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Tightening Judicial Standards for Granting Foreign Discovery Requests

I. INTRODUCTION

Following World War II, the United States emerged as a genuine world power. American products and businesses spurred international modernization, American capital markets began to look abroad, and overseas investment rose dramatically. In the midst of this growth, increasingly complex international disputes created a need for greater international judicial cooperation.¹ International crime and drug problems have also arisen that require close cooperation between foreign governmental and judicial bodies.²

In 1964, Congress responded to the need for increased multinational judicial cooperation by revising 28 U.S.C. § 1782,³ which authorizes U.S. district courts to grant judicial assistance to foreign bodies requesting information in the form

1. See Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 515 (1953); Harvey M. Sklaver, *Obtaining Evidence in International Litigation*, 7 CUMB. L. REV. 233, 233 (1976); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 (1965).

2. See generally Bruce Zagaris, *Developments in International Judicial Assistance and Related Matters*, 18 DENV. J. INT'L L. & POL'Y 339 (1990) (discussing developments in the area of international judicial assistance aimed at combating drug trafficking).

3. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 995, 997 (1964). Section 1782 now provides in pertinent part:

(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. . . . 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.

28 U.S.C. § 1782(a) (1988).

Letters rogatory originating from foreign tribunals may also reach U.S. courts by diplomatic means via the U.S. State Department or the Hague Convention. 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, 178-81 (1982).

of letters rogatory. A "letter rogatory" is one of several international judicial devices used to access information, obtain testimony, and gather evidence from foreign countries.⁴ A foreign court, for example, that desires information located in the United States sends a letter rogatory to an appropriate district court. The letter rogatory requests the U.S. court to compel the production of evidence for use in the foreign proceeding. Unlike many treaties and federal statutory provisions, the revised 28 U.S.C. § 1782 outlines a simple procedure designed to provide an efficient means for obtaining information.⁵ Consequently, foreign countries seeking judicial cooperation increasingly employ letters rogatory to obtain desired information.

Section 1782(a) gives sole discretion to the U.S. district courts to decide whether to grant a letter rogatory application.⁶ The primary policy interests that courts must balance are the desire to promote international judicial cooperation and the privacy interests of U.S. businesses and citizens.⁷ These potentially conflicting interests demand that district courts proceed carefully when releasing information requested by a letter rogatory application.

The diversity among international judicial systems creates a potential for misuse of information. Once in foreign hands, U.S. courts effectively lose control over the use of granted information. Foreign judicial bodies are, for the most part, free to use the information according to their own criminal or civil laws and procedure. Only general threats of reciprocity or restriction of judicial cooperation are available to deter potential misuse of information.

In order to better protect the privacy of U.S. citizens, the Second Circuit recently heightened the requirements for obtain-

4. See *Tiedemann v. The Signe*, 37 F. Supp. 819 (E.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.

Id. at 820.

5. 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, 433 (1989).

6. S. REP. NO. 1580, 88th Cong., 2d Sess. 7 (1964), reprinted in 1964 U.S.C.A.N. 3782, 3788.

7. *Id.* at 7-9.

ing information under § 1782. In *General Universal Trading Corp. v. Morgan Guaranty Trust Co. (In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil)*,⁸ the court held that foreign applicants cannot receive assistance unless the foreign proceeding is "imminent—very likely to occur and very soon to occur."⁹

This Note discusses the background of letters rogatory, their judicial interpretation, and the standard established by *In re Brazil*. Section II discusses the history of 28 U.S.C. § 1782 and the 1964 revisions to that section. Section III examines the legislative history and subsequent judicial interpretations of the 1964 revisions. Section IV analyzes the *In re Brazil* standard and its applicability. Finally, section V recommends a more effective approach to adjudicating letter rogatory applications under 28 U.S.C. § 1782.

II. BACKGROUND OF 28 U.S.C. § 1782

A. Development of Letters Rogatory

The first statute authorizing letters rogatory in the United States was passed in 1855.¹⁰ In an effort to aid a French court in a criminal proceeding, Congress gave circuit courts the authority to appoint a commissioner to examine witnesses who were specified in a letter rogatory.¹¹ According to the 1855 Act, the commissioner had the power to compel the witnesses' testimony if deemed necessary.¹² However, just eight years later, Congress severely restricted the 1855 Act by making it applicable only to pending money or property suits in which the

8. 936 F.2d 702 (2d Cir. 1991) [hereinafter *In re Brazil*].

Two opinions were issued by the district court which initially decided the case. The first opinion stayed the proceeding for the Brazilian federal judge to answer two questions for the U.S. district judge. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federal Republic of Brazil*, 687 F. Supp. 880 (S.D.N.Y. 1988) [hereinafter *In re Brazil*]. The court later lifted the stay and granted the Brazilian request for assistance. See *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federal Republic of Brazil*, 700 F. Supp. 723 (S.D.N.Y. 1988), *rev'd*, 936 F.2d 702 (2d Cir. 1991) [hereinafter *In re Brazil*].

9. *In re Brazil*, 936 F.2d at 706. The lower court had granted assistance on a finding that foreign proceedings were "probable." 700 F. Supp. at 725 (S.D.N.Y. 1988).

10. See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630.

11. *In re Letter Rogatory from Justice Court, District of Montreal, Canada*, 523 F.2d 562, 564 (6th Cir. 1975) [hereinafter *In re Montreal*]; Jones, *supra* note 1, at 540.

12. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630.

foreign government was a party or had an interest.¹³ Among the other restrictions, the requirement that the suit be "pending" provided a subtle, but important, procedural limitation on the granting of foreign requests. In addition, Congress provided that assistance could not be granted unless the foreign government requesting the assistance was at peace with the United States.¹⁴ For the next eighty years, Congress and the federal courts, encouraged in part by the prevailing isolationist attitude, refused to grant any assistance outside the scope of the statute.¹⁵

After World War II, however, U.S. business and citizen involvement in international affairs substantially increased, creating a need to improve international judicial cooperation.¹⁶ Consequently, in 1948¹⁷ and 1949,¹⁸ Congress broadened the statute to allow district courts the power to grant letters rogatory for all civil and criminal actions, not only those involving money or property suits.¹⁹ In addition, the foreign government was no longer required to be a party or have an interest in the suit.²⁰ The act retained, however, the provisions that required the suit to be pending in the foreign court and that the country requesting the information be at peace with the United States.²¹ Although the 1948 and 1949 modifications were significant, the changes proved to be insufficient in light of the prominent role the United States played in shaping the post-war world.

13. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769-70.

14. *Id.*

15. See Jones, *supra* note 1, at 540-41. In 1877, Congress enacted Revised Statutes § 875 using similar language to the 1855 act in order to invite reciprocity from foreign governments in which they had an interest. *In re Montreal*, 523 F.2d at 564 n.5. Revised Statutes §§ 4071-73, however, were adopted at the same time and used wording similar to the 1863 act which limited cooperation to money or property suits. *Id.*

16. S. REP. NO. 1580, *supra* note 6, at 2.

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

18. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (striking the words "civil action" and substituting the words "judicial proceeding").

19. *In re Montreal*, 523 F.2d at 565-66 (6th Cir. 1975) (stating that omission of "civil action" meant the statute enabled foreign bodies to obtain information for criminal and civil actions). See also Deutsch, *supra* note 3, at 182 n.34 (stating that assistance may be granted in foreign criminal actions).

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

21. *Id.*

B. Recent Changes in § 1782

During the 1950s, the rapid modernization of communication and trade, coupled with the United States' dominant economic position, notably increased U.S. involvement in international trade and overseas investments.²² The overseas expansion, however, was not matched by a modernization of international legal procedure needed to settle or litigate the increasing number of disputes that involved international implications.²³

This self-serving interest to improve international adjudication spawned an effort to remove prohibitive foreign barriers and "promote just, speedy and inexpensive adjudication of international disputes."²⁴ Consequently, in 1958, Congress created the Commission on International Rules of Judicial Procedure.²⁵ The commission's purpose was to study the practices of judicial assistance and cooperation between the U.S. and foreign countries and to make recommendations to Congress on how to improve international legal procedures.²⁶

Instead of simply reducing foreign barriers as was originally conceived, the commission ultimately proposed wide, unilateral reductions of domestic judicial barriers.²⁷ The commission proposed changes to U.S. statutes, including 28 U.S.C. § 1782, that had previously restricted foreign access to U.S. courts.²⁸ The proposals were designed to encourage other countries to reciprocate the liberal changes and give the United States leverage in promoting international cooperation.²⁹ In 1964, Congress departed from its previous cautionary approach and adopted the commission's recommendations without objection.³⁰

22. Smit, *supra* note 1, at 1015 n.1.

23. S. REP. NO. 2392, 85th Cong., 2d Sess. 2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201, 5201.

24. Smit, *supra* note 1, at 1015.

25. S. REP. NO. 2392, *supra* note 23, at 3; Smit, *supra* note 1, at 1015 n.4.

26. S. REP. NO. 2392, *supra* note 23, at 4.

27. Smit, *supra* note 1, at 1016.

28. See Sklaver, *supra* note 1, for a review of the changes made to 28 U.S.C. §§ 1781-1784.

29. S. REP. NO. 1580, *supra* note 6, at 2; Bernard H. Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. MIAMI L. REV. 733, 753 (1983).

30. Smit, *supra* note 1, at 1017. Initial drafts of the Act were reviewed by a drafting group before they were submitted to the commission and the advisory

Section 1782's revisions greatly expanded the number of foreign applicants that could receive U.S. assistance and increased the type of information that they could access.³¹ The changes included the following: (1) allowing the district court to assist in obtaining documents and tangible evidence (only depositions and testimony were previously allowed); (2) adopting the term "foreign tribunal" instead of "court," thus expanding the number of impartial adjudicative bodies (including quasi-judicial and administrative bodies) able to access U.S. courts; (3) allowing an "interested person," such as a foreign magistrate, as well as foreign tribunals, to request judicial assistance; and (4) removing the requirement that the foreign judicial proceeding be "pending" before assistance could be granted.³²

III. THE CONGRESSIONAL INTENT AND SUBSEQUENT JUDICIAL INTERPRETATION OF § 1782

A. *Congressional Commentary on § 1782*

Unfortunately, the congressional commentary that exists on the 1964 revisions is very cursory. As a body, Congress did not substantially review or comment on the amendments.³³ Consequently, the legislative history is limited to the chief drafter's report,³⁴ which in describing the statute's purpose states:

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.³⁵

committee. *Id.*

31. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1153-54 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989) [hereinafter *In re Trinidad*].

32. *Id.*

33. See Bomstein & Levitt, *supra* note 5, at 439.

34. *Id.*

35. S. REP. NO. 1580, *supra* note 6, at 2.

Congress noted that before the revision many requests for assistance originated increasingly from investigating magistrates and administrative and quasi-judicial proceedings.³⁶ These non-traditional foreign tribunals were deemed to be as worthy as conventional courts to receive judicial assistance.³⁷ Thus, the revised statute broadly referred to foreign tribunals and interested persons and gave U.S. district courts wide latitude in ordering, conditioning, or restricting assistance to foreign applicants.³⁸

Unfortunately, Congress gave little direction to aid courts in interpreting the meaning of "tribunal" and "interested persons." With regard to tribunal, the legislative history specifically refers to a document that stressed France's *juge d'instruction* as an institution exemplifying the type of body the statute should incorporate.³⁹ A *juge d'instruction* acts similar to an American grand jury; it is commissioned by France's executive branch, but impartially collects information and determines whether a trial should proceed.⁴⁰

The legislative history does not, on the other hand, comment on the term "interested persons." Hans Smit, the statute's chief drafter, states that interested persons include litigants, designated officials, and even persons possessing a reasonable interest in obtaining assistance who appear before or at the direction of foreign or international tribunals.⁴¹ Although Hans Smit is certainly an authority to whom courts may turn, judicial difficulties in applying the term "interested persons" could have been abated if Congress had better explained its intent.

The legislative history mentions the word "pending" once, but strangely, the context in which the word is used provides no indication that the word was deleted intentionally. In explaining the reason the statute substituted "tribunal" for "court," the legislative history curiously states, "it is intended that the court have discretion to grant assistance when pro-

36. *Id.* at 7-8.

37. *Id.*

38. *Id.* at 7-9.

39. *In re* Letters Rogatory Issued by Director of Inspection of India, 385 F.2d 1017, 1020 (2d Cir. 1967) [hereinafter *In re India*] (citing the legislative history of the 1964 revisions).

40. See A.E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441 (1960), for an in-depth review of the role of the *juge d'instruction*.

41. Smit, *supra* note 1, at 1027.

ceedings are *pending* before investigating magistrates in foreign countries."⁴² The chief drafter, Hans Smit, briefly mentioned the deletion of the word "pending" in a law review article, but did not explain why it was deleted. The article states:

The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal. It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.⁴³

This statement constitutes the only advice given to district courts as to the required proximity of the foreign proceeding. Consequently, debate ensues over whether Congress actually intended to delete "pending" or whether the deletion was inadvertent.

B. Judicial Interpretation of § 1782

In attempting to comply with § 1782, courts have recently divided their analysis of a letter rogatory into the following two inquiries: (1) whether the request emanates from a tribunal or person who is authorized by the statute, and (2) whether the information will be properly used by the requesting body.⁴⁴

1. Determination of the nature of the foreign body

Section 1782's general wording, "foreign and international tribunals," includes more than common or civil law courts. Generally, foreign tribunals which employ independent, discretionary, and adjudicatory analysis qualify under the statute.⁴⁵ However, courts must also look at the motive behind a foreign applicant's request. For example, a request from an independent adjudicative body is not dispositive if the request is made on behalf of an investigation that is unrelated to a judicial

42. S. REP. NO. 1580, *supra* note 6, at 7.

43. Smit, *supra* note 1, at 1026 (footnote omitted).

44. See *In re Trinidad*, 648 F. Supp. 464, 465 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989); *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 687, 689-94 (D.C. Cir. 1989) [hereinafter *In re United Kingdom*].

45. See Deutsch, *supra* note 3, at 183-86, for a discussion of judicial interpretation of "tribunal." See also *Fonseca v. Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980) (stating that the hallmark of a tribunal is impartial adjudication).

controversy.⁴⁶ Likewise, requests from foreign tribunals responsible for promoting their own government's position should not be granted, even though the tribunal is not lawfully entitled to act arbitrarily.⁴⁷

Interested persons, as used in § 1782, places few practical restrictions on the scope of potential applicants. Most courts have followed Hans Smit's guideline that an interested person is any person or foreign official possessing a reasonable interest in obtaining assistance.⁴⁸ Because the term incorporates such a broad range of persons, courts must apply subsequent tests to determine whether the person has a need for the information in an upcoming proceeding.⁴⁹

2. *Proper use of the information by the foreign body*

In addition to the great amount of trust courts place in foreign bodies, courts attempt to determine the foreign proceeding's likelihood and proximity to ensure the information's proper use.⁵⁰ Many courts further determine the likelihood that the requested information will be used only in the upcoming proceeding.⁵¹ In weighing these factors, Hans Smit suggested that courts apply a liberal, "eventual use" standard.⁵² However, recent court decisions tend to employ stricter standards requiring, for example: (1) that the proceeding is "very likely to occur,"⁵³ (2) that there are "reliable indications . . . that proceedings will be instituted within a reason-

46. *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511, 512 (9th Cir. 1973) (denying a request by the Chief Justice of a Canadian court because the request appeared to have originated from a Canadian commission's investigation of a forestry and industrial complex development in Canada).

47. *See In re India*, 385 F.2d 1017, 1020-21 (2d Cir. 1967).

48. *See In re United Kingdom*, 870 F.2d at 689-90.

49. *See infra* part III.A.2. One court avoided discussion of interested persons altogether and denied a request from a foreign minister because he did not qualify as an impartial tribunal. *See Fonseca v. Blumenthal*, 620 F.2d at 323-24; *but see In re Trinidad*, 848 F.2d 1151, 1155 n.10 (11th Cir. 1988) ("That the Minister of Legal Affairs lacks adjudicatory powers and is not a tribunal, however, has no bearing on his status as an 'interested person.'").

50. *See In re Brazil*, 687 F. Supp. 880, 885 (S.D.N.Y. 1988).

51. *In re Trinidad*, 648 F. Supp. 464, 465 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989).

52. Smit, *supra* note 1, at 1026.

53. *In re Trinidad*, 848 F.2d at 1155-56.

able time,"⁵⁴ (3) that there is clear evidence of a future proceeding,⁵⁵ or (4) that the proceeding's occurrence is "probable."⁵⁶

Prior to the statute's 1964 changes, the foreign proceeding had to be "pending" before a court could grant aid.⁵⁷ The pending requirement helped assure U.S. courts that the information sought would be used in an upcoming proceeding—not in some improper way. Replacing the procedural status, "pending," with a subjective standard, like eventual use, has created a burden on courts to more carefully ensure proper use by the foreign bodies.

Courts must now delicately balance U.S. citizens' privacy interests with Congress's interest to spur international judicial cooperation. Courts must also examine the letters rogatory not only to determine the requesting body's nature and its ties to the foreign government, but also to determine the foreign proceeding's proximity and the likelihood that the information will be properly used in that proceeding. Finally, courts should examine the nature of the proceeding and the evidence supporting the charges to ensure a dimension of due process and proper use of the information.⁵⁸ These determinations are all within the district court's discretion.⁵⁹ Several judicially-created guidelines simplify the procedure courts use to determine whether to grant the foreign body's requests.⁶⁰ Thus, U.S. courts are not required to understand foreign laws or rules of procedure, and they may avoid questions of comparative law unless proper use of the information granted is not assured.⁶¹ "If the [court] doubts that a proceeding is forthcoming, or suspects that the request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request."⁶²

54. *In re United Kingdom*, 870 F.2d 686, 692 (D.C. Cir. 1989).

55. *In re Letter Rogatory from the Public Prosecutor's Office at the Regional Court of Hamburg, Federal Republic of Germany*, No. M-19-88, 1988 U.S. Dist. LEXIS 14088, at *6 (S.D.N.Y. June 21, 1988).

56. *In re Brazil*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *rev'd* 936 F.2d 702 (2d Cir. 1991).

57. *See supra* part II.A.

58. *In re United Kingdom*, 870 F.2d at 686 (requiring "that the evidence is taken in a manner appropriate for use in judicial proceedings" in a foreign country).

59. *Id.*

60. *See In re Trinidad*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989).

61. *Id.*

62. *Id.*; *see also* Bomstein & Levitt, *supra* note 5, at 465.

3. *Varying judicial application of the "foreign body" and "proper use" tests*

Courts balance to varying degrees their analyses of the foreign body's nature and the likelihood of the information's proper use. While many decisions closely analyze both criteria, several decisions during the 1960s and 1970s focused solely on the foreign body's nature, with little or no discussion of the information's proper use.⁶³ The courts apparently felt that once the body was deemed appropriate, proper use of the obtained evidence was implied. Several recent decisions, however, bypass all but minor discussion on the foreign body's nature and instead focus on the proper use factor.⁶⁴ These decisions usually involve situations in which the body requesting the information is an established foreign court; in such a case, the U.S. court's focus consequently turns to whether the foreign court's motives are proper.⁶⁵

C. *Analysis of the Revised § 1782*

1. *Benefits*

Post-1964 judicial interpretation of § 1782 has generally promoted the international judicial cooperation Congress intended.⁶⁶ The statute's provisions effectively increased the number of foreign bodies that can obtain U.S. court assistance. The increased use of discovery procedures reflects greater efforts to combat international crimes.⁶⁷ Furthermore, as Congress and the statute's drafters envisioned, several foreign bodies have adopted legislation similar to § 1782.⁶⁸ Such reciprocity allows U.S. courts and litigants more access to foreign courts and increases opportunities to detect and prosecute persons involved in international crime and drug organizations.

63. See, e.g., *In re Letters Rogatory from the Tokyo District*, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976); *In re India*, 385 F.2d 1017, 1017 (2d Cir. 1967).

64. See, e.g., *In re Montreal*, 523 F.2d 562 (6th Cir. 1975); *In re Brazil*, 700 F. Supp. 723 (S.D.N.Y. 1988), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

65. *In re Brazil*, 700 F. Supp. at 725.

66. See *In re Trinidad*, 848 F.2d 1151, 1153 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989).

67. Bradford L. Smith, *International Judicial Assistance—Cooperation of United States Courts with Foreign Investigations*, 82 AM. J. INT'L L. 824, 827 (1988).

68. The Hague Convention adopted language that is similar in scope to § 1782. Deutsch, *supra* note 3, at 180 n.27.

2. Problems

Wide use of § 1782, however, has increased the potential for misuse of information and other problems created by the interaction of differing legal systems and governmental structures.

a. Abuse by the party requesting the information. The most noted danger surrounding letters rogatory is the potential injury to privacy and due process interests of U.S. citizens and investors from whom evidence is sought.⁶⁹ Because judicial assistance may be granted before the foreign proceedings begin, the potential for misuse of the information exists.⁷⁰ For example, a foreign prosecutor or interested person may misuse the information to build the potential case, acquire new leads, or use the information in an entirely different proceeding.⁷¹ The foreign official or body may also misuse the information to blackmail or otherwise injure certain persons, compete more effectively against a U.S. firm, or sell the information to persons with ulterior motives. The greater the length of time that passes between the granting of the information and the actual proceedings in which the information is used, the greater the opportunity for the grantees to misuse the information.

Although courts certainly are not immune to corruption, foreign prosecutors and other "interested persons," because of their biased nature, are characteristically suspected of abusing information.⁷² The Eleventh Circuit, for instance, exhorted district judges to "carefully examine and give thoughtful deliberation to any request for assistance submitted by an 'interested person.'"⁷³ Courts and other adjudicatory tribunals raise fewer concerns because their institutional nature appears to impose less of a risk.⁷⁴

69. See *In re Brazil*, 936 F.2d 702, 706 (2d Cir. 1991); Bomstein & Levitt, *supra* note 5, at 463-67; Zagaris, *supra* note 2, at 376-77.

70. Smith, *supra* note 67, at 827.

71. Bomstein & Levitt, *supra* note 5, at 463.

72. *Id.* at 438, 462-65.

73. *In re Trinidad*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied*, Azar v. Minister of Legal Affairs of Trinidad & Tobago, 488 U.S. 1005 (1989).

74. See *In re Letter of Request from the Gov't of France*, 139 F.R.D. 588, 592 (S.D.N.Y. 1991) [hereinafter *In re France*] (quoting *United States v. Salim*, 855 F.2d 944, 952 (2d Cir. 1988)).

b. *Differences in governmental structures and legal systems.* Organizational differences among foreign governmental and judicial bodies, as well as differences among foreign legal systems, pose considerable dilemmas for district courts.⁷⁵ Even within a familiar judicial system, determining the likelihood of a proceedings is a difficult task. Expectedly, the lack of an intricate evaluation of foreign laws and procedure makes the determination of the proximity of a foreign proceeding even more difficult.⁷⁶

Additionally, foreign tribunals that are sincerely interested in assistance must wade through a variety of judicial opinions in deciding when they should request information. This uncertainty adds to both foreign and U.S. court expenses when requests are denied and later resubmitted. U.S. courts also expend valuable time evaluating the foreign requests, determining whether specific privileges apply, and otherwise balancing the individual aspects of each case to determine whether to grant assistance.⁷⁷ Although the nature of the international judicial system creates these problems, well-defined judicial guidelines can deter abuse while encouraging enhanced judicial cooperation among nations.

IV. SECOND CIRCUIT'S DECISION: *In re Brazil*⁷⁸

A. *Statement of the Facts*

In 1989, a former Morgan Guaranty Trust Company officer was convicted for embezzling from Morgan bank accounts on behalf of four Panamanian corporations.⁷⁹ The conviction led Brazilian authorities to suspect a possible flight of capital from Brazil to the United States in violation of Brazilian tax and currency control laws.⁸⁰ A Brazilian court, at the request of a prosecutor, issued a letter rogatory requesting all bank documents with any connection to the embezzlement in order to assess possible violations of tax laws.⁸¹

75. Bomstein & Levitt, *supra* note 5, at 465-69.

76. See *supra* part III.C.1.

77. See Deutsch, *supra* note 3, at 181-92.

78. *In re Brazil*, 936 F.2d 702 (2d Cir. 1991).

79. *In re Brazil*, 687 F. Supp. 880, 881-82 (S.D.N.Y. 1988).

80. *Id.* at 882.

81. *Id.*

In response to the request, the U.S. District Court for the Southern District of New York closely examined the nature and motives of the Brazilian request and questioned whether the information would be used in a foreign proceeding. Unsatisfied with its findings, the district court requested affidavits from the Brazilian court explaining the precise nature of the proceedings, the court's functions in those proceedings, and the independent criteria used in requesting judicial assistance.⁸²

In response, the Brazilian judge sent an official letter that referred to the foreign prosecutor's actions "in 'investigating *probable* illicit acts related to tax evasion in connection with *probable* defalcations in accounts maintained by Brazilian citizens.'" ⁸³ The judge also noted that the evidence requested would be exclusively used as evidence in the judicial proceeding and not for any other purpose.⁸⁴ The district judge granted the request on the grounds that the foreign proceedings were "probable" and that the foreign court would exercise an independent, adjudicative function. Morgan Guaranty Trust Company and the Panamanian corporations appealed the decision.

B. *The Second Circuit's Holding*

On review, the Court of Appeals for the Second Circuit reversed the district court's decision on the ground that "probable" use did not sufficiently protect U.S. privacy interests.⁸⁵ The circuit court deemed it necessary that the foreign adjudicative proceedings be "imminent—very likely to occur and very soon to occur."⁸⁶ Accordingly, the court found that the Brazilian court's reference to possible violations and possible prosecution of four identified individuals was not sufficient to meet the requirement that the proceeding be imminent.⁸⁷

The imminent standard, as explained by the court, allows foreign governments access to U.S. judicial assistance only when "they are on the verge of instituting adjudicative proceedings."⁸⁸ The court claimed that the heightened standard allows the disclosed material to be carefully controlled, and that

82. *Id.* at 886-87.

83. *In re Brazil*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

84. *Id.*

85. *In re Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

86. *Id.*

87. *Id.* at 707.

88. *Id.* at 706.

it "avoids the risks inherent in making confidential material available to investigative agencies of countries throughout the world at preliminary stages of their inquiries. The latter course poses dangers to legitimate privacy interests of our citizenry that we do not believe Congress intended to imperil."⁸⁹

C. *Analysis of the Decision*

1. *Basis of the decision*

The court based its decision on a critical analysis of § 1782's history.⁹⁰ Specifically, the court noted the legislative history's use of the word "pending" to describe when certain foreign judicial bodies should receive assistance.⁹¹ The decision criticized Hans Smit for inappropriately commenting on a Congressional document.⁹² The Second Circuit hinted that the statute's drafters may have deleted pending inadvertently.⁹³ Consequently, the court decided to err on the side of protecting U.S. business interests by requiring that the proceedings be imminent.

2. *Imminence as a standard*

In tightening the standard, the Second Circuit relied on *In*

89. *Id.*

90. *Id.* at 704-05.

91. *Id.* at 705.

92. *Id.* at 706. Much of the Second Circuit's opinion discussed whether "pending" was intentionally or inadvertently deleted. Though the court did not actually find that "pending" was inadvertently deleted, the court stated:

If the omission of pending was intended to mean 'eventually occurring' [as described by Hans Smit in his article], we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees. Staff members have ample opportunity to draft language that members of Congress may choose to use in committee reports and statutory text, but they may not elucidate congressional intent by bearing witness to congressional thinking.

Id.

93. *Id.* Although *In re Brazil* criticized the deletion of "pending" from § 1782, it purposefully adopted a different standard. "The standard 'imminent' implicitly authorizes district courts to order production of evidence pursuant to future, valid letters rogatory prior to the commencement of an adjudicative proceeding." *In re France*, 139 F.R.D. 588, 596 (S.D.N.Y. 1991). These arguments were similar to those made by the losing petitioner in *In re Trinidad*.

re Trinidad.⁹⁴ In that case, the Minister of Legal Affairs from Trinidad and Tobago sought records for use in an investigation of possible violations of Trinidad and Tobago's exchange control laws.⁹⁵ The minister specifically listed in the letter rogatory the documents desired and the information he expected to find, and he explained how he would use the documents in the eventual proceeding.⁹⁶ He further offered to fly certain bank personnel to Trinidad and Tobago to testify concerning the authenticity of the records.⁹⁷ According to the Eleventh Circuit, this specificity indicated that the trial was imminent.⁹⁸

Although described as imminent by the Eleventh Circuit, the Trinidad court was not on "the verge of instituting adjudicative proceedings," as was later required by the Second Circuit.⁹⁹ In fact, at the time of the request, the minister's investigation was just beginning and no criminal proceedings were pending.¹⁰⁰ In fact, the Eleventh Circuit's interpretation of § 1782 differed markedly from the Second Circuit's interpretation. Clearly the Eleventh Circuit interpreted § 1782 differently than did the Second Circuit. The Eleventh Circuit emphasized that deciding whether "to grant assistance turn[ed] not on whether the proceeding [was] pending but on whether the requested evidence [would] likely be of use in a judicial proceeding."¹⁰¹ Additionally, the decision expressly supported the eventual use standard and rejected the inadvertent deletion argument used by the Second Circuit in *In re Brazil*.¹⁰²

3. Criticism of the "imminent" standard

The Second Circuit applied its heightened standard in an attempt to avoid potential abuse of § 1782. Indeed, a stricter formula for granting information reduces the potential for

94. *In re Brazil*, 936 F.2d at 706.

95. *In re Trinidad*, 648 F. Supp. 464, 465 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989).

96. *Id.* at 466.

97. *Id.*

98. *In re Trinidad*, 848 F.2d at 1156.

99. *In re Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

100. *In re Trinidad*, 648 F. Supp. at 465; Bomstein & Levitt, *supra* note 5, at 439.

101. *In re Trinidad*, 848 F.2d at 1155.

102. *Id.*

abuse by assuring that the information will be used in a legitimate, upcoming proceeding. Moreover, the Second Circuit correctly notes that a foreign court will be able to control the granted information better if the proceeding is very likely to occur.¹⁰³ Judicial concerns regarding foreign prosecutors and interested persons therefore are somewhat eased by the "imminent" standard.

Unfortunately, the court's concern regarding misuse may have been illusory. Judicial concerns over misuse primarily involve investigating magistrates and interested persons, not conventional courts or foreign tribunals.¹⁰⁴ Although the Brazilian federal judge requested the information on behalf of an investigative body, she confirmed in a letter that the foreign court would act independent of the investigative agency and would properly use the information.¹⁰⁵ The risk of misuse by the Brazilian federal judge, as opposed to that of a foreign prosecutor or a similar interested person, was comparatively small. Consequently, requiring the Brazilian proceedings to be imminent deterred a small risk, while expending a great amount of judicial time. Applying the more restrictive standard to all foreign bodies, no matter how reliable or trustworthy, would heavily burden them and adversely affect international judicial cooperation.¹⁰⁶

Moreover, the imminent standard is contrary to the Congress's intent to promote international judicial cooperation. For example, reliable and trustworthy foreign tribunals that perform preliminary investigations, such as France's *juge d'instruction*, would be barred from receiving information because their purpose is to decide whether proceedings should occur.¹⁰⁷ Consequently, this type of foreign tribunal cannot demonstrate the imminence of a judicial proceeding.

In re France dealt with this exact problem; the plaintiff contended that after *In re Brazil*, the *juge d'instruction* no longer qualified for assistance under § 1782. The district court explained that the proceeding was underway and therefore the imminent requirement was irrelevant.¹⁰⁸ This sort of seman-

103. *In re Brazil*, 936 F.2d at 706.

104. See *supra* part III.C.2.a.

105. *In re Brazil*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

106. See, e.g., *In re France*, 139 F.R.D. 588, 591-92 (S.D.N.Y. 1991).

107. See *supra* note 41 and accompanying text.

108. *In re France*, 139 F.R.D. at 591.

tic sleight of hand, however, is not judicially sound interpretation of the Second Circuit's standard.¹⁰⁹ Because Congress specifically intended the *juge d'instruction* and similar judicial bodies to receive assistance, the "imminent" standard contradicts established legislative intent.

V. SUGGESTED ALTERNATIVE TO § 1782

District courts can decrease the potential for misuse of information while remaining faithful to congressional intent by employing a multi-level approach to letters rogatory. High risk applicants should be required to show a proportionally higher degree of proof that the information requested is needed and will be used in, and only in, a rapidly approaching or pending proceeding. Applicants considered to pose a lower risk, however, should be required only to demonstrate a need for the information in an upcoming proceeding.

Beyond requiring all applicants to demonstrate that the information will be properly used, different types of applicants should be required to demonstrate the proximity of the proceeding in the following manner: (1) conventional courts and established quasi-judicial and administrative bodies should be required to demonstrate that a foreign proceeding is likely to occur or is reasonably foreseeable; (2) foreign prosecutors and other "interested persons" appointed by the government should be required to demonstrate that their proceeding is imminent before being granted assistance; and (3) private litigants requesting U.S. court assistance must show that the foreign proceeding is pending.¹¹⁰

Appropriate application of this multi-level approach would provide stability for domestic and foreign courts. First, the approach avoids the temptation by the judicial branch to reinterpret the entire statute. Whereas raising the standard as

109. The *In re Brazil* court found the fact that a nonjudicial proceeding is underway insufficient by itself to satisfy the imminent requirement. *In re Brazil*, 936 F.2d 702, 703, 707 (2d Cir. 1991).

110. *In re Trinidad* suggested a limited version of this multi-level standard. *In re Trinidad*, 848 F.2d 1151, 1155 (11th Cir. 1988) ("While a private individual may need to be a litigant in a *pending* proceeding in order to be an 'interested person,' a foreign official properly designated under foreign law may fall within the definition of 'interested person' even when a proceeding is not pending at the time of his request.") (emphasis added); Smith, *supra* note 67, at 827-28. See also Bomstein & Levitt, *supra* note 5, at 446 (proposing that courts should consider requiring the foreign proceeding to be pending for private litigants).

the Second Circuit did potentially creates numerous problems,¹¹¹ a multi-level approach fairly and specifically addresses potential risks. Second, the effective and desirable use of letters rogatory by historically equitable institutions is encouraged. Third, a judicial approach curtails the need for Congress to revise the statute¹¹² while promoting the original intent of Congress.¹¹³

Finally, by applying a three-tier approach, the bulk of the statute's previous judicial interpretation is left intact. A multi-level standard maintains the two-step approach—determination of the foreign body and the likelihood of proper use—courts currently use to determine whether to grant assistance. No new guidelines are needed since courts have developed each of the standards in recent decades. Consequently, foreign applicants and U.S. courts can more easily determine at what point assistance can be successfully requested and granted.

In a case similar to *In re Brazil*, for example, the district court would determine that the Brazilian Federal Court constituted a conventional court and then would apply the likely or reasonable standard to determine the likelihood of the proceeding. If the court determined that there was no evidence suggesting that a foreign proceeding was likely, the request would be denied. In situations similar to *In re Trinidad*, the court would determine that Trinidad's Minister constituted an interested person or a foreign prosecutor and would require the application to demonstrate that the proceeding was imminent—"very likely to occur and very soon to occur."¹¹⁴

VI. CONCLUSION

Letters rogatory, as provided for in 28 U.S.C. § 1782, are an effective and increasingly important means of international judicial cooperation. But because of the problems that have developed since the 1964 revisions to § 1782, U.S. district courts need clearer guidelines in determining whether to grant or reject foreign requests for information. A multi-level approach is preferable to the various current standards because it increases the burden on high risk applicants yet leaves the ma-

111. See *supra* part IV.C.3.

112. Some commentators suggest that Congress should revise § 1782. See Bomstein & Levitt, *supra* note 5, at 436.

113. See *supra* text accompanying note 35.

114. *In re Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

jority of applicants unburdened. By applying this multi-level standard, congressional objectives remain intact, international cooperation is encouraged, and potential misuse of § 1782 is curbed.

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