Nos. 21-401, 21-518

In the Supreme Court of the United States

ZF AUTOMOTIVE US, INC., ET AL.,
Petitioners,
v.

LUXSHARE, LTD.,
Respondent.

ALIXPARTNERS, LLP, ET AL.,
Petitioners,
v.

THE FUND FOR PROTECTION OF INVESTOR RIGHTS IN FOREIGN STATES,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth and Second Circuit

BRIEF OF PROFESSOR YANBAI ANDREA WANG AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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January 31, 2022

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INTEREST OF *AMICUS CURIAE*[1]

Yanbai Andrea Wang ("*amicus*") is an assistant professor at the University of Pennsylvania Carey Law School, where she teaches and writes about civil procedure and transnational litigation. Her article, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089 (2020) ("Wang"), provides a groundbreaking and comprehensive study of the nationwide operation of 28 U.S.C. § 1782 in lower courts since this Court's 2004 decision in *Intel Corp. v. Advanced Medical Devices, Inc.*, 542 U.S. 241 (2004). She submits this *amicus curiae* brief to offer her academic perspective for this Court's consideration as it addresses the scope and application of Section 1782 and the *Intel* decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rather than expressing a view on the issues raised and ably briefed by the parties, *amicus* submits this brief to inform the Court of the extensive scholarly research and analysis she has conducted regarding Section 1782 proceedings since this Court's seminal decision in *Intel*. As the Court itself recognized in

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The University of Pennsylvania Carey Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed herein are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* or her counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Intel, over time, it would need to clarify and refine the factors set forth in that decision in light of "further experience with Section 1782(a) applications in the lower courts." 542 U.S. at 265.

That is precisely the experiential evidence that *amicus*' scholarship provides. The upshot of that scholarly analysis is that, as Section 1782 applications have proliferated, the lower courts have struggled to apply the *Intel* factors as this Court had envisioned. That struggle is evident across all Section 1782 applications, including those for use in arbitral tribunals, whether foreign, international, or investor-state.[2] Because of the strategic ways in which parties now employ Section 1782, interpreting its statutory language is not enough to effectively police its availability for arbitration—*even if* the Court concludes that all arbitral tribunals are beyond the statute's reach. Thus, regardless of how the Court rules on Section 1782's scope, this case presents a perfect and much needed opportunity for the Court

[2] The *amicus* considers the terms "foreign" and "international" to refer to two separate categories of tribunals, and "investor-state" to refer to a third category. "Arbitral tribunal," encompassing all three types of tribunals, is used as shorthand for the disputed language from Section 1782, "a foreign or international tribunal." "International commercial arbitral tribunal" and "commercial arbitral tribunal" are used as shorthand for the first two types. The distinction between "foreign" and "international" is not significant to the points raised in this brief. For the sake of clarity, a "foreign" tribunal is one located outside the territory of the United States and operating within the legal framework of a foreign jurisdiction. An "international" tribunal is a cross-border institution operating within the framework of international law. An "international" tribunal may be located within the territory of the United States and, as such, would not be considered "foreign."

also to clarify how lower courts should apply the *Intel* factors in *all* Section 1782 proceedings. An opportunity to refine the *Intel* factors is unlikely to surface again soon given the deferential standard with which magistrate and district court judges' decisions are reviewed and the tendency for Section 1782 litigation to become moot before it reaches the Court.

Especially in the context of Section 1782 applications submitted by parties to an international proceeding (as opposed to those made by the international tribunal itself), lower courts have frequently found themselves constrained in their ability to analyze and apply the *Intel* factors. In particular, because applicants often do not notify the international tribunals or the other parties to the international proceedings of their application, the federal courts tasked with adjudicating those applications are unable to conduct an informed assessment of the critical *Intel* factors addressing whether the international tribunal is receptive to discovery assistance from U.S. courts and whether the request is an effort to circumvent discovery restrictions in the international proceeding.

That lack of information is exacerbated by three features of Section 1782 applications. *First*, nearly a third of applications from parties seek discovery for use in multiple proceedings at once. Wang, 2115. In such cases, lower courts typically require only one of those proceedings to satisfy the *Intel* factors. This simplification permits applicants to hang their hat on the proceeding most likely to succeed while allowing the remaining proceedings to piggyback on that one regardless of how unlikely they are to be granted discovery on their own. Illogically, it is easier to

obtain discovery for use in a foreign court, an international commercial arbitration, and an investor-state arbitration all at once than for use in an international commercial arbitration alone.

Second, approximately 16% of applications from parties seek discovery for use in proceedings that have yet to be filed. Wang, 2115. The lack of information is most dire in pre-filing requests, perversely making Section 1782 discovery more available for hypothetical proceedings that have not even been initiated. Pre-filing requests provide a particularly effective loophole for requests that are otherwise weak or impermissible. Combined with district courts' treatment of requests linked to multiple proceedings, applicants can obtain discovery based on a contemplated foreign lawsuit but put it to use in an arbitral proceeding notwithstanding this Court's ruling in this case. Similarly, applicants can obtain discovery based on a contemplated foreign lawsuit but put it to use in a U.S. litigation where pre-filing discovery is not permitted under the Federal Rules of Civil Procedure.

Third, many courts place the burden of proof on the Section 1782 target who is resisting discovery, rather than the applicant. In nearly 90% of applications from parties, the discovery target is a nonparty to the international proceeding, such as banks, social media companies, and law firms. Wang, at 2111. Such nonparties are poorly positioned to effectively oppose applications because they often cannot provide the information necessary for lower courts' assessment of the *Intel* factors. These three features show that the Court should clarify the *Intel* factors regardless of how it rules on arbitral tribunals.

The practical problems surrounding Section 1782 can be solved by two simple clarifications from this Court. *First*, the Court should clarify that applicants must notify in advance the discovery target, all parties, and all tribunals where the requested evidence will be used. *Second*, the Court should clarify that applicants bear the burden of proof to establish that the request should be granted under the *Intel* factors. Both of these requirements are undoubtedly within the Court's authority, and both are fully consistent with the Federal Rules' approach to domestic discovery.

Moreover, those two clarifications would resolve many of the policy concerns that appear to animate lower court decisions that have excluded international commercial arbitrations from Section 1782's reach. By ensuring that the discovery target, the opposing parties, and the international tribunals are notified in advance and have an opportunity to express their views on a Section 1782 application, district courts will be able to deny those applications where the international tribunal itself is not receptive to U.S. discovery. And by placing the burden on the party requesting the discovery, the analysis would weed out weak or abusive applications that might currently be granted simply because some lower courts currently place the burden on a nonparty from whom discovery is sought—who, as explained above, is in a particularly weak position to provide the information required to conduct the *Intel* analysis.

Ultimately, this approach—of clarifying the *Intel* factors to require notice and properly placing the burden on the applicant—is a far preferable way to prevent misuse of Section 1782 than drawing an

artificial and ill-defined line between "public" and "private" arbitrations. Indeed, that line does not stand up to the reality of modern international arbitration. On the contrary, because virtually all international arbitration is conducted within the framework of international treaties or other inter-governmental agreements, the line between "public" and "private" arbitral proceedings is an illusory one. Any effort to articulate such a line would exclude many commercial arbitrations from Section 1782's reach while leaving materially indistinguishable proceedings—such as investor-state arbitrations—within the statute's bounds. The more logical and practical approach, in light of the years of experience since *Intel*, is to clarify and strengthen the *Intel* analysis. And that clarification is needed even if the Court rules that all arbitral proceedings are beyond Section 1782's ambit.

ARGUMENT

I. As Section 1782's Use Has Surged, Lower Courts Have Struggled To Apply *Intel*'s Discretionary Factors In A Meaningful Fashion Across All Applications, Including Those For Use In Arbitral Tribunals.

In the years since this Court's seminal decision in *Intel*, the use of Section 1782 for discovery in aid of international proceedings has exploded. Between 2005 and 2017, the number of discovery requests received nationwide for use in international civil or commercial (as opposed to criminal) proceedings *quadrupled* from approximately 50 to 200 annually. Wang, 2111. Section 1782 permits requests to be made either by "a foreign or international tribunal" or

by "any interested person." The latter group—a class overwhelmingly consisting of parties to the proceeding, but also including other persons with participation rights in the proceeding, *Intel*, 542 U.S. at 256-57—has experienced a significant surge.[3] Wang, 2113. The lower courts have struggled immensely to apply the *Intel* factors in response to such party requests. The struggle is the same across all Section 1782 applications, including those for use in arbitral tribunals, which constitute approximately a tenth of all party requests.[4] Wang, 2115. This case therefore presents an opportunity to refine and clarify the *Intel* factors' application in *all* contexts.

A. Practical Experience Has Shown That The Lower Courts Have Struggled To Conduct The Analysis Required By *Intel*.

As the use of Section 1782 has expanded, the number of requests originating from parties now exceeds the number originating from tribunals. Wang, 2113-14. Indeed, party requests have given rise to nearly all appeals of Section 1782 decisions in the past decade, including each of the appellate decisions resulting in the circuit split on international

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[3] Fewer than 1% of requests come from "interested persons" who are not parties to the underlying proceedings. Wang, at 2113. Accordingly, this brief focuses on requests by "interested person[s]" who are parties to the underlying proceedings, or "party requests" for short.

[4] Approximately 9.9% of part requests are for use in commercial arbitrations and approximately 2.5% are for use in investor-state arbitrations. Wang, at 2115.

commercial arbitrations,[5] as well as each of the appellate decisions giving rise to the consensus on investor-state arbitrations.[6] And nearly all requests linked to international commercial arbitrations and investor-state arbitrations come from parties. Wang, 2169.

Yet, party requests pose unique difficulties for the lower courts that are tasked with applying the factors set forth in *Intel*. Structurally, requests from tribunals tend to be straightforward and homogenous. Almost all tribunal requests seek discovery for use in a single pending litigation before a foreign court, and more often than not that litigation concerns a family law matter. Wang, 2115, 2109. Moreover, when a request comes from a tribunal itself, it is self-evident that the international tribunal is receptive to U.S. discovery assistance, even where the tribunal's own discovery rules differ from those in the Federal Rules of Civil Procedure. Accordingly, virtually all tribunal

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[5] *See, e.g.*, *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021), and *cert. dismissed*, 142 S. Ct. 54 (2021); *In Re Guo,* 965 F.3d 96 (2d Cir. 2020), *as amended* (July 9, 2020); *Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd.*, 821 F.3d 573 (5th Cir. 2016); *Suzlon Energy Ltd v. Microsoft Corp.*, 671 F.3d 726 (9th Cir. 2011).

[6] *See, e.g.*, *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. 2021), *cert. granted sub nom. AlixPartners, LLP v. The Fund for Prot. of Investors' Rts. in Foreign States*, 142 S. Ct. 638 (2021); *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a)*, 735 F.3d 1179 (10th Cir. 2013); *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).

requests are granted—approximately 99% in 2015. Wang, 2122. And rightfully so.

By contrast, party requests derive from a variety of different claims, in differing procedural postures, within divergent types of international proceedings. As a result, it is typically much less clear whether the international tribunal is receptive to U.S. discovery assistance when a request comes from a party. In some circumstances, party requests raise the specter that a party might arbitrage different systems of discovery to obtain evidence using Section 1782 that is neither needed nor wanted by the tribunal with jurisdiction over the dispute. That is because "[d]iscovery in the federal court system is far broader than in most (maybe all) foreign countries." *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594 (7th Cir. 2011). The same applies with even greater force in the arbitral context. *See National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999) ("Few, if any, non-American tribunals of any kind, including arbitration panels created by private parties, provide for the kind of discovery that is commonplace in our federal courts.").

The complexities inherent in party requests often make it difficult for lower courts to conduct the analysis this Court articulated in *Intel*. As the Court is aware, it identified the following factors to guide lower courts' consideration of Section 1782 requests:

- Whether the requested evidence is "unobtainable absent § 1782(a) aid," which is likely when the target from whom discovery is sought is a "nonparticipant[] in the foreign proceeding [and] may be

outside the foreign tribunal's jurisdictional reach";

- "[T]he 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";
- Whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
- Whether the discovery requested is "unduly intrusive or burdensome," in which case the request may be rejected or trimmed.

542 U.S. at 264-65 (citation omitted).

In the context of party requests, the lower courts often have little to no information other than what the applicant states in its request. And under current practice, it is unclear who should be informed or have participation rights when a district court receives a request from a party. In fact, Section 1782 requests are often considered and granted on an *ex parte* basis, without prior notice to the other parties to the international proceeding, the tribunal in which the evidence is to be used, or the target of the discovery request. *See, e.g.*, *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) (stating that "it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*" and listing several examples); Order, *Elkind v. CCBill, LLC*, No. 2:14-mc-00030, *1 (D. Ariz. May 9, 2014) (granting *ex parte* request).

While the target of the discovery request has an opportunity to challenge it after the request is granted and the subpoena is served, in nearly 90% of requests, the target is a nonparty who may have no information about the dispute, the proceeding, or the tribunal at issue, and therefore little ability to contest the request under the *Intel* factors. Wang, at 2111. Moreover, nearly a third of party requests are for simultaneous use before multiple proceedings worldwide. Wang, 2115. Lower courts typically require only one of those proceedings to satisfy the *Intel* factors. And approximately 16% of party requests are for use in proceedings that are merely contemplated and have not been filed at all. Wang, 2115. If that unfiled proceeding is an arbitration, as it is in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, then no tribunal yet exists, further reducing the information available about the tribunal and further narrowing the avenues for challenging the request. Each of these scenarios complicates application of the *Intel* factors and causes confusion among lower courts.

Making matters worse, it is currently unclear where the burden of proof lies for the *Intel* factors. Some courts place the burden on the applicant. *See, e.g.*, *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008). Others place the burden on the target resisting discovery. *See, e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 162 (3d Cir. 2011). When the burden is placed on a nonparty target with no relevant information, it is particularly difficult for the court to conduct a full *Intel* analysis.

B. These Practical Difficulties Have Led Some Lower Courts To Dilute The *Intel* Factors.

The result of these practical difficulties is that the *Intel* factors often do not currently function how this Court originally envisioned that they would. In particular, the factors have ceased to serve as effective gatekeepers for party requests where the international tribunal is not receptive to discovery assistance in the United States—in large part because lower courts are often left in the dark as to that critical factor. Intended to guide lower courts in deciding between permissible and impermissible discovery requests, the *Intel* factors now lead almost inexorably to decisions granting Section 1782 applications. Unsurprisingly, applications are granted at astonishingly high rates: 91.9% overall and 86.6% for requests from parties. Wang, 2121. Rather than permit that dysfunction to persist, this Court should take this opportunity to clarify and refine how the factors are intended to function and how lower courts should apply them to achieve that purpose.

The two *Intel* factors concerning an international tribunal's receptivity and the circumvention of proof-gathering restrictions are often considered in tandem. And they are central to ensuring that the statute serves the goal of "assist[ing] foreign tribunals in obtaining relevant information that the tribunals may find useful." *Intel*, at 262. District courts often have no ability to consider these factors in a meaningful way due to information omitted from the applicant's request that can be difficult to ascertain under the current regime. For instance, lower courts have

struggled to ascertain whether the requested discovery is relevant to the dispute,[7] the scope of discovery permitted in the proceeding at issue,[8] and whether a similar discovery request has already been denied by the international court or tribunal.[9] Some district courts avoid the question by shifting the burden of proof to the target of the Section 1782 request, requiring the target to provide "authoritative proof" that the international tribunal is *not* receptive to U.S. federal district court assistance. *See, e.g.*, *In re Chevron Corp.*, 633 F.3d 153, 162 (3d Cir. 2011); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995); *In re MTS Bank*, No. 17-21545, 2017 WL 3155362, *6 (S.D. Fla. July 25, 2017). Especially where the target is not a party to the international proceeding, or when the proceeding has yet to be filed, meeting this burden is nearly impossible. And lower courts are now conflicted, both between and within circuits, on who bears the burden as to the receptivity factor. *See, e.g.*, *In re Schlich*, 893 F.3d 40, 49 (1st Cir. 2018) (noting that "[t]he Supreme Court has not established the appropriate burden of proof, if any, for any of the discretionary factors, or the legal standard required to meet that burden" and placing the burden on neither party); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 241 (D. Mass. 2008) (placing the burden on the proponent of discovery); *In re Clerici*, 481 F.3d 1324, 1335 (11th Cir. 2007)

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[7] *See* Order, *In re Application of Raoul Malak*, No. 2:14-mc-00089, *4 (D. Ariz. filed Feb 17, 2015) (Malak Application Order).

[8] *See Marubeni America Corp. v. LBA Y.K.*, 335 F. App'x 95, 97-98 (2d Cir. 2009).

[9] *See In re Chevron*, 633 F.3d at 162–63.

(placing the burden on neither party). It is thus imperative that this Court provide clarity on this issue.

District courts have also adopted other analytical shortcuts that find no support in this Court's *Intel* decision. For requests seeking discovery for use in multiple proceedings, lower courts simplify the analysis by requiring only one of the proceedings to fulfill the statutory requirements and the *Intel* factors. This shortcut is most vividly illustrated by two Eleventh Circuit decisions on a party request seeking discovery for use in a pending international commercial arbitration as well as in contemplated foreign civil and criminal suits. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012), *vacated and superseded*, 747 F.3d 1262 (11th Cir. 2014). In the 2012 decision, the court granted the request, holding that the arbitral tribunal at issue is a "foreign or international tribunal" under Section 1782 while declining to examine whether the contemplated suits are within the statute's purview. 685 F.3d at 994 ("Because we now hold that the pending arbitration proceeding is a 'proceeding in a foreign or international tribunal,' 28 U.S.C. § 1782(a), we have no occasion to address the second theory [based on the contemplated suits]."). Two years later, the court *sua sponte* vacated that decision and issued a nearly identical opinion granting the same request based on the contemplated suits while disregarding the arbitral tribunal. 747 F.3d at 1270 ("Because we agree that a proceeding exists under the former theory [based on the contemplated suits], we need not address the latter [theory based on the pending

arbitration proceeding].”). This simplification allows an applicant to piggyback any number of proceedings that do not fulfill Section 1782’s statutory requirements or the *Intel* factors on one proceeding that does fulfill them. Doing so undermines Section 1782’s goal of assisting foreign tribunals with respect to those other proceedings.

Another shortcut some courts take is to infer receptivity from prior federal court decisions concerning a court or tribunal in the same jurisdiction without examining how the prior federal court arrived at the decision or whether one tribunal’s putative receptivity can be imputed to another tribunal presiding over a separate proceeding. *See, e.g.*, Order Granting Ex Parte Application for Order to Obtain Discovery for Use in Foreign Proceedings, *In re Ex Parte Application of ANZ Commodity Trading Party Ltd.*, No. 4:17-mc-80070, *6 (N.D. Cal. filed Aug. 4, 2017). Over time, this particular shortcut has a troubling one-way-ratchet effect: as the number of cases granting Section 1782 applications accumulate, it becomes easier for district courts to grant new requests based on old ones, even if the old requests were incorrectly decided.

Courts have likewise adopted inaccurate shortcuts to assess whether the requested evidence is attainable in the absence of Section 1782 assistance. For instance, some courts merely ask whether the discovery target is a nonparty, assuming that the nonparty status of the target means that the sought-after evidence is unattainable without Section 1782. *See, e.g.*, Omnibus Report and Recommendations on Motions to Intervene, Vacate,

Quash Subpoenas, and for Protective Order, *In re Application of H.M.B. Limited Pursuant to 28 USC 1782 to Conduct Discovery for Use in Foreign Proceedings*, No. 1:17-cv-21459, *17 (S.D. Fla. filed July 2, 2018). Taking advantage of that doctrinal shortcut, many discovery requests strategically target a nonparty although the same evidence is *also* held by the opposing party in the international proceeding and is potentially discoverable through the procedures applicable in that proceeding—or not discoverable because the tribunal is not receptive to Section 1782 assistance.

These strategically chosen nonparties include American corporate affiliates of the opposing party and American law firms that received the requested evidence for the purpose of representing the opposing party in U.S. proceedings. *See, e.g.*, *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 241 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 852 (2019) (seeking evidence that was sent to an American law firm "solely . . . for the purpose of American litigation") (citation omitted); *Bravo Express Corp v. Total Petrochemicals & Refining USA, Inc.*, 613 F. App'x 319, 320–21 (5th Cir. 2015) (seeking discovery from U.S. targets that had a corporate relationship and joint business operations with the entities that were party to the underlying proceeding); *Application for an Order Directing ASML US, Inc. to Respond to Requests for Documents Pursuant to 28 U.S.C. § 1782 For Use in Foreign Proceedings*, No. 1:17-mc-00142, *8 (S.D.N.Y. Apr. 26, 2017) (seeking discovery from the wholly owned subsidiary of the opposing party in the foreign proceeding). The target's nonparty status is thus not enough to conclude that

the international tribunal cannot obtain the requested evidence absent Section 1782.[10]

Many of these practical difficulties are on display in *ZF Automotive US*. The district court's order upholding, on abuse of discretion review, the magistrate judge's decision to largely grant Luxshare's application noted that each of *Intel*'s first three factors point in different directions. No. 2:20-mc-51245, 2021 WL 2705477, at *3-6 (E.D. Mich. July 1, 2021). As to the first factor asking whether the discovery is sought from a nonparticipant in the foreign proceeding, Luxshare seeks discovery from both nonparticipants and the intended participant in the contemplated arbitration, but the district court did not find that point dispositive. As to the second factor asking whether the yet to be constituted tribunal would be receptive to U.S. discovery assistance, the district court acknowledged that courts are split on which party bears the burden but found it convincing that ZF Automotive offered "no definitive proof" that the future tribunal would *not* be receptive. And as to the third factor asking whether the request is an attempt to circumvent the tribunal's proof-gathering restrictions, the district court again acknowledged that lower courts are divided but found it sufficient that the tribunal neither expressly permits nor

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[10] In addition, *Intel* instructed that "unduly intrusive or burdensome requests may be rejected or trimmed." 542 U.S. at 265 (citations omitted). This factor, too, has been weakened over time. Since *Intel*, courts have held that it is preferable to modify a request rather than deny it altogether. *See, e.g.*, *Bravo Express Corp v. Total Petrochemicals & Refining USA, Inc.*, 613 F. App'x 319, 325 (5th Cir. 2015).

expressly prohibits Section 1782 discovery. Given lower courts' dilution of the *Intel* factors, it is now exceedingly rare for requests to be denied.

II. The Court Should Clarify The *Intel* Factors And Strengthen The Procedure For Evaluating Section 1782 Requests.

The Court should take this opportunity to resolve the practical difficulties currently plaguing the lower courts' application of the *Intel* factors. Indeed, in *Intel* itself, this Court noted that it might later revisit the factors it articulated following "further experience with § 1782(a) applications in the lower courts." *Intel*, 542 U.S. at 265. That is precisely what *amicus*' detailed scholarly research and analysis now provides: evidence from over a decade's worth of lower court experience showing widespread confusion and an urgent need to refine and clarify *Intel*'s discretionary factors. If the *Intel* factors are to play the critical gatekeeping role that this Court envisioned, they require more active participation from international tribunals and opposing parties, as well as appropriately placed burdens of proof. And this case is a perfect opportunity to provide that necessary clarity to the lower courts—one that is unlikely to arise again soon due to the deferential standard with which lower court decisions are reviewed and the tendency for Section 1782 litigation to become moot before it reaches the Court. The Court should thus provide that necessary guidance in this case.

A. This Court Should Require Applicants To Provide Notice To All Parties And All Tribunals Where Discovery Would Be Used.

The core problems distorting lower courts' application of the *Intel* factors stem from the fact that the most relevant actors—the parties to the international proceeding and the tribunal itself—are often absent from Section 1782 proceedings. As a result, the key questions at the heart of the *Intel* factors are often unanswerable. And the solution is remarkably simple: This Court should clarify that Section 1782 applicants must timely serve the target of discovery, all parties to the proceedings for which the evidence is to be used, and all tribunals before which the evidence is to be used.

In fact, a number of lower courts have already recognized the critical value that notice can provide. Although, under current practice, Section 1782 applications are often made and granted *ex parte*, there is an emerging practice of lower courts requiring notice. In a handful of cases, district courts have ordered applicants to notify the target of the discovery request,[11] the adversary against whom the evidence is

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[11] *See, e.g.*, Order, *In re Application of Halliburton SAS*, No. 1:14-mc-00004, *2 (E.D. Va. filed Feb 4, 2014) ("Halliburton Application Order"); *In re Ex Parte Application of Apple, Inc, Apple Retail Germany GmBh, and Apple Sales International*, No. 3:12-cv00179, *1 (S.D. Cal. filed Feb 1, 2012) ("Apple Application Order"); Order to Show Cause Why this Court Should Not Grant Ecuadorean Plaintiffs' Ex Parte Application for Expedited Service and Enforcement of Subpoenas to Conduct Discovery for Use in Foreign Proceeding Pursuant to 28 U.S.C. § 1782, *In re Application of Daniel Carlos Lusitand Yaiguaje*, No. 3:11-mc-

to be used,[12] and the international tribunal itself.[13] The natural result has been that those courts have been able to conduct the actual analysis that this Court set forth in *Intel*—without having to rely on distortive short-cuts or dubious assumptions.

Moreover, requiring Section 1782(a) applicants to provide notice to all parties is consistent with the approach taken in the Federal Rules of Civil Procedure for domestic discovery. In particular, Rule 45(a)(4) mandates that notice and a copy of a nonparty subpoena be served on each party to the dispute before it can be served on a nonparty target, 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. *See* Fed. R. Civ. P. 45, Notes of the Advisory Committee on Rules—2013 Amendment, Note to Subdivision (a). And Rule 30(b)(1) requires similar notice in the context of nonparty depositions.

There is no reason why this Court cannot require a similar notice process when federal courts are asked to order discovery for use in international proceedings.

80087, *2 (N.D. Cal. filed May 9, 2011) ("Yaiguaje Application Order").

[12] *See, e.g.*, Halliburton Application Order at *2 (ordering that applicant provide notice to a number of relevant parties); Apple Application Order at *1 (same); Yaiguaje Application Order at *2 (same).

[13] *See, e.g.*, Order, *In re Application Pursuant to 28 USC § 1782 of Financial Guaranty Insurance Co v. Lehman Brothers, Inc.*, No. 1:11-mc-00085, *2 (S.D.N.Y. filed Mar 29, 2011).

Indeed, some lower courts have explicitly relied on Rule 45 in imposing notice requirements in Section 1782 proceedings. *See, e.g.*, *In re Hornbeam Corp.*, 722 F. App'x 7, 10-11 (2d Cir. 2018); *see also* Request to File Under Seal, *In re Application of Lúcia de Araujo Bertolla for an Order Pursuant to 28 USC § 1782 to Obtain Discovery for Use in a Foreign Proceeding*, No. 1:17-mc-00284, *1 (S.D.N.Y. filed April 25, 2018). Other courts have relied on other similar grounds to impose an analogous requirement. *See, e.g.*, Order by Magistrate Judge Arthur Nakazato, *In re Ex Parte Application of Nokia Corp.*, No. 8:13-mc-00010, *1 (C.D. Cal. filed May 15, 2013); *In re Merck & Co, Inc.*, 197 F.R.D. 267, 270–71 (M.D. N.C. 2000). Ultimately, this Court need not directly root a notice requirement in the Federal Rules of Civil Procedure. Rather, the same inherent power the Court possessed to articulate the *Intel* factors necessarily affords it the authority to ensure that those factors are meaningfully and accurately applied.

Experience has shown that such a notice requirement is necessary for the effective operation of the *Intel* factors. In particular, if a federal court is to accurately assess an international tribunal's receptivity to U.S. discovery assistance, it is imperative that the international tribunal is actually *notified* that its views would be helpful. In fact, in the domestic discovery context, the Federal Rules encourage precisely that form of coordination when a second federal judge in a different jurisdiction than where the main litigation is being heard is called on to adjudicate disputes over a nonparty subpoena. The judge tasked with adjudicating the subpoena is encouraged to consult with the judge presiding over

the main case, since the latter is more familiar with the underlying dispute. *See* Fed. R. Civ. P. 45, Notes of the Advisory Committee on Rules—2013 Amendment, Note to Subdivision (f). In the domestic context, motions can also be transferred back to the court presiding over the main case so as not to disrupt that court's supervision over the underlying litigation. *See id.* When the tribunal supervising the proceeding is international, such consultation is even more critical because the federal district court adjudicating the Section 1782 request is unfamiliar not only with the underlying case but also with the international tribunal's discovery procedures. And requiring notice to all tribunals where the evidence will be used allows lower court to take them all into account.

The Court should also clarify that, once notified, international tribunals and other affected parties are encouraged to express their views on the Section 1782 request and the *Intel* factors. Surprisingly, lower courts have disagreed on this point. While international tribunals are increasingly participating in Section 1782 proceedings, they have occasionally been precluded from participating. *See, e.g.*, Memorandum and Order, *In re Application of Microsoft Corp*, No. 1:06-mc-10061, *6 n.4 (D. Mass. filed Apr. 17, 2006). Similarly, district courts have debated whether an adverse party in the international proceeding has standing to participate in a Section 1782 request. *Compare In re Kleimar N.V. v. Benxi Iron and Steel America, Ltd.*, No. 17-cv-01287, 2017 WL 3386115, at *4 (N.D. Ill. Aug. 7, 2017) ("[T]here is no question that an entity against whom the discovery will be used has standing to challenge an order allowing discovery under § 1782."), *with*

Order, *In re Application of Chevron*, No. 1:10-mc-00001, *1 (S.D.N.Y. filed Aug 24, 2010) (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 the § 1782 applicant, who happened to be the defendant in the foreign proceeding).

B. This Court Should Clarify That An Applicant Bears The Burden Of Establishing That Their Request Satisfies The *Intel* Factors.

In addition, the Court should specify that the burden of proof with respect to the *Intel* analysis falls on the Section 1782 applicant, who seeks to enlist the federal court's assistance with discovery for an international proceeding. Here, too, this clarification is consistent with the Federal Rules of Civil Procedure, and federal law in general. *See Herbert v. Lando*, 441 U.S. 153, 157 (1979) (citing Fed. R. Civ. Pro. 26); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 49, 56–58 (2005) ("We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. . . . Decisions that place the entire burden of persuasion on the opposing party at the outset of a proceeding . . . are extremely rare.").

Most important, the burden should rest with the applicant to show that the international tribunal is receptive to U.S. discovery assistance and that the request is not an attempt to circumvent the tribunal's proof-gathering framework. Aside from the international tribunal itself, the Section 1782 applicant is in the best position to supply the

necessary information to assess those factors. And placing the burden on the applicant will only further encourage notice to the international tribunal, so that it can offer its views directly. Likewise, the applicant is plainly in the best position to establish whether the evidence is unattainable without U.S. discovery assistance. At the very least, the Court should clarify that it is not sufficient merely to identify the target as a nonparty to the international proceeding without also establishing that the same evidence is not within "the possession, custody, or control" of a party—the standard scope of discovery under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(a)(1)(A)(ii), 34(a)(1), 45(a)(1)(A)(iii).

C. Clarifying The *Intel* Factors Will Strengthen The Framework This Court Envisioned.

By requiring notice and placing the burden of persuasion on the applicant, this Court would curtail abuse of Section 1782 and ensure that lower courts are able to conduct the *actual* analysis required by *Intel*. In the process, the Court will also resolve the policy arguments that some lower courts and parties have relied upon to exclude "private" commercial arbitrations from Section 1782's reach.

For requests connected to pending arbitrations and litigations, the above changes will better align district court decisions with the preferences of the tribunals they are assisting. Indeed, as the European Commission argued in the *amicus* brief it filed in *Intel*, a district court "can only weigh fairly" a foreign or international tribunal's "complex interests . . . in aiding or blocking a Section 1782 discovery request if

it is made aware of those interests." Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal, *Intel Corp. v. Advanced Micro Devices, Inc.*, No. 02-572, 2003 WL 23138389, at *17 (9th Cir. Dec. 23, 2003). But "there is no system for providing it with notice of Section 1782 cases in which [a tribunal's] interests are at stake, much less any regular procedure through which [the tribunal] might appear and make those interests known." *Id.*

The limited instances in which an international tribunal's interests have been solicited reveal that they have diverse preferences that district courts cannot easily divine. For instance, a Swiss arbitrator has conveyed nonreceptivity to Section 1782 discovery[14] while an Israeli arbitrator has expressed receptivity.[15] And the arbitral tribunal in *Servotronics, Inc. v. Rolls-Royce PLC* expressed its view by issuing a decision stating its preference that U.S. courts in the Northern District of Illinois and the District of South Carolina be permitted to hear Servotronics' discovery requests on their merits, leaving it to the tribunal to determine whether any material obtained pursuant to the Section 1782 application would subsequently be relevant or admissible in the arbitration. *See* Third Interim Award, *In the Matter of an Arbitration Under the Rules of the Chartered Institute of Arbitrators Between Rolls Royce PLC and Servotronics Inc.*, No. 20-mc-

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[14] *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App'x 31, 32 (5th Cir. 2009)

[15] *See In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007).

00081-JRT-KMM, Dkt. No. 23-1, at 10, 12 (D. Minn. filed Mar. 9, 2021).

Indeed, these clarifications would also address some of the policy concerns that feature prominently in the Second, Fifth, and Seventh Circuits' decisions excluding international commercial arbitration from Section 1782's reach. One such concern is the discrepancy between Section 1782, which permits parties to invoke the power of federal district courts to obtain nonparty evidence, and Section 7 of the Federal Arbitration Act (FAA), which only permits arbitrators to do so. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (2021), and *cert. dismissed*, 142 S. Ct. 54 (2021); *National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 187 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999). By aligning district court decisions with the preferences of arbitrators presiding over tribunals, the notice requirement would reduce tension between Section 1782 and the FAA. While Section 1782 need not be in perfect unison with the FAA—*Intel*'s rejection of both the foreign discoverability requirement and the requirement that the sought-after discovery be discoverable in an analogous U.S. proceeding made such equivalence unnecessary—harmony among the regimes is clearly preferable.

Meanwhile, for requests, like Luxshare's, that are connected to contemplated proceedings that have not yet been filed, the above clarifications would ensure that Section 1782 is not misused. Currently, due to missing information and inappropriately placed

burdens, applicants can circumvent many of the factors in such "contemplated requests," which perversely makes it easier to obtain intrusive discovery for hypothetical claims that have not even been initiated. Requiring notice and clarifying burdens would make it much harder to obtain discovery for unfiled arbitral proceedings because the tribunal is typically constituted *after* the arbitration has commenced, and only then does the tribunal set the procedures that govern the arbitration. *See generally* Arif H. Ali, *et al.*, The International Arbitration Rulebook: A Guide to Arbitral Regimes (2019). And should the Court rule that arbitral tribunals are excluded from Section 1782, these clarifications would close the current loophole that permits an unfiled proceeding to serve as the anchor for other proceedings—including those that are potentially impermissible.

Requiring applicants to notify all relevant international tribunals and opposing parties would limit the circumstances in which parties seek to enlist federal courts in abusive fishing expeditions. In fact, with the above clarifications, several appellate decisions excluding international commercial arbitration from Section 1782's ambit would reach the same outcome without the categorical exclusion. *See National Broadcasting Co.*, 165 F.3d at 186 (noting that the underlying arbitral proceeding was contemplated and the arbitration panel not yet appointed); *El Paso Corp.*, 341 F. App'x at 32 (noting that the arbitral tribunal had issued an order indicating it was not receptive to U.S. discovery).

III. Clarifying The *Intel* Factors Is Preferable To Adopting An Illusory Distinction Between "Private" Commercial Arbitration And Investor-State Arbitration.

It is imperative to clarify the *Intel* factors regardless of how the Court rules on the statutory meaning of "a foreign or international tribunal." If that language encompasses both "private" and investor-state arbitrations, strengthening the factors will ensure that they operate as effective gatekeepers across all Section 1782 applications, as this Court originally intended. If that language encompasses neither category of arbitrations, clarifying the factors will prevent applicants from manipulating Section 1782 to nevertheless obtain evidence for use in arbitral proceedings in circumvention of the Court's ruling. And, in all events, refining the factors offers a preferable alternative path that addresses many policy concerns without drawing an illusory distinction between "private" and investor-state arbitration.

To the extent that this Court is concerned by the policy arguments raised against including international commercial arbitrations within Section 1782's reach, the Court should resolve those concerns by clarifying the *Intel* factors rather than adopting an illusory distinction between "private" commercial arbitration and other arbitrations with similar features.

In reality, international arbitral tribunals are not readily classified as "private" or "governmental" because they come in many varieties and rely on differing degrees of both state authority and private

contract. Virtually all international arbitrations function within the frameworks set forth in international treaties, other inter-governmental agreements, and implementing legislation. For instance, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997 (the New York Convention), binds over 160 state parties and obligates the courts of those countries to recognize and enforce international commercial arbitral awards rendered in other state parties. The United States is bound by this Convention, which is incorporated into U.S. law at Chapter 2 of the FAA. Many countries have also adopted, in whole or in part, the Model Arbitration Law promulgated by the United Nations Commission on International Trade Law (UNCITRAL), which regulates the interaction between national courts and international arbitral tribunals. And investor-state arbitrations are authorized by bilateral and multilateral investment treaties that permit the private investors of one contracting state to bring claims directly against another contracting state.

Many bilateral and multilateral investment treaties provide for arbitrations to be brought at the International Centre for Settlement of Investment Disputes (ICSID), which was established under the Convention on the Settlement of Investment Disputes Between States and Nationals and operates under the auspices of the World Bank. But some investment treaties also specify other international arbitration regimes such as the International Court of Arbitration of the International Chamber of Commerce (excluded from Section 1782 by the Second Circuit in *National*

Broadcasting Co.) or the Arbitration Institute of the Stockholm Chamber of Commerce (excluded from Section 1782 by the Fifth Circuit in *Biedermann*).

Excluding "private" commercial arbitration ignores the reality that the distinction between "private" and "governmental" arbitral tribunals would be exceptionally difficult for lower courts to apply. As one example, when attempting to classify the China International Economic and Trade Arbitration Commission (CIETAC), the Second Circuit recently articulated a vague, multi-factor test on top of *Intel*'s existing factors. To determine whether CIETAC is a "private" international arbitration outside the scope of Section 1782, the Second Circuit considered "a range of factors, including the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties' contract controls the panel's jurisdiction." *In re Guo*, 965 F.3d 96, 107 (2d Cir. 2020). And the lines are growing ever blurrier. In recent years, the establishment of adjudicatory institutions around the world that function somewhere between courts and arbitral tribunals have further muddied the traditional distinction between public and private adjudication. *See generally* Pamela Bookman, *Arbitral Courts*, 61 Va. J. Int'l L. 161 (2021).

For these reasons, the Court should resolve any concern with Section 1782's use within international commercial arbitrations by clarifying how lower courts should apply the *Intel* factors, rather than adopting a highly fraught and illusory distinction that would place "private" or "commercial" arbitration entirely outside of Section 1782's ambit. Indeed, as explained above, requiring notice and placing the

burden of proof on Section 1782 applicants will restore the gatekeeping role that the *Intel* factors were established to play. And requiring courts to conduct a meaningful analysis of those factors will weed out the abusive and improper claims that seem to motivate lower court decisions that have categorically excluded international commercial arbitrations from Section 1782's reach.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to clarify the *Intel* factors in light of the extensive experience detailed in *amicus*' research and scholarly analysis on Section 1782's application in the lower courts.

Respectfully submitted,

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JANUARY 31, 2022