A COMPARATIVE CRITIQUE TO U.S. COURTS' APPROACH TO E-DISCOVERY IN FOREIGN TRIALS

LAUREN ANN ROSS[†]

ABSTRACT

This Issue Brief explores an oft-neglected irony in international e-discovery: the rationales used by courts to compel discovery against foreign parties embroiled in litigation in U.S. courts may contradict courts' reasoning when compelling discovery against U.S. parties engaged in litigation overseas. U.S. courts often grant petitions for discovery, increasingly electronic in form, both against a foreign party in the U.S. and against a domestic party abroad. Although allowing discovery in both scenarios appears consistent, it actually ignores important counterconsiderations like fairness and reciprocity in different legal systems. Because the rise of technology has exacerbated the existing problem, making discovery more expensive and time-consuming, this Brief proposes that, when examining 28 U.S.C. § 1782 claims, courts adopt a more conservative approach to foreign-discoverability and a comparative approach to the balancing test set forth in Intel Corp. v. Advanced Micro Devices, Inc.

INTRODUCTION

In 2009, Heraeus Kulzer GmbH (Heraeus), a German company, petitioned the District Court for the Northern District of Indiana for an order under 28 U.S.C. § 1782[1] compelling U.S.-style discovery against Biomet, a U.S. company embroiled in a trade secrets dispute with Heraeus in the German courts.[2] In both the German proceedings and the U.S. § 1782 motion, Heraeus alleged that Biomet stole its trade secrets regarding a bone-cement product and produced its own version of the product in 2005.[3] To prove its case, Heraeus sought electronic discovery (e-discovery) of a vast

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[†] J.D. & LL.M. in International & Comparative Law candidate at Duke University School of Law, 2013; B.A. in History and Political Science, Vanderbilt University, 2010. I would like to thank Professor Thomas Metzloff for his help on this topic. All mistakes are my own.

[1] 28 U.S.C. § 1782 (2006).

[2] Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 596 (7th Cir. 2011).

[3] *Id.*

number of documents, dating back to 1996, relating to Biomet's development of its bone-cement product "from conception to finished formula[,] and the steps used to manufacture the products," including communications between Biomet and third-party companies.[4] The discovery request was of typical breadth for U.S. litigation, requesting "all documents referring or relating to" various matters "defined to the broadest extent permitted by law."[5]

Although Heraeus's petition was not an unusual request for U.S. courts, almost all of the documents requested were completely *unobtainable* within the frame of the ongoing German litigation.[6] As the Seventh Circuit noted when the decision was appealed, "[a] party to a German lawsuit cannot demand categories of documents from his opponent. All he can demand are documents that he is able to identify specifically—individually, not by category."[7] Nonetheless, the Seventh Circuit reversed and remanded the district court's denial of the § 1782 motion. On remand, the Seventh Circuit directed the district court to "not bother itself with section 1782 any longer," but instead "to consider Heraeus's requests as it would any other discovery request in a complex case," under Rule 26 of the Federal Rules of Civil Procedure (FRCP).[8]

This Issue Brief uses *Heraeus* as a springboard to explore 28 U.S.C. § 1782 discovery request motions in the context of e-discovery in civil litigation.[9] It argues that the courts' reasoning is problematic because it fails to address comparative law. As such, this Brief proposes a more limited view of § 1782 requests based on the idea that different legal systems have different procedures for a reason, at least partially because one procedure (here, the scope of discovery) is connected to countless other procedures (e.g., factfinding, admissibility of evidence, etc.). A provision like § 1782—that allows one party, but not both, a workaround in one area of civil procedure—should be examined in light of its repercussions in *foreign* litigation rather than treated as a normal request under the FRCP in U.S. domestic litigation. Only by examining the matter using a comparative

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[4] *In re* Application of Heraeus Kulzer for Order Pursuant to 28 U.S.C. section 1782, No. 3:09309-CV-183RM, 2009 WL 2058718, at *2 (N.D. Ind. July 9, 2009) *rev'd sub nom.* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591 (7th Cir. 2011).
[5] *Id.* The request further defined "the terms 'concerning' or 'relating to' [to] mean 'in any way relevant to the subject matter of the request.'" *Id.*
[6] *Heraeus Kulzer*, 633 F.3d at 596.
[7] *Id.*
[8] *Id.* at 599.
[9] Section 1782 has also been applied to foreign criminal proceedings against U.S. domiciliaries. *E.g. In re* Czech, No. 3:08-mc-001-J-33TEM, 2008 WL 179263, at *2–3 (M.D. Fla. Jan. 17, 2008).

approach can a court truly assess the fairness of granting a discovery request in a foreign proceeding.

The analysis proceeds in four parts. Part I provides background material. It first gives an introduction to the differences between the U.S. legal system and the civil law system that exists in most other countries, with special attention to evidence-gathering procedures. A discussion of the explosive growth of electronic information and its role in the discovery process follows. Part II summarizes the jurisprudence surrounding § 1782 requests. Part III uses comparative law techniques to highlight the equitable shortcomings of current § 1782 jurisprudence by (i) examining potential abuse, (ii) contrasting § 1782 jurisprudence with the reasoning courts use in granting discovery requests against international parties in U.S. trials, and (iii) comparing e-discovery to forum non conveniens jurispurdence. Part IV then proposes a two-part change in § 1782 jurisprudence that would give courts the discretion to bar discovery requests based on foreign-discoverability rules and adopt a comparative law approach to the balancing test in *Intel Corp. v. Advanced Micro Devices, Inc.*,[10] due to the changing nature of technology and exponential growth of e-discovery.

I. BACKGROUND

Discovery, the evidence-collecting, fact-gathering middle-step of litigation, has often posed difficulties in cross-border litigation.[11] Different countries have different legal systems, which typically have different perceptions of privacy, different views on the amount of information discoverable in civil proceedings, and different evidentiary standards.[12] Trials that involve litigants from different countries or between litigants from the same nation that require evidence in a second state compound these differences.[13] As we enter an age in which most evidence is in the

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

[11] *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 522 (1987) (holding that the Federal Rules of Civil Procedure should still be employed by U.S. courts, even when they conflict with rules from the Hague Convention on Evidence, to which the U.S. is a party); *cf.* Blackmer v. United States, 284 U.S. 421, 442 (1932) (requiring a U.S. citizen to return from France to the United States to present testimony as a witness in a criminal trial in the U.S.).

[12] For a more detailed description of these complex, interrelated questions, see *infra* Part I.A.

[13] *See, e.g.*, Bodner v. Paribas, 202 F.R.D. 370, 375–76 (E.D.N.Y. 2000) (holding that an American court did not have to recognize a French blocking statute due to either personal privacy or national interests); Strauss v. Credit Lyonnais, S.A., 242 F.R.D. 199, 227–28 (E.D.N.Y 2007) (granting plaintiff's discovery request for

form of electronically-stored information (ESI), the difficulties have not become simpler. The very technology that makes it easier to transfer evidentiary data from one country to another also makes the process more challenging. Because modern discovery involves significantly more data than in the past, the flood of information exacerbates concerns regarding the cost and duration of discovery, as well as the protection of litigants' privacy.[14] This segment includes background information regarding transnational discovery in the digital age in two parts: Section A gives a brief comparative approach, and Section B narrows the topic to discovery with a focus on ESI and the data revolution of the past two decades.

A. Comparative Law and its Relation to International Discovery

Quite simply, comparative law "is the comparison of the different legal systems of the world."[15] Comparative law scholars compare and analyze "the spirit and style of different legal systems, the methods of thought and procedures they use" at the macrolevel,[16] and the differences in "specific legal institutions[, and] the rules used to solve actual problems or particular conflicts of interests" at the microlevel.[17] Instead of simply describing different foreign legal systems, comparative law makes explicit comparisons between different legal systems and focuses on the functional significance of those differences.[18] Whether or not American judges explicitly state their reliance on comparative law techniques in transnational litigation decisions, judges often do incorporate the comparison of different legal systems into their opinions,[19] including in e-discovery cases.[20]

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financial records relating to terrorist financing). A French lawyer involved with the *Strauss* case was convicted under French law for violating the blocking statute. SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE IN A NUTSHELL 208, West Nutshell Series, (2009).

[14] For example, many nations have strict data-protection laws, and some European nations have enacted blocking statutes that proscribe compliance with American courts' discovery orders. *E.g.* CODE PÉNAL [C. PÉN.] loi no. 90-538, art. 1A (Fr.); SCHWEIZERISCHES STRAFGESETZBUCH [STGB], CODE PÉNAL SUISSE [CP], CODICE PENALE SVIZZERO [CP] [CRIMINAL CODE] art. 273 (Switz.); Pres. Dec. No. 1718 (Phil.).

[15] KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 2 (Tony Weir trans., 3d rev. ed. 1998).

[16] *Id.* at 4.

[17] *Id.* at 5.

[18] John C. Reitz, *How to do Comparative Law*, 46 AM. J. COMP. L. 617, 617 (1998).

[19] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003) (discussing a European Court of Human Rights case that paralleled the facts of the case at issue in the litigation); Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J.,

Comparative law often focuses on the world's two primary legal traditions: common law and civil law.[21] Common law, the supposed "seamless web" of judge-made law, predominates in the former British Empire,[22] while civil law, found throughout most of Europe, much of Latin America, and many countries around the rest of the globe, relies on detailed legislative codes.[23] Tangible differences stem from the different origins, development, and general *geist* of these two systems and affect procedure (as well as substantive rules, of course) in everyday litigation.[24] Examples include differences in personal jurisdiction[25] and service of process[26] in civil and common law countries.

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concurring) ("The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations or decrees enacted by the central 'federal' body."); Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 651–54 (1952) (Jackson, J., concurring) (discussing the emergency governments of France, Germany, and the United Kingdom after World War in contrast to the U.S. president's constitutional powers); Bodum USA, Inc. v. La Cafétière, Inc., 621 F.3d 624, 633–38 (7th Cir. 2010) (Posner, J., concurring) (comparing provisions in the French Civil and Commercial Codes relating to parole evidence to the U.S. common law approach to the topic).

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

[21] JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 1 (3d ed. 2007).

[22] *See generally* Geoffrey Samuel, *Common Law*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 145, 145–53 (Jan Smits ed., 2006) (introducing the common law as a legal tradition).

[23] *See generally* Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 FLA. ST. J. TRANSNAT'L L. & POL'Y 163, 163–70, 3–10 (discussing the history of and importance of codes in the civil law tradition).

[24] *See, e.g.*, Mauro Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 885–86 (1971) (discussing the connection of the field of procedure with greater societal values, customs, and trends as part of a call to broaden procedural legal studies). For example, civil and common law countries have quite different rules relating to personal jurisdiction in international cases.

[25] *See* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1007–11 (2006) (discussing differences in jurisdiction that result from the "style and flexibility" of the legal systems' rules, divergent goals due to differences in the regulatory nature of litigation, and different actors involved in the creation and enforcement of the rules).

[26] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 880–81 (5th ed. 2011) (describing the differences in

These distinct legal systems also significantly affect rules on the gathering of evidence and discovery. To start, U.S.-style discovery is much broader than discovery almost anywhere else in the world, based on the "premise . . . that fair, effective dispute resolution requires giving litigants the legal power to obtain largely unhindered access to all information that could be relevant to the resolution of their dispute."[27] This information is intended to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and the facts disclosed to the fullest practicable extent."[28] In the adversarial common law system, private parties direct the litigation; by contrast, the court and the judge have a more active role in the inquisitorial civil law tradition.[29] For example, the court—rather than the parties—is responsible for gathering evidence in a civil law country,[30] and because many civil law countries regard the evidence-gathering process as a *sovereign* act, private parties are not allowed to collect evidence on their own.[31] Similarly, in European civil law, a litigant's privacy rights are significantly broader terms than in American common-law courts.[32]

The distinct nature of the factfinder also creates dissimilarities in the discovery process among nations. The common law jury system, particularly in America, has shaped evidentiary rules, many of which are devoted to ensuring that the finder of fact (the jury) properly considers what

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concepts regarding service of process in U.S. courts, where it is generally a routine undertaking by the plaintiff, and in civil law systems, where it is effected by designated officials under the court's supervision).

[27] *Id.* at 965.

[28] *Id.* at 966 (quoting United States v. Proctor & Gamble Co., 356 U.S. 677, 682–83 (1958)).

[29] *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1682–83 (2009) ("This is one of two grand axes along which comparative law scholars, following Mirjan Damaska, tend to divide adversarial, common law process from inquisitorial, civil law process; the other axis distinguishes the 'hierarchical' organization of civil law adjudication from the flatter, more 'coordinate' organization traditionally associated with common law courts.").

[30] Kathleen Braun Gilchrist, Note, *Rethinking Jurisdictional Discovery under the Hague Evidence Convention*, 44 VAND. J. OF TRANSNAT'L L. 155, 161 (2011).

[31] BORN & RUTLEDGE, *supra* note 26, at 969.

[32] *See* Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery's Threat to Civil Litigation: Reevaluation Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 524 (2011) ("Not surprisingly, the exercise of such broad and invasive investigatory powers by private litigants in American civil courts has appalled much of the civilized world, particularly when American courts purport to authorize or even order an investigative process that extends, vigilante-like, into other countries.").

lies before them.[33] Because the judge is the finder of fact in the civil law system, the same evidentiary protections are not required—the judge is deemed capable of weighing the appropriate evidence and disregarding that which is irrelevant or unreliable.[34]

B. The Explosion of Technology in Discovery

The recent "explosion of information" that has transformed the discovery process has only exacerbated the existing differences between American discovery and evidence-gathering techniques used by the rest of the world. Discovery has evolved from boxes of hard-copy documents in a file room into a complex labyrinth of ESI produced by internet communications and office automation.[35] Globally, the amount of data is increasing exponentially.[36] Between 2004 and 2007, the average amount of information stored by a Fortune 1000 company quintupled,[37] while the average amount of data produced by American midsize companies increased fifty-fold.[38] Because of this, e-discovery has permeated present day trial practice—particularly complex civil litigation—due to the vast

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[33] *See, e.g.*, Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 288–92 (2002) (discussing the jury's "importance in American trials that is unparalleled elsewhere in the world").

[34] *See id.* ("[C]ivil juries have never been found in any of the countries that follow Continental procedure."); *see also* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. 2011) ("[F]oreign courts, because they almost never use juries in civil cases, have, compared to American courts, loose, permissive—sometimes even no—standards (other than privilege) for limiting the admissibility of evidence."). For a comparative approach to evidentiary rules, factfinding, and procedure, see generally MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997).

[35] SCHEINDLIN ET AL., *supra* note 13, at 1. ESI comes in myriad forms: custodian-based data (created by persons while using applications on computers, cell phones, or personal digital assistants), application data, personal digital devices, messaging systems, enterprise-based data (data created by an enterprise-wide application and stored on a central server, organization-specific application data, databases, generic enterprise applications (i.e. programs generally available that generate accounting, customer, records, etc. information), the internet and intranet. *Id.* at 6–14. Additionally, this data is stored in a variety of ways—online, near-line (i.e. on CDs, flash drives), or offline. *Id.* at 14–16. It also includes metadata, additional information that is neither viewable no accessible the computer user and "reflects data regarding the generation, handling, transfer, and storage of the document or file within the computer system." *Id.* at 156.

[36] In 2003, the global data set was only five exabytes (five billion gigabytes). *Id.* at 3. It grew to 161 extabytes in 2006, and it was estimated at 255 in 2007. *Id.*

[37] Stored data rose from 190 terabytes to one thousand terabytes (one petabyte) on average. *Id.*

[38] Stored data rose from two terabytes to one hundred terabyes on average. *Id.* This data was collected from a sample of 9,000 companies. *Id.*

amount of data that companies store, much of which could be relevant during litigation,[39] as the *Heraeus* discovery requests illustrate. Given the immense time and expense associated with e-discovery, it can unsurprisingly be used as a litigation tool in and of itself[40] and can easily become the subject of potential foreign relations conflicts.[41]

Although the process of discovery has changed drastically over the past two decades, and despite the American FRCP's 2006 update to address the technological revolution in litigation, the international norms for evidence collection have not kept pace. International e-discovery is governed (in theory, at least) by the Hague Convention on Evidence, which dates back to 1970.[42] U.S. law on cross-border e-discovery, which succumbed to a "trend of rejecting the mandatory use of the Hague

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[39] A recent law review example of a hypothetical case involving one billion e-mail records where one-quarter have "one or more attachments of varying length (1 to 300 pages)" illustrates the practical effects of this information overload on litigation. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 20 (2007). *Id.* The authors assumed that 1% of the data, or ten million emails, were deemed relevant after an initial search and that a reviewer averaged fifty emails (including attachments) per hour. *Id.* They concluded that "the case would . . . cost $20 million for a first pass review conducted by 100 people over 28 weeks, without accounting for any additional privilege review." *Id.*

[40] *See, e.g.*, *In re* Seroquel Products Liability Litigation, 244 F.R.D. 650, 664–65 (M.D. Fla. 2007) (rebuking and sanctioning defendant for engaging in "purposeful[] sluggish[ness]" sluggishness" with regard to producing ESI that "benefitted [defendant] by limiting the time available to Plaintiffs to review information and to follow up."); *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, Electronic Discovery: A View from the Front Lines 4 (2008), *available at* http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf (discussing how e-discovery burdens can be great enough to pressure defendants to settle if the cost of producing all relevant information would be more than simply settling the case). The U.S. government is not immune from the burdens of producing ESI. *See id.* at 8 (describing two cases, *United States v. Philip Morris* and a discrimination case against the Secret Service where the government had to sift through thousands of electronic documents produced over a number of years).

[41] *See* Hardaway et al., *supra* note 32, at 590 ("Data protection and privacy laws of foreign nations constrain the extraterritorial application of otherwise liberal discovery practices of American courts.").

[42] Hague Conference on Private International Law, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hague Convention on Evidence], *available at* http://www.hcch.net/upload/conventions/txt20en.pdf.

Convention" in the 2000's,[43] has the same problems: many of the key precedential decisions predate the technological boom.[44]

II. 28 U.S.C. § 1782 AND INTERNATIONAL DISCOVERY

Section 1782 of Title 28 of the United States Code permits U.S. courts to compel discovery for cases in foreign or international tribunals.[45] The statute provides, "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."[46] Either the foreign or international tribunal itself or an interested party in the litigation may make the request.[47] The last part of the code provision gives the applicable procedure under which the evidence is to be produced, using the Federal Rules of Civil Procedure as a default when an alternative foreign or international procedure is not specified.[48] This provision was designed to provide "equitable and efficacious" procedures to benefit litigants abroad and to encourage foreign countries to adopt similar, reciprocal procedures in this area.[49] The Second Circuit

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[43] Kristen A. Knapp, *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?*, 10 RICH. J. GLOBAL L. & BUS. 111, 121 (2010).

[44] *E.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522 (1987).

[45] 28 U.S.C. § 1782 (2006).

[46] *Id.*

[47] *Id.*

[48] *Id.* ("By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.").

[49] *See* S.Rep. No. 88-1580, at 1(1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3783 ("Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects. It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures."). Furthermore, having other countries adopt more liberal discovery procedures "might benefit U.S. litigants in

noted, "In pursuit of these twin goals, the statute has, over the years, been given increasingly broad applicability."[50]

Intel Corp. v. Advanced Micro Devices, Inc., the leading Supreme Court case interpreting 28 U.S.C. § 1782, involved an antitrust claim filed against Intel Corp. (Intel) in the European Communities.[51] Advanced Micro Devices (AMD) sought documents Intel had produced in a prior case in U.S. District Court in Alabama.[52] The Supreme Court used this dispute as a vehicle through which it could clarify the law—about which lower courts were divided—surrounding this provision. The Court held that § 1782 authorized the district court to assist with discovery in the foreign proceeding and remanded the case for a decision based on the district court's discretion.[53]

The Court's specific holding rests in two parts: (1) deciding that documents requested pursuant to § 1782 need not be discoverable under the laws of the foreign jurisdiction in which the case is being litigated; and (2) establishing a four-factor test to determine the appropriateness of granting the discovery motion. First, § 1782 imposes no foreign-discoverability requirement.[54] That is, the provision does not "categorically bar a district court from ordering production of documents when the foreign tribunal or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction[]."[55] The Court also determined that discovery is available through § 1782 to complainants who are not actual litigants in the case and are not sovereign agents.[56] The proceeding before the foreign tribunal need not be "pending or at least imminent for an applicant to invoke § 1782(a)."[57] These holdings significantly expanded prior lower court interpretations of the scope of § 1782.

Intel also created a four-factor test for lower courts to utilize when considering § 1782 motions: "(1) whether the person from whom discovery is sought is a participant in the foreign case; (2) the nature and character of

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those countries. And since the foreign court could always exclude the fruits of U.S. discovery, it seemed that allowing such discovery could only help, and not hurt, the foreign tribunal." Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 594 (7th Cir. 2011).

[50] Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012) (citation omitted) (internal quotation marks omitted).

[51] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246 (2004).

[52] *Id.* at 250–51

[53] *Id.* at 266.

[54] *Id.* at 253.

[55] *Id.* at 259–60.

[56] *Id.* at 253–54.

[57] *Id.* (internal quotation marks omitted).

the foreign proceeding, and whether the foreign court is receptive to judicial assistance from the United States; (3) whether the discovery request is an attempt to avoid foreign evidence-gathering restrictions; and (4) whether the discovery request is unduly intrusive or burdensome."[58] This mode of analysis leaves district courts with a significant degree of discretion.[59]

III. THE NEED FOR A CHANGE

This three-part section seeks to establish that current 28 U.S.C. § 1782 jurisprudence does not comport with comparative law norms, and therefore may lead to both abuse by parties and conflict with reasoning that is characteristic of other aspects of international-litigation procedure.

A. Potential for Abuse

The recent Seventh Circuit case *Heraeus Kulzer, GmbH v. Biomet, Inc.*[60] follows the trend toward broad § 1782 discoverability in e-discovery cases. As discussed in the Introduction, the Court of Appeals in *Heraeus* granted the foreign party's e-discovery request, reversing the district court's refusal to do so and directing the district court "to consider Heraeus's requests as it would any other discovery request in a complex case."[61] Although Judge Posner's opinion found no reason not to grant the § 1782 petition, it pointed to several flaws and potential ways that the current system could be abused,[62] including harassing opponents or burdening the foreign court.[63] Both of the abuses identified by Judge Posner are much

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[58] London v. Does 1-4, 279 F. App'x 513, 515 (9th Cir. 2008) (quoting *Intel*, 542 U.S. 264–66) (internal quotations omitted).

[59] *See, e.g. In re* Chevron Corp., 633 F.3d 153, 162–64 (3d Cir. 2011) (applying *Intel*'s four-factor test to the present case in finding that discovery was appropriate); Marubeni Am. Corp. v. LBA Y.K., 335 F. App'x 95, 98 (2d Cir. 2009) (affirming district court's analysis of the *Intel* factors in its decision to grant a § 1782 discovery motion); *In re* Clerici, 481 F.3d 1324, 1333 (11th Cir. 2007) (citing *Intel*, 542 U.S. at 259) ("[T]he Supreme Court has recognized the 'broad range of discovery' authorized under § 1782 and has held that § 1782 is not limited to proceedings that are pending or imminent.").

[60] Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591 (7th Cir. 2011).

[61] *Id.* at 599.

[62] *See id.* at 593–95 ("Discovery in the federal court system is far broader than in most (maybe all) foreign countries. . . . [D]istrict courts must be alert for potential abuses that would warrant a denial of an application to be allowed to take such discovery.").

[63] *Id.* at 594.

more significant today than in years past due to the sheer amount of information in the digital age.[64]

The decision discusses several ways that a § 1782 motion could be used to harass one's opponent. First, a litigant who in a U.S. court seeks discovery "that it could obtain in the foreign jurisdiction, [would] gratuitously forc[e] his opponent to proceed in two separate court systems."[65] A similar inference follows from a situation in which a party seeks U.S.-compelled discovery of documents that were inadmissible as evidence in the foreign court, because the discovery request would not actually help the party at trial in the foreign tribunal.[66] Similarly, one party might impose massive (and unexpected) costs upon the other litigant through numerous U.S. discovery requests, spurred by the proliferation of documents, and the expense of obtaining them, in the e-discovery era.[67]

Judge Posner takes a comparative law approach in recognizing the possibility that § 1782 requests can result in a mismatch between the amount of discovery and the foreign court's approach to evidence. He acknowledges that there is certainly the "danger of swamping a foreign court with fruits of American discovery that would be inadmissible in an American court because admissibility is not a criterion of discoverability in our system."[68] The opinion acknowledges that the potential mismatch stems from the fact that civil law systems, because they lack juries, have "loose, permissive—sometimes even no—standards (other than privilege) for limiting the admissibility of evidence."[69] Furthermore, the mismatch might burden not only the court but also the U.S. litigant because the other party may be able to use broad discovery procedures to obtain much more information about the U.S. party than the U.S. party could obtain regarding the foreign party in the foreign judicial system.[70] The *Heraeus* decision finally cautions district courts to "watch out for" one "party's effort to

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[64] *See, e.g.*, *id.* at 594–95. ("A discovery demand in our courts might yield a haul of 30 million emails, few of which would be admissible in evidence. A litigant in a foreign court who had obtained such a haul would be unlikely to dump the whole mass of emails on that court, but if he did try to overwhelm the court with documentation the court might not be well equipped by its procedures to stem the flow.").
[65] *Id.* at 594.
[66] *Id.*
[67] *Id.* at 595; *see also* Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649 (10th Cir. 2008) (acknowledging the potential costs of § 1782 discovery claims).
[68] *Heraeus Kulzer*, 633 F.3d at 594.
[69] *Id.*
[70] *Id.* at 595.

combine the substantive law of a foreign country with the expansive discovery opportunities available in the United States."[71]

Although *Heraeus*'s actual holding reversed the district court's refusal to grant discovery and encouraged the lower court to treat § 1782 motions like simple domestic discovery requests, the dicta of the opinion encouraged a probing approach that recognizes potential abuses stemming from differences in the forum court's legal system and that of the U.S. court. Part IV, *infra*, advocates the same reasoning in similar contexts: adding to the *Intel* test a close examination of the potential abuses of § 1782 claims that could stem from a disjunction in procedure between the two legal systems.

B. Analogous Procedural Norms

This section briefly examines the reasoning U.S. courts use to compel discovery against a foreign party in cases in which that party is embroiled in litigation in a U.S. court (§ 1782 deals with the opposite phenomenon—a U.S. party engaged in litigation overseas) and to assess motions to dismiss proceedings on the grounds of forum non conveniens.

The first question courts have attempted to resolve is the extent to which U.S. courts may unilaterally compel discovery against a foreign litigant. The seminal case in this area, *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the S. District of Iowa,*[72] in 1987, made legal and permanent the reluctance of American courts to defer to the Hague Convention on Evidence for discovery.[73] The Court held that the Convention does not preempt the FRCP.[74] The Court found that the plain language of the Hague Convention foreclosed use of its procedures as "exclusive" or "mandatory" for conducting discovery in a foreign country.[75] It instead concluded that the Convention's text and legislative history "unambiguously support[ed] the conclusion that it was intended to establish optional procedures."[76]

Therefore, in the Court's judgment, the district court could compel the foreign party to produce documents, because "the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed

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[71] *Id.* Forum-selection clauses in contracts with a preference for non-discovery-laden systems or a plaintiff bringing suit in an inconvenient forum may evince this phenomenon.
[72] 482 U.S. 522 (1987).
[73] *Id.* at 534.
[74] *Id*. at 539–40.
[75] *Id.* at 529.
[76] *Id.* at 538.

to order a foreign national party before it to produce evidence physically located within a signatory nation."[77] A converse holding "would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state."[78] Although the Court did not accept the Convention rules as binding as a matter of law, it also refused to make a common law, prudential rule of its own to require following Convention procedures.[79] Thus, after *Société Nationale*, district courts retained their power to order non-U.S. parties to produce evidence physically or digitally located within a signatory nation.[80] The *Société Nationale* decision is now firmly entrenched in U.S. law. It has been "codified" in the Restatement (Third) of Foreign Relations Law[81] and has shaped the lower courts' discovery practices.[82]

The Court in *Société Nationale* gave three practical reasons for its decision, all relating to "fairness." The opinion focused on the fact that mandatory use of the Hague Convention would produce inequalities among parties to the same litigation in three ways. First, a domestic party would have to go through the Convention to obtain evidence, while the foreign party could simply use the FRCP.[83] Second, and as a consequence of the first result, the different procedures in the Hague Convention and the more lenient and expansive FRCP would produce inequalities, because the foreign party would be able to obtain more information regarding the U.S. party through the FRCP than the U.S. party would be able to obtain regarding the foreign party through the Hague Convention.[84] Thus, in a

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[77] *Id.* at 539–40.
[78] *Id.* at 539.
[79] *Id.* at 542.
[80] *Id.* at 539.
[81] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (1987) (discussing the factors that courts must balance in deciding whether to grant a discovery request for information located abroad).
[82] *See, e.g.*, Lechoslaw v. Bank of Am., N.A., 618 F.3d 49, 58 (1st Cir. 2010) (affirming district court's refusal to grant discovery under the Hague Convention); *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 306 (3d Cir. 2004) (Roth, J., concurring) ("I write separately to express my concern that the Hague Convention has been given short shrift since the Supreme Court's decision in *Societe Nationale Industrielle Aerospatiale*."); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1474 (9th Cir. 1992) (discussing *Société Nationale* and its progeny when evaluating the claim that Chinese state secrecy laws prohibited a foreign litigant from producing information in discovery).
[83] *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 565–66 (Blackmun J., dissenting).
[84] See *id.* at 565. (Blackmun, J., dissenting) ("The second major United States interest is in fair and equal treatment of litigants.").

single trial in a U.S. court, the different parties would have access to vastly different stores of information. This reason, vocalized in 1987, only rings truer today due to the greater amount of ESI and costs of retrieving it.[85] Finally, the Court added that using the Hague Convention could create unfairness between litigants from the foreign countries who were not convention signatories and those litigants from countries that signed the treaty.[86]

This focus on fairness, or equal treatment of the two litigants within a single trial, is very different from what occurs when courts grant § 1782 requests. Most often, granting a § 1782 request creates informational asymmetries between the party obtaining otherwise undiscoverable information and the party giving up such information only to be unable to reciprocate with a similar discovery request. Thus, although both *Intel* and *Société Nationale* do grant discovery requests in international cases, they are largely incongruent. While under *Société Nationale*, both parties are allowed equal discovery under the same standards (those of the forum state), under *Intel*, U.S. courts affirmatively grant discovery, which will most often create an unequal playing field within the foreign litigation. This is because the information requested is typically unobtainable under the forum's procedural rules. Thus, allowing discovery in each scenario has very different effects upon the ongoing litigation.

Second, forum non conveniens analysis often involves comparatively weighing procedures in the foreign court system against the procedures of the U.S. forum. This indicates that courts do have experience balancing U.S. interests against foreign-court procedures on a frequent basis. In forum non conveniens cases, the defendant files a motion to dismiss the action in the U.S. court in favor of an alterative forum. Assuming an alternative forum is available, the district court has significant discretion in assessing the adequacy of that forum by balancing public interest, private interests, and justice.[87]

The forum non conveniens comparison also shows that U.S. courts do not consider the type of broad discovery available in § 1782 requests to be necessary for a foreign country to be fit as an alternative forum. The simple fact that a foreign forum does not have U.S.-style discovery does not make the foreign forum inadequate or inappropriate;[88] it is but one factor to

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[85] *See supra* note 36.
[86] *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 539.
[87] John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT'L & COMP. L. 317, 326 (2008).
[88] *E.g.*, Doe v. Hyland Therapeutics Div., 807 F. Supp. 1117, 1123-24 (S.D.N.Y. 1992).

be considered when balancing the adequacy of the alternative forum.[89] A U.S. court may still dismiss a case in favor of a civil law jurisdiction without even considering the type of discovery available in the foreign proceeding in the balance of private interests.[90] Therefore, U.S. courts in another context have determined that sweeping discovery is not necessary to make a foreign proceeding adequate, thus recognizing the differences in the nature of discovery in common law and civil law systems.

IV. THE PROPOSED SOLUTION

Due to the potential for abuse, this Issue Brief advocates a more cautious approach to 28 U.S.C. § 1782 than is found in the current jurisprudence. First, courts should carefully differentiate between § 1782 discovery requests that originate from the foreign court and those that arise from other sources, including the adverse party, when litigation occurs in a foreign law forum. If the foreign tribunal requests the information, there is a presumption that the information is consistent with the plan and direction of the trial and that the foreign court deems the information to fit into the proceeding.[91] Although *Intel* imposed no foreign-discoverability requirement on requests by foreign parties, the decision recognized that the identity of the requesting party may be significant.

Second, the other three factors of the balancing test can be viewed through a comparative law lens, by looking specifically at how the information obtained through the § 1782 procedure would be used in the context of the foreign-forum trial. The Seventh Circuit used a similar approach in *Heraeus*.[92] These other factors include elements that are amenable to a comparative law analysis, as described in Part I.A, such as

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[89] *See, e.g.*, Windt v. Qwest Communications Intern., Inc., 544 F.Supp.2d 409, 426 (D.N.J. 2008) (internal quotations and citation omitted) (first alteration in original) ("Differences in civil procedure of the competing forums are viewed through the prism of whether there is a danger that [as a result of the alternative proceedings, Plaintiffs would] be deprived of any remedy or treated unfairly. Concluding otherwise would effectively preclude all forum non conveniens dismissals in favor of any Roman-law-based civil jurisdiction, since all continental European jurisdictions provide for less discovery than that available in common law legal systems. As long as the [other] legal system provides procedure ample to render a fair decision under the . . . law, the distinction in the scope of discovery cannot serve as a basis for denial of forum non conveniens dismissal."); *cf.* In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987).

[90] *See id.*

[91] Note that a foreign judgment against a U.S. defendant cannot be enforced unless a U.S. court determines that the foreign proceeding was fair. BORN & RUTLEDGE, *supra* note 26, at 1081–83.

[92] *See supra* notes 68–71.

the nature and the character of the foreign proceeding, whether the discovery request is simply functioning as a work-around of the foreign evidence-gathering rules, and whether the request would be overly intrusive or burdensome.[93] For example, a court should first examine how well the foreign court is equipped to deal with the amount of information that would be collected if the request were granted, and then it should look for possible asymmetries of information that could result.

The Supreme Court in *Intel* wrote, "Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger."[94] This statement, however, conflicts with a careful application of the balancing factors set forth in Part IV. Courts should instead be urged to employ comparative techniques when they employ the four-factor analysis.

This approach has several benefits. First, it aligns with the idea from *Société Nationale* that U.S. courts have a duty to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position" and need to supervise discovery "to minimize its costs and inconvenience and to prevent improper uses of discovery requests."[95] If such an obligation attaches to U.S. courts' *discretionary* treatment of foreign litigants in U.S. courts, why should the same not attach to the protection of the U.S. party abroad in the examination of another *discretionary* matter in transnational civil litigation?

Second, by considering § 1782 discovery requests merely in the context of the foreign trial itself, as was done in *Heraeus*, U.S. courts can decrease the potential for abusive discovery, which has only increased since the 2004 *Intel* decision because companies store much more discoverable ESI.[96] Discovery in the electronic age has transformed into a tool of

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[93] *See supra* note 58.
[94] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 263 (2004).
[95] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 546 (1987).
[96] *See supra* notes 36–38.

potential abuse,[97] and therefore warrants closer scrutiny than Congress originally anticipated.[98]

Third, this analysis prevents the mismatch of very broad discovery with a foreign court ill-equipped to handle that amount of information. The idea that the litigant must take the procedures of the forum as he finds it is well-entrenched in complex, international civil litigation.[99] That is, a litigant cannot have his cake by choosing to litigate in one forum, and eat it too by benefitting from the procedural rules of another.[100] This is a basic tenant of the comparative law approach; because of the interconnectedness of procedural rules and the nature of the legal system, outcomes may become skewed by any mismatch created by conducting an isolated legal transplant of one rule into another system.[101] Therefore, even if a mechanism exists for a party to obtain U.S.-style discovery in a foreign proceeding, such discovery cannot simply be transplanted into a trial in another legal system with completely different procedural norms. This is particularly so when those normative differences are foundational, and stem from the inquisitorial (rather than adversarial) nature of the system, the role of the

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[97] *See, e.g.*, Patton Boggs, LLP v. Chevron Corp., 791 F.Supp.2d 13, 20 (D.D.C. 2011) (internal quotation marks omitted) (discussing Chevron's litigation tactics in a lawsuit against Ecuadorian plaintiffs in which Chevron initiated multiple § 1782 discovery motions with the goal of "burying the Lago Agrio plaintiffs' counsel beneath a mountain of discovery requests").

[98] For an idea of how far ESI was from Congress's mind at this time, see S.Rep. No. 1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 3782.

[99] *See* Bodum USA, Inc. v. La Cafétière, Inc., 621 F.3d 624, 631 (7th Cir. 2010) ("Having chosen to litigate in Chicago rather than arbitrate in Paris, however, Bodum must abide by the forum's procedural doctrines, such as the allocation of tasks between judge and jury."); Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 474 (2002) (citing Lubbe v. Cape PLC, [2000] 1 W.L.R. 1545 (H.L.) (appeal taken from Eng.)) ("[G]enerally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum.").

[100] *Cf.* In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987). The Second Circuit did impose some conditions on the trial in India; however, this is somewhat of a unique circumstance because there were over 200,000 injuries and all of the evidence in India, but one of the offending companies was a U.S. corporation. *Id.* The U.S. court fully relinquished any jurisdiction or control over the matter and refused to monitor the Indian trial. *Id.* at 204–05.

[101] *Compare* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (discussing Watson's theory of legal transplants); *with* Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 114 (1997) ("[L]egal transplants are impossible.").

judge as factfinder, and the view of evidence-gathering as a *sovereign* function.[102]

CONCLUSION

This Issue Brief has attempted to fill a gap in the legal scholarship by examining the use of 28 U.S.C. § 1782 in light of comparative law principles, other discovery practices in which U.S. courts engage, and forum non conveniens jurisprudence. It argues that current § 1782 jurisprudence may overlook potential equity problems in a foreign case because of a disjunction between American discovery notions and procedure and the legal system in which the case is actually being tried. This situation might harm the U.S. party participating in the foreign proceeding, for they might be subjected to significantly greater expense and be unable to obtain similar information regarding the foreign party if the information sought is undiscoverable in the foreign legal system. Therefore, this Brief advocates a comparative approach to § 1782 motions, recognizing the potential mismatch in legal systems as in the *Heraeus* opinion and coloring *Intel*'s balancing test through an examination of how granting discovery against the U.S. party will affect the overall balance of the foreign trial.

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[102] *See supra* notes 28–34.