No. 02-572

In the Supreme Court of the United States

INTEL CORPORATION, PETITIONER

v.

ADVANCED MICRO DEVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 1782 of Title 28 of the United States Code provides that a district court may order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal" upon request "by a foreign or international tribunal or upon the application of any interested person." The questions presented are:

1. Whether Section 1782 authorizes a district court to order production of materials, for use in a foreign tribunal, when the foreign tribunal itself would not compel production of the materials.

2. Whether Section 1782 authorizes production of materials for presentation in an anti-competitive practice investigation by the Commission of European Communities, on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal."

3. Whether, for purposes of Section 1782, a party that files a complaint with the Commission of European Communities is an "interested person."

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The petition raises important and unsettled matters respecting the rights of an applicant to obtain discovery of information in United States courts under 28 U.S.C. 1782 for use "in a proceeding in a foreign or international tribunal." The United States submits that the Court should grant certiorari on the first question presented to resolve a conflict among the courts of appeals and should also grant certiorari on the remaining two questions to clarify the proper operation of the statute, including factors that should influence a district court's exercise of discretion when faced with a request under Section 1782.

STATEMENT

Intel Corporation and Advanced Micro Devices, Inc. (AMD) compete in the development and sale of micro-

processors throughout the world, including within the European Community. AMD filed a complaint with the Directorate General-Competition (Directorate) of the Commission of European Communities (European Commission) alleging that Intel was abusing its dominant market position in violation of Article 82 of the Treaty Establishing the European Community, Dec. 2002 (EC Treaty). AMD then applied to the United States District Court for the Northern District of California for an order requiring Intel to produce materials in this country pursuant to 28 U.S.C. 1782, which authorizes a district court, upon the request of a "foreign or international tribunal or upon the application of any interested person," to order production of testimony, documents, or other thing "for use in a proceeding" in the tribunal. 28 U.S.C. 1782. See App., *infra*, 1a (setting out Section 1782's full text). The district court denied AMD's request on the ground that the European Commission's ongoing investigation is not a "proceeding" within the meaning of Section 1782. Pet. App. 13a-15a. The court of appeals reversed. *Id.* at 1a-9a. That court ruled that the proceeding for which discovery is sought "is, at a minimum, one leading to quasi-judicial proceedings" and that Section 1782 does not impose "a threshold requirement that the material also be discoverable in the foreign court." *Id.* at 2a, 6a; see *id.* at 3a-9a.

1. The European Commission serves as the executive branch of the European Communities and includes numerous directorates charged with specific responsibilities. The Directorate General-Competition has responsibilities for antitrust enforcement in the European Community, including the authority to "conduct[] investigations of alleged infringement, to propose curative measures in published decisions, and to impose

fines and penalties." Pet. App. 3a. On receipt of a complaint or sua sponte, the Directorate conducts a preliminary investigation, during which it may gather information and provide the complainant with the opportunity to support its allegations. *Ibid.* The Directorate has the authority to seek information directly from the alleged infringer, to penalize an alleged infringer for failing to provide such information, and, within the European Community, to search the alleged infringer's place of business. See European Community Council Regulation 17/62, arts. 11, 14, 15(1)(b), 16(1)(c). The European Commission does not consider its initial investigation to be an adversarial proceeding. See European Commission Amicus Br. 5.

If, upon completion of the preliminary investigation, the Directorate decides not to pursue a complaint, it advises the complainant, if any, and the complainant may seek judicial review of that decision. See *Hasselblad (G.B.) Ltd.* v. *Orbinson*, [1985] Q.B. 475, 495-496 (C.A. 1984). The decision is subject to review by the Court of First Instance and, ultimately, by the Court of Justice for the European Communities, which is the court of last resort for European Community matters. See *ibid.*; *Stork Amsterdam BV* v. *European Community Comm'n*, [2000] 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000); *Koelman* v. *European Community Comm'n*, [1996] 4 C.M.L.R. 636, 642-643 (Ct. of First Instance). If the European Commission makes the preliminary determination that infringement has likely occurred, it serves a statement of objections on the alleged infringer, which then has an opportunity to submit written and oral comments on the statement of objections. *Hasselblad*, [1985] Q.B. at 496. If the European Commission decides to proceed with the complaint, it drafts a preliminary decision, which is

subject to further review within the Commission. If the Commission ultimately adopts a decision, that decision, as adopted, becomes a final enforceable decision within the European Community. *Ibid.*

2. Intel and AMD are United States companies that are "worldwide competitors in the microprocessor industry." Pet. App. 2a. AMD filed a complaint with the Directorate, alleging that Intel was abusing its dominant position in the European Common Market, in violation of the EC treaty and European Community regulation. *Ibid.* The Directorate's investigation is at a preliminary stage. *Ibid.*

AMD recommended that the Directorate seek discovery of documents that Intel previously produced in discovery in a United States antitrust dispute, *Intergraph Corp.* v. *Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998), vacated, 195 F.3d 1346 (Fed. Cir. 1999), on remand, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), aff'd, 253 F.3d 695 (Fed. Cir. 2001). See Supp. E.R. 6-7. After the Directorate declined to do so, AMD petitioned a federal district court for an order directing Intel to produce the documents at issue pursuant to 28 U.S.C. 1782. Pet. App. 13a. Section 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes district courts to order the production of documents "for use in a proceeding in a foreign or international tribunal," upon the request of "a foreign or international tribunal or upon the application of any interested person." 28 U.S.C. 1782. AMD asserted that it sought the materials in connection with the complaint it filed with the European Commission. Pet. App. 13a.

The district court denied the application. Pet. App. 13a-15a. The court concluded that the Commission "performs the functions of investigator, prosecutor and

decision-maker without any separation" and views its procedures as administrative rather than judicial. *Id.* at 14a. The court ultimately ruled that Section 1782 does not authorize discovery for use in the Commission's investigation because "[a] 'proceeding' within the meaning of § 1782 means one in which an 'adjudicative function is exercised.'" *Id.* at 14a-15a (quoting *Lancaster Factoring Co.* v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996)).

3. The court of appeals reversed. Pet. App. 1a-9a. The court observed that Section 1782's language is "broad and inclusive," extending "by way of example even [to] criminal investigations prior to formal accusation." *Id.* at 5a. The text does not distinguish, the court added, "between civil and criminal proceedings." *Ibid.* It also noted that Congress had amended Section 1782 in 1964 to eliminate its prior reference to "pending" proceedings. *Ibid.* The court of appeals stated that its previous decisions had "read the legislative history surrounding the adoption of Section 1782 broadly to include 'bodies of a quasi-judicial or administrative nature' as well as preliminary investigations leading to judicial proceedings." *Ibid.* (citing cases).

In this case, the court reasoned, because the Directorate makes recommendations to the European Commission, which issues binding enforceable decisions that are subject to judicial review, "the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." Pet. App. 6a. There is no requirement, the court held, that the proceeding be "imminent." *Ibid.* "Although preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782." *Id.* at 7a.

The court of appeals also rejected Intel's argument that AMD cannot obtain discovery under Section 1782

unless it makes a threshold showing that it could obtain the materials at issue in the European Commission proceeding. Pet. App. 7a-8a. The court acknowledged disagreement among other courts of appeals on that issue. *Ibid.* But it concluded that neither the text nor the legislative history of Section 1782 "require[s] a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a. The court reasoned that rejection of a foreign discoverability requirement is consistent with Section 1782's twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.* (citing *In re Application of Malev Hungarian Airlines, Inc.*, 964 F.2d 97 (2d Cir.), cert. denied, 506 U.S. 861 (1992)). The court of appeals accordingly ruled that the district court may proceed to consider AMD's discovery request on the merits. *Id.* at 9a.

DISCUSSION

Section 1782 authorizes federal district courts to provide foreign tribunals and interested parties with assistance in obtaining evidence for use in foreign proceedings. 28 U.S.C. 1782. The proper construction of that provision plays an important role in facilitating the resolution of foreign disputes and fostering international comity. The United States does not employ Section 1782 to obtain discovery on its own behalf. The United States may, however, receive letters rogatory and letters of request through the Department of State or the Department of Justice and present them, pursuant to Section 1782, to the appropriate court. See, *e.g.*, *In re Letter Rogatory from the First Court, Caracas,* 42 F.3d 308, 309 (5th Cir. 1995). In addition,

Section 1782 provides the statutory framework through which the United States executes requests by foreign governments for witnesses or evidence in criminal matters under Mutual Legal Assistance Treaties (MLATs). See, *e.g.*, *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1290-1291 (11th Cir. 2003). The United States therefore has occasion to invoke Section 1782, and the United States interprets it in accordance with Congress's policy of encouraging international cooperation in facilitating legitimate discovery requests.

Intel correctly asserts, in support of the first of its three questions for review, that the courts of appeals are divided on whether Section 1782 authorizes production of materials only when they would be subject to compelled disclosure in the foreign proceeding in which the material would be used. That recurring issue presents a matter of considerable importance that is ripe for this Court's resolution. Intel's second and third questions, which focus on whether the European Commission's investigation into anti-competitive practices constitutes "a proceeding in a foreign or international tribunal" and whether AMD would be an "interested person" with respect to those "proceedings," present relatively narrower issues that have not generated mature conflicts among the courts of appeals. The petition nevertheless should be granted on those issues as well so that the Court may address the full range of interrelated issues raised under Section 1782 in this case.

A. The Conflict Over Whether Section 1782 Imposes A Foreign Discoverability Requirement Merits This Court's Resolution

1. The courts of appeals have divided on whether Section 1782 imposes a "foreign discoverability" requirement. Relying on the text of the statute, the

Second, Third, and Ninth Circuits have held that Section 1782 contains no such requirement. *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997); *In re Application of Gianoli Aldunate*, 3 F.3d 54, 58-59 (2d Cir.), cert. denied, 510 U.S. 965 (1993); *In re Bayer AG*, 146 F.3d 188, 191-196 (3d Cir. 1998); *Four Pillars Enters.* v. *Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002); see Pet. App. 8a-9a.

In contrast, the First and Eleventh Circuits have construed 28 U.S.C. 1782 to include such a requirement implicitly. *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-7 (1st Cir. 1992); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989). While the Eleventh Circuit has not explicitly explained its rationale, the First Circuit has reasoned that restricting discovery to material that would be subject to discovery in the foreign proceeding would (1) maintain parity between litigants, by declining to give one party an undue discovery advantage over the other party, and (2) avoid causing offense to a foreign tribunal in contravention of Section 1782's overarching goal of encouraging international cooperation. *Asta Medica*, 981 F.2d at 5-6.[1]

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[1] The Fourth, Fifth, and District of Columbia Circuits have noted the foreign-discoverability issue, but have not squarely resolved it. See *In re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996) (stating that discoverability requirement is not germane when requester is foreign court); *In re Letter Rogatory from the First Court, Caracas*, 42 F.3d 308, 310-311 (5th Cir. 1995) (same); *In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 692 n.7 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (noting the Eleventh Circuit's *Trinidad* decision).

The conflict on whether Section 1782 implicitly contains a foreign discoverability requirement has recurring significance and warrants this Court's resolution. The conflict results in inconsistent treatment of similarly situated litigants based on the forum in which discovery is sought. Indeed, because a litigant might seek discovery under Section 1782 in more than one judicial district, the conflict can subject a single litigant to inconsistent treatment when making multiple requests for discovery in different districts. Because Section 1782 provides for discovery in response to requests from foreign or international courts and foreign officials, inconsistent judicial treatment resulting from the circuit conflict can potentially affect the United States' foreign relations.

Contrary to AMD's suggestion (Br. in Opp. 29-30), the existing conflict is unlikely to dissipate merely because the First and Eleventh Circuits cited dictum supporting a foreign discoverability requirement from a Third Circuit decision, *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (1985), that the Third Circuit has since disavowed. Compare *Bayer*, 146 F.3d at 193, with *Asta Medica*, 981 F.2d at 6, and *Trinidad & Tobago*, 848 F.2d 1156. It appears unlikely, as a practical matter, that both the First and Eleventh Circuits would revisit the issue en banc. This Court should therefore resolve the current disagreement over whether Section 1782 implicitly imposes such a requirement.

2. On the merits, Section 1782 does not include a *per se* requirement that the materials sought would be of a type discoverable in the foreign proceeding. The text of Section 1782 does not impose such a foreign discoverability requirement. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing

amendments to the statute, it would have included statutory language to that effect." *Gianoli Aldunate*, 3 F.3d at 59.

The only arguable bases in Section 1782's text for imposing such a requirement are provisions stating that: (1) the practice and procedure prescribed by the district court for taking testimony or producing evidence "may be in whole or part the practice and procedure of the foreign country or the international tribunal"; and (2) to the extent that the district court does not prescribe otherwise, testimony shall be taken "in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. 1782(a). Those statutory provisions, however, by their terms, serve as guides to the district court's exercise of its discretion; they do not impose substantive restrictions on the discovery to be had, let alone create a *per se* foreign discoverability limitation on all Section 1782 requests. See *In re Letter of Request from Crown Protective Service*, 870 F.2d 686, 692 n.6 (D.C. Cir. 1989) (noting that "[t]he district court retains discretion to prescribe other procedures" than those specified in the Federal Rules of Civil Procedure).

In imposing a foreign discoverability requirement, the First Circuit rested its decision primarily on the policy concerns of avoiding offense to foreign governments and maintaining parity between litigants. *Asta Medica*, 981 F.2d at 5-7. While those concerns, like the aspects of Section 1782 discussed above, are legitimate guideposts for the district court's exercise of discretion, they do not support application of a *per se* foreign discoverability rule. For example, if the requesting authority under Section 1782 is a foreign court or a foreign government enforcement authority, comity concerns may well *favor* disclosure. In those circumstances, courts should ordinarily order discovery with-

out a potentially offensive inquiry into the lawfulness of the request under foreign law. *In re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996); *Caracas*, 42 F.3d at 310-311.[2]

Even when the requesting entity is a private party, the unavailability of discovery under foreign law does not necessarily imply that foreign tribunals would take offense at the application of Section 1782. The foreign tribunal's laws may limit discovery out of concern that ordering production of materials located within another country would offend *that* country. See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24, 41 (1986) (the House of Lords, in reversing a decision by the English Commercial Court enjoining a party to a pending reinsurance suit from seeking discovery from non-parties through Section 1782, found that the availability of discovery under Section 1782 posed no "interference with the English court's control of its own process").

3. Congress recognized in Section 1782(a) that rigid discovery rules are frequently not compatible with the wide variety of discovery requests that might emanate from foreign tribunals. Section 1782(a) accordingly provides that a district court "may order" the provision of testimony or documents and "may prescribe" the prac-

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[2] In this regard, the Eleventh Circuit has ruled that foreign government discovery requests made pursuant to an MLAT are subject only to those limitations set forth in the MLAT itself and are therefore not subject to a foreign discoverability requirement. See *Commissioner's Subpoenas*, 325 F.3d at 1304. The United States, however, has not entered into MLATs with every foreign nation. Accordingly, a foreign discoverability requirement could prevent a foreign government from obtaining requested information if the foreign government seeks that information by means other than the MLAT procedure.

tice and procedure for taking the testimony or producing the document. 28 U.S.C. 1782(a). Here, as in other contexts, Congress has granted the district courts substantial discretion in determining the appropriate response to foreign requests for judicial assistance.[3] Once the statutory prerequisites for discovery are satisfied, Section 1782 allows a district court to tailor its assistance to the particular circumstances before it and to consider comity or litigation fairness concerns that might arise in individual cases. *Metallgesellschaft AG*, 121 F.3d at 79; *Gianoli Aldunate*, 3 F.3d at 60; *Bayer AG*, 146 F.3d at 196.

The legislative history of Section 1782 reinforces that understanding. The Senate Report accompanying the 1964 revisions to Section 1782 makes clear that Congress intended to afford district courts considerable discretion in deciding whether to grant assistance under Section 1782:

> [Section 1782] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international

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[3] See 28 U.S.C. 1696 (district court "may order service" of any document issued in connection with proceeding in foreign or international tribunal); 28 U.S.C. 1783(a) (a court "may order the issuance of a subpoena" of U.S. national or resident in foreign country, under certain circumstances). Cf. 28 U.S.C. 1781 (State Department may transmit and return letters rogatory "directly, or through suitable channels," as the agency finds most appropriate).

> tribunal, the nature of the tribunal and the character of the proceedings before it.

S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964); see *United Kindom* v. *United States*, 238 F.3d 1312, 1319 (11th Cir.), cert. denied, 534 U.S. 891 (2001); *United States* v. *Sealed 1, Letter of Request*, 235 F.3d 1200, 1202 (9th Cir. 2000); *In re Application of Esses*, 101 F.3d 873, 876 (2d Cir. 1996).

The discretion of the district court is an important point that the Ninth Circuit did not discuss, but that is critical to the proceedings on remand. District courts have the discretion to consider foreign discoverability as a relevant factor in determining whether the request for discovery is appropriate. A district court is entitled to examine whether a request for discovery under Section 1782 is unduly burdensome or otherwise improper. See, *e.g.*, *Bayer AG* v. *Betachem, Inc.*, 173 F.3d 188, 191 (3d Cir. 1999) (affirming district court decision denying request for unredacted documents as cumulative). The court may likewise examine whether the party seeking assistance under Section 1782 is trying to circumvent foreign discovery rules or other policies of a foreign country or this nation that would make the requested discovery inappropriate. See, *e.g.*, *Four Pillars Enters.*, 308 F.3d at 1080-1081 (affirming decision to provide applicant with only limited Section 1782 assistance in light of, *inter alia*, applicant's conviction for conspiracy to steal trade secrets). The Federal Rules of Civil Procedure provide the district courts with tools for resolving such disputes.[4]

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[4] For instance, a district court can limit unreasonably broad or cumulative discovery through Federal Rule of Civil Procedure 26(b)(1), use Rule 26(c) to restrict discovery to specified terms, conditions and matters, or require an applicant to submit a

Those matters are best resolved on a case-by-case basis. For example, should a particular Section 1782 request implicate submissions to the European Commission's Leniency Program, see European Commission Amicus Br. 6-7, the district court would have the responsibility, in properly exercising its discretion over the request, to consider the Commission's views on the appropriateness of such discovery and the potential harm to the Leniency Program. See *In re Application of Merck & Co.*, 197 F.R.D. 267, 270 (M.D.N.C. 2000) (district court "has inherent authority to require that other parties to the foreign litigation be notified of the [Section 1782] application and be allowed to present their views to the Court"). "If a district court is concerned that granting discovery under § 1782 will engender problems in a particular case, it is well-equipped to determine the scope and duration of that discovery." *In re Application of Esses*, 101 F.3d at 876.

B. The Questions Whether This Case Involves A Request By An "Interested Person" For Materials To Be Used In A "Proceeding In A Foreign Or International Tribunal" Merit Clarification In The Present Context

1. Intel further seeks this Court's review of the court of appeals' holding that the investigation into anticompetitive practices by the European Community will lead to "a proceeding in a foreign or international tribunal." The petition also raises the related question whether the person filing a complaint with the European Commission is an "interested person," within the meaning of 28 U.S.C. 1782. Intel specifically urges that adjudicative proceedings must be pending or at least

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discovery plan to streamline matters and illustrate to the court that another method of discovery would not be more convenient or less burdensome.

"imminent," and that a private party requesting assistance must be a litigant in those proceedings, before Section 1782 authorizes that party to obtain discovery within the United States. Pet. 12-16 (citing, *inter alia*, *Euromepa S.A.* v. *R. Esmerian, Inc.*, 154 F.3d 24, 29 (2d Cir. 1998)).

Although Intel contends otherwise, there is no conflict between the court of appeals' decision and the Second Circuit's ruling in *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (1991), which states that an adjudicatory proceeding must be pending or imminent before a person may obtain Section 1782 assistance. *Brazil* was decided in 1991, five years before Congress's 1996 amendments to Section 1782, which expressly provided that "a proceeding in a foreign or international tribunal" includes "criminal investigations conducted before formal accusation." Act of Feb. 10, 1996, Pub. L. No. 104-106, Tit. XIII, § 1342(b), 110 Stat. 486. The specific holding of *Brazil*—that Section 1782 does not apply to a request in aid of a criminal investigation, absent an actual or imminent criminal trial—is inconsistent with the plain import of the 1996 amendments. See *Sealed 1*, 235 F.3d at 1205 (imminence requirement would preclude Section 1782 assistance before filing of actual criminal charges, "in direct conflict with the plain language of the 1996 amendment"). Intel notes that, since the 1996 amendments, the Second Circuit has continued to recite the standard set out in *Brazil*. See *Lancaster*, 90 F.3d at 42; *Euromepa*, 154 F.3d at 28. Nevertheless, that court has not yet addressed the application of Section 1782 to a foreign criminal or civil investigation, and the court has not clearly indicated how the 1996 amendments would affect its application of *Brazil* to other

situations, including requests arising from European Commission civil proceedings.

2. Despite the absence of a clear conflict, if this Court grants review on the first question presented, it could also usefully clarify the analysis that a court should conduct when a Section 1782 applicant claims to be an "interested person" seeking information for use in a "proceeding in a foreign or international tribunal," and the proceeding in the tribunal has not yet commenced.

The words "interested person" are broad and do not inherently require the applicant to be a "litigant" in a traditional judicial forum. Nor must the "proceeding" in the tribunal be pending at the time the application is made. Those conclusions follow from the text, history, and purpose of Section 1782. As a textual matter, Congress could have, but did not, restrict discovery under Section 1782 to "litigants" or "parties." Instead, it adopted the broader phrase "interested person." The legislative history indicates that the selection of that broader phrase was intentional. See S. Rep. No. 1580, 88th Cong., 2d Sess. 8 (1964) ("A request for judicial assistance under the proposed revision may * * * be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the foreign or international litigation.") (emphasis added). Similarly, the text does not require that the foreign proceeding be "pending" at the time of the request; to the contrary, Congress specifically amended the statute in 1964 to delete the word "pending."[5] The purpose of this and related changes to

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[5] Prior versions of Section 1782 had consistently required that the foreign proceeding be "pending." See Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769 ("If a commission or letters rogatory to take

Section 1782 was to ensure that "assistance is not confined to proceedings before conventional courts," but also extends to administrative and quasi-judicial proceedings worldwide, including "proceedings * * * pending before investigating magistrates in foreign countries." S. Rep. No. 1580, *supra*, at 7. In view of the statute's language, evolution, and intended function, there is no inherent barrier to the grant of discovery under Section 1782 to a complainant who invokes foreign procedures that are integrally linked to a later "proceeding in a foreign or international tribunal."[6]

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such testimony shall have been issued from the court in which said suit is pending".); Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 ("The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country."); Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (amending Section 1782 to cover evidence sought for use "in any judicial proceeding pending in any court.").

In 1964, following Congress's creation of the Commission on International Rules of Judicial Procedure, Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, and the Commission's submission of a report, *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963), Congress adopted a complete revision of Section 1782 that, *inter alia*, omitted the word "pending" and substituted the word "tribunal" for foreign "court."

[6] That conclusion is also made evident by Congress's amendment of Section 1782 in 1996 to provide that a "proceeding in a foreign or international tribunal" "includ[es] criminal investigations conducted before formal accusation." See Act of Feb. 10, 1996, Pub. L. No. 104-106, Tit. XIII, § 1342(b), 110 Stat. 486. The addition of that language underscores two important points. First, criminal investigative proceedings may support discovery *before* they have progressed to an adjudicative stage. Second, the ability to obtain discovery for use in such future criminal proceedings is an example of what is covered by discovery "for use in" a proceeding in a foreign tribunal; it is not an exception to a general rule that the proceeding in the foreign tribunal must be underway.

There are, nevertheless, important prudential considerations that limit the reach of Section 1782. Even when an applicant meets the requirements of the statute, a district court has discretion whether to grant discovery. In the exercise of that discretion, a district court should consider the nature of the pending foreign investigation as well as the imminence, certainty, and character of the future adjudicative proceedings in which the discovered material would be used. A district court is not required to grant pre-adjudication discovery simply because it has authority to do so.

3. In this case, the court of appeals was correct in ruling that Section 1782 does not categorically exclude a complainant in European Commission proceedings from seeking judicial assistance from United States courts. Nevertheless, the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion. The European Commission has described its pending proceeding as investigative, rather than adjudicative. European Commission Amicus Br. 4-5. While AMD filed a complaint that initiated the investigation, and that company may submit supporting material to the Commission, AMD is not the government entity conducting the investigation. And although the Commission's investigation may lead the Commission to take action, the Commission itself has not requested the district court's judicial assistance. There accordingly is no current reason to believe that the Commission would find the requested discovery of use in any future judicial proceeding. Significantly, AMD has no entitlement to initiate the civil enforcement action in which, AMD claims, the information may be used.

AMD points out that, if the Commission elects not to pursue a civil action, AMD may invoke its right to seek

judicial review of the Commission's decision not to proceed. See p. 3, *supra*. AMD cannot claim, however, a current need for judicial assistance in aid of that possible proceeding. Equally important, AMD's judicial challenge to the Commission's enforcement decision would be limited to review of the record before the Commission. Because AMD would have no right to submit new evidence in the judicial review proceeding, it could "use" evidence in that proceeding only by submitting it to the Commission in the current, investigative stage. Yet the Commission's amicus brief suggests that the Commission, which is capable itself of invoking Section 1782, does not need or want the district court's assistance.[7]

The court of appeals did not adequately acknowledge the district court's discretion to determine whether

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[7] AMD contends (Br. in Opp. 20 n.9) that it needs discovery at this juncture to avoid a "Catch-22" that would result if it were denied discovery because judicial proceedings are not occurring at present. AMD argues that "[i]f the EC decides not to issue a statement of objections, AMD is entitled to seek judicial review of that decision, * * * but judicial review is based on the evidence before the EC." *Ibid.* Thus, AMD concludes, it must have discovery now in order to use evidence in judicial review later. But AMD's situation results not from a "Catch-22," but from the European Commission's decision to structure its process with a first-stage investigation followed by a second-stage of judicial review based on the existing record. That process inherently means that the judicial review is not an evidentiary proceeding; rather, it is an analysis of the investigative record. A district court's exercise of discretion on whether to allow discovery would properly be informed by the fact that the foreign procedure accords no discovery rights to a complainant at the *investigative* stage and accords no rights to a complainant to supplement the administrative record at the *judicial review* stage. It would also be properly informed by a foreign tribunal's determination not to invoke Section 1782 and seek the information itself.

judicial assistance may be authorized but inappropriate in a particular case. There are substantial reasons why the district court could conclude, in the exercise of its discretion on remand, that such assistance should not be provided under the facts presented here. Therefore, if the Court determines that the petition for a writ of certiorari should be granted to resolve whether Section 1782 contains an implicit foreign discoverability requirement, the Court should address the other aspects of the court of appeals' ruling to ensure that the district court may appropriately exercise its discretion in further proceedings in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is recused in this case.

APPENDIX

Section 1782 of Title 28, as amended, 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.

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