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Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782

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Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782

ABSTRACT

This Note analyzes Section 1782 of United States Code Chapter 28 and its role in the realm of international judicial assistance. The twin aims of Section 1782 are: (1) to provide efficient means of assistance to participants in foreign litigation, and (2) to encourage foreign countries by example to provide similar assistance to U.S. litigants in court. This Note posits that these goals are violated when a district court, considering a request for documents, imposes a threshold, extra-statutory requirement that the material requested be discoverable in the foreign jurisdiction where the litigation is pending.

*After analyzing the legislative history of Section 1782, including the commentary of persons involved in the drafting of its most current version, the Note delves into the case law that both supports and opposes the threshold discoverability requirement. The Note then examines why the Second Circuit, in *Euromepa S.A. v. Emersian, Inc.*, correctly determined that imposing a threshold discoverability requirement is improper. The Note concludes by suggesting the most prudent approach for a district court when considering a Section 1782 request in light of concerns of comity and the international legal system.*

TABLE OF CONTENTS

I.	INTRODUCTION.....	118
II.	THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1782	121
A.	<i>The Pre-1964 Amendment</i>	121
B.	<i>The 1964 Amendment</i>	123
III.	THE CASE LAW.	128
A.	<i>Cases that Impose a Threshold Discovery Requirement</i>	129
1.	<i>In re Asta Medica</i> —The First Circuit Imposes a Threshold Discovery Requirement	129

2.	Eleventh Circuit Decisions in Harmony with the <i>Asta Medica</i> Decision.....	131
3.	Recent District Court Decision Upholds the <i>Asta Medica</i> Doctrine ...	134
B.	<i>Cases that Do Not Impose a Threshold Discovery Requirement</i>	135
1.	The Second Circuit Decisions—Diametric Opposition to the <i>Asta Medica</i> Doctrine of a Threshold Discovery Requirement	135
2.	Recent District Court Decisions in Harmony with the <i>Gianoli-Malev</i> Doctrine.....	141
C.	<i>The Euromepa S.A. v. R. Emersian, Inc. Decision</i>	143
1.	The District Court Decision— <i>Euromepa I</i>	143
2.	<i>Euromepa II</i> : The Circuit Court Decision Upholds the Twin Aims of Section 1782.....	144
IV.	ANALYSIS AND DISCUSSION	147
A.	<i>Should Judges be Expected to Divine Foreign Law?</i>	150
B.	<i>Concerns of Comity</i>	152
V.	CONCLUSION	152

I. INTRODUCTION

As the world grows smaller and international intercourse more common, the importance of countries' working together to increase the efficiency and strength of legal and diplomatic relations expands exponentially.¹ Entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," Section 1782 of United States Code Chapter 28 (Section 1782 or the Statute), in part, addresses the need to

1. See, e.g., *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("As surely as people, products, and problems move freely among adjoining countries, so national interests cross territorial borders. . . . Every nation must often rely on other countries to help it achieve its regulatory expectations."). See also Stephen B. Burbank, *Practice and Procedure: The World in Our Courts*, 89 Mich. L. Rev. 1456, 1456 (1991) ("International civil litigation shares with complex litigation . . . increasing practical importance. . . .").

coordinate judicial systems and authorizes, *inter alia*, district courts to grant discovery to aid in a foreign proceeding.² The Second Circuit has outlined the twin aims of Section 1782; adherence to these twin aims—in essence, efficiency and encouragement of reciprocity³—will facilitate coordination between judicial systems as well as preserve stability and promote comity in the international legal system. Although infrequently invoked, Section 1782 has gained in importance at a time when disagreement among U.S. courts concerning its interpretation and application, unfortunately, has grown as well.

The current confusion and discord that undermines a unified application of the statute in U.S. courts centers around whether material sought under a Section 1782 discovery request must also be discoverable in the foreign jurisdiction where the main proceeding is taking place. The Second Circuit has championed a literal interpretation of the statutory language and has not engrafted onto the statute an additional hurdle of discoverability.⁴

2. 28 U.S.C. § 1782 (1988) [hereinafter § 1782] provides:

(a) The district court of the district in which a person resides or is found may order [that person] to give . . . testimony or [a] statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of [the] 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 . . . testimony or [a] 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 . . . testimony or [a] 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.

3. The twin aims of § 1782 are: (1) to provide “efficient means of assistance to participants” in foreign litigation, and (2) to encourage “foreign countries by example to provide similar means of assistance” to U.S. litigants in court. *In re Application of Gianoli*, 3 F.3d 54, 58 (2d Cir. 1993), cert. denied, 114 S. Ct. 443 (1993) (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S. Ct. 179 (1992)).

4. See *Gianoli*, 3 F.3d at 54; *Malev*, 964 F.2d at 97.

Conversely, the First and Eleventh Circuits have required discoverability of the requested material in the foreign jurisdiction prior to granting the requested material to the litigants.⁵ At its foundation, this split of opinion represents a philosophical difference in interpreting the role of United States courts in international litigation. Specifically, the problem focuses on one element: discretion. Section 1782 provides district courts broad discretion in granting or denying requests.⁶

The solution to this controversy does not require U.S. district courts to forfeit any of their judicial discretion. Rather, judges faced with Section 1782 requests must seek to fulfill the twin aims of the statute. Judges must also ensure, however, that requests are not abusive and do not involve dilatory behavior or delay tactics on the part of the applicant.⁷

This Note is comprised of three main sections. Part II chronicles the legislative history of Section 1782 and culminates with the most recent amendment in 1964. Also, Part III provides an overview and analysis of the relevant U.S. case law, concentrating on decisions rendered by the First, Second, and Eleventh circuits, as well as some important district court opinions. Also, Part III focuses on one Second Circuit case, *Euromepa S.A. v. R. Emersian, Inc.*,⁸ which presents both sides of the seminal issue: should district court judges impose a threshold discoverability requirement, or is discoverability instead a discretionary tool, available to a judge when deemed necessary? Part IV attempts to find a solution to this problem and relies most heavily on the opinions expressed by the Second Circuit in its *Euromepa* decision, but also incorporates the concerns of the circuits favoring a discoverability requirement for Section 1782 requests. Part IV also includes a literal reading of the statute and relies on an explicit and dispositive legislative history. Part IV concludes that, while the proposed solution disregards an extra-statutory hurdle and permits discoverability to be used as a discretionary tool, judges, in the exercise of their wide discretion, must remain mindful that their decisions have implications not

5. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988).

6. *Gianoli*, 3 F.3d at 59.

7. Dilatory tactics and abusive requests have been the stated concerns of the circuits supporting a discoverability requirement. The greatest fear of these courts appears to be that if the material requested is not discoverable in the foreign jurisdiction but is granted in a U.S. proceeding, a litigant will be able to circumvent the rules of the foreign jurisdiction and will thus gain an unfair advantage over its opponent. *Asta Medica*, 981 F.2d at 5. These courts are also mindful of the burdens that these often hefty requests will place on our already over-burdened federal courts system. *Id.* at 7.

8. 51 F.3d 1095 (2d Cir. 1995).

only for the U.S. federal courts system, but also for the international legal system.

II. THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1782

A. *The Pre-1964 Amendment*

One of the essential features of Section 1782 is that, unlike other procedures,⁹ it is relatively informal and bypasses many of the bureaucratic headaches that accompany other methods of foreign requests for assistance.¹⁰ The scope of Section 1782 has not always been so broad. The United States Congress first granted courts the power to assist foreign courts in 1855.¹¹ Congress' new foreign assistance statute, enacted eight years later, effectively superseded the old statute.¹² The Act of March 3, 1863, restricted the powers that the district courts had enjoyed under the prior act.¹³ Courts could now obtain testimony only if

9. Compare the procedures for requests under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 2558, 847 U.N.T.S. 231, 232 [hereinafter the Hague Evidence Convention]. Under the Hague Evidence Convention, the procedures are rather simple, yet nonetheless more complex than a request under § 1782. Pursuant to the procedures under the Convention, all requests are channeled through a Central Authority designated by each signatory nation, and the requesting party must submit several forms. See Hague Evidence Convention, *supra*, at 2558-59. Under § 1782, the district court receives the requests directly.

10. Stephen M. Saraisky, Comment, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. CHI. L. REV. 1127, 1127-28 (1994).

11. Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630. Section 2 of the Act of March 2, 1855, provides:

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

Because of recording and indexing errors, the statute was "buried in oblivion." See Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L. J. 515, 540 (1953).

12. Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769 [hereinafter the 1863 Act]. The 1863 Act "frustrated" the salutary effects of the 1855 Act and severely limited the use of foreign letters rogatory. Jones, *supra* note 11, at 540.

13. The consequences of the 1863 Act were far-reaching, lasting for nearly a century. Jones, *supra* note 11, at 540-41.

the foreign proceedings were "[1] for the recovery of money or property[, 2] pending in any court in any foreign country with which the United States are at peace, and [3] in which the government of such foreign country shall be a party or shall have an interest"¹⁴ As one author notes, a party seeking judicial assistance was more apt to obtain that help from a state, not a federal, court.¹⁵

With the end of World War II came a corresponding rise in international litigation;¹⁶ as a result, there was a direct need for the United States to revamp its extraterritorial procedures.¹⁷ Two amendments to Section 1782 followed, and both broadened the scope of the statute. Congress, in the 1948 Amendment, removed the requirement that the government of the foreign country be a party or have an interest in the proceedings and also expanded the statute to cover "any civil action pending in any court in a foreign country."¹⁸ Congress further extended the reach of Section 1782 in the 1949 Amendment,¹⁹ replacing the term "civil action" with the phrase "judicial proceeding."²⁰ This Amendment vastly expanded the scope of Section 1782; courts have treated this language as meaning that litigants can use the statute to obtain information in criminal as well as in civil proceedings.²¹

14. Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769-70.

15. Walter A. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 602 (1990) (citing, *inter alia*, Christ v. Superior Court, 211 Cal. 593, 296 P. 612 (1931); People ex rel. Ickes v. Rushworth, 294 Ill. 455, 128 N.E. 555 (1920)).

16. Jones, *supra* note 11, at 558.

17. *Id.*

18. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 869 [hereinafter the 1948 Amendment]. The 1948 Amendment states:

The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found

Id. at 949.

19. Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89 (1949) [hereinafter the 1949 Amendment].

20. The 1949 Amendment further expanded the reach of § 1782:

Sec. 93. Section 1782 of title 28, United States Code, is amended by striking out from the same paragraph the words "civil action" and in lieu thereof "judicial proceeding."

The 1949 Amendment, § 93, 63 Stat. at 103.

21. See *In re Letters Rogatory from Tokyo District, Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976) (citing *In re Letters Rogatory from Justice Court, District Court of Montreal, Canada*, 523 F.2d 562 (6th Cir. 1976) (stating that the omission of the phrase "civil action" meant that a litigant could use the statute to gather information for criminal actions as well as civil actions)).

Commentators have noted that courts use the statute as much in criminal proceedings as in civil matters.²²

B. The 1964 Amendment

The United States Congress again revised Section 1782, when, in 1958, it created the Commission on International Rules of Judicial Procedure.²³ Congress requested that the Commission "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."²⁴ The 1964 Amendment focused on liberalizing the scope of Section 1782 with the corresponding hope that this would prompt other countries to

22. See Brian E. Blomstein & 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, 432 (1990).

23. Act of September 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743. This section requested that the Commission

investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements. To the end that procedures necessary or incidental to the conduct and settlement of litigation in State or Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, or tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly approved, the Commission shall

- (a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;
- (b) draft and recommend to the President any necessary legislation;
- (c) recommend to the President such other action as may appear administrative proceedings; and
- (d) perform such other related duties as the President may assign.

Id. at 1743; see also S. REP. NO. 2392, 85th Cong., 2d Sess. 1, 2-3 (1958), reprinted in 1958 U.S.C.C.A.N 5201, 5202-3 (stating the need for a comprehensive study of the extent to which international assistance can be obtained). The Senate Report concluded that, "the study is of such magnitude that it cannot readily be handled by a private body or law school institute. It should be an integrated study with participation by representatives of the bar and the Government." *Id.* at 5203. The Project on International Procedure of the Columbia University School of Law, directed by Hans Smit, a Professor of Law at Columbia University, aided the Commission. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 (1965).

24. § 2, 72 Stat. at 1743.

liberalize their own judicial assistance provisions.²⁵ In other words, the revised section 1782 would, as the *Gianoli* and *Malev* courts later stated, both provide efficient assistance to parties in foreign litigation and encourage foreign countries by example to provide similar assistance to U.S. litigants in court.²⁶

The Senate Report enunciates these twin aims as the fundamental goals of the Amendment.²⁷ Specifically, the Senate Report focuses on three aspects of the statute: (1) the grant of wide discretion to the district courts, (2) the use of the word "tribunal," and (3) who may qualify as a requesting party.²⁸ While the grant of discretion to the district courts, as recommended in the Senate Report,²⁹ directly bears on the debate over an extra-statutory requirement of discoverability, the other two central aspects of the Senate Report have no such obvious correlation. Still, in order to grasp the true legislative intent behind the 1964 Amendment, it is necessary to briefly examine the three central aspects of the Senate Report and the reasoning behind them.

The proposed changes to Section 1782 expressly intended to liberalize and broaden its scope.³⁰ The committee reports first

25. S. REP. No. 1580, 88th Cong., 2d Sess. 1, 7 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3788 [hereinafter SENATE REPORT].

26. See *In re Application of Gianoli*, 3 F.3d 54, 58 (2d Cir. 1993), cert. denied, 114 S. Ct. 443 (1993); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

27. The SENATE REPORT, *supra* note 25, indicated that:

Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the proposed 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. The Commission hopes that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.

Letter of Transmittal Accompanying S. REP. No. 1580, 88th Cong., 2d Sess. from Rep. Oscar Cox, Chairman of Comm'n on Int'l Rules of Judicial Procedure, to John McCormack, Speaker of the House (May 28, 1963), in 1964 U.S.C.C.A.N. 3782, 3793.

28. Saraisky, *supra* note 10, at 1132.

29. SENATE REPORT, *supra* note 25, at 3788.

30. *Id.* This liberalization of the scope of § 1782 was visionary; it anticipated the rise in international relations and litigation. See Morris H. Deutsch, Comment, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. 1782, for Use in a Foreign or International Tribunal*, 5 B.C. INT'L & COMP. L. REV. 175, 176 n.6 (1982) (stating that a significant increase in

deal with the need to broaden the scope of proceedings that must be underway by using the term "tribunal."³¹ This term ensures that "assistance is not confined to proceedings before conventional courts."³² The reports also note that aside from judicial entities requesting assistance, there was also "the constant growth of administrative and quasi-judicial proceedings all over the world."³³ Thus, in response to the diverse corpus of judicial entities requesting assistance, a United States court can now provide assistance when, for example, "proceedings are pending before investigating magistrates in foreign countries."³⁴

The Senate Report also displays a liberalizing intent concerning the group of persons who may act as requesting parties. The Statute broadens this group to include "international tribunals and litigants before such tribunals."³⁵ In comparison, the pre-1964 Statute had limited the class of requesting parties to those who were involved in proceedings before a conventional court.³⁶ Consistent with one of the twin aims—providing efficient assistance to "participants in international litigation"³⁷—this progressive feature greatly broadened the scope of Section 1782.

The broad discretion given to the district court judge to either grant or deny a request for assistance marks the boldest change in the 1964 Amendment.³⁸ The Senate Report proposes some basic guidelines, stating:

international transactions has resulted in the increased incidence of international litigation); Edward C. Weiner, *In Search of International Evidence: A Lawyer's Guide Through the United States Department of Justice*, 58 NOTRE DAME L. REV. 60, 60 (1982) ("The United States and other countries are increasingly discovering that their citizens engage in transnational activities that often result in lawsuits. Obtaining evidence from foreign nations is necessary to conduct such litigation.").

31. Stahr, *supra* note 15, at 604.

32. SENATE REPORT, *supra* note 25, at 3788.

33. *Id.*

34. *Id.*

35. *Id.*

36. § 1782, 62 Stat. at 949.

37. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

38. SENATE REPORT, *supra* note 25, at 3788. The Report states that "it leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." *Id.*

In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.³⁹

Unfortunately, these guidelines have not fostered a unified application of discretionary authority.⁴⁰

While these aspects of the 1964 Amendment dominated the Senate Report, Congress implemented other liberalizing reforms—such as deleting the word “pending” from the text of the statute⁴¹—that also broadened the scope of the Statute.⁴² In sum, as Philip W. Amram, Chairman of the Advisory Committee to the United States Commission on International Rules of Judicial Procedure (Advisory Committee) expressed, the 1964 Amendment to Section 1782 provided “[w]ide judicial assistance . . . granted on a wholly unilateral basis. . . . This is an enlightened and far-reaching policy.”⁴³ Amram further noted that “it is not unfair to say that [Section 1782] is a one-way street. . . . It grants wide assistance to others . . . ,”⁴⁴ which strengthens the proposition that the revised Section 1782 was not contingent on reciprocity, though it did seek to encourage it. Amram stated that the “sponsors of the act were not unmindful of the need for parallel

39. *Id.* The Senate Report also notes that the court may “include provisions for fees for opponents’ counsel, attendance fees of witnesses, fees for interpreters and transcribers of the testimony and similar provisions.” *Id.*

40. Compare *In re Application of Gianoli*, 3 F.3d 54 (2d Cir. 1993), cert. denied, 114 S.Ct. 443 (1993) (holding that a district court judge has the discretionary authority to determine if the material sought is discoverable in the foreign jurisdiction), with *In re Application of Asta Medica*, 981 F.2d 1 (2d Cir. 1993) (holding that a district court judge must make a threshold inquiry into whether the material sought is discoverable in the foreign jurisdiction).

41. See FOURTH ANNUAL REPORT OF THE COMM’N ON INT’L RULES OF JUDICIAL PROCEDURE, H.R. DOC. NO. 88, 88th Cong., 2d Sess., 1 (1963) (proposing the text of the revised statute, which omits the word “pending”); see also *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1154-55 (11th Cir. 1988) (discussing omission of the word “pending” from the 1964 statute).

42. The Senate Report also recommended that the provision providing that judicial assistance only be granted to “countries with which the United States is at peace” be omitted from the new statute. The Report additionally recommended that a court use its discretion in deciding whether to accept or deny a request. SENATE REPORT, *supra* note 25, at 3789.

43. Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965).

44. *Id.* The Second Circuit picked up this language in *In re Málev Hungarian Airlines*, 964 F.2d 47, 101 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

action abroad, so that U.S. courts and litigants could expect the same generous treatment."⁴⁵

Other commentators concurred in Amram's opinion. Hans Smit, the Reporter to the Advisory Committee,⁴⁶ notes that the 1964 revisions passed without any objection in Congress. He states,⁴⁷ perhaps too optimistically, that the new text of Section 1782 accomplishes both a much needed liberalization and eliminates "former uncertainties."⁴⁸ Smit also notes that the tone of the Amendment is quite liberal in comparison to its predecessors. He states that "it is not necessary . . . 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."⁴⁹ Smit notes that the use of the word "tribunal" is an important, yet "simple extension" that "eliminates . . . undesirable limitations."⁵⁰ Furthermore, under the revised Section 1782, foreign and international officials, persons designated by foreign law or international convention, or other interested parties now can make a request for judicial assistance.⁵¹ This language epitomizes the expansive scope of the revised statute.

Smit describes the penultimate addition to the revised Section 1782—the grant of discretion to the district court judge in deciding whether to accept or deny a request for judicial assistance—as an addition of "quintessential importance."⁵² As the current case law reveals,⁵³ this grant of discretion has also

45. Amram, *supra* note 43, at 651.

46. Smit, *supra* note 23, at 1015.

47. *Id.* at 1017. Smit notes that the passage of the 1964 Amendment was crucial because "involvement in international litigation is no longer a rare occurrence. The interest of all nations in promoting effective and efficient administration of justice in such litigation [is] acute." *Id.*

48. *Id.* at 1026.

49. *Id.* Smit compares this version with the 1949 version of the statute, 63 Stat. 103, which included the use of the word "pending." Congress eliminated the word "pending," he states, to "facilitate the gathering of evidence prior to the institution of litigation abroad." *Id.* at 1026 n.72.

50. *Id.* at 1027. Smit notes that under the revised § 1782, an "important international court, such as the Court of Justice of the European Economic Community, and litigants before such a court can be given any reasonable assistance they may require." *Id.* at 1027 n.73.

51. *Id.* at 1027. Smit adds: "New Section 1782 is based on the hope that . . . the courts, inspired by a desire to accommodate their foreign brethren," will work toward "the removal of obstacles to true international co-operation." *Id.* at 1028.

52. *Id.* at 1029. Smit comments that this grant of discretion is a more prudent course than attempting to "define with precision the variety of circumstances in which the rendition of aid pursuant to its provisions would be improper." *Id.*

53. See *infra* Part III accompanying notes 58-200.

proved a breeding ground for dissension among judges concerning whether they should impose an extra-statutory requirement of discoverability.⁵⁴ Smit, citing his colleague Amram, states that a district court may grant or deny assistance "upon such terms and conditions as it deems appropriate."⁵⁵ The intent of Section 1782 is clear from the legislative history, particularly the commentary to the proposed revisions of the 1964 Amendment contained in the Senate Report, and Professor Smit's lucid and consistent interpretation of the revised Section 1782. The intent was and is to achieve what the Second Circuit deemed Section 1782's twin purposes:⁵⁶ (1) to improve and make more efficient international judicial assistance from our federal courts, with the hope that this would (2) prompt foreign courts to act in similar fashion.⁵⁷ While these twin purposes, like the legislative intent behind the 1964 Amendment, are seemingly clear, the case law indicates that the text of the Statute and interpretation of that text rarely produce a chorus of a thousand voices.

III. THE CASE LAW

This Part presents and analyzes the case law prior to the Second Circuit's most recent decision, *Euromepa S.A. v. R. Emerson, Inc.* An examination of both the district and circuit courts' opinions in the *Euromepa* case then follows.

54. Compare *In re Application of Gianoli*, 3 F.3d 54, 58 (2d Cir. 1993), cert. denied, 114 S. Ct. 443 (1993) (holding that a district court judge should not impose an extra-statutory requirement of discoverability) with *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992) (holding that a district court judge must impose an extra-statutory requirement of discoverability).

55. Smit, *supra* note 23, at 1029 (citing Amram, *Public Law No. 88-619 of October 3, 1964—New Developments in International Judicial Assistance in the United States of America*, 32 J. BAR ASS'N D.C. 24, 31 (1965)). Despite this statement, in a recent article, Smit rejected the practice of engraving a discoverability requirement onto § 1782. See Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 234-35 (1994) ("Section 1782 cannot . . . be construed to impose the requirement that the evidence to be obtained through § 1782 be discoverable . . . under foreign law.").

56. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

57. These twin purposes are echoed in the *Gianoli* opinion. See *Gianoli*, 3 F.3d at 57.

A. Cases that Impose a Threshold Discovery Requirement

1. *In re Asta Medica*—The First Circuit Imposes a Threshold Discovery Requirement

In *In re Application of Asta Medica, S.A.*,⁵⁸ the First Circuit considered for the first time the issue of discoverability in the foreign jurisdiction where a proceeding is pending.⁵⁹ Appellant Pfizer, Inc., was involved in patent litigation in France, Belgium, England, and the Netherlands against Asta Medica, S.A., and several other pharmaceutical companies.⁶⁰ To establish the invalidity of Pfizer's patent, the foreign companies sought to obtain documents and the testimony of former Pfizer employees involved in the process.⁶¹ The United States District Court for the District of Maine eventually granted the application, filed under Section 1782, for the requested documents and testimony.⁶²

After reviewing the legislative history, academic commentary on Section 1782, and affidavits from foreign attorneys on the issue of whether party evidence was obtainable from nonparty witnesses in each of the four foreign jurisdictions,⁶³ the district court stated that "[t]here is absolutely no evidence . . . that suggests any congressional desire to impose on [U.S.] courts the burden of investigating foreign law on matters such as admissibility of the evidence, its discoverability in the [United States] or any other sense"⁶⁴ The district court found that imposing a threshold discoverability requirement would place an "onerous burden on both applicants and judges."⁶⁵ The district court refused to question the congressional intent behind the liberalization of Section 1782, brushing aside "some fear of

58. 981 F.2d 1 (1st Cir. 1992).

59. See John P. Donahue, Comment, *Threshold Showing Required For Foreign Discovery Assistance Requests*, 17 SUFFOLK TRANSNAT'L L.J. 589, 594 (1994).

60. *Asta Medica*, 981 F.2d at 3.

61. *Id.*

62. *Id.* at 3 n.2. The district court opinion is *In re Application of Asta Medica*, 794 F.Supp. 442 (D. Me. 1992).

63. See Lawrence W. Newman & Michael Burrows, *Obtaining Evidence in the U.S. for Foreign Tribunals*, N.Y.L.J., Jan. 21, 1993, at 3.

64. 794 F. Supp. at 446. The court stated that "given that Congress was seeking to liberalize the process available to foreign litigants seeking evidence here, [the court] conclude[s] that resolution of these foreign law issues is not necessary to the exercise of a 1782 discretion." *Id.*

65. *Id.*

offending foreign tribunals.⁶⁶ The court held that the relevant inquiry is whether "the subject matter is generally pertinent and that improper factors, such as harassment and unnecessary expense and delay are minimized."⁶⁷

The First Circuit reversed the district court's decision, denying the Section 1782 application.⁶⁸ Several reasons bolstered its decision to reverse.⁶⁹ The court first stated that under the district court's opinion, litigation in a foreign jurisdiction with limited pretrial discovery places a United States party at a "substantial disadvantage vis-à-vis the foreign party."⁷⁰ The court noted that "Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad."⁷¹

Next, the court reasoned that under the district court's opinion, foreign litigants could circumvent foreign law and procedures.⁷² The court stated that "[i]n amending Section 1782, Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation."⁷³ In order to remedy this potential for abuse, the court recognized that other courts had required, as a prerequisite to granting a Section 1782 request, a threshold showing that the material sought is discoverable under the laws of the foreign jurisdiction.⁷⁴

66. *Id.* at 446 n.9. The court noted that "Congress showed no such fear . . . in enacting a statute that does not depend on reciprocity." *Id.*

67. *Id.*

68. *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992).

69. *Id.* at 5. The court stated that the "central intent" of the 1964 Amendment was to liberalize existing U.S. procedures and also to "adjust those procedures to the requirements of foreign practice and procedure." *Id.* (citing SENATE REPORT, *supra* note 25, at 3788).

70. *Asta Medica*, 981 F.2d at 5. The court stated that a foreign party could file a request for assistance under § 1782 and then "the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction." *Id.* See *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992) (Feinberg, J., dissenting), *cert. denied*, 113 S. Ct. 179 (1992).

71. *Asta Medica*, 981 F.2d at 5-6.

72. *Id.* at 6.

73. *Id.*

74. *Id.* The court cited *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988); *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985); and *In re Court of the Comm'r of Patents for Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). The D.C. Circuit has taken the same approach. In *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686 (D.C. Cir. 1989), the court upheld a discovery request by the Crown Prosecution Service because the "U.S. citizen

By requiring a threshold showing of discoverability, a court also ensures that its Section 1782 analysis includes considerations of international comity, which is readily apparent in the "legislative history and purported goals of section 1782."⁷⁵ Including international comity considerations in the analysis of a Section 1782 request was essential for preserving diplomatic relations between foreign and domestic courts.⁷⁶ The court stated that if the district court opinion allowed for such liberal discovery, it "would lead some nations to conclude that United States courts view [foreign] laws and procedures with contempt . . . [and] the broader goal of the statute—stimulating cooperation in international and foreign litigation—would be defeated since foreign jurisdictions would be reluctant to enact policies similar to section 1782."⁷⁷

The court declared irrelevant the purportedly "onerous burden" placed on both applicants and judges in determining whether information requested is discoverable under foreign law.⁷⁸ Congress, it stated, "intended that the primary burden fall upon the applicant, who has to make a showing that the information is discoverable under foreign law."⁷⁹

2. Eleventh Circuit Decisions in Harmony with the *Asta Medica* Decision

The Eleventh Circuit, like the First Circuit, has also championed the requirement of threshold discoverability for a

could not show that the procedures used by the district court to obtain the requested evidence were unavailable under British discovery laws." *Id.* at 693. The court clearly espoused the view that if evidence is to be obtained pursuant to a § 1782 order, then that evidence must be discoverable in the foreign jurisdiction.

75. *Asta Medica*, 981 F.2d at 6-7. The court stated that the district court had showed complete "indifference" to concerns of international comity. *Id.*

76. *Id.*

77. *Id.* at 7. But see Amram, *supra* note 43, at 651 (noting that § 1782 is a "one way street" not requiring reciprocity).

78. *Asta Medica*, 981 F.2d at 7. But see Donahue, *supra* note 59, at 596-97.

79. *Asta Medica*, 981 F.2d at 7. The court did not cite to any portion of § 1782 or the Senate Report, despite asserting that this was the intent of Congress. Commentators have criticized the court's holding, noting that a discoverability requirement is not found in the text or legislative history of § 1782. Commentators have also claimed that this holding presents significant barriers to foreign litigants seeking assistance in United States courts. See Newman & Burrows, *supra* note 63, at 3; Donahue, *supra* note 59, at 596-97; Smit, *supra* note 55, at 236-37.

Section 1782 application.⁸⁰ In *In re Court of the Commissioner of Patents for the Republic of South Africa*⁸¹ (*Patents*), Electric Furnace Company (Electric) presented the district court with a Section 1782 application requesting the production of documents from Selas Corporation (Selas) relating to a patents case pending in the Republic of South Africa. Electric, however, had not shown that the documents requested were discoverable under South African law.⁸²

The *Patents* court concluded that it would not allow litigants to circumvent foreign procedures imposed by foreign tribunals⁸³ because "few actions could more significantly impede the development of international cooperation . . . than if courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals."⁸⁴

Similarly, in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*⁸⁵ (*Trinidad and Tobago*), the court relied on the *Patents* case to apply the threshold discoverability requirement. In *Trinidad and Tobago*, the court addressed the issue of whether material sought must first be discoverable under the laws of Trinidad and Tobago.⁸⁶ After recognizing the congressional intent to liberalize Section 1782,⁸⁷ the court found that the material sought was discoverable under the laws of both Trinidad and Tobago.⁸⁸ The court stated the

80. See Stahr, *supra* note 15, at 609.

81. *In re Court of the Comm'r of Patents for Republic of South Africa*, 88 F.R.D. 75, 76 (E.D. Pa. 1980) [hereinafter *Patents*].

82. *Patents*, 88 F.R.D. at 77. The court's concern was exacerbated by the fact that the foreign tribunal was not represented in the proceeding. *Id.* at 77 n.1. If, the court noted, the foreign tribunal was represented and could instruct the court on the applicable law, the court would grant the order if it was consistent with South African law. *Id.*

83. *Id.* at 77. The court made this assertion despite only having a suspicion that the materials requested would not be discoverable under South African law, a result of "discussions with counsel." *Id.*

84. *Id.*; see also Stahr, *supra* note 15, at 613 ("There is only one . . . situation in which foreign discoverability may be relevant in a section 1782 case: when one party to a foreign litigation seeks discovery from another party in the foreign litigation, as in the *Patents* case."). But see Lawrence W. Newman & Michael Burrows, *Production of Evidence for Foreign Tribunals*, N.Y.L.J., May 16, 1991, at 3 (considering the *Patents* decision in light of the English House of Lords case, *South Carolina Ins. Co. v. Assurantie Maatchapij "De Zeven Provincien" NV*, 2 Lloyd's Rep. 317 (1986), and stating that the *Patents* court's foreign law determination was an "imprecise venture").

85. *In re Request for Assistance from Ministry of Legal Action of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988) [hereinafter *Trinidad and Tobago*].

86. *Id.* at 1152.

87. *Id.* at 1152-54.

88. *Id.* at 1156.

proper inquiry: the district court "must decide whether the evidence would be discoverable in the foreign country before granting assistance."⁸⁹ Since the Central Bank of Trinidad and Tobago had the authority to request the documents at issue, the court granted the Section 1782 order.⁹⁰

The most recent Eleventh Circuit case to address the threshold discoverability requirement is *Lo Ka Chun v. Lo To (Lo Ka Chun)*.⁹¹ In *Lo Ka Chun*, the court received a Section 1782 request for depositions of four Florida nonparty witnesses for use in a Hong Kong civil proceeding.⁹² The witnesses moved to quash the deposition subpoenas, arguing that this form of discovery would not be available if they were living in Hong Kong.⁹³ The district court rejected this argument, stating that "the folly of this or any other United States court, unschooled in and unfamiliar with foreign law, attempting to predict whether foreign law would permit the requested discovery," precluded it from considering the issue.⁹⁴

In reversing the district court, the Eleventh Circuit stated that "the district court must decide whether the evidence would be discoverable in a foreign country before granting assistance."⁹⁵ Because the district court had not considered the discoverability issue, its decision could not stand.⁹⁶

89. *Id.* (citing *In re Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980)). The material requested in *Trinidad and Tobago* comprised copies of bank records of Joseph Azar, in connection with a criminal investigation of Trinidad and Tobago nationals involved in violations of the Exchange Control Act. 848 F.2d at 1152. See Ch. 79:50, Laws of Trinidad and Tobago.

90. *Trinidad and Tobago*, 848 F.2d at 1156 n.11.

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

92. *In re Lo Ka Chun v. Lo To*, No. 87-8309, slip op. at 1-2 (S.D. Fla. Nov. 19, 1987).

93. *Id.* at 3.

94. *Id.* at 7.

95. *Lo Ka Chun*, 858 F.2d at 1566 (citing *Trinidad and Tobago*, 848 F.2d at 1156).

96. *Lo Ka Chun*, 858 F.2d at 1566. The court noted that if the district court found that the evidence would be discoverable under Hong Kong law, it could go ahead and grant the order. *Id.* As Stahr notes, this application of § 1782 requires analysis of foreign laws, something about which § 1782 and its legislative history are silent. Stahr, *supra* note 15, at 612. Stahr notes that this would require "many section 1782 cases to begin with a debate over foreign law." *Id.* He states that the *Lo Ka Chun* case is a good example; the affidavits and exhibits regarding Hong Kong law before the district court were over 400 pages. *Id.* at 612 n.89. See also *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 692-93 (D.C. Cir. 1989) (Courts should not consider admissibility per se.); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 n.3 (3d Cir. 1985) (Courts should not "predict or construe the procedural or substantive law of the foreign jurisdiction. . .").

3. Recent District Court Decision Upholds the *Asta Medica* Doctrine

A recent opinion of the California Central District Court upheld the *Asta Medica* court and imposed a discoverability requirement for information sought pursuant to a Section 1782 request.⁹⁷ The lawsuit, *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England (Judicial Assistance)*, arose out of a dispute regarding the alleged misappropriation of trust funds.⁹⁸ Appellees, appointed by a London court as trustees over missing funds, filed an action against several foreign defendants, then amended the complaint to include a U.S. citizen, the appellant in this case.⁹⁹ The magistrate judge granted a Section 1782 request, requiring appellant to produce documents and have his deposition taken.¹⁰⁰ Upon review, the district court reversed the magistrate's ruling.¹⁰¹

The court stated that the "[m]agistrate judge's interpretation of Section 1782 [could not] stand and Appellees [were] not entitled to discovery beyond what [was] available to them in the foreign court in which the action [was] proceeding."¹⁰² The court then distinguished cases that the Appellees cited to support the claim that there is no requirement of a threshold showing of discoverability in a Section 1782 request.¹⁰³ The court noted that these cases all involved a direct request for assistance from a foreign tribunal; therefore, "it [was] clear that the discovery sought [was] permitted and authorized by that body."¹⁰⁴ This direct request from a foreign tribunal perhaps assuaged the court's fear of litigants circumventing foreign law or utilizing Section 1782 as a form of harassment. The court's interpretation of Section 1782's purpose was "to foster jurisprudential comity and cooperation between the United States and foreign countries. This court [did] not believe that Congress intended to pass

97. *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the High Court of Justice, Chancery Division, England*, 147 F.R.D. 223 (C.D. Cal. 1993) [hereinafter *Judicial Assistance*].

98. *Id.* at 224.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 226.

103. Appellees cited *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976), *In re Letters Rogatory from the City of Haugesund, Norway*, 497 F.2d 378 (9th Cir. 1974), and *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511 (9th Cir. 1973).

104. *Judicial Assistance*, 147 F.R.D. at 226.

legislation that would significantly weaken the position of United States citizens in foreign legal proceedings.¹⁰⁵ Since an adverse party made the request under Section 1782 in this case, the court noted that it had to be careful to prevent circumvention of foreign discovery laws.¹⁰⁶ The court concluded that its decision would promote good relations and invite foreign courts to reciprocate in the future.¹⁰⁷

B. Cases that Do Not Impose a Threshold Discovery Requirement

1. The Second Circuit Decisions—Diametric Opposition to the *Asta Medica* Doctrine of a Threshold Discovery Requirement

The Second Circuit first addressed the issue of a threshold discoverability requirement for material requested under Section 1782 in *In re Application of Malev Hungarian Airlines*.¹⁰⁸ In *Malev*, Pratt & Whitney, an airplane manufacturer, filed a complaint in the Municipal Court of Budapest, Hungary, against Malev, the Hungarian national airline.¹⁰⁹ Four days after filing its answer, Malev instituted an action in the United States District Court for the District of Connecticut,¹¹⁰ requesting that the district court grant an order pursuant to Section 1782 that would permit discovery of Pratt & Whitney in the United States.¹¹¹ The district court denied the order, finding that Malev's request was "premature" because Malev never attempted this form of discovery before the Hungarian court.¹¹² The court concluded that since discovery procedures were "fully available" to Malev under

105. *Id.* The court stated that the intent behind the statute was to "facilitate compliance by U.S. citizens with foreign court proceedings and to maintain respect for foreign countries' sovereign jurisdiction." *Id.* Compare this view of the congressional intent behind § 1782 with that expressed in *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 179 (1992).

106. *Judicial Assistance*, 147 F.R.D. at 226 (citing *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985)).

107. *Id.* Smit, in criticizing the decision, stated that the discoverability requirement had "superficial appeal," but that it was in neither "the letter nor the spirit of § 1782." Smit, *supra* note 55, at 236.

108. 964 F.2d 97 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 179 (1992).

109. *Id.* at 98.

110. *Id.*

111. *Id.* Specifically, Malev sought to depose certain employees of Pratt & Whitney who resided in Connecticut and to obtain 18 groups of documents that were supposedly relevant to the litigation in Hungary. *Id.*

112. *Id.* at 100.

Hungarian law, Malev should have first sought discovery from the Hungarian court.¹¹³

In reversing the lower court, the Second Circuit found nothing in the text and legislative history of Section 1782 that "would support a quasi-exhaustion requirement of the sort imposed by the district court."¹¹⁴ The Second Circuit wrote that requiring an interested person to first seek discovery from the foreign tribunal would conflict with the twin purposes of Section 1782 and would effectively "impose an additional burden on persons seeking assistance from our federal courts for matters relating to international litigation."¹¹⁵

The *Malev* court addressed the concerns of the district court but did not find them dispositive.¹¹⁶ Specifically, the court noted that making discovery available through Section 1782 "potentially impose[d] heavy burdens on our federal courts . . ."¹¹⁷ Laying the foundation for the *Gianoli* opinion, the *Malev* court reasoned that district courts could exercise discretion to alleviate the burdens imposed by Section 1782,¹¹⁸ but could not impose what amounted to "extra-statutory barriers to obtaining discovery such as an exhaustion requirement."¹¹⁹

113. *Id.* The district court also noted that the Hungarian court never sought the involvement of U.S. courts in overseeing discovery and the district court said such oversight would "unnecessarily complicate the case" and burden U.S. courts. *Id.*; see also Deborah Pines, *Divided Panel Allows Discovery In Foreign Lawsuit*, N.Y.L.J., May 7, 1992, at 1.

114. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992). The Court's brief analysis of the applicable text of Section 1782 reveals that no quasi-exhaustion requirement exists. The court stated that Section 1782 allows an interested person to apply to the district in which the person from whom discovery is sought resides, and that upon application, the district court may "order [that person] to give . . . testimony or [a] statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." *Id.* (citing Section 1782).

115. *Malev*, 964 F.2d at 100; see Robert C. Bata & Kenneth Pasquale, *Discovery Rights Under Rule 1782 Affirmed*, N.Y.L.J., Sept. 9, 1993, at 5 ("[S]uch a requirement would contradict the goals of the statute. . .").

116. *Malev*, 964 F.2d at 100; see Tariq Mundiya, Comment, *U.S. Court Invites Foreign Litigants to Use U.S. Discovery Laws*, 42 INT'L & COMP. L.Q. 356, 358-59 (1993) (explaining the Second Circuit's rejection of the district court's concerns).

117. *Malev*, 964 F.2d at 100; see Herbert N. Ramy, 17 SUFFOLK TRANSNAT'L L.J. 230, 237 (1994) ("While the appeals court empathized with the district court's fears, it determined that Congress' intent as expressed through § 1782 should control.").

118. *Malev*, 964 F.2d at 100.

119. *Id.* See Bata & Pasquale, *supra* note 115, at 5.

Finally, the Second Circuit dismissed the district court's concern about reciprocal discovery problems.¹²⁰ On remand, the court advised the lower court to utilize its powers under Federal Rule of Civil Procedure 26(b)(1) to limit discovery if it thought the request too burdensome or cumulative.¹²¹ This would enable the lower court to minimize the burdens of discovery and still remain within the parameters of Section 1782.¹²²

Judge Feinberg, writing in dissent, stated that the majority had interpreted the statute too literally.¹²³ According to Judge Feinberg, the majority's opinion would require U.S. courts to become "Special Masters for Discovery."¹²⁴ The dissent contended that Malev never showed a need to invoke Section 1782,¹²⁵ and that Malev first should have gone through discovery procedures in the Hungarian court.¹²⁶ The dissent did not deem this "quasi-exhaustion,"¹²⁷ but concluded that a "quasi-exhaustion" requirement was consistent with the purposes of Section 1782.¹²⁸

120. *Malev*, 964 F.2d at 101 (citing Amram, *supra* note 43, at 651) ("[Section 1782] is a one way street. It grants wide assistance to others, but demands nothing in return. It was deliberately drawn this way . . .").

121. *Malev*, 964 F.2d at 102. The court proposed that the district court could require Malev to submit a discovery plan and make a showing that the discovery is "not obtainable from some other source that is more convenient, less burdensome, or less expensive," like the Hungarian court. *Id.*; see also Bata & Pasquale, *supra* note 115, at 5 ("The *Malev* decision does not grant license to a party in a foreign litigation to obtain unlimited discovery in the United States.").

122. *Malev*, 964 F.2d at 102. In the underlying litigation, the Hungarian court rendered a partial decision for Pratt & Whitney; the Hungarian Supreme Court reversed and dismissed the action against Malev. See Bata & Pasquale, *supra* note 115, at 5. The authors note that it is important for the party requesting assistance under § 1782 to remember that "unless it gets quick relief in the district court, it runs the risk of an adverse foreign judgment, because foreign courts have no obligation to put up with calendar congestion in the United States." *Id.*

123. *Malev*, 964 F.2d at 102 (Feinberg, J., dissenting). The result was the creation of a "precedent that bodes ill for a federal judicial system that is struggling to stay afloat." *Id.* For an endorsement of Feinberg's stance, see Mundiya, *supra* note 116, at 360-66. For the opposing view, see Ramy, *supra* note 117, at 239-41.

124. *Malev*, 964 F.2d at 103 (Feinberg, J., dissenting).

125. *Id.* at 105.

126. *Id.* at 105. If, Feinberg questioned, the district court judge can impose this requirement, "why bar it at the outset?" *Id.*

127. *Id.*; see Mundiya, *supra* note 116, at 360.

128. *Malev*, 964 F.2d at 105 (Feinberg, J., dissenting). Though not written into the statute, the dissent stated that § 1782 appeared to be a perfect instance for applying the doctrine of exhaustion of remedies. *Id.*

In *In re Application of Gianoli*,¹²⁹ the Second Circuit again considered the issue of a threshold discoverability requirement. In *Gianoli*, the court addressed a Section 1782 discovery order requesting documents and testimony concerning assets held by a Chilean holding company, Casabianca Investments, S.A., and the whereabouts of those assets.¹³⁰ The order asserted that "information about these assets is relevant to, and will be used in, the guardianship proceeding in the Chilean Court, in which the guardians must file an inventory of [Ciro Gianoli's] assets wherever they may be found."¹³¹ In granting the order to produce documents and appear for depositions, the United States District Court for the District of Connecticut held, *inter alia*, that Section 1782 does not require that the evidence sought in a district court be discoverable under Chilean law.¹³²

A unanimous Court of Appeals affirmed the district court decision.¹³³ The court began by noting that the primary intent of the amendment was to "liberalize existing U.S. procedures."¹³⁴ The court reached the issue of whether to impose an extra-statutory discovery requirement, concluding that these changes served the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance."¹³⁵ Appellants averred that appellees were limited to "information they could obtain within their own country, but not more."¹³⁶ The court reasoned first that the language of the statute simply could not support such a

129. 3 F.3d 54 (2d Cir. 1993), cert. denied, 114 S.Ct. 443 (1993).

130. *Id.* at 56. The litigation arose when Ciro Gianoli Martinez, a wealthy Chilean businessman, began to deteriorate in health. *Id.* at 55. All his living descendants commenced an incompetency proceeding; the provisional guardians, the appellees, filed an inventory of all of Gianoli's assets located in Chile with the Third Civil Court. *Id.* at 56. Determining that Gianoli held significant assets abroad, the appellees, in order to provide a complete inventory, filed this application under § 1782. *Id.*

131. *Id.*

132. *Id.* The district court also held that the requirements of § 1782 had been met and that "in any event, Chilean law empowers the Appellees to obtain the information requested." *Id.* at 57.

133. *Id.* at 54.

134. *Id.* at 57-58. Specifically, the court discussed the 1964 Amendment.

135. *Id.* at 58 (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992)).

136. *Gianoli*, 3 F.3d at 58. Appellants relied on decisions handed down in four other circuits. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *In re Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692-93 n.7 (D.C. Cir. 1989); *Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

reading.¹³⁷ The court stated that if "Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect."¹³⁸ The *Gianoli* court, however, pointed out that a finding of discoverability might nonetheless serve as a useful tool for district court judges in the exercise of discretion granted them under Section 1782.¹³⁹

The court recognized the legitimacy of the policy considerations, such as preventing circumvention of foreign limitations on discovery and avoiding offense to foreign tribunals,¹⁴⁰ that motivated the First and Eleventh Circuits to imply a threshold showing of discovery under the laws of the foreign jurisdiction.¹⁴¹ The *Gianoli* court nevertheless rejected the contention that these considerations favored reading into Section 1782 a threshold showing of discovery.¹⁴² Rather, the court "believe[d] Congress intended that these concerns be addressed by a district judge's exercise of discretion."¹⁴³

The court also considered whether the district court judge had abused his discretion by issuing the order.¹⁴⁴ The court was satisfied that the district court judge had exercised sound discretion in finding that (1) Chilean law allows provisional

137. *Gianoli*, 3 F.3d at 59. The court stated that the only language related to whether a district court must adopt a discovery requirement is "permissive language, stating that the practice and procedure prescribed by the district court 'may be in whole or in part the practice and procedure of the foreign country or international tribunal.'" *Id.* (citing 28 U.S.C. § 1782(A)).

138. *Gianoli*, 3 F.3d at 59. The court stated that "we are not free to read extra-statutory barriers to discovery into section 1782." *Id.* (citing *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S. Ct. 179 (1992)); see also Smit, *supra* note 55, at 235 ("But we are not at liberty to second-guess the policy choices of our Congress.").

139. *Gianoli*, 3 F.3d at 60. See also Lawrence W. Newman & Michael Burrows, *U.S. Discovery for Foreign Litigants*, N.Y.L.J., July 29, 1994, at 3.

140. *Gianoli*, 3 F.3d at 60. These concerns, the court noted, were motivating forces behind the 1964 Amendment to § 1782. *Id.* Another policy concern was maintaining the "balance between litigants that each nation creates within its own judicial system." *Id.*

141. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1st Cir. 1992); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988).

142. *Gianoli*, 3 F.3d at 60.

143. *Id.* at 60; see also SENATE REPORT, *supra* note 25, at 3788.

144. *Gianoli*, 3 F.3d at 61. The court reviewed the appellants' assertions that granting this order would (1) allow appellees to gain information that they could not obtain in their home jurisdiction, raising issues of comity, and (2) open the federal courts to waves of foreign litigants attempting to avoid limits on pretrial discovery procedures in their home jurisdictions. *Id.* This Note addresses the issue of comity in Parts III and IV.

guardians to acquire information about assets,¹⁴⁵ (2) Chilean courts could obtain this information by issuing a letter rogatory,¹⁴⁶ (3) obtaining the information would not offend the Chilean court but would instead assist the court in its proceedings,¹⁴⁷ and (4) Chilean law does not "prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken."¹⁴⁸ While the district court judge did not make a finding as to whether pretrial discovery is allowed under Chilean law, he did inquire into whether the order would circumvent Chilean limitations on discovery¹⁴⁹ and whether the grant of discovery would offend the Chilean court or Chilean sovereignty.¹⁵⁰ The court concluded that granting the order would not undermine the twin aims of Section 1782 but would, in fact, serve them.¹⁵¹

To summarize, both *Gianoli* and *Malev* expressly reject the notion that a court can impose extra-statutory requirements onto Section 1782. Both decisions, however, recognize the district court judge's statutory authority to exercise discretion—which

145. *Gianoli*, 3 F.3d at 61. The district court noted that under Article 378 of the Civil Code of Chile, the provisional guardians had a duty to compile a complete inventory of assets. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* This finding seemed to be dispositive for the Second Circuit and crucial to the conclusion that granting this order would not circumvent Chilean discovery restrictions. *Id.* at 62. Foreign courts are sensitive to the problems of different discovery procedures among differing legal systems. See Blomstein & Levitt, *supra* note 22, at 466. In *South Carolina Ins. Co. v. Assurantie Maatchapilj "De Zeven Provincien"* NV, 2 Lloyd's Rep. 317 (1986), a case before the British House of Lords, the defendants, "re-reinsurers," applied directly to the District Court for the Western District of Washington for an order pursuant to § 1782. See Newman & Burrows, *supra* note 139, at 3. After noting the differences between the two systems regarding pretrial discovery, the court held, *inter alia*, that a party could obtain evidence for trial "provided always that such means were lawful in the country, in which they were used; and the application made by the defendants could not be regarded as an interference with the Court's control of its own process." 2 Lloyd's Rep. at 318. All that the defendants had done was "what any party preparing [a] case in the High Court was entitled to do." *Id.* The English High Court did not appear to view § 1782 as an affront to its judicial system.

149. *Gianoli*, 3 F.2d at 61-62. Circumvention appears to be one of the greatest fears of courts considering § 1782 requests. See Saratsky, *supra* note 10, at 1136 (describing fear that foreign litigants are trying to take advantage of the more "liberal" U.S. discovery procedures). See also Newman & Burrows, *supra* note 139, at 3 (asserting that the *Gianoli* court may have proposed a different standard: "[T]hat § 1782 relief should be granted unless the law of the foreign country forbids the obtaining of evidence abroad through such means as § 1782.").

150. *Gianoli*, 3 F.3d at 62.

151. *Id.*

may entail determining whether material requested is discoverable in the foreign jurisdiction—and so minimize burdensome and perhaps inappropriate discovery requests. These discretionary orders are permissible as long as the twin purposes of Section 1782 are furthered and not compromised.

2. Recent District Court Decisions in Harmony with the *Gianoli-Malev* Doctrine

One case in particular, *In re Application of Technostroyexport*, evidences the strength of the *Gianoli-Malev* line of reasoning.¹⁵² The petitioner Technostroy (Techno) petitioned to obtain discovery pursuant to Section 1782 to assist in arbitration proceedings pending in Moscow and Stockholm against International Development and Trade Services, Inc. (IDTS).¹⁵³ Specifically, Techno sought to obtain documents from IDTS, as well as the deposition testimony of IDTS's president and sole shareholder.¹⁵⁴ The district court issued the subpoenas.¹⁵⁵ Techno argued that the material requested was "imperative" to the proceedings.¹⁵⁶ IDTS responded that Techno "should be relegated to applying to the arbitration tribunals for permission to take discovery."¹⁵⁷

The district court, on hearing a motion to quash, revised its earlier holding. First, the court noted that Techno had made no attempt to obtain any decision from the arbitrators.¹⁵⁸ The court then distinguished arbitration proceedings from regular court proceedings, describing the respective rules and procedures as

152. *In re Application of Technostroyexport*, 853 F.Supp. 695 (S.D.N.Y. 1994). Another case from the Eastern District of New York is also clearly consistent with the *Gianoli-Malev* line of cases. See *In re Letter of Request from the Boras District Court, Sweden*, 153 F.R.D. 31 (E.D.N.Y. 1994), in which the district court granted a § 1782 request from the Boras District Court, requiring respondent to submit to a blood test to determine paternity. The court found that the blood test requested was a standard procedure used by the Boras District Court in paternity cases.

153. *Technostroyexport*, 853 F. Supp. at 696.

154. *Id.* On January 6, 1994, Judge Mukasey signed an order permitting the issuance of a *subpoena duces tecum* to IDTS and deposition subpoenas to its president and sole shareholder. *Id.* On February 18, IDTS moved to have them quashed, and to have the parties referred to the pending arbitration proceedings. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 697.

158. *Id.* But see *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992) (rejecting the "quasi-exhaustion" requirement).

"radically different."¹⁵⁹ The court stated that applicable arbitration rules govern the matter of prehearing discovery¹⁶⁰ and noted that "[i]t has been expressly held that a Federal District Court has no power to order discovery under court rules where the matter is being litigated in an arbitration."¹⁶¹ The court then examined the applicable Russian and Swedish laws,¹⁶² finding that they clearly delegate the determination of obtaining evidence in arbitration proceedings to the arbitrators.¹⁶³

Finally, the court noted that there were no provisions in the Russian or Swedish laws for applying to a foreign court for assistance.¹⁶⁴ Dismissing Techno's argument that this permitted direct application to a United States court to obtain discovery,¹⁶⁵ the court, following the approach of the Second Circuit in *Gianoli* and relying on the discretion granted to it under Section 1782,¹⁶⁶ stated that the Russian and Swedish provisions "make it clear that in those countries it is the arbitrators, and not the courts, who are to decide the question of what discovery is to be obtained in arbitration proceedings."¹⁶⁷ The court properly exercised its statutory grant of discretion, considering all the circumstances, and conditioned the obtaining of evidence on the approval of the arbitrators.¹⁶⁸ The court did not impose a threshold discoverability requirement; instead, it used the issue of discoverability as a tool to determine whether to grant the Section 1782 request.

159. *Technostroyexport*, 853 F. Supp. at 697.

160. *Id.* The court stated that "[a]rbitrators govern their own proceedings...." *Id.*

161. *Id.* at 698 (citing *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359 (S.D.N.Y. 1957)).

162. *Technostroyexport*, 853 F.Supp. at 698. Experts for both sides testified concerning the Russian and Swedish Laws. *Id.* at 697. The court examined three Russian laws: Rule 30 of the Rules of the Arbitration at the U.S.S.R. Chamber of Commerce and Industry, and Articles 5 and 27 of the Law of the Russian Federation on International Commercial Arbitration. The Swedish law that the court examined was section 15 of the Swedish Arbitration Act. *Id.* at 698.

163. *Id.*

164. *Id.*

165. *Id.*

166. See 28 U.S.C. § 1782 (1988).

167. *Technostroyexport*, 853 F. Supp. at 698. The court stated that "parties to arbitrations in those countries cannot bypass the arbitrators and go directly to court." *Id.* at 699.

168. *Id.* See Newman & Burrows, *supra* note 139, at 3. The authors note that this may be a prudent course of action given the "negative attitude expressed by many European arbitrators toward discovery." *Id.*

C. The Euromepa S.A. v. R. Emersian, Inc. Decision

The *Euromepa* case embodies the debate surrounding Section 1782 and its correct interpretation. It demonstrates how difficult it is to gauge and limit a judge's discretion when the judge is faced with a Section 1782 request. The decision also reinforces the *Gianoli-Malev* line of reasoning, (i.e., the court does not impose a threshold showing of discoverability for requested documents).

1. The District Court Decision—*Euromepa I*

In *In re Application of Euromepa*, S.A.¹⁶⁹ (*Euromepa I*), the district court denied a request for discovery under Section 1782 for use in proceedings in a French court.¹⁷⁰ The court first noted that Section 1782 grants "wide discretion" to the district courts when considering discovery requests,¹⁷¹ and that the policy concerns underpinning Section 1782 must guide a district court's decision.¹⁷² The court reasoned that in reviewing a Section 1782 request, "a balance must be struck between the policy of not infringing upon a foreign nation's procedural rules with the policy of promoting the efficient resolution of dispute in a foreign tribunal."¹⁷³ As part of this balancing test, the court found it necessary to examine French procedural law.¹⁷⁴ The court discerned four features of the French system to be dispositive: (1) the French courts strictly administer, and maintain control over, the French rules on gathering and submitting evidence;¹⁷⁵ (2) the judge retains authority to decide on the production of documents

169. 155 F.R.D. 80 (S.D.N.Y. 1994) [hereinafter *Euromepa I*].

170. *Id.* at 84.

171. *Id.* at 82 (citing *In re Application of Gianoli*, 3 F.3d at 54, 59 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 443 (1993)).

172. *Euromepa I*, 155 F.R.D. at 82 (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 179 (1992)).

173. *Euromepa I*, 155 F.R.D. at 82.

174. *Id.* at 82-83. The court deemed its understanding of French law to be "a superficial one." *Id.* at 82. Its analysis has been criticized by some commentators. See Newman & Burrows, *supra* note 139, at 3 ("The *Euromepa* case also raises questions as to the extent to which the district courts can be expected to be able to divine the attitude of foreign courts to having their evidence-gathering procedures supplemented by applications under section 1782.").

175. *Euromepa I*, 155 F.R.D. at 82-83 (citing New Code of Civil Procedure and Related Laws, arts. 132-37 in GEORGE A. BERMANN ET AL., FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION ch. 7 (1994) [hereinafter *French New Code*]).

or testimony in court;¹⁷⁶ (3) no mechanism exists in French procedure for a party to require production of other documents from an opponent without judicial intervention;¹⁷⁷ and (4) French law does not allow a party to take a pretrial deposition of an opponent.¹⁷⁸ The court concluded that pretrial discovery is "controlled by the court and not the parties."¹⁷⁹

In denying Euromepa's Section 1782 petition, the court made several observations. First, the court noted that Euromepa had not attempted to use mechanisms provided by French procedure to obtain documents.¹⁸⁰ Second, considering the "nature and attitudes" of the French toward discovery, Euromepa's failure to attempt to use French procedures could not be "disregarded."¹⁸¹ Finally, finding that Euromepa was attempting to do something prohibited by French law, the court held that "granting this petition would infringe on the French courts while not promoting the efficiency of the pending appeal in France."¹⁸² The court explicitly noted that its holding did not impose a threshold discovery requirement on Euromepa.¹⁸³

2. *Euromepa II*: The Circuit Court Decision Upholds the Twin Aims of Section 1782

In *Euromepa S.A. v. R. Emerson, Inc.*¹⁸⁴ (*Euromepa II*), the Second Circuit reversed the district court decision. The court stated that the district court, in essence, had imposed an "extra-statutory hurdle to obtaining discovery" by requiring Euromepa

176. *Euromepa I*, 155 F.R.D. at 83 (citing *French New Code*, *supra* note 175, arts. 132-37).

177. *Euromepa I*, 155 F.R.D. at 83. The court noted that "[t]hese provisions . . . cannot be used for pretrial exploratory discovery." *Id.* (citing *French New Code*, *supra* note 175, arts. 138-42).

178. *Euromepa I*, 155 F.R.D. at 83 (citing *French New Code*, *supra* note 175, arts. 184-98).

179. *Euromepa I*, 155 F.R.D. at 83. The court added that "[t]his policy determination must be fully accounted for when balancing the various policy concerns." *Id.*

180. *Id.* The court emphasized that it was not imposing a quasi-exhaustion requirement, which the Second Circuit had expressly rejected in *Malev*. *Id.*

181. *Id.* The court cited to the SENATE REPORT, *supra* note 25, at 3788.

182. *Euromepa I*, 155 F.R.D. at 84. *See generally* Newman & Burrows, *supra* note 139, at 3. ("The court . . . did not expressly find that [French] law forbids efforts to obtain evidence outside France through means that are lawful in other countries.").

183. *Euromepa I*, 155 F.R.D. at 84 n.2. Commentators have suggested, however, that the court's decision imposes a requirement that is "functionally equivalent" to the discoverability standard. *See* Newman & Burrows, *supra* note 139, at 3.

184. 51 F.3d 1095 (2d Cir. 1995) [hereinafter *Euromepa II*].

S.A. (hereinafter MEPA) to "exhaust its discovery options in France" prior to seeking assistance in a United States court.¹⁸⁵

The court focused its analysis on the district court's primary inquiry: whether this discovery request would offend the French tribunal and appear as an "unwarranted intrusion."¹⁸⁶ The court reaffirmed its position taken in *Gianoli* and *Malev*—that a determination of discoverability under the laws of a foreign jurisdiction when considering a Section 1782 request is within a judge's discretion, but is not a threshold requirement—but concluded that an extensive foray into examining foreign discovery law of the forum state was undesirable and unnecessary.¹⁸⁷ In this case, the court noted, the district court's approach was ineffective and "promoted the very thing that section 1782 was intended to avoid."¹⁸⁸ The court's scathing review continued:

The record reveals that this litigation became a battle by affidavit of international legal experts, and resulted in the district court's admittedly "superficial" ruling on French law. We think it is unwise . . . for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and . . . biased interpretations of foreign law. . . . We do not read the statute to condone such speculative forays into legal territories unfamiliar to federal judges. . . . [This] cannot possibly promote the "twin aims" of the statute.¹⁸⁹

The court then offered parameters to guide and limit a judge's inquiry into the discoverability of requested information—an "authoritative proof" standard. The court stated that a district

185. *Id.* The imposition of an extra-statutory hurdle, the court noted, was something it had rejected in *Malev*. *Id.*

186. The Second Circuit construed the statements of the district court in this regard, *see supra* note 183, as meaning that the district court was concerned with offending the French tribunal, and not so concerned with discerning whether "comparable discovery exists under French law" *Euromepa II*, 51 F.3d at 1098.

187. The court cited a "chief architect of section 1782's current version," Professor Hans Smit, who has stated that the statute's drafters thought it would be "wholly inappropriate for a [U.S.] district court to try to obtain this understanding [of foreign law] for the purpose of honoring a simple request for assistance." *Euromepa II*, 51 F.3d at 1099 (quoting Smit, *supra* note 55, at 235 (1994)). The court also recognized that the Third Circuit, in *John Deere Ltd.*, "has already tempered the need to engage in an extensive foreign law analysis under section 1782." *Euromepa II*, 51 F.3d at 1099. The *John Deere* court, when considering the statements of the drafters of § 1782, stated that "to require that a district court undertake a more extensive inquiry into the laws of the foreign jurisdiction would seem to exceed the proper scope of section 1782." *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985).

188. *Euromepa II*, 51 F.3d at 1099.

189. *Id.* at 1099-1100 (citation omitted).

court should consider only "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782."¹⁹⁰ Without this authoritative proof, the statute's twin aims must guide a district court's decision.¹⁹¹

Upon examination of the lower court's reasoning,¹⁹² the Second Circuit concluded that the district court based its decision not to grant the Section 1782 request on a desire not to offend the French tribunal.¹⁹³ The Second Circuit observed that the district court had failed to apply the appropriate standard: the district court did not discover any authoritative proof that French officials objected to foreign discovery assistance.¹⁹⁴ Accordingly, the Second Circuit rejected the lower court's decision.¹⁹⁵ Additionally, the court noted that the French court had control over whether MEPA introduced specific evidence: the French court could stop MEPA from obtaining discovery in a way that offended French judicial policies, or could refuse to admit evidence offered by MEPA that, under French procedures, had been obtained through an "unacceptable practice."¹⁹⁶ The court made two final suggestions prior to reversing the district court's denial of MEPA's Section 1782 request: (1) if a district court is concerned with its impact upon foreign litigation, it should issue a "closely tailored discovery order rather than . . . simply deny[] relief outright"; and (2) if the district court is concerned with procedural parity (i.e., not allowing a party to circumvent foreign

190. *Id.* at 1100. Examples of such authoritative proof could be found, the court suggested, in a forum country's "judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures . . ." *Id.*

191. *Id.* The court added that a district court must keep in mind the statute's "overarching interest" in "providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." *Id.* (citing SENATE REPORT, *supra* note 25, at 3783).

192. The district court stated that "granting this petition would undeniably infringe on the power that the French legislature has bestowed to its courts." *Euromepa I*, 155 F.R.D. 80, 83 (S.D.N.Y. 1994).

193. *Euromepa II*, 51 F.3d at 1101.

194. *Id.*

195. *Id.*

196. *Id.* The court felt that the French court was in control and could "quite easily protect itself from the effects of any discovery order by the district court that inadvertently offended French practice." *Id.*

Since foreign courts could always rule upon the propriety of reliance on evidence through the cooperation extended by [U.S.] courts when it was presented to them . . . it [is] both unnecessary and undesirable to let the propriety of discovery with the aid of [a U.S.] court depend on discoverability and admissibility under foreign law.

discovery laws), it can premise relief "upon the parties' reciprocal exchange of information."¹⁹⁷

Judge Jacobs rendered a spirited dissent, stating that the majority opinion unduly limited the district court's discretion, wrongfully considered the factor of discoverability abroad as "quite limited," and did not give due deference to foreign attitudes concerning discovery.¹⁹⁸ In particular, Judge Jacobs took issue with what he perceived was the court's unwarranted and cursory analysis of the nature of French discovery.¹⁹⁹ In conclusion, Judge Jacobs suggested that the best route would be to implement what the *Malev* court had proposed: use of a discovery plan, submitted to the foreign court prior to seeking documents before a United States court.²⁰⁰

IV. ANALYSIS AND DISCUSSION

The most prudent approach for a district court to follow when presented with a Section 1782 request for assistance is the reasoning of *Euromepa II*, *Gianoli*, and *Malev*. This suggested approach more heartily embraces the twin aims of Section 1782 by not imposing threshold, extra-statutory barriers to assistance.²⁰¹ Instead, a district court judge retains the

197. *Euromepa II*, 51 F.3d at 1101-02.

198. *Id.* at 1102 (Jacobs, J., dissenting). While Judge Jacobs did not favor the imposition of a threshold discoverability requirement like the *Asta Medica* court, he did stress that discoverability in a foreign forum was a "useful tool" for a district judge, as the Second Circuit had recognized in *Gianoli*. *In re Application of Gianoli*, 3 F.3d 54, 60, 62 (2d Cir. 1993), cert. denied, 114 S. Ct. 443 (1993). The dissent seemed troubled that MEPA had not taken steps under French procedure to obtain the material requested. *Euromepa II*, 51 F.3d at 1103 (Jacobs, J., dissenting).

199. *Euromepa II*, 51 F.3d at 1104 (Jacobs, J., dissenting). Judge Jacobs stated that the majority opinion, while acknowledging that discoverability abroad is a useful tool, nonetheless unduly limited the scope of this line of inquiry. *Id.* Judge Jacobs also expressed concern with how a district court would discern "authoritative proof." *Id.*

200. *Id.* at 1105 (Jacobs, J., dissenting) (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992)).

201. See *supra* notes 187-97 and accompanying text; see also *United States v. Ron Pair Enterprises*, 489 U.S 235, 242 (1989). The U.S. Supreme Court stated that the "plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Id.* (citation omitted). A literal application of § 1782 does not produce results at odds with the drafters' intentions, as the Second Circuit cases and numerous commentators—most notably, Professor Smit—have revealed.

discretion to utilize discoverability as a tool, but is not required, at the outset, to make a discoverability determination. Moreover, the Second Circuit's interpretation of the legislative intent behind Section 1782 is fortified by numerous commentators.²⁰²

Most importantly, the suggested approach does not require a *threshold showing* that the material requested be discoverable under the laws of the foreign jurisdiction where the proceeding is pending.²⁰³ This proposition is persuasive for several reasons. The requirement of discoverability is a significant obstacle; it has the potential to create complex questions of foreign law and can also be extremely time-consuming.²⁰⁴ The Second Circuit approach honors one of the twin aims of Section 1782 by making assistance to foreign litigants more efficient and straightforward.²⁰⁵ In addition, it does not result in the imposition of an extra-statutory obstacle, which also accords with the legislative history of the statute.²⁰⁶

The rejection of a discoverability requirement also does not interfere with the statutory grant of discretion to district court judges. While there is no evidence of congressional intent to support an implicit discoverability requirement, a district court, utilizing its statutory grant of discretion, can inquire whether the

202. Specifically, the interpretations espoused by Smit and Amram are echoed in the *Gianoli* and *Malev* decisions. See *supra* notes 39-53 and accompanying text. In fact, the only language that relates to discoverability in the statute is permissive. See Peter Metis, Note, *International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Implicit Discoverability Requirement?*, 18 FORDHAM INT'L L.J. 332, 363 (1994) (Also stating that "there is nothing in the wording or structure of the statute that suggests that a discoverability requirement exists.").

203. This is consistent with the Second Circuit's opinions in *Gianoli* and *Malev*. The majority of commentators endorse this approach. See Smit, *supra* note 55, at 234-38. Smit strongly urges courts not to adopt the discoverability requirement, noting that it goes against the "letter and spirit" of § 1782. See Donahue, *supra* note 59, at 597 ("Compelling a district court to make preliminary rulings regarding foreign discovery laws is inefficient, unnecessary, and inconsistent with the policy underlying the statute.").

204. See *Euromepa II*, 51 F.3d 1095, 1099-1100 (2d Cir. 1995) (describing foreign law determinations as "costly, time-consuming, and inherently unreliable"); see also Stahr, *supra* note 15, at 613 ("To limit section 1782 discovery by reference to foreign discovery would thus place a significant burden on the litigants and the federal district courts."). See also Newman & Burrows, *supra* note 84, at 3 (attempting to make foreign law determinations could lead to incorrect results).

205. See *supra* notes 24, 35, 36 and accompanying text; see also SENATE REPORT, *supra* note 25, at 3788.

206. SENATE REPORT, *supra* note 25, at 3788; see also Smit, *supra* note 55, at 236; *In re Application of Gianoli*, 3 F.3d 54, 59 (2d Cir. 1993), cert. denied, 114 S.Ct. 443 (1993); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

material requested is discoverable in the foreign jurisdiction.²⁰⁷ This approach sensibly avoids second-guessing Congress and also provides a mechanism—judicial discretion—with which concerns about discoverability and potential abuse of the U.S. discovery laws can be addressed.

Under the umbrella of judicial discretion, a district court has an arsenal of weapons to combat the concerns, vocalized most notably by the First and Eleventh Circuits, about potential misuse of liberal U.S. discovery rules.²⁰⁸ The *Malev* and *Euromepa II* courts each suggested several methods to facilitate the handling of Section 1782 requests. First, the district court presented with the request can limit unreasonably broad or cumulative discovery through Federal Rule of Civil Procedure 26(b)(1).²⁰⁹ The district court can also use Federal Rule of Civil Procedure 26(c) to restrict the discovery to specified terms, conditions, and matters.²¹⁰ Second, the district court could require an applicant to submit a discovery plan to streamline matters and also to illustrate to the court that there is not another method of discovery that is more convenient or less burdensome.²¹¹ Third, the *Euromepa II* court suggested that to guide a district court's inquiry into the discoverability of requested materials, the district court should only consider "authoritative proof" that a foreign tribunal would reject evidence obtained through a Section 1782 request.²¹² Fourth, the *Euromepa II* court, aware of Section 1782's twin aims, also recommended that a district court should consider issuing a "closely-tailored" discovery order rather than denying relief outright.²¹³

By following these suggestions, a district court would not impose any threshold extra-statutory barriers, but would be able to handle the request, if needed, through its statutorily conferred discretion. Moreover, the district court would not be issuing speculative rulings on foreign attitudes toward discovery proceedings. If a district court issued a ruling precluding

207. *Gianoli*, 3 F.3d at 60; see also *Malev*, 964 F.2d at 100.

208. Both the First and Eleventh Circuits are primarily concerned with circumvention of foreign discovery rules through a § 1782 application. See *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Action of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

209. *Malev*, 964 F.2d at 102 (citing Fed. R. Civ. P. 26(b)(1)).

210. *Malev*, 964 F.2d at 102 (citing Fed. R. Civ. P. 26(c)).

211. *Malev*, 964 F.2d at 102.

212. *Euromepa II*, 51 F.3d 1095, 1100 (2d Cir. 1995); see also supra notes 190-97 and accompanying text.

213. *Euromepa II*, 51 F.3d at 1101; see also supra note 197 and accompanying text.

discovery, it would be predicated only on authoritative proof. This is a critical guideline, for it imposes much needed restraint on the scope of judicial inquiry into foreign law. The authoritative proof standard ensures that the twin aims of Section 1782, and not a speculative inquiry into foreign law, informs the district court decision.

The district court's exercise of discretion, when considering Section 1782 applications, must not be blind to the concerns voiced by the First and Eleventh Circuits. Still, it seems a bit far-fetched that district courts will be flooded by discovery requests pursuant to Section 1782. Furthermore, such a result does not present a valid reason for second-guessing Congress' decision to implement the statute.²¹⁴ Fear of circumvention of foreign discovery laws is a more legitimate concern. Though some commentators debate whether Section 1782 is used for this purpose,²¹⁵ it nonetheless is a viable concern when considering the second of the twin aims—the encouragement of reciprocity. The court's approach in *Euromepa I* perhaps was overzealous in its attempt to avoid offending the French court. Circumvention of foreign discovery laws is a factor that a judge should weigh, but this consideration must be tempered by a necessarily literal interpretation of the statute, as well as a need for judicial restraint in interpreting foreign law. This judicial restraint is a product of the prudent, "authoritative proof" standard suggested by the *Euromepa II* court. A district court could not exercise judicial restraint if it were required to make a threshold discoverability determination when presented with a Section 1782 request.

A. Should Judges be Expected to Divine Foreign Law?

The district court's approach in *Euromepa I* raised a two-tiered problem: whether a domestic district court judge should

214. See Donahue, *supra* note 59, at 597 ("Even if the statute imposed significant burdens on district courts, the court of appeals should not second guess Congress's policy choice by limiting the statute's scope.").

215. See Newman & Burrows, *supra* note 63, at 3.

Litigants in civil cases in foreign countries seem not to have had such great interest in trying to avail themselves of the benefits of § 1782. When such litigants do make applications under § 1782, it cannot necessarily be concluded—as our courts tend to do—that they are attempting to use the United States district courts to engage in U.S.-style discovery. Such an applicant may well be simply seeking evidence for presentation in [the] case abroad and not engaging in a proverbial fishing expedition for evidence to support [the] case.

interpret and apply foreign law, and whether that district court judge is able to interpret and apply foreign law.²¹⁶ In the opinion, the court admitted that its analysis of French law was a "superficial" one.²¹⁷ According to *Euromepa II*, however, an in-depth analysis of foreign law—which can be difficult and dangerous—is not necessary to a district court's determination of whether to grant a Section 1782 order.²¹⁸ In fact, often a cursory analysis of foreign law suffices to arrive at the correct result.²¹⁹ Still, in the event that the analysis will necessarily involve volumes of documents, as in the *Lo Ka Chun* case,²²⁰ the argument for analyzing foreign law appears less compelling. District court judges should not be expected to make complex foreign law determinations; moreover, these judges must guard against the result in *Euromepa I*—"a battle-by-affidavit of international legal experts."²²¹ Some commentators have added that aside from being time-consuming, this line of analysis can be an "imprecise venture."²²² District court judges must recognize when this line of analysis will be beneficial and when it will be too time-consuming and complex.

It must be remembered that the district court judge has the discretion to make this inquiry—it is not an inquiry that is statutorily dictated.²²³ The suggested approach does not seek to make interpretation of foreign discovery law a required component of Section 1782 analysis. Rather, in light of the specific circumstances presented by a given case, a district court judge

216. Smit states that the drafters of the 1964 Amendment did not want to have a request for [foreign] cooperation turn into an unduly expensive and time-consuming fight about foreign law. . . . [C]ivil law countries . . . often have quite different procedures for discovering information that could not properly be evaluated without a rather broad understanding of the subtleties of the applicable foreign system. It would . . . be wholly inappropriate for [a U.S.] district court to try to obtain this understanding for the purpose of honoring a simple request for assistance.

Smit, *supra* note 55, at 235.

217. *Euromepa I*, 155 F.R.D. 80, 82 (S.D.N.Y. 1994).

218. This was precisely the case in *Euromepa II*. See *Euromepa II*, 51 F.3d 1095, 1100 n.5 (2d Cir. 1995).

219. See *In re Application of Gianoli*, 3 F.3d 54, 61 (2d Cir. 1993), cert. denied, 114 S. Ct. 443 (1993) (describing the district court's cursory, yet accurate, analysis of the applicable Chilean law).

220. See *In re Lo Ka Chun v. Lo To*, No. 87-8309 (S.D. Fla. Nov. 19, 1987); *Lo Ka Chun v. Lo To*, 858 F.2d 1564 (11th Cir. 1988); see also Stahr, *supra* note 15, at 613 n.89.

221. *Euromepa II*, 51 F.3d at 1099.

222. See Newman & Burrows, *supra* note 84, at 3.

223. See 28 U.S.C. § 1782 (1988).

may examine foreign law if it appears crucial in determining whether to grant or deny the Section 1782 request.²²⁴ The parameters tempering the judge's discretion are, as the *Euromepa II* court suggested: (1) "authoritative proof" that a foreign tribunal would reject evidence obtained through a Section 1782 request; and (2) the twin purposes of Section 1782, which, if honored, will ensure that the judge's decision is consonant with congressional statutory intent.²²⁵

B. *Concerns of Comity*

In the final analysis, district courts must recognize that their decisions to grant or deny Section 1782 requests impact the international legal system *as well as* the U.S. federal courts system. To promote comity, which has been described as the "golden rule" of international relations,²²⁶ courts must, if the case so demands, inquire into foreign procedures. While district courts may be limited in their ability to divine foreign law, the exercise is nonetheless important for concerns of comity. Comity must inform a judge's decision and, in many cases, may lead to judicial restraint.²²⁷ Comity serves to reach objective judicial results that reflect the international value of reciprocal goodwill, and is essential to the effective long-term functioning of the international judicial system.²²⁸ Its importance is manifest in the context of Section 1782 and its twin aims.

V. CONCLUSION

The most prudent approach to Section 1782 analysis is grounded in the twin aims of the statute: (1) to provide "efficient means of assistance to participants in international litigation in our federal courts," and (2) to encourage "foreign countries by example to provide similar means of assistance to our courts."²²⁹

224. The *Gianoli* case seemed to present such a situation.

225. Again, this approach comports with the reasoning of the *Gianoli* and *Malev* courts. Both courts exalted the twin purposes of § 1782 but stated that the judge's discretion was essential in addressing difficulties with specific requests. See *In re Application of Gianoli*, 3 F.3d 54, 60 (2d Cir. 1993), cert. denied, 114 S.Ct. 443 (1993); *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 102 (2d Cir. 1992), cert. denied, 113 S.Ct. 179 (1992).

226. See Harold G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239, 242 (1986).

227. *Id.* at 252-53.

228. *Id.* at 252.

229. See *Malev*, 964 F.2d at 100; *Euromepa II*, 51 F.3d 1095, 1100 (2d Cir. 1995).

By following a policy of judicial restraint regarding inquiries into foreign law—the authoritative proof standard—a district court adheres to the twin aims of Section 1782. By following these principles, courts must reject a *threshold showing* that material requested under Section 1782 be discoverable in the foreign jurisdiction. A district court can—but is not required to—utilize discoverability of material requested as a tool to help determine if a Section 1782 request should be granted. The district court retains a statutory grant of discretion, reinforced unanimously by the courts,²³⁰ to prevent litigants from abusing the liberal U.S. discovery rules. This approach also ensures that notions of comity and national sovereignty are not compromised. As international disputes continue to arise, there is a greater need for international judicial cooperation. A balance of Section 1782's twin aims with a district court's prudent exercise of discretion and judicial restraint must therefore inform every case involving a Section 1782 analysis. Only then will the United States legal system facilitate international judicial cooperation.

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230. Although the First and Eleventh Circuits do not agree with the Second Circuit concerning the threshold discoverability requirement, all these courts agree that the district court judge retains broad discretion under § 1782.

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