personal jurisdiction over the person from whom discovery is sought.[102] As long as the US court has personal jurisdiction, then the subpoenaed companies or individuals may not resist the subpoena on the ground that they are non-resident aliens.[103]

A US court may exercise personal jurisdiction over the corporation or individual when 'consistent with the United States Constitution and laws'.[104] The issue of personal jurisdiction involves a fact-specific analysis over whether the person purposefully established 'minimum' contacts in the forum State or judicial district,[105] and second whether exercising jurisdiction comports with fair play and substantial justice.[106]

The fact that the foreign corporation is not a party to the US litigation does not absolve it of its duty to comply with the US discovery request. Even for non-parties, the US discovery rules make

> clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party [to the litigation].[107]

However, when discovery is requested from a non-party as opposed to a party, the US litigants must take steps to reduce the non-party's burden. Under the applicable discovery rule, a 'party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena'.[108] The US district court can impose 'an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply'.[109]

[101] GB Born and PB Rutledge, *International Civil Litigation in United States Courts*, 4th edn (New York, Aspen, 2007) 910 (noting that 'uncertainties and delays that were traditionally associated with such requests have led US courts to prefer unilateral US discovery efforts'); US Departement of State, Preparation of Letters Rogatory (execution of letters may take a year or more worldwide) http://travel.state.gov/law/judicial/judicial_683.html; JR Martin 'Putting the Case Together: Organizing and Maximizing Discovery in Civil Antitrust Cases', www.abanet.org/antitrust/at-committees/at-yld/pdf/OrganizingMaximizingDiscoveryCivil_Ant.pdf (usually in plaintiffs' interests to seek discovery under the Federal Rules, while defendants likely advocate for discovery under the Hague Evidence Convention or foreign discovery rules).

[102] *Dexia Credit Local v Rogan* 231 FRD 538, 541 (ND Ill 2004); *Uranium* (n 91) 1144.

[103] *Re Marc Rich & Co* 707 F 2d 663, 667 (2d Cir 1983) (citing *United States v Field* 532 F 2d 404, 407–10 (5th Cir 1976); *United States v Germann* 370 F 2d 1019, 1022–23 (2d Cir), vacated on other grounds, 389 US 329 (1967)).

[104] Fed R Civ P 4(k)(2)(B); *Adams v Unione Mediterranea Di Sicurta* 364 F 3d 646 (5th Cir 2004).

[105] The constitutional touchstone of due process analysis is whether the entity purposely established minimum contacts in the forum (*Burger King Corp v Rudzewicz* 471 US 462, 474 (1985)) such that it could reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp v Woodson* 444 US 286, 297 (1980).

[106] *Burger King* (n 105) 476 (quoting *International Shoe Co v State of Washington, Office of Unemployment Compensation and Placement* 326 US 310, 320 (1945)); ABA (n 33) 1221–28.

[107] Advisory Committee Notes, 1991 Amendments to Fed R Civ P 45.

[108] Fed R Civ P 45(c)(1).

[109] ibid. According to one recent survey, however, non-parties still claimed that undue burdens and costs occurred 'frequently' or 'very frequently' and the US courts were not sympathetic to the non-parties' undue cost arguments. The Sedona Conference, 'The Sedona Conference Commentary on Non-party Production & Rule 45 Subpoenas' (2008) 9 *Sedona Conference Journal* 197, 204. However, nearly 80% of the surveyed members of the working group felt that the threshold for cost-shifting or cost-sharing was lower when discovery of a non-party's electronically-stored information (ibid 205).

iii. US Court's Subpoena Power

In addition to personal jurisdiction over the foreign corporations and individuals, the US court must have the power to subpoena such persons. If the foreign person is not a party to the US litigation, it may be beyond the court's subpoena power.[110]

The court's subpoena power is generally not an issue for the parties to a federal antitrust suit.[111] But under the US discovery rules, service of a *subpoena duces tecum* on non-parties is subject to territorial limitations. Namely the subpoena may validly be served

1. within the judicial district of the issuing federal district court;
2. outside that judicial district but within 100 miles within the US of the place specified for the deposition, hearing, trial, production or inspection;
3. within the State of the issuing federal district court if a State statute or court rule allows service at that place of a subpoena issued by a State court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or
4. where the federal district court authorises on motion and for good cause, if a federal statute so provides.[112]

In one antitrust case, a trade association was properly subpoenaed. But it argued that the subpoena was invalid because the requested documents were located in Belgium, and the discovery rules cannot be used to require a non-party to produce documents not located within 100 miles of the judicial district.[113] The district court disagreed. The word " 'Production' [in Federal Rule of Civil Procedure 45(a)(2)] refers to the delivery of documents, not their retrieval'.[114] Thus, the judicial district where the documents are to be produced need not be the same district where the documents are housed.[115]

iv. Seeking Discovery from Multi-National Corporations Operating Through Subsidiaries in Various Countries

US litigants may realise that the district court cannot order discovery under the Federal Rules of Civil Procedure. The court lacks personal jurisdiction over the foreign person or

[110] Federal statutes can expand the court's subpoena power beyond Rule 45. US nationals or residents living in a foreign country, for example, can be subpoenaed under the Walsh Act, 28 USC s 1783. To obtain discovery, a litigant must show that (i) there is a pending proceeding in the United States, (ii) the information cannot be obtained through any other source, and (iii) the information is necessary in the interest of justice. *Oxus Gold* (n 6) 8–9 (denying discovery when no showing why testimony could not be obtained through other means including written interrogatories). Like s 1782, issuing a subpoena under s 1783 ultimately lies within the district court's discretion. ibid 10 (denying subpoena requiring person to travel across continents for a deposition in connection with international arbitration). As to where to take depositions of persons living abroad, see Born and Rutledge, *International Civil Litigation* (n 101) 920–23; Fed R Civ P 28(b).

[111] s 12 Clayton Act, 15 USC s 22, provides antitrust plaintiffs with worldwide service of process on corporate antitrust defendants. See *McManus v Tato* 184 F Supp 958 (SD NY 1959). US courts are divided whether s 12's worldwide service of process provision applies only when plaintiff satisfies the section's venue requirement. cp *Daniel v American Board of Emergency Medicine* 428 F 3d 408 (2d Cir 2005) (must satisfy venue requirements) with *Re Automotive Refinishing Paint Antitrust Litigation* 358 F 3d 288, 297 (3d Cir 2004) (service and venue provisions independent).

[112] Fed R Civ P 45(b)(2).

[113] *Re Automotive Refinishing Paint* 229 FRD 482 (ED Pa 2005).

[114] ibid 494 (quoting *Hay Group Inc v EBS Acquisition Corp* 360 F 3d 404, 412 (3d Cir 2004)).

[115] ibid; see also Fed R Civ P 45(a)(2) advisory committee note ('Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the District or within the territory within which the subpoena can be served'); C Wright and A Miller, *Federal Practice and Procedure*, vol 9A (2nd edn 1995 and 2004 Supp) para 2456, p 31: 'Even records kept beyond the territorial reach of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction'.

the foreign person, while subject to personal jurisdiction, is not a party to litigation, is located outside the US, and is beyond the subpoena's geographic reach.

Because the US litigants cannot subpoena directly the foreign non-party for the documents, the US litigants instead may subpoena the foreign company's US affiliate to retrieve and produce the documents located with the foreign affiliate. The US court can subpoena and exercise personal jurisdiction over the domestic corporate affiliate. The question is whether the domestic corporate affiliate must produce the documents located abroad.

To answer this question, the district court must determine whether the US company has possession, custody, or control over the requested documents, electronically stored information or other tangible things located abroad with the foreign affiliate.[116] Under the US civil discovery rules, the 'test for the production of documents is control, not location'.[117] A corporation or individual cannot resist a subpoena simply because the requested documents are located abroad.[118] Thus a person can be ordered to produce documents, wherever their location, over which it has control. But a person cannot be ordered to produce documents over which it lacks control.[119]

On the issue of control, it is 'well-settled that a party need not have actual possession of the documents to be deemed in control of them'; rather, the 'test is whether the party has a legal right to obtain them'.[120] This definition of control applies to individuals and corporations.[121]

There are few bright-line rules of when a person has the requisite control over the requested discovery. The issue of 'control' over documents is 'often highly fact-specific'.[122] As one court said

> the issue of control is more a question of fact than of law, and it rests on a determination of whether the defendant has practical and actual managerial control over, or shares such control with its affiliate, regardless of the formalities of corporate organization.[123]
>
> When the domestic corporation 'has practical and actual managerial control' over a corporate organisation, then that domestic corporation has the requisite 'control' to order production of corporate documents from the foreign affiliate.[124]

[116] Fed R Civ P 34(a)(1) (party may serve on any other party a request to produce documents and other items in the responding party's 'possession, custody, or control'); Fed R Civ P 45(a)(1)(A) (litigant may subpoena a non-party subject to the court's personal jurisdiction by a specified time and at a specified place to 'attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises'); *Re Citric Acid Litigation* 191 F 3d 1090 (9th Cir 1999).

[117] *Marc Rich* (n 103) 663, 667 (citing *Re Canadian International Paper Co* 72 F Supp 1013, 1020 (SD NY 1947)).

[118] *Marc Rich* (n 103) 667 (citing *United States v First National City Bank* 396 F 2d 897, 900–01 (2d Cir 1968) and *Federal Maritime Commission v DeSmedt* 366 F 2d (2d Cir 1966) 464, 468–69); *Dexia Credit Local* (n 102) 541; *Uranium* (n 91) 1144.

[119] C Wright, A Miller, and R Marcus, *Federal Practice & Procedure: Federal Rules of Civil Procedure*, vol 8A, 2nd edn (St Paul, Thomson West, 2009) para 2210.

[120] *Dexia Credit Local* (n 102) 542 (quoting *Re Folding Carton Antitrust Litigation* 76 FRD 420, 423 (ND Ill 1977)); see also *United States v International Union of Petroleum & Industrial Workers* 870 F 2d 1450, 1452 (9th Cir 1989) (defining control as 'the legal right to obtain documents upon demand'); *Cochran Consulting Inc v Uwatec USA Inc* 102 F 3d 1224, 1229–30 (Fed Cir 1996); *Re Bankers Trust Co* 61 F 3d 465, 469 (6th Cir 1995); *Chaveriat v Williams Pipe Line Co* 11 F 3d 1420, 1426 (7th Cir 1993); *Gerling International Insurance Co v Commissioner* 839 F 2d 131, 140–41 (3d Cir 1988); *Searock v Stripling* 736 F 2d 650, 653 (11th Cir 1984); *Comcast of Los Angeles Inc v Top End International Inc* No CV 032213 JFWRCX, 2003 WL 22251149, 4 (CD Cal 2 July 2003); *Avery Dennison Corp v UCB Films PLC* No 95 C 6351, 1998 WL 293002, 2 (ND Ill 28 May 1998).

[121] *Dexia Credit Local* (n 102) 542; *Uranium* (n 91) 1144–45.

[122] Wright, Miller, and Marcus, *Federal Practice & Procedure* (n 119) para 2210.

[123] *Uranium* (n 91) 1145.

[124] ibid 1145; see also *Société Internationale Pour Participations Industrielles et Commerciales SA v Rogers* 357 US 197, 204 (1958).

Before ordering a US parent corporation to produce the documents of a foreign subsidiary, the district court must determine if the US parent corporation 'has power, either directly or indirectly, through another corporation or series of corporations, to elect a majority of the directors of another [foreign] corporation'.[125] If the US corporation has the power to elect to office the foreign corporation's directors, then the US corporation is considered in control of the foreign corporation.[126] Thus, if the US parent company owns more than 50 per cent of the foreign subsidiary's stock, it possesses the necessary control over that subsidiary's documents.[127] So a litigant can subpoena the US parent company, who must produce any of its foreign subsidiary's non-privileged responsive documents.

On the other hand, when the American subsidiary of a foreign corporation is asked to produce documents from its head office located abroad, the 'test is less clear'.[128]

B. Should the US Court Exercise Its Discretionary Authority to Compel Production?

If the US court has the authority under the federal civil discovery rules to compel discovery, then the court must determine whether to exercise its authority. Generally, the US court first exercises its discretion when considering a pending motion – either a motion to compel discovery or a motion by the recipient to quash the subpoena or seek a protective order. If the court grants the motion to compel discovery and if the responding party elects to withhold the requested discovery, then the US court exercises its discretion when determining the consequences of non-compliance.[129] In exercising its discretion, the court can 'explore the possibility of less severe steps' such as postponing the foreign discovery at issue until it is clear that other discovery is inadequate, having the parties inspect the documents abroad, or utilising the Hague Convention procedures.[130]

This chapter considers two contexts where courts consider comity principles when deciding to compel discovery from foreign corporations: applications for leniency and blocking statutes.

i. EC's Leniency Program

The European Commission and US DOJ have promoted their antitrust leniency programs.[131] One issue is whether private US litigants may discover communications between

[125] ibid 1144–45 (quoting *Re Investigation of World Arrangements* 13 FRD 280, 285 (D DC 1952)).

[126] ibid 1144–45 (quoting *World Arrangements* (n 125) 285).

[127] ibid 1145 (citing W Fugate, *Foreign Commerce and the Antitrust Laws*, 2nd edn (Boston, Little, Brown, 1973) 116).

[128] ibid 1145; see also Born and Rutledge (n 101) 931 (findings of control in these cases 'typically turn on highly fact-specific circumstances and provide little basis for broad generalizations').

[129] Fed R Civ P 37 (rules outlining sanctions for failure to make disclosures or cooperate in discovery) and 45(e) (district court may hold in contempt a person who having been served fails without adequate excuse to obey the subpoena); s 442 cmt g Restatement (Third) of the Foreign Relations Law of the United States.

[130] SW Waller, *Antitrust & American Business Abroad*, vol II, 3rd edn (St Paul, West Group, 2010) section 14:22.

[131] *F Hoffmann-La Roche Ltd v Empagran SA* 542 US 155, 174–75 (2004) (noting the US government's concern that 'an expansive interpretation of the FTAIA would greatly expand the potential liability for treble damages in United States courts and would thereby deter members of international cartels from seeking amnesty from criminal prosecution by the United States Government' and an expansive 'interpretation adopted by the court of appeals thus would weaken the DOJ's criminal amnesty program, which has served as an effective means of cracking international cartels'); *Re Rubber Chemicals Antitrust Litigation* 486 F Supp 2d 1078, 1084 (ND Cal 2007) (EC describing its leniency program as its most effective tool in combating illegal cartels).

a defendant (or its corporate affiliate) and the European Commission that were made pursuant to the EC's Leniency Program. Here the results are mixed. In a couple of cases, the US courts were sensitive to the EC's concerns and denied civil discovery of materials submitted as part of the Leniency Program.[132] But in another case, the district court granted the motions to compel production of the materials defendants filed with several foreign antitrust enforcement agencies.[133]

The recent *Rubber Chemicals* case illustrates a careful weighing of the EC's and private litigants' interests. Flexsys NV disclosed to the European Commission anti-competitive practices in the rubber chemicals industry.[134] The plaintiff Korea Kumho Petrochemical Co Ltd sued, among others, Flexsys for unlawfully excluding the plaintiff from the US rubber chemicals market. The private antitrust plaintiff thereafter sought to discover from Flexsys its communications with the European Commission generated under the EC's Leniency Program. Both Flexsys and the European Commission opposed this discovery request.

In deciding whether to compel discovery, the US district court relied on section 442 of the Restatement (Third) of the Foreign Relations Law of the United States.[135] That section recognises that a US court or agency may order discovery from 'a person subject to its jurisdiction . . . even if the information or the person in possession of the information is outside the United States'.[136] To balance comity principles and the policies underlying promoting civil discovery, the district court considered the Restatement's five factors:

(a) the importance to the investigation or litigation of the documents or other information requested;
(b) the degree of specificity of the request;
(c) whether the information originated in the United States;
(d) the availability of alternative means of securing the information; and
(e) the extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the State where the information is located.[137]

[132] *Rubber Chemicals* (n 131) 1080; *Re Methionine Antitrust Litigation* MDL No 00-1311 CRB (ND Cal 17 June 2002) (materials submitted to EC and Australian Competition and Consumer Commission).

[133] *Re Vitamins Antitrust Litigation* MDL No 1285, 2002 US Dist LEXIS 26490 (D DC 23 January 2002) (special master's report and recommendation) and 2002 US Dist LEXIS 25815 (18 December 2002). In a recent case, the district court initially ordered that plaintiffs could obtain confidential information defendants received through the EC's Access to File process. *Re Flat Glass Antitrust Litigation* No 08-180 (29 July 2009); SR Miller, 'US Discovery of European and US Leniency Applications and Other Confidential Investigatory Materials' (March 2010) *Competition Policy International* (*CPI) Antitrust Journal* 13. The EC intervened, and both the EC and DOJ asked the court to reconsider its ruling. The parties thereafter entered into a consent order that substantially reflected the EC's initial demands (ibid 14). In another recent case, *Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* No 05-1720, 2010 WL 3420517 (ED NY 27 August 2010), the US court after hearing the EC's objections and the parties' submissions, ordered defendant MasterCard to produce the transcript of the oral hearing held before the EC and ordered defendant Visa to produce a copy of the EC's statement of objections issued against it. The court concluded that the international comity concerns raised by the EC do not require the plaintiffs to forego information to which they would otherwise be entitled. The district court, however, stayed enforcement of its discovery order to allow the EC to further elaborate its objection to discovery. Judge Gleeson subsequently denied the plaintiffs access to them pursuant to the doctrine of international comity. He concluded that compelling disclosure would be 'contrary to the law of international comity, which mandates an exception in this instance to the usual rule that all relevant information is discoverable'. *Re Payment Card Interchange Fee and Merchant Discount* (above) 1.

[134] *Rubber Chemicals* (n 131) 1080.

[135] s 442 Restatement (Third) of the Foreign Relations Law of the United States (1987).

[136] ibid 442(1)(a).

[137] *Rubber Chemicals* (n 131) 1082, citing s 442(1)(c) Restatement (Third) of the Foreign Relations Law of the United States.

Under the Restatement's first factor – the importance to the investigation or litigation of the documents or other information requested – the US courts 'are less inclined to ignore a foreign State's concern where the outcome of litigation "does not stand or fall on the present discovery order", or where the evidence sought is cumulative of existing evidence'.[138] The plaintiff in *Rubber Chemicals* failed to convince the US court how the defendant's admissions to the European Commission were relevant to its US antitrust litigation which involved a different geographic market. Moreover, the plaintiff received the defendant's submissions to the US competition authorities, including all documents relating to any actual or proposed amnesty, agreement or plea.

The second factor – the degree of specificity of the request – weighed in favour of disclosure. The plaintiff's discovery request was 'sufficiently specific' rather than a 'generalized' search.[139]

The third factor – whether the information originated in the United States – weighed against disclosure. The requested documents 'were created, transmitted, and used only in Europe and in conjunction with the European enforcement proceeding'.[140]

The fourth factor – the availability of alternative means of securing the information – also weighed against disclosure. The private antitrust plaintiff already secured the more probative information (namely the DOJ amnesty documents) and to the extent the European Commission proceeding was relevant, the European Commission issued a detailed decision detailing the price fixing 'communication-by-communication'.[141]

Finally, the fifth factor – the extent to which compliance or non-compliance with the request would undermine important interests of the State where the information is located and the United States – also weighed against production.[142] The European Commission in its letter to the US district court argued that production of the EC communications would undermine its ability to initiate and prosecute future investigations by creating disincentives for future applicants to cooperate with the EC.[143] Moreover, disclosure could compromise the EC's cooperation with the US in prosecuting cartels.

Consequently, since the European Commission took a clear position and articulated why the requested discovery would harm its interests, and three of the remaining factors weighed against disclosure, the US court denied the motion to compel discovery.

ii. Blocking Statutes

Another issue is when a foreign person claims that a sovereign's 'blocking statute' seeks to prevent the foreign person from producing the requested information as part of US

[138] ibid (quoting *Richmark Corp v Timber Falling Consultants* 959 F 2d 1468, 1475 (9th Cir 1992)); see also s 442 cmt a Restatement (Third) of the Foreign Relations Law of the United States (ordinarily reasonable to limit foreign discovery to information 'necessary to the action – typically, evidence not otherwise readily obtainable – and directly relevant and material').

[139] ibid 1083.

[140] ibid.

[141] ibid.

[142] s 442 cmt c Restatement (Third) of the Foreign Relations Law of the United States (the court should consider the 'expressions of interest by the foreign state, as contrasted with expressions by the parties; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought'). Moreover, a 'communication privileged where made – for instance, confidential testimony given to a foreign government investigation under assurance of privilege – is not subject to discovery in a United States court, in the absence of waiver by those entitled to the privilege' (ibid s 442 cmt d).

[143] *Rubber Chemicals* (n 131) 1084.

discovery.[144] Such blocking statutes reflected historically a dislike toward US antitrust policies.[145] Over the years, however, other nations have taken a tougher stance on antitrust violations; so the extent to which blocking statutes still have traction probably comes from a lingering hostility to the exportation of the US's liberal discovery policies.[146]

In a famous US antitrust case involving blocking statutes, *Re Uranium Antitrust Litigation*, the Tennessee Valley Authority and Westinghouse Electric Corporation, among others, sued 12 foreign and 17 domestic companies for fixing uranium prices in violation of the Sherman Act.[147] In the ensuing discovery, many defendants withheld foreign documents based on foreign law objections under Swiss, Australian, South African and Canadian law. The latter three jurisdictions enacted or modified their statutes 'for the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel'.[148] All the 'blocking statutes' imposed criminal penalties for any violation.[149]

When faced with a blocking statute, the US district court must first determine whether a conflict exists between the laws of the United States and the foreign countries.[150] '[T]o meet that burden, the party resisting discovery must provide the [c]ourt with information of sufficient particularity and specificity to allow the [c]ourt to determine whether the discovery sought is indeed prohibited by foreign law'.[151]

If the foreign law does prohibit the disclosure of the requested documents, this by itself does not eliminate the US court's power.[152] As the US Supreme Court noted, the 'lesson of comity is that neither the [US court's] discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign'.[153] Even 'The fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production'.[154]

[144] Born and Rutledge (n 101) 914–15 (describing various types of blocking statutes); *Strauss v Credit Lyonnais SA* 249 FRD 429 (ED NY 2008); *Bodner v Paribas* 202 FRD 370 (ED NY 2000).

[145] s 442 Restatement (Third) of the Foreign Relations Law of the United States, Reporters' Note 1 ('To a considerable extent, the hostility to United States discovery practices reflects dislike of aspects of substantive American law, notably United States antitrust law and laws providing for regulation of international shipping').

[146] ibid (noting: 'No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States' and that by 1986, 'some 15 states had adopted legislation expressly designed to counter United States efforts to secure production of documents situated outside the United States'); *Re Air Cargo Shipping Services Antitrust Litigation* 2010 WL 1189341, 4 (ED NY 29 March 2010) (noting France's and US's shared interest in prohibiting price fixing).

[147] *Uranium* (n 91) 1138.

[148] *Uranium* (n 91) 1143.

[149] ibid.

[150] *Dexia Credit Local* (n 102) 541; *Alfadda v Fenn* 149 FRD 28, 34 (SD NY 1993) ('the party relying on foreign law bears the burden of demonstrating that such law actually bars the production or testimony at issue').

[151] *Alfadda* (n 150) 34.

[152] *Société Nationale* (n 1) 544 fn 28: 'It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute' (citing *Rogers* 357 US 204–06); see also *Uranium* (n 91) 1145: 'The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power'.

[153] *Société Nationale* (n 1) 544 fn 29.

[154] *Reinsurance Company of America Inc v Administratia Asigurarilor* 902 F 2d 1282 (7th Cir 1990) (quoting *United States v First National Bank of Chicago* 699 F 2d 341, 345 (7th Cir 1983)). If the foreign blocking statute provides civil rather than criminal sanctions, the case for non-production is less compelling. *First National Bank of Chicago* (above) 346–47.

On the other hand, 'American courts should not ignore the fact that such a law exists'.[155] After the Supreme Court's 1958 *Société Internationale* decision,[156] the US courts consider the five factors under the Restatement section 442, which are discussed above in the context of the leniency program.[157]

The US courts consider the importance of the Congressional policies underlying the US law which forms the basis for the plaintiff's claim.[158] Despite the Supreme Court's recent statements that may suggest the contrary,[159] the federal antitrust laws 'have long been considered cornerstones of [the United States'] economic policies'.[160] Thus, this first factor is generally met for federal antitrust claims.[161]

In considering how important the requested documents are to determining the pivotal statutory inquiry,[162] the US courts employ a higher standard than that for ordinary civil discovery under the federal civil discovery rules. When a conflict of law exists, the person seeking discovery must show 'whether the requested documents are crucial to the resolution of a key issue in the litigation'.[163] In *Uranium*, the antitrust plaintiffs' showing on this factor was 'simply overwhelming' as their discovery requests were probative of the case's fundamental issues, including (i) the time period of the uranium producers' alleged conspiracy; (ii) defendants' alleged efforts to conceal their conspiracy; (iii) the impact of that alleged conspiracy on US interstate and foreign commerce; (iv) the defendants' defences of sovereign compulsion; and (v) information on uranium sales and market conditions.[164]

The US courts also inquire on the degree of flexibility in the foreign nation's application of its non-disclosure laws,[165] and whether the party was 'in a favourable position to secure a waiver of those laws from its government or to explore alternative procedures for achieving compliance'.[166] In *Uranium*, South Africa was the most flexible in its application of its non-disclosure laws. It allowed the private antitrust plaintiff to inspect the domestic firm's uranium-related documents in that country.[167] Australia rejected all past requests for a waiver of its regulations, but interpreted its laws as authorising the Attorney General to grant such waivers.[168] Canada, the least flexible, rejected all requests for waivers.[169]

[155] *Uranium* (n 91) 1145.

[156] *Société Internationale v Rogers* (n 124) 197, 204–06.

[157] *Re Westinghouse Electric Corp Uranium Contracts Litigation* 563 F 2d 992, 999 (10th Cir 1977) (district court erred in not balancing interests); *Air Cargo Shipping Services* (n 146).

[158] *Uranium* (n 91) 1148.

[159] Stucke (n 10) 1378–79 (collecting Court's recent statements).

[160] *Uranium* (n 91) 1154 (quoting *United States v First National City Bank* (n 118) 897, 903); see also *Novell Inc v Microsoft Corp* 505 F 3d 302, 315 (4th Cir 2007) (quoting *United States v Topco Associates Inc* 405 US 596, 610 (1972) (Sherman Act is 'the Magna Carta of free enterprise')); *Kochert v Greater Lafayette Health Services Inc* 463 F 3d 710, 715 (7th Cir 2006) (same); *Glen Holly Entertainment Inc v Tektronix Inc* 343 F 3d 1000, 1014–15 (9th Cir 2003) (same); *Allegheny General Hospital v Philip Morris Inc* 228 F 3d 429, 439 (3d Cir 2000) (same).

[161] *Westinghouse* (n 157) 999 (distinguishing between contract and antitrust actions); *Air Cargo Shipping Services* (n 146) 4; *Uranium* (n 91) 1154; see also Waller, *Antitrust & American Business Abroad* (n 130) section 14:22 (first element is 'arguably satisfied in every antitrust case, given the substantial national polices advanced by antitrust').

[162] *Uranium* (n 91) 1148.

[163] ibid 1146; see also *Westinghouse* (n 157) 999 (noting that litigant's defence 'does not stand or fall on the present discovery order' and discovery is cumulative).

[164] *Uranium* (n 91) 1138.

[165] ibid 1148; *Air Cargo Shipping Services* (n 146) 3 (in discussing hardship of compliance, noting that a number of courts have discounted this hardship when considering the French blocking statute).

[166] *Uranium* (n 91) 1146.

[167] ibid 1155.

[168] ibid.

[169] ibid.

Section 442 of the Restatement also adds a good faith requirement to the analysis:

> If disclosure of information located outside the United States is prohibited by law, regulation, or order of court or other authority of the State in which the information is located, . . . a court or agency of the United States may require the person to whom the order is directed to make a good faith effort to secure permission from the foreign authorities to make the information available.[170]

Thus a US litigant raising a foreign law defence must make a good faith effort to obtain permission to disclose.[171] Evidence, on the other hand, that the party 'actively sought [this statutory] prohibition against disclosure, or that the information was deliberately moved to a state with blocking legislation, may be regarded as evidence of bad faith and justification for sanctions'.[172]

IV. Friction from US Discovery

This part examines several criticisms expressed about the United States' liberal discovery mechanisms for foreign litigants, and offers two proposals. Since the 1990s, competition authorities have increasingly prosecuted multinational price-fixing cartels and other anti-competitive behaviour by multinational firms. Global cartels produce global victims. In seeking to recover for their antitrust injuries, these private antitrust plaintiffs may forum shop. In determining which forum will likely yield the best result, the antitrust plaintiff weighs the benefits and costs of different judicial fora, including (i) the scope of relief, (ii) the amount of potential monetary damages, (iii) the costs to prosecute the claim, and whether, and to what extent, litigation costs including attorney's fees are recoverable, (iv) rule-of-law principles, and the likelihood of prevailing under that forum's legal standards, (v) the likely time to litigate the claim, and (vi) the ability to collect the judgment against the defendants.

Presently, the United States is an attractive venue for some antitrust claims. No other country affords private antitrust plaintiffs the combination of (i) broad civil discovery largely determined by the parties, rather than the courts;[173] (ii) the ability to lower individual litigation costs by bringing antitrust claims as a class;[174] (iii) treble damages;[175] (iv) recovery of the costs of a successful suit, including reasonable attorney's fees;[176]

[170] s 442(2)(a) Restatement (Third) of the Foreign Relations Law of the United States.

[171] *Reinsurance* (n 154) 1282: 'Thus, at its discretion, the district court may require a good faith effort from the parties [or non-parties] to seek a waiver of any blocking provisions'; *United States v Bank of Nova Scotia* 691 F 2d 1384, 1388–89 (11th Cir 1982); *Westinghouse* (n 157) 996; *Air Cargo Shipping Services* (n 146) 2 (distinguishing case where defendant relies on statute to block discovery in one instance, while ignoring the statute in another where it served the defendant's interests to do so).

[172] s 442 cmt h Restatement (Third) of the Foreign Relations Law of the United States.

[173] See Fed R Civ P 26–37.

[174] Fed R Civ P 23.

[175] 15 USC s 15.

[176] s 4 Clayton Act, 15 USC s 15. Fee-shifting on certain costs is permitted generally in civil litigation between private parties. See Fed R Civ P 54(d) ('Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party'); 28 USC s 1920 (setting out recoverable costs). But in the absence of an agreement or statute providing for attorney's fees, the 'American Rule' is that 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser'. *Alyeska Pipeline Service Co v Wilderness Society* 421 US 240, 247 (1975). Under the Clayton Act, a prevailing antitrust plaintiff can recover attorney's fees. But the unusual feature under the 'American Rule' is its going one-way:

(v) broad injunctive relief;[177] (vi) a per se illegal standard for evaluating price fixing and other 'hard core' cartel behaviour;[178] (vii) expansive jurisdictional rules; and (viii) the use of collateral estoppel for follow-on private antitrust suits.[179]

In contrast, the lack of treble damages, broad civil discovery, and limitations on class actions made 'litigating in European courts less favourable from the perspective of the economics of litigation and damages awards'.[180] As the European Commission noted in 2008, 'victims of EC antitrust infringements only rarely obtain reparation of the harm suffered'.[181]

Foreign plaintiffs may recognise after *Empagran* that US courts lack jurisdiction to hear their antitrust claim.[182] But antitrust litigants in foreign proceedings nonetheless may still seek to benefit from the United States' liberal civil discovery rules. In the 1960s, the United States wanted to make it easier for foreign litigants to discover evidence in the United States. The US sought to be at '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'.[183] By making it easier for foreign litigants to seek discovery in the US, Congress hoped other foreign countries would adjust similarly their discovery procedures.[184]

One critical issue is whether the United States' liberal civil discovery rules are viewed as a shining example of equitable and efficacious procedures or as a nuisance. To what extent do the United States' generous discovery mechanisms for foreign litigants assist or frustrate a foreign sovereign's exercise of power and promote or violate principles of comity? The United States has long recognised the 'degree of friction created by [its litigants'] discovery

prevailing defendants, absent statutory authority, cannot obtain their costs and fees from an unsuccessful plaintiff. *Sharp Electronics Corp v Metropolitan Life Insurance Co* 578 F 3d 505, 513 (7th Cir 2009). Thus under the American Rule, an antitrust defendant that prevails generally cannot recover its attorney's fees from the defeated plaintiff. Exceptions exist to the general rule. See 15 USC s 4304(a)(2) (permitting defendant in a qualifying research and development joint venture to recover attorney's fees for frivolous claims). This one-sidedness can contribute to the international friction from US civil discovery. Although the 'loser pays' principle, which prevails in the EU Member States, 'plays an important function in filtering out unmeritorious cases', the EC recognised that 'under certain circumstances, this principle could also discourage victims with meritorious claims'. European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' SEC(2008) 404, SEC(2008) 405, SEC(2008) 406 (2 April 2008) 9, http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1. Thus, the EC recommended the national courts to derogate from this principle when, for example an unsuccessful claimant would have to bear the defendants' costs that 'were unreasonably or vexatiously incurred or are otherwise excessive'.

[177] 15 USC s 26.

[178] *United States v Socony-Vacuum Oil Co* 310 US 150 (1940).

[179] 15 USC s 16(a) (if the United States brings a civil or criminal antitrust action, and testimony is taken, then any resulting final judgment or consent decree can be used as prima facie evidence against the defendants for the same conduct in a later private antitrust action).

[180] *Empagran SA v F Hoffman-La Roche Ltd* 453 F Supp 2d 1, 12 fn 12 (D DC 2006).

[181] EC White Paper (n 176).

[182] *Empagran* (n 131) 155. Private plaintiffs filed a class action on behalf of foreign and US purchasers of vitamins under the Sherman Act, the antitrust laws of the relevant foreign nations and international law. The plaintiffs alleged that the defendant foreign and domestic vitamin manufacturers and distributors had engaged in a global price-fixing conspiracy. The vitamins cartel significantly and adversely affected both customers outside and within the United States. The defendants moved to dismiss the claims by the foreign purchasers who purchased their vitamins entirely outside US commerce. The Supreme Court framed the price-fixing activity as causing some antitrust injury in the US and 'independently' causing a separate foreign injury. Two sets of considerations, 'one derived from comity and the other reflecting history,' convinced the Supreme Court 'that Congress would not have intended the [Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)] exception to bring independently caused foreign injury within the Sherman Act's reach.' Ibid 173.

[183] S Rep No 88-1580 (n 8) 3783.

[184] ibid.

requests' and 'the differing perceptions of the acceptability of American-style discovery under national and international law'.[185]

A. Criticisms about the United States' Liberal Discovery Mechanisms for Foreign Litigants

Critics in *Intel* complained about the 'one-sided imposition of US-style discovery obligations'.[186] Some complained that the United States' liberal discovery rules for foreign litigants present 'a threat to foreign sovereigns'.[187] Others warned that foreign rivals can abuse these discovery rules to 'inquire into competitively sensitive information, under the imprimatur of a US District Court, even though the information is not needed by the foreign sovereign's court or administrative body'.[188] They predicted that helping foreign litigants obtain discovery in the US would 'make US companies the preferred targets of future [product liability] litigation', and place American manufacturers at a competitive disadvantage in selling their products internationally.[189]

In *Intel*, the European Commission expressed several concerns if complainants could secure discovery under section 1782(a). So it is interesting whether these concerns materialised in the five years since *Intel* was decided.

First, the EC warned of the 'inevitable unpredictability and inconsistency' from a US court's case-by-case weighing.[190] But the inevitable thus far is evitable, at least for the EC. When the European Commission protests, the US courts nearly always listen. The one exception, as discussed in III.B.i above, is discovery regarding materials submitted as part of the EC's leniency program. Otherwise, I have not found any decision in the five years since *Intel* where the district court ordered discovery under section 1782 over the EC's opposition. The district court in *Intel* on remand and the three district courts in *Microsoft* all deferred to the EC's comity concerns and denied discovery. Of course, the European Commission may lose future cases – when the 'interested person' raises a strong countervailing interest for compelling discovery. But absent that scenario, the US courts likely will defer to the foreign tribunal's opposition to the grant of discovery.

The EC's second concern in *Intel* was that companies would inundate the European Commission with pretextual complaints to gain access under section 1782(a) to their competitors' business secrets.[191] A firm could obtain broad discovery against its competitor simply by filing an antitrust complaint with the European Commission. The EC, as a result, would 'waste precious time and resources on unfounded antitrust complaints'.[192] The firm

[185] *Société Nationale* (n 1) 544 fn 29 (quoting s 437 Restatement of Foreign Relations Law of the United States (Revised) Reporters' Note 5 41–42); see also US Department of State, Preparation of Letters Rogatory, http://travel.state.gov/law/judicial/judicial_683.html (advising litigants in drafting letters rogatory to avoid 'use of the term discovery' and 'the appearance of a fishing expedition').

[186] Brief of Amicus Curiae the Commission of the European Communities, *Intel Corp v Advanced Micro Devices Inc* 2003 WL 23138389, 1 (US 23 December 2003).

[187] ibid.

[188] Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, *Intel Corp v Advanced Micro Devices Inc* 2003 WL 23112944, 3 (US 31 December 2003).

[189] Brief of the Product Liability Advisory Council Inc as Amicus Curiae in Support of Petitioner, *Intel Corp v Advanced Micro Devices Inc* 2003 WL 23112943, 2 (US 31 December 2003).

[190] EC Amicus Brief (n 186) 17.

[191] ibid 15.

[192] ibid.

would benefit from the discovery without incurring the possible sanctions under the Federal Rules of Civil Procedure.[193]

This abuse has not materialised, at least in the reported US decisions regarding section 1782(a) since *Intel*. The premise that US courts cannot sanction frivolous section 1782(a) applications is itself suspect. Moreover, unlike substantive antitrust issues, which US district courts infrequently address, the courts routinely deal with confidential commercial information and protective order issues in general business litigation.[194] When mistakes or unforeseen consequences arise, the US litigants often raise them and seek modifications to their existing protective order. Thus, with this trial-and-error feedback loop, US courts are familiar with different mechanisms to protect confidential information from falling into a direct competitor's hands.[195] An applicant under section 1782, for example, must show a substantial need for the commercially sensitive information that cannot be otherwise met without undue burden.[196] After the applicant makes this threshold showing, the court may limit access to the commercially sensitive information to a select few. For example, the court can allow discovery under specific conditions, such as limiting disclosure to 'attorneys' eyes only'.[197] Only the outside counsel (or in some cases corporate counsel) can access the competitor's commercially-sensitive information. If an outside-attorneys' eyes-only restriction is unworkable, the district court can opt for alternative solutions.[198]

A third concern, which the Supreme Court in *Intel* recognised but did not resolve, was that disclosure under section 1782(a) may undermine another jurisdiction's antitrust leniency program.[199] As Professor Spencer Waller noted, if 'such materials are routinely required to be disclosed, this would have an obvious chilling effect on the use of amnesty and leniency programs and lower the overall deterrent effect of such programs on international cartel behavior'.[200] The European Commission likewise warned in *Intel* that 'any enhanced risk of public disclosure' of the confessions by its leniency program's applicants would 'deter their participation'.[201]

In 2006, the European Commission adopted procedures to address its concern. Leniency applicants may now make their corporate statements orally at the EC's premises; the statements are recorded and transcribed. Leniency applicants do not 'retain or receive from the

[193] *Intel* (n 9) 268 (J Breyer, dissenting).

[194] *Procter & Gamble* (n 35) 1117 (courts generally 'possess sufficient tools to ensure that confidential discovery material is not publicly disclosed').

[195] *Schottdorf* (n 58) 8 (confidentiality agreement should mitigate concerns, and if parties cannot agree to terms, then court 'is willing and ready to assist').

[196] *Heraeus Kulzer* (n 71) 5 (quoting Fed R Civ P 45(c)(3)(C)).

[197] ibid; *Michael Wilson Partners* (n 79) 3 (confidential competitive information ordinarily protected by attorney's-eyes-only provision).

[198] *Cryolife* (n 37) 5 (to protect confidential data, parties can enter into agreement, enforceable in US court and foreign tribunal, that parties will not use any s 1782(a) discovery in foreign proceeding unless they first obtain a ruling from foreign tribunal that the material will be kept confidential); *Kang v Nova Vision* (n 35) 3 (in response to company's confidentiality concern, US court ordered all relevant discovery to bypass the applicant and be submitted directly to German appraiser); *Procter & Gamble* (n 35) 1117 (parties in foreign tribunal can agree not to submit any s 1782(a) discovery to foreign tribunal unless the tribunal first orders that the discovery will be kept confidential; if the foreign court would not enforce such an agreement, then the US district court can retain jurisdiction for purposes of enforcing confidentiality agreement).

[199] *Intel* (n 9) 266.

[200] Waller (n 130) section 14:26.

[201] EC Amicus Brief (n 186) 14–15.

Commission any copies of these statements'.[202] Nonetheless, even under the EC's oral statement approach, leniency applicants cannot always rely on memory in making their oral application. There remains the risk that drafts or other materials that the applicant created in applying for amnesty may be discoverable. Accordingly, this is one area, as discussed below, where the US courts can provide greater clarity.

The European Commission's fourth concern in *Intel* was that a case-by-case discretionary approach by US courts increases the EC's monitoring costs. The European Commission's concern is that any of the 975 US district court judges may be currently contemplating discovery that could compromise the European Commission's interests.

This concern remains unresolved. The European Commission has been successful when voicing its concerns to the US district court. But the onus remains on the European Commission 'to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery', which the European Commission argues is contrary to principles of comity.[203] The target of discovery may have the incentive to contact the European Commission to assist its efforts to quash the subpoena. But there is no assurance that the European Commission is always aware of section 1782(a) applications where its interests are at stake.[204]

A related concern after *Intel* is about applying section 1782(a) to discovery located outside the United States. This, some fear, would turn the US courts into a discovery clearinghouse for global litigants seeking documents located anywhere around the world, and would interfere with foreign proceedings.[205] Accordingly, some US district courts have held that section 1782(a) does not reach discovery located abroad.[206] Other US courts disagree: section 1782(a) only requires that the person from whom discovery is sought resides or is found in the US.[207] Absent any express statutory language to the contrary, the location of the documents is at most a discretionary consideration.[208]

The difference between the two conflicting positions taken by the US courts is a matter of degree: to what extent should the documents' situs be an absolute bar to discovery versus a discretionary factor? Discovery can be hit-or-miss, such as obtaining the draft contract physically located in the investment firm's New York office, but not obtaining the version sent to the London branch office. As companies achieve economies of scale and scope by outsourcing tasks to employees throughout the globe, and with the proliferation of, and improvements in, communication capabilities, company employees communicate daily across the globe.

Moreover, US companies cheaply outsource their data warehousing to other countries. One hot issue today in the US is electronic discovery, and within electronic discovery, one of the more problematic practices is 'cloud computing'. Cloud computing involves Internet-based computer services that allow 'businesses and consumers to use software and hardware located on remote computer networks operated by third parties', who can be located

[202] Competition: revised Leniency Notice – Frequently Asked Questions, Reference: MEMO/06/469, 07/12/2006, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/469&format=HTML&aged=1&language=EN&guiLanguage=en.

[203] EC Amicus Brief (n 186) 17.

[204] ibid.

[205] *Godfrey* (n 6) 423.

[206] ibid; *Norex Petroleum Ltd v Chubb Insurance Co of Canada* 384 F Supp 2d 45, 50–51 (D DC 2005).

[207] *Schottdorf* (n 58) 5.

[208] ibid; see also *Minatec Finance* (n 20) 4 fn 8 (in dictum agreeing with *Schottdorf*); *Re Nokia Corp* 2007 WL 1729664, 5 fn 4 (WD Mich 13 June 2007) (without determining issue, court considers the location of the documents as a discretionary factor).

outside the US.[209] Cloud computing can offer businesses and individuals a cheaper way to manage, store, and use their data, and reduce their need to purchase, operate, and maintain software and hardware themselves. Such services will increase with the growth of the iPhone and its competitors, which can access data from remote servers.[210]

Cloud computing adds a layer of complexity to the otherwise difficult issue of deciding where computerised data is really located. Many companies around the world outsource all kinds of information technology work to other countries, such as India. But at the tap of a computer key, the US company can pull up its own data wherever located.

With the ease to which data can be stored in, and retrieved from, foreign countries, it is unrealistic to hinge discovery under section 1782(a) on the documents' situs. Instead, the Internet should compel the US courts to adopt under section 1782(a) the approach they have taken under the Federal Rules of Civil Procedure. As discussed in part III above, the US courts in civil litigation focus on their power over the person who *controls* the data, rather than the data's physical location.[211] Given the realities of discovery in a global economy, it makes little sense for the judiciary to add its gloss onto section 1782(a) that the documents are located physically in the United States.

Unless one has little faith in the US judiciary's exercising its discretion (such as a significant risk of inconsistent results), the district courts should consider the documents' location as a discretionary factor when ordering discovery. Namely, the district court can consider, along with the other discretionary factors, the alleged hardship to the person subject to the discovery request in locating and retrieving the requested documents from the foreign site. For example, one district court observed that the requested documents could be easily shipped to the company's New York headquarters or perhaps accessed electronically.[212]

B. Policy Proposals

Section 1782 does raise the risk of costly, time-consuming, and unpredictable and inconsistent discovery adjudications. But it appears that the European Commission's concerns in *Intel* largely have not materialised. Section 1782 is not perfect. But the US courts, in their decisions after *Intel*, appear to reach workable accommodations to address the parties' needs. Absent any empirical data of the undue costs and burdens imposed by section 1782, the case-law does not suggest the need for wholesale revision of the statute. But two changes can help reduce the friction with foreign sovereigns.

First, with respect to leniency materials, to the extent they are not legally privileged, the US court, as in the case involving Flexsys, should provide greater clarity to such discovery requests. To reduce uncertainty, the US courts should employ the following presumption: if the requested documents were created, transmitted and used solely for the foreign country's leniency program, if the requested materials are otherwise non-public, and if the foreign sovereign expressed concern in the past that production of this narrow category of

[209] Letter from DC Vladeck, Director of Consumer Protection, US Federal Trade Commission to MH Dortch, Secretary, Federal Communications Commission (9 December 2009) http://fjallfoss.fcc.gov/ecfs/document/view?id=7020352132.

[210] J Menn, 'Battle of Quality Instead of Quantity' (23 December 2009) *Financial Times* 14.

[211] See Fed R Civ P 34(a)(1); Fed R Civ P 45(a)(1)(A); *Norex* (n 206) 55–57 (noting that even if documents located abroad were within s 1782, there was no showing that documents were within US subsidiary's possession, custody, or control).

[212] *Schottdorf* (n 58) 8.

materials would undermine its ability to initiate and prosecute future investigations by creating disincentives for future applicants to cooperate, then the leniency materials should not be produced, absent written consent by the foreign country.

Second, Congress should amend section 1782(a) to require the applicant to simultaneously file written notice of its discovery request under section 1782(a) with the foreign tribunal. Such notice would enable the European Commission or any other foreign tribunal to timely object to any discovery request under section 1782, and thereby lower the foreign tribunal's monitoring costs.

V. Conclusion

As this chapter addresses, section 1782(a) provides litigants in foreign proceedings access to broad discovery from persons located in the US. Likewise, litigants in US antitrust proceedings can often seek discovery abroad. The US courts, eschewing bright-line rules, weigh several factors to determine whether it should exercise its authority to permit such discovery. The US courts consider, among other things, the burdens imposed by the discovery request, the interests of the foreign State or tribunal, and the importance of the information requested.

The US's liberal discovery mechanisms have been a source of friction. Some are concerned about the United States becoming a clearinghouse for discovery requests. But as this chapter discusses, a couple of the European Commission's concerns about the US's liberal discovery mechanisms did not materialise after the Supreme Court's *Intel* decision. The US courts, in their decisions after *Intel*, sought to reach workable accommodations that addressed the parties' needs and were deferential to any expressed concerns of the foreign tribunal.

As discovery continues to cross borders, discovery requests invariably will result in some friction. As more jurisdictions promote private antitrust actions, cross-border discovery issues will likely increase. But it is unrealistic to view discovery as a parochial matter. Already by the 1960s and early 1970s, the US saw the 'substantial increase in litigation with foreign aspects arising, in part, from the unparallel expansion of international trade and travel' which 'intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad'.[213] Since then, the Internet and other improvements in communication technology have lowered the costs and speed in communicating around the world. Thus, litigants cannot return to the days where discovery was mostly located within walking distance.

To meet the increased demand for discovery located abroad, government institutions must coordinate on global discovery issues. This chapter offers two policy proposals for US courts to further reduce friction with foreign sovereigns. Ultimately the heat from any friction will depend on the advancement of international mechanisms to secure the just, speedy and inexpensive resolution of discovery issues.

[213] *Société Nationale* (n 1) 531 (quoting CF Salans, Deputy Legal Advisor, US Department of State, Convention on Taking of Evidence Abroad, S Exec Rep No 92-25 (1972)).