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High Court's 'Intel' Ruling

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IN THE FINAL DAYS of the previous U.S. Supreme Court term, the focus on the terrorism and alien tort decisions drew attention from a critical ruling on 28 U.S.C. 1782(a), providing that district courts upon application of an interested person "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal." In *Intel Corp. v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466 (2004), the court affirmed a 9th U.S. Circuit Court of Appeals decision and held that a U.S. company was not "categorically" barred from seeking information under § 1782 for an antitrust investigation pending before the Directorate General-Competition (DG-Competition) of the Commission of the European Communities (E.C.). The court remanded the case for the district court to evaluate a number of considerations in determining whether the request should be granted and, if so, on what terms.

The significance of the case arises, first, from the grounds that the court rejected for denying the request, including those advanced in amici briefs of the U.S. Chamber of Commerce and the Product Liability Advisory Council. The E.C. told the court that it was "taking the highly unusual [for it] step of appearing as amicus curiae...because it is deeply concerned" that the lower court's interpretation of the provision "would directly threaten the Commission's enforcement mission in competition law." Second, in her opinion

for the court, Justice Ruth Bader Ginsburg outlined the factors district courts should consider in evaluating requests under the statute. This guidance will affect all § 1782 requests.

Section 1782 traces its origins to legislation enacted in 1855 and amended in 1863 and 1948. After a far-reaching study, the Commission on International Rules of Judicial Procedures, which included a number of leading American practitioners and scholars, proposed in the early 1960s substantial amendments to § 1782. Congress approved the amendments to this provision and certain other sections on international judicial assistance, and President Lyndon B. Johnson signed the legislation. Pub. L. 88-619 §9, 78 Stat. 997 (Oct. 3, 1964). Ginsburg served in the early 1960s as a research associate and then associate director of the Columbia Law School Project on International Procedure that worked with the commission in conducting studies and drafting the proposed amendments.

Request arose in European competition law dispute

The request under § 1782 in *Intel Corp.* arose in connection with the complaint that Advanced Micro Devices Inc. (AMD) filed with DG-Competition against Intel Corp., a major competitor of AMD in the microprocessor industry, alleging violation of various provisions of European competition law. AMD recommended that DG-Competition order Intel to furnish certain documents that Intel produced in a U.S. antitrust dispute in the U.S. District Court for the Northern District of Alabama. In that case, the court granted Intel's request for summary judgment, and the documents in question were under protective order.

DG-Competition rejected this recommendation. In its amicus brief, the E.C. stated its "clear preference" for relying instead "on the formal mechanisms that it has carefully negotiated with the United States specifically for the purpose of cooperation in competition law enforcement." Relying on § 1782(a), AMD then petitioned the U.S. District Court for the Northern District of California for an order directing Intel to produce the documents under protective order in the Alabama proceeding for use in supporting its complaint filed with DG-Competition. The lower court denied this request; the 9th Circuit reversed, holding that § 1782 author-ized entertaining AMD's request and remanding to the district court to determine if the request should be granted and on what terms.

The E.C. submitted that the 9th Circuit ruling "cannot stand" because that court erred in its "characterization of [E.C.] competition law proceedings as involving a 'tribunal.' " In its amicus brief, the U.S. acting solicitor general disagreed and relied upon the statutory language and

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the legislative history demonstrating that § 1782 "is not limited to courts but includes, more broadly, governmental bodies that exercise adjudicative functions."

Further, the acting solicitor general said that the information sought need only be "for use in an investigation that may lead to a governmental adjudication." Ginsburg concluded that the E.C. acts "as a first-instance decisionmaker" in competition matters. She relied expressly on language in the E.C.'s amicus brief that, while arguing that DG-Competition was principally an executive agency investigating whether to initiate proceedings, conceded that "the investigative function blur[s] into decision-making" when the E.C. acts on DG-Competition's final recommendation. 124 S. Ct. at 2479. Denying the restrictions imposed by some circuit courts, the court held that § 1782 "requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation." Id. at 2480.

The Supreme Court also denied Intel's argument, and that of several circuit courts, that § 1782 was inapplicable because the documents sought would not be discoverable under the law governing the foreign proceeding. In its amicus brief, the U.S. Chamber of Commerce argued that the documents sought would not be available under European or U.S. discovery rules. The chamber supported the E.C.'s position that a contrary interpretation would ignore comity principles and undermine the confidentiality promises that are essential to the effectiveness of DG-Competition's leniency policy.

The high court appeared to reconcile these strong objections to its holding by adopting almost verbatim the point emphasized by the acting solicitor general, i.e., "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." This key point emerges from the 1963 report of the Commission on International Rules of Judicial Procedures, which emphasized that under the provision, "[t]he court...retains complete discretion to frame an appropriate order," and that U.S. courts may, but need not, follow the foreign practice. Ginsburg then set out a number of "factors that bear consideration" in ruling on § 1782 requests and fashioning orders granting the relief requested.

Ginsburg noted that Intel is itself a participant in the DG-Competition proceeding and that European officials could have ordered Intel to produce the requested evidence. She contrasted that situation with a production request to a nonparticipant in the foreign proceeding. The court also specified that the district court "may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance."

A U.S. company is not 'categorically' barred from seeking information under § 1782 for an action pending before an E.C. division.

For example, Intel urged, and the high court agreed, that the district court should consider whether the requests under § 1782(a) attempt to circumvent foreign discovery procedures or other policies of the foreign authority before which the matter is pending. Ginsburg also agreed that "unduly intrusive or burdensome requests may be rejected or trimmed" and orders granting production may include provisions to protect confidentiality. She also suggested that the California district court "might" also consider the significance of the outstanding protective order of the Alabama district court. Recently, applying these standards, the district court denied the discovery request in an order based on findings that at least three of the factors that the high court identified tilted strongly against granting of the request. *Advance Micro Devices Inc. v. Intel Corp.*, 2004 U.S. Dist. Lexis 21437 (N.D. Calif. Oct. 4, 2004); see also *Procter & Gamble Co. v. Kimberly-Clark Corp.*, 334 F. Supp. 2d 1112 (E.D. Wis. 2004) (allowing § 1782 discovery based on *Intel* factors).

Supreme Court declined to fashion supervisory rules

The high court rejected, however, the proposal by Intel and several amici to fashion supervisory rules because, Ginsburg explained, there is insufficient experience to date to permit doing so. The court responded specifically to the E.C. submission that, in the court's words, DG-Competition "does not need or want the District Court's assistance." E.C. officials argued that, absent reversal of the 9th Circuit, the E.C. might have to appear to represent its interests in all district courts considering § 1782(a) requests implicating DG-Competition actions.

Invoking the captain in *H.M.S. Pinafore*, Ginsburg said that the E.C. is "not altogether clear" whether it meant "to say 'never' or 'hardly ever' to judicial assistance from United States courts" under § 1782(a). Ginsburg pointed out that the E.C. itself could seek assistance under § 1782(a). Nothing in the E.C. amicus brief expressly committed the E.C. to not availing itself of this right. Further, Ginsburg stated that, even if DG-Competition intended to reject any such assistance, the court does not know whether such views "are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions." 124 S. Ct. at 2484.

In his dissent, Justice Stephen G. Breyer favored not only some categorical limits to § 1782(a) but also urged that the high court on comity principles should have given greater weight to the E.C.'s views of whether its functions are those of a tribunal. While not adopted in this case, Breyer's position on comity may become significant in future cases if the implicated non-U.S. authority adopts a less nuanced position than the E.C. did in rejecting assistance under § 1782(a). In any event, non-U.S. authorities will want to consider articulating more precisely their reasons for rejecting discovery requests of a party that might invoke § 1782(a). In particular, they may want to elaborate if their reasons for not wishing to secure the requested evidence arise from considerations of policy, party parity or factors other than their limited powers or resources. NLJ