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International Judicial Assistance: Does 28 U.S.C. §1782 Contain an Implicit Discoverability Requirement

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International Judicial Assistance: Does 28 U.S.C. §1782 Contain an Implicit Discoverability Requirement

Peter Metis

Abstract

This Note argues that the Second Circuit's interpretation of Section 1782 should become the standard throughout the federal courts because it applies proper canons of statutory interpretation, adheres to the U.S. Congress' intent to provide an efficient means of assistance to participants in non-U.S. tribunals, and encourages other nations to provide similarly broad discovery requests when U.S. litigants seek evidence located abroad. Part I discusses the development of judicial assistance statutes in the United States and sets forth the U.S. congressional intent behind the enactment of Section 1782. Part I also examines the provisions of the current statute governing international judicial assistance. Part II analyzes the split within the U.S. circuit courts on whether Section 1782 contains an implied discoverability requirement. Part III argues that federal courts should adopt the Second Circuit's reasoning and not read a judicially-created barrier to discoverability into 28 U.S.C. §1782. This Note concludes that the split in the circuit courts should be resolved in favor of the Second Circuit's approach, thereby providing non-U.S. parties a uniform rule for conducting discovery within the United States.

INTERNATIONAL JUDICIAL ASSISTANCE: DOES 28 U.S.C.
§ 1782 CONTAIN AN IMPLICIT
DISCOVERABILITY REQUIREMENT?

Peter Metis*

INTRODUCTION

As the twenty-first century approaches, the economic and political interdependence of the nations of the world continues to grow.¹ The continual development and expansion of multinational corporations,² international trade agreements, international financial transactions³ and transboundary criminal investigations⁴ have precipitated a corresponding increase in interna-

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1. See Robert J. Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In Re Westinghouse Uranium Contract Litigation*, 10 GA. J. INT'L & COMP. L. 101 (1980) (stating that nations of world have become increasingly interdependent); Sharon Devine & Christine M. Olsen, *Taking Evidence Outside of the United States*, 55 B.U. L. REV. 368 (1975) (noting increase in number of contacts between U.S. citizen and citizens of other nations).

2. See Lee Paikin, *Problems of Obtaining Evidence in Foreign States for Use in Federal Criminal Prosecutions*, 21 COLUM. J. TRANSNAT'L L. 233, 234 (1986) ("The rise of multinational corporations with branches or subsidiaries in different states, each controlling its own domain of information, has added a special dimension to [international litigation]."); Henry Harfeild, *The Implications of U.S. Extraterritorial Discovery Proceedings Against Multinational Corporations for the Judiciary*, 16 N.Y.U. J. INT'L L. & POL. 973 (1984) (discussing effect of U.S. discovery proceedings on multinational corporations).

3. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 n.1 (1965) (documenting "vast growth of international commerce" after World War II).

4. See Bradley O. Field, Comment, *Improving International Evidence-Gathering Methods: Piercing Bank Secrecy Laws from Switzerland to the Caribbean and Beyond*, 15 LOY. L.A. INT'L & COMP. L.J. 691 (1993) (documenting need for improving methods by which United States obtains criminal evidence from non-U.S. banking institutions); see also Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339 (1990) (discussing significant developments in international judicial assistance due to growth of international narcotics trafficking); Robin Jo Frank, Note, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. INT'L L. & POL. 415 (1984) (discussing legal problems involving international child abductions); Roger M. Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984) (examining U.S. procedures for compelling production of evidence abroad); Serge April & Jonathan T. Fried, *Compelling Discovery and Disclosure in Transnational Criminal Litigation: A Canadian View*, 16 N.Y.U. J. INT'L L. & POL. 961 (1984) (discussing problems of extraterritorial jurisdiction in criminal law enforcement).

tional litigation.⁵ The proliferation of disputes involving governments, businesses, and individuals across national boundaries requires litigants in one country to obtain evidence located within another country.⁶ Consequently, the need for more efficient international judicial cooperation has become manifest.⁷

Government authorities and litigants involved in legal disputes outside the United States often need to obtain evidence

5. See Robert Greig & Walter Stahr, *US Discovery in Overseas Litigation*, INT'L FIN. L. REV., Jan. 1988, at 27, 28 (discussing discovery in United States for use in litigation abroad); Morris H. Deutsch, Comment, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal*, 5 B.C. INT'L & COMP. L. REV. 175, 176 n.6 (1982) (stating that significant increase of international transactions has had result of increasing incidence of international litigation); Devine & Olsen, *supra* note 1, at 368. "The number of contacts between United States citizens and the citizens of other nations has been increasing rapidly in recent years. As these contacts continue to increase there will be a corresponding rise in the amount of litigation in United States courts with international aspects." *Id.*; Harvey M. Sklaver, *Obtaining Evidence in International Litigation*, 7 CUMB. L. REV. 233, 233 (1976) ("During the past 25 years there has been unprecedented growth in the United States international commercial intercourse which has taken diverse forms and, not unpredictably, has lead to increased international litigation."); Edward C. Weiner, *In Search of International Evidence: A Lawyer's Guide Through The United States Department of Justice*, 58 NOTRE DAME L. REV. 60, 60 (1982) ("The United States and other countries are increasingly discovering that their citizens engage in transnational activities that often result in lawsuits. Obtaining evidence from foreign nations is necessary to conduct such litigation.").

6. Gary B. Born & Scott Hoing, *Comity and the Lower Courts: Post-Aeropastiale Applications of the Hague Evidence Convention*, 24 INT'L LAW. 393, 394 (1990) (stating that "[i]nternational litigation in U.S. courts frequently requires access to materials or witnesses located outside the United States"). For an example of U.S. prosecutors taking depositions outside the United States, for use within the United States, see *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988).

7. Ryan J. Earl, Note, *Tightening Judicial Standards for Granting Foreign Discovery Requests*, 1993 B.Y.U. L. REV. 343 (1993) (stating that growth of complex international disputes created need for greater international judicial cooperation); see *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

As surely as people, products, and problems move freely among adjoining countries, so national interests cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce. Every nation must often rely on other countries to help it achieve its regulatory expectations.

Id. at 937; see Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953) (detailing history of international judicial assistance in United States); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 117 F.R.D. 177, 180 (S.D.Fla. 1987) ("In today's world of international crimes and world-wide criminal enterprises, especially in the area of narcotics trafficking and money laundering, the nations of the world must work together to eliminate sanctuaries for criminal activities and provide the production of relevant and sought-after evidence needed for successful prosecution.").

located within a U.S. jurisdiction.⁸ 28 U.S.C. § 1782 ("Section 1782" or "statute") governs the procedures for obtaining evidence within the United States for use abroad.⁹ Section

8. See, e.g., JUDICIAL PROCEDURES IN LITIGATION WITH INTERNATIONAL ASPECTS, S. REP. NO. 1580, 88th Cong., 2d Sess. 13 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3783. "The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation." *Id.*; see *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992) (non-U.S. corporation requesting discovery within United States for use in non-U.S. proceeding); see also Christopher L. Eldrige, *Federal Judicial Procedure—Judicial Assistance—Preservation of the Adjudicative Role of Letters Rogatory, In Re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702 (2d Cir. 1991), 16 SUFFOLK TRANSNAT'L L. REV. 255 (1992).

During the first one hundred and fifty years as a sovereign entity, the United States rarely and reluctantly granted judicial assistance. Although congressional enactments existed to authorize federal courts to accommodate foreign requests for information, there were substantial obstacles and exacting criteria which curtailed such assistance. In the past five decades, however, there has been a concerted legislative effort toward facilitating, rather than impeding, the collection and transmittal of judicial information across international borders.

Id. at 259-60.

9. Act of Oct. 3, 1964, Pub.L. 88-619, § 9(a), 78 Stat. 997 (codified as amended at 28 U.S.C. § 1782 (1988)) [hereinafter 28 U.S.C. § 1782]. The statute states in its entirety:

[a]ssistance to foreign and international tribunals and to litigants before such tribunals

(a) 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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or the other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has the power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice or procedure, which may be in whole or in 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.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1782 (1988).

1782 establishes the standards by which U.S. federal courts¹⁰ adjudicate discovery requests from non-U.S. and international tribunals.¹¹

The U.S. Congress, when enacting Section 1782, bestowed considerable discretion upon district courts when determining whether to compel a witness to testify or to provide information sought by a requesting party.¹² However, due to this broad grant of discretion in Section 1782 the U.S. circuit courts have been unable to provide a uniform response to requests for discovery.¹³ These disparate interpretations cause non-U.S. parties¹⁴ who are

10. This Note is limited in scope to the federal approach toward judicial assistance. For a discussion on the state court approach, see Jones, *supra* note 7, at 542-43.

11. See, e.g., Deutsch, *supra* note 5, at 175 n.5 (providing example of judicial assistance involving international tribunal).

12. See Deutsch, *supra* note 5, at 178 (discussing wide discretion given to courts in providing international judicial assistance). "Congress liberalized Section 1782 by designating a wide range of foreign proceedings as eligible for judicial assistance with respect to discovery. Congress also granted wide discretion to the judiciary both in rendering such requested assistance and in allowing the use of foreign procedures in the evidence gathering process." *Id.*; Senate Report *supra* note 7, at 3788. Section 1782

leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. . . . The terms the court may impose include provisions for fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers of the testimony and similar provisions.

Id. The wide discretion given to the district courts under Section 1782 has been acknowledged by the U.S. federal courts. See, e.g., *In re Application of Asta Medica, S.A.*, 794 F.Supp 442, 445 (D. Maine 1992) ("The broadened power of the district courts under amended § 1782 was expressly designed to make the federal judicial system more generous in its assistance to foreign litigation. Both the legislative history and academic commentary bear out this reading of the statute."); *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (Section 1782 gives courts broad discretion in deciding whether or not to honor letters rogatory); Brian E. Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look at Recent Problems With Discovery in the United States for Use in Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 435 (1989) (stating that federal courts appear to doubt that Congress intended to give courts unbridled discretion suggested by Section 1782).

13. See Bomstein & Levitt, *supra* note 12, (stating that statute's broad grant of discretion has led to courts struggling to construe statute consistently). See generally Eileen P. McCarthy, Note, *A Proposed Uniform Standard for U.S. Courts in Granting Requests For International Judicial Assistance*, 15 FORDHAM INT'L L. J. 772 (describing circuit courts' varying interpretations of terms in statute); Amy J. Conway, Note, *In Re Request For Judicial Assistance From the Federative Republic of Brazil: A Blow to International Judicial Assistance*, 41 CATH. U. L. REV. 545 (1992) (noting inconsistent standards imposed by district courts in Section 1782 cases).

14. Throughout this Note the terms "non-U.S. parties" and "non-U.S. litigants" refer to both non-U.S. and U.S. citizens who are involved in litigation abroad. See 28 U.S.C. § 1782, *supra* note 9 ("The order may be made pursuant to a letter rogatory

seeking judicial assistance from U.S. courts to receive different treatment based on the geographic location of the evidence in question.¹⁵ Specifically, the U.S. circuit courts disagree on whether Section 1782 contains a threshold requirement that evidence sought to be discovered under Section 1782 must also be discoverable under the laws of the jurisdiction in which the litigation will take place.¹⁶ The First¹⁷ and Eleventh Circuits¹⁸ have held that Section 1782 contains a discoverability requirement, which necessitates that any evidence sought to be discovered in the U.S. district courts must also be discoverable under the laws of the jurisdiction where the litigation is to take place.¹⁹ In addition, two other circuit courts, although not expressly mandating a discoverability requirement, have implied that such a requirement exists in the statute.²⁰ The Second Circuit, however, in ad-

issued, or request made, by a foreign or international tribunal or upon the application of any interested person”).

15. *See* 28 U.S.C. § 1782. According to Section 1782, the person from whom discovery is sought must reside or be found in the district of the district court to which the application is made. *Id.* Therefore, a non-U.S. litigant seeking judicial assistance within the United States will receive disparate results depending upon the geographic location of the evidence.

16. *See* Application of Gianoli, 3 F.3d 54, 58 (2d Cir. 1993) *cert. denied*, ___ U.S. ___, 114 S. Ct. 443 (1994) (describing split between circuit courts in interpretation of discoverability requirement).

17. *In re* Application Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992) (“We hold that a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law.”).

18. *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (stating that district court “must decide whether the evidence would be discoverable in the foreign country before granting assistance”); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988) (remanding case for determination on discoverability of evidence sought). There also have been some lower court decisions which have reached the same conclusion. *In re* Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England, 147 F.R.D. 233 (C.D. Cal. 1993) (under Section 1782 parties “are not entitled to discovery beyond what is available to them in the foreign court where the action is proceeding”); *In re* The Court of the Commissioner of Patents for the Republic of South Africa, 88 F.R.D. 75 (E.D. Pa. 1980) (asserting that courts should not allow litigants to circumvent restrictions imposed on discovery by non-U.S. tribunals.).

19. *See* Application of Gianoli, 3 F.3d at 58-60 (describing federal court decisions that have recognized discoverability requirement).

20. *See* *In re* Request from Crown Prosecution Service of United Kingdom, 870 F.2d 686 (D.C. Cir. 1989) (holding that procedures used under Section 1782 cannot be inconsistent with intent to use evidence in non-U.S. judicial proceeding); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3rd Cir. 1985) (stating that “[a] grant of discovery that trench[ed] upon clearly established procedures of a foreign tribunal would not be within section 1782”).

addressing the same question, concluded that Section 1782 contains no such implicit requirement.²¹

This Note argues that the Second Circuit's interpretation of Section 1782 should become the standard throughout the federal courts because it applies proper canons of statutory interpretation, adheres to the U.S. Congress' intent to provide an efficient means of assistance to participants in non-U.S. tribunals, and encourages other nations to provide similarly broad discovery requests when U.S. litigants seek evidence located abroad. Part I discusses the development of judicial assistance statutes in the United States and sets forth the U.S. congressional intent behind the enactment of Section 1782. Part I also examines the provisions of the current statute governing international judicial assistance. Part II analyzes the split within the U.S. circuit courts on whether Section 1782 contains an implied discoverability requirement. Part III argues that federal courts should adopt the Second Circuit's reasoning and not read a judicially-created barrier to discoverability into 28 U.S.C. § 1782. This Note concludes that the split in the circuit courts should be resolved in favor of the Second Circuit's approach, thereby providing non-U.S. parties a uniform rule for conducting discovery within the United States.

I. AN OVERVIEW OF INTERNATIONAL JUDICIAL ASSISTANCE

International judicial assistance²² is the process whereby courts in one jurisdiction assist courts located in another jurisdiction in obtaining evidence.²³ The concept of international

21. See *Application of Gianoli*, 3 F.3d 54, 62 (2nd Cir. 1993) ("We hold that section 1782 does not contain a requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction.").

22. See *Weiner*, *supra* note 5, at 60 n.1 ("The term 'international judicial assistance' is defined as servicing documents in foreign states and obtaining evidence in foreign states."); see also *Jones*, *supra* note 7, at 515 n.1 (describing different terms used for international judicial assistance in other countries).

23. See BRUNO A. RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE CIVIL AND COMMERCIAL § (1990) ("[I]nternational judicial assistance [is the] assistance which domestic courts render to courts and litigants in other countries"); Paul D. McCusker, *Some United States Practices in International Judicial Assistance*, 37 DEP'T STATE BULL. 808, 808 (1957) ("Judicial assistance is the aid rendered by the courts of one country to the courts of another country in support of judicial proceedings taking place in the country that requests the foreign court's cooperation."); Karl Schwappach, *The Inter-American Convention on Taking Evidence Abroad: A Functional Comparison with the Hague Convention*, 4 N.Y. INT'L L. REV. 69 (1991) ("The field of international judicial assistance represents

judicial assistance rests on the principle that jurisdictional boundaries, which limit the ability of national courts to collect evidence,²⁴ should not prevent such courts from obtaining all the information needed to adjudicate disputes before them.²⁵ Judicial bodies originally did not render international judicial assistance based on any positive law or duty.²⁶ Instead, well-recognized principles of comity²⁷ and reciprocity²⁸ encouraged courts in the United States to assist courts in other nations when gathering evidence.²⁹ Today, non-U.S. litigants and tribunals seeking judicial assistance in the United States may utilize fed-

the multinational goal of having nations render aid to one another in support of their respective judicial or quasi-judicial tribunals." See generally Jones, *supra* note 7 (describing history, procedures, and issues in international judicial assistance).

24. See *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). The D.C. Circuit Court noted that

[t]he prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty. . . . Consequently, the territoriality base of jurisdiction is universally recognized. It is the most persuasive and basic principle underlying the exercise by nations of prescriptive regulatory power. It is the customary basis of the application of law in virtually every country.

Id. at 921.

25. See Bomstein & Levitt, *supra* note 12, at 430; see also McCusker, *supra* note 23, at 808 ("Even countries which are unfriendly with each other for political reasons do not hesitate, except in case of actual war, to request each other's courts to further the cause of justice.").

26. See RISTAU, *supra* note 23, at 3 ("It is true that the duty [to render judicial assistance] may not be imposed by positive local law, but it rests on national comity, creating a duty that no state could refuse to fulfill without forfeiting its standing among the civilized states of the world.") (quoting *Oregon v. Bourne*, 21 Or. 218, 228, 27 Pac. 1048 (1891)).

27. See P.F. Sutherland, *The Use of the Letter of Request (or Letters Rogatory) For the Purpose of Obtaining Evidence For Proceedings in England and Abroad*, 31 INT'L COMP. L.Q. 784, 785 (1982) (stating that "[c]ompliance with a letter of request received from a foreign requesting court has generally been considered a matter of courtesy"); see also *Hilton v. Guyot*, 159 U.S. 113 (1895).

'Comity,' refers to the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-64.

28. BLACK'S LAW DICTIONARY 1270 (6th ed. 1990). Reciprocity is defined as the "relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state." *Id.*

29. See Devine & Olsen, *supra* note 1, at 372 n.26 ("The willingness of courts to execute such requests, in the absence of a statute or treaty, is grounded in international good will and comity."); Born & Hoing, *supra* note 6, at 393 (stating that "U.S. courts have invoked the doctrine of international comity to moderate the conflicts that have

eral and state statutes,³⁰ international accords,³¹ and mutual

arisen between extraterritorial U.S. discovery orders and foreign laws and sovereign interests"). *But see* *Laker Airways*, 731 F.2d at 937. The D.C. Circuit Court stated:

However, there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.

Id.

30. *See supra* note 9 (quoting 28 U.S.C. § 1782). Most individual states also have their own statutes governing international judicial assistance. *See, e.g.*, N.Y. CIV. PROC. L. & R. 328 (McKinney 1988) Rule 328, entitled assistance to tribunals and litigants outside the state, reads in pertinent part:

(a) Pursuant to court order. Upon application by any interested person or in response to letters rogatory issued by a tribunal outside the state, the supreme court or a county court of the state may order service upon any person who is domiciled or can be found within the state of any document issued in connection with a proceeding in a tribunal outside the state. The order shall direct the manner of service.

(b) Without court order. Service in connection with a proceeding in a tribunal outside the state may be made within the state without an order of the court.

Id.; CAL. CIV. PROC. CODE § 2029 (West 1994). The California statute, states in pertinent part:

[c]ompelling deponent to appear and testify, and to produce documents and things upon issuance of commission out of foreign court of record.

Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation . . . the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

Id.

31. *See* The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]. For a discussion on the Hague Evidence Convention, see Schwappach, *supra* note 23, at 69; Born & Hoing, *supra* note 6, at 396 ("The [Evidence] Convention is a multilateral agreement that prescribes procedures by which litigants involved in civil and commercial disputes may obtain evidence from abroad."); *see also* Hague Convention of the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163. For a discussion on the Hague Service Convention, see Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, (1994) (concluding that flexible domestic rules are preferable to international agreements when regulating international litigation); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 20, 1988 U.N. Doc. E/Conf./82/15, *re-*

legal assistance treaties.³²

Although other methods for obtaining judicial assistance in the United States exist, Section 1782 is a principal choice for parties abroad.³³ Section 1782 authorizes U.S. district courts to grant judicial assistance to non-U.S. parties requesting information in the form of letters rogatory.³⁴ A letter rogatory is a formal request by the court of one nation to the appropriate court of another nation for assistance in procuring desired evidence.³⁵

printed in 28 I.L.M. 493 (1989); Zagaris, *supra* note 4, at 345-48 (describing international judicial assistance requirements in U.N. Drug Convention).

32. Treaty Between the United States of America and the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters, Jan. 28, 1988, U.S.-Belg., S. TREATY DOC. NO. 16, 100th Cong., 2d Sess. (1988); Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance, Dec. 9, 1987, U.S.-Can., S. TREATY DOC. NO. 13, 100th Cong. 2d Sess. (1988); Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K.-N. Ir., S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. (1987), *reprinted in* 26 I.L.M. 537-52; Treaty with the Italian Republic on Mutual Assistance in Criminal Matters, Nov. 9, 1982, U.S.-Italy, S. TREATY DOC. NO. 25, 98th Cong., 2d Sess. (1984). For a discussion of mutual legal assistance treaties, see Marian Nash, *Judicial Assistance*, 86 AM. J. INT'L L. 548 (1992). "Mutual legal assistance treaties are generally intended to enable law enforcement authorities to obtain evidence abroad." *Id.* at 550; *see also* Zagaris, *supra* note 4, at 351-357 (discussing procedures and status of mutual legal assistance treaties in United States).

33. *See* Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 599 (1990) ("[T]he litigation regarding discovery in the United States for use abroad has turned on the proper interpretation and application of section 1782, not on the interpretation of the Hague [Evidence] Convention."). Litigation involving the Hague Evidence Convention has focused on parties using the treaty to obtain evidence outside the United States for use in U.S. tribunals. *See, e.g.,* Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 539-40 (1987) (determining when U.S. parties seeking extraterritorial discovery must do so under Hague Evidence Convention rather than U.S. discovery rules).

34. *See* McCusker, *supra* note 23, at 808. Courts traditionally request judicial assistance from their foreign counterparts by issuing a letter rogatory. *Id.* For a discussion on the procedures and mechanics of a letter rogatory, *see* Deutsch, *supra* note 5, at 179-81; Gary B. Born & David Westin, *International Civil Litigation in United States Courts*, (1992) 40-41 (providing model letter rogatory); RISTAU, *supra* note 23, at 31-50 (describing procedures and documents for obtaining international judicial assistance in United States).

35. *De Villeneuve v. Morning Journal Ass'n*, 206 F. 70 (S.D.N.Y. 1913); *see* Stahr *supra* note 33, at 600 n.12; *see also* *The Signe*, 37 F.Supp. 819 (D.La. 1941).

Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of comity existing between nations in ordinary peaceful times.

The letter rogatory may be transmitted through the U.S. Justice Department,³⁶ the U.S. State Department, or sent directly from the non-U.S. tribunal to the U.S. district court.³⁷ Furthermore, any interested person may make a Section 1782 request directly to a U.S. district court.³⁸

A. *The Development of International Judicial Assistance in the United States*

Until 1855, U.S. federal district courts had no explicit authorization to compel an unwilling witness to give testimony or produce documents in response to a letter rogatory.³⁹ The im-

Id. at 820; see Born & Hoing, *supra* note 6 at 395 ("The customary method of obtaining foreign judicial assistance in taking evidence abroad, in absence of a specific treaty obligation, has been by letter rogatory."). For a discussion on the disadvantages of letters rogatory, see generally Jones, *supra* note 7 (discussing problems with using letters rogatory); Deutsch, *supra* note 5, at 178-81 (discussing problems with letters rogatory). For a comparison of letters rogatory with commissions, see Stahr, *supra* note 33, at 600 n.13 ("The basic alternative to a letter rogatory is a commission, which appoints a particular person to obtain evidence."); Field, *supra* note 4, at 702 ("The effectiveness of letters rogatory depends on comity between nations.").

36. U.S. Dep't of Justice, Civil Division Practice Manual § 4-1.325 (stating procedures for judicial assistance to foreign tribunals). Requests by governments for discovery in the United States in criminal cases are frequently made to the Justice Department, which may represent the government in the district court Section 1782 proceeding. See, e.g., *In re Letters of Request from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1152 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) (U.S. Department of Justice representing Ministry of Legal Affairs of Trinidad & Tobago in Section 1782 request).

37. See, e.g., *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967).

38. Stahr, *supra* note 33, at 627.

Although federal law is liberal regarding the form of a request for discovery under Section 1782, some types of requests are more likely to receive a favorable reception than others. Requests from courts are more likely to be granted than requests from governments; requests from governments are more likely to be granted than requests from litigants. Although it is not unreasonable for courts to consider somewhat more carefully requests from foreign litigants, they should not create artificial barriers to direct discovery by litigants. Such barriers would be inconsistent both with section 1782, which allows direct requests by foreign litigants, and with our customary reliance upon litigants, not courts, to conduct discovery.

Id.

39. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855). Some judges and commentators, however, believed that there was no need for explicit statutory authorization permitting courts to respond to letters rogatory. See *In re Letter Rogatory from the Justice Ct., Dist. of Montreal, Canada*, 523 F.2d 562, 564 (6th Cir. 1975) ("it has been held that federal courts have inherit power to issue and respond to letters rogatory") (citing *United States v. Reagan*, 453 F.2d 165, 173 (6th Cir. 1971)); *United States*

petus for enacting legislation to empower the federal courts with such authority came in 1854 when the French government sent the U.S. Department of State a letter rogatory requesting the deposition of a witness located in New York State.⁴⁰ The U.S. Attorney General concluded that no statute authorized a federal court to compel a witness to testify in reply to the French letter rogatory.⁴¹ In response to this deficiency in the law, the U.S. Congress passed the first statute enabling U.S. federal courts to assist non-U.S. courts in procuring evidence located within the United States.⁴²

Pursuant to the Act of March 2, 1855 ("1855 Act") U.S. federal courts were accorded broad authority to compel the testimony of witnesses to assist non-U.S. courts.⁴³ Specifically, the 1855 Act authorized U.S. circuit courts to appoint a commissioner to compel testimony from witnesses identified in a letter rogatory.⁴⁴ The 1855 Act, however, failed to achieve its intended result of providing non-U.S. courts with judicial assistance due to

v. Staples, 256 F.2d 290, 292 (9th Cir. 1958); Pacific Ry. Comm'n, 32 F. 241, 256-57 (C.C.N.D. Cal. 1887); see also 8 WIGMORE, EVIDENCE § 2195a n.2 (3d ed. 1940) ("That any domestic court has inherit power at common law to honor a letter rogatory should not be doubted."); Devine & Olsen, *supra* note 1, at 372 n.26 (stating that federal courts have held the issuance of letters rogatory to be within their inherent powers). But see Janssen v. Belding-Corticelli, 84 F.2d 577 (3d Cir. 1936) (arguing that only power that court has to respond to letters rogatory is granted to it by U.S. Constitution or by statute).

40. See Jones, *supra* note 7, at 540-42 (chronicling history of judicial assistance in United States). The French government at that time was acting on behalf of a French *juge d'instruction*, a magistrate sitting in a preliminary criminal proceeding. *Id.* at 541.

41. See generally 7 Op. Att'y Gen. 56 (1855) (reviewing letter written by Attorney General Cushing to Secretary of State Marcy, which discussed defect in American law and probable solution).

42. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855); see Jones, *supra* note 7, at 540-41 (describing history of 1855 Act); see also Stahr, *supra* note 33, at 600-05 (documenting stages of international judicial assistance in United States).

43. *In re Montreal, Canada*, 523 F.2d at 564 ("This statute granted broad powers to the United States courts to compel the testimony of witnesses to assist foreign courts.").

44. Act of March 2, 1855. Section 2 of the 1855 Act states:

[W]here letters rogatory shall have be [sic] addressed from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

Id.

an error in indexing.⁴⁵ This error resulted in the disuse of the 1855 Act by the U.S. federal courts.⁴⁶

In 1863, another more restrictive statute was passed by the U.S. Congress governing discovery requests from other nations.⁴⁷ The 1863 Act permitted a federal court, in response to a letter rogatory, to compel a witness located in the United States to provide testimony for use in another jurisdiction.⁴⁸ The 1863 Act, however, placed various conditions on when federal courts could provide such judicial assistance.⁴⁹ The 1863 statute stipulated that federal courts could respond to letters rogatory only in cases where: (1) the non-U.S. litigation was for the recovery of money or property; (2) the requesting country was not at war with the United States; and (3) the requesting government was a party to or had an interest in the litigation.⁵⁰ These statutorily imposed requirements inhibited the ability of U.S. courts to offer litigants from other countries the same judicial assistance that American parties received abroad.⁵¹ Thus, for almost a cen-

45. Jones, *supra* note 7, at 540. The 1855 Act was indexed in the Statutes at Large under the heading "Mistrials." *Id.* at 540 n.77.

46. *Id.* at 540; *see also* Stahr, *supra* note 33, at 60 n.18 (stating that 1855 Act was omitted from federal code index).

47. Compare Act of March 2, 1855 with Act of March 3, 1863, ch. 95, §§ 1-4, 12 Stat. 769-70 (1863). The 1863 Act was proposed by the Treasury Department, apparently unaware of the existence of the 1855 Act. Jones, *supra* note 7, at 540 n.77.

48. *See* Act of March 3, 1863, ch. 95, 12 Stat. 769.

49. *Id.* The 1863 Act stated in pertinent part:

An Act to facilitate the taking of depositions within the United States, to be used in the Courts of other Countries, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the testimony of any witness residing within the United States, 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, may be obtained, to be used in such suit.

Id.

50. *Id.* Following the passage of the 1863 Act Congress attempted, but failed, to successfully amend the 1863 Act in order to provide broader assistance. *See In re Montreal, Canada* 523 F.2d at 564 n.5 (describing congressional attempts to liberalize 1863 Act).

51. *See* Note, *Reciprocity for Letters Rogatory Under the Judicial Code*, 58 YALE L.J. 1193, 1195 ("the federal courts and Congress have ungenerously refused to accord foreign letters [rogatory] the same treatment which foreign courts have been requested to extend to American letters"); Jones, *supra* note 7, at 540-41 ("For almost a century, requests for assistance in foreign private litigation were denied hospitality in our federal courts. And for almost a century, our national government remained unperturbed by

tury, the 1863 Act prohibited non-U.S. parties from conducting necessary discovery in the United States.⁵²

After World War II, the U.S. position as an economic superpower considerably increased U.S. involvement in international trade and global investment.⁵³ The international disputes which resulted due to the prominent status of the United States required that evidence located within the United States be used in litigation throughout the world.⁵⁴ In an attempt to enable federal courts to meet the increasing demand for discovery requests from abroad, the U.S. Congress passed 28 U.S.C. § 1782 in 1948.⁵⁵ The 1948 statute broadened the authority of district courts by allowing the courts to designate a person who could depose any witness residing in the United States for use in a civil

this judicial apathy."); Henry Jones also commented on the condition of U.S. federal law in this manner: "[I]t is probable that no other government permits such widespread confusion and such profound disregard for the concept of comity or international obligation in connection with judicial assistance between nations." *Id.* at 538.

52. Jones, *supra* note 7, at 540. In 1939, an international practitioner wrote that [t]he difficulties surrounding the securing of evidence abroad are such as to confound any general practitioner not experienced in such matters. Even to one who has the necessary experience, the delays and red tape involved in an effort to secure such evidence create a formidable psychological barrier in the prosecution of a litigation.

Raymond T. Heilpern, *Procuring Evidence Abroad*, 14 *TUL. L. REV.* 29 (1939).

53. See S. REP. NO. 2392, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 *U.S.C.A.N.* 5201. The Senate Report stated:

Overseas investment by United States citizens and business firms have multiplied considerably since the conclusion of World War II. In addition, the United States Government has instituted trade and aid programs of considerable magnitude. These developments have occasioned an interrelation of the financial and commercial life in this country and abroad to a degree unparalleled in history. Yet, oddly enough, this expansion of international business activities has not been accompanied by a modernization of international legal procedures necessary to settle commercial disputes. This deficiency was evident to some in the legal profession before World War II, but it has become increasingly apparent to the bar since the war.

Id. at 5201; see also Smit, *supra* note 3, at 1015 (attributing growth in international litigation to increase in international commerce); Deutsch, *supra* note 5, at 176 n.6 (attributing increased need for international litigation to significant increase in international transactions during twentieth century).

54. See Jones, *supra* note 7, at 558 (explaining how surge in international litigation following World War II revealed inadequacy of federal judicial assistance statute); see also S. REP. NO. 1580, *supra* note 8 ("The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation.").

55. Pub. L. No. 773, 62 Stat. 869, 949 (1948).

case in another country.⁵⁶

By enacting the 1948 statute, the U.S. Congress took a significant step in accommodating external requests for judicial assistance in U.S. federal courts.⁵⁷ Following the 1948 statute, the U.S. Congress continued to amend Section 1782, broadening its application to include criminal actions, while simplifying the procedures used to obtain evidence.⁵⁸ Critics of Section 1782, however, continued to consider this statute too narrow in its scope, thereby restricting cooperation among national and international judicial systems.⁵⁹

B. Congressional Revision of 28 U.S.C. § 1782

In response to growing criticism and the increased demand placed on U.S. courts to provide international judicial assistance, the U.S. Congress, in 1958, created the Commission on International Rules of Judicial Procedure (the "Commission").⁶⁰ The

56. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (1948). The statute provided in pertinent part that:

[t]he deposition of any witness 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 before a person . . . designated by the district court of any district where the witness resides or may be found.

Id.

57. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1153 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989) ("[b]eginning in 1948, Congress enacted several amendments that broadened the scope of the statute.") The 1948 amendment expanded judicial authority by allowing district courts to provide assistance in all civil actions pending in any court of another country. *Id.* The amendment also deleted the requirement that the foreign government must be a party to or have an interest in the litigation. *Id.*

58. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949). Congress modified the limitation that the non-U.S. litigation must be for the recovery of money or property and eventually only required that the action be a judicial proceeding.

Section 1782 of title 28, United States Code, is amended by striking out "residing", which appears as the sixth word in the first paragraph, and by striking out from the same paragraph the words "civil action" and in lieu thereof inserting "judicial proceeding."

Id.

59. *See Smit*, *supra* note 3, at 1026 (stating that problems with previous statute called for revisions).

60. Act of September 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743 (1958). Section 2 of the Act gave the Commission the following tasks:

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. To the end that procedures necessary or incidental to the conduct and settlement of litigation in State and Federal

Commission's principal task was to study and recommend improvements to Section 1782.⁶¹ The Commission determined that before it would consider any international agreements, it would first concentrate on unilateral improvements to U.S. laws.⁶² In 1964, the Commission's proposed amendments to Section 1782 were enacted into law by the 88th U.S. Congress with-

Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall-

(a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;

(b) draft and recommend to the President any necessary legislation;

(c) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings; and

(d) perform such other related duties as the President may assign.

Id.; see S. REP. NO. 2392, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 5201. The Senate Report stated:

[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and comprehensive study of the extent to which international judicial assistance can be obtained. The study is of such magnitude that it cannot readily be handled by some private body or law school institute. It should be an integrated study with participation by representatives of the bar and of the government.

Id. at 5202-03. For a discussion on the Commission, see Smit, *supra* note 31, at 217-19; see also Conway, *supra* note 13, at 555-56 n.71 (listing some members who served on Commission and its Advisory Board).

61. Conway, *supra* note 13, at 555-56 (describing goals of Commission). For a description on the tasks and accomplishments of the commission, see Philip W. Amram, *Public Law No. 88-619 of October 3, 1964-New Developments in International Judicial Assistance in the United States of America*, 32 D. C. BAR J. 24 (1965).

62. See Amram, *supra* note 61.

[T]he Commission] determined that its first task would be exclusively domestic. Before entering into any consideration of international agreements . . . the Commission determined to recommend to the appropriate authorities unilateral internal improvements and modernization of the United States Code, the Federal Rules of Civil and Criminal Procedure and the statutes of the several states.

Id. at 25; see also COMM'N ON INT'L RULES OF JUDICIAL PROCEDURE, FOURTH ANNUAL REPORT TO THE PRESIDENT FOR TRANSMISSION TO CONGRESS, H.R. DOC. NO. 88, 88th Cong., 1st Sess. viii (1963) ("The Commission determined at the outset that it should begin its work with the reform and improvements of domestic practices."); Smit, *supra* note 3, at 1016 ("It was decided that domestic reform should be the object of initial attention . . .").

out any revision.⁶³

The 1964 amendments had two major objectives.⁶⁴ First, the revisions were meant to provide a liberal and efficient means of assistance to international litigation in U.S. federal courts.⁶⁵ Second, the revisions were designed to encourage, by example, other nations to provide similar means of assistance to U.S. courts.⁶⁶ The authors of the 1964 amendments believed that the revisions would facilitate international litigation and encourage other countries to make similar improvements to their judicial systems.⁶⁷ The first amendment made to Section 1782 expanded the type of evidence that federal courts could obtain for use in

63. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995 (1964) (codified at 28 U.S.C. § 1782). For a discussion on the philosophy behind the amendments, see generally Amram, *supra* note 61.

64. *Malev Hungarian Airlines v. United Technologies*, 964 F.2d 97, 100 (2d Cir. 1992), *cert. denied sub nom. United Technologies Int'l v. Malev Hungarian Airlines*, — U.S. —, 113 S. Ct. 179 (1992). The Court stated that the amendments had the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *United Technologies*, 964 F.2d at 100. The primary intent of the amendments was to "clarify and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States." S. REP. NO. 1580 *supra* note 8, at 3784.

65. *United Technologies*, 964 F.2d at 100.

66. See Letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure, to John McCormack, Speaker of the House, (May 28, 1963), *reprinted in* 1964 U.S.C.C.A.N. at 3792-94. "The Commission hopes that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures. . . . Enactment of the proposed bill should encourage foreign nations to follow the example of the United States." *Id.* at 3794.

67. See *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 ("Congress did not intend Section 1782 orders to depend upon reciprocal agreements."); Amram, *supra* note 61, at 28 ("Wide judicial assistance is granted on a wholly unilateral basis. *No reciprocity is required.*") (emphasis added); Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965) ("It is not unfair to say that Public Law 88-619 [Section 1782] is a one way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drawn this way.").

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. S. REP. NO. 1580, *supra* note 8, at 3783. For a discussion on the failure of other governments to provide reciprocal treatment to U.S. litigants, see Schwappach, *supra* note 23, at 69.

non-U.S. proceedings.⁶⁸ Originally, Section 1782 only allowed a district court to assist in the taking of depositions and testimony.⁶⁹ After 1964, however, federal courts could also assist in obtaining documents and other tangible evidence for trials abroad.⁷⁰

In addition, the U.S. Congress modified the requirement that the evidence sought had to be used in another nation's "court" by substituting the term "tribunal"⁷¹ and adding "international tribunals."⁷² This revision permitted district courts to assist in proceedings before other countries' investigating magistrates, international administrative and quasi-judicial proceedings, and international judicial actions.⁷³ Furthermore, the amended statute added that any interested person could request judicial assistance.⁷⁴ This allowed not only foreign tribunals and officials, but also private litigants, to initiate discovery proceedings.⁷⁵ The 1964 amendments represent the latest progression

68. See *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1153 (11th Cir. 1988), *cert. denied*, 485 U.S. 1005 (1989) (outlining changes produced by 1964 amendments).

69. *Id.*

70. *Id.*; see Smit, *supra* note 3, at 1026 (1965) ("[N]ew Section 1782] . . . properly recognizes that judicial co-operation should be available on the same terms irrespective of the nature of the evidence sought").

71. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)) with 28 U.S.C. § 1782(a) (1988). For a discussion on the legislative history of the switch from the word "court" to the word "tribunal," see S. REP. NO. 1580, *supra* note 8, at 3788.

72. Application of Gianoli, 3 F.3d 54, 57 (2d Cir. 1993) ("The amendments . . . expanded the class of litigation in which section 1782 could be used by substituting the word 'tribunal' for the word 'court.'"); see Smit, *supra* note 3, at 1027 n.73 (stating increasing number and importance of international tribunals). Commentators of that time period noted that the statute's expansion to include international tribunals was of great significance. *Id.* For a history of assistance to international tribunals, see Hans Smit, *Assistance Rendered By the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264 (1962).

73. *In re Montreal*, 523 F.2d at 565 ("Also noteworthy is the use of the word 'tribunal' in place of 'court.'").

74. See Deutsch, *supra* note 5, at 178 ("The phrase 'interested person,' refers both to persons designated under foreign law to seek the evidence and to parties to foreign or international litigation.").

75. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)) with 28 U.S.C. § 1782(a) (1988). The 1964 amendments also abolished the limitation that evidence could only be discovered for use in a country with which the United States was at peace because the framers of the amendments realized that such problems were already regulated by the Trading With the Enemy Act. Smit, *supra* note 3, at 1028.

of judicial assistance statutes in the United States.⁷⁶ Section 1782 represents the modern view of providing a liberal approach to international judicial assistance.⁷⁷

C. *The Present State of 28 U.S.C. § 1782*

By amending Section 1782 in 1964, the U.S. Congress gave federal courts complete discretion in deciding the appropriate procedures to be followed by the party requesting discovery.⁷⁸ The pertinent Senate Report stated that the purpose of revising Section 1782 was to clarify and liberalize U.S. procedures for assisting non-U.S. and international tribunals in obtaining evidence in the United States.⁷⁹ Section 1782 now gives U.S. district courts complete discretion to decide whether they will grant judicial assistance under the statute.⁸⁰ Moreover, a U.S. district court, in response to a Section 1782 request, has the discretion to observe the discovery rules of the relevant foreign jurisdiction or to follow the Federal Rules of Civil Procedure.⁸¹ However,

76. *In re Montreal*, 523 F.2d at 565 (chronicling evolutionary process of international judicial assistance under U.S. law).

77. *See Smit*, *supra* note 31, at 229 (describing liberal grant of judicial assistance under U.S. Code).

78. *See John Deere Ltd. v. Sperry Corp.*, 100 F.R.D. 712, 714 (E.D.Pa. 1983) (“[T]he use of permissive, as opposed to mandatory language in the provision makes it clear that there is no automatic right to a section 1782 order. Instead, Section 1782 grants the district courts broad discretion to issue or to decline to issue, a discovery order.”). For an example of the procedures courts employ under Section 1782, *see Application of Gianoli*, 3 F.3d at 54-56.

79. *See S. REP. NO. 1580*, *supra* note 8, at 3788-90.

80. 28 U.S.C. § 1782(a). The statute states that the district court “may” grant a request, but it does not give the court much guidance as to “when” it may do so. *See supra* note 9 for entire text of section 1782; *John Deere Ltd.*, 100 F.R.D. at 714 (stating that Section 1782 grants district courts broad discretion to issue or decline to issue discovery order); *Amram*, *supra* note 61, at 31 (describing unrestricted grant of power to courts); *Smit*, *supra* note 3, at 1029 (explaining district court’s discretion under Section 1782); *Bomstein & Levitt*, *supra* note 12, at 446 (“The effect of the statute’s broadly drafted language has been the granting of complete discretion to the district court in evaluating section 1782 requests. Noticeably absent are proper guidelines for the exercise of this discretion.”) (emphasis added).

81. *See S. REP. NO. 1580*, *supra* note 8. The report states that Section 1782 permits, but does not command, following the foreign or international practice. If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding . . . is of a criminal, civil, administrative, or other nature.

Id. Since Congress passed the 1964 amendments without debating the recommendations of the Committee there is not a lot of evidence of the Congressional viewpoint in

because the Commission's proposal was passed through the U.S. Congress without debate and Congress did not clearly define key words in the statute, there has been a great deal of conflict among the U.S. federal circuit courts over the proper interpretation of Section 1782.⁸² As a result, the statute's guidelines, criteria, and terminology have not been construed consistently.⁸³

II. SPLIT AMONG THE FEDERAL CIRCUITS OVER THE
INTERPRETATION OF 28 U.S.C. § 1782: DOES THE STATUTE
IMPLICITLY REQUIRE THAT EVIDENCE SOUGHT MUST BE
DISCOVERABLE UNDER THE LAWS OF THE
FOREIGN JURISDICTION?

Although the U.S. Congress did not give the federal courts strict guidelines for interpreting Section 1782, the legislative history did state that a district court, in exercising its discretionary powers, may take into account the nature and attitudes of the government making the request and the character of the pro-

this area. See Bomstein & Levitt, *supra* note 12, at 439 ("Congress played no role in redrafting the statute. Rather, the new draft was written entirely by an advisory committee and adopted summarily."). However, the statements that do exist clearly establish Congress' intent to liberalize the judicial assistance procedures by allowing the courts wide discretion. Smit, *supra* note 31, at 219 n.18 ("since Congress adopted [the Commission's] proposals, including the legislative history, without change, the argument that Congress had an intent other than that of the drafters would appear difficult to maintain"); see also *In re Court of Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75 (E.D.Pa. 1980). The *In re South Africa* court reasoned:

In contrast to the usual circumstances concerning letters rogatory, the requesting party in this case is a litigant in a foreign action. While this in no way derogates from his right to petition this Court for such a request, it does complicate analysis of this Court's appropriate exercise of discretion. If the purpose of the act enabling this Court to grant such a request is, as stated, for the improvement of international cooperation, and if, as it appears, *Congress expects the district court to grant requests that will spur a reciprocity of cooperation*, then this Court must act with special regard for the South African Commissioner of Patents, who is not represented here.

Id. at 77 (emphasis added). In *In re South Africa*, the court found it useful to use discoverability as a guide in its exercise of discretion because the Commissioner of Patents was not represented in the action and the courts had grounds to believe that the applicant was attempting to circumvent South African discovery restrictions. Application of Gianoli, 3 F.3d at 61 n.3 (citing *In re South Africa*, 88 F.R.D. at 77).

82. See Bomstein & Levitt, *supra* note 12, at 446-47. "[S]ome courts, interpreting the same statutory words, have drawn opposite conclusions; still other courts have applied the statute in a fashion which seems at odds with the policy behind it." *Id.*

83. *Id.* at 446 ("judicial interpretation of the statute has not been uniform"); see Smit, *supra* note 3, at 1029 (describing Congress' lack of precision in granting district courts broad discretion in granting judicial assistance).

ceedings in which the discovered evidence will be used.⁸⁴ The U.S. district courts, however, have been reluctant to use those guidelines when making discretionary decisions under Section 1782.⁸⁵ One reason for this may be that the U.S. Congress neither explained nor demonstrated how the courts should interpret and then apply these terms.⁸⁶ The discretion issue, therefore, continues to be troublesome for the courts.

One area where the issue of proper discretion plays a controversial role is in the district court's analysis of the other nation's laws and procedures.⁸⁷ According to Section 1782, the district court, in its discretion, may order that the discovery be conducted according to the procedural rules of the non-U.S. or international tribunal.⁸⁸ If the court does not make such a determination, the parties must follow the Federal Rules of Civil Procedure when conducting discovery within the United States.⁸⁹

Some U.S. circuit courts have held that Section 1782 contains an implicit requirement that controls any exercise of discretion as to the discovery procedures to be followed.⁹⁰ This im-

84. S. REP. No. 1580, *supra* note 8, at 3788. The report stated that:

In exercising its discretionary power, the court may take into account the *nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.*

Id. (emphasis added).

85. *See* Bomstein & Levitt, *supra* note 12, at 450. "[N]early all of the courts interpreting Section 1782 have declined to base their decisions upon Congress' standards, yet Congress has taken no action to let the courts know that the legislature is displeased with the alternative tests used by the courts." *Id.* at 450 n.91; Smit, *supra* note 31, at 229 (describing federal courts reluctance to follow clearly expressed provisions of Section 1782).

86. Bomstein & Levitt, *supra* note 12, at 448. One discretionary factor that arises from the legislative history is that the lack of reciprocity given to U.S. citizens in the foreign jurisdiction is not a valid reason for a district court to deny a discovery request. *Id.*

87. *See John Deere Ltd.*, 754 F.2d at 132 (reversing district court's refusal to grant discovery under Section 1782, which was based, in part, on district court's erroneous view that material sought must itself be admissible).

88. 28 U.S.C. § 1782(a).

89. *Id.*; *see* Deutsch, *supra* note 5, at 189 (describing procedural options under Section 1782).

90. *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992); *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989); *In re Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d

implicit requirement provides that material sought to be discovered in the United States must also be discoverable under the laws of the extraterritorial jurisdiction where the litigation is taking place.⁹¹ In effect, this implicit discovery requirement mandated by some circuit courts places an extra burden upon parties requesting discovery under Section 1782. The issue of whether or not Section 1782 contains an implicit discoverability requirement has caused a split in the U.S. federal circuit courts.⁹²

A. The Majority View: Section 1782 Contains an Implicit Requirement That the Material Requested in the District Court Be Discoverable Under the Laws of the External Jurisdiction

Cases representing the majority reasoning⁹³ require a non-U.S. litigant to make a preliminary threshold showing that the material sought would be discoverable in the non-U.S. jurisdiction before obtaining discovery in the United States.⁹⁴ Since this is a threshold requirement, the discretion of the district court is eliminated.

1. The Origins of the Discoverability Requirement

The first court to examine the discoverability requirement did so in 1980.⁹⁵ In *In re the Court of the Comm'r of Patents for the Republic of South Africa*,⁹⁶ the Pennsylvania district court held that it would not direct a person under its jurisdiction to give testimony or produce documents absent a showing by the requesting party that the materials requested were discoverable under laws

1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *John Deere Ltd. v. Sperry Co.*, 754 F.2d 132 (3rd Cir. 1985).

91. *See supra* notes 17-21 and accompanying text (describing split in circuit courts on discoverability issue).

92. *Compare* Application of Gianoli, 3 F.3d 54 (2d Cir. 1993) *with In re Asta Medica S.A.*, 981 F.2d at 1, *and In re Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988).

93. *See supra* notes 85-90 and accompanying text (describing discoverability requirement).

94. *See In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992).

95. *In re the Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75 (E.D.Pa. 1980).

96. *In re Court of Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75 (E.D.Pa. 1980). In this case, a party to a South African patent litigation requested discovery of documents from an American corporation located in Pennsylvania. *Id.* at 76.

of the country where the litigation was taking place.⁹⁷ The district court concluded that it should not, by exercise of its discretion under Section 1782, permit litigants to circumvent the discovery restrictions imposed by another nation's judicial system.⁹⁸ The court reasoned that since the congressional purpose behind the 1964 amendments to Section 1782 was to encourage reciprocity and judicial cooperation, this goal would be impeded if discovery offending the non-U.S. jurisdiction took place in the United States.⁹⁹ Although the district court did not expressly

97. *Id.* at 77. The district court differentiated this case from the more traditional judicial assistance cases because the requesting party was not a tribunal or an official governmental entity but was a litigant in the non-U.S. action. *Id.* The *In re South Africa* court held that under such circumstances, it must act with special regard, to the South African Commissioner of Patents because the Commissioner was not represented in the proceedings. *Id.* The court stated that

[i]n contrast to the usual circumstances concerning letters rogatory, the requesting party in this case is a litigant in a foreign action. While this in no way derogates from his right to petition this Court for such a request, it does complicate analysis of this Court's appropriate exercise of discretion. If the purpose of the act enabling this court to grant such a request is, as stated, for the improvement of international cooperation, and if, as it appears, Congress expects the district courts to grant requests that will spur a reciprocity of cooperation, then this Court must act with special regard for the South African Commissioner of Patents, who is not represented here.

Id. Furthermore,

if, as in the usual case of letters rogatory, the foreign tribunal were represented here, the task of this Court would be very much simpler. Were that the situation, and the foreign tribunal could instruct this Court as to its law, this Court would not hesitate to order discovery consistent with South African law.

Id. at 77 n.1 (citation omitted). Most cases concerning Section 1782's discoverability requirement distinguish cases that involve a direct request for assistance from a non-U.S. tribunal from cases where the request is made from an individual party from the non-U.S. proceeding. See *In re Application for an order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England*, 147 F.R.D. 223 (D.C.Ca. 1993).

Where the request emanates from the tribunal itself, it is clear that the discovery sought is permitted and authorized by that body. Where the request is made by an adverse party in a foreign proceeding . . . the federal courts must exercise caution to prevent the circumvention of foreign discovery provisions and procedures. While individual litigants are entitled to make requests for assistance under 28 U.S.C. § 1782, such requests do not establish the foreign court's position as to the discovery sought.

Id. at 226 (citation omitted).

98. *In re Republic of South Africa*, 88 F.R.D. at 77.

99. *Id.* "Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunal." *Id.*

state that Section 1782 contained a discoverability requirement, the district court's holding implied that Section 1782 contained a discoverability requirement.¹⁰⁰

The next case to examine the discoverability requirement was *John Deere Ltd. v. Sperry Corp.*¹⁰¹ In that case the Third Circuit held that Section 1782 does not require a district court to consider the ultimate admissibility of evidence in the external jurisdiction prior to granting a discovery order requested by a non-U.S. litigant.¹⁰² In reaching this conclusion, the *John Deere* court seemed to acknowledge that in cases where an individual litigant requests judicial assistance, as opposed to another court through a letter rogatory, the district court should make a determination on whether the evidence requested is discoverable under the laws of the jurisdiction where the litigation will take place.¹⁰³ The *John Deere* court cited *In re the Court of the Comm'r of Patents for the Republic of South Africa* case for the proposition that other countries' discovery proceedings should not be circumvented.¹⁰⁴ The court, however, was willing to allow discovery to proceed in this case because the evidence sought would also be discoverable in Canada and the Canadian court would not be offended.¹⁰⁵

100. *Id.*; see Stahr, *supra* note 33, at 609 (describing language of court in *In Re South Africa* as "unfortunately broad").

101. *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3rd Cir. 1985). This case involved a patent infringement dispute in the Federal Court of Canada. *Id.* The defendant sought to depose and acquire documents from two American employees of the Sperry Corporation. *Id.*

102. *Id.* at 135-36 (stating that it is not within province of district courts to decide if evidence sought is admissible in external jurisdiction).

103. *Id.* at 136. The court stated that "[a]s a cooperative measure, section 1782 cannot be said to ignore those considerations of comity and sovereignty that pervade international law. A grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782." *Id.* at 135. "Concern that foreign discovery provisions not be circumvented by procedures authorized in American courts is particularly pronounced where a request for assistance issues not from letters rogatory but from an individual litigant." *Id.* at 135, 136 (citation omitted).

104. *Id.* at 136. The *John Deere* court cited *In re the Court of the Comm'r of Patents for the Republic of South Africa* as an example of a district court denying a discovery request because an individual litigant did not show that the documents sought would be discoverable in the external jurisdiction. Moreover, the language used by the court seemed to imply that it agreed with the district court's decision. The court stated that "[i]n *In re the Court of the Commissioner of Patents for the Republic of South Africa* . . . the court denied a request for discovery where it was doubtful that the documents and testimony sought would be discoverable under South African law." *Id.* (citation omitted).

105. *Id.* "We are also satisfied that permitting discovery in this case would not

2. The Discoverability Requirement Takes Hold Among the Circuit Courts: The Eleventh Circuit Constrains the District Court's Discretion by Mandating the Discoverability Requirement

In 1988, the Eleventh Circuit, in two separate cases, expressly stated that Section 1782 contains an implicit discoverability requirement.¹⁰⁶ In the first case, *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*,¹⁰⁷ the court held that although a district court should refrain from deciding whether the evidence requested will be admissible in the external jurisdiction, the district court is required to decide whether the evidence would be discoverable in the external jurisdiction before granting assistance.¹⁰⁸ The *Trinidad* court did not give any reason for mandating the discoverability requirement in Section 1782 cases. Instead, the court cited the Third Circuit's *John Deere* decision and the Pennsylvania District Court's *South Africa* decision as support for its conclusion.¹⁰⁹

The Eleventh Circuit reaffirmed its interpretation of Section 1782 four months later with its decision in *Lo Ka Chun v. Lo To*.¹¹⁰ In *Lo Ka Chun*, the Eleventh Circuit remanded the case to the district court for a determination as to the discoverability of the evidence sought by the requesting non-U.S. party in the

offend the Canadian tribunal. Our decision does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals." *Id.*

106. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988).

107. 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). In *Trinidad*, the appellant sought to reverse the district court's denial of his motion to quash a subpoena obtained by the U.S. Department of Justice at the request of the Minister of Legal Affairs of Trinidad and Tobago. *Id.* The United States had sought to obtain the appellant's bank records as part of a criminal investigation in Trinidad and Tobago. *Id.* The Eleventh Circuit affirmed the district court's decision and held that Section 1782 authorized the judicial assistance sought by the Minister of Legal Affairs even though there was no pending proceeding in Trinidad and Tobago. *Id.*

108. *In re Trinidad & Tobago*, 848 F.2d at 1156. The Eleventh Circuit stated that "[w]hile a district court generally should not decide whether the requested evidence will be admissible in the foreign court, . . . the district court *must decide whether the evidence would be discoverable in the foreign country before granting assistance.*" *Id.* (emphasis added).

109. *Id.* (citing *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3rd Cir. 1985); *In re Court of the Comm'r of Patents for Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980)).

110. *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988).

home country of litigation.¹¹¹ Similarly, the Eleventh Circuit did not state any reason for mandating the discoverability requirement, but instead cited to its previous decision in *Trinidad*.¹¹²

In 1989, the D.C. Circuit appeared to join the Third and Eleventh circuits by holding that Section 1782 contained an implicit discoverability requirement.¹¹³ In *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, the court upheld a discovery request by the Crown Prosecution Service of the United Kingdom to depose a U.S. citizen for use in a British criminal proceeding.¹¹⁴ The D.C. Circuit Court upheld the request, in part, because the U.S. citizen could not show that the procedures used by the district court to obtain the requested evidence were unavailable under British discovery laws.¹¹⁵ Although the court did not place the burden on the requesting party to show that the evidence was discoverable under the laws of the external jurisdiction, the court did advocate the view that evidence may only be obtained under Section 1782 if it is discoverable in the other jurisdiction.

3. *In re Application Asta Medica, S.A.*: The Strongest Pronouncement for the Discoverability Requirement

The First Circuit, in *In re Application of Asta Medica, S.A.*,¹¹⁶ followed the holdings of the Third and Eleventh Circuits by stating that Section 1782 requires a litigant requesting assistance from a district court to make a threshold showing, prior to obtaining discovery, that the information sought in the United

111. *Id.* at 1566.

[W]e hereby remand this cause to the district court for a determination as to the discoverability of the evidence sought by appellee Lo To. Should the district court find the evidence discoverable under the laws of Hong Kong, the taking of the testimony and/or production of documents should commence in accordance with the Federal Rules of Civil Procedure However, if the court finds that the evidence is not discoverable, the subpoenas duces tecum are due to be quashed.

Id.

112. *Id.*

113. *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989).

114. *Id.* at 687.

115. *Id.* at 693. The court stated that the appellant "cites no statutes, rules, cases, or other official pronouncements to support his claim that the procedures approved by the district court's order in this case violate British practices." *Id.*

116. 981 F.2d 1 (1st Cir. 1992).

States would be discoverable in the non-U.S. jurisdiction.¹¹⁷ The First Circuit based its decision on the history, rationale, and various policy considerations concerning the statute.¹¹⁸

The *Asta* court first noted that without a discoverability requirement, a U.S. party involved in litigation in another country with limited pre-trial discovery will be placed at a substantial disadvantage *vis-à-vis* the non-U.S. party.¹¹⁹ This disadvantage would result from the non-U.S. party being able to conduct liberal discovery in the United States, while the U.S. party is confined to the restricted discovery of the other jurisdiction.¹²⁰ The *Asta* court reasoned that the U.S. Congress did not intend for Section 1782 to place U.S. litigants in a more detrimental position than their opponents when litigating abroad.¹²¹

The second factor, articulated by the *Asta* court, in favor of a threshold discoverability requirement was that without the requirement a non-U.S. litigant may use Section 1782 to circumvent the laws and procedures of the jurisdiction where the litigation will take place.¹²² Such a case may arise when the information sought under Section 1782 is not available to the litigants in the non-U.S. jurisdiction due to that jurisdiction's adjudicatory

117. *In re Asta Medica S.A.*, 981 F.2d at 7 (holding that "a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law"). The *Asta* court acknowledged that Congress gave district courts broad discretion under Section 1782 but stated that "[n]evertheless, limitations imposed by or implicit in the statute must control any exercise of discretion." *Id.* at 4.

118. *See id.* ("The court's discretion under section 1782] is limited by the restriction that we find . . . to be implicitly required by section 1782, based upon its history, rationale, and the policy considerations . . . discussed.").

119. *Id.*

120. *Id.* The First Circuit stated that without a discoverability requirement a United States party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage *vis-a-vis* the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are opened for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction.

Id. at 5.

121. *Id.* at 6. The court stated that such a result "would be contrary to the concept of fair play embodied in United States discovery rules and the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'" *Id.* (citing *Societe National Industrielle Aeropastiale v. U.S. Dist. Court for Southern Dist.*, 482 U.S. 522, 540 n.25 (1987) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))).

122. *Id.*

system.¹²³ If the same information is located within the United States, however, the litigant may circumvent the other country's discovery rules by obtaining the information under Section 1782.¹²⁴ The *Asta* court reasoned that Section 1782 should not disrupt the balance among litigants that each nation creates for its own judicial system.¹²⁵

Finally, the court emphasized that upsetting the balance between litigating parties by allowing parties to use Section 1782 to circumvent another country's laws would create an unwarranted intrusion into that country's adjudicatory system.¹²⁶ This intrusion would offend such tribunals, undermining the statute's ultimate purpose of encouraging countries to liberalize their discovery rules.¹²⁷ Based on these considerations, the court held that a district court's discretion is limited by an implicit discoverability requirement in the statute.¹²⁸

123. *Id.* ("The information sought under Section 1782 may not be available in the foreign jurisdiction due to either procedural restrictions or the substantive law.")

124. *Id.* The *Asta* court illustrated such a possible scenario.

[I]n a purely domestic litigation in a foreign jurisdiction with restrictive pre-trial discovery procedures, a litigant may request the foreign tribunal to issue an order compelling the production of information located in the foreign jurisdiction. If such request is denied and the same information is located in the United States, the litigant may side-step that result by racing here and obtaining the information under Section 1782.

Id.

125. *Id.* The First Circuit stated that "[i]n amending Section 1782, Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Id.*

126. *Id.*

127. *Id.* The court noted that "[i]n order to avoid offending foreign tribunals, other courts have established, as a prerequisite to granting a request for assistance under Section 1782, a threshold showing that the information would be discoverable in the foreign jurisdiction if located there." *Id.* (citations omitted). *But see South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" NV*, [1987] 1 App. Cas. 24 (H.L.). In this case the plaintiff sought an injunction from the British courts in order to prevent the defendant from initiating a Section 1782 action requesting depositions of parties located in the United States. *Id.* The House of Lords refused to issue the injunction, holding that the while procedural differences regarding discovery existed between the United States and England, the Court would not prevent a party from gathering information necessary to prove its case. *Id.* The House of Lords found that an application under Section 1782 to do what could not be done under British law was not an affront to their sovereignty. *Id.* The English Court stated that "it could not possibly have been said that there had been any interference with the English Court's control of its own process." *Id.* at 42. For a description and analysis of the case, see DAVID MCLEAN, *INTERNATIONAL JUDICIAL ASSISTANCE* (1992).

128. *Id.* at 7. According to the *Asta* court the primary burden falls upon the appli-

B. *The Second Circuit Creates a Spilt in the Circuits: Application of Gianoli*

In *Application of Gianoli*,¹²⁹ the Second Circuit was presented with the same issue as in the previous cases: namely, whether Section 1782 contains a discoverability requirement, either on its face or by implication.¹³⁰ Similar to the First Circuit in *Asta*, the *Gianoli* court based its interpretation of Section 1782 on the statute's legislative history and congressional intent, but reached the opposite conclusion.¹³¹ The Second Circuit held that Section 1782 does not require that the material requested in the district court be discoverable under the laws of the other jurisdiction.¹³²

The *Gianoli* court began its analysis by reviewing the language of Section 1782.¹³³ The court stated that since the statute's language is unambiguous in its requirements¹³⁴ and makes no reference to a discoverability requirement,¹³⁵ the court will

cant who is requesting assistance to show that the information is discoverable under the non-U.S. law. *Id.* The court further stated that in cases where the district court may have problems determining the discoverability of the evidence requested, it may ask the other country's court for assistance or solicit the assistance of a non-U.S. law expert to clarify whether the requested information is discoverable or not. *Id.* at n.7.

129. 3 F.3d 54 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 443 (1994) (parties appointed as guardians of Chilean incompetent sought discovery in U.S. district court concerning incompetent's assets in United States).

130. *Id.*

131. *Id.* at 57-58 (discussing history and purposes of Section 1782).

132. *Id.* at 62.

133. *Id.* at 58. The Second Circuit cited a U.S. Supreme Court decision which held that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.'" *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

134. *Application of Gianoli*, 3 F.3d at 58-59. The court listed the requirements of Section 1782 as follows:

- (1) the person from whom discovery is sought must reside or be found in the district of the district court to which the application is made,
- (2) the discovery must be "for use in a proceeding in a foreign or international tribunal," and
- (3) the application must be made "by a foreign or international tribunal" or by "any interested person."

Id. (citing 28 U.S.C. § 1782).

135. *Id.* at 59.

The language makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. Indeed, the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court

not read an extra-statutory barrier to discovery into Section 1782.¹³⁶ The court advocated a literal reading of Section 1782 and stated that such a reading conforms with the purpose and legislative history of the statute.¹³⁷ The Second Circuit reasoned that if the U.S. Congress actually intended to impose such a sweeping restriction on the district court's discretion, it would have included statutory language to that effect.¹³⁸

The *Gianoli* court then examined the First and Eleventh Circuits' decisions, which read a discoverability requirement into Section 1782.¹³⁹ The Second Circuit agreed that the factors

"may be in whole or part the practice and procedure of the foreign country or the international tribunal."

Id. (citing 28 U.S.C. § 1782).

136. *Id.* ("As we recently made clear . . . we are not free to read extra-statutory barriers to discovery into section 1782.") (citing *Malev Hungarian Airlines v. United Technologies Int'l Corp.*, 964 F.2d 97, 100 (2d Cir. 1992)). The Second Circuit in *Gianoli* relied on its previous decision in *United Technologies*. *Id.* at 59, 61. In *United Technologies*, the appellant filed a Section 1782 request for discovery for use in a Hungarian court. *United Technologies*, 964 F.2d at 98-99. The district court denied the request primarily because the appellant never made a formal request for discovery before the Hungarian court. *Id.* at 100. The Second Circuit reversed, holding that the district court's grounds for denying the request were improper. *Id.* The Second Circuit stated 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." *Id.*

137. *Application of Gianoli*, 3 F.3d at 59.

The Senate Report makes clear that the 1964 amendments were intended to leave the district courts with wide discretion in granting relief under Section 1782. . . . The Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure expressed a similar viewpoint: " '[Section 1782] is a one-way street. It grants wide assistance to others, but demands nothing in return. It was deliberately drawn this way.' " Given that the statutory language is silent and the legislative history indicates that "[i]n exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country," we find it difficult to believe that Congress actually intended section 1782 to have an implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country.

Id. (citations omitted).

138. *Id.* The Second Circuit did state that district court judges may find it appropriate in some cases to make a determination of discoverability under the law of the other jurisdiction as part of their discretionary powers. *Id.* at 60. However, the statute contains no threshold requirement of discoverability. *Id.*

139. *Id.* at 60. The Second Circuit rejected the idea that the *John Deere* and *In re South Africa* cases held that Section 1782 contains a discoverability requirement. The court stated:

In *John Deere*, however, the Third Circuit merely decided that section 1782 does not require (1) that the foreign courts have similar judicial assistance

cited by the courts mandating a discoverability requirement were valid concerns to be examined in a Section 1782 proceeding.¹⁴⁰ The court, however, held that such considerations were properly addressed by a district court judge's exercise of discretion and not by a circuit court instituting a threshold discoverability requirement.¹⁴¹

III. THE SECOND CIRCUIT CORRECTLY HELD THAT SECTION 1782 DOES NOT CONTAIN A DISCOVERABILITY REQUIREMENT

In *Application of Gianoli*,¹⁴² the Second Circuit correctly held that Section 1782 does not contain a discoverability requirement.¹⁴³ By rejecting the view that Section 1782 requires a party to make a threshold showing of discoverability, the Second Circuit properly applied principles of statutory interpretation and appropriately based its decision on Congress' intent to liberalize judicial assistance in the U.S. district courts.¹⁴⁴ Moreover, the *Gianoli* decision will not offend other nation's judicial systems in cases where district courts permit non-U.S. litigants to conduct

procedures, or (2) that the evidence sought be admissible under the rules of evidence of the foreign jurisdiction. *John Deere* is not a case about whether section 1782 requires discoverability, and the court never explicitly states that such a requirement exists. The *Fodens*, however, point to the court's language in *John Deere* that on the facts before it the discoverability requirement has been met, and that '[a] grant of discovery that trenched upon the clearly established procedures of a foreign tribunal would not be within section 1782.' Nonetheless, we are unconvinced that these general concerns of the *John Deere* Court require the reading of an absolute discoverability requirement into section 1782. In . . . Court of the Comm'r of Patents for South Africa, the district court did not hold that section 1782 requires a finding of discoverability be made prior to granting discovery under the statute. . . . The court found discoverability to be a useful guide to its exercise of discretion in the case before it because the Commissioner of Patents was not represented in the action and the court had grounds to believe that the applicant was attempting to circumvent South African discovery restrictions.

Id. at 60-61 n.3 (citations omitted).

140. See *supra* notes 116-28 and accompanying text (describing First Circuit's factors for mandating discoverability requirement).

141. *Application of Gianoli*, 3 F.3d 54, 60-61 (2d Cir. 1993) *cert. denied*, ___ U.S. ___, 114 S. Ct. 443 (1994).

142. *Id.*

143. See *supra* notes 129-41 and accompanying text (describing *Gianoli* decision).

144. See *supra* notes 129-41 and accompanying text (describing the court's analysis).

discovery under the federal rules.¹⁴⁵ Instead, the Second Circuit's interpretation will grant non-U.S. litigants the liberal discovery that the U.S. Congress intended,¹⁴⁶ while still enabling district courts to use their discretion to limit discovery under certain conditions.¹⁴⁷

A. *The Second Circuit Properly Applied Principles of Statutory Interpretation and Appropriately Based Its Decision on Congressional Intent*

Neither the language of Section 1782 nor its legislative history support the decision that material sought to be discovered under the statute must also be discoverable under the laws of the jurisdiction where the litigation will take place.¹⁴⁸ The U.S. Supreme Court has held that the plain meaning of legislation is conclusive except in certain rare instances when the literal application of a statute will create a result demonstrably at odds with the intention of the legislature that drafted it.¹⁴⁹ In this instance, a literal reading of Section 1782 does not require district courts to mandate a discoverability requirement upon request-

145. See *supra* notes 126-128 and accompanying text (discussing argument that non-U.S. courts may be offended by allowing discovery under U.S. rules).

146. See *supra* notes 64-74 and accompanying text (describing congressional intent to liberalize discovery proceedings under Section 1782).

147. See Smit, *supra* note 3, at 1029 (describing factors that may influence courts to refuse to render judicial assistance). "The basic rule should be that assistance is rendered unless important considerations affecting concrete and vital American interests require its refusal." *Id.* at 1029 n.87.

148. See *supra* notes 39-77 and accompanying text (describing history and legislative revisions of Section 1782). Smit, *supra* note 31, at 234 (concluding that discoverability under non-U.S. law is irrelevant). Stahr, *supra* note 33, at 612 (explaining that nothing in language or history of statute demands discoverability requirement).

149. See *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242. The U.S. Supreme Court stated that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Id.* (citation omitted); *Halvering v. Hammel*, 311 U.S. 504 (1941). In *Halvering*, the Court stated that

courts in the interpretation of a statute have some scope for adopting a restrictive rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, or would thwart the obvious purpose of the statute. But courts are not free to reject that meaning where no such consequences follow and where [such meaning] appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure.

Id. at 510-11 (citation omitted); *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S. Ct. 2589, 2594 (1992) ("In a statutory construction case, the beginning point must be the language of the statute . . .").

ing parties.¹⁵⁰ Moreover, there is nothing in the wording or structure of the statute that suggests that a discoverability requirement exists.¹⁵¹ In fact, the only language pertinent to the question of whether a district court must examine the discoverability of evidence is permissive language.¹⁵² The statute states that the practices and procedures prescribed by the district court may be in whole or in part the practices and procedures of the external jurisdiction.¹⁵³ Therefore, the Second Circuit correctly limited its interpretation of Section 1782 to the plain meaning of the statute and avoided placing a judicially-created requirement upon requesting parties in Section 1782 proceedings.¹⁵⁴

The legislative history of Section 1782 makes it clear that the U.S. Congress intended courts in the United States to provide discovery to non-U.S. litigants in a wide variety of circumstances.¹⁵⁵ Congress, however, did not provide strict standards to guide when a court should grant judicial assistance.¹⁵⁶ Instead, the U.S. Congress determined that the requests for judicial assistance should be left to the court's discretion.¹⁵⁷ By imposing a threshold discoverability requirement, however, a district court's discretion is being unduly narrowed from the originally broad scope envisioned by Congress.¹⁵⁸ The statute's legislative history confirms that discoverability is one of a variety of factors for the district court to consider when exercising its discretion, but is not a precondition for granting a Section 1782

150. See *supra* note 9 (quoting Section 1782).

151. See *supra* notes 80-84 and accompanying text (describing requirements of Section 1782).

152. *Application of Gianoli*, 3 F.3d at 59 (2d Cir. 1993); see 28 U.S.C. § 1782(a).

153. 28 U.S.C. § 1782(a).

154. See *Application of Gianoli*, 3 F.3d at 61 (holding that no discoverability requirement exists in Section 1782).

155. See *supra* notes 80-84 and accompanying text (discussing broad discretion given to district courts under Section 1782); Conway, *supra* note 13, at 574 (stating that "[t]he evolution of § 1782, from its enactment in 1855 through its most recent amendment in 1964, provides a very good indication of Congress' intent regarding the application of the statute").

156. See *In re Application of Asta Medica S.A.*, 794 F.Supp. 442 (D.C. D. Maine 1992) *rev'd*, *In re Application of Asta Medica S.A.*, 981 F.2d 1 (1st Cir. 1992) ("Congress has provided no standard to guide the courts' determination of when to grant such assistance. Instead, it has left this decision wholly discretionary.")

157. *Id.*

158. See *supra* notes 80-84 and accompanying text (describing statute's broad scope of discretion).

request.¹⁵⁹ The Senate Report, which is a principal document explaining the legislature's conception of Section 1782, states that a district court in exercising its discretion may consider the character of the proceedings in the other country.¹⁶⁰ This consideration may include the discovery practices of the country where the litigation will take place. Since Congress intended discovery in the external jurisdiction to be only one factor to be considered by the district court in exercising its discretion, it is apparent that Congress did not intend the discoverability issue to be a threshold requirement.¹⁶¹

B. Mandating a Discoverability Requirement Usurps the District Court's Power of Discretion Under Section 1782 and Requires District Courts to Make Difficult Determinations of Non-U.S. Discovery Laws

The discoverability requirement forces U.S. district courts to evaluate other countries' discovery procedures in every Section 1782 action.¹⁶² This places an inordinate burden on district courts by requiring an evaluation of other nation's evidentiary and discovery rules.¹⁶³ This results in district courts having to make difficult decisions on how to apply law in which they may not have expertise.¹⁶⁴ Numerous courts have stated that it is undesirable to have district courts determine the scope of other

159. See *supra* notes 57-83 and accompanying text (tracing legislative history of Section 1782).

160. *Id.*

161. *Id.*

162. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992) (holding that showing of discoverability in non-U.S. jurisdiction is threshold requirement).

163. See *Smit supra* note 31, at 235 ("[T]he drafters realized that making the extension of American assistance on foreign law would open a veritable Pandora's box. They definitely did not want to have a request for cooperation turn into an unduly expensive and time-consuming fight about foreign law."). But see *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992). The *Asta* court stated that "[t]he only burden that would fall upon the district court is to make a discovery determination based upon the submission by the parties. That is hardly an 'onerous' burden." *Id.* at 7. The *Asta* court further stated that in cases where the district court may have trouble in determining whether the information is discoverable in the other jurisdiction, the court may ask the other nation's court to help it decide whether the information is discoverable or it could request the assistance of a non-U.S. law expert to clarify the law in question. *Id.* at 7 n.7.

164. See *Bomstein & Levitt, supra* note 12, at 4656 n.115 ("U.S. lawyers and courts alike have great difficulty mastering and applying the U.S. federal evidentiary rules and exceptions. It is not unreasonable to assume that similar complexities could exist under foreign evidentiary codes. Certainly, then, U.S. courts are not in a position to master and apply foreign codes."); *Smit, supra* note 31, at 235 (arguing that it would be

nations' laws.¹⁶⁵

In *In re Request for Judicial Assistance from the Seoul District Criminal Court*,¹⁶⁶ the Ninth Circuit stated that in Section 1782 cases courts should not involve themselves in technical issues of other nations' laws relating to the admissibility of the evidence sought.¹⁶⁷ In *John Deere v. Sperry Corp.*,¹⁶⁸ the Third Circuit agreed and stated that federal courts should refrain from deciding technical questions of other nations' laws relating to the admissibility of the evidence sought before such tribunals.¹⁶⁹ Although neither the *South Korea* court nor the *John Deere* court were addressing the discoverability requirement, the same concerns exist when federal district courts decide questions involving discoverability laws of other nations.

The discoverability requirement also places a heavy burden on the party requesting discovery to provide evidence on the discoverability of the material in the home country.¹⁷⁰ Alternatively, the *Gianoli* decision allows the discovery to take place subject to the discretion of the court, leaving the other nation's court to decide whether and in what capacity to admit the evidence sought to be discovered.¹⁷¹ This approach is more compatible with Congress' broad grant of judicial assistance to the U.S. federal courts under Section 1782.

inappropriate for U.S. courts to evaluate different discovery procedures of civil law countries in requests for assistance).

165. See *John Deere Ltd.*, 754 F.2d 132, 136 (stating that federal courts should not decide technical questions of other nation's laws); *In re Trinidad and Tobago*, 117 F.R.D. 177, 178 (S.D. Fla. 1987) ("[f]oreign tribunals are far more competent to decide issues of their own making than are United States courts. If the situation were reversed, this court would certainly prefer to interpret United States law rather than have a foreign tribunal sit in judgment."). The court also stated:

As a matter of law and policy, United States courts should refrain from undertaking an extensive analysis of foreign law in determining whether to honor a request for judicial assistance, and should confine its [sic] inquiry solely to whether the evidence requested comports with language of 28 U.S.C. § 1782 Our Courts should not become entangled in interpreting foreign law when deciding whether to grant requests for judicial assistance.

Id.

166. *In re Request for Judicial Assistance from the Seoul District Criminal Court*, Seoul, Korea, 555 F.2d 720 (9th Cir. 1977).

167. *Id.* at 723.

168. 754 F.2d 132 (3rd Cir. 1985).

169. *Id.*

170. See *In re Asta Medica S.A.*, 981 F.2d 1, 6 (1st Cir. 1992) (describing threshold discoverability requirement).

171. See *Application of Gianoli*, 3 F.3d at 60 (evaluating discoverability requirement).

*C. The Second Circuit Opinion Will Not Offend Non-U.S. or
International Tribunals*

In *Asta*, the First Circuit reasoned that without a discoverability requirement non-U.S. litigants may use Section 1782 to circumvent external law and procedures.¹⁷² Proponents of the discoverability requirement argue that non-U.S. courts will be offended when U.S. courts grant broad discovery requests, enabling litigants to bypass their procedures.¹⁷³ This bypass will disrupt the balance between litigants that each nation creates for its own judicial system.¹⁷⁴

However, there is no evidence that when district courts grant Section 1782 requests without imposing a threshold requirement of discoverability, non-U.S. courts are offended.¹⁷⁵ It is important to note that when other national courts provide judicial assistance to U.S. litigants for use in U.S. courts, they ordinarily do so according to their own judicial procedures and customs.¹⁷⁶ Ironically, there has not been an outcry from U.S. courts that they are offended by such practices.¹⁷⁷ Instead the framers of the statute acknowledged that differing procedures in other nations may lead to divergent discovery procedures.¹⁷⁸

172. *In re Asta Medica S.A.*, 981 F.2d at 6.

173. *See id.* at 7. In *Asta*, the court stated that allowing Section 1782 requests to proceed without a discoverability requirement would

lead some nations to conclude that United States courts view their laws and procedures with contempt. In this manner, the broader goal of the statute - stimulating cooperation in international and foreign litigation - would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782.

Id.

174. *Id.*

175. *See supra* note 127 (stating that English courts appear not to be offended by such practices); Greig & Stahr, *supra* note 5, at 28 ("The South Carolina case thus establishes that, except in extraordinary circumstances, U.K. courts will not enjoin attempts by U.K. litigants to obtain evidence from third parties in the United States under § 1782.").

176. *See Jones, supra* note 7, at 515 n.1.

177. *See United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (permitting admission of testimony in U.S. criminal proceeding taken according to procedural rules of other country which are inconsistent with U.S. rules).

178. *See Smit, supra* note 31, at 235 n.93. "The drafters were quite aware of the circumstances that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence. They nevertheless provided for discovery and compulsory production of tangible existence pursuant to the federal rules." *Id.*

CONCLUSION

Section 1782 was amended in an attempt to liberalize U.S. procedures while accommodating different evidentiary procedures and regulations around the world. It was further meant as an example to other nations to provide similar assistance in their judicial tribunals. The current split among the circuits, however, creates an impediment to consistent and orderly responses to international litigants seeking discovery in the U.S. federal courts. Allowing district courts to use their discretion in deciding Section 1782 cases is a better alternative than for some circuit courts to create judicially a statutory barrier to international judicial assistance. As the boundaries between nations continue to decrease and transboundary disputes continue to escalate, the ability of parties to conduct discovery under Section 1782 becomes increasingly important. In order to meet this growing demand the U.S. Supreme Court should adopt the Second Circuit's interpretation of Section 1782.