Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C § 1782, for Use in a Foreign or International Tribunal

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1. INTRODUCTION

The need to obtain evidence available only in the United States, for use in a foreign or international tribunal, arises in diverse situations. Foreign governments occasionally need such evidence to advance civil or criminal charges or to conduct investigations in contemplation of legal action. Such evidence may be important in foreign private litigation. Recent events demonstrate that such evidence also might be required by international tribunals with jurisdiction over contractual disputes between corporations of one nation and the government of another.

Congress has provided a right to gather evidence in the United States for use...
in a foreign or international tribunal in 28 U.S.C. § 1782. The liberality of Section 1782 procedures allows foreign courts to obtain evidence in the United States with greater ease than an American court can obtain evidence in foreign jurisdictions. The difference in procedures is particularly acute when the nation in which the evidence is sought has a civil legal system. In 1964, the United


Section 1782 provides as follows:

(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 other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(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.


7. In 1959, one international practitioner stated 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." Heilpern, Procuring Evidence Abroad, 14 Tul. L. Rev. 29 (1959). This condition, which still exists today, has been as much due to delays encountered in using the required diplomatic channels as to the failure of various nations' governments to reach agreement on the subject by treaty. Applications for the execution of letters rogatory have been known to require up to two years before their return to the requesting party. The application sometimes must pass through a dozen or more government offices on its way to the foreign court and back, and there is an opportunity for loss or delay at each stop. Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 529-30 (1953) [hereinafter cited as Jones]. Furthermore, treaties to which the United States has been a signatory have either failed to clarify the procedure for obtaining assistance in evidence-taking or have not been followed for a variety of reasons. See generally Jones, supra, at 519-34. The Hague Convention, infra note 24, has overcome most, but not all, of these difficulties. For a discussion of letters rogatory and their procedures, see notes 19-23 and accompanying text infra.

8. Although civil legal practice varies from nation to nation, basic procedural differences exist between civil and common legal systems. The civil system is generally inquisitorial in nature, in contrast to the common law system, which is adversarial. Jones, supra note 7, at 531. Compare C. PR. CIV., tit. VII (French) (Judicial Administration of Evidence) with FED. R. CIV. Prs. 26-37 (the former grants its judges broad and exclusive powers in evidence-gathering, while the latter assigns the duty of examining
States Congress, recognizing a need for better international cooperation in litigation, liberalized Section 1782 by amendment. By improving the U.S. statutory scheme of international judicial assistance, Congress hoped to bring the United States "to the forefront of nations adjusting their procedures to those of sister nations." Congress hopes that this initiative would "invite foreign countries similarly to adjust their procedures."

This Comment examines the procedures of Section 1782, its liberalizing aspects, and its limits. The discussion of procedure focuses on obtaining evidence through voluntary, as opposed to compulsory, discovery. The author also discusses alternative approaches available for judicial assistance.

witnesses to the parties and their counsel. The French Civil Code requires, if the subject matter of the action exceeds fifty French francs, that evidence be submitted only in written form. C. civ. art. 1341 (Fr.). Only where a judge finds this evidence to be inconclusive may the parties produce oral testimony. Borel & Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States, 13 INT'L LAW. 35, 36 (1979) [hereinafter cited as Borel]. Only a judge may order such types of examination as the inspection of a site, the testing of physical evidence, and the oral examination of parties and non-parties. Id. The judge, rather than counsel, interrogates witnesses. Oaths are administered, if at all, only in judicial proceedings. Jones, supra note 7, at 527-28. Counsel who attempt to address witnesses directly or to influence them may be excluded from court. C. pr. civ. art. 214 (Fr.). The civil system's reliance upon the judge to perform procedural acts is the result of higher expectations for a judge's work and a desire for some guarantee of the authenticity and veracity of evidence. 1 U.S. DEP'T OF JUSTICE, CIVIL DIVISION PRACTICE MANUAL § 3-12.9 (1976) [hereinafter cited as PRACTICE MANUAL].

Common legal systems, in contrast, impose more rigid rules of procedure and notice upon the parties, instead of entrusting discovery to the judge. Id. Since the civil law judge's knowledge of a case, under a request for international judicial assistance, may be confined to the limited description of the letter rogatory, his examination "may seem vague and perfunctory when issues are complicated or the witness hostile or reluctant." Jones, supra note 7, at 531. In civil law proceedings, the judge summarizes the oral evidence and dictates it to a clerk. The court does not produce a verbatim transcript. The clerk then reads the summary to the witness for approval. CODE OF CIVIL PROCEDURE § 160 (W. Ger.), cited in id. The result is that oral examination carried out under a civil law system is often inadequate for use in a common law proceeding. Id.

Under the French Code of Civil Procedure, no procedure exists for obtaining evidence prior to the commencement of an action. Written evidence is gathered before trial, but other kinds of evidence are gathered during trial. Borel, supra, at 43. Civil legal systems do not recognize the common law notion of discovery and trial as separate entities, the former a preparation for the latter. Jones, supra note 7, at 528. Many civil law practitioners mistakenly believe that the common law permits the use of pre-trial discovery devices prior to the institution of a lawsuit. Borel, supra, at 43. Due to this assumption, France has declared that it will not honor requests by other nations for the pre-trial discovery of documents. Hague Convention, infra note 24, art. 23. Declarations of France. Although common legal practitioners may not "go on a broad fishing expedition, to determine whether there might be some evidence somewhere which would support a lawsuit," overly-broad discovery requests by American attorneys have not helped to alter this mistaken attitude. Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March, 1970, reprinted in 17 INT'L LEGAL MATS. 1417, 1421-24 (1978) [hereinafter cited as Report on the Convention]. Certain civil law practitioners have agreed to urge their governments to reconsider this refusal to allow the pre-trial discovery of documents under the Hague Convention. Id. at 1424.

9. U.S. CODE CONG. & AD. NEWS, supra note 6, at 3783. For a discussion of the specific changes effected by the 1964 amendment, see § III infra. For the text of the 1964 amendment, see note 6 supra.

10. U.S. CODE CONG. & AD. NEWS, supra note 6, at 3783.

11. Id.
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. Although neither of these areas of liberalization is without limits, this Comment demonstrates that Congress intended to further reduce the potential overuse and abuse of Section 1782 by greatly expanding the privileges which a hostile witness may assert.

II. The Procedural Aspects of Section 1782

Section 1782(b) provides that a person who voluntarily agrees to give evidence may do so “before any person and in any manner acceptable to [the witness].”\(^{12}\) This subsection serves two purposes: (1) it stresses to foreign nations the freedom that the United States affords voluntary evidence-taking, and (2) it keeps such voluntary procedures intact.\(^{13}\) A foreign litigant may, therefore, obtain evidence in the United States in a manner convenient to the witness and also acceptable to the foreign tribunal. In contrast, an attorney who obtains evidence through by-passing the judiciary in a civil law jurisdiction risks criminal sanctions even when a witness provides evidence voluntarily.\(^{14}\)

The procedures of Section 1782 apply only when an individual possessing sought-after evidence is uncooperative. If a witness in the United States refuses to provide evidence for use in a foreign or international tribunal, the party seeking the evidence must obtain an order from the appropriate U.S. district court compelling cooperation.\(^{15}\) Only a “foreign or international tribunal” or an “interested person” has standing to request such an order.\(^{16}\) The phrase “interested person,” refers both to persons designated under foreign law to seek the evidence and to parties to foreign or international litigation.\(^{17}\)

14. Such a by-passing may be interpreted, in civil law nations, as a usurpation of the sovereignty bestowed upon their judiciaries. See note 8 supra. For example, article 271 of the Swiss Penal Code provides in part that:

Whoever, on Swiss territory, without being authorized so to do, takes on behalf of a foreign government any action which is solely within the province of a [Swiss] government authority or a [Swiss] government official, whoever does anything to encourage such action, . . . shall be punished by imprisonment, in serious cases in the penitentiary. StGb, C.P., Cod. Pén. 271, quoted in Jones, supra note 7, at 520 n.12. Article 258 of the French Penal Code similarly imposes a prison sentence for one who, “without lawful authority, interferes with public, civil or military functions.” Borel, supra note 8, at 45.

15. Subject-matter jurisdiction for § 1782 actions is placed in the United States district courts. 28 U.S.C. § 1782. Venue lies in the district court “of the district in which [the witness] resides or is found.” Id.
16. Id. See note 1 supra for a general explanation of the term “tribunal.” For a discussion of its construction within the context of § 1782, see § III. A supra.
An "interested person" must apply directly to the court for an order. An interested person must apply directly to the court for an order. A tribunals, however, may make requests by way of the historically recognized method of the letter rogatory. An interested person must apply directly to the court for an order. A letter rogatory may reach a U.S. court by one of three different routes. Two of those routes are through government channels and one is by a request directly to the court.

The first government channel for the transmission of letters rogatory to an American court is embodied in 28 U.S.C. § 1781(a)(1) (1964) (Transmittal of letter rogatory or request). Pursuant to that section, a foreign or international tribunal can transmit a letter rogatory to the Department of State which in turn has power to receive the letter, to transmit it to the requested court and to return it to the initiating tribunal after its execution. Due to delays encountered in the transmission of letters rogatory, such as those resulting from the awkwardness of diplomatic channels and from the conflicts inherent in different legal systems, the United States and several other nations developed a second government channel. This system was embodied in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Hague

19. 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 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 Signes, 37 F. Supp. 819, 820 (D. La. 1941). Judicial comity is a principle in accordance with which the courts of one jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect. E.g., Hilton v. Guyot, 159 U.S. 113, 165 (1895). Since foreign laws are recognized as a favor or out of courtesy, and not as a matter of right, comity is not an imperative rule of law; it may persuade but not command. E.g., United States v. Gillock, 445 U.S. 360, 373 (1980).

The letter rogatory should not be confused with the "deposition," provided for in the Federal Rules, under which testimony may be taken in a foreign nation. Fed. R. Civ. P. 28(b). A deposition may be taken in two ways: (1) "On notice," where the witness is served with a written notice that he is to be deposed by someone authorized to take oaths; and (2) "By commission," where the American court commissions someone to administer the oath and to take the testimony. Id. Depositions of witnesses in foreign countries proceed under United States law, since the Federal Rules provide for a by-pass of the foreign judiciary. Letters rogatory, in contrast, are submitted for approval and execution to the foreign court and are carried out under the procedure ordered by the foreign court. Id. Letters rogatory are the required medium where a witness must be compelled to produce evidence or if the law of the foreign nation mandates gaining the judiciary's approval before any evidence-taking may commence. See note 14 supra.

20. The foreign or international tribunal may also transmit its request directly to a U.S. court and that the latter court may then return it in the same manner. 28 U.S.C. § 1781(b).

21. Prior to 1972, this was the only government channel available. In practice, requests made through the State Department are referred to the Department of Justice for execution. See Practice Manual, supra note 8 at § 3-12.19, 56-57. The Justice Department subjects all such foreign requests to a screening and approval process before executing them. Id.

22. See note 7 supra.
23. See note 8 supra.
Convention solved the delay problem by allowing states that seek evidence to by-pass diplomatic channels. Under the Hague Convention each contracting state designates a “central authority” to receive letters rogatory and transmit them to an appropriate court. Since the Hague Convention provides for the avoidance of diplomatic channels and requires that requests made under its auspices be executed as the result of a treaty obligation, tribunals of its signatory nations should, where possible, transmit their letters rogatory under the Hague Convention. However, Section 1782 is applicable wherever evidence is sought in the United States for use in a foreign or international tribunal, whether or not the request is made under the Hague Convention.


25. Id. art. 2. In the United States, this designated authority is the Assistant Attorney General in charge of the Civil Division of the Department of Justice. 28 C.F.R. § 0.49 (1973). (This by-pass of channels is an improvement for American courts seeking evidence in civil law nations.) See notes 7-8 and accompanying text supra. Other such improvements exist in revisions to the French Code of Civil Procedure since the Hague Convention’s enactment. France now allows verbatim transcripts to be made of testimony and allows the use of foreign evidence-taking procedures. The French judge may now authorize the interrogation of the witness by the parties or their counsel. C. Pr. Civ. arts. 739-40 (Fr.), cited in Borel, supra note 8, at 39. Civil law jurisdictions still do not apply compulsory measures to certain witnesses, nor do they allow the pre-trial discovery of documents. The system is also still complicated by the need to resort to the judiciary, even when a witness would volunteer evidence. See generally Borel, supra note 8; Report on the Convention, supra note 8.

On the other hand, the Hague Convention has not been especially helpful to foreign courts seeking evidence in the United States. Section 1782, as amended six years prior to the creation of the Hague Convention, already contained all of the advantages which the latter provided, in addition to broader standing rules. 28 U.S.C. § 1782 (1964). See note 27 infra, for a comparison of § 1782 with the Hague Convention.

26. Practice Manual, supra note 8, at 56-57. Signatory nations which have ratified the Hague Convention include Denmark, France, Norway, Portugal, Sweden, the United Kingdom and the United States. Eighteen other signatory nations have not yet ratified.

Signatory nations may by-pass the Department of Justice if they wish. Hague Convention, supra note 24, art. 18, Declarations of U.S. However, government channels may not be by-passed under the Hague Convention in other nations unless they have declared that a by-pass is permissible. Id.

Tribunals may not make requests for judicial assistance under the Hague Convention if they wish. Hague Convention, supra note 24, art. 18, Declarations of U.S. However, government channels may not be by-passed under the Hague Convention in other nations unless they have declared that a by-pass is permissible. Id.

27. The Department of Justice executes all letters rogatory forwarded through government channels, whether sent to it directly or through the Department of State regardless of whether the Hague Convention applies. Practice Manual, supra note 8, at § 3-12.19, 56-57. When a witness declines to cooperate, the Department of Justice will make an application for an order under § 1782. Id. at 61.

The Hague Convention and § 1782 are similar in scope. Both allow a United States court to render assistance to a foreign judicial authority in response to a letter rogatory. Hague Convention, supra note 24, art. 1; 28 U.S.C. § 1782. Both permit that the evidence-gathering procedure be dictated by either American or the applicable foreign law. Hague Convention, supra note 24, art. 9; 28 U.S.C. § 1782. Both
Few formalities are applicable to a letter rogatory directed to a U.S. court.\(^\text{28}\) The letter should be accompanied by an English translation when necessary. The usual practice for the filing of these letters is ex parte.\(^\text{29}\)

III. LIMITATIONS ON THE USE OF SECTION 1782

The present Section 1782, as amended in 1964, is the most recent in a long line of predecessor statutes.\(^\text{30}\) A comparison of the different versions of Section 1782 shows that a number of amendments facilitated foreign access to evidence-taking in the United States. These changes also set new limits by which foreign courts may prevent the overuse and abuse of discovery.

A. Foreign Proceedings

Section 1782 limits the court's authority to grant assistance in evidence-taking. The statute formerly permitted assistance by the courts only where the evidence was for use in a "judicial proceeding" pending in a foreign court.\(^\text{31}\) The present
statute permits assistance where the evidence is for use in a "proceeding in a foreign or international tribunal." Thus, under the current language, the proceeding need not be judicial or be pending in a foreign court, but merely must occur before a "tribunal."

1. Congress’ Explanation of “Tribunal”

Congress used the term “tribunal” in order “to make it clear that assistance is not confined to proceedings before conventional courts.” A Congressional report states, for example, that Section 1782 applies to the taking of evidence intended for use in proceedings “pending before investigating magistrates in foreign countries.” The use of the phrase “investigating magistrates” broadens Section 1782’s scope to encompass proceedings before the French juge d’instruction within the meaning of “tribunal.” A juge d’instruction is a legal practitioner with a status that is judicial in nature.

33. For the common definition of “tribunal,” see note 1 supra.
34. U.S. Code Cong. & Ad. News, supra note 6, at 3788. Several congressional references to “litigation,” however, clearly demonstrate that Congress intended § 1782 assistance to be granted by courts only for investigations related to judicial or quasi-judicial controversies. U.S. Code Cong. & Ad. News, supra note 6, at 3783; Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H.R. Doc. No. 88, 88th Cong., 1st Sess. 19 (1962); In re Letters of Request to Examine Witnesses from the Court of Queen’s Bench for Manitoba, Canada, 59 F.R.D. 625 (N.D. Cal. 1973), aff’d per curiam, 488 F.2d 511 (9th Cir. 1973) (Canadian Commission of Public Inquiry, created by the Canadian legislature to investigate all aspects of the Pas Forestry and Industrial Complex Project, held not to be a tribunal within the meaning of § 1782).

Furthermore, the fact that a foreign proceeding deals with a criminal subject matter does not preclude its being a tribunal. Congress did not permit a court to grant § 1782 assistance in criminal matters prior to 1949; the 1948 version of the statute expressly limited such assistance to “civil action(s).” See note 30 supra. All U.S. courts deciding the issue based upon § 1782's 1964 amendment have since held that § 1782 assistance may be granted in the case of foreign criminal actions. E.g., In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea, 428 F. Supp. 109, 112-13 (N.D. Cal. 1977), aff’d, 555 F.2d 720 (9th Cir. 1977). The latter result is supported by congressional intent. In a discussion of the procedural aspects of § 1782, Congress formulated rules which apply “irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature.” U.S. Code Cong. & Ad. News, supra note 6, at 3789 (emphasis added).

35. Id. at 3788.
36. The quoted committee report refers to a 1956 speech in which it was noted that approximately half of the letters rogatory received by the French consulate in New York issued from juges d’instruction. In re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017, 1020 (2d Cir. 1967). Although these requests were often enforced by U.S. courts, the courts probably should not have granted such assistance under the former version of § 1782, which allowed assistance only where the evidence was for use in a “judicial proceeding.” Id.
37. Anton, L’Instruction Criminelle, 9 Am. J. Comp. L. 441 (1960) [hereinafter cited as Anton]:

It is not merely that the legislature confides in him exceptional powers in matters concerning the individual liberty of citizens, but that it is perfectly clear that the worth and industry of this magistrate determine the efficacy of the whole process of penal justice. If it is the jurisdictions of judgment which definitively decide the lot of persons accused, it belongs to the juge
system, conducts criminal investigations. He has the dual purpose of assembling the elements of proof against an accused person and of protecting the accused’s right against false accusation. The juge d'instruction represents the interest of neither the police nor the state prosecutor. His duty is simply to ensure that justice is done. The juge d'instruction enters the case only at the request of either the civil law counterpart of the district attorney or the injured party. He cannot initiate proceedings of his own accord. Once the juge d'instruction enters the case, he conducts the entire investigation, although he may delegate some investigative work to the police. The juge d'instruction questions the accused and decides whether to submit the case to the appropriate court for trial.

In addition to encompassing juges d'instruction, Congress extended Section 1782 judicial assistance to foreign “administrative tribunals” and other “quasi-judicial” bodies. However, Congress did not define these latter phrases. Consequently, beyond agreeing that the term “tribunal” includes proceedings before juges d'instruction, U.S. courts have failed to clarify the parameters of the term under Section 1782.

2. The Scope of “Tribunal” Under U.S. Case Law

The Southern District of New York rendered the first judicial interpretation of the term “tribunal” under Section 1782 in In re Letters Rogatory Issued by the Director of Inspection of the Government of India. In this case, the Indian Director of Inspection relied on the 1961 Income Tax Act of the Government of India to issue a letter rogatory to the District Court for the Southern District of New York. This letter requested that the court order representatives of two American financial institutions to provide evidence. The Director of Inspection was seeking

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*d'instruction* to bring together the elements on which their decisions are based, and upon the professional qualities of this magistrate there directly depend the revelation of truth and the efficient functioning of criminal justice.

*Id.* at 456-57 (quoting *Instruction Generale prise pour l'application du Code de Procedure Penale*, ch. 95).

38. In France, this type of investigation is called l'instruction criminelle. "It is an extremely patient preliminary examination of the evidence, which is sifted and studied, heard and reheard, until as far as possible all inconsistencies have been eliminated and until those which have not been eliminated are thrown into sharp relief." *Id.* at 442.

39. One reason a juge d'instruction conducts l'instruction criminelle is to protect the accused from overzealous police interrogation. *Id.* at 441.

40. *Id.* at 443.

41. The title of this counterpart is the procureur. See *id.* at 444-45.

42. The injured party is known as the partie civile. See *id.*

43. *Id.* at 445.

44. *Id.* at 444, 446.

45. *Id.* at 455.

46. U.S. CODE CONG. & AD. NEWS, supra note 6, at 3788.

evidence concerning an Indian citizen who had been involved in a pending tax assessment proceeding under the Income Tax Act before an Income Tax Officer. The district court issued an ex parte order and subpoena. The financial institutions responded with a motion to vacate the order and quash the subpoena. The district court denied the motion, finding that the pending income tax proceeding was a "tribunal" within the meaning of Section 1782.\(^\text{48}\) The Second Circuit Court of Appeals reversed this finding on two grounds.\(^\text{49}\)

First, the appeals court reasoned that Congress intended to limit the term "tribunal" by reference to *juges d'instruction.*\(^\text{50}\) The court compared the *juge d'instruction* to the Anglo-American system's grand jury, finding that both of these official bodies decide "whether the evidence against a person accused of a major crime is sufficient to require him to stand trial."\(^\text{51}\) The *juge d'instruction* represents neither the interests of the state nor of the prosecution and has no interest in obtaining a conviction.

Using that concept, the court defined "tribunal" for purposes of Section 1782 as any tribunal which primarily has an adjudicative function, separate from the state's prosecutorial function.\(^\text{52}\) The court then contrasted functions of the *juge d'instruction* with those of the Indian Income Tax officer, who "has the sole responsibility for making the government's argument as well as for evaluating it." The court found that the latter functioned in a prosecutorial as well as an adjudicative role.\(^\text{53}\)

The second reason for the court's ruling was similar to the first: tax assessors "scarcely [fit] the notion that most American legislators would entertain of what constitutes a 'tribunal.'"\(^\text{54}\) In comparing the Indian Income Tax Officer to an IRS agent, the court noted that the law empowered both officials to compel oral and written testimony, to swear witnesses and to punish perjury and insulting behavior. The court also noted that both have a legal duty to grant a fair hearing. However, both officials "remain tax collectors and not adjudicators; they do not have, and are not supposed to have, the complete objectivity normally associated with a 'tribunal.'"\(^\text{55}\) The appeals court indicated that a tax court, in contrast to an assessor, would be a "tribunal."\(^\text{56}\) Presumably the court based its rationale on the ability of a tax court to act impartially and to bind the disputants.\(^\text{57}\)

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\(^{48}\) *India,* 272 F. Supp. at 762.

\(^{49}\) *India,* 385 F.2d at 1021-22.

\(^{50}\) "The [1964] amendment must be interpreted in terms of the mischief it was intended to rectify." *Id.* at 1020. This "mischief" was the granting of assistance, under § 1782, to legal practitioners not qualified under the statute. See note 36 and accompanying text supra. *Accord Fonseca v. Blumenthal,* 620 F.2d 322 (2d Cir. 1980).

\(^{51}\) *India,* 385 F.2d at 1020.

\(^{52}\) *Id.* at 1020.

\(^{53}\) *Id.* at 1020.

\(^{54}\) *Id.* at 1020.

\(^{55}\) *Id.* at 1021.

\(^{56}\) *Id.* at 1021.

\(^{57}\) For a discussion of the common definition of "tribunal," see note 1 supra.
The result of the Second Circuit's holding, under either theory, is that only when the evidence is for use in an adjudicatory proceeding may assistance be granted under Section 1782. Conversely, a proceeding conducted by someone who represents only one side of a dispute would not qualify to receive Section 1782 assistance.58

The Ninth Circuit ignored the "tribunal" issue in In re Letters Rogatory from the Tokyo District, Tokyo, Japan.59 In this case, the Tokyo District Court issued a letter rogatory pursuant to a request by the Tokyo District Public Prosecutor's Office. The Public Prosecutor was seeking information regarding a bribery investigation.60 Using its discretion under Section 1782,61 the U.S. court granted the request for judicial assistance.62 The court explicitly declined to examine the tribunal issue, stating that the issue did not "deserve" the court's concern.63 However, the first issue for judicial resolution under Section 1782 is whether the requested evidence is intended for use in a tribunal.64 Therefore, the court's use of its judicial discretion may have been improper.

If the Tokyo court had considered the India definition of "tribunal,"65 it could not have justifiably granted the request for judicial assistance. The evidence sought in Tokyo was for use by a public prosecutor in a criminal investigation.66 Although the Tokyo District Court, clearly a tribunal, had standing to make the request,67 the proper issue for the court was whether the investigative proceeding in which the evidence was to be used was a "tribunal." The Japanese Public Prosecutor holds the position of plaintiff-prosecutor in criminal trials; he is an

58. The court described the juge d'instruction, in part, as "he who decides whether the evidence against a person accused of a major crime is sufficient to require him to stand trial." India, 385 F. 2d at 1020.

One commentator argues that the India holding excludes even juges d'instruction from the ambit of "tribunal." Note, Judicial Assistance for the Foreign "Tribunal," 68 DUKE L.J. 981 (1968) (hereinafter cited as Judicial Assistance). In this argument, the juge d'instruction is comparable to a prosecutor. Both conduct the investigation of criminal cases, including deciding the type and scope of the investigation. Id. at 989. In so doing, the juge d'instruction constructs the dossier upon which is based the decision of whether to prosecute the accused. The commentator further argues that the juge d'instruction does not decide, for other than minor crimes, whether the accused will stand trial. Rather, that decision is made by the Chambre d'accusation, a higher organ of l'instruction criminelle. "Thus, it can be argued that the juge d'instruction, by conducting the investigation and compiling the dossier, constructs the government's case against the accused, and that, therefore, his function is basically prosecutorial." Id.

59. 539 F.2d 1216 (9th Cir. 1976).

60. Id. at 1217-18.

61. For a discussion of judicial discretion under § 1782, see § III. B supra.

62. Tokyo, 539 F.2d at 1219.

63. Id.

64. 28 U.S.C. § 1782. See also India, 385 F.2d at 1022 (court refused to consider issues bearing on judicial discretion in lieu of its holding that Indian income tax assessment proceeding was not a tribunal within the meaning of § 1782).

65. See note 52 and accompanying text supra.

66. Tokyo, 539 F.2d at 1217-18.

67. For a discussion of standing under § 1782, see notes 16-17 and accompanying text supra. For a discussion of the common definition of "tribunal," see note 1 supra.
“agent of government . . . and conducts the prosecution on behalf of the state.”68 Therefore, he does not have primarily adjudicative functions,69 and the court should not have granted assistance to him under Section 1782. The decisions of the India and Tokyo courts are irreconcilable with respect to the “tribunal” issue; the former proposed a definition of “tribunal” which the latter failed to apply by granting Section 1782 assistance to a foreign prosecutor. Depending upon a court’s desire to aid foreign nations under Section 1782, either the Second or the Ninth Circuit court results can be justified.

3. A Further Analysis of the “Tribunal” Issue

One commentator has stated that the term “tribunal” was selected by Congress “deliberately as being both neutral and encompassing.”70 According to this view, “tribunal” includes “[a]ny person or body exercising adjudicatory power.”71 This construction would disallow Section 1782 assistance to foreign prosecutors because prosecutors, rather than adjudicating, represent one side of any dispute, i.e., that of the state.72 However, this construction would be consistent with the India approach, which focuses upon the quasi-judicial qualities of the juge d'instruction in defining “tribunal.”73 He adjudicates because his “independence and impartiality are beyond question.”74 If courts limit the scope of the term “tribunal” to proceedings in which such quasi-judicial standards are applied, judicial assistance would be eliminated under Section 1782 to foreign prosecutors such as that of Tokyo. However, this restricted definition of “tribunal” would still permit courts to assist foreign legal practitioners such as the juge d'instruction, which Congress unquestionably intended to include within the scope of the term.75 Alternatively, a court could reach a conclusion similar to that of the Tokyo court by interpreting the words “for use,” in Section 1782, to mean “for intended or actual use.” Municipal law empowers prosecutors to conduct investigations into

68. S. DANDO, JAPANESE CRIMINAL PROCEDURE 82-85 (1965) [hereinafter cited as DANDO].
69. See id.
71. Id.
72. See notes 68-69 and accompanying text supra.
73. See notes 50-58 and accompanying text supra.
74. Anton, supra note 37, at 445. This is further exemplified by the fact that the juge d'instruction is seized of the facts of a case rather than of a complaint against a particular person. He may formally charge any person who his investigation leads him to think may have committed the offense. Id. at 446. In all cases, he expresses his findings regarding the propriety of further prosecution in an interlocutory order which closes l'instruction criminelle. For minor crimes, this order either closes the case or mandates that it be tried. For major crimes, the Chambre d'accusation decides whether to prosecute, this decision involving an examination of the regularity with which procedures were carried out by the juge d'instruction. Id. at 455.
75. See note 36 and accompanying text supra.
suspected crimes. Prosecutors can often use a range of compulsory measures both before and after the institution of a prosecution. A request for assistance made during a foreign prosecution would not present a "for use" problem, since a tribunal clearly would be the forum "for use" of the evidence. However, in a pre-prosecution investigation, no trial has yet begun in which the sought-after evidence will, with certainty, be used. By intending to use obtained evidence in a future prosecution, individuals conducting such investigations would satisfy the alternate "tribunal" criterion.

The courts face two competing policy concerns when defining the term "tribunal." First, the court itself has an interest in protecting persons within its jurisdiction from undue inconvenience through either abuse or overuse of Section 1782 procedures. To reconcile this concern, a narrow judicial interpretation of the term "tribunal" would be appropriate. Secondly, however, the courts must recognize the expressed Congressional intent to liberalize Section 1782 in order to encourage other nations to similarly provide easy access to judicial assistance procedures. This perspective would necessitate a broad interpretation of the statute.

The solution to this policy dilemma may be to interpret the term "for use" as meaning "for intended or actual use," as suggested above. This "for use" approach would permit foreign prosecutors to obtain assistance in gathering evidence for criminal prosecutions and pre-prosecution investigations. Although this interpretation might enable any foreign citizen to seek evidence under Section 1782 prior to the institution of a lawsuit, such persons would be precluded from receiving Section 1782 assistance. A private party might intend to use the evidence in potential litigation. This intention would satisfy the "tribunal" criteria, but the party would not have standing to use Section 1782 unless litigation had already commenced. Prosecutors, on the other hand, are "designated by or under foreign law" to seek evidence for their investigations and,

76. For example, the Japanese Public Prosecutor "may himself investigate a crime if he deems it necessary." Keiji soshō hō, art. 191(1) (Japan); PUBLIC PROSECUTOR'S OFFICE LAW, art. 6, quoted in DANDO, supra note 68, at 304 (Japan).


78. See In re Letters Rogatory from the 9th Criminal Division, Regional Court, Mannheim Federal Republic of Germany, 448 F. Supp. 786 (S.D. Fla. 1978).

79. The bulk of investigation in Japanese criminal cases is carried out prior to the institution of prosecution, although the investigation can continue even after the prosecution begins. DANDO, supra note 68, at 303.

80. Judicial Assistance, supra note 58, at 992.

81. Id.

82. Id.

83. See notes 76-79 and accompanying text supra.

84. See notes 16-17 and accompanying text supra.
therefore, have standing under Section 1782. Furthermore, a prosecutor’s letter of request is usually issued by his domestic court. A prosecutor may only compel the production of evidence, even in his own country, through an order issued by that domestic court. Thus, U.S. courts could limit Section 1782 assistance, in the case of private parties, to those with pending actions or with court-issued requests. The issuing foreign court would retain the power “to determine whether or not an investigation is entitled to judicial assistance.”

B. Judicial Discretion to Execute a Letter Rogatory

Once the court determines that evidence sought under Section 1782 is for use in a foreign or international tribunal, it must decide whether to compel production. U.S. courts have discretion, under Section 1782, to issue an appropriate order. The court may refuse to grant judicial assistance or may impose conditions it deems desirable. In deciding whether to grant or deny a request, the court may consider the “nature and attitudes” of the government of the nation from which the request emanates and the “character” of the proceedings in which the evidence will be used. When the request involves proceedings before an international tribunal, the court may also consider the “nature” of that tribunal and the “character” of the proceedings. A court may grant Section 1782 assistance only to tribunals of nations with which the United States is at peace.

Tribunals in civil law nations often request that a magistrate, judge or other...

85. Id.
86. See Tokyo, 539 F.2d at 1218.
87. E.g., DANDO, supra note 68, at 319.
88. Private foreign litigants with no court order would derive their standing through being “part[jes] to the foreign or international litigation.” U.S. CODE CONG. & AD. NEWS, supra note 6, at 3789. Those applicants with a court order would rely on the standing of the issuing court, a tribunal. 28 U.S.C. § 1782.
89. Tokyo, 539 F.2d at 1219.
90. E.g., India, 385 F.2d at 1022 (court refused to consider issues bearing on its discretion in lieu of its holding that the proceeding involved was not a “tribunal”).
92. U.S. CODE CONG. & AD. NEWS, supra note 6, at 3788.
93. Id.
94. Id. Presumably, U.S. courts should not assist foreign tribunals whose proceedings the court finds either objectionable or questionable.
95. The former version of § 1782 limited assistance to nations “with which the United States [was] at peace.” 63 Stat. 103, supra note 30. Congress deleted this wording because it became devoid of significance due to Congress’ grant of discretion, to the judiciary, under the 1964 amendment. Where the United States has declared a war, no discretion exists to grant a request. Such a declaration places all relations with the enemy under the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-40 (1951). U.S. CODE CONG. & AD. NEWS, supra note 6, at 3789.
specifically designated individual take the evidence.96 Under Section 1782, the court has discretion to grant this request and to appoint the person selected by the foreign tribunal.97 This court-designated person has the power by virtue of his appointment to administer any necessary oaths.98

Another feature of Section 1782 is the provision that permits different evidence-taking procedures in accordance with civil and other legal systems. Civil systems, for example, require the person taking the testimony to interrogate the witness and to then dictate his version of the testimony to a clerk.99 The U.S. court may, in its discretion, order that discovery be conducted in whole or in part according to the procedure of the foreign or international tribunal.100 If the court does not exercise this discretion, the parties must follow the Federal Rules of Civil Procedure.101

Few judicial decisions have dealt with the discretionary aspect of Section 1782. Rather, the courts have limited the statute by narrowing their definition of the term "tribunal."102 The decisions dealing with judicial discretion have focused on three issues: the likelihood of future reciprocity from the foreign nation;103 the possibility of discovering the evidence in the foreign nation;104 and the admissibility of the evidence in the courts of the foreign nation.105

96. Civil law systems often require that a judge, rather than a party or his counsel, take evidence. See note 8 supra.


98. Id.

99. Id., supra note 70, at 1028.

100. 28 U.S.C. § 1782. Under the predecessor to § 1782, the deposition was the only procedural device for evidence-taking. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949); see also note 30 supra.

101. See § II. A.

102. See § II. A.

103. The likelihood of reciprocity was at one time considered, by courts, to be an important factor in the decision of whether to execute a letter rogatory. E.g., Jones, supra note 7, at 532-34. Under the 1964 amendment of § 1782, however, the unwillingness or inability of a foreign nation to reciprocate is not determinative of the decision to grant requests. See, e.g., In re Request for Judicial Assistance from Seoul, Korea, 428 F. Supp. 109, 112 (N.D. Cal. 1977), aff'd, 555 F.2d 720 (9th Cir. 1977). Congress intended that the United States' initiative would encourage reciprocity from other nations. U.S. Code Cong. & Ad. News, supra note 6, at 3788.

104. In the Court of the Commissioner of Patents for the Republic of South Africa, No. 80-591, slip op. (D. Pa. Sept. 16, 1980), when the requester's counsel could not demonstrate to the court that the sought-after evidence was discoverable under the foreign nation's law, the request was not honored. The court suggested, however, that the request might have been granted had counsel instructed the court in the applicable foreign law. The court also hinted that it would have approved a request for an order directing the witness to deliver the evidence to his South African counsel, where the material would fall within the jurisdiction of that nation's court. Id.

105. Tokyo, 539 F.2d at 1219. The Ninth Circuit reasoned that since evidence is discoverable for an American grand jury, it should also be discoverable in the preliminary stages of the foreign nation's procedure. Id.
C. Invoking Privileges to Avoid Providing Evidence

Although U.S. courts have power to grant a request under Section 1782, their freedom in this regard is not absolute. Congress added language to the 1964 amendment which significantly broadened the privileges a witness may assert in order to avoid providing the sought-after evidence. The 1964 amendment to Section 1782 provides that the court may not compel a witness to give evidence if doing so would violate any privilege to which he is entitled. The amendment replaced 28 U.S.C. § 1785, which had only provided a privilege against self-incrimination on examination under letters rogatory. The 1964 amendment extended the Fifth Amendment privilege to Section 1782 proceedings beyond those conducted pursuant to letters rogatory.

The amendment also clarified the ambiguous language of Section 1785. On its face, the Section 1785 language permitted a witness to invoke the privilege against self-incrimination if the requested evidence would tend to incriminate him under the law of any nation of the world. Congress resolved this ambiguity by providing the courts with a “reasonable connection” test to be applied in circumstances where the Fifth Amendment is invoked. Under this standard, the Fifth Amendment privilege is not available to a witness absent “at least a reasonable connection between the person asked to produce the evidence and the state or country under the laws of which he claimed the possibility of incrimination.” Among the factors which the court may consider in determining the existence of such a connection are nationality, domicile, forum and the place where the potentially incriminating events occurred. The “reasonable connection” test is, both on its face and in application, a restatement of the “Michigan View.” This view applies the privilege only when a witness suffers a substantial risk of prosecution by the foreign sovereignty under whose law the testimony would be incriminating.

The court used this standard in In re Letters Rogatory from the 9th Criminal
In that case, the witness claimed the privilege against self-incrimination under both the Fifth Amendment and the German Code of Civil Procedure. The witness had already been convicted in the United States on numerous counts resulting from his fraudulent sale of worthless securities in Germany. A criminal court in Germany sought the answers to questions pertinent to a pending German prosecution related to the same fraudulent transactions. The German case involved the prosecution of someone other than the witness. Moreover, the request was accompanied by a letter from the German Consulate General stating that the witness neither could nor would be prosecuted in Germany.

The letter offering immunity was based on the German prosecutor’s interpretation of the applicable West German statute of limitations. The U.S. court undertook an exhaustive examination of West German law and determined that the statutes of limitations had not yet run on several offenses for which the Germans could still prosecute the witness. The court found the promise of immunity to be worthless because of West Germany’s rule of compulsory prosecution. Under that rule, a prosecutor must prosecute all actionable offenses for which sufficient factual bases exist. Furthermore, if the prosecutor fails in this duty, the victims of the given crime may compel prosecution. Noting that approximately 600 victims of the alleged securities scheme resided in West Germany alone, the court found a “substantial risk” of prosecution and denied the Section 1782 request.

By replacing Section 1785 with the new language of Section 1782, Congress also extended a witness’ assertable privileges to “all [of those privileges] to which

116. Paragraph 55 of the West German Code of Civil Procedure is “comparable to (the) U.S. Fifth Amendment but applies also if a dependent of the witness would be jeopardized.” Id. at 787.
117. Id.
118. Id.
119. According to the Germany court, West German law contains no immunity procedures comparable to those of the United States. Id. at 788.
120. Id. at 789.
121. StPO sec. 152 (II), quoted in id. at 788.
123. 448 F. Supp. at 788.
124. Id. at 788-89. The Germany court cited the United States Supreme Court decision of Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472 (1972), where the Court held that the Fifth Amendment protects against only real dangers of incrimination, “not remote and speculative possibilities.” Germany, 448 F. Supp. at 788. In dicta the Germany court said that it would also not be likely to compel evidence-giving because of the risk that the witness would be prosecuted for perjury. The witness had pled not guilty at his trial, was convicted and, if he were now to say truthfully that he did not know the securities were worthless, he would be immediately exposed to such an indictment. Id. at 789-90.
125. See notes 106-107 and accompanying text supra.
[he] may be entitled, including privileges recognized by foreign law."\(^{126}\) Congress purposely made no specific reference to any particular privilege, thereby leaving that issue to be clarified by case law, rule or statute.\(^{127}\) One writer has argued that the recognized Section 1782 privileges should not be more extensive than those recognized under other American law.\(^{128}\) At the same time, however, such privileges should not be any less extensive.\(^{129}\) It seems that Congress intended to balance these objectives when it stated that the judiciary should "achieve equitable accommodation of the witness' interests" under Section 1782.\(^{130}\)

### IV. Conclusion

Section 1782, amended by Congress in an effort "to improve [the] practices of international cooperation in litigation,"\(^{131}\) was necessitated by growing U.S. involvement in international transactions. This Comment has analyzed the extent to which Congress intended to liberalize access to Section 1782 judicial assistance and has examined the response of U.S. courts to that policy. This analysis demonstrates that the Congressional intent behind the 1964 amendment to Section 1782 is ambiguous, particularly with respect to interpretation of the term "tribunal." As a result, recent cases reaching that issue have been inconsistent in both reasoning and result. This Comment suggests that the solution to the confusion in that area may be in interpreting "for use" to mean "for intended or actual use."

Congress granted the courts judicial discretion to decide whether to enforce letters rogatory or to alter the methods by which evidence is taken under Section 1782. In so doing, Congress provided foreign nations and nationals with

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127. Id. During the enactment of the 1964 amendment to § 1782, the yet unfinalized Federal Rules of Evidence were under consideration and Congress did not wish to interfere with their development. See Smit, supra note 70, at 1034.
128. Smit, supra note 70, at 1033.
129. The Sixth Circuit, for example, practically disregarded a criminal defendant's claim that his sixth amendment right of confrontation was being denied, in In re Letter Rogatory from the Justice Court, District of Montreal, Canada, 383 F. Supp. 857 (E.D. Mich. 1974), aff'd, 523 F.2d 562 (6th Cir. 1975). The case involved a Canadian prosecutor who attempted to obtain certain American bank records, about the defendant, for a Canadian prosecution. The defendant argued that the prosecutor did not intend to allow him to cross-examine the witness. 383 F. Supp. at 858. Both the district and appeals courts denied the defendant's motion to quash the § 1782 order to produce the records. The district court admitted an ignorance of Canadian procedures, but would not "assume that such rights will receive no protection under [those] procedures." Id. at 859. The appeals court held the claimed privilege to be "nothing more than the bald assertion of potential harm." 523 F.2d at 566. This summary ruling presents a stark contrast to the Germany court's in-depth examination of West German law. See notes 115-24 and accompanying text supra.
131. Id. at 3783.
a flexible tool for evidence-gathering in the United States. Should the “tribunal” issue be resolved in favor of assisting foreign prosecutors during pre-prosecution investigations, more situations will likely arise in which courts will have the opportunity to examine the appropriateness of assisting various foreign tribunals.

However, expanded use of Section 1782 will require that U.S. courts place correspondingly greater attention upon the privileges claimed by Section 1782 witnesses. In the Germany case, the court agreed with this view, determining that Congress, in enabling foreign and international legal practitioners to reach evidence through the United States courts, did not intend to ignore the established rights which make this nation so unique.

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