

AMERICAN ASSISTANCE TO LITIGATION IN FOREIGN AND INTERNATIONAL TRIBUNALS: SECTION 1782 OF TITLE 28 OF THE U.S.C. REVISITED

Hans Smit*

I. INTRODUCTION

In 1964, the United States Congress enacted a revised version of section 1782 of Title 28 of the United States Code, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals."¹ This revision had been prepared by the Columbia Law School Project on International Procedure, of which I was the Director, and the U.S. Commission and Advisory Committee on International Rules of Judicial Procedure, to which I functioned as the Reporter.² It was part of an overall revision of American rules for obtaining and giving of assistance to litigants involved in international adjudication undertaken by the Columbia Project and the U.S. Commission and Advisory Committee.³

The 1964 revision of Section 1782 was a drastic one. It substituted one succinct section for a number of sections in the United States Code that had rarely found practical application.⁴ The revised section 1782 greatly liberalized assistance given to foreign and international litigants and tribunals and, in the thirty-five years that followed its enactment, has been applied in scores of cases.⁵ All too frequently, the develop-

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1. 28 U.S.C. § 1782 (1996).

2. On the co-operation between the Project and the Commission, see Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264-65, n.7 [hereinafter Smit, *Assistance*].

3. On the work of the Project and Commission generally, see INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE, col. 1 (Hans Smit, ed., The Hague, 1965).

4. On the precursors of § 1782, see Smit, *Assistance*, *supra* note 2, at 1264; Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-35 (1965)[hereinafter Smit, *International Litigation*].

5. For commentatorial treatment of these cases, see Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215 (1994) [hereinafter Smit, *Recent Developments*]; LAWRENCE W. NEWMAN & MICHAEL BURROWS, *THE PRACTICE OF INTERNATIONAL LITIGATION* 251 (1993); Robert H. Smit, *The Sarrio Decision*, 12 IBA CIV. LITIG. NEWSL. No. 5 (1996); Peter D. Troobof & Bradford L. Smith, *Judicial Assistance - Foreign Criminal Investigations. Evidence "For Use in a Proceeding"*, 3 AM. J. INT'L L. 929 (1989); Walter B. Stahr, *Discovery Under 28 U.S.C. Section 1782 For Foreign and International Proceedings*, 30 VA. J. INT'L L. 597 (1990); Edward C. Weiner, *In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice*, 58 NOTRE DAME L. REV. 60 (1982); Brian E. Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look at Present Problems in the Discovery in the United States*

ment of considerable case law bears testimony to deficiencies in statutory text. But, as I hope to demonstrate, that is not the case here. The statutory text is straightforward and clear. The case law it has spawned has been caused by judicial unwillingness to give it the meaning that an unbiased reading requires. The reasons for this unwillingness have not always been clearly expressed. They include a reluctance to add to the burdens of already overtaxed courts,⁶ a lack of understanding of adjudicatory processes in foreign and international tribunals,⁷ and, in some measure, a distrust of those processes.⁸

Now that thirty-five years have passed, it seems appropriate that we evaluate in greater detail the developments under a provision that has led to a good deal of litigation and evoked widespread comment.⁹

It is a fortuitous circumstance that this time span of thirty-five years is the same in which I have had the great pleasure and privilege of collaborating with Peter Herzog, to which this article, and the issue in which it appears, are dedicated. When, in 1960, I returned to Columbia to direct the Project on International Procedure, Peter had just completed his work towards a Master's Degree under the direction of W.L.M. Reese, the Reporter of the Restatement (Second) of Conflict of Laws and one of this nation's greatest scholars and teachers, who had also been my mentor. When I was asked to direct the Project, I thought that what we then called "international judicial assistance" was too limited a subject and that the Project should undertake comparative studies of selected foreign systems of civil procedure. In the first instance, we selected French, Italian, and Swedish procedures as suitable for comparative treatment. Professor Reese, who described Peter as one of the brightest men he knew, urged that we seek to persuade him to take

for Use in Foreign Litigation Under 28 U.S.C. Section 1782, 20 U. MIAMI INTER-AM. L. REV. 429 (1989); Eileen P. McCarthy, *A Proposed Litigation Standard for U.S. Courts in Granting Requests for International Judicial Assistance*, 15 FORDHAM INT'L L. J. 772 (1992).

6. See Judge Feinberg in *Malev Hungarian Airlines v. United Technologies, Inc.*, 964 F.2d 97 105 (2d Cir. 1992) (dissenting in the case by noting that the liberal assistance sought would unduly add to the burdens of already overtaxed courts).

7. Civil law courts generally do not provide for American-style discovery and do not rule on admissibility of evidence, particularly documentary evidence, at the time it is submitted. Furthermore, foreign procedural systems permit recourse to other ways of inducing a party or witness to produce the evidence. See Smit, *Recent Developments*, *supra* note 5, at 236-37, n. 96.

8. This may have played a role in Judge Friendly's decision in *In The Matter of Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967). See also text accompanying notes 21-22 *infra*.

9. See *supra* note 5.

on the French system and, in due course, Peter produced his *opus magnificentum*, entitled "Civil Procedure in France."¹⁰

When the work on the Columbia Project on International Procedure had been completed, we organized a Project on European Legal Institutions under a Ford Foundation grant. Again, we turned to Peter to seek his collaboration on a multi-volume work on the European Economic Community that bears his and my name.¹¹

Having worked with Peter on projects in the areas of international law and international procedure, it would appear appropriate that I deal, in a volume dedicated to him, with a subject that has always remained the focus of his intellectual and academic endeavors: the interaction of laws on the multi-state level.¹²

II. THE PRECURSOR OF SECTION 1782 AND ITS PRESENT VERSION

The present version of Section 1782 deals in one section with what had previously been the subjects of separate treatments: The assistance to international tribunals had been addressed in Sections 270 through 270C of the Title 22 of the United States Code,¹³ while that rendered for foreign courts and litigants had been covered by Sections 1782 and 1785 of Title 20 of the United States Code.¹⁴ The 1964 Revision deals with both types of assistance in one encompassing section. As may become clear, this amalgamation does have a bearing on the proper construction of new Section 1782.¹⁵

I will not deal here with the details of the changes that new Section 1782 brought. They have been described in earlier publications.¹⁶ In the following, primary consideration will be given to the constructions given to Section 1782 by the courts. My conclusion will be that, on the whole, Section 1782 has served its intended purpose, that, on occasion, some courts have given it a construction that is at odds with both its clear text and evident purpose, but that it is reasonable to expect that, over time,

10. PETER HERZOG, CIVIL PROCEDURE IN FRANCE (with Martha Weser, 1967). It remains the only work in English on the subject. In the same series, the Project published MAURO CAPPELLETTI & JOSEPH PERILLO, CIVIL PROCEDURE IN ITALY (1965); RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965); TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN (1983, loose-leaf).

11. HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY (loose-leaf, 7 volumes).

12. For many years, Peter published his annual reviews of decisions by New York courts in conflict of laws cases, which rank among the best publications in the area.

13. On these sections, see Smit, *Assistance*, *supra* note 2, at 1264.

14. On the precursors of § 1782, see Smit, *International Litigation*, *supra* note 4, at 1026-35.

15. See the text accompanying notes 18-26 *infra*.

16. See Smit, *International Litigation*, *supra* note 4, at 1.c.

the courts and commentators will fall into line and will apply Section 1782 in a manner consistent with its purpose of facilitating the conduct of litigation with international aspects.

III. THE PRINCIPAL ELEMENTS OF SECTION 1782

Section 1782 provides:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. 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 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.

The elements that deserve more detailed consideration are the following:

- (1) on behalf of which tribunals and litigants may the evidence be sought;
- (2) when is assistance to be rendered to arbitral tribunals;
- (3) to which persons may the court's order be addressed;
- (4) must the evidence be located in the United States;
- (5) what is the relevance of foreign rules of evidence;

- (6) what must be the intended use of the evidence;
- (7) how should the court exercise its discretion;
- (8) what is the procedure under Section 1782;
- (9) what are the applicable privileges;
- (10) what is the significance of Subsection (b);
- (11) what is the relation to The Hague Evidence Convention?

IV. THE TRIBUNALS AND LITIGANTS TO WHICH ASSISTANCE MAY BE GRANTED

The precursor of Section 1782 provided for the taking of a deposition "to be used in any judicial proceeding pending in any court."¹⁷ Under that version, the assistance to be rendered therefore had to be in aid of a judicial proceeding in a court. However, the present version of Section 1782 provides for assistance for use in "a foreign or international tribunal." The substitution of the word "tribunal" for "court" was deliberate, for the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions.¹⁸ Clearly, private arbitral tribunals come within the term the drafters used.¹⁹ This is also confirmed by the legislative history. New Section 1782 was expanded also to cover the assistance provided for in Sections 270-270C of Table 22 of the United States Code. This assistance was available to international tribunals established pursuant to an international agreement to which the United States was a party. Clearly those tribunals included international arbitral tribunals. Indeed, sections 270-270C of 22 United States Code were enacted especially for the purpose of providing for assistance to an international arbitral tribunal.²⁰ New Section 1782 not only intended to continue the provision for this assistance, but eliminated the requirement that the international tribunals be established by agreement to which the United States is a party. Indeed, the broad term "international tribunal" was intended to cover all international arbitral tribunals.

Notwithstanding this fulsome support for giving a broad reading to the term "tribunal" as it appears in Section 1782, some courts have failed to do so. In *In re Letters Rogatory Issued by the Director of*

17. *See id.* at 1026-27, n.72.

18. *See id.* at 1021, n.36.

19. *Accord Smit, Assistance, supra* note 2, at 1264.

20. *Id.*

Inspection of the Government of India,²¹ Judge Friendly, writing for the Second Circuit, ruled that Section 1782 could not be used to obtain evidence for use in an Indian proceeding to fix a tax assessment that could be appealed to appellate tribunals.²² More recently, Judges Duffy and Sweet, of the Southern District, have ruled that the term "tribunal" does not include an international arbitral tribunal.²³ These decisions are most regrettable. They run counter not only to the plain meaning of the term, to Section's 1782 legislative history, and to the clear purpose of that Section to facilitate evidence gathering in foreign and international adjudication.

As will be explained below, special caution is appropriate in regard to requests for assistance in adjudication by arbitral tribunals, but that is because of the special concern courts should show for not interfering with the arbitral process.²⁴ In the case decided by Judge Duffy, however, it was the arbitrator who requested assistance. Compliance with the request would therefore further, rather than frustrate, the arbitral process. Judge Duffy's decision not only does not take this circumstance into account, but also fails to consider the desirability of promoting international arbitration by extending to international arbitral tribunals the same assistance that is granted to other international tribunals. Leading decisions by the U.S. Supreme Court, like those in *Scherck*²⁵ and *Mitsubishi*,²⁶ leave no doubt that international arbitration is a specially favored institution. The decisions by Judges Duffy and Sweet fail to give consequence to this judicially pronounced favor. On the contrary, they put international arbitral tribunals in a disfavored position.

While the term "tribunal" in Section 1782 includes an arbitral tribunal created by private agreement,²⁷ another question is what tribunals are "international" within the sense of Section 1782. Judge Duffy, in his *Medway* opinion,²⁸ advanced the argument that, if Section 1782 were construed to reach privately formed international arbitral tribunals, it

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

22. On this case, see also Smit, *Recent Developments*, *supra* note 5, at 233.

23. *In re Medway Power Ltd.*, 1997 U.S. District LEXIS 18553 (Judge Kevan T. Duffy, S.D.N.Y., Nov. 20, 1997); *In re National Broadcasting Co.*, 1998 U.S. Dist. LEXIS 385 (Judge Robert Sweet, S.D.N.Y., Jan. 16, 1998).

24. See text accompanying notes 32-41 *infra*.

25. *Scherk v. Alberta-Culver Company*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 170 (1974).

26. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 7 L. Ed. 2d 444 (1985). On this decision, see Hans Smit, *Mitsubishi: It's Not What It Seems To Be*, 4 J. INT. ARB. 7 (1987).

27. See text at notes 18-26 *infra*.

28. *In re Medway Power Ltd.*, 1997 U.S. District LEXIS 18553.

would provide for assistance to foreign arbitrations that is not extended to domestic arbitrations and that that would be improper. This argument fails for a variety of reasons.

First, Section 1782 seeks to deal only with assistance to foreign and international tribunals, not with assistance to purely domestic tribunals. The latter subject lay without the purview of the task assigned to the Commission and the Columbia Project. Indeed, when I prepared the revision to Rule 4 of the Federal Rules of Civil Procedure for the Commission and the Project relating to service of judicial documents abroad and provided for service by a non-party over eighteen years of age,²⁹ I was firmly convinced that a provision to that effect would also be most desirable in the domestic context. I decided, however, that proposal of a provision to that effect would carry us beyond our bailiwick and that, if our proposal would work well in the international context, it would in due course also be adopted in the domestic context. Our expectation in that regard proved to be well-founded, and the Federal Rules of Civil Procedure now provide for such service across the board.³⁰

I similarly believe that the assistance provided to international and foreign tribunals should also be extended to domestic tribunals and that, if it is not, it should be.³¹ But the possible absence of desirable assistance to domestic arbitration tribunals may not reasonably be used as an argument for giving an unduly narrow construction to a statutory provision that, on its face, does grant such assistance to international arbitral tribunals.

Second, Section 1782 is not, as Judge Duffy erroneously assumes, limited to foreign, as distinguished from domestic, arbitrations. It provides for assistance to an "international tribunal". An international arbitral tribunal may also conduct its business in the United States. When it does, recourse to Section 1782 is available to it. Of course, this raises the question of what renders a tribunal international in the sense of Section 1782. In line with the purpose of Section 1782 to provide broad and liberal assistance, the term "international" should be given the broadest possible construction. Accordingly, a tribunal is international in the sense of Section 1782 when any of the parties before it, or any of the arbitrators, is not a citizen or resident of the United States. Similarly, a tribunal should be regarded as foreign within the purview of Section

29. On the 1963 revision of Rule 4 of the Federal Rules of Civil Procedure, see INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE, *supra* note 3, at 10-11 (Nijhoff, 1965).

30. FED. R. CIV. P. 4 (i).

31. Section 1782 does extend to international arbitral tribunals sitting in the United States. See text following this footnote. In purely domestic cases, courts may well be argued to possess inherent power to issue subpoenas in aid of arbitral tribunals sitting in sister states.

1782 when it is held anywhere outside the United States or is created under the law of a foreign country.

V. WHEN ASSISTANCE TO ARBITRAL TRIBUNALS IS TO BE RENDERED

As stated above, Section 1782 does apply to international arbitral tribunals created by private agreement.³² But this does not mean that assistance to international arbitral tribunals should be provided in the same circumstances in which it is extended to foreign courts. The purpose of Section 1782 is to provide liberal assistance to foreign and international tribunals, but this assistance should not be provided when it would interfere with the orderly processes of the foreign or international tribunal. This, of course, raises a question of foreign law that, in the generality of cases, should be left for the foreign or international tribunal to decide.³³ The reason for this is that an application under Section 1782 should not burden the American court with the ordinarily difficult task of determining the relevant foreign law. Recourse to Section 1782 should be left as simple as possible in order to keep the provision of assistance to foreign and international speedy and efficient. The American court should refrain from passing on questions of foreign law³⁴ when these can quite properly be left to the foreign or international tribunal which is necessarily the ultimate judge of whether the evidence can properly be used in its own forum.³⁵ And it may also safely be assumed that a litigant before a foreign or international tribunal will carefully consider whether it will be able to use the evidence in the foreign or international tribunal before it expends the effort and expense involved in seeking evidence pursuant to Section 1782.

These considerations do not apply with the same force to international arbitral tribunals. One of the great advantages of arbitration is that it leaves a great deal of freedom to the tribunal and the litigants to tailor the procedure to the needs of the particular case. This procedure will normally not be known before the tribunal and the litigants have had an opportunity to lay down the particular procedure they wish to be followed. The parties can therefore not make any judgment as to whether recourse to Section 1782 would be compatible with the tribunal's procedure. And once the tribunal has determined what procedure is to be followed, the parties can easily address the tribunal with the request that

32. See text accompanying notes 23-26 *supra*.

33. See text accompanying notes 57-59 *infra*.

34. For a more detail justification for this judicial abstention, see Smit, *Recent Developments*, *supra* note 5, at 235-36.

35. See Smit, *International Litigation*, *supra* note 4, at l.c.

it approve of a proposed application under Section 1782. Accordingly, the rule in relation to international arbitral tribunals should be that American court should honor an application under Section 1782 only if the application is approved by the arbitral tribunal. Judge Griesa, in an admirably reasoned decision, so ruled in *In re Technostroyexport*,³⁶ in which he also properly stressed that the parties, by agreeing to arbitration, had agreed to abide by the arbitrator's rules.

A different result was reached by Judges Duffy and Sweet,³⁷ who ruled that private arbitral tribunals were not covered by Section 1782 at all.³⁸ The result reached by Judge Sweet is compatible with the analysis defended here, since in the case he adjudicated the arbitral tribunal had not approved the application.³⁹ The same is not true of the application addressed to Judge Duffy, which had been made upon a ruling by the arbitrator that "directed that GE's documents are relevant and necessary for the fair determination of the dispute."⁴⁰ As already indicated, Judge Duffy's ruling disregards the plain text, the legislative history, and the evident purpose of Section 1782.⁴¹

VI. PERSONS REACHED BY SECTION 1782

Section 1782 provides for a district court of a district "in which a person resides or is found" to order the production of evidence for use in a foreign or international tribunal. Thus far, the precise meaning of the quoted terms has not occasioned controversy. But, in a future case, a person addressed by an order to produce evidence may raise the question of whether it is subject to the district court's authority. The answer to that question is not immediately clear. There are no generally prevailing rules of *in personam* competence to which Section 1782 might be argued to refer. The quoted language must therefore be given its own meaning.

The purpose of Section 1782 is to liberalize the assistance given to foreign and international tribunals.⁴² The language defining its *in personam* reach must therefore be given a liberal construction commensurate with that purpose. This means that a person should be regarded as

36. An opinion to that effect by the author was submitted in the NBC case. *In re National Broadcasting Co.*, 1998 U.S. Dist. LEXIS 385.

37. *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y.1994).

38. See cases cited *supra* note 23.

39. In the *Medway* case, I had provided an opinion to the effect that the application should be denied on that ground.

40. *Medway*, 1997 U.S. District LEXIS 18553, at *3.

41. See *supra* text accompanying notes 18-22.

42. Smit, *International Litigation*, *supra* note 4, at 1026-27.

residing in the district not only when it is domiciled there, but also when it is resident there in the sense of residing in the district for some not insignificant period of time. Indeed, if the relationship of the person addressed to the district is such as to warrant the exercise of *in personam* authority under the due process clause, it should be regarded as "resident" there.⁴³

The same is true of the term "found." The evident statutory purpose is to create adjudicatory authority based on presence.⁴⁴ Insofar as the term applies to legal rather than natural persons, it may safely be regarded as referring to judicial precedents that equate systematic and continuous local activities with presence.⁴⁵

VII. THE LOCATION OF THE EVIDENCE

The question has arisen whether Section 1782 can be used to compel production of tangible evidence located outside the district and, more particularly, in a foreign country and to compel testimony by witnesses outside of the district or in a foreign country. Section 1782 does not address this question in explicit terms. However, by creating adjudicatory authority over persons who may possess tangible evidence abroad⁴⁶, Section 1782 might be argued to provided a statutory basis for production of evidence located abroad.

The issue arose in *In re Sarrio S.A.*, involving an action before a Spanish court between Spanish parties, in which the plaintiff sought an order in the United States Court for the Southern District of New York to compel Bank America and "its direct and indirect subsidiaries and

43. The United States Code, after its 1948 revision, speaks of "residence" and "residents" whenever the pertinent criterion is either domicile or residence. The revision of § 1783 and 1784 of Title 28 added residence as a basis for *in personam* adjudicatory authority on the assumption that the courts would exercise *in personam* adjudicatory authority whenever the physical relationship to the United States of the person subpoenaed was such as to render it constitutional to exercise such authority over him or her.

44. But mere transient presence is not sufficient. Whatever one may think of the propriety of using transient presence as a basis for *in personam* adjudicatory authority in an ordinary action to recover on a personal obligation. *Cf. Burnham v. Superior Court of California*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631, (U.S. Cal., May 29, 1990) (NO. 89-44) mere transient presence is not a reasonable basis for exercising adjudicatory authority on behalf of a foreign and international tribunal.

45. For such cases, see MAURICE ROSENBERG, ET AL., *ELEMENTS OF CIVIL PROCEDURE* 255-57 (5th ed. 1990)

46. Persons resident or found within the United States may have in their possession or under their control evidence located abroad. It has long been recognized that such persons may be required to produce such evidence in actions in courts in the United States. *See, e.g., Société Nationale Industrielle Aerospatiale v. U.S. District Court of Southern District Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987); *United States v. First National City Bank*, 396 F. 2d 97 (2d Cir. 1968)

affiliates" to produce documents, and testimony by witnesses, located in Spain and Great Britain.⁴⁷

The drafters of Section 1782 did not anticipate recourse to Section 1782 for this purpose. Furthermore, there are potent reasons for not giving Section 1782 the extraterritorial effect sought in this case.⁴⁸

First, the evident purpose of Section 1782 is to make available to foreign and international tribunals and litigants evidence to be obtained in the United States. Thus, a harmonious scheme is established: Evidence in Spain is obtained through proceedings in Spain, evidence in Great Britain is obtained through proceedings in Great Britain, and evidence in the United States is obtained through proceedings in the United States.

Second, Section 1782 was not intended to enable litigants to obtain in Spain evidence located in Spain that could not be obtained through proceedings in Spain.⁴⁹ Section 1782 should not be used to interfere with the regular court processes in another country. Furthermore, such use would produce its effects haphazardly, because recourse to it would be available only to a party that could find a person resident or "found" in the United States, which controlled, directly or indirectly, evidence located abroad.

Third, if Section 1782 could be used for this purpose, American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world. And the burden to produce that information would be imposed on persons in the United States who have operations abroad. With American banks and financial institutions doing business all over the world, finding such a person would be relatively simple.⁵⁰ It is no coincidence that most of the cases concerning the production of evidence to be produced or to be obtained abroad have involved banks doing business in the United States and abroad.⁵¹ Federal courts and

47. *In re Sarrio S.A.*, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995) *rev'd* 119 F. 3d 43 (2d Cir. 1997). On this case, see Robert H. Smit, *The Sarrio Decision*, *supra* note 5.

48. The analysis that follows is drawn from an expert opinion I submitted in the *Sarrio* case.

49. A sharp distinction should be made between recourse to § 1782 to obtain evidence located in the United States for use in a proceeding abroad and recourse to § 1782 to obtain evidence located in a foreign country for use in that action. It is the latter situation that was addressed in *Sarrio*.

50. In fact, since probably all of the major banks in the world can be "found" in the United States, it would be most likely that in any proceeding in any foreign country evidence located in that country could be sought by recourse to § 1782 if that section were given extraterritorial effect.

51. See, e.g., *United States v. The Bank of Nova Scotia*, 691 F. 2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119, 103 S. Ct. 3086, 77 L. Ed 2d (1348 (1983)); *United States v. First National City Bank*, 379 U.S. 378, 85 S. Ct 520, 13 L. Ed 2d 365 (1965). See further LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 1098-1108 (3d ed. 1993).

American business should not be saddled with such significant burdens in the absence of a legislative intent clearly expressed.⁵²

Fourth, if American courts were to assume the role of clearing houses for world-wide information gathering, conflicts with foreign countries would inevitably arise. These conflicts have already arisen when American courts and litigants seek information abroad for use in American courts.⁵³ They would be substantially aggravated if American courts were to seek to impose their information gathering procedures, generally unknown in foreign countries that do not belong to the family of common law systems. It is one thing for American court to insist that its procedures be used in aid of American litigation but quite another to impose them on actions brought in foreign courts.

In *In re Application of Sarrio S.A.*,⁵⁴ Judge Paterson denied an application under Section 1782 made for the purpose of obtaining evidence in Spain for use in Spanish proceedings. The Second Circuit, per Judge Leval, reversed, but on the ground that the bank that was asked to produce the evidence did not object to doing so. Noting that "there is reason to think that Congress intended to reach only evidence located within the United States" Judge Leval ruled that, since the bank was prepared to produce the evidence, it is "unnecessary for us to decide. . . the geographical reach of Section 1782." Essentially, therefore, the case became one involving application of subsection (b) which provides that any person within the United States may voluntarily give testimony or produce tangible evidence before any person and in any manner acceptable to him.⁵⁵

Of course, even if Section 1782 were read to apply to the situation addressed in *Sarrio*, the court asked to compel the production of the evidence should, for the reasons detailed above, exercise the discretion that Section 1782 indubitably gives it to refuse to comply with the request.⁵⁶

52. It should be acknowledged that the statutory text does not provide explicitly that § 1782 has no extraterritorial effect. See Robert H. Smit, *The Sarrio Decision*, *supra* note 5. However, the statutory text does not preclude the construction advocated here either. In any event, the court may use its discretion to reach the same result. See *infra* text accompanying notes 70-72.

53. See *supra* cases cited in note 51.

54. See *supra* note 47.

55. See also *infra* text accompanying notes 83-86.

56. See *infra* text accompanying notes 71-72.

VIII. THE EXTENT OF THE RELEVANCE OF FOREIGN RULES RELATING TO THE PRODUCTION OF EVIDENCE

Without any warrant or support that can be found in the text of Section 1782, some courts have ruled that Section 1782 does not authorize production of evidence that cannot be compelled under the law of the foreign or international tribunal.⁵⁷ It should be stressed that the courts that have so ruled have not drawn sharp distinctions between non-discoverability and non-admissibility under foreign law.⁵⁸ Whatever the criterion used, it should be regarded as irrelevant. Section 1782 does not make discoverability or admissibility under foreign law a prerequisite to proper recourse to Section 1782, and the court should not seek to render less liberal the assistance the legislator so clearly prescribed. Fortunately, the Second Circuit, which is likely to be most frequently addressed with requests for assistance under Section 1782, has ruled discoverability or admissibility under foreign law not to be a general prerequisite to assistance under Section 1782.⁵⁹

It should be noted that this does not mean, that a court, asked to provide assistance under Section 1782, should never consider non-discoverability or non-admissibility under foreign law. For example, in order to create equality of treatment, an American court, when asked to compel production by a litigant before a foreign or international tribunal, may condition discovery on that litigant's agreeing to make the same extent of discovery available to its opponent.⁶⁰ In addition, an American court may properly take into account a foreign or international tribunal's ruling that the evidence sought should not be produced.⁶¹ I have dealt with these questions in greater detail in earlier publications.⁶² I should note, however, that foreign courts are increasingly recognizing that non-discoverability under their own laws should not preclude recourse to Section 1782. Both English and Dutch courts have so ruled.⁶³ How-

57. See, e.g., *In re Asta Medica, S.A.*, 981 F. 2d 1 (1st Cir. 1992); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir.(Fla.), Nov 08, 1988) (NO. 87-6098); Smit, *Recent Developments*, *supra* note 5, at 236-38.

58. On this distinction, see Smit, *International Litigation*, *supra* note 4, at l.c.

59. *Malev Hungarian Airlines v. United Technologies, Inc.*, 964 F. 2d 97 (2d Cir.), *cert. denied*, 113 S. Ct. 179 (1992); *Foden v. Aldunate*, 3 F. 3d 54 (2d Cir.), *cert. denied*, 114 S. Ct. 443 (1993).

60. Of course, this requirement can be imposed only on a party, not on witnesses not subject to the American court's adjudicatory authority.

61. This aspect arose in the *Enron* Litigation, in which the English High Court upheld an injunction issued by a lower English court. On this decision, see *Enron Corp. v. Amoco Corp.*, Case No. 96-20735 (5th Cir. 1997).

62. See Smit, *Recent Developments*, *supra* note 5 at 236-38.

63. The leading English case is *South Carolina Ins. Co. v. Assurantie Maatschappij De Zeven Provinciën N.V.*, (1987) 1 App. Cas. 24, in which the House of Lords ruled that the non-

ever, when a foreign or international tribunal has ruled that production of the evidence pursuant to Section 1782 would not be appropriate, an American court should heed that ruling and deny the application.⁶⁴

IX. THE INTENDED USE OF THE EVIDENCE SOUGHT

Section 1782 requires that the evidence be sought "for use in a proceeding in a foreign and international tribunal." In two cases, the Second Circuit, in other respects a paragon of liberal construction of Section 1782, has given the quoted words an unduly limited interpretation. In the first,⁶⁵ Judge Friendly reversed a lower court's order appointing a commissioner to take evidence sought by an Indian inspector of taxes. Judge Friendly stressed that the inspector did not come within the statutory terms. I have already criticized this decision as paying insufficient attention to the adjudicatory nature of the proceedings before the inspector and its disregard of the possible use of the evidence sought in proceedings before appellate tribunals.⁶⁶ In the second case,⁶⁷ Judge Newman, rejecting my views, ruled that Section 1782 is applicable only if the foreign proceeding is "imminent, *i.e.*, very likely to occur within a brief interval. . ."⁶⁸

Fortunately, Judge [now Justice] Ginsburg, writing for the District of Columbia Circuit Court of Appeals, rejected an attempt to put an unduly constraining construction on Section 1782 by upholding a lower court's holding that an English prosecutor could have recourse to Section 1782, even though no proceedings before an English court were pending, as long as such proceedings were "within reasonable contemplation."⁶⁹ Indeed, the 1964 revision of Section 1782 deliberately eliminated the requirement that the proceedings in the foreign tribunal be "pending." This was done in recognition of the fact that the proper gathering of evidence before a proceeding is commenced may serve the wholesome purpose of avoiding litigation altogether.

discoverability under English law did not stand in the way of an English court's or litigant's seeking assistance in the United States under § 1782. A similar decision was rendered by the President of the Amsterdam District Court.

64. See *supra* text accompanying note 61.

65. See *supra* note 21.

66. See Smit, *Recent Developments*, *supra* note 5, at 233

67. *In re* Request for International Judicial Assistance (Letter Rogatory) for the Federal Republic of Brazil, 936 F. 2d 702 (2d Cir. 1991).

68. 936 F. 2d. at 703. For additional commentaries on this decision, see authorities cited in Smit, *Recent Developments*, *supra* note 5, at 234, n 92.

69. *In re* Letter of Request From the Crown Prosecution Service of the United Kingdom (Ward), 879 F. 2d 686 (D.C. Cir. 1989). For a comment on this case, see Peter D. Troobofs & Bradford L. Smith, *supra* note 5, at 929. I submitted an expert opinion to the same effect in this case.

X. THE COURT'S DISCRETION UNDER SECTION 1782

Section 1782 provides that a district court "may" order the production of evidence in aid of a proceeding in a foreign or international tribunal. The term "may" was used deliberately to afford the court the opportunity of refusing assistance, or conditioning it upon compliance with conditions, when this was deemed appropriate. As already indicated, a district court should normally exercise its discretion to refuse assistance to a private international arbitral tribunal, unless a request for such assistance is approved by the tribunal.⁷⁰ In addition, a district court should exercise its discretion to ensure that a litigant not obtain a one-sided advantage from the fortuitous circumstance that relevant evidence favorable to that litigant is under the control of a person residing or found in the United States.⁷¹ And a district court should also use its discretion to refuse assistance to compel production of evidence located in a foreign country under the control of a person in the United States in an action between foreign litigants in a foreign country.⁷²

A refusal to grant assistance under Section 1782 may also be based on the district court's finding that, in some way, the foreign proceedings are unfair or incompatible with domestic notions of propriety. But caution in that regard is warranted, because American courts should not condemn foreign proceedings merely because they are different from those conducted in, or unknown to, American courts.

XI. PROCEDURE UNDER SECTION 1782

Section 1782 provides that the district court may prescribe the procedure to be followed in the production of the evidence and that, unless the court prescribes otherwise, the procedure prescribed by the Federal Rules of Civil Procedure shall be followed. Taken literally, Section 1782 prescribes only the procedure to be followed in taking testimony and producing tangible evidence and does not address the procedure to be followed in obtaining the order directing the production of the evidence. On reflection, it would have been better to provide that, unless the court directs otherwise, all procedures under Section 1782 are to

70. See *supra* text accompanying notes 32-41.

71. It may be argued that a disadvantage of conditioning recourse to § 1782 on making discovery available to the opposing party is that it may need an inquiry into what discovery is available under foreign law. This argument must fail, because the court can impose the condition, regardless of whether foreign law permits the discovery.

72. See *supra* text accompanying notes 46-56.

conform to the Federal Rules of Civil Procedure. That, clearly, was the intention of the drafters.⁷³

The reported cases reflect that, in actual practice, application for assistance under Section 1782 are frequently filed *ex parte*. This may result in an order's being issued without notice to either adverse parties or contemplated parties in the foreign or international tribunal or to the person to whom the order is to be directed. Normally, this will cause no substantial harm, since, when the order is brought to the attention of the person ordered to produce the evidence, that person can move to vacate the order if it has been improperly issued. And that person may also inform adverse parties in the foreign or international tribunal of the order's issuance. However, the person against whom the order has been issued will then have the burden of filing a motion to vacate the order rather than merely oppose the initial application. And that person may, but also may not, inform parties adverse to the applicant.

Since it is an elementary precept of due process that a person on whom an obligation is to be judicially imposed should have an opportunity to defend before the obligation is imposed,⁷⁴ *ex parte* applications are improper, and adequate notice of the application should be given both to the person who is to produce the evidence and to adverse parties.⁷⁵

In actual practice, courts appear to have overlooked the impropriety of recording to *ex parte* applications, perhaps on the ground that, by the time an application to vacate the order is being considered, it would involve duplication of time and effort to force the refile of the original application for assistance. But that is not an adequate reason for overlooking an unconstitutional error. At the least, the court should consider assessing costs and attorney's fees against the party that made the original application.⁷⁶

73. This intention may be found in the statutory text by reading § 1782 as requiring that the Federal Rules of Civil Procedure apply broadly to all steps that are necessary in order to achieve the production of the evidence.

74. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

75. The legal interest of adverse parties to receive notice of the application was underlined by Judge Leval, in the *Sarrjo* case, who affirmed their standing to oppose recourse to § 1782. *In re Sarrjo S.A.*, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995) *rev'd* 119 F. 3d 43 (2d Cir. 1997). To the same effect, *In re Letter Rogatory from Justice Court, Montreal*, 523 F. 2d 562 (6th Cir. 1975).

76. The assessment of attorney's fees can be justified on the ground of reckless disregard of constitutional guarantees. For support of the notion that violation of constitutional norms provides a special argument for assessing attorney's fees, see *Serrano v. Priest*, 20 Cal. 3d 25, 141 Cal. Rptr. 315, 569 P. 2d. 1303 (1977). *But cf.* *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421

It may be questioned whether notification of adverse parties, as distinguished from the person to whom the order is to be directed, is necessary. After all Subsection (b) of Section 1782 provides that the person from whom the evidence is sought may voluntarily produce it, regardless of the wishes of adverse parties. Subsection (b), however, is written for the situation in which a person voluntarily, and without a court order, produces the evidence. In that case, notice to adverse parties is not required.⁷⁷ But the situation is different when a court order is sought. It cannot be denied that the issuance of such an order imposes an obligation on the person to whom the order is addressed and that compliance with that obligation may affect the interests of adverse parties in the proceeding before the foreign or international tribunal. That being so, the adverse parties should be notified.⁷⁸ Such notification may also alleviate the burdens of the person from whom the evidence is sought. In the generality of cases, that person can rely on the adverse party's contesting the application and need not expend the money and effort to contest the application itself.

XII. APPLICABLE PRIVILEGES

The last sentence of Section 1782(a) provides that a person may not be required to produce evidence "in violation of any legally applicable privilege." The quoted language is deliberately open-ended. It refers to any legally applicable privilege, but does not specify what that privilege may be. The drafters wished to leave it to the district court to determine which privileges, under pertinent conflict of laws rules, were to be applied. Whenever a plea of privilege is raised under Section 1782, the court must therefore determine which evidence is allegedly shielded from disclosure and whether, in applying appropriate choice of law rules, there is an applicable privilege rule precluding production of the evidence.⁷⁹

In the *Sarrío* case, Judge Leval did not follow the analysis indicated by Section 1782. The evidence of which production was sought were documents under the control of the bank in Spain and Great Britain. The bank caused these documents to be transported to New York to enable the bank's counsel to evaluate whether they should be produced. Judge Leval's analysis focused on whether the evidence was covered by the

U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), recognizing, in dictum, that imposition of attorney's fees may be proper to punish vexatious conduct.

77. But it may be required by the procedural or ethical rules prevailing in the foreign or international tribunal.

78. See *supra* text accompanying notes 74-75.

79. See Smit, *International Litigation*, *supra* note 4, at 1033-34.

attorney-client privilege under American law. The appropriate analysis would have focussed on whether the documents that were located in Spain and Great Britain were covered by a privilege extended by Spanish or English law. After all, the bank should not be able to bring the documents within the reach of an American privilege by bringing them to New York. Whether the bank was free to produce the documents could therefore have been decided under the law of the place that had the most significant relationship to the issue, which would appear to be the place where the evidence was located at the time its disclosure was sought.⁸⁰ Of course, the prevailing choice of law rule in the United States in that American courts apply the law of the forum in determining whether the attorney client privilege applies.⁸¹ But in the *Sarrio* case, the claim that the attorney-client privilege stood in the way of production could hardly be regarded as serious, since the documents were put in the hands of the bank's attorney in New York after their production was sought.⁸² A more respectable argument would have been that the bank was obligated to maintain confidentiality under the agreement with its customer. That question had to be decided under the law of the place where the relationship was created and existed at the time production was sought. If, under the applicable foreign law, the information was privileged or covered by an obligation of confidentiality, the district court should not order its production.

XIII. SUBSECTION (B)

Subsection (b) of Section 1782 provides that any person may voluntarily produce evidence for use in a foreign or international tribunal. Of course, this does not give a person the freedom to produce evidence that, under applicable law, it may not produce.⁸³ Its purpose is to make clear that the United States creates no obstacles, such as undue reliance on sovereignty, to the voluntary production of evidence.⁸⁴ Nor does Subsection (b) mean that an interested party may not seek to preclude a

80. The law of that place might well regard the adverse party as having a protected interest in precluding disclosure of confidential information. Significantly, Judge Leval ruled that, under American law, the adverse party could not assert the privilege.

81. RESTATEMENT (SECOND), CONFLICT OF LAWS §139 (2) (1971).

82. If a privilege were recognized in such circumstances, an easy way of frustrating discovery would be to transmit the documents to one's attorney.

83. See *supra* text accompanying notes 80-82.

84. Many foreign countries invoke sovereignty as an obstacle to discovery in aid of foreign litigation. See Hans Smit, *International Cooperation in Litigation: Some Observations on the Role of International Law and Reciprocity*, 9 NETH. INT'L. L. REV. 137 (1962).

person from giving evidence that, under applicable law, the person seeking the evidence is precluded from seeking.⁸⁵

As already indicated, Subsection (b) is not applicable when a district court orders the production of evidence pursuant to Subsection (b), for that production cannot properly be regarded as voluntary.⁸⁶

XIV. THE RELATION TO THE HAGUE EVIDENCE

It might be argued that, in relations with foreign countries that have ratified The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, that Convention provides the exclusive procedures for obtaining evidence in the United States for use in a court located in a Convention country. The analogous argument has been advanced by a number of states that have ratified The Hague Evidence Convention when American litigants have tried to obtain evidence located in those states.⁸⁷ Indeed, it may be regarded as somewhat surprising that no case has yet been decided in which that argument has been advanced. Fortunately, the Supreme Court has ruled that The Hague Evidence Convention is not exclusive.⁸⁸ It is therefore reasonable to assume that it will rule similarly when the evidence is to be obtained in the United States.

In any event, The Hague Evidence Convention should not be construed to stand in the way of recourse to Section 1782. The purpose of Section 1782 is to provide liberal assistance. It would be anomalous, to say the least, if a Convention that purports to facilitate international judicial assistance were construed to impede it.

XV. CONCLUSION

All in all, Section 1782 has largely served the purposes for which it was enacted. American courts have, upon occasion, given it a more restricted construction than warranted by either its text or the legislative

85. See *supra* note 77. See also Jack B. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535 (1956).

86. See *supra* text accompanying note 55.

87. *Société Nationale Industrielle Aerospatiale v. U.S. District Court of Southern District Iowa*, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed 2d 461 (1987).

88. However, the Supreme Court stressed the desirability of the district courts' being especially concerned about the comity due to foreign countries.

history, but there appears to be no reason for seriously considering, at this time, any statutory amendments.⁸⁹

89. Indeed, the only amendment that might arguably deserve consideration is one that would make explicit that the Federal Rules of Civil Procedure apply to all procedures under § 1782. *See supra* text accompanying note 73. The only amendment made to § 1782 since enactment of the 1964 revision consists of addition of the words “. . . , including criminal investigations before formal accusation.” in the first sentence of Subsection (a). This amendment was both unnecessary and undesirable: unnecessary, because the leading appellate court decision on the issue had already held in favor of assistance in such investigations (*see supra* text accompanying note 73); and undesirable, because this unneeded particularization may lead to the argument that other similar situations are not covered by § 1782 (for an example of such a situation, see *supra* text accompanying notes 21-22).