Notes

Use or Abuse of § 1782 Discovery in Less-Developed Legal Systems

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This Note discusses 28 U.S.C. § 1782, which authorizes district courts to issue orders compelling discovery of evidence located within their district for use in a proceeding in a foreign tribunal. For a district court to grant a § 1782 application, it must find that the requested evidence is "for use in a foreign or international tribunal." This Note addresses whether, to satisfy the § 1782 "for use" requirement, applicants must show that they possess some procedural right entitling them to participate in the foreign proceeding or otherwise describe the procedures through which the applicant intends to inject the requested discovery into the foreign proceeding. After reviewing the evolution of § 1782, this Note describes transnational bankruptcy proceedings in less-developed legal systems involving Islamic finance. The Note posits that, in such a context, a narrow reading of the "for use" requirement would contravene the principal Supreme Court decision construing the statute, Intel Corp. v. Advanced Micro Devices, Inc.*, and its purpose by unnecessarily limiting U.S. judicial assistance to less-developed legal systems. To support that conclusion, this Note surveys federal court precedent interpreting the "for use" requirement. With a focus on Second Circuit decisions, federal court precedent is analyzed against the transnational bankruptcy context, Supreme*

Court precedent, and the text and "twin aims" of § 1782. This Note rejects a narrow reading of the "for use" requirement as supra-textual, inconsistent with Supreme Court precedent, and unfaithful to § 1782's twin aims. Understanding that participation rights are an important factor in § 1782 analysis, this Note suggests that a § 1782 applicant's participation rights are properly assessed not within the "for use" requirement, but under the discretionary factors outlined by the Supreme Court.

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INTRODUCTION

This Note discusses 28 U.S.C. § 1782, which authorizes district courts to issue orders compelling discovery of evidence located within their district for use in a proceeding in a foreign tribunal.[1] Despite judicial experience applying § 1782, significant uncertainty remains in its application.[2] In *Intel Corp. v. Advanced Micro Devices, Inc.*, the U.S Supreme Court construed the statute's requirements that, if satisfied, authorize a district court to order discovery under § 1782, and it outlined discretionary factors a court should weigh to determine whether to exercise that authority.[3] Although this decision settled many debates over the interpretation and application of § 1782, it also created new areas of uncertainty.[4]

1. 28 U.S.C. § 1782 (2018). To illustrate the utility of § 1782, imagine two South American firms with a contract dispute. One firm intends to initiate civil and criminal suits in Ecuador as a result of the underlying conduct and in so doing would like to rely on evidence located in the Miami offices of an affiliate of the other firm. To acquire the evidence, the first firm can apply to the U.S. District Court encompassing Miami and request a discovery order under § 1782, which will be granted if the statutory requirements are satisfied and the district court believes it is within its discretion to order discovery. *See* Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1266–67 (11th Cir. 2014).

2. *See, e.g.*, Marat A. Massen, *Discovery for Foreign Proceedings after Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. Section 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 878 (2010) (arguing that *Intel* created confusion and unpredictable district court analyses of foreign receptivity to discovery obtained through § 1782).

3. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 255–67 (2004).

4. *See, e.g.*, Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118 (2d Cir. 2015) (noting that "the Court [in *Intel*] did not lay down minimum requirements or tests to be met in determining whether the party seeking discovery is an 'interested person' or whether the discovery is sought 'for use' in a foreign proceeding"); Laura Emmy Malament, *Making or Breaking Your Billion Dollar Case: U.S. Judicial Assistance to Private International Arbitration Under 28 U.S.C. Section 1782(a)*, 67 VAND. L. REV. 1213, 1216 (2014) ("Nonetheless, because the Court's holding [in *Intel*] did not

One such area concerns the showing necessary to satisfy the statutory requirement that the requested discovery be "for use in a proceeding in a foreign or international tribunal."[5] Facing this uncertainty, the Second Circuit has interpreted the "for use" requirement under *Intel* to require that applicants show they have a procedural or participation right to use the requested discovery in a foreign or international tribunal or otherwise establish that the discovery will actually be received into the foreign or international proceeding.[6] This Note argues that the Second Circuit's participation right requirement, although facially reasonable, is not consistent with the *Intel* decision, the text of § 1782, or its "twin aims."[7] To draw that conclusion, this Note identifies transnational bankruptcy proceedings as a context where use of the Second Circuit's approach will frustrate the purposes behind the enactment of § 1782. Instead, this Note proposes a more permissive reading of the "for use" requirement, and suggests district courts should conduct their assessment of participation rights as part the discretionary analysis set forth in *Intel*. This suggestion is rooted in a desire to remain faithful to *Intel* and ensure that district courts can order the full extent of U.S. judicial assistance that Congress provided for when it enacted § 1782, while retaining discretion to prevent potential misuse of § 1782.

Part I.A reviews U.S. judicial assistance to international tribunals and the purposes behind enactment and amendment of § 1782. Part I.B discusses current practice under § 1782 and the uncertainties following the *Intel* ruling. Part II.A introduces transnational bankruptcy and the still-developing field of Islamic finance to frame the drawbacks of the Second Circuit's "for use" requirement jurisprudence. Given this context, Part II.B posits that the Second Circuit approach to the "for use" requirement—demanding applicants prove a demonstrable participation right—is not faithful to the text of § 1782, its twin aims, or the *Intel* decision

directly address whether private arbitral bodies were 'foreign or international tribunals,' the issue remains controversial.").

5. 28 U.S.C. § 1782 (2018).

6. *Certain Funds*, 798 F.3d at 122 n.11 (citing with approval "[t]he district court's demand that the Funds identify some 'discernible procedural mechanism' for introducing the evidence they sought [which] simply reflects the burden on a § 1782 applicant to establish that it will have some means of actually using the evidence in the foreign proceeding" (citation omitted)).

7. The term "participation right" should not be confused with the rights associated with purchasing a loan participation, which are not discussed here. The terms "participation right" or "procedural right" are used interchangeably in this Note to refer to whatever rights a § 1782 applicant possesses that entitle it to inject the requested discovery into the foreign proceeding.

because it limits district courts' authority to order discovery on the basis of a supra-textual restriction that is not supported by its twin aims or prior § 1782 precedent. Part III.A proposes an alternative approach to the "for use" requirement, and suggests the proper role participation rights should play in § 1782's statutory analysis. Part III.B explains why a more searching review of an applicant's participation rights is properly conducted as part of the court's discretionary analysis under *Intel*.

I. U.S. JUDICIAL ASSISTANCE TO INTERNATIONAL TRIBUNALS: HISTORICAL DEVELOPMENT AND MODERN PRACTICE

Part I discusses the enactment and amendment of § 1782 and its current practice. Part I.A outlines the historical precedent to § 1782—letters rogatory—then identifies the purposes associated with congressional enactment and amendment of § 1782. Part I.B describes current § 1782 jurisprudence, drawing on the *Intel* decision, and highlights uncertainties remaining after this decision.[8]

A. Historical Development of U.S. Judicial Assistance to Foreign and International Tribunals

1. The Precursor to § 1782: Letters Rogatory

Congress has long recognized the benefit of providing judicial assistance to international tribunals and has repeatedly broadened the power granted to district courts to provide such assistance.[9] In 1855, Congress first provided for judicial assistance to international tribunals by authorizing federal circuit courts to respond to letters rogatory—foreign requests for judicial assistance—forwarded to them through diplomatic channels.[10] Circuit judges were authorized

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

9. Daniel A. Losk, *Section 1782(A) After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 CARDOZO L. REV. 1035, 1040 (2005); Luis A. Perez & Frank Cruz-Alvarez, *28 U.S.C. Section 1782: The Most Powerful Discovery Weapon in the Hands of a Foreign Litigant*, 5 F.I.U. L. REV. 177, 179 (2009) (noting most "changes [to providing judicial assistance] promoted liberal access, with minimal restriction, to U.S. discovery assistance").

10. Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 519 (1953) ("[A] *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness.").

but not required to honor such requests,[11] mirroring current practice under § 1782.[12] Due to errors in recording and indexing, this statute was inconsequential and was replaced by an 1863 amendment.[13] The 1863 amendment broadened the scope of U.S. judicial assistance by permitting circuit courts to compel testimony from any witness residing in the United States.[14] However, the amendment also limited judicial assistance to suits located in countries at peace with the United States and in which the complainant was seeking recovery of money or property, and importantly, required that the foreign country was involved as a participant or interested party.[15] The 1863 amendment also required "proof" that the requested testimony was "material" to the party requesting it.[16]

Judicial authority to provide assistance to foreign tribunals increased in 1948, when Congress removed the limitation that a foreign government hold litigant status or an interest in the proceedings.[17] The 1948 revision provided for U.S. judicial assistance to "any civil action pending in any court in a foreign country" but retained the requirement that judicial assistance only be provided to countries on friendly terms with the United States.[18] The

11. *See* Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630. If a circuit court decided to respond to a letter rogatory, the 1855 Act dictated that "a United States commissioner [would be] designated by said circuit court to make the examination of witnesses in said letters mentioned . . ." and was "empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court." *Id.*

12. *Intel*, 542 U.S. at 266 (holding "that § 1782(a) authorizes, but does not require, discovery assistance . . .").

13. *See* Jones, *supra* note 10, at 540.

14. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769–70 ("[T]he testimony of any witness residing in the United States . . . may be obtained . . . ."); Kenneth R. Adamo, Robert L. Canala & Susan M. Gerber, *Section 1782—A Powerful Tool for Obtaining Discovery to Assist Foreign Litigation*, 33 AIPLA Q. J. 337, 376 (2005).

15. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769–70 (stating that testimony may be obtained if it is "to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. . . ."); Charles McClellan, *America, Land of (Extraterritorial) Discovery: Section 1782 Discovery for Foreign Litigants*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 809, 812 (2008).

16. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769–70 ("[O]n due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to [compel testimony].").

17. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949.

18. *Id*. ("The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken.").

1948 amendment, codified at 28 U.S.C. § 1782, was the first statute in this subject area, and it dictated that U.S. judicial assistance would conform to U.S. discovery procedures.[19] In 1949, Congress replaced "civil action" with "judicial proceeding," further broadening the scope of permitted U.S. judicial assistance.[20]

2. Enacting the Modern § 1782

Responding to expanding international commerce, in 1958 Congress established the Commission on International Rules of Judicial Procedure, led by Columbia Law School Professor Hans Smit and assisted by the Columbia Law School Project on International Procedure.[21] The Commission's mandate was to understand the procedures for cooperation between foreign judiciaries, which were neither uniform nor comprehensive at the time, then draft suggested statutory revisions.[22] Congress hoped the Commission would improve the procedures for obtaining judicial assistance from foreign governments when necessary for the resolution of legal disputes in the United States, as well as U.S. procedures for providing similar assistance to foreign tribunals.[23]

The Commission submitted proposed revisions to § 1782, which Congress adopted in full in 1964.[24] The 1964 version was

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19. *Id*. ("The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.").

20. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

21. Act of Sept. 2, 1958, Pub. L. No. 85–906, § 2, 72 Stat. 1743. *See generally* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1, 1 (1998).

22. Act of Sept. 2, 1958, Pub. L. No. 85–906, § 2, 72 Stat. 1743 ("The Commission shall investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."). *See* Jones, *supra* note 10, at 515–18 (noting the importance of judicial cooperation both at home and abroad and identifying a contemporary lack of procedure for obtaining evidence from witnesses not residing in the forum country, serving legal documents on non-residents, and obtaining clarity on foreign law).

23. Act of Sept. 2, 1958, Pub. L. No. 85–906, § 2, 72 Stat. 1743 (directing the Commission to make recommendations such that "procedures necessary or incidental to [resolving disputes adjudicated in the United States requiring] acts in foreign territory, [including] service of judicial documents, [obtaining] evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that [U.S. procedures for rendering judicial assistance] be similarly improved . . .").

24. Act of Oct. 3, 1964, Pub. L. No. 88–619, § 9, 78 Stat. 997; S. Rep. No. 88–1580 at 2 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3782.

amended again in 1996, adding a phrase to confirm that § 1782 applies to criminal investigations.[25] The current version of 28 U.S.C. § 1782 authorizes, but does not require, district courts to order production of any form of evidence when the statutory requirements are satisfied.[26] The statute's text includes three requirements. First, the person from whom discovery is requested must be located in the district of the district court where the § 1782 application is filed.[27] Second, the requested discovery must be "for use in a proceeding in a foreign or international tribunal."[28] Third, the applicant must have an interest in the foreign proceeding.[29]

The 1964 revisions to § 1782 also added specificity to the procedure for providing U.S. judicial assistance. Consistent with prior authorizations, § 1782 empowers district courts to order discovery and to appoint a person to receive that discovery.[30] Deviating from earlier authorizations, § 1782 now provides that a district court has flexibility to prescribe discovery procedures.[31] District courts may order that discovery procedures partially or entirely conform to the procedures of the foreign tribunal or may fashion a discovery protocol to address a specific concern.[32] Where the district court order does not outline a discovery procedure, the default is that discovery will proceed consistent with the Federal

25. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, §1342(b), 110 Stat. 186 (amending § 1782 to insert the phrase "including criminal investigations conducted before formal accusation").

26. 28 U.S.C. § 1782 (2018) (dictating that "[t]he district court of the district in which a person resides or is found *may* order him to give his testimony or statement or to produce a document or other thing" (emphasis added)).

27. *Id*.

28. *Id*.

29. *Id*. (dictating that the applicant must be "a foreign or international tribunal or . . . any interested person").

30. *Id*. (district courts may "direct that the testimony or statement [requested by the § 1782 applicant] be given, or the document or other thing be produced, before a person appointed by the court").

31. *Id*. ("The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.").

32. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1102 (2d Cir. 1995) (noting that "[w]e read section 1782's investment of broad discretion in the district courts as an invitation to fashion creative means of implementing the statute's [twin aims]"); S. Rep. No. 88–1580 at 9 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3789 (indicating that the "revised section 1782 gives the court complete discretion in prescribing the [discovery] procedure to be followed").

Rules of Civil Procedure.[33] The objects of § 1782 applications also retain the protection of any legally applicable privilege.[34]

The Supreme Court described the 1964 amendment as a "complete revision" that increased the scope of U.S. judicial assistance to proceedings in foreign tribunals.[35] The broad purpose behind the expansion, referred to as the statute's "twin aims," was to improve federal procedures for providing judicial assistance to international tribunals with the hope that foreign countries would also improve their procedures for providing judicial assistance to U.S. tribunals.[36] The text of the 1964 revisions reveals the extent of this expansion and the drafters' commitment to the statute's twin aims.

Expanding the class of international proceedings eligible for U.S. judicial assistance and the class of applicants who could request such assistance, the revised statute permits judicial assistance for proceedings in a "foreign or international tribunal," while prior legislation only provided assistance to proceedings in "court."[37] The purpose of this revision was to ensure that § 1782 reached administrative and quasi-judicial proceedings.[38] The drafters also removed the word "pending" from the description of the proceedings that could receive judicial assistance,[39] which the Supreme Court

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33. 28 U.S.C. § 1782 (2018).

34. *Id*.

35. Losk, *supra* note 9, at 1041 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 (2004)).

36. S. Rep. No. 88–1580 at 2 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 (the purposes behind the proposed revision were "providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects" and to "invite foreign countries similarly to adjust their procedures").

37. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248–49 (2004).

38. Adamo et al., *supra* note 14, at 341 (citing S. Rep. No. 88–1580, at 7–8 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788) (indicating that "[t]he word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. . . . [I]t is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries."). The drafters wanted to expand U.S. judicial assistance to quasi-judicial proceedings because of the increasing role they play in adjudicating disputes at home and abroad. S. Rep. No. 88–1580, at 7–8 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court.").

39. *Intel*, 542 U.S. at 241 (describing how the current § 1782 deleted the phrase "in any judicial proceeding *pending* in any court in a foreign country" and replaced it with "in a proceeding in a foreign or international tribunal").

interpreted as broadening the scope of contemplated proceedings eligible for U.S. judicial assistance.[40] In addition, the 1964 revisions expanded the class of applicants that could request judicial assistance from only courts to any "interested person."[41] Similarly, prior to the 1964 revisions a district court was empowered only to order that depositions be taken, but after the revisions Congress authorized district courts also to order discovery of "documents and other tangible evidence."[42] As previously noted, the current version of § 1782 provides courts with discretion to refuse to order discovery or to narrowly tailor a discovery plan to address concerns about misuse of § 1782.[43] Taken together, the 1964 revisions increased both federal district courts' authority to provide judicial assistance to interested persons in proceedings in foreign tribunals and discretion to refuse or narrowly tailor that assistance.

B. Modern § 1782 Jurisprudence

1. Requirements for Statutory Authority Under § 1782

The principal authority on the proper interpretation of § 1782

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40. *Id*. at 259 (requiring only that proceedings be "within reasonable contemplation"). The court cited Professor Smit, who wrote that "pending" was removed "to facilitate the gathering of evidence prior to the institution of litigation abroad." *Id*. at 249 n.3 (citing Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026–27 n.72 (1965)).

41. 28 U.S.C. § 1782 (2018); S. REP. No. 88-1580 at 9 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3789. The Supreme Court again looked to Professor Smit on the interpretation of this change, noting that he stated the term is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." *Intel*, 542 U.S. at 256–57 (citing Smit, *supra* note 40, at 1027).

42. 28 U.S.C. § 1782 (2018). This change was made in response to the recognition "that the need for obtaining tangible evidence may be as imperative as the need for obtaining oral evidence." S. REP. No. 88–1580 at 7–8 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

43. *See* Adamo et al., *supra* note 14, at 341–42 (citing S. REP. No. 88–1580, at 7–8 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788) ("In exercising its discretionary power, the court may [consider] the nature and attitudes of the government of the [forum country] and the character of the proceedings in that country, or in the case of . . . an international tribunal, the nature of the tribunal and the character of the proceedings."); *see also* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247, 264–65 (2004) (outlining discretionary factors and stating "[w]e caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance").

is *Intel Corp. v. Advanced Micro Devices, Inc.*[44] *Intel* concerned a § 1782 application by AMD—Intel's rival computer processor producer—to obtain information for use in an antitrust investigation being conducted by the European Communities' Directorate General-Competition ("DG-Competition"). AMD had filed an antitrust complaint against *Intel*, triggering a preliminary investigation by the DG-Competition in which AMD could submit information to the DG-Competition to be considered by investigators.[45] After filing its complaint, AMD submitted a § 1782 application, seeking discovery of documents it intended to submit to the DG-Competition.[46] Under *Intel*, to successfully apply for judicial assistance, "(1) the person from whom discovery is sought must reside or be found in the district in which the application was made, (2) the discovery must be 'for use in a foreign proceeding before a foreign tribunal,' and (3) the applicant must be either a foreign tribunal or an 'interested person.'"[47] The interpretive challenge in § 1782 litigation arises in defining the limits of the terms contained within those broad statutory requirements.

The court in *Intel* relied on the text of § 1782 to clarify uncertainties contained within its statutory requirements.[48] Regarding the pendency of the proceeding where the applicant plans to use the requested discovery, the Court held "that § 1782(a) requires only that a dispositive ruling by the [tribunal] . . . be within reasonable contemplation."[49] As to whether § 1782 contains a foreign-discoverability requirement, a topic hotly debated among

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44. *Intel*, 542 U.S. 241; *see, e.g.*, In re Chevron Corp., 633 F.3d 153, 161 (3d Cir. 2011) (describing *Intel* as "[t]he seminal case exploring the parameters of section 1782 . . .").

45. *Intel*, 542 U.S. at 242 (citing Brief for the Commission of European Communities as Amicus Curiae Supporting Reveral at 67, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2003) (No. 02-572)).

46. *Id*. at 241. AMD had initially recommended to the DG-Competition that it seek the relevant documents itself, but the DG-Competition declined.

47. In re Accent Delight Int'l Ltd., 869 F.3d 121, 128 (2d Cir. 2017) (quoting Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 117 (2d Cir. 2015)).

48. *Intel*, 542 U.S. at 255 ("As 'in all statutory construction cases, we begin [our examination of § 1782] with the language of the statute.'" (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002))).

49. *Id.* at 258–59. The Court premised this on removal of the word "pending" from § 1782 in the 1964 revision and cited Professor Smit, who stated that "[i]t is not necessary . . . for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." *Id*. at 259 (quoting Smit, *supra* note 40, at 1026).

commentators prior to *Intel*,[50] the Court sharply rejected such a categorical limitation.[51] That decision was grounded in the plain meaning of the text of § 1782.[52] In rejecting a foreign-discoverability requirement, the Court also dismissed policy concerns related to parity[53] and comity,[54] finding that such concerns were not supported by the text of the statute or its practice.[55]

2. The *Intel* Discretionary Factors and Standard of Review Under § 1782

After sharply rejecting categorical limitations not supported by the text of § 1782, the Court in *Intel* "caution[ed], however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to 'interested person[s]' in proceedings abroad."[56] To guide lower courts in navigating this discretion and respond to concerns about misuse of § 1782, the Court outlined a series of considerations courts should assess to determine whether to grant an authorized request for judicial assistance.[57] The Second Circuit views the guidance from *Intel* as four separate factors a court should consider after

50. *See, e.g.*, Christopher Walker Sanzone, *Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782*, 29 VAND. J. TRANSNAT'L L. 117, 154 (1996).

51. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 260 (2004).

52. *Id*. According to the Court, had Congress sought to enact "such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *Id*. (quoting In re Application of Gianoli Aldunate, 3 F.3d 54, 59 (2d Cir. 1993)).

53. *Id*. at 262 (finding that "[c]oncerns about [parity] likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. [A] district court could condition relief upon [an applicant's] reciprocal exchange of information. . . . [Or] the foreign tribunal can [condition acceptance] of the information to maintain whatever measure of parity it concludes is appropriate." (citing Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101 (2d Cir. 1995))).

54. *Id.* at 261 (questioning "whether foreign governments would . . . be offended by a domestic prescription permitting, but not requiring, judicial assistance").

55. .Justice Scalia concurred to note his disapproval of the Court's reliance on legislative history for some of its holdings, but ultimately concluded that "the Court's disposition is required by the text of the statute. None of the limitations urged by petitioner finds support in the categorical language of 28 U.S.C. § 1782(a)." *Id.* at 267.

56. *Id.* at 246–47.

57. *Id*. at 244 (noting that "the grounds . . . urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case").

determining that it is authorized to order discovery under § 1782.[58]

The first discretionary factor directs district courts to consider that the need for judicial assistance under § 1782 is "generally" more "apparent" when the object of the § 1782 application is a nonparticipant in the proceedings in a foreign tribunal. The Supreme Court reasoned that nonparticipants may not be in a position to ask the foreign tribunal to use its own procedures to obtain evidence located in the United States.[59] The second factor dictates that courts "may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the [tribunal] to U.S. federal court judicial assistance."[60] Third, courts weighing whether to grant an authorized § 1782 application can "consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."[61] Fourth, the Court in *Intel* provided that "unduly intrusive or burdensome requests may be rejected or trimmed."[62] Once a court has determined the statutory requirements are satisfied and it is authorized to order discovery, it must balance the four factors to determine whether to grant discovery

58. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80–81 (2d Cir. 2012). Other circuits view the Supreme Court's guidance as two, rather than four, factors. Regardless of the organization, the content remains the same. *See, e.g.*, In re Chevron Corp., 633 F.3d 153, 161–62 (3d Cir. 2011) (outlining the *Intel* discretionary factors as two factors).

59. *Intel*, 542 U.S. at 264. The Court in *Intel* reasoned that a tribunal will have jurisdiction over participants in proceedings before it, so it may have the ability to order those participants to produce the relevant discovery without need for recourse to American courts. *Id.* Conversely, the Court thought that evidence from nonparticipants located in the United States might lie outside the jurisdiction of the foreign tribunals and be difficult to obtain without U.S. judicial assistance. *Id*.

60. *Id*. Again, the Court referred back to the 1964 Senate Report to supply content for its guidance to lower courts. *Id*. This factor has been criticized for providing insufficient guidance to lower courts on how to weigh a foreign tribunal's receptivity to judicial assistance from American courts. Massen, *supra* note 2, at 930–31 (noting that *Intel* "has led . . . [to] unpredictable standards and complex, multitiered analyses. District courts . . . now engage in complicated analyses of foreign declarations. The Supreme Court provided no guidance on how courts should evaluate either foreign receptivity or whether a § 1782 request circumvents foreign proof-gathering methods").

61. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004). This consideration goes only to "whether a discovery order should be granted in a particular case," not whether § 1782 discovery could be granted. *Id*.

62. *Id*.; *see, e.g.*, *In re Chevron Corp*., 633 F.3d at 168 (upholding a lower court opinion granting a § 1782 discovery request, but dictating that the court must review certain documents in camera to determine whether an exception to attorney-client privilege was applicable as to any of those documents).

and how to fashion the discovery procedure.[63] Expressing these concerns as discretionary factors, rather than supervisory rules or categorical statutory limitations, indicates the Court's loyalty to the text of § 1782[64] and its view that congressional policy favors broad U.S. judicial assistance.[65]

Whether a district court justifies its decision on a § 1782 application on statutory or discretionary grounds dictates the standard of review that will be applied by a reviewing court. If the district court decision is based on the statutory requirements, the standard of review is de novo.[66] On the other hand, if the district court decision is made in the court's discretion, the standard of review is whether the court's determination was "clearly erroneous."[67]

3. Remaining Uncertainties

Although *Intel* did conclusively settle two areas of uncertainty within § 1782 application (establishing the "within reasonable contemplation" standard and rejecting a foreign-discoverability requirement), the opinion did not eliminate all uncertainty from the doctrine.[68] An area of uncertainty that has not generated substantial scholarship is the question of whether an applicant must possess some participation right or otherwise establish that the requested discovery will be received into the proceeding to satisfy the "for use" requirement when all parties agree there is a valid proceeding in a foreign or international tribunal.[69] This includes the closely related question of whether § 1782 contains an admissibility requirement—that is, whether an applicant must prove the discovery it seeks is admissible in the foreign tribunal in order to satisfy the "for use"

63. *Id.*

64. Massen, *supra* note 2, at 931 (observing that "§ 1782 jurisprudence deemphasizes the opinions of the foreign tribunal in favor of a mechanistic loyalty to the statute's text").

65. *Intel*, 542 U.S. at 259.

66. In re Accent Delight Int'l Ltd., 869 F.3d 121, 128 (2d Cir. 2017) (citing Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015)) (stating that "because both [arguments] challenge the district court's interpretation of Section 1782, rather than its discretionary grant of discovery under the statute, our review is de novo").

67. In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings, 773 F.3d 456, 459–60 (2d Cir. 2014).

68. An area of controversy that has generated substantial scholarship concerns whether private international arbitral tribunals will qualify as "foreign tribunals" under § 1782. *See, e.g.*, Malament, *supra* note 4, at 1244; Losk, *supra* note 9, at 1076.

69. *See* Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118 (2d Cir. 2015).

requirement.[70]

In addressing the "for use" requirement, the *Intel* court focused its analysis on the second part of the sentence: whether the DG-Competition qualified as a foreign or international tribunal.[71] Only a small portion of one paragraph in the opinion addressed "use," and in so doing the Court in *Intel* did not establish a framework for assessing whether the "for use" requirement was satisfied, but merely indicated that on the facts before it the requirement had been met.[72] Precisely what showing should be necessary to meet the "for use" requirement is the focus of this Note and is assessed in Part II.

II. THE "FOR USE" REQUIREMENT AND ITS APPLICATION WHEN USE IS DIFFICULT TO DEMONSTRATE

Although the § 1782 requirement that evidence requested be "for use in a foreign or international tribunal" may appear as an unambiguous statutory pronouncement, this is not always the case in practice. Whether a § 1782 application meets the "for use" requirement is a contentious debate because of the lack of guidance from the Supreme Court in *Intel*.[73] This Note suggests that satisfaction of the "for use" requirement is an even more contentious question in the context of a still-developing legal regime where parties' participation rights are opaque. Given the ubiquity and complexity of cross-border relationships,[74] it is critical to arrive at a greater level of certainty regarding how courts should assess the "for use" requirement and ensure that the twin aims of § 1782 are

70. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 81 (2d Cir. 2012); *but cf. Certain Funds*, 798 F.3d at 122, n.11 (describing the question of whether § 1782 contains a foreign-admissibility requirement as "a separate question" from whether requested discovery is "for use" in a foreign proceeding).

71. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 257–58 (2004).

72. *Certain Funds*, 798 F.3d at 118 (noting that "[t]he Court [in *Intel*] appeared to regard the case before it as an easy one, in effect finding that the facts before it were sufficient to satisfy the requirements of the statute, and not suggesting that facts identical to those in Intel were necessary to meet those requirements").

73. *See, e.g.*, In re Accent Delight Int'l Ltd., 869 F.3d 121, 129 (2d Cir. 2017) (affirming a lower court decision granting a § 1782 application by rejecting an argument that the requested discovery did not meet the "for use" requirement because the applicants were no longer seeking any type of relief in the relevant proceeding).

74. *See, e.g.*, Malament, *supra* note 4, at 1214–15 (describing the outstanding growth of international commerce and international arbitration).

served.[75]

Part II discusses the uncertainty surrounding the "for use" requirement and the importance of finding a practicable solution to assessment of "use." Part II.A introduces transnational bankruptcy and insolvency proceedings involving Islamic financial instruments as a specific scenario in which demonstrating "use" might be difficult. This discussion is included to illustrate how a narrow reading of the "for use" requirement could frustrate the twin aims of § 1782. Part II.B surveys the various approaches to the "for use" requirement employed by circuit courts and argues against wider adoption of the Second Circuit approach endorsed in its *Certain Funds* decision because this approach is not faithful to *Intel* or the text and twin aims of § 1782.

A. When is "Use" Difficult to Demonstrate? A Brief Discussion on Transnational Bankruptcy & Islamic Finance

The following section presents the scenario of a transnational bankruptcy proceeding that serves as the basis of a § 1782 application in which the applicant may have difficulty establishing her ability to use the requested discovery in the proceeding. Section II.A.1 provides a brief discussion of the basic principles of transnational bankruptcy. Section II.A.2 introduces Islamic finance and the *sukuk*.

1. Principles of Transnational Bankruptcy

Bankruptcy laws are "highly procedural in nature," meaning that a jurisdiction's procedural design is crucial to determining how participants' roles will be allocated and the bankruptcy estate liquidated.[76] Currently, transnational bankruptcy proceedings operate on the basis of territoriality, meaning that "bankruptcy courts of a country have jurisdiction over those portions of the company that are within its borders and not those portions that are outside them."[77]

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75. *See* David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 735 (discussing the important role legal certainty plays in economic growth and development).

76. LEGISLATIVE GUIDE ON UNCITRAL MODEL INSOLVENCY LAW, Part I, ¶27 (2004), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [https://perma.cc/825U-GTBR].

77. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218 (2000).

In response to territoriality, many multinational firms organize their offshore holdings as separate corporations formed under local law, each of which would be governed by local insolvency laws in the event of default.[78]

When a bankruptcy spanning multiple countries occurs, bankruptcy estates are created in each country where the defaulted firm has "significant" assets.[79] If no agreement results from negotiation between the bankruptcy estates and creditors, each bankruptcy estate will be reorganized or liquidated in accordance with the domestic law of each forum country.[80] The consequence of this system is that the priority rules dictating who will receive liquidated assets and in what proportion are typically those of the country where the assets are located.[81] Priority rules vary substantially from State to State and require a variety of evidentiary showings depending on local law and the context of the default.[82] Even though countries might have overlapping ideas about public policy, national priority systems are variegated.[83] Countries may also be self-interested in the design of their priority systems.[84] Until a system of universalism transforms the field of transnational bankruptcy, an issue in most transnational bankruptcy proceedings will be the interplay of different priority systems and the subsequent procedural challenges that might emerge as a result.[85] This is an obstacle to transnational cooperation, and makes determination, assertion, and enforcement of domestic priority rights and procedures

78. *Id*. at 2219.

79. *Id*.

80. *Id*. at 2220.

81. *Id*.

82. John K. Londot, *Handling Priority Rules Conflicts in International Bankruptcy: Assessing the International Bar Association's Concordat*, 13 BANKR. DEV. J. 163, 166 (1996).

83. *Id*. (quoting Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 511 (1991)) (describing national priority systems as "bewildering in their variety, reflecting various cultural and political preferences.").

84. *Id*. (finding that sometimes countries may "exhibit something akin to nationalistic greed in identifying priority creditors").

85. Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2302 (2000) (quoting AM. LAW INST., PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1 n.2 (Tentative Draft 2000)) ("[D]ifficulties created by differing priority systems [will] constitute one of the major complications of parallel [bankruptcy] proceedings [in separate countries]").

a crucial aspect of bankruptcy proceedings.[86]

Responding to the complexity of transnational bankruptcy proceedings and in pursuit of judicial cooperation among jurisdictions where a bankrupt entity has assets, the United Nations Commission on International Trade Law ("UNCITRAL") developed a Model Law on Cross-Border Insolvency in 1997.[87] The Model Law was adopted by the United States in 2005 and codified at 11 U.S.C. Chapter 15.[88] Forty-three countries have since adopted legislation based on the Model Law.[89] National legislation derived from the Model Law provides a mechanism for recognition of foreign bankruptcy proceedings by domestic courts, aims to expedite liquidation procedures, and ensure fairness for all creditors and interested persons across jurisdictions.[90]

In the United States, Chapter 15 operates similarly to § 1782. To obtain recognition of a foreign insolvency proceeding, a representative of the foreign proceeding must submit a petition to a U.S. bankruptcy court establishing the existence of the foreign proceeding.[91] If a proceeding is established and recognized, the foreign representative can obtain U.S. judicial assistance, including discovery of evidence located in the United States.[92] The key difference between Chapter 15 and § 1782 is that Chapter 15 is limited to foreign representatives of the proceeding, meaning that creditors, debtors, or other interested persons cannot unilaterally apply for recognition and U.S. judicial assistance under Chapter 15.[93] As a result, Chapter 15 is of little use to parties or interested persons

86. *Id.*

87. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html [https://perma.cc/9XCT-56WH].

88. In re Millennium Glob. Emerging Credit Master Fund Ltd., 458 B.R. 63, 69 (Bankr. S.D.N.Y. 2011).

89. STATUS UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html [https://perma.cc/QPW4-TELC].

90. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, Preamble (U.N. Comm'n on Int'l Trade Law, 1997) ("The purpose of this Law is . . . to promote the objectives of: (a) Cooperation between the courts . . . of this State and foreign States involved in . . . cross-border insolvency; . . . (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor . . . .").

91. *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. at 69–71.

92. *Id.* at 69.

93. *See id.*

in transnational bankruptcy proceedings if the foreign tribunal does not submit a petition.

Absent a sophisticated and proactive foreign tribunal willing to file a Chapter 15 petition, creditors, debtors, and other interested persons in transnational bankruptcy proceedings who seek U.S. judicial assistance must resort to § 1782.[94] In so doing, these creditors, debtors, and other interested persons will engage in a § 1782 proceeding that is ripe for the sort of "battle-by-affidavit of international legal experts" that some § 1782 opinions warn against because the applicants will need to prove that the requested discovery will be used in the foreign bankruptcy proceeding.[95] The narrower a court chooses to interpret the "for use" requirement, the more likely it is for these battles to occur.[96]

When the bankruptcy laws in the forum state are not fully developed, the likelihood of "battles-by-affidavit" increases because the bankruptcy proceeding representative may lack the sophistication or resources to file a Chapter 15 petition, and the procedural rules dictating which individuals can participate in the bankruptcy proceeding may not indicate the participation rights of creditors or other interested persons. For example, in Saudi Arabia, the forum state for the insolvency proceeding at the heart of the Second Circuit's *Certain Funds* decision, the bankruptcy system is

94. If a debtor is a U.S. resident, has a place of business in the United States, or possesses property in the United States, a group of creditors may be able to initiate a bankruptcy proceeding in the United States under 11 U.S.C. § 303 in order to obtain discovery or other U.S. judicial assistance. 11 U.S.C. § 303(a)–(b)(1) (2018). However, this route is unavailable in cases like *Certain Funds*, where the bankrupt firms were incorporated and operated outside the United States. 11 U.S.C. § 109(a) (2018) ("Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title").

95. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995) ("[T]he record reveals that this litigation became a battle–by–affidavit of international legal experts, and resulted in the district court's admittedly 'superficial' ruling on French law." (citation omitted)). For example, if a § 1782 application is opposed on the grounds that the applicant is unable to "use" the requested discovery in the foreign bankruptcy proceeding, it might lead to a "battle-by-affidavit" in which interested parties clash over the content of foreign law to argue for or against the applicant's ability to use the discovery.

96. Narrow interpretation of "for use" creates more opportunities to argue that the intended application of the requested evidence does not count as "use" on the basis of foreign law. *See, e.g.*, Mees v. Buiter, 793 F.3d 291, 303–04 (2d Cir. 2015) (reversing a lower court opinion, which found merit in an argument that the requested evidence was not "for use" in a foreign proceeding as it was unnecessary to the § 1782 applicant under the foreign country's law, on grounds that § 1782 contains no such limitation).

underdeveloped and its procedures uncertain.[97] These facts may explain why the petitioners in *Certain Funds* sought judicial assistance under § 1782. More importantly, this state of affairs is indicative of how transnational bankruptcy proceedings in less-developed legal systems pose unique challenges for U.S. courts facing § 1782 applications. To explore these challenges, Part II.A.2 discusses the evolving state of Islamic finance and insolvency and argues that a narrow reading of the § 1782 "for use" requirement in this context would frustrate the twin aims of § 1782.

2. Insolvency in Islamic Finance

This section considers Islamic finance and the *sukuk*. A *sukuk* is similar to a traditional bond but is structured such that it complies with Shari'a law, typically through the involvement of a physical asset.[98] After the Fourth Annual Plenary Session of the Islamic Jurisprudence Counsel determined that the *sukuk* was compliant with Shari'a law, demand skyrocketed, and *sukuk* now make up a major component of the Islamic financial market.[99] Shari'a law disapproves of charging interest, so *sukuk* holders are typically paid via income derived from the sale and leaseback of a piece of real property.[100] Although the prohibition on charging

97. *See, e.g.*, Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 115 (2d Cir. 2015); Frank Kane, *Saudi Arabia's Multibillion Corporate Collapse: Al–Gosaibi Exec on His Role in 8-Year Saga*, ARAB NEWS (July 2, 2017), http://www.arabnews.com/node/1122941/business–economy [https://perma.cc/95DP-FH9U]. Additionally, no Gulf Cooperation Council States, including Saudi Arabia and the United Arab Emirates, have adopted the Model Law on recognition of foreign bankruptcy proceedings. STATUS UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY (1997), *supra* note 89.

98. Ayman H. Abdel-Khaleq & Christopher F. Richardson, *New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings*, 7 CHI. J. INT'L L. 409, 415 (2007) ("Perhaps the most significant recent development [in Islamic finance] has been the emergence of *sukuk* [which roughly translates to 'certificates']—in essence an asset–backed security structured in compliance with the precepts of Shari'ah, somewhat similar to a trust certificate or bond.").

99. *Id*. at 413.

100. *Id*. at 412 (indicating that the underlying sale-leaseback is known as a "*ijara* transaction"). Essentially, *sukuk* are certificates of a share of ownership in an asset or class of assets that entitle the holder to financial returns generated by leasing or selling the underlying assets, and because of the Shari'a prohibition on charging interest, "periodic payments to the holder must . . . rely on the profitability of the underlying contracts. Investors are not conventional creditors, . . . but are . . . owners or partners in the underlying business entitled to a share of the profits and risk of the enterprise." Krista Mancini, *Not by Benevolence Alone: The Use of Project Sukuk to Finance Public-Private Partnerships in*

interest is indicative of the focus on debt within Shari'a law and Islamic finance, there is "astonishingly low" scholarly or practical interest in Islamic bankruptcy.[101] At the same time, there is unpredictability as to what happens when a *sukuk* defaults[102] and to the insolvency procedures generally in countries governed by Shari'a law.[103] The result is unpredictability on the substance and procedure of an insolvency proceeding in Gulf Cooperation Council ("GCC") nations.[104]

The facts of the Second Circuit's *Certain Funds* decision reflect this state of affairs. When the two conglomerates at the center of *Certain Funds* defaulted on their *sukuk* debt obligations, Saudi Arabia did not have a viable bankruptcy code[105] and only began implementation of a formal bankruptcy code in early 2018.[106] Without a bankruptcy code, the liquidation of the two conglomerates has been a "tortuous process" that remains unresolved.[107]

Although Saudi Arabia is modernizing its insolvency procedures, it is unrealistic to think that new contexts will not emerge in which Islamic financial instruments default in a territory with a

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Saudi Arabia, 45 PUB. CONT. L.J. 313, 328 (2016).

101. Haider Ala Hamoudi, *The Surprising Irrelevance of Islamic Bankruptcy*, 19 AM. BANKR. INST. L. REV. 505, 506–08 (2011) ("[T]here is a particularly close connection [between insolvency and financing] in the Islamic context, [in part because] *Islam's central financing prohibition, respecting money interest on a loan, derives from a broadly prohibited practice known as riba, which is at its core a rule of insolvency*." (emphasis in original)).

102. *See, e.g.*, Irina Marinescu, *Where Does the Dirham Stop in a Sukuk Default*, 35 HASTINGS INT'L & COMP. L. REV. 451, 452 (2012) (describing a "lack of legal clarity around default mechanisms" in the *sukuk* space because of the unique asset-backed nature of the *sukuk* and the interplay of Shari'a law and insolvency procedures).

103. Daniel Rankin, *Restructuring and Buy-Back of Sukuk*, *in* SUKUK AND ISLAMIC CAPITAL MARKETS: A PRACTICAL GUIDE 157, 162–63 (Rahail Ali ed., 2011) (noting that in Gulf Cooperation Council nations "insolvency regimes are uncertain, . . . have developed unevenly and are generally untested and therefore unpredictable [and] due to the lack of precedent, there exists no definitive priority ranking of creditors and no way to determine how creditors will be paid in the event of a liquidation of the obligor's assets").

104. *Id*. (noting that there is "little guidance on the relative length of an insolvency proceeding or how it will be carried out in practice" in GCC nations).

105. Kane, *supra* note 97.

106. *Id*.; *Saudi Arabia to Implement Bankruptcy Law in Early 2018: Al Arabiya*, REUTERS (Sept. 22, 2017, 10:48 AM), www.reuters.com/article/us-saudi-economy-bankruptcy/saudi-arabia-to-implement-bankruptcy-law-in-early-2018-al-arabiya-idUSKCN1BX1AR [https://perma.cc/AJ62-CTW9].

107. Kane, *supra* note 97.

less than fully developed bankruptcy system.[108] More importantly, it is possible that other unique or incipient legal arrangements will emerge from less-developed or transitioning economies. In the face of such uncertainty, demonstrating a procedural mechanism for introducing evidence into a proceeding in a foreign tribunal could be difficult despite an otherwise-valid application for § 1782 assistance.

A narrow approach to the § 1782 "for use" requirement will frustrate the twin aims of § 1782 in the context of uncertain procedural rules by unnecessarily limiting judicial assistance from U.S. district courts, which in turn might limit the extent to which such assistance "invite[s] foreign countries similarly to adjust their procedures."[109] This is pertinent to the development of insolvency systems in GCC countries as they relate to transnational bankruptcy proceedings. After the first default of a *sukuk* issued by a U.S.-based entity, which was resolved in a Chapter 11 bankruptcy court, commentators called on GCC nations to look to Western countries for guidance on bankruptcy procedures in order to improve insolvency proceedings when Islamic financial instruments default in Western jurisdictions, perhaps through judicial assistance to Chapter 11 courts or otherwise.[110] Courts must remain faithful to the text of § 1782, but the context of Islamic insolvency proceedings supports the conclusion that the § 1782 "for use" requirement should not be interpreted any narrower than that demanded by the text.

B. The Federal Courts' Response to Challenges to § 1782 Applications on the Basis of the "For Use" Requirement

The previous section identifies a scenario illustrating the utility of a liberally construed § 1782 "for use" requirement. This

108. *See Insolvency & Debt Restructuring in Islamic Finance*, ISLAMICBANKER (July 6, 2017), https://www.islamicbanker.co/2017/07/06/insolvency-debt-restructuring-in-islamic-finance/ [https://perma.cc/U6W6-PMUP] ("Most . . . GCC countries do not have adequate bankruptcy laws even though some Islamic financial transactions and indeed institutions are vulnerable to financial distress . . . [yet] the skyrocketing interest in developing the Islamic finance industry does not have any meaningful impact on bankruptcy laws of most Muslim countries . . . .").

109. S. REP. NO. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3783.

110. *See, e.g.*, Esther Agbaje, *The Need for an Islamic Bankruptcy Code*, SHARIASOURCE AT HARV. LAW SCH. (Jan. 17, 2017), https://shariasource.blog/2017/01/17/the–need–for–an–islamic–bankruptcy–code/ [https://perma.cc/B8CJ-BN2R] (describing how the U.S. bankruptcy court in the East Cameron Gas Company *sukuk* default "reorganize[d] the debt offering in a way that removed the Islamic financial aspects of the security offering," which represents "a failure of sukuk financial structuring in instance of default, because of Islamic law's lack of robust bankruptcy laws").

section surveys the approaches embraced by federal courts in response to § 1782 applications with similar facts. That is, this section focuses on the judicial response to challenges to § 1782 applications that allege the applicant will be unable to use the requested discovery even though there is a proceeding occurring in a foreign tribunal.[111] Part II.B.1 discusses the Second Circuit's approach to the "for use" requirement. Part II.B.2 outlines relevant precedent from outside the Second Circuit. Part II.B.3 assesses this jurisprudence against the *Intel* decision, the text of § 1782, and its twin aims, and does so in light of the scenario set forth in Part II.A.[112] Part II concludes by arguing that requiring § 1782 applicants to possess a participation right or otherwise establish that the requested discovery will actually be received into the proceeding to satisfy the "for use" requirement is an extra-statutory limitation on U.S. judicial assistance that is not supported by *Intel* or the twin aims of § 1782.

1. The Second Circuit's Interpretation of *Intel* and the "For Use" Requirement

Part II.B.1 illustrates the Second Circuit's approach to the "for use" requirement when the § 1782 applicant's ability to actually use the requested evidence in a foreign proceeding is in question. Emphasis is placed on the Second Circuit because it is "likely to be most frequently addressed with requests for assistance under Section 1782"[113] and has had the most experience dealing with this aspect of the "for use" requirement.[114] The question at the heart of this Note came to the fore in *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG*, but the Second Circuit has also addressed the "for use"

111. This Note does not address the related aspects of the § 1782 "for use" requirement, namely whether a proceeding constitutes a "proceeding in a foreign or international tribunal" or whether anticipated proceedings are sufficiently "within reasonable contemplation." *See, e.g.*, Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 83 (2d Cir. 2012) ("The only issue addressed in [In re Ishihara Chem. Co., 251 F.3d 120 (2d Cir. 2001)], however, was whether a foreign proceeding actually existed at the time discovery was sought."); In re Dubey, 949 F. Supp. 2d 990, 993 (C.D. Cal. 2013) (holding that a certain arbitration did not qualify as a "[proceeding in a] foreign or international tribunal").

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

113. McClellan, *supra* note 15, at 814 (quoting Smit, *supra* note 21, at 13) (noting that the high concentration of § 1782 applications occurring in the Second Circuit is likely due to the prevalence of banks doing international business that have their headquarters in New York City).

114. *See* In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017).

requirement in earlier cases.[115]

Prior to the *Intel* ruling, the Second Circuit favored a broad interpretation of § 1782.[116] Beginning with *Application of Malev Hungarian Airlines*, the Second Circuit repeatedly resisted invitations to read into the text of § 1782 categorical limitations based on the applicant's intended use of the sought-after discovery.[117] In *Malev*, the Second Circuit looked to the text of § 1782 to determine that it does not require applicants to prove they exhausted domestic discovery procedures in the forum State before seeking evidence through a § 1782 application.[118]

Three years later in *Euromepa S.A. v. R. Esmerian, Inc.* the Second Circuit addressed the related question of the extent to which district courts should assess foreign law in deciding whether to grant a § 1782 request.[119] The Second Circuit in *Euromepa* directed future courts to avoid "speculative forays" into the content of foreign law and warned of "battle[s]-by-affidavit"[120] that could lead to "superficial" rulings on foreign law.[121] Reflecting the Second Circuit's broad view of § 1782, the court in *Euromepa* concluded that, unless specifically directed otherwise by the foreign tribunal, the underlying policy of § 1782 "should generally prompt district courts to provide some form of discovery assistance."[122]

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115. Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 115 (2d Cir. 2015).

116. *See, e.g.*, Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1087–98 (2d Cir. 1995); Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (2d Cir. 1992).

117. *Malev*, 964 F.2d at 100.

118. *Id*. (holding that "[w]e find nothing in the text of 28 U.S.C. § 1782 which would support a quasi-exhaustion requirement of the sort imposed by the district court").

119. *Euromepa*, 51 F.3d at 1096 ("This case raises the question of the degree to which federal district courts, in deciding whether to order discovery under 28 U.S.C. § 1782(a) in aid of a foreign litigation, should delve into the mysteries of foreign law").

120. *Id*. at 1099.

121. *Id*. (quoting Application of Euromepa, S.A., 155 F.R.D. 80, 82 (S.D.N.Y. 1994), *rev'd sub nom. Euromepa*, 51 F.3d 1095). The district court denied the § 1782 application in *Euromepa* because it thought granting the discovery order would offend the French tribunal, since the applicant had not attempted to obtain the sought-after discovery through French procedures. *Euromepa*, 51 F.3d at 1098.

122. *Id*. at 1102. Neither *Euromepa* nor *Malev* directly reviewed district court decisions based on the "for use" requirement. Rather, each dealt with the discretion of the lower court. *Id*. at 1097; Application of Malev Hungarian Airlines, 964 F.2d 97, 99 (2d Cir. 1992). These precedents remain relevant to the "for use" requirement because they reveal the Second Circuit's view on assessment of the use of discovery. That is, because there is no exhaustion requirement when a court is deciding whether to grant a § 1782 application that is within the court's discretion, it is also not a component of the statutory requirements. *See* In re Accent

The Second Circuit dealt directly with the "for use" requirement in *Brandi-Dohrn v. IKB Deutsche Industriebank*, in which the court held that § 1782 does not include a foreign-admissibility requirement.[123] In *Brandi-Dohrn*, the Second Circuit reversed a ruling that had denied a § 1782 application on the grounds that the "for use" requirement was not satisfied because the foreign tribunal was unlikely to admit the requested discovery.[124] The Second Circuit reasoned that the argument against a foreign-discoverability requirement in *Intel* also supported rejecting an admissibility requirement.[125] The Second Circuit found that "[a]s in *Intel*, there is no statutory basis for an admissibility requirement."[126] As to policy concerns, the Second Circuit reasoned that if parity issues emerged from the discovery order, the foreign tribunal could adequately address them.[127] The court in *Brandi-Dohrn* also considered that an admissibility requirement would impede the statute's object of helping foreign tribunals obtain information that would otherwise remain outside their reach.[128]

Delight Int'l Ltd., 869 F.3d 121, 134 (2d Cir. 2017) (noting that "[i]n *Malev*, for example, we held that Section 1782 does not require applicants first to seek discovery in the foreign tribunal before applying in this country . . ."). Similarly, later courts have viewed the *Euromepa* prohibition on detailed analysis of the content of foreign law as extending to the entirety of the § 1782 application, not exclusively to assessment of the court's discretion to provide judicial assistance. *See, e.g.*, Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 122 n.11 (2d Cir. 2015); Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 82 (2d Cir. 2012).

123. *Brandi-Dohrn*, 673 F.3d at 81–82.

124. *Id*. (noting that the district court had concluded that "*the likelihood of use has not been shown*" because the evidence was unlikely to be admitted in the foreign tribunal (quoting Nov. 9, 2011 Conf. Tr. 12, 15) (emphasis in original)). At issue was the fact that the foreign proceeding had progressed to the appellate stage more than a year before the § 1782 request. Domestic law in the forum State did not allow for new evidence to be introduced on appeal except in limited circumstances, which the district court thought unlikely to apply to the sought-after evidence. *Id*. at 78–80.

125. *Id*. at 81. The Second Circuit's own precedents also supported this decision. Before *Intel* confirmed the absence of a foreign-discoverability requirement, the Second Circuit declined to find either a foreign-discoverability or admissibility requirement. *Id.* (citing *Malev*, 964 F.2d 97; In re Application of Gianoli Aldunate, 3 F.3d 54 (2d Cir. 1993)).

126. *Id.* at 81.

127. *Id*. (noting that the foreign tribunal "is free to exclude the evidence [obtained through a § 1782 request] or place conditions on its admission" to maintain the desired level of parity among litigants).

128. *Id*. The court indicated that an admissibility requirement would require difficult interpretation and analysis of foreign law, encouraging rejection of the requirement because it would make provision of U.S. judicial assistance less efficient. *Id*. The Second Circuit later repeated this sentiment when referencing this debate in *Certain Funds*. Certain Funds,

The Second Circuit again addressed the "for use" requirement in *Mees v. Buiter*, holding that § 1782 applicants do not need to show the requested discovery is "necessary" to their legal position to satisfy the "for use" requirement.[129] Instead, the Second Circuit cited various dictionary definitions of "use" to conclude that the text of § 1782 only demands that the requested evidence "be employed with some advantage or serve some use in the proceeding."[130] In addition to the text of § 1782, the Second Circuit referenced *Euromepa* and *Brandi-Dohrn* for the proposition that imposing a necessity requirement would lead to unnecessary analysis of foreign law.[131]

In *Certain Funds*, the Second Circuit was presented with the question at the heart of this Note: how to assess the "for use" requirement when the § 1782 applicant lacks procedural rights in the foreign proceeding.[132] *Certain Funds* concerned the default of two Saudi conglomerates that had issued a *sukuk* held in large part by Certain Funds, Accounts and/or Investment Vehicles Managed by Affiliates of Fortress Investment Group L.L.C. ("the Funds").[133] Insolvency-related proceedings had commenced in three countries

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Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 122 n.11 (2d Cir. 2015) (citing Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995)).

129. Mees v. Buiter, 793 F.3d 291, 298 (2d Cir. 2015) (holding that "discovery sought pursuant to § 1782 need not be necessary for the party to prevail in the foreign proceeding in order to satisfy the statute's 'for use' requirement").

130. *Id*. The proposed necessity requirement was premised on an argument that the § 1782 applicant in *Mees* did not need the requested evidence to plead her claim in an anticipated foreign proceeding, but the Second Circuit instead held that an applicant can satisfy the "for use" requirement by requesting information that is to be used "both to plead *and to prove*" a claim. *Id*. at 299.

131. *Id*. (explaining that in addition to the lack of textual support, the party proposing the necessity requirement "identifie[d] no countervailing concerns that might justify such a time-consuming and unreliable 'necessity' inquiry").

132. *Certain Funds*, 798 F.3d at 116 (noting that the district court held that the "for use" requirement was not satisfied because "there was no 'discernible procedural mechanism' whereby the discovered material would actually be used in the foreign proceedings" (citation omitted)).

133. *Id*. at 115. The two Saudi conglomerates were the Saad Group ("Saad") and Ahmad Hamad Algosaibi and Brothers Company ("AHAB"). The interests held by the Funds were valued at around $380 million, the largest of which were in the Golden Belt 1 *sukuk*. *Id*. The Funds were the largest single holder of this *sukuk*, with ownership of around 20% of its certificates. *Id*. The Funds also participated in a Cayman Islands holding corporation valued at $35 million, which held some of the Saudi conglomerate's offshore assets. *Id*. In 2009, as part of the global financial crisis, the two conglomerates collapsed due to what was later determined to be fraudulent practices by a member of the family that had built the companies, including diverting money to shell companies. Due to the collapse, the assets held by the Funds defaulted. *Id*.

after the default, and at the time of the Funds' § 1782 application, a claim related to the default of the *sukuk* was pending before the Saudi Banking Disputes Committee.[134] A proceeding was also underway in the Cayman Islands to liquidate assets held there, and a third proceeding had begun in Bahrain to liquidate an affiliate of the conglomerate in which the Funds held an interest.[135]

The Funds petitioned the District Court for the Southern District of New York under § 1782 to obtain discovery from U.S. and international auditing firms whose affiliates might have possessed information useful to the insolvency proceedings because they had audited companies owned by the two conglomerates involved in the offerings purchased by the Funds.[136] The district court rejected the Funds' application, finding that the Funds had not established that they possessed the ability to use the requested discovery in the insolvency proceedings.[137] The Second Circuit affirmed, concluding that the Funds had not satisfied the "for use" requirement as it related to the ongoing proceedings.[138]

In *Certain Funds*, the Second Circuit observed that *Intel* did not produce a test for assessing whether requested discovery would actually be "for use" in a proceeding or whether an applicant was an "interested person," but concluded that the two requirements are interrelated.[139] Facing this uncertainty, the Second Circuit asserted that the "key question" was "whether the Funds will actually be able

134. *Id*. at 116. Reflecting the inchoate state of the Saudi bankruptcy system, the delegate of the Golden Belt 1 *sukuk*, who acts akin to a bankruptcy trustee, originally filed a claim before the Saudi Negotiable Instruments Committee, "a quasi-judicial body that has binding authority to resolve disputes related to negotiable instruments." However, that claim was withdrawn and "refiled before the Saudi Banking Disputes Committee, another quasi-judicial committee with jurisdiction over bank debt." *Id*.

135. *Id*. The Funds also stated that they planned to use the information obtained through the § 1782 application to "instigate" other claims in Saudi quasi-judicial committees and to bring tort and breach of contract claims in English court. *Id*. Both the district court and the Second Circuit held that these proceedings did not independently satisfy the statutory requirements because they were not "within reasonable contemplation" under *Intel*. *Id*. at 124–25.

136. *Id*.

137. *Id*. at 116–17.

138. *Id*. at 120–21.

139. *Id*. at 118 (observing that *Intel* "did not lay down minimum requirements or tests to be met in determining whether the party seeking discovery is an 'interested person' or whether the discovery is sought 'for use' in a foreign proceeding" and that *Intel* "suggests that, while the 'interested person' and 'for use' requirements are independent, there is considerable overlap between them").

to use the information in the proceeding."[140] To answer this question, the Second Circuit looked to *Intel* and concluded that the Funds were not able to use the information in the ongoing proceedings because, unlike the § 1782 applicant in *Intel*,[141] the Funds had not shown that they had participation rights associated with the ongoing proceedings.[142]

The crux of the decision in *Certain Funds* is that the Second Circuit viewed the existence of procedural or participation rights as crucial to assessing both the "interested person" and "for use" requirements.[143] The Second Circuit tied the existence of those rights more closely to satisfaction of the "for use" requirement, as it ultimately found the Funds' lack of participation rights failed to satisfy the "for use" requirement and then declined to reach the question of "interested person" status.[144] In reference to participation rights, the court held, "[w]ithout some means of injecting the evidence into the proceeding, a § 1782 applicant cannot show that it has a role in the proceeding, such that it may 'use' the information,

140. *Id*. at 120–21.

141. *Id*. at 118 ("[T]he applicant 'ha[d] a significant role in the process,' including various 'participation rights' in the proceeding" and "could 'use evidence in the reviewing courts . . . by submitting it to the Commission in the current, investigative stage,' and then relying on that evidence before the Commission itself and the reviewing courts." (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256–58 (2004)).

142. *Id*. at 122. The Funds purported to hold various participation rights, including that they "may submit probative evidence to the foreign tribunal," but absent evidence of the procedure for doing so, the court discounted that claim. *Id*. at 121 (quoting Brief and Special Appendix for Plaintiff-Appellant at 138, Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113 (2d Cir. 2015) (No. 12-2838) [hereinafter Appellants' Brief]). The Funds also claimed to be members of a steering committee of the conglomerates' creditors, but "provide[d] no information on what role, if any, that steering committee plays in the Saudi proceeding or whether the steering committee has any ability to put evidence before the quasi-judicial committees." *Id.* In addition, the Funds held procedural rights related to the proceedings in the Cayman Island and Bahrain, which the Court determined "upon examination reveal no mechanism by which they could use any information obtained through a § 1782 order in the liquidation proceedings." *Id.* The Funds alleged that in the Cayman Island proceedings, they could "request the removal of an official liquidator; coordinate with other investors to request that the liquidator apply to the court for a discovery order[;] request the ability to participate in an oral examination; apply to the court with respect to the exercise or proposed exercise of the liquidators' powers; . . . and seek to inspect the company's records." *Id*. (quoting Appellants' Brief at 11–12). In the Bahraini proceeding, the Funds alleged they had "the ability to challenge before a competent court of law any proposal or decision made by the liquidator." *Id*. (quoting Appellants' Brief at 13).

143. *Id*. at 119.

144. *Id*. at 119–20.

or, as we have recently said, employ it 'with some advantage.'"[145]

Certain Funds appears to create within the Second Circuit a bright-line rule requiring § 1782 applicants to show they possess procedural or participation rights in order to satisfy the "for use" requirement. The court in *Certain Funds* stated that even on the Funds' most favorable facts, it was not certain that the requested discovery would be "for use" in a foreign proceeding because even if the Funds could find a way to present information obtained through a § 1782 application to the Saudi Delegate, there was no guarantee the delegate would use that information in the proceedings occurring in Saudi Arabia.[146]

The holding in *Certain Funds* is facially reasonable but appears to contradict prior Second Circuit precedent. Without providing any support, the Second Circuit analogized the Funds' position to that of a witness approaching a prosecutor's office with information about a crime and found such a position clearly insufficient to satisfy the "for use" requirement.[147] However, in *In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings* ("*Berlamont*"), a case decided eight months before *Certain Funds*, the Second Circuit held that a § 1782 applicant, who, as the victim of a crime, was seeking evidence to provide to an investigating magistrate, had satisfied the "for use" requirement.[148] Inexplicably, the only citation to

145. *Id*. at 120 (quoting Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015)).

146. *Id*. at 121 (concluding "at best, the Funds can furnish information in the hope that it might be used").

147. *Id*. (describing the Funds' position as "no different from . . . a witness approaching a prosecutor's office claiming to have knowledge of a crime. Such information . . . is not 'for use' in any proceeding in which the recipient is a party unless the recipient takes some further, independent action to introduce it"). This analogy also appears to contradict *Intel*. In dissent, Justice Breyer argued that "[i]n many respects, the Commission more closely resembles a prosecuting authority, . . . than an administrative agency that adjudicates cases." Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 270 (2004) (Breyer, J., dissenting). In response, the majority noted that Breyer's statement was "a questionable suggestion" not because of the participation rights afforded to the applicant, but because the tribunal was a first-instance decision-maker, even if it resembled a prosecuting authority. *Id*. at 255 n.9.

148. In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings, 773 F.3d 456, 458 (2d Cir. 2014) [hereinafter *Berlamont*]. The applicant in *Berlamont*, a victim of the Bernard Madoff Ponzi scheme, was seeking documents to provide to an investigating magistrate presiding over a Swiss criminal investigation that Berlamont had initiated via a complaint. *Id*. There was no discussion of Berlamont's participation rights because the § 1782 application was opposed on the grounds that an investigating magistrate is not a "foreign or international tribunal" under § 1782. *Id*. at 460. The closest the court came to assessing what practical means Berlamont had to inject

Berlamont in *Certain Funds* concerned the de novo standard of review for the case, and it is not clear whether *Certain Funds* intended to overrule *Berlamont*.[149]

In *In re Accent Delight*, the most recent Second Circuit case dealing with participation rights and the "for use" requirement, the court again addressed a crime victim seeking to use § 1782 to obtain evidence for use in the prosecution of a crime and again did not read a categorical limitation into the "for use" requirement.[150] The § 1782 application was challenged on the basis that the applicant could not use the requested evidence because he was not pursuing a claim for relief in any of the ongoing proceedings.[151] The court relied on *Berlamont* and the text of § 1782 in affirming the lower court decision granting the § 1782 application.[152]

The court in *Accent Delight* recognized some tension between its holding and *Certain Funds*, distinguishing *Certain Funds* on the grounds that the applicant in *Certain Funds* lacked participation rights in the ongoing insolvency proceedings, whereas the applicant in *Accent Delight* held participation rights in the French and Monégasque criminal proceedings.[153] This conclusion strengthens

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the requested discovery into the preceding was acknowledging that Berlamont had produced a communication from the Swiss investigating magistrate "explicitly" stating that the requested discovery "would be 'of great usefulness to [his] inquiry.'" *Id*. at 461 (citation omitted). Returning to the *Certain Funds* analogy, there is a difference between a witness to a crime and a victim, but as creditors of the bankruptcy estate, the Funds are closer to victims than witnesses.

149. Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 117 (2d Cir. 2015).

150. In re Accent Delight Int'l Ltd., 869 F.3d 121, 124–25 (2d Cir. 2017). The wrinkle in *Accent Delight* was that the applicant had disclaimed his right to damages in the various ongoing proceedings dealing with the alleged criminal conduct. *Id*. The § 1782 applicant in *Accent Delight* was initially participating in proceedings related to the alleged criminal activity in Singapore, France, and Monaco. *Id*. The court in Singapore required the applicant to disclaim his right to damages in the French and Monégasque proceedings in order to continue with the proceeding in Singapore. *Id*. The applicant complied, but the Singaporean proceedings were ultimately terminated on *forum non conveniens* grounds, leaving only the French and Monégasque proceedings, where the applicant was no longer pursuing a claim for relief. *Id.*

151. *Id*.

152. *Id*. at 131. Specifically, the Second Circuit thought that congressional inclusion of the phrase "including criminal investigations conducted before formal accusation" in the text of § 1782 "suggests that [Congress] contemplated a more expansive universe of foreign disputes and interested parties that qualify under the statute than [the appellee's] reading of 'for use' would permit." *Id.*

153. *Id*. at 132–33 (noting that the § 1782 applicant "retain[ed] the procedural right to submit the requested documents to the magistrate overseeing the investigation. [And]

the proposition that the Second Circuit has a bright-line rule requiring that § 1782 applicants possess a participation right in order to satisfy the "for use" requirement. On the other hand, the court in *Accent Delight* described its holding in less-demanding language, describing the "for use" requirement by stating "we have focused in each [case] on the *practical ability* of an applicant to place a beneficial document—or the information it contains—before a foreign tribunal."[154] This language supports a broader reading of the "for use" requirement, less dependent on identifying a procedural *right* than on the practical ability to put discovery before a tribunal. The broader reading is also reflected in the court's approval of the *Berlamont* decision, which included no discussion of the applicant's participation rights.[155]

In sum, the Second Circuit has repeatedly declined to impose categorical limitations on the "for use" requirement, including rejecting proposed exhaustion,[156] admissibility,[157] and necessity[158] requirements and finding that a § 1782 applicant can satisfy the "for use" requirement without pursuing a claim for relief in the foreign proceeding.[159] Whether the Second Circuit recognizes a bright-line participation right requirement is unclear.[160] However, the Second Circuit most recently stated the focus of the "for use" inquiry is on the applicant's "*practical ability*" to inject the requested evidence into the foreign proceeding.[161] To put the Second Circuit's approach in context, Part II.B.2 surveys approaches to the "for use" requirement employed outside the Second Circuit. Part III then evaluates these approaches and suggests that courts should assess

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introduction of the discovery would be to their 'advantage' and 'serve some use' if it tends to prove [the] alleged fraud against them." (quoting Mees v. Buiter, 793 F.3d 291, 298 (2d Cir. 2015)).

154. *Id*. at 131 (emphasis in original).

155. *Id*. at 130–31. The Second Circuit's broad approach to the "for use" requirement was reinforced in the second aspect of *Accent Delight*, in which the court held that "[s]ection 1782 does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise." *Id*. at 135.

156. Application of Malev Hungarian Airlines, 964 F.2d 97, 100 (2d Cir. 1992).

157. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 81–82 (2d Cir. 2012).

158. *Mees*, 793 F.3d at 298.

159. In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017).

160. *Compare* Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 119 (2d Cir. 2015) *with Accent Delight*, 869 F.3d at 131.

161. *Accent Delight*, 869 F.3d at 131 (emphasis in original).

only an applicant's practical ability to inject evidence into a proceeding as part of its statutory analysis, while considering procedurual rights as part of its discretionary analysis.

2. Approaches to the § 1782 "For Use" Requirement Outside the Second Circuit

This section surveys approaches used outside the Second Circuit when a § 1782 application is opposed because the applicant cannot use the requested discovery in a foreign proceeding. Although other circuits have addressed the "for use" requirement, there is not much experience assessing participation rights outside of the Second Circuit.[162] Nevertheless, this section highlights relevant precedents outside the Second Circuit as they relate to the question at the heart of this Note: whether a § 1782 applicant must possess a procedural right or establish that evidence will actually be received into the proceeding to satisfy the "for use" requirement.

The circuits that have assessed whether § 1782 includes a foreign-admissibility requirement are largely in unison with the Second Circuit.[163] Prior to *Intel*, the First Circuit,[164] Third Circuit,[165] and Ninth Circuit[166] each held that § 1782 does not include a foreign-admissibility requirement. These precedents are rooted in the text of § 1782, but they also mirror *Euromepa*[167] in warning against delving too deeply into foreign law.[168] The Eleventh Circuit similarly directed its district courts not to assess the underlying merits of an applicant's claims in the foreign tribunal when assessing whether requested evidence will actually be used.[169]

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162. This reflects the fact that most § 1782 cases are likely to occur in the Second Circuit. McClellan, *supra* note 15, at 814 (citing Smit, *supra* note 21, at 13).

163. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 82 (2d Cir. 2012).

164. *See* In re Asta Medica, S.A., 981 F.2d 1, 7 n.6 (1st Cir. 1992) (holding that district courts "need not explore whether the information the applicants seek is admissible in the foreign jurisdiction or other issues of foreign law").

165. John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 138 (3d Cir. 1985) (holding that "concern for the ultimate admissibility of the discovered material [cannot] be argued as a limit on section 1782 orders").

166. In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, 555 F.2d 720, 723 (9th Cir. 1977) ("[F]ederal courts, . . . should not feel obliged to involve themselves in technical questions of foreign law relating to . . . the admissibility before such tribunals of the testimony or material sought").

167. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1096 (2d Cir. 1995).

168. *See, e.g.*, *Seoul Dist. Criminal Court*, 555 F.2d at 723.

169. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS

Similar decisions outside of the Second Circuit that have included assessments of participation rights arose in one Third Circuit case and a handful of district court cases occurring before and after *Certain Funds*. In *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC*, the Third Circuit quashed a discovery order, finding it had become moot because the relevant international arbitration had progressed to a point where the parties were waiting for a decision and no additional evidence would be accepted, so there was no longer a foreign proceeding where evidence could be used.[170] However, the applicant alleged it could reopen the arbitration and submit the requested discovery, or alternatively could use a "revision" procedure under Swiss law.[171] The Third Circuit rejected the reopening argument because the applicant previously requested expedited discovery orders by arguing evidence would be unusable after the close of the arbitration's evidence submission period.[172] Conversely, the Third Circuit did not reject the "revision" argument, but instead thought the proper procedure was for the applicant to submit a new § 1782 application so the district court would make the initial determination on those facts.[173]

Forwarding (USA), Inc., 747 F.3d 1262 (11th Cir. 2014) (holding that an argument that the applicant did not meet the "for use" requirement because the underlying dispute was meritless was not persuasive because district courts should not look to foreign law to address "whether any . . . underlying dispute [proffered by the applicant] and related persons has merit").

170. Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC, 341 F. App'x 821, 827–28 (3d Cir. 2009) (noting that in making this decision the Third Circuit was following the Second Circuit precedent of *Ishihara*, which dealt with whether a valid proceeding existed at the time of the discovery request (citing In re Ishihara Chem. Co., 251 F.3d 120, 122–23, 127 (2d Cir. 2001))). The mootness argument was utilized by the court because the district court had granted the § 1782 application in its discretion when the proceedings were at a different stage, but the Third Circuit felt that the statutory elements were no longer met and thus the issue was moot. *Id.*

171. *Id.* at 826–27 (describing how the § 1782 applicant cited "the UNCITRAL Arbitration Rules to contend that, even though the Arbitral Tribunal noted that the evidentiary phase was closed at the end of the hearing, CEL still has an opportunity to introduce new evidence in the proceeding" and "alternatively argue[d] that, even after the Arbitral Tribunal makes its award, it could still take advantage of a 'revision' procedure available under Swiss law").

172. *Id.* at 826 (noting that the applicant's "various arguments are themselves undercut by some statements it previously made to this Court in support of its unsuccessful motions to expedite").

173. *Id.* at 828 (finding that "it would not be proper for this Court to determine in the first instance whether discovery assistance should be granted with respect to a speculative 'revision' procedure. At the very least, [the applicant] should file a new application in the

The Third Circuit's review of the participation rights held by the applicant in *Rio Lempa* was searching, as the court looked to the specific procedures governing the international arbitration in making its decision.[174] However, this might be explained by the applicant's contradictory earlier assertions when arguing for expedited discovery.[175] That the Third Circuit did not outright reject the "revision" argument similarly reflects the likelihood that the Third Circuit simply felt the arbitration had already ended and any new use of the evidence required a new application.[176] It remains unclear whether the Third Circuit will require § 1782 applicants to possess a discrete participation right to survive a challenge under the "for use" requirement, but the Third Circuit appears to be in line with the Second Circuit in focusing on the applicant's "practical ability" to inject the discovery into a proceeding.[177]

In the district court cases, the U.S. District Court for the District of Columbia in *In re Veiga* held, prior to *Certain Funds*, that a § 1782 applicant satisfies the "for use" requirement merely by showing that it will provide the requested evidence to the foreign tribunal and ask that it be taken into consideration.[178] In *Veiga*, the applicant was challenged because it was unlikely the foreign tribunal would be receptive to the requested discovery since the discovery was sought with the intention of discrediting the tribunal itself.[179] However, because the applicants were litigants in the relevant proceedings, the district court felt the "for use" requirement was met.[180] Along with using broad language to describe the minimum

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District Court premised on this theory of 'revision'").

174. *Id*. at 826–27.

175. *Id*. at 826.

176. *Id*. at 828.

177. In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017).

178. In re Veiga, F. Supp. 2d 8, 18 (D.D.C. 2010) (indicating that "it is sufficient 'use' if the applicant will present the evidence sought to the foreign tribunal with a request that it be considered; the statute does not require the actual receipt of materials into evidence" (citing In re Application of Grupo Qumma, No. M 8-85, 2005 WL 937486, at *2 (S.D.N.Y. Apr. 22, 2005)).

179. *Id*. at 18, 24 (explaining that the "resistance [to granting the § 1782 application], at its core, reduces to a quarrel as to the Applicants' theory of those proceedings and the underlying validity of the claims and defenses asserted therein, supported with little more than alternative interpretations of the evidence [of foreign procedures] relied upon by Applicants"). The § 1782 application was one of many related to ongoing litigation involving Chevron's activities in Ecuador; in particular, this application sought documents for use in a court in Ecuador that proved "improprieties allegedly committed by its sovereign." *Id.*

180. *Id*.

showing necessary to satisfy the "for use" requirement, this decision was predicated on the finding that, as litigants, the applicants had at least some practical ability to ask the tribunal to consider the evidence, even if it was unlikely to enter the proceeding.[181]

The District Court for the District of Massachusetts faced a similar problem in *In re Schlich*, in which the court held the "for use" requirement was satisfied despite an argument that the only issue in the foreign proceeding was a pure question of law so the tribunal would not use the requested evidence.[182] Although all parties agreed that the statutory factors were met, the court denied the application after assessing the discretionary factors and finding the requested discovery would be irrelevant and that the tribunal would not be receptive to it.[183]

The import of *Rio Lempa* and the two district court cases to the participation right question is mixed because in each case the § 1782 applicant was a party to the relevant proceedings.[184] The courts were asked to assess the scope of the applicant's ability to participate in the proceedings, rather than whether the applicant had any procedurual rights at all. Therefore, these cases might be best

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181. *Id*.

182. In re Schlich, Civil Action No. 16-91278-FDS, 2016 WL 7209565, at *3 (D. Mass. Dec. 9, 2016).

183. *Id*. at 8 (noting that "[h]ere, it is undisputed that the first three statutory factors are met" but denying the application because "[the applicant] has not demonstrated that the [tribunal] would be receptive to the requested assistance, because the evidence in question does not appear to be relevant to the . . . proceeding."). The case involved a bitter controversy over patent rights to the innovative CRISPR/Cas9 genome-editing technology and is now on appeal to the First Circuit. *Id*. at 1. The underlying foreign proceeding is a patent challenge taking place in the European Patent Office ("EPO") and the crucial question concerns whether U.S. or European Patent law should govern the "inventorship" determination for the technology. *Id*. at 1–3. The district court determined that the requested discovery was material to an "inventorship" determination, but was irrelevant to the EPO because it would not be conducting such a determination. *Id*. at 6. However, and as will be discussed in Part III *infra*, when faced with identical facts the District Court for the Southern District of New York drew heavily on *Certain Funds* and held that the "for use" requirement had not been met because the irrelevance of the requested discovery meant that it was unlikely it would actually be used in the foreign proceeding. In re Schlich for Order to Take Discovery Pursuant to 28 U.S.C. § 1782, 16-MC-319 (VSB), 2017 WL 4155405, at *6 (S.D.N.Y. Sept. 18, 2017) (denying the § 1782 application "[b]ecause the question before the [tribunal] is whether United States law or European law applies, the material sought is plainly irrelevant to the foreign proceeding and not 'for use' in a foreign proceeding within the meaning of § 1782." (citing Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 120 n.7 (2d Cir. 2015)).

184. *See, e.g*., In re Veiga, 746 F. Supp. 2d 8, 18 (D.D.C. 2010).

understood as contributing to the admissibility requirement debate.[185] On the other hand, an admissibility requirement is a component of the larger question of what minimum showing is necessary to satisfy the "for use" requirement when one party alleges the requested discovery will not actually be used in a foreign proceeding. On that score, *Rio Lempa* and the district court cases indicate, in line with the Second Circuit,[186] that what matters is whether the applicant has some ability to put the discovery in front of the foreign tribunal, even if it will not be accepted into the proceeding.[187] It remains outstanding whether a § 1782 applicant can establish that it has this ability in the absence of a "discernible procedural right."[188]

3. Assessing the Lower Federal Courts Against *Intel* and the "Twin Aims" of § 1782

This section argues that interpreting the "for use" requirement as demanding that § 1782 applicants either possess a "discernible procedural right" or establish that the requested evidence will actually be received into the foreign proceeding is not faithful to the text and twin aims of § 1782 or the *Intel* decision.[189] This section analyzes the participation rights at play in *Intel*, then looks to the admissibility requirement debate to argue by analogy that the "for use" requirement does not demand a participation right or a demonstration that the requested evidence will be received into the foreign proceeding. The section closes by returning to the transnational bankruptcy scenario to demonstrate how a narrow reading of the "for use" requirement will violate the statute's twin aims and limit the beneficial effects Congress intended when it passed § 1782.

As a threshold matter, nowhere does the text of § 1782 explicitly provide for a participation right requirement.[190] The

185. *See, e.g.*, Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 81–82 (2d Cir. 2012); In re Asta Medica, S.A., 981 F.2d 1, 7 n.6 (1st Cir. 1992); John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 138 (3d Cir. 1985); In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, 555 F.2d 720, 723 (9th Cir. 1977).

186. In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017); *but cf. In re Schlich*, 2017 WL 4155405, at *6 (holding that the "for use" requirement was not met because the requested discovery was not relevant to the foreign proceeding).

187. *See, e.g.*, *Veiga*, 746 F. Supp. 2d at 18.

188. *Certain Funds*, 798 F.3d at 116 (quoting Special App'x 14.).

189. *Id.*; Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257–58 (2004).

190. 28 U.S.C. § 1782 (2018).

argument for requiring participation rights or actual receipt of the evidence is a proposed interpretation of the words "for use."[191] Rejection of a foreign-discovery requirement in *Intel* signaled the Supreme Court's reluctance to infer categorical limitations into § 1782 without explicit textual support.[192] Whether a participation right requirement can be inferred from the text of § 1782 is a closer question because of the relationship between the right to participate in a proceeding and the practical ability to "use" evidence by placing it before the tribunal.

Applying the Supreme Court's guidance in *Intel* to participation rights requires understanding the participation rights at play in *Intel*. The only "use" recognized by the court in *Intel* was the applicant's ability to submit evidence to the DG-Competition in its investigative stage.[193] The question the court answers in *Intel* is whether submitting discovery to the DG-Competition satisfies the "for use" requirement.[194]

In light of the modest participation rights held by the applicant in *Intel*, lower courts' rejection of a foreign-admissibility requirement is in line with *Intel*. The *Intel* applicant could only submit information to the DG-Competition and hope it would be used in recommending antitrust enforcement to the European Commission. This position is analogous to a person with a practical ability to put information before a foreign tribunal but no certainty that the information will be admitted into the proceeding.[195] As such, the

191. *See, e.g.*, Mees v. Buiter, 793 F.3d 291, 298 (2d Cir. 2015) (noting "in several other contexts we and the Supreme Court have declined to read into the statute requirements that are not rooted in its text").

192. *Intel*, 542 U.S. at 243; *Mees*, 793 F.3d at 298.

193. *Intel*, 542 U.S. at 257 (noting that the applicant "could 'use' evidence in the reviewing courts *only* by submitting it to the Commission in the current, investigative stage." (emphasis added)). This limited view of the applicant's participation rights led the court in *Intel* to assess whether the DG-Competition's investigation constituted a "proceeding in a foreign or international tribunal." *Id*. at 258. Surprisingly, in quoting this aspect of the *Intel* decision, the court in *Certain Funds* excerpted the word "only," instead stating the "applicant 'could 'use' evidence in the reviewing courts . . . by submitting it to the Commission in the current, investigative stage,' and then relying on that evidence before the Commission itself and the reviewing courts." Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118 (2d Cir. 2015).

194. *Intel*, 542 U.S. at 257–58.

195. *See, e.g.*, Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 81–82 (2d Cir. 2012) (rejecting a foreign-admissibility requirement and granting a § 1782 application seeking discovery for use in an appellate proceeding despite an argument that evidence was not "for use" in the proceeding because domestic procedure sharply limited the ability to submit new evidence on appeal).

Second Circuit properly interpreted *Intel* in concluding that § 1782 does not include a foreign-admissibility requirement.[196] Other circuits that drew the same conclusion prior to *Intel* should also remain good law.[197]

The position of the applicant in *Intel* is also "remarkably similar" to the applicant in the Second Circuit's *Berlamont* and *Accent Delight* decisions.[198] Like the applicants in *Intel*, the *Berlamont* and *Accent Delight* applicants had initiated foreign investigations and, although not pursuing private claims for relief, each had a practical ability to put discovery before the relevant foreign tribunal even though there was no guarantee the discovery would be used by the tribunal.[199] This "striking similarity" indicates that the holdings in *Berlamont* and *Accent Delight* were faithful to *Intel*.[200] Conversely, the holdings in *Rio Lempa* and *Certain Funds*, to the extent they require a showing that discovery will be received into the foreign proceeding, are less consistent with *Intel*. The decision in *Rio Lempa* can be explained by the Third Circuit's belief that the foreign proceeding had ended.[201] However, the decision in *Certain Funds* stems from a misconstruction of the participation rights at play in *Intel*.

The court in *Certain Funds* wrote that the *Intel* applicant could "rely[] on . . . evidence before the Commission itself and the reviewing courts."[202] This is not an accurate description of the

196. *Id.*

197. *See, e.g.*, In re Asta Medica, S.A., 981 F.2d 1, 7 n.6 (1st Cir. 1992). Professor Smit also agreed that § 1782 does not include a foreign-admissibility requirement. In an article cited throughout the *Intel* decision, Professor Smit argues that although courts applying § 1782 "have not drawn sharp distinctions between non–discoverability and non–admissibility under foreign law," in his view neither is a requirement for § 1782 authorization. Smit, *supra* note 21, at 13 (arguing "Section 1782 does not make discoverability or admissibility under foreign law a prerequisite to proper recourse to Section 1782").

198. In re Accent Delight Int'l Ltd., 869 F.3d 121, 129–30 (2d Cir. 2017) (noting that the "applicant in *Intel* stood in a remarkably similar position *vis-à-vis* the foreign tribunal in that case as [the applicants here] do . . . in the Monégasque proceeding" and that "the facts underlying the successful Section 1782 application in *Berlamont* bore a striking similarity to those in this case").

199. *Id.*

200. *Id.*

201. Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC, 341 F. App'x 821, 827–28 (3d Cir. 2009). S*ee also* Part II.B.2, *supra*.

202. Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118 (2d Cir. 2015). *See also* note 193, *supra*, illustrating the Second Circuit's description of the participation rights at issue in *Intel*.

limited participation rights recognized by the court in *Intel* because the *Intel* applicant could not guarantee the DG-Competition would use any discovery provided to it.[203] Therefore, the Second Circuit's conclusion that "by adopting the phrase 'for use,' Congress plainly meant to require that § 1782 applicants show that the evidence sought is 'something that will be employed with some advantage or serve some use in the proceeding'" is not in line with *Intel*.[204]

Certain Funds also contradicts the arguments underlying rejection of a foreign-admissibility requirement. If likely exclusion of requested evidence by the foreign tribunal does not jeopardize a § 1782 applicant, it does not follow that a § 1782 applicant must possess a participation right sufficient to show evidence "will be employed with some advantage or serve some use in the proceeding."[205] The Court in *Certain Funds* addresses this conflict in a footnote, stating that identification of a participation right is a different inquiry from questions of foreign admissibility.[206] This is true, but the practical consequence is the same: evidence excluded by the tribunal, like evidence sought without the ability to inject it into the proceeding, is evidence that is unlikely to serve any use in the proceeding.[207]

If the narrower view of the "for use" requirement described in *Certain Funds* is more fully embraced by the Second Circuit or adopted by other circuits, it would limit the judicial assistance Congress intended district courts to provide when it passed § 1782. That outcome would contravene the broad view of § 1782 that was embraced by the court in *Intel*.[208] Recalling the transnational

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203. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257–58 (2004).

204. *Certain Funds*, 798 F.3d at 120 (quoting Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015)).

205. *Id*.

206. *Id*. at 122 n.11.

207. There may be limited scenarios where excluded evidence could serve some useful purpose, and the court in *Brandi-Dohrn* recognized that "there are circumstances under which the [tribunal] could hear new evidence—regardless of how narrow those circumstances might be." 673 F.3d 76, 83 (2d Cir. 2012). There similarly may have been limited scenarios where the evidence requested by the applicant in *Certain Funds* could find its way into the proceedings, perhaps if relevant information were discovered then provided to the Saudi delegate, even if not through a formal procedure. The import of *Brandi-Dohrn* is that applicants do not need to show that evidence will actually be received into the foreign proceeding so long as the facts support the possibility of a good faith effort to inject them into the proceeding. *Id*.

208. *Intel* 542 U.S. at 265–66. The Court stated that even the European Commission's statement to the Court that it did not want or need American judicial assistance did not warrant a categorical limit on the assistance authorized by § 1782, although such information

bankruptcy scenario outlined in Part II.A, it is possible that courts will face § 1782 applications from persons who cannot prove a discernible participation right because of the inchoate state of the foreign tribunal.[209] Applications might also emerge from criminal investigation in developing jurisdictions where victims are working with investigators on a less formal basis than the victims in *Berlamont* and *Accent Delight*.[210]

Based on the twin aims of § 1782, district courts should be open to providing judicial assistance in these scenarios if the statutory factors are met because provision of U.S. judicial assistance to incipient foreign tribunals might encourage the development of procedures for those tribunals to provide judicial assistance back to the United States. If district courts are told that a participation right is necessary to satisfy the "for use" requirement, they will not be able to provide that assistance. Nonetheless, participation rights are a relevant factor in § 1782 analysis. To that end, Part III proposes that district courts include a searching assessment of participation rights not under the rubric of the "for use" requirement, but rather in the discretionary analysis.

III. A MORE FLEXIBLE APPROACH TO PROCEDURAL RIGHTS AND THE § 1782 "FOR USE" REQUIREMENT

This Part suggests district courts employ a permissive

would be relevant when considering the discretionary factors. *Id*. *Intel* has received criticism on the grounds that a categorical foreign-discoverability requirement would have better served the statute's twin aims by requiring district courts to more seriously assess foreign receptivity to the requested discovery. *See, e.g.*, Deborah C. Sun, Note, Intel Corp. v. Advanced Micro Devices, Inc.: *Putting "Foreign" Back into the Foreign Discovery Statute*, 39 U.C. DAVIS L. REV. 279, 302 (2005) (outlining the benefits of requiring district courts to assess foreign-discoverability). Others have suggested that a quasi-exhaustion requirement is necessary to protect judicial comity in the face of foreign tribunals irritated by expansive American discovery. Massen, *supra* note 2, at 932. The recent post-*Intel* rejection of a foreign-admissibility requirement indicates that these proposals are unlikely to gain traction in the federal judiciary and do not reflect the proper view of congressional policy favoring broad U.S. judicial assistance contained in § 1782. *See, e.g.*, *Brandi-Dohrn*, F.3d at 81–82.

209. *See* Part II.A, *supra*, describing the Saudi bankruptcy system as still developing, with its first bankruptcy code to be implemented in early 2018.

210. In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017) (granting a § 1782 application from a victim of a crime who had disclaimed his right to damages in the criminal proceedings); *Berlamont*, 773 F.3d 456, 461 (2d Cir. 2014) (granting a § 1782 application from a victim of a Ponzi scheme seeking to obtain evidence to provide to a magistrate investigating the alleged crimes in Switzerland).

interpretation of the "for use" requirement focused exclusively on the practical ability of an applicant to put discovery in front of the foreign tribunal for consideration. Instead of assessing an applicant's participation rights under the "for use" requirement, this section proposes district courts consider procedural or participation rights when conducting the discretionary analysis. This reflects an effort to ensure district courts can provide judicial assistance to less-developed legal systems while still addressing the concerns that animate desire for a participation right requirement, namely preventing unwanted "fishing expeditions."[211] Part III.A discusses the relationship between the "for use" requirement and the "interested person" requirement and then outlines the role that participation rights should play in analysis of each requirement. Part III.B explains why participation rights should be assessed under the discretionary factors.

A. The Proper Role of Participation Rights in the "For Use" and "Interested Person" Requirements

This Note does not suggest that participation rights have no role to play in statutory analysis of a § 1782 application. Participation rights should be thought of as valuable evidence that a § 1782 applicant can use to satisfy the "for use" and "interested person" requirements, but should not be included as a categorical limitation on either. As the Second Circuit noted in *Certain Funds*, the "for use" and "interested person" requirements are interrelated.[212] That overlap is reflected in the fact that participation rights can be relevant to assessing whether an applicant is an "interested person" and whether discovery will be used in a proceeding.[213] Faced with this overlap, the court in *Certain Funds* chose to not answer the "interested person" question and held that the applicants' lack of participation rights did not satisfy the "for use" requirement.[214] This decision reflects a desire to prevent applicants from abusing U.S. judicial assistance to conduct "fishing expeditions" without an

211. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 245 (2004) (describing the dissent's fear that without a foreign-discoverability requirement § 1782 will be misused to obtain discovery based on mere speculation).

212. Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118 (2d Cir. 2015).

213. *Id*. (noting that "the Court [in *Intel*] relied [on the applicant's participation rights] in finding that the applicant was an 'interested person'").

214. *Id*. at 120–21.

interest in a proceeding.[215] Preventing abuse of U.S. judicial assistance is important, but requiring that applicants possess participation rights focuses too intently on preventing abuse at the expense of providing broad judicial assistance in line with the statute's twin aims.

Courts can solve this problem by following the Second Circuit in *Accent Delight* and defining the "for use" requirement as a question about an applicant's practical ability to put discovery before a tribunal for consideration.[216] A § 1782 applicant could satisfy this formulation of the "for use" requirement by showing its intent to make a "good faith" effort to inject the requested evidence into the foreign proceeding.[217] Probative evidence could be communications from the foreign tribunal as to receptivity to requested evidence or other indications of a semi-formal relationship with the foreign tribunal.[218] Simply "reciting some minimal relation to a pending foreign proceeding" would not suffice.[219] Participation rights would remain relevant as evidence of practical ability to use discovery, but identification of a "discernable procedural mechanism" would not be required to meet the "for use" requirement.[220]

If an applicant demonstrates its practical ability to inject the requested evidence into the foreign proceeding, the district court must also assess whether the applicant is an "interested person." The Supreme Court in *Intel* held that substantial procedural rights can indicate an applicant "possesses a reasonable interest in obtaining judicial assistance, and therefore qualifies as an interested person within any fair construction of that term."[221] As with the "for use" requirement, significant participation rights should remain probative

215. *Certain Funds*, 798 F.3d at 122, 124 n.14; *Intel*, 542 U.S. at 245, 264–65.

216. In re Accent Delight Int'l Ltd., 869 F.3d 121, 131 (2d Cir. 2017).

217. In re Veiga, 746 F. Supp. 2d 8, 18 (D.D.C. 2010).

218. In *Berlamont*, for example, the Second Circuit held that the "for use" requirement was satisfied because the "investigating magistrate has explicitly stated that the [requested discovery] would be 'of great usefulness to [his] inquiry.'" *Berlamont*, 773 F.3d 456, 461 (2d Cir. 2014). Other than the preceding quote, the court did not discuss what participation or procedural rights the applicant might have had. *Id*. This liberal approach to the "for use" requirement employed by the Second Circuit was likely influenced by the fact that as a victim of the crime being investigated, the applicant was clearly an interested person under § 1782.

219. In re Asia Mar. Pac. Ltd., 253 F. Supp. 3d 701, 706 (S.D.N.Y. 2015) (citing Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 118–22 (2d Cir. 2015)).

220. *Certain Funds*, 798 F.3d at 122 n.11 (internal citation omitted).

221. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256–57 (2004).

evidence that an applicant is an "interested person."[222] But a truly interested applicant, such as a crime victim, should be able to survive the "interested person" analysis even she cannot demonstrate "a discernable procedural right" with absolute certainty.[223]

This approach to the "for use" and "interested person" requirements rejects a formalistic participation right requirement unsupported by the text of § 1782 in favor of forcing district courts to address directly whether § 1782 applicants seek to misuse U.S. judicial assistance. For example, a crime victim seeking evidence to submit to a foreign authority that is receptive to the evidence is less likely to abuse U.S. judicial assistance than a non-victim seeking the same discovery without any evidence suggesting she is working with foreign authorities. In a case like *Certain Funds*, the court would have to answer the "closer questions" of "[w]hether the Funds are 'interested person[s]' based on their alleged ability to put evidence before other persons who are parties to the foreign proceedings, or by dint of their status as creditors in the liquidation actions. . . ."[224]

Although rejecting a participation rights requirement creates difficult questions for district courts, the Supreme Court provided guidelines in the form of discretionary factors.[225] That these guidelines exists underlies the suggestion above that assessment of § 1782 statutory requirement should be permissive and not extend beyond the text of the statute. The result allows courts to reach the crucial question—whether the applicant seeks to abuse U.S. judicial assistance—without establishing categorical limitations that limit future U.S. judicial assistance.

B. Discretionary Factors Are the Proper Mechanism for Addressing Concerns About Use of the Requested Discovery

The approach outlined above allows district courts to use their discretion to address whether an applicant seeks to misuse U.S. judicial assistance. This suggestion mirrors *Intel*, in which the court rejected a foreign-discoverability requirement in favor of

222. *See* RTI Ltd. v. Aldi Marine Ltd., 523 F. App'x 750, 751–52 (2d Cir. 2013) (holding that a corporation was not an interested person because "[the applicant corporation] has not shown that it enjoys significant participation rights, but instead that its sister corporations do").

223. *Certain Funds*, 798 F.3d at 122 n.11 (internal citation omitted); *see Berlamont*, 773 F.3d at 461.

224. *Certain Funds*, 798 F.3d at 119.

225. *Intel*, 542 U.S. at 264–67.

discretionary factors that address the concerns motivating desire for a categorical limitation.[226] District courts should take the same approach to participation rights because neither the text nor purpose of § 1782 supports a participation right requirement. Moreover, the existing discretionary factors are sufficient to address concerns about participation rights because two of the four *Intel* discretionary factors already ensure that § 1782 applicants do not abuse U.S. judicial assistance.[227] The first factor directs district courts to consider the nature of the foreign tribunal and whether it would be receptive to the requested evidence.[228] The second factor asks whether the § 1782 applicant seeks to circumvent foreign discovery procedures.[229]

Divergent opinions issued by the Southern District of New York[230] and the District of Massachusetts[231] when faced with near identical § 1782 applications illustrate the doctrinal approach this Note suggests. The District of Massachusetts held that the statutory factors were met but denied the application after considering the nature of the tribunal and its receptivity to the requested discovery because the requested discovery was not relevant to the foreign proceedings.[232] On the same facts, the Southern District of New York held that the "for use" requirement was not satisfied because

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226. *Id*. (noting "factors that bear consideration in ruling on a § 1782(a) request" and explaining that "the grounds . . . urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case"). In addition to rejecting categorical limitations, the court in *Intel* also declined to adopt supervisory rules, believing flexibility better served the twin aims of § 1782. *Id.* at 265.

227. *Id*. at 265 n.17 (rejecting categorical limitations because "[t]here is no evidence whatsoever, in the 40 years since § 1782(a)'s adoption . . . of the costs, delays, and forced settlements the dissent hypothesizes"). *But cf.* Massen, *supra* note 2, at 921–25. Massen argues that the discretionary factors are insufficient to prevent causing offense to foreign tribunals because assessment of foreign receptivity is optional. This is not precisely relevant because it concerns causing offense to foreign tribunals as opposed to misuse of U.S. judicial assistance and reflects disagreement with congressional policy favoring broad judicial assistance rather than with § 1782 jurisprudence. Regardless, the approach advocated by this Note would require some evidence of foreign receptivity in order to survive discretionary review without a clear participation right, thus Massen's concerns would be addressed.

228. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004).

229. *Id*. at 264–65.

230. In re Schlich, No. 16-MC-319 (VSB), 2017 WL 4155405, at *6 (S.D.N.Y. Sept. 18, 2017).

231. In re Schlich, No. 16-91278-FDS, 2016 WL 7209565, at *3 (D. Mass. Dec. 9, 2016).

232. *Id*.

the discovery's irrelevance meant it would not be used in the proceeding.[233]

Although both applications were denied, wider adoption of the Southern District of New York's approach would give district courts little flexibility to deal with § 1782 applications seeking allegedly irrelevant evidence. A court following the approach used by the Southern District of New York would have to reject the § 1782 application on statutory grounds, whereas a court following the approach used by District of Massachusetts could use its discretion to deny the request or narrowly tailor a discovery procedure that better addresses the alleged irrelevance of the requested evidence than wholesale rejection.[234] Following the District of Massachusetts's approach when assessing participation rights, as opposed to irrelevance, would provide the same benefits. Given the twin aims of § 1782, federal courts should embrace the more flexible approach suggested by this Note. That approach allows district courts to use their discretion to handle difficult § 1782 applications that might emerge from still-developing legal institutions without unnecessarily limiting U.S. judicial assistance and the concomitant benefits Congress expected from its provision.[235]

CONCLUSION

At its most basic level, this Note aims to take a facially reasonable interpretation of § 1782—that applicants must possess a "discernible procedural right" to use evidence to satisfy the "for use" requirement—and explain why it is unreasonable.[236] In so doing, this Note argues that foreign proceedings are not always as clean cut as U.S. courts expect.[237] Absent explicit textual support to the contrary, demonstrating possession of a discrete participation right should not be a minimum requirement to satisfy the "for use" requirement. Instead, this Note advocates an approach that privileges judicial

233. *In re Schlich*, 2017 WL 4155405, at *6 (rejecting the § 1782 application because "[p]etitioner has not identified any way that it can employ the material sought before the EPO, given the limited choice–of–law question before it").

234. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004).

235. Smit, *supra* note 21, at 13 (arguing "the court should not seek to render less liberal the assistance the legislator so clearly prescribed").

236. Certain Funds, Accounts and/or Inv. Vehicles v. KPMG, L.L.P., 798 F.3d 113, 122 n.11 (2d Cir. 2015) (internal citation omitted).

237. *See* Part II.A, *supra*, describing transnational bankruptcy and Islamic finance.

flexibility and asks district courts to use their discretion to directly assess the question at the heart of a § 1782 application: does the applicant seek to abuse the broad grant of U.S. judicial assistance that Congress provided?

Whether the context is an inchoate foreign bankruptcy system called into action during the next global financial crisis or a foreign criminal investigation cooperating in some less-than-formal way with victims, district courts should be able to provide the full extent of judicial assistance Congress envisioned when it passed § 1782. Moreover, the text of § 1782 does not indicate that § 1782 prefers the legal institutions of developed countries over those of less-developed countries.[238] Therefore, rejecting a participation right requirement and assessing underlying concerns about misuse of U.S. judicial assistance through the *Intel* discretionary factors best achieves the statute's twin aims and is most faithful to the guidance provided by the Supreme Court.[239]

*Andrew Scappaticci Brickfield**

238. 28 U.S.C. § 1782 (2018); *but cf.* In re Accent Delight Int'l Ltd., 869 F.3d 121, 130 (2d Cir. 2017) (rejecting an argument that § 1782 "prefers claims for damages or pleas for enforcement of antitrust laws over the interest of a fraud victim in assisting in the prosecution of a fraudster").

239. *Intel*, 542 U.S. at 265.

* Andrew Scappaticci Brickfield is a student at Columbia Law School, a native of New Jersey, a recreational hockey player, and a home cook.