Exporting American Discovery

Yanbai Andrea Wang*

87 U. CHICAGO L. REV. (forthcoming 2020)

Since the 1960s, the U.S. has pursued a policy of liberally providing evidence for disputes and parties not before U.S. courts. U.S. judges now routinely compel discovery in the U.S. and make it available for use abroad in proceedings governed by different procedural rules and in which U.S. judges have no other involvement. In the past decade and a half, federal courts have received and granted thousands of such discovery requests for use in foreign disputes ranging from environmental controversies to the dissolution of marriages and in countries as varied as Chile, Iran, and South Korea. I call this global role played by U.S. courts the "export" of American discovery. This Article presents the first comprehensive study of this perplexing and increasingly pervasive practice that is transforming litigation worldwide.

This Article compiles and analyzes a dataset of over 3000 foreign discovery requests filed between 2005 and 2017. These requests are typically hidden from view because most are unpublished orders buried in federal dockets around the country. I use the dataset to show that foreign demand for U.S. discovery has approximately quadrupled during the study period, that their countries of origin have diversified, and that requests are granted at astonishingly high rates—94% in 2015—calling into question whether U.S. judges are serving as effective discovery gatekeepers for foreign disputes. I then map the ways in which the machinery of domestic discovery is ill-equipped to manage the challenges of global discovery. Missing foreign stakeholders leads to systematic bias toward granting U.S. discovery, which in turn undermines Supreme Court doctrine, foreign tribunals, and universal notions of fairness and due process. Finally, I argue that federal judges are global actors engaged in the global governance of discovery. Because they share overlapping authority with judges worldwide, they need a system of coordination to avoid confusion and conflict. The foundation of such a system is a mandatory system of notification to foreign tribunals and foreign opposing parties, as well as an opportunity for them to weigh in.

---

* Author's note.

TABLE OF CONTENTS

* Appendices available in separate document.

"A curious quirk of our law is that American courts are not limited to American disputes."

–Magistrate Judge Paul Singh Grewal, Northern District of California[1]

"[T]he obvious question is well, why, don't they have access to that discovery vehicle in Argentina, why do they need access to this little Reno office[?]"

–Chief District Judge Robert C. Jones, District of Nevada[2]

INTRODUCTION

Across the country, federal courts now routinely have a hand in the resolution of foreign disputes. They do so by compelling discovery in the United States—typically as much discovery as would be available for a lawsuit adjudicated in federal district court—and making it available for use in foreign proceedings governed by different procedural rules and in which U.S. judges have no other involvement. In the past decade and a half, federal courts have received and granted thousands of such discovery requests.[3] They come from foreign courts and foreign parties.[4] They seek discovery for cases ranging from billion-dollar environmental controversies[5] to the dissolution of

---

1 Order Denying Applications for Leave to Obtain Discovery For Use in Foreign Proceedings, Qualcomm Inc. v. Apple Inc., No. 5:16-mc-80002 (N.D. Cal. Feb. 18, 2016), ECF No. 31, at *3.

2 Transcript of Proceedings, United States v. Request for Int'l Judicial Assistance from the Nat'l Court of First Instance in Labor Matters No. 37 of Buenos Aires, Arg., No. 3:12-cv-00662 (D. Nev. Apr. 13, 2013), ECF No. 5, at *3.

3 *See infra* Part II.

4 *Id.*

5 *See, e.g.*, Republic of Ecuador v. Connor, No. 4:11-mc-00516 (S.D. Tex. Nov. 28, 2011).

marriages,[6] and in countries as varied as Chile,[7] Romania,[8] Iran,[9] and South Korea.[10] Since most of these requests are decided in low-profile, unpublished orders buried in federal dockets around the country, they have received no systematic attention from scholars despite their transformative impact on the practice of global litigation.[11] Nearly every major law firm and numerous smaller ones now advise clients and strategize around the availability of compelled discovery in the U.S. for use abroad.[12] Practitioners consider this

---

6 *See, e.g.*, Kwong v. Battery Tai-Shing Corp., No. 5:08-mc-80142 (N.D. Cal. July 11, 2008).

7 *See, e.g.*, Request for Int'l Judicial Assistance from the 24th Civil Court of Santiago, Chile in Juan Carols Said Kattan v. Antonio Miguel Orlandini Said, No. 1:17-mc-22657 (S.D. Fla. July 17, 2017).

8 *See, e.g.*, Matter of Ionela Camelia Buzduga v. Constantin Viorel Buzduga, No. 4:16-mc-01439 (S.D. Tex. June 28, 2016).

9 *See, e.g.*, Masoud Borhani v. Mahdi Ahmadi, No. 8:16-mc-00021 (C.D. Cal. Sept. 19, 2016).

10 *See, e.g.*, Subway Int'l B.V. v. Kyung Hee Hwang, No. 1:13-mc-00059 (S.D.N.Y. Feb. 20, 2013).

11 There is one limited systematic study of *published* decisions granting discovery for use in connection with foreign commercial arbitration, but it does not examine unpublished decisions. *See* Kevin E. Davis, Helen Hershkoff & Nathan Yaffe, *Private Preference, Public Process: U.S. Discovery in Aid of Foreign and International Arbitration*, (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 15-51, 2015) (identifying 22 published opinions of this type).

12 *See, e.g.,* Duane Loft & Joshua Libling, *Discovery in Aid of International Proceedings: Recent Developments in Section 1782*, BOIES SCHILLER FLEXNER (Oct. 20, 2015), https://www.bsfllp.com/news-events/discovery-in-aid-of-international-proceedings-recent.html; H. Christopher Boehning, Damiën F. Berkhout & Peter Hering, *The* Consorcio *decision and the need to account for discovery outside the arbitration procedure*, PAUL WEISS (Feb. 2013), https://www.paulweiss.com/media/1618048/boehning_iba30apr13.pdf; Claudia T. Salomon, David McLean, Samul B.C. de Villiers & Eric M. Broad, *US Court of Appeals Revises Opinion: Section 1782's Use in Arbitration Ambiguous*, LATHAM & WATKINS (Feb. 3, 2014), https://www.lw.com/thoughtLeadership/LW-section-1782-arbitration-decision.

feature of U.S. law "an invaluable tool,"[13] "a powerful strategic advantage,"[14] and "a back door for foreign litigants"[15] that parties ignore "at their peril."[16]

I call this growing global role played by U.S. courts and judges the "export" of American discovery.[17] In today's globalized world, disputes increasingly cannot be resolved by one legal system alone. That evidence relevant to a foreign dispute might be located in and exported from the United States is a symptom of this modern reality. But when U.S. courts export discovery, what is being exported is not only information—typically in the form of witness testimony or the production of documents—that may be submitted as evidence before a foreign tribunal. Along with that information come the compulsory power of U.S. courts and a set of discovery procedures and litigation values found virtually nowhere else in the world. American civil procedure is well-recognized as being exceptional.[18] Discovery in U.S. federal courts is far broader in scope than in other countries,[19] and primarily

---

[13] *Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782*, JONES DAY (Apr. 2009), https://www.jonesday.com/Developments-in-US-Law-Regarding-a-More-Liberal-Approach-to-Discovery-Requests-Made-by-Foreign-Litigants-Under-28-USC--1782-04-24-2009/.

[14] *Discovery In Aid of Foreign Proceedings*, LYONS FLOOD, https://www.lyons-flood.com/discovery-in-aid-of-foreign-proceedings.html.

[15] Christopher J. Houpt & Mark G. Hanchet, *Discovery In Aid of Foreign Proceedings*, MAYER BROWN (Mar. 2012), https://www.mayerbrown.com/en/perspectives-events/publications/2012/03/section-1782-discovery-a-back-door-for-foreign-lit.

[16] Harout Jack Samra, *US courts affirm expansive discovery under 28 U.S.C. § 1782*, DLA PIPER (Sept. 29, 2015), https://www.dlapiper.com/en/us/insights/publications/2015/09/international-arbitration-newsletter-q3-2015/us-courts-affirm-expansive-discovery/ (last visited July 12, 2019).

[17] As explained below, "export" here occurs on a case-by-case basis, and with the participation of foreign courts or foreign private actors.

[18] *See, e.g.*, Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 2 (2002); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 3 (2005); AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877 (2017) (recounting the nineteenth century origins of the idea of American legal exceptionalism).

[19] *See* Haraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. 2011) ("Discovery in the federal court system is far broader than in most (maybe all) foreign countries.").

conducted and controlled by the parties rather than by judges.[20] Expansive discovery is central to American litigation, and is intertwined with the very mission of government in American society—one that is more "reactive" and plays a smaller ex post role resolving disputes, rather than a larger ex ante role implementing state programs.[21] Outside the United States, where litigation often occupies a different role in regulating society, American discovery is regarded as excessive, and has been approached with skepticism and animosity.[22]

As cases crisscross borders, contrasting legal traditions come into contact, giving rise to complications for courts and litigants. Take the example of a discovery request, filed in the Northern District of Alabama, by a private actor seeking discovery from a U.S. bank for a contemplated lawsuit in the British Virgin Islands.[23] Such pre-filing evidence requests are permitted under 28 U.S.C. § 1782—an expansive federal statute written in the 1960s that is now the pivotal law governing the export of discovery. The request was initially granted ex parte and a subpoena was served on the bank, which was not a party to the contemplated suit. Months after the discovery was authorized, the putative opposing party moved to intervene, arguing denial of due process because the company was never informed of the request at the time the court considered it. In fact, similar discovery requests had been made in five different U.S. district courts without providing the opposing party with notice. This fact pattern is common as most foreign discovery requests are entertained ex parte, and there is no agreed-on way for ensuring symmetrical discovery when one side benefits from broad U.S. discovery while the other is limited to the procedures of the court adjudicating the action.

---

[20] *See infra* Part III.A.

[21] *See* MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 71-96 (1986) (describing two orientations of government: the "activist" state pursues its vision of the good life through policy implementation and tends toward legal institutions that are hierarchical judicial bureaucracies; the "reactive" state provides a framework for its citizens to pursue their own goals and tends toward legal institutions that are more like that of the United States).

[22] *See, e.g.*, James H. Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5 (1979) (noting that the "virtually boundless sweep of the pre-trial procedures presently permitted by many American courts is so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created").

[23] *See* Assigned to: Chief Judge Karon O Bowdre, No. 2:15-mc-00748 (N.D. Ala. May 01, 2015).

Discovery that crosses borders also raises the prospect of institutional conflict with foreign courts and tribunals. Consider the example of the European Commission filing an amicus brief before the Supreme Court in 2003 to prevent a district court in the Northern District of California from compelling the production of evidence, ostensibly in its aid.[24] At the time, the European Commission was investigating an antitrust complaint brought by Advanced Micro Devices ("AMD") against its worldwide competitor, Intel.[25] When the Commission declined AMD's suggestion that it seek certain documents from Intel, AMD asked the Northern District of California, where Intel is headquartered, to subpoena Intel for that same information.[26] The request eventually reached the Supreme Court, where the European Commission argued that granting AMD's request in the U.S. would be a "direct interference" with the Commission's own "orderly process," and would undermine its policies, increase its workload, and divert its enforcement resources.[27] The Commission protested: "[we do not] want to be used as a pawn by . . . private entities seeking to employ [American] processes . . . to obtain . . . discovery that's available under no other circumstances."[28]

These two cases illustrate the types of unintended consequences American discovery can have abroad. When Congress first passed § 1782 in its current form, it believed the statute to be "the kind of assistance that is likely to be preferred abroad."[29] Yet, the export of American discovery has also been described as "legal imperialism" [30] and "officious intermeddl[ing]."[31] Some pinpoint the problem to be § 1782's conferral of

---

[24] Brief of the Commission of the European Communities as Amicus Curiae Supporting Reversal, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2003 WL 23138389.

[25] Case Comp/C3/37.990, AMD v. Intel, 2000 European Commission.

[26] Advanced Micro Devices, Inc. v. Intel Corp., No. 01-7033 MISC JW, 2001 WL 35995385 (N.D.Cal. Oct. 1, 2001).

[27] Oral Argument Transcript, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2004 WL 954709, at *22.

[28] *Id.*, at *21.

[29] Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1018 (1965).

[30] Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 624 (2001).

[31] Marcus, *Retooling American Discovery*, *supra* note [], at 193.

broad discretion on federal judges,[32] though there is much disagreement over how that discretion should be narrowed.[33] Others contend that the export of American discovery violates the separation of powers in the U.S.,[34] and that it is a unilateral fix for a set of issues that call for a multilateral solution.[35] While a treaty governing the international exchange of evidence—the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention")—was signed in 1970, it is widely considered to be ineffective,[36] leading some to demand further efforts to forge procedural uniformity across nations[37] and others to bemoan the futility of

---

[32] *See* Brian Eric Bomstein & Julie M. Levitt, *Much Ado about 1782: A Look at Recent Problems with Discovery in the United States for Use in Foreign Litigation under 28 U.S.C. 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 432 (1989) (explaining that the "nearly unbridled discretion" exercised by district courts under 28 U.S.C. § 1782 in deciding whether to aid foreign fact-finding "is the root of the problem[]"); Marat A. Massen, *Discovery for Foreign Proceedings After* Intel v. Advanced Micro Devices*: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 877 (2010) (noting that most academic criticism of 28 U.S.C. § 1782 and the Supreme Court's interpretation of that statute has focused on granting "judges too much discretion for evaluating" foreign discovery requests).

[33] Proposals include a default rule that requests be denied when they seek discovery for certain types of foreign proceedings, most notably commercial arbitrations, and that requests be granted only when the sought-after discovery would be discoverable in the foreign proceeding in which it is to be used. Courts and academics are split on whether § 1782 permits the export of discovery to commercial arbitral tribunals, and the latter proposal was rejected as a bright-line rule by the Supreme Court.

[34] *See* David J. Gerber, *Obscured Visions: Policy, Power, and Discretion in Transnational Discovery*, 23 VAND. J. TRANSNAT'L L. 993, 1007 (1991) (noting that the excessive discretion exercised by judges in responding to foreign discovery requests inappropriately "shifts the available use of United States power from the executive and legislative branches to the judiciary").

[35] *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 135-39 (1994) (criticizing the U.S.'s historic preference for a unilateral approach that is "hard to justify, even in purely practical terms, in a world that is increasingly interdependent and in which our economic strength is waning").

[36] *See* Burbank, *supra* note [], at 132 (1994) (noting that the Hague Evidence Convention "has been a disappointment to many countries that ratified it and a source of controversy and friction").

[37] *See* James A. R. Nafziger, *Another Look at the Hague Evidence Convention after Aerospatiale*, 38 TEX. INT'L L. J. 103, 116 (2003) (noting the "need for uniform procedures or at least procedural standards" given the Hague Evidence Convention's failure to bridge international differences in discovery procedures).

seeking convergence given the vast procedural differences worldwide.[38] There is no consensus on whether the export of American discovery is working, and, if not, where the problems lie and what an alternative system for sharing evidence would look like.

I argue that the export of American discovery is in dire straits. Its most pressing shortcoming is its failure to include, and to provide due process to, the appropriate actors—as required by Supreme Court doctrine. When discovery is exported, it has ripple effects for foreign parties against whom the evidence is to be used, and for the foreign tribunal overseeing the dispute. Yet, there is no established mechanism for informing or involving the foreign adversary and the foreign tribunal. Instead, federal judges have, for decades, remained at arm's length from the very foreign courts whose proceedings they are influencing, and engaged in the impossible task of abstractly weighing foreign interests with no foreign input. The problem, therefore, is not an excess of discretion, but a shortage of information.

This Article proceeds in four parts. Part I describes the centrality of § 1782 to the export of discovery. The statute makes district courts liberally and directly available to discovery requests from foreign tribunals and foreign private actors. The Supreme Court's interpretation of the statute in turn instructs district courts to consider a foreign tribunal's need for and receptivity to U.S. discovery, and to maintain an appropriate measure of parity between the parties by conditioning grants of discovery on the reciprocal exchange of information.[39]

Part II provides a comprehensive, nationwide descriptive account of how foreign discovery requests have operated in district courts. Relying on a newly compiled dataset of over 3000 foreign discovery requests filed between 2005 and 2017, I show that the foreign demand for U.S. discovery has approximately quadrupled in that time, and that their countries of origin have diversified. The rise in demand comes from both foreign parties and foreign tribunals—including tribunals in countries that have historically approached U.S. discovery with suspicion—but these two types of requests have distinctive features. Foreign tribunal requests have remained fairly consistent over time. Most are from civil law countries and members of the Hague Evidence Convention, and they concern primarily family law matters.

---

[38] *See* Marcus, *supra* note [], at 199 (arguing that despite U.S. reforms to constrain discovery in recent decades, "a new world order that fits the American reality and also commands the respect of the rest of the industrialized world is probably a thing of the remote future so far as discovery is concerned").

[39] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 262-65 (2004).

Foreign party requests have become more varied and complex over time. They come from common law, civil law, and other legal systems, and they concern primarily commercial matters. Both types of requests are granted at very high rates (94% in 2015) while being contested at very low rates (22% in 2015), calling into question whether U.S. judges are serving as effective discovery gatekeepers for foreign disputes.

Part III evaluates the export of American discovery by mapping the ways in which the machinery of domestic discovery is ill-equipped to manage the challenges of exported discovery. The blueprint of domestic discovery falls short in two ways: the discretion and expertise exercised by federal courts in domestic discovery is inapposite for discovery requests from foreign tribunals, and it cannot be properly applied to discovery requests from foreign parties due to the absence of critical actors and the lack of relevant information. Most foreign discovery requests are considered ex parte, without the participation of the foreign opposing party or the foreign tribunal adjudicating the dispute abroad. Consequently, federal judges have devised shortcuts for the analyses they conduct, which in turn place a heavy thumb on the scale for granting discovery. Those shortcuts undercut the Supreme Court's interpretation of § 1782, comity, adverseness, and due process, while thwarting attempts to apply the Federal Rules of Civil Procedure.

Finally, Part IV proposes that federal judges are now engaged in the global governance of discovery and share overlapping authority with foreign judges and arbitrators with whom they ought to coordinate. Coordination can be achieved through a system of mandatory notification that involves foreign tribunals and foreign opposing parties in U.S. decisions concerning foreign discovery requests. I suggest shifts in practice that federal judges can adopt in the short term to more vigorously apply the Supreme Court's interpretation of § 1782, and advocate for statutory amendments and changes to the Federal Rules of Civil Procedure in the long term. These changes are not only imperative in a world where disputes routinely cross borders, but they are feasible: coordination between courts is already occurring on the ground in a haphazard manner, and these ad hoc practices need to be systematized.

I. THE MECHANICS OF EXPORT

Before examining how foreign actors have used U.S. discovery, this Part sets out the mechanics, governing laws, and institutional actors engaged in its export. The U.S. has been offering some form of exported discovery since the mid-nineteenth century. Initially, it did so through a traditional system of letters rogatory that operates via diplomatic channels and responds to requests from foreign tribunals. Beginning in the 1960s, it added a policy of liberal

judicial assistance that makes federal courts directly available to both foreign tribunals and foreign private actors through 28 U.S.C. § 1782. In 1970, the U.S. additionally signed the Hague Evidence Convention, providing a multilateral mechanism that is more streamlined than letters rogatories but less so than direct use of § 1782, and fulfills requests from foreign tribunals. These three paths to U.S. discovery now co-exist, and all are ultimately executed by federal district courts under the authority of § 1782.[40]

A. *Letters Rogatory*

In 1855, Congress passed a statute establishing the first process for obtaining judicial assistance in the U.S.[41] The statute instructed circuit courts to compel the appearance of witnesses and to depose them on the receipt of a "letter rogatory"[42]—a formal request to perform a judicial act sent from the court of one country, typically through diplomatic channels, to the court of another country.[43] Today, the traditional letter rogatory remains a mechanism for obtaining discovery assistance in the U.S., with the Department of State and Department of Justice operating as intermediaries for executing them.[44]

Because letters rogatory originate with a request from a foreign court, the receptivity of that court to U.S. discovery assistance is a given. Letters rogatory have been criticized for being unwieldy, time-consuming, and costly.[45] In most cases, a letters rogatory travels from the requesting court in

---

[40] *See* Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 599 (1990) (explaining that once requests reach a federal district court, there is no difference between a § 1782 request and a Hague Evidence Convention request).

[41] Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT'L L. REV. 649, 654 (2005).

[42] Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630.

[43] GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1024 (5th ed. 2011).

[44] *See* 28 U.S.C. § 1781(a)(1) ("The Department of State has power, directly, or through suitable channels . . . to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution.")

[45] *See* 22 C.F.R. 22.1 (2012) (listing $2,275 as the fee for executing a letter rogatory); DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW AND PRACTICE 941 (2015) (explaining that processing is "frequently . . . delayed by poor diplomatic relations, bureaucratic inertia, and conflicts with public policy").

a foreign country, to the ministry of foreign affairs in that country, to that country's embassy in the U.S.,[46] to the U.S. Department of State, and then to the Office of International Judicial Assistance ("OIJA") in the Department of Justice. OIJA screens the requests for straightforward technical requirements, goes back and forth with the foreign tribunal or foreign attorney if more information is needed, and attempts to secure the requested discovery voluntarily.[47] In the absence of voluntary compliance, OIJA either forwards the request to a U.S. Attorneys' Office, which in turn presents it to a federal district court, or OIJA submits the request directly to the district court.[48] The district court then grants or denies the request for compelled discovery. If the district court grants the request for compelled discovery, it issues an order and a subpoena. Once compelled, the discovery travels back to the requesting court via the same path. The State Department estimates that this process can take a year or more, and recommends use of more "streamlined procedures," such as an international treaty or a direct petition to a court, where possible.[49]

Internationally, letters rogatory are fulfilled on a discretionary basis and as a matter of international comity,[50] defined by William Dodge as "deference to foreign government actors that is not required by international law but is incorporated in domestic law."[51] But domestically, they are accorded the same more favorable treatment as requests made under the Hague Evidence Convention.[52]

---

[46] ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 1017 (3d ed. 2006).

[47] Telephone Interview with Katerina Ossenova, Office of International Judicial Assistance, Department of Justice (Feb. 13, 2019).

[48] *Id.*

[49] *Preparation of Letters Rogatory*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited June 24, 2019).

[50] 22 C.F.R. § 92.54 (2019) (noting that letters rogatory requests "rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity").

[51] William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015).

[52] Ossenova Interview, *supra* note [].

B. *28 U.S.C. § 1782*

During the years following World War II, a surge in international business and other cross-border activities led to a flood of litigation with international elements.[53] American lawyers called for "a modernization of international legal procedure."[54] Adoption of the Federal Rules of Civil Procedure ("FRCP") in 1938 meant that American lawyers were accustomed to a liberal, party-driven system of discovery aimed at uncovering the "fullest possible knowledge of the issues and facts before trial."[55] They expected a process for requesting and exchanging information directed by the parties, with limited judicial intervention to work out disagreements.[56]

The main frustration at the time were procedural differences between the U.S. and the civil law countries of Europe and Latin America, where discovery is a judicial function, and common American practices are prohibited or restricted.[57] American lawyers were forbidden from taking evidence directly,[58] and had to rely on letters rogatory, which they found to be "inefficient, time consuming, and costly."[59] Some jurisdictions, like Germany and the Netherlands, would not compel the testimony of unwilling witnesses even when a letter rogatory was issued.[60] And testimony secured through a letters rogatory might not be usable in the U.S. because of

---

53 *See* 103 CONG. REC. S5726 (daily ed. Apr. 16, 1957) (statement of Sen. Watkins) (noting that cases with international ramifications included "cases in which judicial documents must be served abroad, records or witnesses examined within the territory of a foreign state, or in which proof must be offered of the law prevailing in a foreign jurisdiction").

54 S. REP. NO. 85-2392 (1958), reprinted in 1958 U.S.C.C.A.N. 5201, at 5201, 5206; THE FIRST ANNUAL REPORT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE 10 (1959); INTERNATIONAL CO-OPERATION IN CIVIL LITIGATION—A REPORT ON PRACTICES AND PROCEDURE PREVAILING IN THE UNITED STATES 5 (1961); Burbank, *supra* note [], at 111.

55 Hickman v. Taylor, 329 U.S. 495, 501 (1957).

56 CHILDRESS, RAMSEY & WHYTOCK, *supra* note [], at 937.

57 THE FIRST ANNUAL REPORT OF THE INTERNATIONAL RULES COMMISSION, *supra* note [], at 13; CHILDRESS, RAMSEY & WHYTOCK, *supra* note [], at 938. Even in common law countries like United Kingdom, discovery is narrower, and litigants must request specifically defined categories known to exist. BORN & RUTLEDGE, *supra* note [], at 969.

58 In some countries like Switzerland, it is a criminal infringement of state sovereignty for a private party to take evidence. THE FIRST ANNUAL REPORT OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE, *supra* note [], at13.

59 103 CONG. REC. S5726 (daily ed. Apr. 16, 1957) (statement of Sen. Watkins).

60 *Id*.

noncompliance with domestic requirements such as examination under oath, oral questioning by an attorney, and documentation by verbatim transcript.[61]

To address these challenges, Congress enacted a number of measures. To facilitate the import of discovery, Congress authorized federal courts to subpoena and to hold in contempt an American citizen or resident in a foreign country.[62] The FRCP were revised to specify how testimony could be taken abroad,[63] and have long permitted district courts to order the production of documents, regardless of location, so long as they are in the "possession, custody, or control" of a party to a U.S. proceeding or a nonparty witness over whom the court has jurisdiction.[64]

To facilitate the export of discovery, Congress passed 28 U.S.C. § 1782 in 1948[65] and rewrote it in 1964.[66] The statute authorizes the "district court of the district in which a person resides or is found" to "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."[67] The order may be made at the request of "a foreign or international tribunal or upon the application of any interested person," and may prescribe the procedure of another country or tribunal, though the FRCP apply by default.[68] In 1996, the statute was revised to include discovery for use in criminal investigations,[69] a subject beyond the scope of this Article.

Compared to traditional letters rogatory, § 1782 requests are less costly and more streamlined, as applications are filed directly in federal district

---

61 S. REP. NO. 85-2392 (1958), reprinted in 1958 U.S.C.C.A.N. 5201, at 5201, 5206; CHILDRESS, RAMSEY & WHYTOCK, *supra* note [], at 940; BORN & RUTLEDGE, *supra* note [], at 1025.

62 Act of June 25, 1948, ch. 117, §§ 1783-1784, 62 Stat. 869, 949-50.

63 *See* Burbank, *supra* note [], at 112-13 (describing amendments to Rule 28(b) in 1963).

64 FED. R. CIV. P. 34, 45.

65 The 1948 version authorized district courts to depose "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." Act of June 25, 1948, ch. 117, § 1782, 62 Stat. 869, 949.

66 Act of Oct. 3, 1964, Pub. L. 88–619, § 9, 78 Stat. 997.

67 28 U.S.C. § 1782.

68 *Id.*

69 Act of Feb. 10, 1996, Pub. L. 104–106, §1342(b), 110 Stat. 486.

court.[70] At the time of the 1964 revision, the statute was considered "a major step in bringing the United States to the forefront of the nations."[71] It was thought to provide "equitable and efficacious procedures" for foreign tribunals and litigants, and to meet the "requirements of foreign practice and procedure."[72] Congress hoped that foreign countries would reciprocate by providing U.S. litigants with easy access to foreign discovery.[73]

Despite these aspirations, many have observed that foreign countries have not in fact reciprocated.[74] Some scholars argue that permitting "any interested person" to access U.S. discovery was a "dramatic departure" from the traditional notion that judicial assistance is provided by one court to another,[75] and could be considered a "violat[ion] [of] the constitutional principle of adjudication in the civil law system."[76] Section 1782's statutory language does not specify whether or how a foreign tribunal's receptivity to U.S. discovery should be taken into account when the request comes from a private actor. The statute's legislative history notes that federal district courts should consider "the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings of that country" when granting or denying a § 1782 application.[77]

---

70 *See infra* Part III.C.1 (explaining that § 1782 requests are typically filed as either civil or miscellaneous matters, at a cost of, respectively, $400 or $47).

71 S. REP. NO. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783.

72 *Id.* at 3783, 3788.

73 *Id.* at 3783.

74 *See, e.g.*, Burbank, *supra* note [], at 136 (lamenting that § 1782 "reflect[s] the naïve view that if the United States were generous, other countries would follow its lead"); Lien, *supra* note [], at 631 (noting that "the invitation [to follow U.S. example in liberal export] has been declined").

75 BORN & RUTLEDGE, *supra* note [], at 1066 (asking whether it is "wise for § 1782 to provide judicial assistance at the request of foreign litigants").

76 Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 74 NOTRE DAME L. REV. 1017, 1024 (1998) ("[R]ecognizing in a party a *right* to require production of evidence, as distinct production of evidence, as distinct from a party's right to ask the *court* to require production of evidence, violates the constitutional principle of adjudication in the civil law system," whereas "the concept that a party has such a right . . . has become fundamental and perhaps nearly constitutional in the modern American scheme of civil litigation.").

77 S. REP. NO. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

C. *Hague Evidence Convention*

While these domestic policies for the import and export of discovery were being put into place, it was also recognized that the problems arising from international litigation needed an international response. During the late 1960s, the U.S. led the negotiations for the Hague Convention Evidence Convention, which was adopted in 1970 and entered into force for the U.S. in 1972.[78] The Convention aims to create a system for transnational discovery that is "utilisable" in the country requesting it and "tolerable" in the country compelling the evidence.[79] The Convention was presented to the U.S. Senate and to bar associations as requiring other countries to make concessions while not necessitating significant changes domestically given the existence of the more powerful § 1782.[80]

The Hague Evidence Convention is in force between the U.S. and 54 countries.[81] For these countries, the Convention is more user-friendly than the traditional letters rogatory, but less so than § 1782. It operates through "letters of request," which are issued by the judicial authority of one contracting state to the designated "Central Authority" of another, and then to the proper domestic authority for execution, and returned via the same route.[82] Within the U.S., OIJA serves as the Central Authority.[83] Although the Hague Evidence Convention formally poses more requirements than the letters rogatory system,[84] once a request reaches OIJA, it is carried out in the same way regardless of whether it came from a Convention or non-

---

78 Hague Evidence Convention, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

79 Hague Evidence Convention, Explanatory Report, para. 5 (emphasis removed).

80 Burbank, *supra* note [], at 132-33.

81 There are sixty-two contracting states overall. The Convention has entered into force between the United States and all but seven of the other contracting states. *See Hague Evidence Convention – Acceptances of Accessions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (June 19, 2019), https://assets.hcch.net/docs/f094fd72-6213-4950-96ea-955f41a311eb.pdf.

82 Hague Evidence Convention, arts. 1 and 2.

83 Ossenova Interview, *supra* note [].

84 *See, e.g.*, Hague Evidence Convention, arts. 5 (requiring a request that does not comply with Hague provisions to be returned promptly with specific objections), 9 (requiring requests to be "expeditiously" executed), 14 (requiring that execution of requests should not give rise to costs, with narrow exceptions).

Convention country.[85] OIJA screens the request, attempts to secure the evidence voluntarily, and then forwards the request to a U.S. Attorneys' Office or to the appropriate federal district court for compelled discovery.[86] Since requests must originate from a foreign judicial authority, receptivity of that authority to U.S. discovery is assured.

Many have commented that the Hague Evidence Convention has failed to bridge the gap between the U.S. and civil law countries.[87] All but a handful of contracting states have adopted a declaration that they will not execute letters of request seeking pretrial discovery of documents as is common in the U.S.[88] Meanwhile, observing that the Convention's procedures "would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules," the Supreme Court concluded in 1987 that the Convention is not the exclusive or even the first resort procedure for American litigants seeking evidence abroad.[89] Instead, a U.S. court may continue to unilaterally compel extraterritorial discovery from those subject to its jurisdiction[90]—a practice resented by foreign countries.[91] There remains no effective international agreement governing discovery across borders, and some suggest that the U.S. should denounce the Hague Evidence Convention.[92]

---

85 Except that there are typically no fees associate with a request coming from a Hague Evidence Convention state party. Ossenova Interview, *supra* note [].

86 *Id.*

87 *See, e.g.*, LOWENFELD, *supra* note [], at 1052 (noting that the "conflict over the Hague Evidence Convention appears as a kind of replay of the overall conflict about American-style litigation, and in particular about American-style discovery").

88 A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. Hague Evidence Convention, art. 23.

89 Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 537 (1987).

90 *Aérospatiale* left judges to conduct an open-ended, "particularized analysis" to determine whether first resort to the Hague Evidence Convention is required. *Id.*

91 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporters' note 1 (AM. LAW INST. 1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

92 *See* Smit, *Recent Developments in International Litigation*, *supra* note [], at 227 ("While the ruling that the [Hague Evidence Convention] is nonexclusive is to be welcomed, and

* * *

These three paths to U.S. discovery now overlap each other. A foreign tribunal seeking discovery in the U.S. may either use the indirect path of the Hague Evidence Convention or letters rogatory, or the direct path of § 1782. Similarly, a foreign private actor may either ask the relevant foreign tribunal to send a request, or request it directly from a federal district court under § 1782, bypassing the foreign tribunal and other intermediary national authorities. Within the U.S., all requests are ultimately executed by federal district courts under § 1782. Section 1782's statutory language does not differentiate between direct requests and indirect requests, or between requests from foreign tribunals and those from foreign private actors.

Direct requests from foreign private actors have caused the most complications, and are the source of nearly all appeals in the past decade.[93] In particular, courts have struggled with the question of how they should weigh a foreign tribunal's receptivity to U.S. discovery. In 2004, the Supreme Court considered whether sought-after discovery must be discoverable abroad for it to be discoverable under § 1782—a shorthand for determining receptivity that had been adopted by some courts.[94] The Supreme Court rejected the foreign discoverability requirement in *Intel Corp. v. Advanced Micro Devices, Inc.*,[95] a case in which the discovery sought by a private actor under § 1782 was not discoverable abroad and not wanted by the foreign tribunal at issue, the European Commission. The Commission filed an amicus brief explaining that the discovery would give AMD access to documents it is not permitted to review under European law, would undermine the

---

a different ruling would have been calamitous, it would nevertheless be preferable to denounce the Convention."); Stahr, *supra* note [], at 599.

93 *See, e.g.*, Kiobel v. Cravath, Swaine & Moore LLP, 895 F.3d 238 (2d Cir. 2018); Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd., 821 F.3d 573 (5th Cir. 2016); Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591 (7th Cir. 2011); Suzlon Energy Ltd. v. Microsoft Corp., 671 F.3d 726 (9th Cir. 2011).

94 *See In re* Application of Asta Medica, S.A., 981 F.2d 1, 7 (1st Cir. 1992); *In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 858 F.2d 1151, 1156 (11th Cir. 1988); *but see* Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 668-69 (9th Cir. 2002) (rejecting a foreign discoverability requirement); *In re* Bayer AG, 146 F.3d 188, 193-94 (3d Cir. 1998) (same); Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099-1100 (2d Cir. 1995) (same).

95 542 U.S. 241 (2004).

Commission's policies on confidential information, and would increase its workload and divert its enforcement resources.[96] Section 1782, the Commission argued, could "become a threat to foreign sovereigns if interpreted expansively."[97] Several industry associations filed amicus briefs expressing concern that compelling discovery under § 1782 that is not discoverable abroad could produce unfair outcomes when U.S.-style discovery benefits one side to a dispute but not the other.[98] The Department of Justice filed an amicus brief supporting a broad interpretation of § 1782 since it relies on the statute to execute letters rogatory and letters of request under the Hague Evidence Convention.[99]

The Supreme Court reasoned that a foreign discovery restriction does not necessarily translate into an objection to exported discovery from the U.S.[100] Instead, the Court enumerated four discretionary factors for district courts to consider: (1) whether the requested evidence is available without § 1782, (2) whether the foreign government or court is receptive to U.S. federal court judicial assistance, (3) whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States," and (4) whether the request is unduly burdensome or intrusive.[101] The Supreme Court explained that these factors, as well as the exercise of judicial discretion more generally, could safeguard comity as well as parity between the parties abroad.[102]

---

96 Brief for the Commission of the European Communities as Amicus Curiae Supporting Reversal, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23138389, at *4, 15-16.

97 *Id.* at 2.

98 *See* Brief for the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23112944; Brief for Product Liability Advisory Council as Amicus Curiae Supporting Petitioner, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 23112943; *see also* Brief for the National Association of Manufacturers as Amicus Curiae in Supporting Petitioner's Petition for a Writ of Certiorari, *Intel*, 542 U.S. 241 (No. 02-572), 2003 WL 32157292.

99 *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel*, 542 U.S. 241 (No. 02-572), 2004 WL 214306.

100 *Id.* at 261.

101 *Id.* at 264-65

102 *Id.* at 262.

II. EVIDENCE FROM FEDERAL DOCKETS

This Part presents the findings of the first nation-wide study of foreign discovery requests in federal district courts. Despite anecdotal reports that foreign discovery requests have experienced "a groundswell of popularity,"[103] there have been no attempts to systematically investigate recent trends in the overall number of requests, or their nature, origins and outcome. I fill this gap by compiling and analyzing the most exhaustive existing dataset of requests for discovery to be used in civil disputes abroad.

The number of foreign discovery requests received by district courts has indeed surged, approximately quadrupling between 2005 and 2017. Their countries of origin have diversified, suggesting that the historic concern about procedural differences between the U.S. and the civil law countries of Europe and South America may not be as central as they used to be, while the need to understand legal systems in Asia and Eastern Europe is expanding. The vast majority of requests fall into two categories: indirect requests from foreign courts and direct requests from foreign parties. In other words, foreign parties now have a more direct relationship with U.S. district courts than do foreign tribunals. Foreign tribunal requests are fairly homogenous, most frequently connected to family law matters, almost never contested, and almost invariably granted with minimal judicial activity. Foreign party requests are more heterogenous, most frequently connected to commercial matters, contested at a low rate, and granted at a high rate. These divergences suggest that there are different dynamics at play in these two sets of requests, while the high grant rates call into question whether the broad discretion exercised by district courts has effectively safeguarded comity and parity as intended. Because requests are typically considered ex parte, without informing or including the foreign tribunal or foreign opposing party, it is not possible to systematically ascertain from docket analysis alone how often courts welcome or resist the sought-after discovery, or whether the evidence is ultimately used in the foreign proceeding against the opposing party.

A. *Data Overview*

I compiled a dataset comprised of over 3000 discovery requests, filed between January 1, 2005 and December 31, 2017, seeking evidence for use

---

[103] Globalization Spurs Use of USC 1782, *supra* note []; *see also* Geoffrey Kertesz, *Section 1782: American Dream . . . or Nightmare?*, 22 Trusts & Trustees 293, 297 (2016) ("If the reported cases are any indication, use of the statute is on the rise.").

in civil proceedings abroad. Appendix A describes the process I used to build the dataset and to ensure that it is close to exhaustive and lacking in bias. The time period 2005 to 2017 was selected to capture recent trends in foreign discovery requests: 2005 is the first full calendar year after the Supreme Court decided *Intel*, and 2017 is the final full calendar year prior to commencement of this study. The dataset is summarized year by year in Table 3 of Appendix C. I drew a random sample of over 1000 discovery requests for more detailed analysis, also summarized year by year in Table 3.

Analysis of the sample shows that the number of discovery requests connected to civil proceedings abroad ("civil requests") has grown rapidly, approximately quadrupling between 2005 and 2017. In recent years, district courts have received over 200 civil requests per year. There is an inverse trend for criminal discovery requests brought under § 1782,[104] though this does not necessarily reflect an overall contraction in criminal requests due to the enactment of an overlapping federal statute in 2009.[105] There is also a small number of cases every year that are refiled under another case number due to confusion concerning the proper case type designation for foreign discovery requests.[106] This rising number of civil requests, along with upper and lower bounds representing 95% confidence intervals, are visualized below in Figure 1 and summarized numerically in Table 4 of Appendix C.

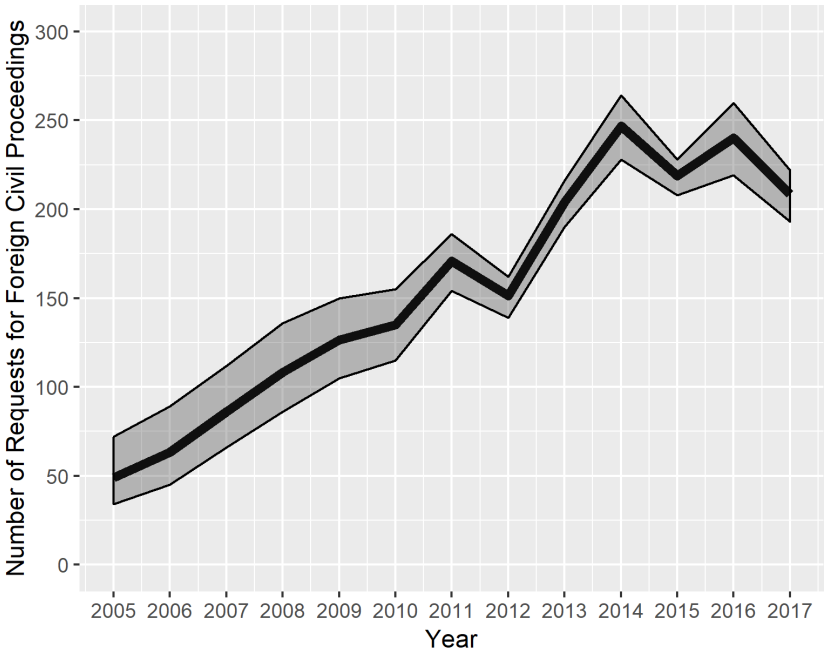
---

[104] *See* Appendix C, Table 4.

[105] As noted in Part I, § 1782 was amended in 1996 to encompass discovery requests related to criminal investigations. In 2009, Congress enacted 18 U.S.C. § 3512, which authorizes federal judges to "issue such orders as may be necessary to execute a request from a foreign authority for assistance" with criminal matters. Correspondence with the Department of Justice confirmed that, since 2009, the agency has gradually reduced reliance on § 1782 for executing criminal requests, and no longer relies on the statute for that purpose. Correspondence with a member of the Department of Justice's Office of International Affairs (Feb 5, 2019) (on file with author).

[106] *See infra* Part III.C.1 (discussing the significance of these refiled cases).

Figure 1: Estimated Number of Civil Requests, 2005-2017[107]



Approximately half of civil requests are sent to the Southern District of New York, the Southern and Middle Districts of Florida, and the Northern and Central Districts of California,[108] with the rest distributed across the country. The remaining analyses below rely on in-depth coding of civil requests from the randomly drawn sample. Appendix B describes the methodology I used to conduct the coding.

B. *Request Analysis*

I examined basic characteristics of civil requests: who requested them, who they targeted, the nature of the foreign tribunal, the nature of the foreign proceeding for which it was requested, and the country of origin.

---

[107] Since the random sample was drawn without replacement from a finite population of comparable size, I modeled it as a random draw from a hypergeometric random variable and used this distribution to calculate 95% confidence intervals.

[108] *See* Appendix C, Table 5.

Requestor. The vast majority of foreign discovery requests come either indirectly from foreign tribunals through OIJA (approximately 44%) or directly from foreign parties under § 1782 (approximately 55%). For the most part, foreign tribunals continue to seek judicial assistance indirectly through the Hague Evidence Convention and letters rogatory despite having direct access to federal courts.[109] Additionally, a tiny number of requests originate from a broader class of "interested persons" (approximately 0.77%) who are not a party to but have some procedural rights in a foreign proceeding.[110] These findings are summarized in Table 6 of Appendix C. Figure 2 below visualizes the increase in tribunal and party requests over time, and shows that the number of party requests has exceeded the number of tribunal requests in most recent years.

---

[109] In a tiny number of actions, requests originating from tribunals are filed directly with a district court (approximately 1.1%) or are conveyed to the district court by a foreign party (approximately 2.8%).

[110] The Supreme Court interpreted "interested persons" from the statutory language of § 1782 to "reach[] beyond the universe of persons designated 'litigant.'" Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, at 256-57 (2004).

Figure 2: Estimated Number of Civil Requests from Foreign Tribunals and Foreign Private Actors, 2005-2017[111]

Target. The vast majority of civil requests seek discovery from nonparties to the proceeding abroad. This is true for requests from foreign tribunals (approximately 85%) and foreign parties (approximately 88%), and remains consistent over the study period. Nonparty targets include banks, Internet and social media companies, as well as law firms. The prominence of nonparties as targets is in part because nonparties located in the U.S. cannot be reached by the foreign court where the case is pending, and in part because discovery targeting nonparties is favored under *Intel*, so it is more advantageous to target a U.S. nonparty even if a foreign party holds the same information.[112] Table 5 of Appendix C provides a breakdown of requests from foreign tribunals and foreign parties by target.

---

[111] Since the random sample was drawn without replacement from a finite population of comparable size, I modeled it as a random draw from a hypergeometric random variable and used this distribution to calculate 95% confidence intervals.

[112] *See infra* Part III for discussion.

Nature of foreign tribunal and proceeding. Overall, requests from foreign tribunals are more homogeneous than those from foreign parties. Virtually all requests from foreign tribunals seek discovery for use in one pending litigation before a foreign court. Requests from foreign parties are more varied. The vast majority are for use before foreign courts (approximately 90%), but a steady number are for use before commercial arbitrations (approximately 9.9%) and a smaller number are for use before foreign regulatory agencies (approximately 4%) and investor state arbitrations (approximately 2.5%). Similarly, most party requests are for use in one proceeding (approximately 72%) or in only pending proceedings (approximately 84%) but nearly a third are for simultaneous use in multiple proceedings worldwide (approximately 28%) and a steady number are for use in contemplated proceedings that are yet to be filed (approximately 15.9%). Tables 8 and 9 of Appendix C summarize these findings. The number of foreign party requests seeking discovery for contemplated prefiling proceedings, as well as those for multiple parallel proceedings worldwide, are increasing over time.[113]

There is significant breadth in the substantive merits issue in dispute in the foreign proceedings. Requests from foreign tribunals are concentrated primarily in family law (approximately 52%), followed by contract (approximately 15%) and employment law (approximately 12%). These substantive areas have remained consistently prevalent for tribunal requests over the study period.[114] Requests from foreign parties are concentrated primarily in contract law (approximately 27%), followed by intellectual property and trade secret law (approximately 19%), and corporate law (approximately 12%). While the prevalence of contract law disputes in foreign party requests has remained consistent over the study period, the number of intellectual property and corporate law disputes has grown over time and the number of family law disputes has diminished. These shifting tides suggest that the private usage of § 1782 is increasingly driven by corporations, and increasingly involve the types of cases that are likely to

---

[113] Year by year data on file with author.

[114] *See* Appendix B for a full list of the substantive area categories.

result in voluminous discovery requests.[115] Table 10 of Appendix C summarizes these findings.

Country of foreign proceeding. As the number of civil requests has increased over the years, so too has the diversity of countries from which they originate.[116] This is true both for all requests taken together, and for tribunal and party requests taken separately.

Breaking down the countries by region, legal system type, Hague Evidence Convention status, and rule of law rating[117] further illustrates the range of countries with which district courts are interacting. While the vast majority of requests still come from the Americas and Western Europe, there has been significant growth in the number of party requests coming from Asia and the number of tribunal requests coming from Eastern Europe.[118] Tribunal requests predominantly seek discovery for use in civil law countries (approximately 92%) and in countries for which the Hague Evidence Convention is in force with respect to the U.S. (approximately 81%). Party requests are again more varied. About as many come from common law countries (approximately 43%) as civil law countries (approximately 45%), and a steady number comes from mixed or other legal systems (approximately 17%).[119] Most party requests come from countries for which the Hague Evidence Convention is in force with respect to the U.S. (approximately 60%), but a significant number also comes from other countries (approximately 43%).[120] As for rule of law, which could only be assessed for the three-year period 2015-2017 due to the availability of rule of law data,[121] more party requests are for use in countries with relatively high

---

[115] Born & Rutledge, *supra* note [], at 967-68 (noting that substantive claims involving antitrust, patent, product liability, and other similar cases often result in "sweeping" discovery requests compared to routine contract or tort disputes).

[116] *See* Appendix C, Figure 4 showing and explaining a graph visualizing a rise in Shannon's entropy, calculated on the mixture of countries over the study period.

[117] *See* Appendix B for a full list of each of these categories.

[118] Year by year data on file with author.

[119] Requests that sought discovery for use in multiple countries with different legal system types were counted toward each category, which is why the percentages add up to more than 100%. I double counted because each legal system type is independently significant.

[120] Requests that sought discovery for use in multiple countries with different Hague Evidence Convention statuses were counted toward each category, which is why the percentages add up to more than 100%. I double counted because each Convention status is independently significant.

[121] *See* Appendix B (discussing rule of law score categories and data).

rule of law scores than are tribunal requests. See Tables 1 and 2 below summarizing these findings.

These findings suggest that U.S. courts are interacting with a larger spectrum of legal systems worldwide, as opposed to the relatively narrow focus on the civil law systems of Western Europe and South America when the Hague Evidence Convention was negotiated during the 1960s. Since most legal scholarship on comparative law concentrates on civil law countries, it is unclear how conclusions from that literature extend to the rest of the world. There is a growing need to understand a more diverse set of legal systems worldwide, and the types of discovery to which they may be open.

Table 1: Estimated Number of Civil Requests by Region of Origin, 2005-2017[122]

	Requests from Foreign Tribunals		Requests from Foreign Parties	
	Number 95% CI	% 95% CI	Number 95% CI	% 95% CI
Americas	565 483—660	62% 53%—73%	273 219—343	23% 18%—29%
Caribbean	0 0—11	0% 0%—1.2%	60.7 40—96	5.1% 3.3%—8%
W. Europe	166 126—222	18% 14%—24%	732 639—837	61% 53%—70%
E. Europe	112 81—158	12% 8.9%—17%	53.9 35—87	4.5% 2.9%—7.2%
Middle East	38.3 23—67	4.2% 2.5%—7.4%	74.2 51—112	6.2% 4.2%—9.3%
Asia	25.5 14—50	2.8% 1.5%—5.5%	209 163—271	17% 14%—23%
Africa	3.2 1—17	0.35% 0.11%—1.9%	20.2 11—43	1.7% 0.92%—3.6%

[122] Where a request sought discovery for use in countries in multiple regions, it was counted toward each region, which is why the percentages add up to more than 100%. To calculate the 95% confidence intervals, I first used the hypergeometric distribution to estimate a 95% confidence interval for the number of (for example) tribunal requests in the overall population. I then used the hypergeometric distribution a second time to estimate how many requests of this particular sort were made by tribunals. I took a conservative approach and used the lower bound for the number of tribunal requests to calculate the lower bound for the number of requests made by tribunals, etc. This method errs on the side of wider-than-necessary confidence intervals.

Table 2: Estimated Number of Civil Requests by Legal System Attribute[123]

	Requests from Foreign Tribunals		Requests from Foreign Parties	
	Number 95% CI	% 95% CI	Number 95% CI	% 95% CI
Legal System Type (2005-2017)[124]				
Common Law	28.7 17—54	3.2% 1.9%—5.9%	525 445—620	44% 37%—52%
Civil Law	846 759—940	93% 83%—98%	553 470—650	46% 39%—54%
Mixed/Other	35.1 21—63	3.9% 2.3%—6.9%	210 163—273	17% 14%—23%
Hague Evidence Convention Status (2005-2017)[125]				
Member	734 645—834	81% 71%—92%	718 626—823	60% 52%—69%
Non-Member	131 97—181	14% 11%—20%	519 441—613	43% 37%—51%
Rule of Law Score (2015-2017)[126]				
Quartile 4	101 73—142	33% 24%—47%	224 180—279	57% 46%—71%

[123] Where a request sought discovery for use in countries that fell into multiple categories of any attribute, it was counted toward each category, which is why the percentages sometimes add up to more than 100%. To calculate the 95% confidence intervals, I first used the hypergeometric distribution to estimate a 95% confidence interval for the number of (for example) tribunal requests in the overall population. I then used the hypergeometric distribution a second time to estimate how many requests of this particular sort were made by tribunals. I took a conservative approach and used the lower bound for the number of tribunal requests to calculate the lower bound for the number of requests made by tribunals, etc. This method errs on the side of wider-than-necessary confidence intervals.

[124] *See* Appendix B for a list of countries with each legal system type.

[125] *See* Appendix B for a list of countries with each Hague Evidence Convention status.

[126] *See* Appendix B for a list of countries with in each rule of law score quartile. Note that I only examined rule of law score for the years 2017-2017 due to the availability of comparable data.

Quartile 3	95.3 68—136	31% 22%—45%	59.2 39—92	15% 9.9%—23%
Quartile 2	31.8 19—57	10% 6.3%—19%	28 16—53	7.1% 4%—13%
Quartile 1	72.2 50—108	24% 16%—36%	37.4 23—65	9.4% 5.8%—16%
No Rule of Law Score	2.9 1—15	0.95% 0.33%—4.9%	87.2 61—126	22% 15%—32%

C. *Outcome Analysis*

Finally, I examined the outcome of requests. I used two crude proxies to gauge the complexity of requests: the number of docket entries and the number of orders.[127] I also tracked whether the request was ultimately granted.[128]

Foreign party requests are more complex and require more judicial activity to resolve than those from foreign tribunals, though both sets of requests are relatively straightforward. Requests from foreign tribunals are typically resolved with one order—the order granting or denying the request—and requests were granted over 95% of the time. Of the remaining tribunal requests that were not granted, most did not reach resolution, and only a tiny percentage were denied.[129] Requests from foreign parties typically take about three orders to resolve, and were granted over 80% of the time. There is both a larger number of foreign party requests not reaching resolution and a larger number of denials.[130] Figure 3 below visualizes the estimated grant rate for all requests, tribunal requests, and party requests over the study period. Tables 11, 12, and 13 in Appendix C summarize the numerical outcome data.

A possible reason for these differences can be found in the level of contestation. For 2015 cases, whereas only 2.2% of foreign tribunal requests were opposed, 37% of foreign party requests were opposed.[131]

---

[127] *See* Appendix B.

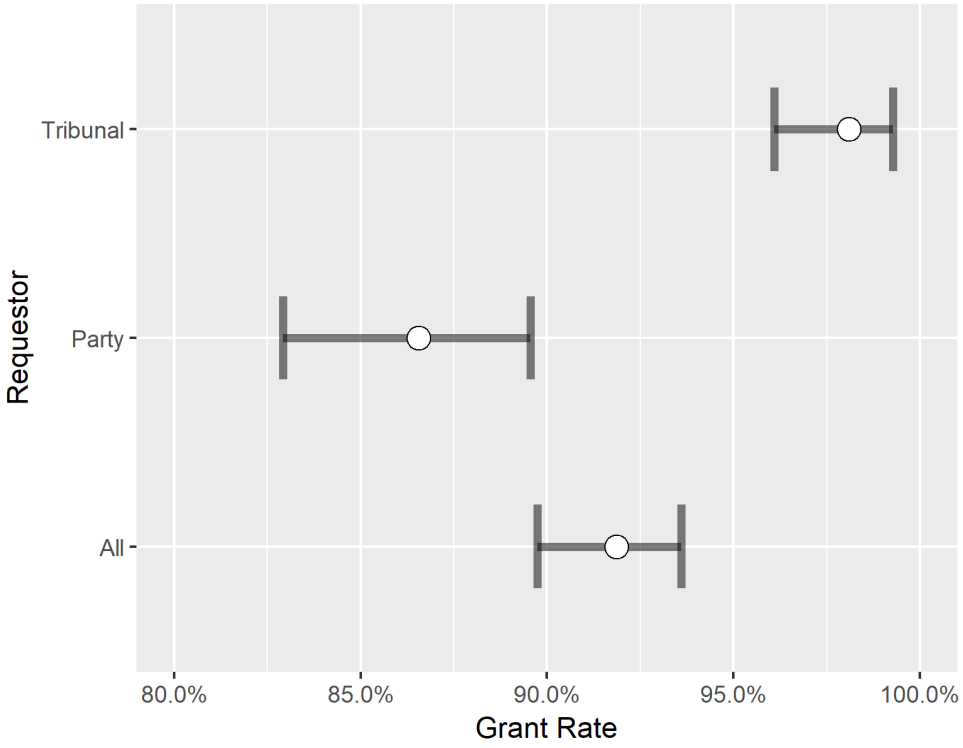
[128] *Id.*

[129] *See* Appendix C, Table 12.

[130] *See* Appendix C, Table 12.

[131] These figures are not estimates, as they are based on coding of all 237 cases in 2015.

Figure 3: Estimated Grant Rates of Civil Requests



III. EVALUATING AMERICAN DISCOVERY IN THE WORLD

Having characterized the rise in foreign demand for U.S. discovery, the differences between demand from foreign tribunals and foreign parties, and the high rates at which both types of requests are granted, this Part now evaluates the analytical framework leading district courts to these decisions. All foreign discovery requests for use in civil disputes abroad are executed under § 1782, regardless of whether they began as a letters rogatory, a request under the Hague Evidence Convention, or a § 1782 application brought directly by a foreign party.[132] Section 1782, in turn, has been described as a "screen" or "threshold determination" of whether to allow a foreign actor

[132] *See infra* Part I.

access to U.S. discovery.[133] Once that threshold is overcome, § 1782 "drops out" and the "ordinary tools of discovery management" under the FRCP take over.[134] It is assumed that the FRCP can be seamlessly translated from the domestic to the transnational context, and that district courts can weigh the interests of affected parties in foreign countries just as they do in the U.S.

Drawing from the empirical findings above and peering into district court proceedings and appellate court decisions, I argue that the operational machinery developed for domestic discovery is ill-equipped to manage the challenges of exported discovery. More specifically, the blueprint for domestic discovery falls short in distinctive ways when applied to requests from foreign tribunals than when applied to requests from foreign litigants. In entertaining requests from foreign tribunals, federal courts have a far reduced basis for exercising the discretion they typically wield under the FRCP or under *Intel*'s discretionary factors. That is because tribunal requests are not adversarial, and there is no uncertainty surrounding whether the foreign tribunal is receptive to U.S. discovery since the tribunal is making the request.

By contrast, requests from foreign litigants are and should be adversarial between the two contending parties in the foreign dispute. But much of the time they currently are not, or they involve some but not all relevant stakeholders, resulting in a distorted adversarialism and missing information. I identify who the relevant stakeholders are and the information that each uniquely possesses, in the absence of which district courts are unable to undertake the analysis required under the FRCP or under *Intel*'s discretionary factors. Without that information, judges apply more manageable heuristics that put a heavy thumb on the scale for granting applications, which in turn threatens to undermine both the foreign litigation and U.S. litigation values.

Section III.A examines the underlying tenets of domestic discovery. Sections III.B and Section III.C look, respectively, at how foreign tribunal requests and foreign party requests deviate from this framework.

---

[133] *See, e.g.*, Texas Keystone, Inc. v. Prime Nat. Res., Inc., 694 F.3d 548, 554 (5th Cir. 2012); Gov't of Ghana v. ProEnergy Servs., LLC, 677 F.3d 340, 343 (8th Cir. 2012); Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 597 (7th Cir. 2011).

[134] *Heraeus Kulzer*, 633 F.3d at 597; *see also* 28 U.S.C. § 1782 ("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. *A Domestic Procedure for Foreign Use*

At the core of American civil litigation is a litigant-driven system for obtaining information from adverse parties that aims to give both sides "the fullest possible knowledge of the issues and facts before trial."[135] That system is considered fundamental to fair adjudication because it narrows the issues, promotes settlement, and reduces surprises during trial.[136] It relies on contending adversaries to negotiate a mutual exchange of information that reveals the strengths and weaknesses of each party's case, and a judge to manage and resolve discovery disagreements. Although this vision of active judicial management of discovery has not been fully realized in the domestic context,[137] setting out the ideal highlights the grave problems posed by the current operation of transnational discovery.

The FRCP gives litigants broad authority to obtain from each other "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."[138] This scope is subject to the requirement that discovery be "proportional to the needs of the case," which requires a consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[139] The adversaries direct discovery requests to each other and negotiate the level of

---

[135] Hickman v. Tayler, 329 U.S. 495, 500 (1947).

[136] *See* United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery . . . make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); *Hickman*, 329 U.S. at 507 ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 556-575 (2010).

[137] Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform*, 64 S. C. L. REV. 495 (2013), 505 (noting a lack of active judicial involvement despite general agreement that active judicial involvement in discovery leads to better results).

[138] FED. R. CIV. P. 26(b)(1), 16(b).

[139] *Id.*

compliance.[140] If they are unable to reach an agreement, a litigant can ask the court to compel discovery or for a protective order to forestall discovery.[141]

The current discovery regime is the result of changes over the past few decades responding to criticisms that discovery has been used abusively.[142] The ongoing debate on the need for discovery reform in the U.S. is beyond the scope of this Article,[143] except to note the measures courts have adopted to address discovery abuse. Most notably, the Supreme Court has reinterpreted the FRCP's pleading standard, raising the bar for surviving a motion to dismiss as an indirect way to narrow discovery.[144] The FRCP have also been revised to encourage "more aggressive judicial control and supervision,"[145] both at the outset through pretrial scheduling conferences, and later on through the proportionality requirement. The adversaries and the court have "collective responsibility to consider proportionality."[146] Ongoing participation from all parties is needed to elucidate the proportionality factors since each party holds different information, and that information may

---

[140] Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1304 (1978) ("Modern discovery . . . has removed most of the decisive plays from the scrutiny of the court. Because so many civil cases are settled before trial and because the conduct of attorneys is subject only to fitful and superficial judicial review during the discovery stage, much of the decisive gamesmanship of modern litigation takes place in private settings.").

[141] FED. R. CIV. P. 26(c) (providing that a party from whom discovery is sought can move for a protective order following an effort to resolve the dispute without court action; protective order can be issued to protect from "annoyance, embarrassment, oppression, or undue burden or expense"); FED. R. CIV. P. 37 (providing that a party may move for an order to compel discovery following an effort to obtain the discovery without court action).

[142] *See* FED. R. CIV. P. 26 advisory committee's note to 1980 amendment ("There has been widespread criticism of abuse of discovery."); FED. R. CIV. P. 26 advisory committee's note to 1983 amendment ("Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems."); Herbert v. Lando, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (expressing concern that federal discovery rules are "not infrequently exploited to the disadvantage of justice").

[143] *See, e.g.*, Matthew T. Cuilla, Note, *A Disproportionate Response?: The 2015 Proportionality Amendments to Federal Rule of Civil Procedure 26(b)*, 92 NOTRE DAME L. REV. 1395, 1405 (2017) (noting wide differences in opinion concerning the need for discovery reform).

[144] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558-560 (2007) (discussing the cost of discovery) *and* Ashcroft v. Iqbal, 556 U.S. 662, 684-86 (2009) (same).

[145] FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

[146] FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

change or clarify over time.[147] When parties disagree, the court's role is to consider all the factors given the information provided by the parties, and to arrive at a case-specific determination, which is in turn reviewed for abuse of discretion.[148] Some scholars have questioned whether judges can effectively apply the proportionality requirement, given the vagueness of the standard and judges' relative lack of in-depth knowledge about the facts of the case.[149] Some of the proportionality factors are difficult to quantify or require forecasting of the value of the sought-after information to the underlying dispute.[150]

The FRCP also allow parties to seek compelled discovery from nonparties[151]—a process that maintains the core adversarial relationship between the parties by involving all parties to the dispute as well as the court presiding over the action. Notice and a copy of the subpoena must be served on each party to the dispute before it can be served on the nonparty target,[152] so that other parties have an opportunity to object, to monitor the discovery, and to seek access to the information produced or make additional discovery requests of their own.[153] When the nonparty is located in a different district than the one where the case is pending, two district courts may be involved. The district court where the case is pending issues the subpoena,[154] and the district court where the nonparty is found manages compliance and hears

---

147 *Id.* (noting that the factors may not be fully understood at the outset and that the requesting party may not know about the burden or expense, while the requested party may not know about the importance of the sought-after discovery for resolving the underlying issues).

148 *See, e.g.*, Moore v. Ford Motor Co., 755 F.3d 802, 808 (5th Cir. 2014) (explaining that a judge's discovery decision is reversible only if it is arbitrary or clearly unreasonable and results in prejudice).

149 *See e.g.*, Cuilla, *supra* note [], at 1402 (noting that the impact of amendments has not been as great as expected); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (2009) (noting that the proportionality rules are difficult to apply effectively).

150 Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093 (2016).

151 FED. R. CIV. P. 45(a)(1)(A)(iii) (stipulating that a subpoena may compel a person to "attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control").

152 FED. R. CIV. P. 30(b)(1), 45(a)(4).

153 FED. R. CIV. P. 45(a)(4), (b) (setting out service requirements).

154 FED. R. CIV. P. 45(a)(2).

subpoena-related motions[155]—a measure designed to protect nonparties through local resolution of disagreements. The judge in the compliance court is encouraged to consult with the judge in the issuing court on subpoena-related motions, since the latter is more familiar with the underlying case.[156] Motions can also be transferred back to the issuing court so as not to disrupt the issuing court's supervision over the underlying litigation, as might occur if the same discovery issues are likely to arise in many district courts or if the issuing court has already ruled on issues implicated by the motion.[157] The FRCP recognize that the participation of the judge presiding over the case may be necessary due to her knowledge of the case and in order to consistently manage discovery requests across the case.

B. *Use by Foreign Tribunals*

When a district court receives a discovery request from a foreign tribunal, its role bears little resemblance to discovery within the U.S. Under longstanding custom, these requests are typically considered on an ex parte basis[158]—a practice characterized by Jim Pfander and Daniel Birk as an exercise of "non-contentious" Article III jurisdiction, which gives federal courts power to consider non-adversarial applications asserting a legal interest under federal law.[159] While the target of a foreign tribunal request may oppose the discovery sought, leading to litigation that creates "a measure of adverseness,"[160] tribunal requests are not adverse between the two contending parties in the underlying plenary dispute. For this reason, discovery requests from foreign tribunals have been likened to administrative

---

155 FED. R. CIV. P. 45(a)(1), (2).

156 FED. R. CIV. P. 45(f) advisory committee's note to 2013 amendment.

157 *Id.*

158 *In re* Letters Rogatory from Tokyo Dist., 539 F.2d 1216, 1220 (9th Cir.1976) ("Letters Rogatory are customarily received and appropriate action taken with respect thereto ex parte.").

159 James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1355, 1390-91 (2015).

160 *Id.* at 1391.

subpoenas that federal courts enforce on behalf of agencies[161]—a limited judicial role that has been described as "adjunct."[162]

Without adversity between the two contending parties to the foreign dispute, district courts cannot exercise their usual broad discretion in evaluating domestic discovery disputes. There are no party needs or interests to weigh, and no disagreements over particular discovery requests to resolve. Approximately 92% of foreign tribunal requests come from civil law countries,[163] where discovery is primarily a judicial function.[164]

Nor is a district court entertaining a foreign tribunal request playing its usual screening role under § 1782. The statute requires that the requested discovery be "for use in a proceeding in a foreign or international tribunal."[165] Three out of the four discretionary factors enumerated by the Supreme Court in *Intel*—whether the discovery is available to the foreign tribunal without U.S. court assistance, whether the foreign tribunal will be receptive to U.S. court assistance, and whether the discovery request is an attempt to circumvent foreign discovery restrictions—weigh the likelihood that granting the request will offend a foreign tribunal.[166] When the request is made by the foreign tribunal, it can be inferred that the discovery is for use in the proceeding it is adjudicating, and that the three comity-oriented *Intel* discretionary factors are met. Some courts acknowledge that these analyses collapse when the request comes from a foreign tribunal, while others parrot

---

[161] *See In re* Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557, 566 (9th Cir. 2011) (likening a discovery request from the Russian government to "an order enforcing the subpoenas of independent administrative agencies, an order granting a subpoena in aid of an extradition proceeding, and an order to appear before the Internal Revenue Service").

[162] Pfander & Birk, *supra* note [], at 1379; *see also* United States v. Markwood, 48 F.3d 969, 976 (6th Cir. 1995) (emphasizing that a "district court's role in the enforcement of an administrative subpoena is a limited one" consisting of determining whether the agency has met statutory and judicially-created standards for issuing and enforcing the subpoena).

[163] *See supra* Table 2.

[164] *See, e.g.*, Langbein, *supra* note [], at 826-27 (noting that in Germany, "[d]igging for facts is primarily the work of the judge").

[165] 28 U.S.C. § 1782.

[166] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264-65 (2004).

standard conclusory language that the *Intel* factors weigh in favor of granting the request.[167]

Not only are the bases for a district court's usual exercise of jurisdiction under the FRCP and § 1782 inapposite, but since approximately 60% of tribunal requests come from countries for which the Hague Evidence Convention is in force with respect to the U.S.,[168] district courts are further limited to a handful of permissible reasons for denying requests.[169] This restriction under international law is not altered by the Convention's internal execution through a pre-existing general-use statute that is discretionary.[170] For these reasons, the very low contestation rates and very high grant rates observed—typically with minimal judicial activity, the order granting the request being the only order issued by the court—are, for the most part, justified. These observations suggest that judges are highly deferential to the Hague Evidence Convention and, by extension, foreign tribunals, granting their requests more or less as a matter of course.[171] Conversely, judges

---

[167] *Compare In re* Patricio Clerici, 481 F.3d 1324, 1335 (11th Cir. 2007) (explaining that the Intel factors for receptivity and non-circumvention supported granting the request "given that the foreign tribunal here is the Panamanian Court and the Panamanian Court itself issued the letter rogatory requesting assistance"), *with In re* Istanbul Turkey, No. 1:15-mc-22425, at *1 (S.D. Fla. June 30, 2015) ("The statutory requirements set forth at 28 U.S.C. § 1782(a) have been met. Furthermore, the additional factors to be considered . . . weigh in favor of granting the request." (citing Intel, 542 U.S. at 247)).

[168] *See supra* Table 2.

[169] The permissible grounds for denying a discovery request under the Hague Evidence Convention include if the request does not comply with Convention requirements (Article 5), if the request is for a matter that is not civil or commercial (Article 1), and if the country to which the request is addressed "considers that its sovereignty or security would be prejudiced thereby" (Article 12). Hague Evidence Convention, arts. 1, 5, 12.

[170] *See In re* Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 577 (9th Cir. 2011) (holding that the U.S.-Russia Mutual Legal Assistance Treaty governing discovery assistance in criminal matters superseded § 1782's grant of discretionary authority to district courts); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L. REV. 319, 326 (2005) (explaining that where there is a conflict between a treaty and a statute, the "last-in-time" rule applies).

[171] There were five tribunal requests that were denied in the random sample. All but one of the denials were for technical reasons, such as a technical defect in the application, and without prejudice. The last denial is discussed below.

occasionally exceed their discretion by denying tribunal requests in violation of international law.[172]

C. *Use by Foreign Litigants*

When a district court receives a discovery request directly from a foreign litigant, it bears some resemblance to discovery within the U.S. The request is coming from a party to a foreign litigation and there is an adverse party, which parallels the structure of domestic discovery disputes. Perhaps because of this analogous structure, some courts are confident that their "substantial experience controlling discovery abuse in domestic litigation" prepares them for "similarly root[ing] out sham applications under § 1782."[173] It is assumed that district courts are best-positioned to weigh the needs and interests of parties affected by a foreign discovery request, just as they are in domestic discovery requests,[174] and that the FRCP's safeguards are well-suited to prevent foreign misuse.[175] Consequently, the same abuse of discretion standard of review for ordinary discovery rulings is applied to § 1782 rulings.[176]

Yet, foreign discovery requests are distinctive in several key respects. First, there are two courts involved in a foreign discovery request—the U.S. court entertaining the discovery request, and the foreign court presiding over the action. Since the plenary suit is necessarily abroad, it is governed by a different set of procedural rules. When a discovery request comes from a foreign litigant, it cannot be guaranteed that the foreign court will accept U.S. discovery under the FRCP as would another district court governed by the FRCP. Second, unlike domestic out-of-district discovery requests targeting a

---

[172] *See, e.g.*, Transcript of Proceedings at 4-8, United States v. Request for Int'l Judicial Assistance from the Nat'l Court of First Instance in Labor Matters No. 37 of Buenos Aires, Arg., No. 3:12-cv-00662 (D. Nev. Sept. 16, 2013), ECF No. 11 (denying a tribunal request in part due to the judge's belief that the country from which the request originated did not honor American judgments and extradition requests—a ground for denial not permitted under the Convention).

[173] Glock v. Glock, Inc., 797 F.3d 1002, 1009 (11th Cir. 2015).

[174] *In re* Schlich, 893 F.3d 40, 46 (1st Cir. 2018) (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984)).

[175] H.R. Rep. No. 79-2646, at A146 (1946).

[176] Kang v. Noro-Moseley Partners, 246 F. App'x 662, 663 (11th Cir. 2007); *see also*, Gov't of Ghana v. ProEnergy Servs., L.L.C., 677 F.3d 340, 344 (8th Cir. 2012); Nascimento v. Faria, 600 F. App'x 811, 812 (2d Cir. 2015).

nonparty and involving two district courts, there is no clear requirement for informing or involving other parties to the foreign dispute or for consulting with the foreign court on subpoena-related motions. A foreign discovery request "stands separate from the main controversy"[177] in a heightened way. There is both a heightened need for information given procedural differences between countries, and a reduced supply of information due to the absence of the foreign opposing party and the foreign court. For these reasons, requests from foreign litigants cause more complications than those from foreign tribunals.

1. Missing Stakeholders and Information

There is an acute lack of clarity as to who should be informed, involved, or consulted when a district court receives a discovery request from a foreign party. Following precedents concerning discovery requests from foreign tribunals, many courts have held that it is proper for § 1782 applications to be made on an ex parte basis even when that application comes from a foreign party.[178] The rationale is usually that no prejudice will result because the target of the discovery will eventually have an opportunity to contest it once served with the subpoena.[179] This reasoning does not distinguish between a discovery request that targets a party and one that targets a nonparty. It is the latter scenario that leaves the foreign adversary in the dark, preventing it from

---

[177] *In re* Premises Located at 840 140th Ave. NE, Bellevue, Wash., 634 F.3d 557, 566 (9th Cir. 2011) (internal quotation omitted).

[178] *See, e.g.*, Gushlak v. Gushlak, 486 F. App'x 215, 217 (2d Cir. 2012) ("[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 ex parte." (citing *In re* Letters Rogatory from Tokyo Dist., 539 F.2d 1216, 1220 (9th Cir. 1976))); Elkind v. CCBill L.L.C., No. 2:14-mc-00030 (D. Ariz. May 9, 2014), ECF No. 7 (order granting ex parte request).

[179] *See, e.g.*, *In re* Ex Parte Application of Societe d'Etude de Realisation et d'Exploitation Pour le Traitement du Mais, No. 13-MC-0266, 2013 WL 6164435, at *2 (E.D. Pa. Nov. 22, 2013) (explaining that ex parte applications under § 1782 are justified because the parties will be given adequate notice of any discovery taken pursuant to the request and will then have the opportunity to move to quash the discovery); Interbrew Cent. Eur. Holding BV v. Molson Coors Brewing Co., No. 13-CV-02096-MSK-KLM, 2013 WL 5567504, at *1 (D. Colo. Oct. 9, 2013) (finding that "Applicant's ex parte request is appropriately made and that Respondents may later seek modification of the discovery herein ordered by way of an appropriate motion").

objecting to, monitoring, or seeking access to the requested discovery, as a domestic adversary would be able to do.[180]

Other courts have not condoned ex parte proceedings for a spectrum of reasons. Some have applied FRCP Rule 45's requirement that all parties be notified of discovery requests targeting nonparties.[181] Others have applied local rules concerning ex parte orders, for instance the Central District of California's rule mandating a memorandum explaining why a matter was brought ex parte[182]; required notice as a matter of judicial discretion since § 1782 does not prescribe ex parte applications[183]; or requested briefing on whether notice is needed.[184] Still others have treated foreign discovery requests as if they are full cases or controversies, extending FRCP Rule 4's requirement that a plaintiff serve a summons and a copy of the complaint on the defendant.[185] The specific notification requirement has also varied: courts have ordered applicants to notify the target of the discovery request,[186] the

---

180 *See infra* Section III.A (discussing FED. R. CIV. P. 45 requiring notification to all parties of discovery requests targeting nonparties).

181 *In re* Hornbeam Corp., 722 F. App'x 7, 10-11 (2d Cir. 2018) (applying FRCP 45(a)(4)'s notification requirements but nevertheless affirming the district court's denial of a motion to vacate or quash and refusal to sanction the applicant due to lack of prejudice).

182 *In re* Ex Parte Application of Nokia Corporation, No. 8:13-mc-00010 (C.D. Cal. May 15, 2013), ECF No. 4 (denying a § 1782 request without prejudice for failure to comply with Local Rule 7-19 governing ex parte applications in the Central District of California).

183 *In re* Merck & Co., Inc., 197 F.R.D. 267, 270-71 (M.D.N.C. 2000) (observing that "nothing in Section 1782 states that the application is to be made ex parte, much less that the Court must entertain the application ex parte," and concluding that "nothing in Section 1782 prevents the Court in any given case from advancing the process by requiring the notification to take place at an earlier time in order to reduce disruption and conserve judicial resources").

184 *See, e.g.*, *In re* Lucia De Araujo Bertolla, No. 1:17-mc-00284 (S.D.N.Y. July 31, 2017).

185 *See, e.g.*, *In re* Romford County Court of Gr. Brit., No. 6:11-mc-00028 (M.D. Fla. Feb. 22, 2011), ECF No. 3 (ordering the applicant to explain in writing why the target has not been served per a prior order and threatening sanctions as well as denial of the request); *see also* Certain Funds, Accounts and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. L.L.C. v. KPMG L.L.P., No. 1:14-cv-01801 (S.D.N.Y. Mar. 14, 2014), (issuing a summons for a § 1782 request); Blue Traffic Ltd. v. VT iDirect, Inc., No. 1:08-mc-00031 (E.D. Va. July 1, 2008) (same); FED. R. CIV. P. 4(c).

186 *See, e.g.*, *In re* Application of Halliburton SAS, No. 1:14-mc-00004 (E.D. Va. Jan. 31, 2014); *In re* Ex Parte Application of Apple, Inc., No. 3:12-cv-00179 (S.D. Cal. Jan. 20, 2012); *In re* Daniel Carlos Lusitand Yaiguaje, No. 3:11-mc-80087 (N.D. Cal. Apr. 27, 2011).

adverse party in the foreign proceeding against whom the evidence is to be used,[187] and the foreign court itself.[188] Even when notification is required, courts do not agree on the legal basis for, or the components of, the requirement.

The confusion goes deeper: whether a foreign discovery request is a case or controversy is itself a question that has caused widespread discord across district courts, revealing uncertainty about the basic structure of these requests and the due process requirements attending them. Over the study period of 2005 to 2017, more than a hundred cases were recategorized by district courts either from a miscellaneous case to a civil case or vice versa.[189] Miscellaneous matters are typically ancillary or ex parte proceedings such as an out-of-district motion to compel or motion to quash, or the registration of a judgment from another district court.[190] Civil matters are typically full cases or controversies between adversarial parties that invoke all the protections of the FRCP, including the requirement for a summons and service when a complaint is filed. That there is no case or controversy in the U.S. attached to foreign discovery requests has befuddled courts.

The result of this confusion and the accompanying erratic notification requirements are missing parties and stakeholders that ultimately deprive federal courts of the information they need to conduct rigorous analyses. Because foreign discovery requests are frequently decided without the knowledge or input of the foreign adversary or the foreign court, the range of basic information that judges struggle to ascertain is staggering. They

---

[187] *See, e.g.*, In Re Halliburton SAS, No. 1:14-mc-00004 (E.D. Va. Jan 31, 2014); In re Ex Parte Application of Apple, Inc., et al, No. 3:12-cv-00179 (S.D. Cal. Jan 20, 2012); v. Yaiguaje, No. 3:11-mc-80087 (N.D. Cal. Apr 27, 2011).

[188] *See, e.g.*, Fin. Guar. Ins. Co. v. Lehman Bros., Inc., No. 1:11-mc-00085 (S.D.N.Y. Mar. 25, 2011).

[189] *See* Appendix C, Table 4; *compare In re* Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum, No. 2:17-mc-00088 (C.D. Cal. June 19, 2017) (case converted from miscellaneous to civil), *and In re* H.M.B. Ltd., No. 1:17-mc-21459 (S.D. Fla. Apr. 19, 2017) (same), *with In re* APR Energy Holdings Ltd., No. 1:17-cv-02784 (S.D.N.Y. Apr. 18, 2017) (case converted from civil to miscellaneous), *and* Akebia Therapeutics, Inc. v. Fibrogen, Inc., No. 5:14-cv-04678 (N.D. Cal. Oct. 20, 2014) (same).

[190] *See, e.g.*, U.S. DIST. COURT N. DIST. OF TEX., ELECTRONIC CASE FILING: OPENING A MISCELLANEOUS CASE 1 (Nov. 2016) http://www.txnd.uscourts.gov/sites/default/files/documents/openMCcase.pdf.

include: whether the foreign proceeding is civil or criminal[191]; whether the foreign proceeding is on appeal[192]; whether the requested discovery is relevant to the foreign dispute[193]; whether the foreign defendant has been served[194]; the whereabouts of the foreign proceeding[195]; the scope of discovery that is available in the country where the proceeding is being adjudicated[196]; and whether a similar discovery request has already been denied in that country.[197] The remainder of this Section examines how these missing stakeholders and this missing information impacts the foreign litigation, basic notions of and due process and fairness, and U.S. litigation values.

2. Undermining Foreign Tribunals and Litigation

When § 1782 was considered by the Supreme Court in *Intel*, the Court held that comity is "important as [a] touchstone[] for a district court's exercise of discretion in particular cases."[198] The Supreme Court laid out four discretionary factors for district courts to consider, three of which are directed toward ensuring deference to and avoiding interference with foreign tribunals.[199] The first factor is whether the foreign tribunal can itself order production of the evidence sought, or if it is unobtainable without U.S. court

---

191 *See In re* Biomet Orthopaedics Switzerland GmBh, 742 Fed.Appx. 690, 697 (2018) (noting that the lower court erred in concluding that discovery was sought for a criminal appeal when in fact it was sought for a civil trial proceeding).

192 *Id.*

193 *See* Malak v. Hanna, No. 2:14-mc-00089 (D. Ariz. Feb. 17, 2015), ECF No. 14, at *4 ("[T]he Court lacks any meaningful information with which to determine whether the such [sic] discovery is relevant to the foreign proceeding.").

194 *See* Gorsoan Ltd. and Gazprombank OJSC v. Janna Bullock, No. 1:13-mc-00397 (S.D.N.Y. Nov. 27, 2013).

195 *See* Hanwha Azdel, Inc. v. Crane & Co., Inc., No. 3:13-mc-93004 (D. Mass. Apr. 9, 2013).

196 *See* Marubeni Am. Corp. v. LBA Y.K., 335 F. App'x 95, 97–98 (2d Cir. 2009).

197 *See In re* Chevron Corp., 633 F.3d 153, 162–63 (3d Cir. 2011).

198 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261 (2004).

199 The fourth discretionary factor and parity, which the Court also identified as "important as [a] touchstone[] for a district court's exercise of discretion in particular cases," will be discussed in the following subsection. *Id.*; *see also* Dodge, *supra* note [], at 2105 (noting that § 1782 is motivated by "adjudicative comity," which the author defines as "deference to foreign courts").

assistance.[200] Because the underlying discovery request in *Intel* sought evidence from a party to the foreign proceeding, the Supreme Court focused on the party status of the discovery target, writing that "when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[201] The second factor is whether U.S. discovery assistance is desired abroad, and the Supreme Court instructed district courts to consider "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."[202] The third factor, related to the second, is whether the foreign discovery request "conceals an attempt to circumvent foreign proof-gathering restrictions."[203]

Due to the lack of input from foreign tribunals and foreign opposing parties in § 1782 proceedings, and the open-ended nature of these factors,[204] district courts have evolved simplified tests that lead to reflexive grants of foreign discovery requests. These simplified tests reflect Maggie Gardner's observation that the complex inquiries required in transnational cases encourage judges to develop analytical shortcuts that can lead to systemic bias favoring what is known (U.S. parties and U.S. law) over what is not known (foreign parties and foreign law).[205] In the § 1782 context, the simplified tests place a heavy thumb on the scale for granting foreign discovery requests while failing to properly apply *Intel*'s discretionary factors.

The first factor concerning whether the foreign tribunal can obtain the requested evidence without U.S. assistance is often simplified to ask whether the target of the discovery request is a party or nonparty to the foreign proceeding. This analysis is easier to manage judicially, leading many courts to recite standard language that discovery is favored because it is sought from

---

200 *Intel*, 542 U.S. at 264.

201 *Id.*

202 *Id.*

203 *Id.*, at 265.

204 *See* Certain Funds, Accounts and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. L.L.C. v. KPMG L.L.P., 798 F.3d 113, 118 (2d Cir. 2015) (commenting that the Intel opinion does not provide guidance on "minimum requirements or tests to be met").

205 Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 945-46 (2017).

a nonparty.[206] In fact, many discovery requests strategically target a token nonparty although the same evidence is also held by a party to the foreign proceeding. These token nonparties include American corporate affiliates of the foreign opposing party[207] and American law firms that have represented foreign clients in U.S. litigation.[208] Most recently, the Second Circuit reversed a lower court's grant of a § 1782 petition ordering Cravath, Swaine & Moore LLP to turn over documents in aid of litigation in Netherlands.[209] The reversal was based not on fears of interfering with the foreign litigation but rather on concern that granting the request would undermine attorney-client communications in the U.S. as well as confidence in protective orders.[210] In the absence of information from foreign courts, it is easier to locate a domestic rationale than a foreign one for limiting a doctrine whose primary effect is abroad.

Focusing on the nonparty status of the discovery target leads to a particularly absurd result when the discovery that is sought is in fact located abroad. While the drafters of § 1782 did not anticipate the statute to be used

---

206 *See, e.g.*, *In re* Lucia De Araujo Bertolla, No. 1:17-mc-00284 (S.D.N.Y. July 31, 2017), ECF No. 5 ("[T]he Discovery Targets are not parties in the proceedings in Brazil and are not expected to become parties thereto, thus, the need for this discovery is more apparent."); *In re* H.M.B. Ltd., No. 1:17-mc-21459 (S.D. Fla. Apr. 19, 2017), ECF No. 50, at *17 (refusing to "look beyond the subpoenaed party to ascertain the true target of discovery"). *But see In re* Judicial Assistance Pursuant to 28 U.S.C. 1782 by Macquarie Bank Ltd., No. 2:14-CV-00797-GMN, 2015 WL 3439103, at *6 (D. Nev. May 28, 2015) (arguing that the first discretionary factor "militates against allowing § 1782 discovery when the petitioner effectively seeks discovery from a participant in the foreign tribunal even though it is seeking discovery from a related, but technically distinct entity"); *In re* Parmalat Brasil S.A. Industria de Alimentos and LAEP Investments, Ltd., No. 1:11-mc-00077 (S.D.N.Y. Mar. 24, 2011) (concluding that the first factor is neutral because "whether those same documents are obtainable in Brazil is at this juncture unknown").

207 *See, e.g.*, Bravo Express Corp. v. Total Petrochemicals & Ref. U.S., 613 F. App'x 319, 321 (5th Cir. 2015) (seeking discovery from U.S. targets that had a corporate relationship and joint business operations with the entities that were involved in the underlying disputed acts); Nikon Corporation v. ASML US, Inc., No. 1:17-mc-00142 (S.D.N.Y. Apr. 26, 2017) (seeking discovery from the wholly owned subsidiary of the opposing party in the foreign action).

208 *See, e.g.*, *In re* Schmitz, 259 F. Supp. 2d 294, 296 (S.D.N.Y. 2003) ("Application of section 1782 does not involve an analysis of . . . why a respondent has the documents."); *In re* Ex Parte Application of Apple, Inc., No. 5:12-mc-80124 (N.D. Cal. May 25, 2012).

209 Kiobel ex rel. Samkalden v. Cravath, Swaine & Moore L.L.P., 895 F.3d 238, 241 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 852 (2019) (noting that the sought-after documents were sent by Shell to the U.S. "solely . . . for the purpose of American litigation").

210 *Id.*, at 241, 246-47 (internal citation and quotation omitted).

extraterritorially,[211] some courts have compelled discovery from the very country where the foreign dispute is being adjudicated, because the FRCP reaches documents and other tangible things "in the possession, custody, or control" of the discovery target.[212] Such extraterritorial discovery is typically within the reach of the foreign court, and seeking it in the U.S. should raise strong suspicions of the applicant sidestepping foreign discovery restrictions.

The second and third factors concerning receptivity and whether a discovery request is an attempt to circumvent foreign proof-gathering restrictions are often considered in tandem and have resulted in a number of analytical shortcuts. The most prominent among them is burden-shifting, since *Intel* did not specify burdens. Many district courts have held that the target resisting discovery must provide "authoritative proof" that the foreign court is not receptive.[213] Authoritative proof of a negative is hard to come by,

---

[211] Smit, *Section 1782 Revisited*, *supra* note [], at 10-12 (noting that allowing such discovery is likely to interfere with foreign court processes while making the U.S. the clearing house for information all over the world).

[212] *See* Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016) (holding that § 1782 reaches "responsive documents and information located outside the United States" so long as it is within the "possession, custody, or control of" the discovery target); *In re* Application of Gemeinschaftspraxis Dr. Med. Schottdorf, No. M19-88 (BSJ), 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006) (concluding that documents located outside the U.S. are discoverable under § 1782); *see also* FED. R. CIV. P. 45(1)(1)(A)(iii). *But see In re* Godfrey, 526 F. Supp. 2d 417 (S.D.N.Y. 2007) (reaching the opposite conclusion).

[213] There is a multi-way split in the courts on the question of who bears the burden of showing receptivity or the lack thereof. *Compare* Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373, 378–79 (5th Cir. 2010) (internal quotations and alterations omitted), *and In re* Chevron Corp., 633 F.3d 153, 162 (3d Cir. 2011) (holding that relevant evidence is "presumptively discoverable" unless the party opposing discovery shows offense to the foreign jurisdiction), *and In re* MTS Bank, No. 17-21545-MC, 2017 WL 3155362, at *6 (S.D. Fla. July 25, 2017) ("[C]ourts look for authoritative proof that a foreign tribunal would reject evidence obtained with the aid of § 1782."), *with* Foda v. Capital Health, No. C 10-80099 MISC JW (PVT), 2010 WL 2925382, at *2 (N.D. Cal. July 26, 2010) (placing the burden of proof on the applicant), *and* In re Chevron Corp., 762 F. Supp. 2d 242, 252 (D. Mass. 2010) (noting that the targets of foreign discovery requests "are often individuals plucked out of their repose who may . . . not necessarily [have] the wherewithal to mount a defense to an application, let alone . . . prove a negative, i.e., a foreign tribunal's non-receptivity to the discovery sought"), *with* Dep't of Caldas v. Diageo PLC, No. 17-15267, 2019 WL 2333910, at *3 (11th Cir. June 3, 2019) (taking a "middle-of-the-road approach" that does not apply a rigid burden-shifting framework), *and In re* Application of Digitechnic, No. 2:07-cv-00414 (W.D. Wash. Feb 21, 2007) (not placing the burden on either side).

particularly where the discovery target is a U.S. nonparty to the foreign litigation, who is unlikely to have much information about the foreign tribunal adjudicating the dispute abroad. Other analytical shortcuts that district courts have taken include inferring that membership in the Hague Evidence Convention signals receptivity to U.S. discovery[214] despite the fact that nearly all Convention members have submitted a declaration objecting to pre-trial discovery as is mandated by the FRCP,[215] and relying on prior federal court decisions concluding that a foreign country is receptive without looking more deeply at how those courts arrived at the conclusion.[216]

The overarching result of these simplified tests is that the comity-based discretionary factors are not effectively gauging whether exported U.S. discovery is assisting or interfering with foreign proceedings. Instead, appellate courts have instructed district courts that it is preferable to modify a request on the basis that it is too burdensome rather than deny or quash a request altogether.[217] Information about the burden imposed by a discovery request is more readily available since it can be furnished by the local U.S. target of the discovery, providing another example of how the absence of foreign courts and parties in § 1782 proceedings results in domestic rationale driving a doctrine whose primary effect is abroad. If all else fails, courts reason that the foreign tribunal can simply disregard the discovery compelled by a U.S. court,[218] neglecting the judicial and private resources wasted as well

---

[214] *See, e.g.*, *In re* O'Keeffe, 646 F. App'x 263, 266–68 (3d Cir. 2016) (affirming district court's conclusion that Hague Evidence Convention being in effect between United States and Hong Kong was sufficient indication that Hong Kong courts would be receptive to American judicial assistance); *see also In re* Servicio Pan Americano de Proteccion, 354 F. Supp. 2d 269, 274 (S.D.N.Y. 2004) ("Venezuela has indicated its receptivity to federal judicial assistance by its signature of treaties facilitating such cooperation.").

[215] *See supra* Part I.

[216] *See, e.g.*, ANZ Commodity Trading Pty Ltd, No. 4:17-mc-80070 (N.D. Cal. Aug. 4, 2017), ECF No. 4, at *6 (relying on cases cited by applicant in which U.S. courts had previously granted foreign discovery requests from Hong Kong to conclude that Hong Kong is receptive).

[217] *See, e.g.*, Bravo Express Corp. v. Total Petrochemicals & Ref. U.S., 613 F. App'x 319, 325 (5th Cir. 2015) ("Modification of a subpoena is preferable to quashing it outright, and a district court abuses its discretion when it does not explain its reasoning, does not allow the applicant an opportunity to cure any defects, and does not attempt to modify the subpoena to cure any overbreadth.") (internal quotation omitted).

[218] *See, e.g.*, Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 597 (7th Cir. 2011) ("German judges can disregard evidence that would waste the court's time."); *In re* Ex Parte Application of Nokia Corporation, No. 5:13-mc-80217 (N.D. Cal. Nov. 8, 2013),

as the fact that foreign countries lacking broad discovery provisions typically do not have admissibility rules.

3. Undermining Universal and American Litigation Values

Not only are there inadequate safeguards for protecting against compelling discovery that interferes with foreign litigation, the way in which foreign discovery requests are considered also undermines universal notions of due process and fairness as well as deeply-held American litigation values. Federal courts are typically permitted to hear "definite and concrete" controversies affecting "the legal relations of parties having adverse legal interests."[219] While ex parte proceedings can be a legitimate exercise of Article III power, they pose potential risks to the rights of absent parties.[220] Accordingly, federal courts must be particularly vigilant about protecting those parties, and due process requires that absent parties receive notice of proceedings that concern them, as well as an opportunity to participate.[221] Non-contentious jurisdiction ends, or at least must be moderated, where a judgment encroaches on the rights of parties not before the court.[222] Moderation may require judges to play a more active role, for instance by conducting their own factual investigation and framing the legal issues, since they cannot rely on an adverse party to do so.[223]

When foreign discovery requests proceed ex parte, they raise all the alarms that ex parte proceedings do. The presence of a nonparty target does not assuage these concerns, as nonparty targets often operate cooperatively with the requestor, agreeing to a joint protective order that protects the confidentiality of the discovered materials instead of opposing the request

---

ECF No. 11, at *5 ("[T]he German court can exclude evidence of marginal probative value.").

219 Aetna Life Ins. Co. v. Hawaorth, 300 U.S. 227, 240-41 (1937) (citations omitted).

220 Pfander & Birk, *supra* note [], at 1357.

221 *Id.*, at 1358 ("The courts must be especially mindful of the potential for cases heard on the non-contentious side of their dockets to affect the rights of absent parties, and due process will continue to require that third parties receive notice of, and an opportunity to participate in, matters that concern them.").

222 *Id.*, at 1450 n.490 (noting that "the Fifth Amendment's Due Process Clause may provide a more effective instrument for moderating non-contentious forms than a strict adherence to an adverse-party rule that would foreclose the exercise of all judicial power over such matters").

223 *Id.*, at 1446.

itself.[224] Sometimes the nonparty target even brings the application on behalf of the foreign applicant.[225] The foreign adversary against whom the requested discovery is to be used is an obvious absent party whose rights are affected. The adverse-party requirement articulated by the Supreme Court,[226] the Due Process Clause of the Fifth Amendment, and universal conceptions of fairness require that foreign adverse parties be notified of the proceeding and provided an opportunity to participate. Were the adverse parties located in the U.S., these requirements would be set out in FRCP Rule 45. But because the adverse parties and the plenary dispute is abroad, courts have not consistently applied any notification requirement, and, on the contrary, have even debated whether the opposing adversary has standing to participate.[227]

Although a foreign tribunal is not an adverse party, its rights are also affected, since compelled discovery in the U.S. can alter a foreign tribunal's ability to manage litigation before it. Notifying and involving the foreign tribunal is justified both on this ground and because it is the type of factual investigation a U.S. judge should undertake when faced with an ex parte § 1782 request. Were the foreign tribunal a different district court in the U.S., consultation with the tribunal, and potentially also transfer of subpoena-related motions back to it, would be, respectively, encouraged and permitted under FRCP Rule 45. But because the tribunal is located abroad, courts have, on occasion, precluded its participation.[228]

Without adversity and the typical due process accorded to parties whose legal interests might be harmed, § 1782 proceedings are often characterized

---

224 *See, e.g.*, Miasto Poznan v. Panstwa, No. 1:15-mc-00179 (D. Colo. Oct. 20, 2015).

225 *See, e.g.*, Comcast Cable Communications, LLC v. Hourani, No. 1:15-cv-01724 (D.D.C. Oct. 19, 2015).

226 Aetna Life, 300 U.S. at 240-41.

227 *Compare In re* Kleimar N.V v. Benxi Iron & Steel Am., Ltd., No. 17-CV-01287, 2017 WL 3386115, at *4 (N.D. Ill. Aug. 7, 2017) ("there is no question that an entity against whom the discovery will be used has standing to challenge an order allowing discovery under § 1782"), *with In Re*: Chevron Corporation, No. 1:10-mc-00001 (S.D.N.Y. July 22, 2010), ECF No. 40 (noting that the plaintiffs in the foreign proceeding for which discovery was sought, "whose standing in this matter is debatable to say the least," had moved to strike some of the filings submitted by § 1782 applicant, who happened to be the defendant in the foreign proceeding).

228 *See, e.g.*, *In Re* Microsoft Corp., No. 1:06-mc-10061 (D. Mass. Mar. 03, 2006) (denying the European Commission's motion to intervene on the grounds that its views have already been received and represented by Microsoft, the nonparty target of the § 1782 request).

by unfairness and a lack of parity between the parties to the foreign dispute. In *Intel*, the Supreme Court instructed district courts to consider parity a "touchstone" for its exercise of discretion, and noted that a district court could condition its grant of a discovery request on the applicant's reciprocal exchange of information.[229] Yet, compelling discovery in the U.S. conditioned on a reciprocal exchange of information poses more problems than it solves. For one thing, that reciprocal discovery is usually located abroad outside of the jurisdiction of U.S. courts, and requires district courts to order extraterritorial discovery that the foreign court could itself order and thus is likely to be perceived as interference.[230] For another thing, when U.S. discovery is sought from a nonparty to the foreign dispute, there is no way for the district court to ensure parity since the nonparty has no use for reciprocal discovery and the adverse party is not before the court.

Moreover, district courts typically do not consider parity at all, occasionally leading to inconsistent and unfair results within the U.S. In a set of three related foreign discovery requests spanning nearly a decade, two were granted to Haraeus Kulzer, a German company, for use against its competitor Biomet with which it was embroiled in litigation in both Germany and Switzerland.[231] Years later, a district court in the Eastern District of Pennsylvania denied a discovery request brought by Biomet for use against Haraeus Kulzer in related litigation, a decision that was later vacated in part due to parity concerns.[232] In fact, foreign litigants regularly make not one but numerous discovery requests in the U.S., and since there is no requirement for applicants to inform district courts of related requests, it is difficult to ensure consistency even across a single foreign proceeding.[233] This is

---

229 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261-62 (2004).

230 *See, e.g.*, Consorcio Minero, 2012 WL 1059916, at *4 (granting reciprocal discovery in Peru); Minatec Finance, 2008 WL 3884374, at *9 (granting reciprocal discovery located in Luxembourg).

231 *See* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591 (7th Cir. 2011); Kulzer v. Esschem, Inc., 390 F. App'x 88 (3d Cir. 2010).

232 *See In re* Biomet Orthopaedics Switzerland GmBh, 742 F. App'x 690, 699 (3d Cir. 2018) (refusing to accept Heraeus' argument that Biomet's discovery request should not be granted due to potential exposure of trade secrets because "Heraeus [had] gained access to wide swaths of Biomet's potentially proprietary information through its own 1782 discovery requests in the Northern District of Indiana and the Eastern District of Pennsylvania").

233 *See, e.g.*, Astronics Advanced Elecs. Sys. Corp. v. Lufthansa Technik AG, 561 F. App'x 605, 606 (9th Cir. 2014); *but see* Republic of Ecuador v. Connor, 708 F.3d 651, 658 (5th

particularly so given the number of splits among the courts on issues of law now plaguing § 1782.

Aside from undermining adverseness, due process, and parity between the foreign parties, the lack of information about the underlying foreign proceeding also frustrates the usual discovery analyses judges are expected to conduct. In particular, judges often have no reliable way of ascertaining whether the requested discovery is "relevant to any party's claim or defense."[234] They do not usually attempt any proportionality analysis. Many of the proportionality factors are impossible to gauge without input from the foreign court and the foreign opposing party. For instance, a U.S. federal judge has no basis for understanding "the importance of the issues at stake in the action," which is understood to mean the social, philosophical, or institutional significance of the substantive issues in the case[235]—matters bound up in the social fabric of the foreign country. Nor do they have much visibility into the parties' comparative resources or access to relevant information, or the importance of the discovery requested in resolving the case. The fear that federal judges do not have nearly as much facility with the facts as do the parties in a domestic discovery dispute[236] is amplified many times over when discovery is requested for a foreign dispute. Whether requested discovery is relevant in foreign discovery requests is further complicated by the lack of information about whether it is possible for the

---

Cir. 2013) (relying on judicial estoppel to prevent an applicant from taking advantage of a circuit split).

234 *See, e.g.*, Malak v. Hanna, No. 2:14-mc-00089 (D. Ariz. Dec. 10, 2014), ECF No. 14, at *4 ("[T]he Court lacks any meaningful information with which to determine whether the such discovery is relevant to the foreign proceeding."); Metalab Design Ltd., No. 3:17-mc-80153 (N.D. Cal. Dec. 12, 2017), ECF No. 11 (concluding that the requested evidence "may be relevant" to the requestor's counterclaims, but noting in a footnote that the court could not determine whether the applicant's assertion that the discovery would allow it "to defend the Canadian Action" was in fact the case); Alexander v. Federal Bureau of Investigation, 194 F.R.D. 316, 325 (D.D.C. 2000) (changing the relevance standard to "bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the case").

235 The proportionality analysis was originally introduced in 1983. The corresponding committee notes recognized "the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." FED. R. CIV. P. 26 advisory committee's note to 1983 amendment.

236 *See* Marcus, supra note [], at 167 (noting that U.S. judges do not have the capacity to become involved in the factual development of domestic cases given the increase in caseload).

requested information to be put to any sort of use abroad. For all of these reasons, some courts have noted that ex parte foreign discovery proceedings undercut "evenhanded justice and a sense of fair treatment"[237] while making it more difficult for judges to make decisions.[238]

IV. REIMAGINING GLOBAL DISCOVERY

The previous Part laid out the many reasons why transposing the FRCP from the domestic context to the international context is problematic. In particular, federal judges cannot be respectful of a foreign tribunal's own orderly procedural system, cannot ensure adversity, due process, or parity between the parties to a foreign dispute, and cannot effectively apply the *Intel* discretionary factors or the discovery standards under the FRCP without the input of the foreign tribunal and the foreign opposing party. There is yet another reason why U.S. courts need to account for the intended yet often unpredictable cross-border impacts of their transnational discovery decisions: because U.S. courts are now one of many institutions engaged in the global governance of discovery. This Part proposes that court-to-court dialogue and coordination are needed to manage the overlapping and non-hierarchical authority exercised by a multitude of institutions in the area of discovery.

A. *Federal Judges as Global Governors*

By making compelled U.S. discovery available for foreign use, federal judges are no longer operating as national actors, but as global governors. Global governance is defined as "the collective management of common problems at the international level."[239] Global governance is distinct from global government in that governance involves a range of actors and mechanisms for exercising authority that together constitute a system of rule.[240] Political scientists have observed that there is rising density and

---

[237] *In re* Merck & Co., Inc., 197 F.R.D. 267, 270 (M.D.N.C. Mar. 3, 2000).

[238] Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 125 (2d Cir. 2015).

[239] NATIONAL INTELLIGENCE COUNCIL AND EUROPEAN UNION INSTITUTE FOR SECURITY STUDIES, GLOBAL GOVERNANCE 2025: AT A CRITICAL JUNCTURE iii (2011).

[240] James N. Rosenau, *Governance, Order, and Change in World Politics*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 4 (James N. Rosenau and E. O. Czempiel eds. 1992) ("Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also

complexity in particular issue areas that are now governed by "an array of partially overlapping and nonhierarchical institutions."[241] Conceptualizing this phenomenon as "regime complexity," scholars note that the proliferation of institutional actors and rules that can plausibly claim to govern an issue can lead to confusion and conflict.[242] Along the same lines, legal scholars have noted that a decentralized international judicial system has emerged, characterized by both cooperation and competition.[243]

Discovery is one issue area where regime complexity is on the rise. Information needed for litigation—especially electronic information[244]—can be stored and is located worldwide. Compelling the production of that information is governed by many national and international courts and tribunals whose authorities are overlapping and non-hierarchical. When a foreign dispute leads to a § 1782 request, both the foreign court adjudicating the case and the U.S. federal court receiving the discovery request have authority over the case. These overlapping claims to governance can lead to confusion and discord. In exporting discovery, federal judges are altering the procedural rights accorded to the discovery applicant as well as the balance of procedural rights between the applicant and its foreign adversary.[245] The Ninth Circuit considers access to U.S. discovery a "statutory right" for qualifying foreign actors.[246] In exporting discovery without the knowledge of the foreign court adjudicating the case, federal judges may be undermining the foreign court's decisions and shaping foreign authority.[247] Recognizing that federal judges are global governors reveals the forest from the trees: individually, these foreign discovery requests are routine and low profile;

---

subsumes informal, non-governmental mechanisms . . . . Governance is thus a system of rule that is as dependent on inter-subjective meaning as on formally sanctioned constitutions and charters.").

241 Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 ANN. REV. L. SOC. SCI. 18.1, 18.3 (2018).

242 Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES POL. 13, 13 (2009); Alter & Raustiala, *supra* note [], at 18.2.

243 Jenny S. Martinez, *International Judicial System*, 56 STAN. L. REV. 429, 443 (2003).

244 Kristin E. Eichensehr, *Data Extraterritoriality*, 95 TEXAS L. REV. 145 (2017).

245 *See generally* Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. 67, 71 (2009) (discussing the global governance role played by U.S. courts by allocating rights and authority internationally).

246 Akebia Therapeutics, Inc. v. FibroGen, Inc. 793 F.3d 1108, 1111 (9th Cir. 2015).

247 Alter & Raustiala, *supra* note [], at 18.3.

together, they give rise to a system of global discovery governance marked by institutional conflict and chaos.

Although there may be benefits to a complex system of global governance that allows for forum-shopping and competition among different regulatory systems, those benefits are far outweighed by the costs in the context of discovery. International relations scholars Karen Alter and Kal Raustiala identify flexibility, innovation, and responsiveness to new needs as advantages of complexity.[248] Pamela Bookman describes the benefits of plaintiffs forum shopping for a forum to bring their case to include ensuring access to court, broadening the influence of particular regulatory regimes, and driving experimentation and reform.[249] Yet, in the discovery context, procedural forum-shopping and lack of coordination between courts undermine not only the foreign tribunal but also the rights of the foreign opposing party and parity between the parties. Global governance solutions are critical in discovery.

B. *Convergence Versus Coordination*

There are two approaches to the problems emanating from overlapping and non-hierarchical authority in global governance: one is to converge on an all-encompassing international regime that addresses the problem as a whole; the other is to accept that a multitude of policy solutions will persist within a larger regime complex and instead devise a way of implementing individual solutions in a coordinated fashion.[250] Examining the structure of global governance in other issue areas, Alter and Raustiala observe that the latter approach is almost inevitably taken because cooperative efforts to govern at the global level rarely occur on a blank slate.[251] Instead, they must stitch together preexisting institutions and agreements, as has been done in issue areas as wide ranging as refugees and biodiversity.[252] The same is true for the global governance of discovery.

---

[248] *Id.* at 18.10.

[249] Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 613-21 (2016).

[250] Alter & Raustiala, *supra* note [], at 18.9.

[251] *Id*. at 18.9.

[252] *Id.* at 18.5-18.7.

Attempts at creating an all-encompassing, convergent system for the global governance of discovery have failed repeatedly. The Hague Evidence Convention was one such attempt, though most countries worldwide are not signatories, and the Convention has not fulfilled its goals even for the countries that are signatories. Instead, disagreements over different systems of discovery have continued to play out within the Hague Evidence Convention. This is particularly so for the U.S., which views the Convention as optional both for the export and for the import of discovery.[253] Meanwhile, nearly all other signatory countries have declared that they will not execute pre-trial discovery as is typically practiced within the U.S.[254]

A further effort at creating a convergent international procedural regime was made during the late 1990s. The American Law Institute, along with UNIDROIT, an intergovernmental organization aimed at harmonizing private international law, drafted a model set of transnational rules of civil procedure.[255] These model rules have not been adopted by any country, while many have questioned their utility.[256] Most scholars are skeptical that a uniform set of procedural rules can be agreed to internationally given the vast differences between national legal systems and the deep social and cultural significance that legal systems carry.[257]

It is time to explore the second solution—one that preserves diversity across legal systems worldwide yet seeks to coordinate between different national approaches when cases cross borders.[258] Such an approach is more feasible because, as Richard Marcus argues, despite the increasing prevalence of transnational cases, most American litigation remains chiefly domestic,

---

253 *See infra* Part I

254 *Id.*

255 *ALI/UNIDROIT Principles of Transnational Civil Procedure*, 9 UNIF. L. REV. 758 (2004); Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure Rules and Commentary*, 30 CORNELL INT'L L.J. 493, 493–94 (1997).

256 Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L. J. 463, 467–68 (1998).

257 Bookman, *supra* note [], at 601-602.

258 Constructing a system of coordination does not necessarily mean that the United States should coordinate with all foreign judicial systems. Some foreign judicial systems may fall below a minimal universal standard of rule of law and due process such that coordinating with their courts would not be appropriate. I reserve for future consideration the need for such a safety valve as well as how to determine when a foreign court has fallen below that threshold.

and U.S. discovery as a whole should be designed to suit the needs of those domestic cases rather than the smaller number of cases with international implications.[259] Such an approach would also be more normatively justifiable because it allows most decisions about judicial procedure to be made at the national level where there are, to varying degrees, mechanisms for democratic accountability, whereas such mechanisms do not yet exist at the international level.[260] However, a system of procedural coordination is needed for those cases that implicate multiple judicial systems.

The idea of managing diversity rather than forging convergence has been broached by judges and other legal scholars. Drawing from the work of Immanuel Kant, Jenny Martinez argues that the "overriding purpose of the emerging international judicial system should be to promote the 'federalism of free nations'—a decentralized system of cooperative relations among nations."[261] She proposes that such a system can be developed by fostering dialogue among its participants.[262] Anne-Marie Slaughter argues that a system of dialogue has already emerged through "[h]orizontal government networks" that link "counterpart national officials across borders."[263] Within the judicial world, this network takes the form of judge-to-judge interactions. Writing specifically about § 1782, Judge Guido Calabresi reflected in a 1995 foreign discovery case that transnational discovery "presupposes an on-going dialogue between the adjudicative bodies of the world community."[264]

C. *Constructing a System of Coordination*

When the European Commission opposed a broad interpretation of § 1782 combined with case-by-case judicial discretion, it noted that a district court "can only weigh fairly the complex interests of a foreign sovereign in aiding or blocking a Section 1782 discovery request if it is made aware of those interests. . . . But so far as the Commission is aware, there is no system for providing it with notice of Section 1782 cases in which its interests are at stake, much less any regular procedure through which the Commission might

---

[259] Marcus, *Retooling*, *supra* note [], at 197.

[260] Martinez, *supra* note [], at 434.

[261] *Id.* at 461.

[262] *Id.* at 434

[263] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 13 (2004).

[264] Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101 (2d Cir. 1995).

appear and make those interests known."[265] The foundation for coordination is a system of prompt notification to foreign stakeholders and an administratively simple way for foreign tribunals to make their interests known—for instance through a written statement interest. Additionally, an applicant should be required to disclose all the related discovery requests that have been made in the U.S. or elsewhere so that other U.S. or foreign courts can partake in the coordinative effort.

In the short term, such a system of notification and participation can be achieved through shifts in judicial practice since it is necessary for meaningful application of the *Intel* discretionary factors and the FRCP's discovery standards as well as to satisfy the requirement of adverseness and basic notions of due process and fairness—all of which bind lower court judges. Lower court judges should no longer allow § 1782 requests to proceed ex parte, and instead require notification to foreign tribunals and foreign opposing parties in the first instance. Federal appellate judges should enforce these notification requirements by holding that a § 1782 decision reached ex parte is an abuse of discretion.

In the long term, and to ensure their consistent application across the board, such foreign notification and participation rights need to be codified through the addition of a new Federal Rule of Civil Procedure governing transnational discovery requests specifically. Moreover, this system of notification and coordination requires amendments to § 1782. The statute is currently interpreted to permit discovery requests related to suits that are being contemplated and have yet to be filed. It should be amended to preclude prefiling discovery, because coordination is not possible where there is not yet a foreign tribunal overseeing the case with which to coordinate. There are two rationales for prefiling foreign discovery requests, neither of which is compelling. One is that prefiling discovery is necessary due to many foreign legal systems having higher pleading standards than the U.S., and so prefiling discovery is needed to file the suit abroad in the first place. But a higher pleading standard does not justify uncoordinated prefiling discovery because the pleading standard may be a policy choice that reflects a desire to control discovery, as it does in the U.S.[266] The other rationale is that prefiling discovery is necessary to maximize the chances that U.S. discovery will be compelled in time to be used in the foreign tribunal. The challenge of timing

---

[265] Brief of the Commission of the European Communities as Amicus Curiae Supporting Reversal, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (No. 02-572), 2003 WL 23138389, at *17.

[266] *See supra* Part III.A.

U.S. discovery to suit the needs of a foreign proceeding is a reason for better coordination, but not for broadening the reach of U.S. discovery in hopes that some of it is useful. Finally, extraterritorial discovery in aid of a foreign tribunal should also be explicitly precluded because no coordination is needed in that scenario. The foreign tribunal can order the discovery itself and a U.S. court should refrain from doing so.

Not only is coordination judicial dialogue necessary, but there is evidence that it is already occurring on an ad hoc basis. At the most high-profile level, the European Commission's filing of its amicus brief in *Intel* was a form of coordinating between the Commission's interests and U.S. federal courts' export of American discovery. Although the Supreme Court did not restrict the reach of § 1782 as the European Commission urged, once the case was remanded back to the Northern District of California, the district court denied Intel's discovery request on the basis that the European Commission had represented that it was not receptive to U.S. discovery assistance.[267]

Even more surprisingly, district court and magistrate judges have repeatedly sought out information from foreign tribunals in individual foreign discovery requests, and foreign tribunals have repeatedly weighed in. These court-to-court interactions are varied in both form and content. They include the filing of amicus briefs and attempts to intervene and file memoranda. They also include attempts to coordinate that flow through private litigants, for instance letters written by a foreign judge and submitted to a U.S. judge by a litigant, anti-injunction suits, orders preventing a foreign private actor from seeking U.S. discovery, and stays of an ongoing U.S. discovery dispute pending foreign court action. They express interests ranging from being receptive to discovery compelled in the U.S. using American procedures to being neutral about it and rejecting it.

Examples of expressions of receptivity include judges from Monaco and Germany writing letters noting that they would consider discovery compelled in the U.S.[268] A U.S. district court judge has sent letters directly to a Mexican

---

[267] Advanced Micro Devices v. Intel Corp., No. C 01-7033, 2004 WL 2282320, at *2-3 (N.D. Cal. Oct. 4, 2004).

[268] *In re* Application of Accent Delight International Ltd., No. 16-MC-125, 2016 WL 5818597, at *2 (S.D.N.Y. Oct. 5, 2016) (magistrate judge in Monaco wrote that it was permissible for two corporations to seek discovery in the U.S. and submit it in their proceeding in Monaco); *In re* Application of Schmitz, 259 F. Supp. 2d 294, 299 (S.D.N.Y. 2003) (presiding judge of a Frankfurt district court filed a letter stating that "if . . . documents from a US-American proceeding are attached to a written statement in the case file, the court will take notice of this submission" but note that Frankfurt

judge regarding the transcript for a witness deposition taken in the U.S.[269] A German court has not only expressed receptivity but has postponed its own hearing to permit a litigant to pursue discovery requests in Indiana and Pennsylvania.[270] Similarly, an Israeli arbitrator has expressed receptivity to U.S. discovery.[271] And applicants for § 1782 discovery have also represented in their requests that a judge from Brazil[272] and the Elders' Council in Ethiopia are receptive to evidence from the U.S.[273]

Examples of expressions of non-receptivity include the Korean Fair Trade Commission filing amicus briefs in seven foreign discovery requests in the Northern District of California.[274] These amicus briefs asserted that the Korean Fair Trade Commission was not receptive to U.S. discovery related to disputes between Qualcomm and Apple. Similarly, the European Commission sought to intervene and to file a memorandum in support of a motion to quash a § 1782 subpoena in the District of Massachusetts.[275] German authorities have also weighed-in against the production of evidence

---

judge later changed mind after finding out that the German Ministry of Justice had opposed it).

269 *In re* Operacion y Supervision de Hoteles, S.A. de C.V., No. 1:15-mc-00172 (S.D.N.Y. June 19, 2015), ECF Nos. 3, 6 (letters from U.S. District Court Judge Paul A. Crotty to Judge Enrique Claudio Gonzalex Meyenberg in Mexico).

270 Kulzer v. Esschem, Inc., 390 F. App'x 88, 92 (3d Cir. 2010) (noting that although the German court at issue could not itself order the sought-after discovery due to German procedural rules, the court "does not restrict receipt of the evidence sought and in fact has postponed a hearing scheduled for April 15, 2010 to September 30, 2010, specifically for the purpose of permitting [the applicant] extra time to pursue its discovery requests in Indiana and Pennsylvania").

271 *In re* Hallmark Capital Corp., 534 F. Supp. 2d. 951, 957 (D. Minn. 2007) ("[T]he Israeli arbitrator has stated his 'receptivity' to this Court's assistance.").

272 Pedrinha Representacoes Ltda et al v. MHAG Servicos E Mineracao Ltda., No. 1:06-mi-00372 (N.D. Ga. Dec. 05, 2006) (request says Brazilian judge has already expressed on the record his interest in receiving testimony).

273 Mahmoud v. PNC Financial Serv. Group, No. 2:06-mc-00314 (W.D. Pa. Oct. 12, 2006) (request says Elders' Council requested information).

274 *See, e.g.*, Qualcomm Inc. v. Apple Inc., No. 5:16-mc-80002 (N.D. Cal. Jan. 07, 2016); *In re* Qualcomm Inc., No. 5:16-mc-80008 (N.D. Cal. Jan. 07, 2016); *In re* Qualcomm Inc., No. 5:16-mc-80005 (N.D. Cal. Jan 07, 2016).

275 *In re* Microsoft Corporation, No. 1:06-mc-10061 (D. Mass. Mar. 03, 2006), ECF No. 22 (motion to intervene), ECF No. 25 (memorandum filed). The motion to intervene was denied on the basis that the European Commission's views were already represented by the other parties.

in the U.S.,[276] while a Swiss commercial arbitral tribunal has noted its non-receptivity to U.S. discovery.[277] A Hong Kong court has issued an order prohibiting a party before it from seeking discovery in the U.S.,[278] and the Supreme Court of Bermuda has entertained an application for an anti-suit injunction related to a § 1782 request.[279] Finally, wanting more information about a foreign tribunal's preferences, U.S. district courts have delayed their decision pending foreign court action,[280] ordered and received status reports

---

[276] *In re* Application of Schmitz, 259 F. Supp. 2d 294, 297 (S.D.N.Y. 2003) (German Federal Ministry of Justice submitted letter); *In re* Winkler, No. M 19-88, slip op. at 3 (S.D.N.Y. Nov. 21, 2005) (German court submitted letter).

[277] El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31, 32 (5th Cir. 2009) ("The arbitral tribunal issued an order expressing its views on the § 1782 application, noting that it was not receptive to these discovery efforts.").

[278] Cantor Fitzgerald Europe et al v Ainslie, No. 1:11-cv-01960 (D. Colo. July 28, 2011), ECF No. 14 (joint status report noting that Hong Kong court issued order prohibiting applicant from pursuing this or other legal proceedings in the U.S. for discovery until final determination of Hong Kong action).

[279] *In re* Winston Wen-Young Wong, No. 2:13-cv-03860 (D.N.J. June 21, 2013) (the § 1782 request was denied while the application for the anti-suit injunction was still pending before the Supreme Court of Bermuda); *see also* Ching Chung Taoist Ass'n of Hong Kong Ltd., No. 3:16-mc-80157 (N.D. Cal. July 22, 2016) (nonparty target's counsel threatened to seek injunction in Australian court unless applicant agreed to permanently refrain from subpoenaing the target).

[280] *In re* Lucia De Araujo Bertolla, No. 1:17-mc-00284 (S.D.N.Y. July 31, 2017), ECF No. 11; Ching Chung Taoist Ass'n of Hong Kong Ltd., No. 3:16-mc-80157 (N.D. Cal. July 22, 2016), ECF No. 4 (denying discovery as to one witness but says may revisit issue after Australian court decides pending motion about discovery from that witness); Sao Paulo State, Brazil, No. 1:16-mc-21971 (S.D. Fla. June 01, 2016), ECF No. 11 (giving respondents opportunity to obtain Brazilian court decision regarding their asserted privileges and instructing them to submit status report regarding their prospective request for declaratory relief in Brazil); *In re* Parmalat Brasil S.A. Industria de Alimentos, No. 1:11-mc-00077 (S.D.N.Y. Mar. 24, 2011), ECF No. 58 (staying discovery request pending further action from Brazilian court).

on foreign proceedings,[281] examined documents submitted to foreign tribunals,[282] and sought rulings from foreign courts.[283]

These examples of court-to-court interaction reveal that, when faced with a transnational discovery request, U.S. judges need, seek out, and receive information about happenings in the foreign proceeding and the preferences of the foreign tribunal. They also reveal that the needs of transnational discovery are not easily generalizable, for they are too specific and fine-tuned to be addressed by blanket rules. A German judge may find U.S. discovery assistance helpful in one proceeding but not in another. A broad-stroke solution covering an entire country, or a type of foreign proceeding such as commercial arbitration, is unlikely to further the goal of facilitating dispute resolution across borders.

The information that U.S. courts need from foreign tribunals goes beyond the binary question of whether the foreign tribunal is receptive to U.S. discovery. The two courts also need to coordinate on scheduling and timing so that U.S. discovery is produced in time for it to be taken into consideration abroad. Many foreign discovery requests are currently filed while the foreign litigation is pending but reach no resolution because the foreign litigation is resolved before the application is decided, leading the requestor to withdraw the request.[284] Coordination is even more critical in those instances where evidence is requested for multiple parallel proceedings occurring worldwide, and requests are made to more than one U.S. district court: all of those courts need to be aware of and to consider the other proceedings in order to avoid confusion, duplication, abuse, and circumvention of various discovery restrictions. Courts will likely need to coordinate on issues of privilege and protective orders safeguarding the confidentiality of materials produced for litigation. A joint protective order agreed to by the litigants and approved by a court in one jurisdiction likely has externalities in other jurisdictions that need to be accounted for. Finally, the above instances of court-to-court

---

[281] *In re* Mentor Graphics Corp., No. 5:16-mc-80037 (N.D. Cal. Feb. 16, 2016) (ordered); Ching Chung Taoist Ass'n of Hong Kong Ltd., No. 3:16-mc-80157 (N.D. Cal. July 22, 2016) (applicant provided notice to court regarding status of underlying foreign proceeding).

[282] *In re* George W. Schlich, No. 1:16-mc-91278 (D. Mass. Sept. 2, 2016) (both sides cited to submissions before the European Patent Office).

[283] Pimenta, No. 1:12-mc-24043 (S.D. Fla. Nov. 08, 2012), ECF No. 28 (ordering movant to seek ruling or guidance from Brazilian court).

[284] *See* Appendix C, Table 12 (showing a steady number of cases every year that reach no resolution).

interaction suggest that there is an urgent need to systematize when and how courts initiate a dialogue with each other. The interactions that are currently occurring take place in a haphazard manner, while most foreign discovery requests continue to be decided in the dark, in the absence of any information from the foreign tribunal or the foreign opposing party.

To say that coordination is needed does not answer the question of what the substance of that coordination should be, nor does it tell us which country's procedural values should prevail. For transnational discovery must still contend with the deep divide between the exceedingly broad and party-driven discovery procedures employed by U.S. courts and those employed in the rest of the world—a divide that is reflective of the different roles played by litigation in society.[285] A broader exploration of what a system of procedural coordination might look like is beyond the ambit of this Article. I undertake that exploration elsewhere.[286]

CONCLUSION

The export of American discovery is in urgent need of reform. The U.S. policy for liberalizing discovery assistance has now been pursued for over half a century. It has uncovered vast demand for efficient transnational discovery, but it is currently implemented in a way that excludes foreign stakeholders, undercuts foreign proceedings, and undermines strongly held American litigation values. It is time to recognize that U.S. judges operate on the frontlines of globalization, making decisions with deep ripple effects abroad, and to equip them with the tools for taking those foreign stakeholders and impacts into account. A mandatory system of court-to-court notification, dialogue, and coordination can serve that purpose.

The challenges identified in this Article will only grow in the coming years and they shed light on other areas of transnational procedure as well. From taking jurisdiction over or dismissing a transnational dispute to enforcing a foreign judgment, U.S. courts make decisions across the lifecycle of a dispute that implicate foreign judicial authorities and the rights of foreign

---

[285] *See* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (asserting that discovery is "the American alternative to the administrative state"); *see also* Diego A. Zambrano, *Discovery As Regulation* (unpublished manuscript) (on file with author) (arguing that American discovery serves regulatory goals by relying on private litigants to enforce important statutes).

[286] Yanbai Andrea Wang, *Procedural Coordination Across Borders* (unpublished manuscript) (on file with author).

private actors. Yet U.S. judges currently do not have a mechanism for gathering information about those foreign impacts. This Article serves as a wider call for scholarship on judicial coordination across borders, and for a deeper understanding of diverse legal systems worldwide with which U.S. courts might coordinate.