No. 02-572

In the Supreme Court of the United States

INTEL CORPORATION, PETITIONER

v.

ADVANCED MICRO DEVICES, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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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 practices investigation by the Commission of the 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 the European Communities is an "interested person."

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of 28 U.S.C. 1782, which authorizes federal district courts to provide foreign tribunals and interested persons with assistance in obtaining evidence for use in foreign proceedings. Section 1782 plays an important role in encouraging international cooperation, facilitating the resolution of foreign disputes, and fostering international comity. The United States utilizes Section 1782 to present to courts letters rogatory and letters of request, received through the Department of State or the Department of Justice. See, *e.g.*, *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d 308, 309 (5th Cir. 1995). The United States also employs Section 1782 to execute requests from 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). At the Court's invitation, the United States filed a brief amicus curiae in response to the petition for a writ of certiorari. The

United States submits that Section 1782 authorizes, but does not require, a federal district court to provide judicial assistance in this case and that the Court should remand the case for the district court to determine whether such assistance is appropriate.

STATEMENT

Petitioner Intel Corporation and respondent Advanced Micro Devices, Inc. (AMD) compete in the development and sale of microprocessors throughout the world, including within the European Community. AMD filed a complaint with the Directorate-General for Competition (DG-Competition) of the Commission of the 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, consolidated version published in 2002 O.J. (C.325) 33 (EC Treaty). Pet. App. 2a. 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(a), 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. 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. Intel challenges the court of appeals' decision.

A. Section 1782's History And Background

Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide means to assist foreign tribunals in obtaining evidence for use in their proceedings.[1]

1. In 1855, the Attorney General of the United States concluded that United States courts lacked statutory authority to execute a letter rogatory, submitted from an official of the French government to the State Department, seeking assistance in securing testimony for a French proceeding. See 7 Op. Att'y Gen. 56 (1855); Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953). The following year Congress gave federal courts the authority to assist foreign courts by appointing commissioners to compel testimony from witnesses identified in letters rogatory. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630. See Jones, *supra*, 62 Yale L.J. at 540.

Because of indexing errors, Congress's 1855 legislation was "buried in oblivion" and the courts apparently were unaware of its existence. See Jones, *supra*, 62 Yale L.J. at 540-541. Eight years later, Congress enacted new legislation governing discovery requests from foreign courts. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769. The new legislation authorized federal courts to respond to letters rogatory by compelling witnesses in the United States to provide testimony for use in foreign courts. That assistance was available, however, only if the foreign proceedings were "for the recovery of money or property depending in any court in any foreign country with which the United States are at

[1] The relevant statutory provisions are set forth in the appendix to this brief. See Add., *infra*, 1a-5a.

peace, and in which the government of such foreign country shall be a party or shall have an interest." 12 Stat. at 769.[2]

2. In 1948, Congress substantially broadened the scope of federal court assistance available for foreign proceedings. See Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949. Congress extended federal judicial assistance to "any civil action pending in any court in a foreign country" and eliminated the requirement that the government of a foreign country be a party or have an interest in the proceedings. See § 1782, 62 Stat. 949. The following year, Congress replaced the term "civil action" with the phrase "judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103. Thus, by 1949, federal courts were authorized to compel the testimony of any witness located in the United States to be used in a pending foreign judicial proceeding, but only proceedings in those countries with which the United States was at peace. See 28 U.S.C. 1782 (1952). See Jones, *supra*, 62 Yale. L.J. at 541-542.

3. In 1958, Congress concluded that "[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resulting disputes, leading sometimes to litigation, has pointedly demonstrated the need for comprehensive study of the extent to which international judicial assistance can be obtained." S. Rep. No. 2392, 85th Cong., 2d Sess. 3 (1958).

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[2] In 1877, Congress added language to Revised Statutes § 875, similar to that used in the Act of March 2, 1855, providing assistance for foreign governments in cases in which they were parties or had an interest. See Act of Feb. 27, 1877, ch. 69, 19 Stat. 241. At the same time, Revised Statutes §§ 4071-4073 (1875 ed.), drawn from part of the 1863 legislation, set out more limited circumstances in which a foreign government could obtain assistance in United States courts. "These two sets of statutes remained separate until 1948 when they were revised and consolidated at 28 U.S.C. § 1781 et seq. (62 Stat. 949)." *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 564 n.5 (6th Cir. 1975).

Congress therefore created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743.[3]

The Commission drafted and recommended adoption of (1) amendments to the Federal Rules of Civil and Criminal Procedure, (2) amendments to sections of the United States Code, and (3) a Uniform Interstate and International Procedure Act, to be enacted by individual States. See *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2 (1963). In 1964, without debate, Congress unanimously adopted the legislation recommended by the Commission. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 997; see H.R. 9435, 88th Cong., 2d Sess. (1964), *reprinted in* 110 Cong. Rec. 596-598, 22,857 (1964).[4]

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[3] Congress charged the Commission with, *inter alia*, drafting legislation to render "more readily ascertainable, efficient, economical, and expeditious" those "procedures necessary or incidental to the conduct and settlement of litigation in State and Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law," and to accomplish the same result for "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." § 2, 72 Stat. 1743.

[4] The legislation to improve international processes included, *inter alia*, amendments to 28 U.S.C. 1781(b), which authorizes the State Department to receive, and return after execution, both foreign and domestic letters rogatory and similar requests, while making clear that other means of transmittal continue to be available. See § 8, 78 Stat. 996. The legislation also included the new provisions of 28 U.S.C. 1696, which gives district courts discretionary authority to grant or deny requests for assistance in effecting service of documents issued in connection with proceedings in foreign or international tribunals, and 28 U.S.C. 1783(a), which gives district courts discretion, under certain circumstances, to issue a subpoena requiring the appearance of a United States national or resident who is in a foreign country. See §§ 4, 10, 78 Stat. 995, 997.

The 1964 legislation included a complete revision of Section 1782. Section 1782, as amended, provided that federal district courts "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." See Act of Oct. 3, 1964, § 9(a), 78 Stat. 997. The amended Section 1782 deleted language in the 1949 version that had limited assistance to a "judicial proceedings pending in any court in a foreign country with which the United States is at peace." Compare 28 U.S.C. 1782 (1958), with § 9(a), 78 Stat. 997. The Senate Report that accompanied the legislation stated that Congress substituted the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but also extends to "administrative and quasi-judicial proceedings all over the world," including "proceedings * * * pending before investigative magistrates in foreign countries." S. Rep. No. 1580, 88th Cong., 2d Sess. 7-8 (1964); see also H.R. Rep. No. 1052, 88th Cong., 1st Sess. 9 (1963); see generally Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-1035 (1965).[5]

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[5] The 1964 legislation also repealed prior enactments that had authorized judicial assistance to international tribunals established by a treaty to which the United States was a party involving claims in which the United States or its nationals were interested. See 22 U.S.C. 270-270g (1958) (repealed Act of Oct. 3, 1964, § 3, 78 Stat. 995). Those prior enactments had given the tribunals and their commissioners authority to administer oaths in proceedings involving such claims and permitted agents of the United States before the international tribunal to invoke the assistance of the district court in compelling the production of documents. See Act of July 3, 1930, ch. 851, 46 Stat. 1005, as amended by the Act of June 7, 1933, ch. 50, 48 Stat. 117. Section 1782's amended provisions were viewed as sufficiently broad to provide assistance in those circumstances. See S. Rep. No. 1580, *supra*, at 3-4, 8; Smit, *supra*, 65 Colum. L. Rev. at 1027.

The Senate Report emphasized that Section 1782 authorized, but did not require, district courts to provide judicial assistance, stating:

> 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 tribunal, the nature of the tribunal and the character of the proceedings before it. The terms the court may impose include provisions for fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers and similar provisions.

S. Rep. No. 1580, *supra*, at 7; see also Smit, *supra*, 65 Colum. L. Rev. at 1029.

4. In 1996, Congress amended Section 1782(a) to modify the reference to "foreign or international tribunal" in the first sentence by adding the phrase "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486. That revision produced the current version of Section 1782 at issue in this case. See Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Comm. 1, 20 n.89 (1998).

B. The European Commission Proceedings

The European Commission describes itself as "the executive and administrative organ of the European Communities." Br. of Amicus Curiae European Commission Supporting Reversal 1 (EC Merits Amicus Br.). It exercises responsibility over a wide range of subject areas, including the EC Treaty's provisions relating to competition. *Ibid.* The European Commission's DG-Competition enforces those

treaty provisions, which include provisions addressing anti-competitive agreements (Art. 81) and abuse of dominant market position (Art. 82). *Id.* at 1-2; see also Br. of the European Commission as Amicus Curiae in Support of Petitioner 1-2, 4-5 (EC Pet. Amicus Br.).

1. The DG-Competition's "overriding responsibility" is to conduct investigations into alleged violations of those competition laws. EC Merits Amicus Br. 6. On receipt of a complaint or sua sponte, the DG-Competition conducts a preliminary investigation. It "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint." *Ibid.* "Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If it declines to proceed, that decision is subject to judicial review." *Id.* at 7. See generally *Hasselblad (G.B.) Ltd.* v. *Orbison*, [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. First Instance); *Koelman* v. *European Community Comm'n*, [1996] 4 C.M.L.R. 636, 649 (Ct. First Instance); Pet. App. 3a-4a.

2. If the DG-Competition decides to pursue the matter further, it typically serves the target with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated the relevant competition laws. EC Merits Amicus Br. 7. The target is entitled to a hearing before a hearing officer, who provides a report to the DG-Competition. *Ibid.*; Pet. App. 4a. Once the DG-Competition has made its recommendation, the European Commission may "dismiss[] the complaint, or issue[] a decision finding infringement and

imposing penalties as appropriate." EC Merits Amicus Br. 7. That action is also subject to judicial review. *Ibid.* See generally *Hasselblad*, [1985] Q.B. at 496. Although the European Commission "has significant responsibilities that may partake of an adjudicatory character," EC Pet. Amicus Br. 4, "neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights as between private parties," EC Merits Amicus Br. 7.

C. The Proceedings In This Case

Intel and AMD are United States companies that are "worldwide competitors in the microprocessor industry." Pet. App. 2a. AMD filed a complaint with the European Commission's DG-Competition, 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 DG-Competition's investigation is at the preliminary stage. *Ibid.*

1. AMD recommended that the DG-Competition 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 Pet. App. 2a-3a, 13a; J.A. 111. After the DG-Competition declined to do so, AMD petitioned in federal district court for an order directing Intel to produce the documents at issue pursuant to 28 U.S.C. 1782. Pet. 6; Pet. App. 13a. AMD asserted that it sought the materials in connection with the complaint it had filed with the European Commission. *Ibid.*

2. The district court denied the application based on its perception of the European Commission's proceedings. Pet. App. 13a-15a. The court reasoned that Section 1782 applies only to foreign proceedings "in which an 'adjudicative function is exercised.'" *Id.* at 14a-15a (quoting *Lancaster Factor-*

ing Co. v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996)). Relying on "the record now before the court," and focusing specifically on a declaration from a United States legal practitioner and a 1981 European Commission report on competition policy, the court concluded that AMD's application was "not supported by applicable authority." *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-9a. The court of appeals observed at the outset that Section 1782 authorizes federal courts, through "broad and inclusive" language, to assist foreign proceedings. *Id.* at 5a. That assistance extends "by way of example even [to] criminal investigations prior to formal accusation." *Ibid.* The court observed that Section 1782's text does not distinguish "between civil and criminal proceedings." *Ibid.* In addition, the court noted, Section 1782's legislative history indicates that it authorizes assistance to "'bodies of a quasi-judicial or administrative nature' as well as preliminary investigations leading to judicial proceedings." *Ibid.* (quoting *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1218 (9th Cir. 1976)).

The court of appeals reasoned that, because the DG-Competition's preliminary investigation can ultimately result in an enforceable administrative decision that is subject to judicial review, in this instance "the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." Pet. App. 6a. The court concluded, based on Congress's 1964 amendments eliminating Section 1782's prior reference to "pending" proceedings, that those proceedings need not be "imminent." *Ibid.* (citing *United States* v. *Sealed 1*, 235 F.3d 1200, 1205 (9th Cir. 2000)). "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.* The court concluded, however, 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*, 964 F.2d 97 (2d Cir.), cert. denied, 506 U.S. 861 (1992)). The court of appeals accordingly remanded the case for the district court to consider AMD's discovery request on the merits. *Id.* at 9a.

SUMMARY OF ARGUMENT

Section 1782 grants district courts broad authority to assist foreign proceedings, but it also grants those courts discretion to withhold such assistance when reason and judgment counsel that course. The court of appeals was correct in concluding that Section 1782 does not categorically prohibit the district court from providing assistance in this case, but the absence of such a prohibition does not prevent the district court from withholding assistance on remand as a matter of discretion based on the considerations that petitioner and its amici have identified as absolute obstacles to the use of Section 1782.

1. Section 1782 authorizes federal courts to order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation," upon request of the tribunal or "upon application of any interested person." 28 U.S.C. 1782. Section 1782's use of the term "tribunal" indicates that Section 1782 authorizes fed-

eral courts to assist both foreign courts and foreign administrative bodies that exercise quasi-judicial functions. Section 1782's inclusion, by example, of "criminal investigations conducted before formal accusation," and its purposeful omission of any requirement of a pending adjudication, indicate that the foreign proceedings can include government investigations that will lead to an adjudication. And Section 1782's reference to requests by "any interested person" indicates that federal courts are not barred from considering requests for production from persons who, while not formal parties, are entitled to participate in those foreign proceedings. The court of appeals accordingly was correct in ruling that Section 1782 does not categorically preclude the district court from providing assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication.

2. Section 1782 expressly prohibits a federal court from ordering production of materials in violation of "any legally applicable privilege." 28 U.S.C. 1782. But Section 1782 contains no provision that would categorically prohibit the federal court from ordering production of materials simply because the foreign tribunal or the interested person would not be able to obtain them if they were located in the foreign jurisdiction. The existence of such a categorical requirement cannot be inferred from "comity" or "parity" concerns because neither of those concerns necessarily supports a "foreign discoverability" requirement. Nor can such a requirement be inferred from United States discovery practices. The court of appeals accordingly was correct in refusing to rule that Section 1782 imposes a categorical "foreign discoverability" requirement.

3. Section 1782, which states that a district court "may" provide the requested assistance, grants discretionary authority. 28 U.S.C. 1782. Section 1782 recognizes and preserves a district court's traditionally broad powers to deter-

mine whether, to what extent, and on what conditions, to compel testimony or the production of materials. Petitioner and its amici raise a number of considerations that may provide persuasive reasons for the district court to decline to compel production in this case. Furthermore, some of those considerations may ultimately provide the basis for reviewing courts to articulate supervisory rules to guide a district court's exercise of its discretion. But the courts below have not yet evaluated those considerations in the context of this particular dispute, and this Court should await that effort before announcing far-reaching principles that may prove unnecessary to resolve this case.

ARGUMENT

Petitioner contends that Section 1782 does not authorize discovery that would otherwise be unavailable to private non-litigants under both United States and foreign law (Pet. Br. 19-27) and that discovery is inappropriate because there is no live "proceeding in a foreign or international tribunal" (*id.* at 27-33). These contentions should be rejected as inconsistent with the text and statutory evolution of Section 1782. For economy in exposition, the United States will address the meaning of a "proceeding in a foreign or international tribunal" (pp. 14-20, *infra*) before turning to the petitioner's assertion of a "foreign discoverability" requirement (pp. 21-26, *infra*). Petitioner also contends, in the alternative, that this Court should exercise its supervisory authority to impose rules of practice in the application of Section 1782 (Pet. Br. 34-38). The United States submits that, while such rules may ultimately have merit, this Court should allow the lower courts to formulate such rules in the first instance (pp. 26-30, *infra*).

I. SECTION 1782 AUTHORIZES, BUT DOES NOT REQUIRE, A FEDERAL DISTRICT COURT TO PROVIDE JUDICIAL ASSISTANCE TO A COMPLAINANT IN A EUROPEAN COMMISSION PROCEEDING THAT WILL ULTIMATELY RESULT IN AN ADJUDICATION

This Court has emphasized that "in all statutory construction cases, we begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1782's operative terms have a readily ascertainable meaning, confirmed by context and legislative history, that prescribes the statute's reach. Section 1782 authorizes, but does not require, a federal district court to provide judicial assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication. In challenging the court of appeals' ruling, petitioner and its amici have no adequate textual answer to the court of appeals' straightforward construction of the statutory language.

A. Congress Used The Term "Foreign Or International Tribunal" To Encompass Administrative Bodies, Such As The European Commission, That Exercise Adjudicative Functions

Section 1782(a) expressly authorizes a district court to order a person to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). The central limiting term is "tribunal," which can mean: "a court or forum of justice" or, more broadly, "something that decides or judges." *Webster's Third New International Dictionary* 2441 (1993). Under that definition, the term "tribunal" in Section 1782 is not limited to courts but includes, more broadly, governmental bodies that exercise adjudicative functions.

The legislative history confirms that construction. The 1949 version of Section 1782 authorized judicial assistance in aid of "any judicial proceeding pending in any court in a foreign country." 28 U.S.C. 1782 (1958). In 1958, Congress directed the Commission on International Rules of Judicial Procedure to recommend procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies*." Act of Sept. 2, 1958, § 2, 72 Stat. 1743 (emphasis added). See note 3, *supra*. The Commission accordingly recommended, and Congress enacted, amendments extending Section 1782 to "a proceeding in a foreign or international tribunal" (Add., *infra*, 4a-5a). The Senate Report stated that the amendment "clarifies and liberalizes U.S. procedures," explaining:

> The word "tribunal" is used to make it clear that assistance *is not confined* to proceedings before conventional courts. *For example*, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. * * * In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before *a foreign administrative tribunal or quasi-judicial agency* as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance *in connection with all such proceedings*.

S. Rep. No. 1580, *supra*, at 7-8 (emphasis added). See *id.* at 9 (district courts may prescribe appropriate procedures "irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature").[6]

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[6] Professor Smit, the Reporter for the Commission on International Rules of Judicial Procedure, similarly stated in the "leading commentary"

The European Commission is a "foreign or international tribunal" within the meaning of Section 1782 because it exercises adjudicative functions. The Commission itself acknowledged, at the petition stage, that it "has significant responsibilities that may partake of an adjudicatory character." EC Pet. Amicus Br. 4. Most obviously, the European Commission is a governmental body that, in response to a complaint alleging anti-competitive conduct, may "issue[] a decision finding infringement and imposing penalties as appropriate." EC Merits Amicus Br. 7. The Commission points out that it does not "engage[] in adjudicating rights as between parties." *Ibid.* Nevertheless, the Commission, like criminal and civil courts and other administrative agencies, can adjudicate disputes between the government and private parties. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). Such "special tribunals" (*ibid.*) exercise adjudicative functions and accordingly fall within the reach of Section 1782.[7]

(*In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 690 (D.C. Cir. 1989) (R.B. Ginsburg, J.)) that the term "'tribunal' embraces all bodies exercising adjudicatory powers and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil commercial, criminal, and administrative courts." Smit, *supra*, 65 Colum. L. Rev. at 1026 n.71.

[7] The European Commission urges that the Court should reject that construction "to avoid inappropriately burdening the Commission." EC Merits Amicus Br. 16 (capitalization altered). Although the United States is sensitive to the Commission's policy concerns, Section 1782 unambiguously authorizes judicial assistance in aid of Commission proceedings. As Professor Smit specifically stated, contemporaneously with Section 1782's enactment, the statute "permits the rendition of proper aid in proceedings before the [European Economic Community] Commission in which the Commission exercises quasi-judicial powers." Smit, *supra*, 65 Colum. L. Rev. at 1027 n.73. There are other means, apart from an unduly narrow construction of Section 1782's terms, to address the Commission's policy concerns. See pp. 26-30, *infra*.

B. Congress Did Not Require That A Foreign Proceeding Be Pending At The Time Of The Request

Section 1782 does not limit district courts to providing judicial assistance for "pending" judicial or quasi-judicial proceedings. Rather, Section 1782's text makes clear that the statute authorizes district courts to compel the production of testimony and documents for use in an investigation that may lead to a governmental adjudication. Section 1782 specifically authorizes, as an example, judicial assistance in support of "criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a).

Again, the legislative history confirms that construction. The 1949 version of Section 1782 limited judicial assistance to "any judicial proceeding *pending* in any court in a foreign country." 28 U.S.C. 1782 (1958) (emphasis added); see Add., *infra*, 4a; see also *id.* at 3a (1863 statute), 4a (1948 statute). Congress, however, eliminated the requirement that a proceeding be "pending" (as well as that it be a "judicial proceeding") in the 1964 version. See *id.* at 4a-5a. Congress's deletion of that key limitation cannot reasonably be dismissed as inadvertent, especially when the meaning of the resulting text is plain. See, *e.g.*, *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Rather, Congress recognized that judicial assistance would be available "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 1580, *supra*, at 9. (emphasis added).[8]

Section 1782 accordingly authorizes a federal district court to provide assistance at the preliminary investigative stage

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[8] See Smit, *supra*, 65 Colum. L. Rev. at 1026 ("It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.").

of the European Commission's proceedings. Section 1782 does not require that the judicial or quasi-judicial proceeding for which assistance is sought be "pending at the time of the request for assistance." *In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 687 (D.C. Cir. 1989) (R.B. Ginsburg, J.); see *id.* at 690, 694; see also *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1218 (9th Cir. 1976) (joined by Kennedy, J.) (allowing discovery "for use in completion of the investigation and in future trials"); But cf. *In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 705-706 (2d Cir. 1991) (requiring that the proceeding must be "very likely to occur").

C. Congress Used The Term "Any Interested Person" To Encompass Persons Who, While Not Parties, Nevertheless Are Participants In The Foreign Proceedings

Section 1782(a) authorizes a district court to provide judicial assistance "pursuant to a letter rogatory, or request made, by a foreign or international tribunal or *upon application of any interested person.*" 28 U.S.C. 1782(a) (emphasis added). The phrase "any interested person," in ordinary and legal parlance, is inclusive and encompasses, at the least, persons who have initiated, and are entitled to participate in, an investigative proceeding that may lead, in the ordinary course, to an adjudication before the foreign or international tribunal.[9]

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[9] See, *e.g.*, 5 U.S.C. 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."); 28 U.S.C. 1822 ("Any person interested in a share of any fine, penalty or forfeiture incurred under any Act of Congress, may be examined as a witness in any proceeding for the recovery of such fine, penalty or forfeiture by any party thereto."); see also 22 U.S.C. 270-270e (1958) (distin-

Petitioner suggests that, because the caption of Section 1782 refers to "litigants before [foreign and international] tribunals," the phrase "any interested party" should be correspondingly construed to reach only such "litigants." Pet. Br. 24. This Court has cautioned, however, that the captions of statutes, which frequently employ shorthand terminology, "cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). In this instance, the text of the statute employs words that, by their plain terms, are unambiguously broader than the words the caption employs. The caption accordingly provides little guidance beyond the obvious implication that "litigants" are included among (and may be the most common example of) the "interested persons" who may invoke Section 1782. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

Section 1782's legislative history confirms that the statute authorizes federal district courts to provide assistance upon the application of persons other than litigants. The Senate Report states that a request for judicial assistance 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." S. Rep. No. 1580, *supra*, at 8 (emphasis added). That statement indicates that a "litigant" is only one of a variety of "interested persons."[10]

A complainant in the European Commission's proceedings qualifies as an "interested person" within the meaning of Section 1782. The complainant participates, in a substantial

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guishing between governmental party claimants before an international tribunal and persons who are "interested" in those claims).

[10] Professor Smit's authoritative commentary additionally states that the term "any interested person" is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." 65 Colum. L. Rev. at 1027.

way, in the Commission's proceedings by initiating the investigation through filing a complaint, by submitting information that the Commission must consider, and by pursuing the option of judicial review if the Commission discontinues an investigation or dismisses the complaint. See EC Merits Amicus Br. 7. That role is sufficient to qualify the complainant as an "interested person" within any reasonable conception of that term.[11]

In sum, Section 1782 authorizes a federal district court to provide judicial assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication. Significantly, Section 1782 only authorizes such assistance—the statute does not require it. The district court retains discretion to consider whether rendering such assistance is appropriate in light of such factors as the nature and timing of the proceeding and the role of the entity seeking the assistance. See pp. 26-30, *infra*.

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[11] Petitioner suggests that 28 U.S.C. 1696, which addresses international "service * * * of any document issued in connection with a proceeding in a foreign * * * tribunal," indicates that the term "interested person" should be confined to a "litigant." Pet. Br. 27. Petitioner reasons that "the class of private parties qualifying as 'interested persons' for those purposes *must* of course be limited to litigants, because private parties * * * cannot serve 'process' unless they have filed suit." *Ibid.* Section 1696, however, is not limited to service of *process*, but instead allows service of "any document" issued in connection with a foreign proceeding. For example, if the European Commission's procedures were revised to require a complainant to serve its complaint on a target company, but the complainant's role in the Commission's proceedings otherwise remained unchanged, Section 1696 would authorize the district court to provide that "interested party" with assistance in serving that document.

II. SECTION 1782 DOES NOT CATEGORICALLY PROHIBIT A DISTRICT COURT FROM ORDERING PRODUCTION OF MATERIALS SIMPLY BECAUSE THE FOREIGN TRIBUNAL OR THE INTERESTED PARTY WOULD NOT BE ABLE TO OBTAIN THEM IF THEY WERE LOCATED IN THE FOREIGN JURISDICTION

Section 1782 does not give federal district courts unlimited license to compel testimony or order the production of documents or other materials. Most significantly, Section 1782(a) expressly states that a district court may not order discovery "in violation of any legally applicable privilege." 28 U.S.C. 1782(a). That provision ensures that the targets of discovery retain relevant privileges that have an established basis in law. See S. Rep. No. 1580, *supra*, at 9. Section 1782 does not, however, categorically prohibit production of materials simply because the foreign tribunal or an interested party would not be able to obtain them if they were located in the jurisdiction where the foreign proceeding will take place.

A. Congress Did Not Impose A "Foreign Discoverability" Requirement

Just as Section 1782's scope depends on "the language of the statute," *Barnhart*, 534 U.S. at 450, Section 1782's affirmative limitations must be grounded in the statutory text. Section 1782 contains no language categorically limiting a district court to production of materials that could be produced in the foreign jurisdiction if the materials were located there. "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." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir.), cert. denied, 510 U.S. 965 (1993). Accord *Four Pillars Enters. Co.* v. *Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002);

In re Application Pursuant to 28 U.S.C. § 1782, Bayer AG, Applicant-Appellant, to Take Discovery, 146 F.3d 188, 191-196 (3d Cir. 1998); *In re Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77, 79 (2d Cir. 1997); see also Pet. App. 8a-9a.[12]

There is likewise no indication in Section 1782's legislative history that Congress intended to impose categorical restrictions (apart from legally applicable privileges) or reciprocal conditions on the provision of assistance under Section 1782. Instead, 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." S. Rep. No. 1580, *supra*, at 7.[13]

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[12] 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, are permissive rather than restrictive. They 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 Crown Prosecution Serv.*, 870 F.2d at 692 n.6 (noting that "[t]he district court retains discretion to prescribe other procedures" than those specified in the Federal Rules of Civil Procedure).

[13] For example, Professor Smit noted in his commentary that, under the laws of foreign countries such as the Netherlands and Italy, "parties may not be heard as witnesses and party statements are not considered testimony." Smit, *supra*, 65 Colum. L. Rev. at 1026 & n.68. He stated that "Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard." *Id.* at 1026.

B. A "Foreign Discoverability" Requirement Cannot Be Inferred From "Comity" Or "Parity" Concerns

The two courts of appeals that have construed Section 1782 to include, implicitly, a foreign discoverability requirement have not provided a persuasive reason for doing so. The First Circuit rested its decision primarily on the policy concerns of avoiding offense to foreign governments and maintaining parity between litigants, *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-7 (1992), while the Eleventh Circuit did not explain its rationale, see *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); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988). While comity and parity concerns may provide legitimate touchstones for the district court's exercise of discretion, they do not provide a basis for inferring that Section 1782 implicitly contains a *per se* foreign discoverability rule.

Comity concerns provide a weak foundation for inferring that Section 1782 contains such a categorical rule because those concerns may actually *favor* production of the materials at issue. For example, if the requesting authority under Section 1782 is a foreign court or a foreign government enforcement authority, the federal district court should ordinarily evaluate that request without a potentially offensive inquiry into the lawfulness of the request under foreign law. See *In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 592 (4th Cir. 1996); *Caracas*, 42 F.3d at 310-311; Comment, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. Chi. L. Rev. 1127, 1142 (1994).[14]

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[14] 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 Sub-*

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 a district court's decision to order discovery in this country. The foreign tribunal's laws may limit discovery within its borders out of concerns that are peculiar to its legal practices, culture, or traditions, but have no analogue in the United States. See *In re Bayer*, 146 F.3d at 194. The application of a foreign discoverability rule would make little sense in that situation; rather, it would undermine Section 1782's objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons that have no bearing on international comity, they cannot obtain under their own laws. See *ibid.* A foreign tribunal's general reluctance to order production of materials present in the United States likewise provides no sound basis for a foreign discoverability rule because that reluctance may simply reflect that tribunal's desire to avoid offending *this* country. See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24, 40 (1986) (recognizing a litigant's entitlement to seek foreign discovery "provided always that such means are lawful in which they are used").

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a foreign discoverability rule. In the case of requests from foreign tribunals seeking to enforce public laws, it is not at all unusual for government authorities to have broader powers of discovery than private parties. See, *e.g.*, Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.*; 18 U.S.C. 1505; EC Merits

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poenas, 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.

Amicus Br. 6 (describing "dawn raids"). And whether information is sought by a foreign tribunal or an "interested person," the foreign tribunal itself can adopt appropriate rules of practice respecting the admission of evidence to maintain whatever measure of parity that it concludes is appropriate. See *South Carolina Ins. Co.*, [1987] 1 App. Cas. at 41 ("English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action * * * for the protection of those third parties, and not for the protection of either of the persons who are parties to the action.").

C. A "Foreign Discoverability" Requirement Cannot Be Inferred From United States Discovery Practices

Petitioner suggests that a "foreign discoverability" requirement can be inferred from United States discovery practices. Pet. Br. 19-20 ("[I]f AMD were pursuing this matter in the United States, U.S. law would preclude it from obtaining discovery of Intel's documents."). The inquiry into whether a federal court could order production of analogous materials if an analogous proceeding were taking place in the United States, rather than abroad, may be a consideration in the district court's exercise of discretion, but it sheds little light on the meaning of Section 1782 because Section 1782 expressly would not apply in that situation. Congress enacted Section 1782 to deal with the provision of judicial assistance to foreign tribunals; it did not include any indication that such assistance would necessarily depend on whether United States courts would grant discovery in analogous circumstances.[15]

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[15] A United States tribunal can, of course, obtain discovery from targets during the investigative phase of the agency's proceedings. See *e.g.*, Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.* Hence a foreign discoverability requirement founded on United States practice would be limited to private requests. But the text of Section 1782 does not suggest

In short, Section 1782 does not categorically prohibit a district court from ordering production of materials simply because the foreign tribunal or the interested party would not be able to obtain them if they were located in the foreign jurisdiction. Rather, the district court retains discretion to take that consideration into account in the course of considering whether to render the requested assistance. See pp. 26-30, *infra*.

III. THE DISTRICT COURT RETAINS DISCRETION TO DENY DISCOVERY IN THIS CASE

Congress recognized 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 practice and procedure for taking the testimony or producing the documents. 28 U.S.C. 1782(a). The district court retains discretion to deny discovery based on individualized considerations. Such considerations may ultimately lead to the development of supervisory rules that channel the district court discretion. But this Court should not announce such rules in the first instance.

A. Section 1782 Expressly Confers Discretion

Section 1782's direction that a district court "may order" discovery expressly 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. See *Bayer AG*, 146 F.3d at 196; *Metallgesellschaft AG*, 121 F.3d at 79; *Gianoli Aldunate*, 3 F.3d at 60. As the Senate Report explains:

> In exercising its discretionary power, the court may take into account the nature and attitudes of the government

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a categorical rule that distinguishes between requests from a "foreign tribunal" and those from "any interested person."

> 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 that tribunal and the character of the proceedings before it.

S. Rep. No. 1580, *supra*, at 7. As a consequence, the district court may consider the nature of the pending foreign investigation as well as the likelihood, imminence, 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. See, *e.g.*, *United States* v. *United Kingdom*, 238 F.3d 1312, 1319 (11th Cir.), cert. denied, 534 U.S. 891 (2001); *United States* v. *Sealed 1*, 235 F.3d 1200, 1202 (9th Cir. 2000); *In re Application of Esses*, 101 F.3d 873, 876 (2d Cir. 1996).

District courts also have the discretion to consider foreign discoverability as a relevant factor in determining whether a 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 limits 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 fashioning appropriate discovery orders and limiting inappropriate requests. See, *e.g.*, Fed. R. Civ. P. 26(b)(1) and (c).

B. Reviewing Courts May Announce Supervisory Rules To Channel District Court Discretion

Section 1782 contemplates that district courts will exercise their discretion on a case-by-case basis. Nevertheless, those courts are likely to face recurring fact patterns and issues. As petitioner points out, reviewing courts have inherent supervisory authority to formulate rules of "sound judicial practice," *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985), and to identify principles for "channeling the discretion" of federal district courts, *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998), to foster consistent outcomes in like situations. See Pet. Br. 35.

The United States, in its brief at the petition stage, suggested factors that would inform the district court's exercise of discretion in this case, see U.S. Pet. Amicus Br. 14, 18-19, and some of those factors may ultimately provide the basis for general rules of practice. Most significantly, the European Commission is now clearly on record, through its amicus curiae briefs in this Court, that Section 1782's provision of judicial assistance may be inimical to its investigations. EC Merits Amicus Br. 11-18. The European Commission's assertions may provide a substantial basis for the district court to decline to provide judicial assistance in this case. See U.S. Pet. Amicus Br. 18-19. Furthermore, if the Commission means to say, as a general matter, that it does not desire to receive judicial assistance from United States courts through Section 1782, the Commission's position could properly lead United States courts to follow a general rule of declining to provide a form of assistance that the foreign tribunal does not want. See Smit, *supra*, 25 Syracuse J. Int'l L. & Comm. at 13 ("[A]n American court may properly take into account a foreign or international tribunal's ruling that the evidence sought should not be produced.").

C. This Court Should Not Announce Supervisory Rules At This Juncture

Although petitioner and its amici have set forth considerations that may counsel the district court to deny judicial assistance in this case, and those considerations may ultimately provide the basis for developing general rules to channel the district court's discretion, the Court should not attempt to develop any such rule at this juncture. There are compelling reasons why the Court should decline to do so.

First, the considerations that petitioner and its amici cite have not received adequate scrutiny in the proceedings below to ensure that they provide a solid foundation for announcing a generally applicable rule that would control this case. For instance, petitioner and its amici express concerns that the discovery in this case may lead to "fishing expeditions" and disclosure of confidential information, encourage sham litigation in foreign tribunals to obtain discovery, or undermine the European Commission's leniency program. See Pet. Br. 4-5, 37-38; EC Merits Amicus Br. 13-15; Chamber of Commerce Amicus Br. 26-27. But neither the proceedings below nor the filings in this case provide concrete evidence establishing the realistic contours of those threats or the scope of an appropriate rule to curtail abusive practices while preserving legitimate discovery.[16]

Second, as an institutional matter, this Court does not normally announce broad new principles in the first instance, but instead obtains guidance from the experience of the

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[16] For example, the European Commission expresses concern that parties may file "pretextual complaints" with the Commission in order to trigger Section 1782 and "obtain access in the United States to confidential documents describing his competitor's business practices." EC Merits Amicus Br. 14. But no one has suggested that respondent's complaint in this case is pretextual or that Section 1782's preservation of legally applicable privileges and discretionary limitations on discovery would be ineffective in preventing such disclosures.

lower courts. Such guidance is imperative here because this Court has received the view of only one foreign governmental entity—the European Commission—respecting Section 1782's effect on foreign proceedings, and it is not clear whether those views are more widely shared in the international community. Because this Court's announcement of any supervisory rule could have far-reaching national and international consequences, the Court should not proceed without the perspective and judgment of the lower courts that have practical experience in applying Section 1782 to specific factual contexts.

Finally, the discovery dispute in this case may be most properly resolved on narrow grounds. If the Court agrees with the United States' primary submission that Section 1782 authorizes, but does not require, judicial assistance in this case, then the district court should have the opportunity in the first instance to resolve the dispute on what it determines to be the most appropriate basis. In doing so, the district court should have "the necessary flexibility" to determine that this specific discovery dispute should be resolved on "narrow facts" that "resist generalization." *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

ADDENDUM

Table of Contents

1. 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.

2. Section 2 of the Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 provided, in relevant part:

> *And be it further enacted*, That where letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

3. The Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769, provided in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. * * *

4. Section 1782 of the Act of June 25, 1948, ch. 646, 62 Stat. 949, provided in relevant part:

> **Testimony for use in foreign country**
>
> The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. * * *

5. Section 93 of the Act of May 24, 1949, ch. 139, 63 Stat. 103, provided in relevant part:

> Sec. 93. Section 1782 of title 28, United States Code, is amended by striking out "residing", which appears as the sixth word in the first paragraph, and by striking out from the same paragraph the words "civil action" and in lieu thereof inserting "judicial proceeding".

6. Section 1782 of Title 28, as amended by Section 9 of the Act of October 3, 1964, Pub. Law No. 88-619, 78 Stat. 997, provided in relevant part:

> **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. 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. * * *

7. Section 1342(b) of the National Defense Authorization Act for Fiscal Year 1996, Pub. Law No. 104-106, 110 Stat. 486 (1996), provided:

Section 1782(a), title 28, United States Code, is amended by inserting in the first sentence after "foreign or international tribunal" the following: "including criminal investigations conducted before formal accusation".