

1992

In Re Request for Judicial Assistance From the Federative Republic of Brazil: A Blow to International Judicial Assistance

Amy Jeanne Conway

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Amy J. Conway, *In Re Request for Judicial Assistance From the Federative Republic of Brazil: A Blow to International Judicial Assistance*, 41 Cath. U. L. Rev. 545 (1992).

Available at: <https://scholarship.law.edu/lawreview/vol41/iss2/7>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

IN RE REQUEST FOR JUDICIAL ASSISTANCE FROM THE FEDERATIVE REPUBLIC OF BRAZIL: A BLOW TO INTERNATIONAL JUDICIAL ASSISTANCE

Evidence gathering for criminal investigations and litigation within the United States necessarily implicates constitutional principles.¹ The difficulties inhering in this process are compounded when the evidence is not found within the United States, but is located within another sovereign nation.² In this latter situation, prosecutors must consider not only United States constitutional principles, but also issues of jurisdiction,³ international law,⁴ and

1. See U.S. CONST. amends. IV, V & VI.

2. See III (a) UNITED STATES ATTORNEYS' MANUAL § 9-13.510 (1988) [hereinafter MANUAL] ("Most problems associated with international evidence gathering revolve around the concept of sovereignty" and the idea that every nation must respect and abide by the laws of the sovereign or state in which the evidence is located). Sovereignty is defined, in part, as "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). All nations jealously guard sovereignty. See Joseph F. Weis, Jr., *The Federal Rules and The Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 903 (1989) (recognizing the concept of territorial sovereignty as "a very real concern posing substantial problems in transnational litigation"); Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET"*, 73 MINN. L. REV. 1023, 1029 n.28 (1989) (depicting "extraterritorial actions as 'intrusions into another's domestic affairs and as a challenge going to the heart of [the] notion of sovereignty' " (quoting Alan Gottlieb, *Extraterritoriality: A Canadian Perspective*, 5 NW. J. INT'L L. & BUS. 449, 452 (1983))). Violation of a nation's sovereignty will frequently generate diplomatic protests, denial of access to the requested evidence, and in some extreme cases, will result in an arrest warrant being issued and subsequent incarceration of the agent or attorney who violates the law. MANUAL, *supra*, § 9-13.510. Prosecutors can avoid such consequences, and at the same time obtain the necessary assistance, by invoking the aid of the sovereign when seeking evidentiary assistance. *Id.*

3. See *In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir. 1987) (requiring a court to establish personal jurisdiction over the person who has control over the documents requested or the individual whose testimony is requested when the evidence is not handed over voluntarily).

4. See MANUAL, *supra* note 2, § 9-13.522-523. Treaties, conventions, and executive agreements are the principal sources of applicable international law. *Id.*

Currently, the United States has bilateral mutual legal assistance treaties (MLATs) in force with Anguilla, the Bahamas, Belgium, the British Virgin Islands, Canada, the Cayman Islands, Italy, Mexico, Monserrat, the Netherlands, Switzerland, Turkey, and Turks and Caicos. See Agreement Extending Application of the Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters to Montserrat, Apr. 26, 1991, U.S.-U.K., Hein's No. KAV 2880; Agreement Extending Application of the Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters to Anguilla, the British Virgin Islands and Turks and Caicos Islands, Nov. 9, 1990, U.S.-U.K., Hein's No. KAV 2762; Treaty

most importantly, the laws of the foreign country in which the evidence is located.⁵ Nations generally employ three methods when seeking international legal assistance:⁶ informal requests,⁷ subpoenas,⁸ and formal requests.⁹ This Note examines one type of formal request, letters rogatory.

with Belgium on Mutual Legal Assistance in Criminal Matters, Jan. 28, 1988, U.S.-Belg., S. TREATY DOC. NO. 16, 100th Cong., 2d Sess. (1988); Mutual Legal Assistance Cooperation Treaty with Mexico, Dec. 9, 1987, U.S.-Mex., S. TREATY DOC. NO. 13, 100th Cong., 2d Sess. (1988); Treaty with the Bahamas on Mutual Assistance in Criminal Matters, June 12 and Aug. 18, 1987, U.S.-Bah., S. TREATY DOC. NO. 17, 100th Cong., 2d Sess. (1988); Treaty with Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., S. TREATY DOC. NO. 14, 100th Cong., 2d Sess. (1988); Treaty with the United Kingdom Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. (1987); Treaty with the Italian Republic on Mutual Assistance in Criminal Matters, Nov. 9, 1982, U.S.-Italy, S. TREATY DOC. NO. 25, 98th Cong., 2d Sess. (1984).

5. See *supra* note 2. See also *United States v. Salim*, 855 F.2d 944, 949 (2d Cir. 1988) (permitting the admission of testimony in a United States criminal proceeding taken according to the procedural rules of a foreign country which are inconsistent with those of the United States); Michael J. Burke, Note, *United States v. Salim: A Harbinger For Federal Prosecutions Using Depositions Taken Abroad*, 39 CATH. U. L. REV. 895, 942 (1990) (concluding that the Second Circuit's approach in *Salim* will allow United States prosecutors to obtain evidence abroad for use in a domestic proceeding even though the foreign procedural rules are incompatible with federal procedural requirements).

6. See MANUAL, *supra* note 2, § 9-13.520. See also *id.* § 9-13.500 ("International legal assistance is the process of obtaining aid from abroad in connection with United States investigations and prosecutions, or from the United States in connection with foreign investigations and prosecutions.").

7. See *id.* § 9-13.520 ("Informal requests use *ad hoc* methods to secure assistance, often more quickly and flexibly than by formal means . . ."). This can be accomplished if the evidence is voluntarily produced by the individual or entity controlling it, whether the individual or entity is a police organization, government agency, corporation, or private citizen. See *supra* note 2. Depending on how important the evidence sought is to the successful outcome of the proceedings in the United States, it may be advantageous for a prosecutor to employ a formal method to ensure, to the extent possible, that evidence is obtained legally and will be admissible in a United States court. Cf. *Salim*, 855 F.2d at 944 (acknowledging the importance of obtaining evidence abroad in a manner acceptable to federal courts). Moreover, crucial evidence obtained in an unacceptable manner may not be admissible and could result in dismissal of the case. *Id.*; see also MANUAL, *supra* note 2, § 9-13.520.

8. See MANUAL, *supra* note 2, § 9-13.520. Evidence can be obtained unilaterally without the aid of a foreign nation through the use of a subpoena ordering production of documents or testimony. *Id.* § 9-13.525. Courts will generally issue a subpoena only if there is personal jurisdiction over the individual or entity in control of the evidence sought. See LETTERS ROGATORY 50, 60 (Bernard A. Grossman ed., 1956) (remarks of Samuel M. Fink) (suggesting that issuing a subpoena compelling the production of evidence without the ability to penalize those who fail to comply with it would be "an empty gesture").

9. See MANUAL, *supra* note 2, § 9-13.520. Formal requests for judicial assistance include treaty requests, requests under executive agreement, and letters rogatory. *Id.* If an MLAT exists, the requesting party can obtain the evidence so long as it comports with applicable treaty requirements. See *id.* § 9-13.522. Compliance with a request made pursuant to such an agreement is mandatory since treaties have the force and effect of law under the Constitution. See U.S. CONST. art. IV. Executive agreements, on the other hand, apply to specific

A letters rogatory is a formal request issued by "a judge in . . . [one country] to the judiciary of a foreign country requesting the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty."¹⁰ The contents of a letters rogatory vary depending on the country from which assistance is requested.¹¹ The request typically includes background information regarding "who is investigating whom and for what charge,"¹² the assistance requested, the facts of the case, the text of the applicable statutes,¹³ and a promise of reciprocity by the requesting court.¹⁴ The foreign judicial authority making the request generally signs the documents constituting the letters rogatory.¹⁵ The foreign government then authenticates the documents through either an apostille or a chain certificate of authentication,¹⁶ and subsequently forwards the documents through diplomatic channels to the court in the jurisdiction where the evidence is located.¹⁷ Statutes in the jurisdiction executing the

investigations. MANUAL, *supra* note 2, § 9-3.523. These agreements are temporary by nature and may be replaced at some point in time by MLATs. *Id.* In the absence of either an MLAT or executive agreement, assistance can be requested through use of a letters rogatory. *See id.* § 9-13.520-521.

10. *Id.* § 9-13.521. *See also* LETTERS ROGATORY, *supra* note 8, at 9, 10 (remarks of Lucien R. LeLievre) (defining letters rogatory as "formal communications from a court of one country to a court of another country requesting the latter to direct the taking of testimony of a witness within its jurisdiction for the use of the court making the request"); Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 519 (1953) (defining letters rogatory as a "request by a domestic court to a foreign court to take evidence from a certain witness"). For a description of other types of formal requests, see *supra* note 9. In the absence of a treaty or executive agreement, "[l]etters rogatory are an important device by which governments and their officials may enlist the assistance of foreign courts in requiring the production of evidence." *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Rep. of Braz.*, 936 F.2d 702, 704 (2d Cir. 1991) [hereinafter *Brazil III*].

11. MANUAL, *supra* note 2, § 9-13.521.

12. *Id.*

13. *Id.* The applicable statutes include those that are alleged to have been violated, the penalties for violation of the statutes, and the statute of limitations for the alleged offenses. *Id.*

14. *Id.*

15. *Id.*

16. *See id.* An apostille is a less time-consuming form of authentication which may be used if the requesting country is a member of the Hague Convention. *Id.* The latter method is a more cumbersome process involving authentication by the foreign judiciary making the request, the embassy of the foreign country, and the United States Department of State. *Id.*

17. *See* LETTERS ROGATORY, *supra* note 8, at 50, 61 (remarks of Samuel M. Fink). In the absence of established procedures under a treaty or some other governing agreement, letters rogatory generally are not forwarded directly to the foreign court. *Id.* The proper channels vary depending on the countries involved. *See* Jones, *supra* note 10, at 529. Requests coming into the United States regarding criminal cases are usually forwarded to the Department of State under cover of a diplomatic note. *See* MANUAL, *supra* note 2, § 9-13.521. The request is then forwarded to the Office of International Affairs, Criminal Division in the United States Department of Justice, where it is reviewed to ensure that it meets procedural

request govern the execution of letters rogatory.¹⁸ In the absence of any treaty obligation, the execution of letters rogatory is a matter of comity.¹⁹ Therefore, the receiving court will have substantial discretion in deciding whether to execute the request.²⁰

Before 1948, the United States showed little concern for the problems associated with foreign evidence gathering.²¹ However, in the past few decades, disputes involving international elements have become increasingly common,²² creating a need for more efficient and effective methods of ob-

and substantive standards of United States law. *See id.* § 9-13.540. If the request is deficient, it is returned to the foreign country making the request. *See In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Rep. of Braz.*, 687 F. Supp. 880, 882 (S.D.N.Y. 1988) [hereinafter *Brazil I*] (noting that the original letters rogatory was returned to Brazilian authorities for revisions). If the request complies with federal law, it is forwarded to the United States Attorney's Office in the jurisdiction in which the evidence is located for execution. *See* MANUAL, *supra* note 2, § 9-13.540. Ultimately, the district court in that jurisdiction has discretion to determine whether the letters rogatory is sufficient under 28 U.S.C. § 1782. MICHAEL ABBELL & BRUNO A. RISTAU, 3 INTERNATIONAL JUDICIAL ASSISTANCE § 12-3-3(1) (1990).

18. LETTERS ROGATORY, *supra* note 8, at 61-62 (remarks of Samuel M. Fink) (explaining that procuring evidence pursuant to a letters rogatory is completely controlled by the procedural methods of the "foreign tribunal which is requested to assist in the administration of justice").

19. *See* Harry L. Jones, *Letters Rogatory in Federal Practice*, in LETTERS ROGATORY, *supra* note 8, at 73 (pointing out that United States federal courts regard execution of letters rogatory, not subject to treaty or executive agreement, as nothing more than a "matter of comity"); P.F. Sutherland, *The Use of the Letter of Request (or Letters Rogatory) For the Purpose of Obtaining Evidence For Proceedings in England and Abroad*, 31 INT'L COMP. L. Q. 784, 785 (Oct. 1982) (stating that "[c]ompliance with a letter of request received from a foreign requesting court has generally been considered a matter of courtesy" in the absence of a treaty or agreement stating otherwise). The principle of "comity" generally refers to the deference and mutual respect that a sovereign nation will give to the laws and judicial decisions of other sovereign nations pertaining to matters in their own respective territories. *See* BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (defining comity).

20. *See* Philip W. Amram, *Public Law No. 88-619 of October 3, 1964 — New Developments in International Judicial Assistance in the United States of America*, 32 J. BAR ASS'N D.C. 24, 30-31 (1965) (explaining that while § 1782 authorizes judicial assistance where compulsion of the witness is necessary, the ultimate execution of the request is entirely within the discretion of the court).

21. Jones, *supra* note 10, at 556-59 (describing isolationist policies of the United States from 1854 until after World War II).

22. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1015 n.1 (1965) (documenting "the vast growth of international commerce" from 1950 to the present).

The growth of economic interdependence between nations which has occurred during the last four decades, the increasing internationalization of the world's capital markets, the extraordinary advances in communications and information sharing technology, and the increased ease with which travel between distant places can be made with minimum loss of time and maximum convenience have all served to enhance the opportunities for the international criminal

taining assistance.²³ Therefore, in 1948, Congress amended an antiquated and restrictive statute enacted in 1863, which permitted courts to provide judicial assistance to foreign courts, but only in very limited circumstances.²⁴ Congress further amended the statute in 1949 by broadening the 1948 language and increasing the power of United States district courts to execute requests for assistance.²⁵ The current version of the statute ("§ 1782"), enacted by Congress in 1964, enables foreign entities to gather evidence more effectively in the United States.²⁶ Section 1782 authorizes

[t]he district court . . . in which a person resides or is found . . . [to] order him to give his testimony . . . or to produce a document . . . for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter[s] rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person²⁷

Following the 1964 amendments, American courts for the most part have responded favorably to foreign requests for judicial assistance,²⁸ and have executed most requests without conflict.²⁹ In the past few years, however, litigation surrounding § 1782 has increased and courts are divided over the standard to apply in analyzing letters rogatory requests. The litigation often deals with requests for evidence when no formal criminal charges are pending in the foreign country and evidence is needed to determine whether charges should be brought.³⁰ In those cases, courts must resolve two issues

Robert G. Clark, *International Cooperation in the Investigation and Prosecution of Economic Crimes*, 26 RESOURCE MATERIAL SER. 52 (Dec. 1984) (emphasis added). Cf. Weis, *supra* note 2, at 903 (attributing the increase in private international litigation to the "rapid growth of worldwide trade after World War II").

23. H.R. REP. NO. 1052, 88th Cong., 1st Sess. 19 (1963) [hereinafter HOUSE REPORT]; S. REP. NO. 1580, 88th Cong., 2d Sess. 24 (1964) [hereinafter SENATE REPORT], reprinted in 1964 U.S.C.A.N. 3782, 3783 (attributing the growth of international litigation with the increase in international trade, which in turn created a need for improved procedures in the United States to facilitate assistance).

24. Pub. L. No. 773, 62 Stat. 949 (1948). See *infra* notes 58, 65-67 and accompanying text.

25. Pub. L. No. 73, 63 Stat. 103 (1949). See *infra* note 68 and accompanying text.

26. Pub. L. No. 88-619, § 9(a), 78 Stat. 997 (1964) (codified at 28 U.S.C. § 1782).

27. 28 U.S.C. § 1782 (1988).

28. Clark, *supra* note 22, at 54-55 ("United States courts have almost uniformly honored letters rogatory requests when they have been found to have been made by properly constituted tribunals within the meaning of the statute . . .").

29. *Id.* at 55. Generally, United States courts have recognized Congress' intent that requests for judicial assistance be executed "unless specific reasons exist to deny a request." *Id.*

30. This Note is limited to a discussion of requests in criminal matters. However, there exists a significant number of cases dealing with requests in civil cases. See generally ABBELL & RISTAU, *supra* note 17 (describing similarities and differences of procedures applicable in both civil and criminal letters rogatory).

before granting requests for judicial assistance. First, the court must determine the nature of the proceeding and whether it falls within the definition of § 1782.³¹ Second, in the absence of a pending proceeding, the court must determine the likelihood of formal proceedings taking place in the future.³²

Regarding these two issues, the United States Court of Appeals for the Second Circuit takes the most rigid approach of all the circuits.³³ In *In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil (Brazil III)*,³⁴ the Second Circuit adopted a standard requiring proceedings to be "imminent," or "very likely to occur within a brief interval from the request," before a district court can execute a letters rogatory request.³⁵ This standard virtually nullifies the ability of district courts to render assistance in the absence of a pending criminal proceeding.

Brazil III arose out of the criminal prosecution of a former senior vice-president of Morgan Guaranty Trust Company ("Morgan"), Antonio Gebauer.³⁶ Gebauer embezzled more than \$4 million from bank accounts which six Panamanian corporations held at Morgan on behalf of four Brazilian citizens. Gebauer's criminal prosecution alerted Brazilian officials to the

31. See *Brazil III*, 936 F.2d 702, 705 (2d Cir. 1991); see also *Fonseca v. Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980) (per curiam) (refusing to grant assistance to the Superintendent of the Exchange Control of Colombia for failing to meet the impartiality test), cert. denied, 469 U.S. 882 (1984); *In re Letters of Request to Examine Witnesses From the Court of Queen's Bench for Man., Can.*, 488 F.2d 511, 512 (9th Cir. 1973) [hereinafter *Manitoba II*] (refusing to grant judicial assistance in response to a letters rogatory request when the requesting party's sole purpose is to conduct an investigation unrelated to a judicial or quasi-judicial matter); *In re Letters Rogatory Issued by the Director of Inspection of the Gov't of India*, 385 F.2d 1017, 1021-22 (2d Cir. 1967) [hereinafter *India*] (denying assistance to an Indian income tax official because he failed to qualify as a "tribunal" under the statute). But see *In re Letter of Request From the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 689-91 (D.C. Cir. 1989) (granting assistance where request is made by an "interested person"); *In re Letter Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) [hereinafter *Tokyo*] (executing a letters rogatory request from the Tokyo District Court because its investigation was related to a judicial or quasi-judicial proceeding); *In re Letter Rogatory from the Public Prosecutor's Court at the Regional Court of Hamburg, F.R.G.*, No. M-19-88, 1988 U.S. Dist. LEXIS 14088, at *4 (S.D.N.Y. June 21, 1988) (holding that a prosecutor is an "interested person" authorized to request assistance under § 1782).

32. See *Brazil III*, 936 F.2d at 706 (requiring the proceedings to be "imminent," i.e. very likely to occur within a short period of time); *Crown Prosecution*, 870 F.2d at 687 (requiring proceedings to be within "reasonable contemplation"); *In re Request for Assistance From the Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) [hereinafter *Trinidad & Tobago*] (confining assistance to those requests where the proceeding is "very likely to occur"), cert. denied, 488 U.S. 1005 (1989).

33. See *supra* note 32. The Supreme Court has yet to address these issues.

34. 936 F.2d 702 (2d Cir. 1991).

35. *Id.* at 703.

36. *Id.*

considerable amount of money in these accounts.³⁷ The officials subsequently began an investigation to determine whether the four individuals had violated Brazilian tax and currency control laws through capital flight.³⁸

At the behest of Brazilian investigators, Brazilian Judge Anna Maria Pimentel issued a letters rogatory request for the production of various account documents held at Morgan.³⁹ The United States District Court for the Southern District of New York issued an order to execute the request.⁴⁰ The court subsequently issued a subpoena *duces tecum* ordering the production of the requested testimony and documents from Morgan.⁴¹ The Panamanian corporations filed a motion to quash the subpoena.⁴² The district court, after reviewing information on the legal system of Brazil⁴³ and a declaration by Judge Pimentel, made two rulings. First, the court found that there were no adjudicative judicial proceedings currently pending in Bra-

37. *Id.* There was more than U.S. \$6 million combined in the accounts maintained for four Brazilian citizens. *Brazil I*, 687 F. Supp. 880, 882 (S.D.N.Y. 1988).

38. *Brazil III*, 936 F.2d at 703. While there is no universal definition for "capital flight," see Barnaby J. Feder, *Capital Flight Adds to Burden of Debtor Nations*, N.Y. TIMES, June 9, 1986, at D4, the term is generally thought to refer to "outflows [of capital] caused by a resident's fear that his domestic assets will soon suffer big capital losses, perhaps through hyperinflation, exchange-rate depreciation, taxation or expropriation." *Anything to Declare, Señor?*, THE ECONOMIST (U.K. ed.), Oct. 3, 1987, at 86.

39. *Brazil III*, 936 F.2d at 703. The letters rogatory stated that there was a police investigation underway to determine whether the Brazilian citizens who maintained accounts at Morgan had violated Brazilian tax and currency control laws. *Brazil I*, 687 F. Supp. at 882. The following is an excerpt from the official translated request:

HONORABLE ANNA MARIA PIMENTEL, Judge of the 5th Division makes it known that in this Court and Secretariat proceedings of the Police Investigation no. 148-PCD/86 are under way, commenced in view of the request contained in the Office of the Attorney General . . . aiming at assessing and determining possible offenses of tax evasion related to an alleged defalcation on bank accounts maintained by Brazilian citizens with the MORGAN GUARANTEE [sic] TRUST COMPANY OF NEW YORK aggregating to about US \$6,000,000.00

Id. (brackets in original).

40. *Brazil I*, 687 F. Supp. at 882.

41. *Id.*

42. *Id.* at 883. The Panamanian corporations argued that the requested evidence was not sought "for use in a judicial proceeding in a foreign or international tribunal" as required by § 1782. *Id.* (quoting 28 U.S.C. § 1782).

43. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Rep. of Braz.*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988) [hereinafter *Brazil II*], *rev'd*, 936 F.2d 702 (2d Cir. 1991). The district court found that the procedure followed in the Brazilian criminal system is divided into pre-accusatory and post-accusatory stages. *Id.* According to Brazilian legal experts, " 'adjudicative judicial proceedings begin in Brazil only after the defendant is made party to the action and both sides to the controversy are before the courts.' " *Id.* (quoting Petitioner's Supplemental Reply Memorandum at 7).

zil.⁴⁴ Second, the court found that even though no proceedings were presently pending, such proceedings were “probable.”⁴⁵ Therefore, the court denied the motion to quash.⁴⁶ The Panamanian corporations appealed to the Second Circuit.

The Second Circuit rejected the district court’s interpretation of the statute.⁴⁷ The panel interpreted the “probable” standard enunciated by the district court as “too lenient” in light of the lack of legislative history surrounding the 1964 amendments to § 1782.⁴⁸ Therefore, the Second Circuit implemented a new “imminence” standard, requiring a proceeding to be “very likely to occur” within a brief period of time.⁴⁹

This Note analyzes the purpose behind 28 U.S.C. § 1782, and the effectiveness of its current application regarding the execution of foreign requests for judicial assistance. First, this Note describes the evolution and development of § 1782 from its initial enactment in 1855 through the 1964 amendments. This Note then discusses the increasingly restrictive judicial interpretations of § 1782 since the enactment of the 1964 amendments, which have effectively limited the ability of United States district courts to render judicial assistance. Next, this Note analyzes the *Brazil III* decision by the United States Court of Appeals for the Second Circuit, which represents the latest and most restrictive application of § 1782. Finally, this Note concludes that the interpretation of § 1782 by the Second Circuit in *Brazil III* is erroneous and will have devastating repercussions on international judicial assistance in criminal cases.

I. THE EVOLUTION OF 28 U.S.C. § 1782

A. Execution of Letters Rogatory Before 1948

On February 2, 1854, the French Government forwarded a letters rogatory to the Department of State from a French court requesting witness testimony in connection with a preliminary criminal proceeding in France.⁵⁰

44. *Id.* There were no charges pending in Brazil. *Id.* In addition, the Brazilian citizens were not parties to any action. *Id.* Therefore, there were no adjudicatory judicial criminal proceedings pending in Brazil. *Id.*

45. *Id.* This finding was based on a letter submitted to the court by Judge Pimentel stating that the evidence sought “is to be used exclusively as evidence in a judicial proceeding . . . [and] will not be used for any other purpose.” *Id.* (quoting Judge Pimentel’s declaration to the court).

46. *Id.*

47. *Brazil III*, 936 F.2d 702, 706 (2d Cir. 1991).

48. *Id.*

49. *Id.* at 703, 706.

50. Jones, *supra* note 10, at 540. The request was issued by a French *juge d’instruction*, “a magistrate sitting in a preliminary criminal proceeding.” *Id.* at 541.

The United States Government, however, lacked statutory authority to execute the request.⁵¹ One year later, in response to this embarrassing debacle, Congress passed the first statute authorizing federal courts to assist foreign courts in gathering evidence located within the United States.⁵²

The Act of March 2, 1855 granted broad powers to United States circuit courts to respond to letters rogatory.⁵³ Specifically, the 1855 Act authorized the examination of witnesses in response to letters rogatory issued from any court of a foreign country.⁵⁴ Therefore, provided the request was issued by a foreign court, witness testimony was virtually assured. The impact of this statute, however, was minimal and short-lived. The 1855 Act was mis-indexed in the United States Code and, consequently, knowledge of its existence was limited.⁵⁵ Moreover, the enactment of subsequent letters rogatory legislation eight years later⁵⁶ rendered the 1855 Act obsolete.⁵⁷

The subsequent statute governing the execution of foreign requests for judicial assistance was enacted on March 3, 1863.⁵⁸ The 1863 Act substantially curtailed the ability of American courts to provide assistance of any kind to a foreign court requesting it.⁵⁹ Assistance was limited to civil proceedings pending in a foreign court in which the foreign government had an

51. *Id.* at 540. At the time of the request, Attorney General Cushing informed Secretary of State Marcy that there was no statute authorizing United States courts to compel witness testimony pursuant to a letters rogatory request. *Id.* Secretary of State Marcy later communicated this to the French Ambassador and refused the request. *Id.*

52. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (authorizing the execution of letters rogatory “from any court of a foreign country to any circuit court of the United States . . . to make the examination of witnesses [located within the United States]”). In a letter to French Ambassador Sartiges, Secretary of State Marcy advised that the enactment of the 1855 Act would allow the United States government to execute the French request made in the preceding year. Jones, *supra* note 10, at 541 n.79.

53. *In re Letter Rogatory From the Justice Court, Dist. of Montreal, Can.*, 523 F.2d 562, 564 (6th Cir. 1975) [hereinafter *Montreal*] (acknowledging the broad grant of powers pursuant to the 1855 Act).

54. Act of March 2, 1855, ch. 140 § 2, 10 Stat. 630. *See supra* note 52 for the text of the statute in pertinent part.

55. Jones, *supra* note 10, at 540. The 1855 Act was indexed under the heading of “Miscellaneous” in the Statutes at Large. *Id.* at 540 n.77.

56. The Treasury Department, which proposed the Act of March 3, 1863, was apparently unaware of the earlier statute. *Id.*

57. Compare Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 with Act of March 3, 1863, ch. 95, § 4, 12 Stat. 769-70. *See supra* note 52 and *infra* note 58 for applicable text.

58. Act of March 3, 1863, ch. 95, §§ 1-4, 12 Stat. 769 (limiting the ability of United States courts to execute requests for “the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest . . . [i]f a . . . letters rogatory to take such testimony shall have been issued from the court in which said suit is pending”).

59. Jones, *supra* note 10, at 540.

interest.⁶⁰ Furthermore, the foreign government had to be at peace with the United States.⁶¹ As a result, American courts were forced to deny assistance in many cases simply because they lacked the requisite power to compel witness testimony pursuant to a letters rogatory request.⁶²

The tremendous growth of international commerce, coupled with the increase in "international" litigation after World War II,⁶³ brought to the forefront the critical deficiencies preventing countries from obtaining international judicial assistance from the United States.⁶⁴ Congress responded by enacting 28 U.S.C. § 1782 in 1948.⁶⁵

B. *The Development and Expansion of § 1782*

The enactment of § 1782 in 1948 was the first of a series of amendments broadening the scope of the statute governing the execution of foreign requests for judicial assistance. The 1948 amendments made two important changes to the then-existing law. First, Congress expanded the statute to

60. The statute specifically requires that the suit be for "the recovery of money or property." See *supra* note 58. Other than the apparent oversight of the 1855 Act, there is no indication why criminal proceedings were not also included.

61. Act of March 3, 1863, ch. 95, 12 Stat. 769. See *supra* note 58 for the text of the statute in pertinent part.

62. See *Janssen v. Belding Corticelli, Ltd.*, 84 F.2d 577, 579 (3d Cir. 1936) (lacking an express statutory grant, federal courts do not have the power to issue the subpoena *duces tecum* needed to order the production of the evidence requested); *In re Letters Rogatory from Examining Magistrate of the Tribunal of Versailles, Fr.*, 26 F. Supp. 852, 853 (D. Md. 1939) (refusing to grant judicial assistance for a criminal proceeding stating that the court's jurisdiction is limited to civil suits); *In re Letters Rogatory from the First Dist. Judge of Vera Cruz*, 36 F. 306, 306 (C.C.S.D.N.Y. 1888) (refusing to grant judicial assistance because it was not apparent from the letters rogatory that the testimony was to be used in "a suit for the recovery of money or property"); *cf.* *The Signe*, 37 F. Supp. 819, 821-22 (E.D. La. 1941) (refusing to grant the execution of a letters rogatory issued by the Supreme Court of the Russian Soviet Federated Socialist Republic, Union of Soviet Socialist Republics, because the latter lacked legal jurisdiction over the resident of Estonia, whose deposition was being sought). Ironically, United States courts were particularly hostile towards requests for testimony for use in foreign criminal proceedings, the original impetus behind the enactment of letters rogatory legislation. Jones, *supra* note 10, at 541. See Letter of Circuit Judge Morrow to the Mexican Consul General, Apr. 9, 1909, 3 AM. J. INT'L L. 1011, 1011-13 (1909) (informing the Mexican Consul General that United States law did not authorize federal judges to take the deposition of a witness to be used in a criminal case pursuant to a letters rogatory request).

63. LETTERS ROGATORY, *supra* note 8, at 50 (remarks of Samuel M. Fink) (explaining how the growth in international commerce since the end of World War II has been "directly responsible for a marked increase in litigation in American courts, where either parties or witnesses may be present in those foreign jurisdictions").

64. Jones, *supra* note 10, at 558 (explaining how the surge in "international" litigation following World War II revealed the inadequacy of our extraterritorial procedures); Smit, *supra* note 22, at 1015 (attributing the growth in international litigation to the increase in international commerce).

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

encompass all civil actions pending in any court of the foreign country.⁶⁶ Second, Congress deleted the requirement that the foreign government be a party to or have an interest in the case.⁶⁷ In 1949, Congress further liberalized the statute by replacing the restrictive phrase "civil action" with "any *judicial proceeding* pending in any court in a foreign country."⁶⁸ Unfortunately, the lack of statutory procedures under which courts could provide assistance created confusion and inconsistency regarding the timing and scope of assistance available under § 1782.⁶⁹

In 1958, following increased debate and criticism of judicial assistance given and received by the United States,⁷⁰ Congress created a Commission on International Rules of Judicial Procedure, along with an Advisory Committee,⁷¹ to "investigate and study existing practices of judicial assistance

66. *Id.* (allowing for the compelled production of evidence from "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*") (emphasis added). Again, there is no indication why assistance was not authorized in criminal cases as well.

67. *Id.*

68. Pub. L. No. 72, 63 Stat. 89, 103 (1949) (deleting the requirement that the witness be "residing" in the United States and replacing the words "civil action" with "judicial proceeding") (emphasis added). Consistent with the 1855 Act, the amended statute allowed for the execution of letters rogatory for use in foreign criminal proceedings. See Jones, *supra* note 10, at 542. This amendment, however, did not allow the execution of a request issued by an investigating magistrate, such as the French *juge d'instruction*. LETTERS ROGATORY, *supra* note 8, at 14.

69. See Jones, *supra* note 19, at 88 (explaining that "there is no statute or rule of court expressly authorizing a certain procedure" governing international judicial assistance). "American courts are deprived of adequate overseas assistance at a time when tribunals hear an unprecedented volume of litigation involving international complications." Jones, *supra* note 10, at 516.

70. For example, a symposium conducted by the Consular Law Society on letters rogatory in 1956 generated sharp criticism of the current procedures employed by the United States regarding the execution of letters rogatory. LETTERS ROGATORY, *supra* note 8, at 63 (remarks of Samuel M. Fink) (explaining the frustration encountered by foreign courts when requesting evidence located within the United States). Lack of procedural authority and reliance primarily on the concept of comity enabled courts to refuse to execute letters rogatory at a time when such assistance was becoming increasingly essential throughout the world. LETTERS ROGATORY, *supra* note 8, at 11. At the same time, those criticizing American procedures recognized that the United States must be less than satisfied with foreign execution of its own letters rogatory as well. Jones, *supra* note 10, at 516. The consensus of the symposium, as well as other discussions on the subject, was that changes were necessary; specifically, that procedures adapted to the increasing need for foreign evidence gathering should be developed. See LETTERS ROGATORY, *supra* note 8, at 34 (remarks of George Yamaoka) (endorsing suggestions to facilitate international judicial assistance in the United States through legislation and treaties).

71. HOUSE REPORT, *supra* note 23, at ix-xii. The members of both the Commission and Advisory Committee comprised a superlative collection of international legal scholars, indicating an intentional decision to entrust the investigation and drafting of legislation essential to the improvement of international judicial assistance to experts in the field, who were selected

and cooperation between the United States and foreign countries with a view to achieving improvements."⁷² In addition, Congress conferred upon the Commission the task of drafting and recommending any legislation necessary to accomplish this goal.⁷³ In 1960, the Commission was joined by the "Columbia Project" following Congress' failure to appropriate the funds necessary to finance the Commission's work.⁷⁴

In the ensuing years, staffs of the Commission and the Columbia Project studied United States procedures involving international judicial assistance.⁷⁵ A drafting committee, established by the Commission and made up of members of the Columbia Project and certain members of the Advisory Committee, drafted proposed amendments to federal statutes to effectuate improvements⁷⁶ and recommended unprecedented revisions of several federal statutes, including 28 U.S.C. § 1782.⁷⁷ On November 9, 1962, the Com-

by Congress. The following are only some of the esteemed members of the Commission and Advisory Committee: Oscar Cox, Chairman of the Commission, member of the firm of Cox Langford & Brown, Washington, D.C. and formerly General Counsel to the Foreign Economic Administration; Archibald Cox, Solicitor General, Department of Justice and formerly Professor of Law, Harvard Law School; Michael A. Musmanno, Justice, Supreme Court of Pennsylvania and formerly Judge, International War Crimes Tribunal II, Nuremberg, Germany; Bethvel M. Webster, member of the firm of Webster, Sheffield & Chrystie, New York, New York, member of Permanent Court of Arbitration, The Hague, and formerly President, The Association of the Bar of the City of New York; Philip W. Amram, Chairman of the Advisory Committee, member of the firm of Amram, Hahn & Sundlun, Washington, D.C., and Chairman, Civil Procedural Rules Committee, Supreme Court of Pennsylvania; Albert A. Ehrenzweig, Professor of Law, University of California Law School, Berkeley, California and formerly Professor of Law, University of Vienna, Austria and Judge of the Austrian Courts; James J. Robinson, Justice, Supreme Court of Libya, Tripoli, Libya and formerly Reporter, Supreme Court Advisory Committee on Federal Rules of Criminal Procedure. *See id.*

72. Pub. L. No. 85-906, 72 Stat. 1743 (1958). Congress' objective was to make assistance "more readily ascertainable, efficient, economical, and expeditious, and . . . [to improve] the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id.*

73. *Id.*

74. *See* HOUSE REPORT, *supra* note 23, at 2. In its Second Annual Report to Congress in 1959, the Commission explained that, due to Congress' failure to appropriate funds, the Commission had sought funds from private sources in order to accomplish its task. *Id.* In April, 1960, the Carnegie Corporation made a \$350,000 grant to Columbia University Law School, part of which was used for research and drafting by the Commission. *Id.* Columbia Law School established a Project on International Procedure "as an instrumentality for administering the grant and for collaborating with the Commission and its Advisory Committee." *Id.* The "Columbia Project" was directed by Professor Hans Smit of Columbia University Law School. *Id.* at 3.

75. *See id.* at 2-3; Smit, *supra* note 22, at 1015-16.

76. HOUSE REPORT, *supra* note 23, at 3. Distinguished members of the Drafting Group included, among others, Philip W. Amram, Chairman of the Advisory Committee; Harry L. Jones, Director of the Commission; Professor Hans Smit, Director of the Columbia Project; and Professor Arthur Miller, Associate Director of the Columbia Project. *See id.*

77. *See id.* at 4-8 (listing the proposed statutory amendments).

mission approved the final text of the proposed amendments to improve procedures for executing requests for judicial assistance within the United States as well as the historical and explanatory notes which accompanied them.⁷⁸ In 1964, the Commission submitted a proposed bill and its final report to the President and to Congress.⁷⁹ The bill was passed without debate and signed into law.⁸⁰ While there is little legislative history regarding the proposals ultimately adopted by Congress, the intent of Congress when it adopted them is clear:⁸¹ Congress intended to remove "all unnecessary obstacles" encountered in executing foreign requests for judicial assistance in this country.⁸²

C. The 1964 Amendments to § 1782

Prior to the enactment of § 1782 in 1964, United States district courts were authorized to take "[t]he deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign

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.

Id. at 19; see also SENATE REPORT, *supra* note 23, at 13 (urging Congress to adopt the recommended amendments).

78. HOUSE REPORT, *supra* note 23, at 6. At the same time, the Commission hoped to encourage other countries to do the same. Amram, *supra* note 20, at 28 (quoting the House and Senate Reports) ("It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures'") (emphasis omitted).

79. See HOUSE REPORT, *supra* note 23, at v.

80. No debate on record exists in either the House or the Senate. According to Professor Smit, there was no debate on the bill because Congress relied so heavily on the work of the Commission and Advisory Committee to determine what was necessary to improve existing procedures. Telephone Interview with Hans Smit, Professor, Columbia University Law School (Sept. 26, 1991). When the proposals were finally submitted to Congress, they were passed by both houses "without encountering any objection." Smit, *supra* note 22, at 1017 (emphasis added). Finally, on October 3, 1964, President Johnson approved the amended legislation. *Id.* at 1016.

81. See *Brazil III*, 936 F.2d 702, 705-06 (2d Cir. 1991). The legislative history available is limited to the House and Senate Reports. See House Report, *supra* note 23, at 43-47; Senate Report, *supra* note 23, at 7-9. In addition, insight into the intended scope and operation of the law is provided in two articles authored respectively by Philip W. Amram, Chairman of the Advisory Committee to the Commission, and Hans Smit, the chief draftsman of the 1964 amendments. See generally Amram, *supra* note 20; Smit, *supra* note 22.

82. Smit, *supra* note 22, at 1017-18 (explaining that "[a] nation should object to the performance of foreign procedural acts within its borders only if its interest in doing so outweighs its interest in promoting the administration of justice on the international level") (emphasis added).

country with which the United States is at peace.”⁸³ In 1964, two critical changes were made to broaden the scope of this requirement, which have been subject to considerable judicial scrutiny over the years.⁸⁴

The first amendment to § 1782 authorizes federal district courts to execute letters rogatory requests provided that the evidence sought is “for use in a proceeding in a foreign or international tribunal.”⁸⁵ The Commission purposely replaced the restrictive word “court,” found in the 1949 version of § 1782, with the phrase “foreign or international *tribunal*”⁸⁶ in order “to make it clear that assistance is not confined to proceedings before conventional courts.”⁸⁷ Unfortunately, Congress’ failure to define the meaning of “tribunal” has caused considerable confusion among litigants and the courts.

The second amendment, also a source of significant litigation, deleted the word “pending” from the statute.⁸⁸ Based on this change, it is no longer necessary for a proceeding to be pending before a foreign or international tribunal. Instead, the statute requires that the requested information merely be “for use” in a proceeding, not that the proceeding be currently under-

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

84. In addition, there were other important changes made to § 1782. The statute now makes clear that federal courts can compel not only the testimony of witnesses found in the United States, but also the production of documents under the witnesses’ control. See HOUSE REPORT, *supra* note 23, at 45; SENATE REPORT, *supra* note 23, at 8. The Commission recognized that the need for “tangible evidence” in a judicial proceeding, such as bank records or financial statements, may be just as critical as the need for oral testimony. SENATE REPORT, *supra* note 23, at 7. Furthermore, the requirement that the request emanate from a country with whom the United States is at peace was deleted. See 28 U.S.C. § 1782. This restriction was eliminated because, in light of the amount of discretion given to courts in deciding whether to execute a request, the Commission did not believe the restriction had any real significance. See HOUSE REPORT, *supra* note 23, at 45 (leaving the execution of the letters rogatory to the discretion of the court “which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable”); see also SENATE REPORT, *supra* note 23, at 8. The Commission also acknowledged that, in the event a request came from a country with which the United States was at war, the relations of the United States would be regulated by the Trading with the Enemy Act. HOUSE REPORT, *supra* note 23, at 46.

85. 28 U.S.C. § 1782 (1988).

86. See *id.* (emphasis added).

87. See HOUSE REPORT, *supra* note 23, at 45. The legislative history explains that the statute grants courts the discretion to provide assistance when the proceedings are pending before investigating magistrates, such as the French *juge d’instruction*. *Id.*

88. There is no discussion in the House or Senate Reports explaining why the word “pending” was dropped. However, according to Professor Smit, Director of the Columbia Project and chief draftsman of § 1782, the word “pending” was dropped because it was deemed unnecessary for a proceeding to be pending. Telephone Interview with Hans Smit, Professor, Columbia Law School (Sept. 26, 1991); see also Smit, *supra* note 22, at 1026 (“It is not necessary . . . for a 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.”).

way.⁸⁹ However, this change has created new problems. Since Congress failed to explain the deletion of the word "pending," courts have imposed inconsistent standards regarding how likely a proceeding must be in order to fall within the purview of § 1782.⁹⁰

II. THE JUDICIARY'S RESPONSE TO § 1782

United States courts have routinely executed both civil and criminal letters rogatory since the expansion of § 1782 in 1964.⁹¹ Most requests are executed without difficulty, and there are few reported decisions involving challenges to their sufficiency. In recent years, however, federal courts have encountered substantial litigation concerning § 1782. The reported cases indicate that these courts are increasingly less receptive to foreign requests for information pertaining to potential violations of the requesting jurisdiction's criminal laws if the requests are made before formal charges are actually brought.⁹² Numerous challenges have arisen in cases where no formal charges are currently pending and evidence is requested in conjunction with an investigation of activities that may lead to criminal charges.⁹³

89. 28 U.S.C. § 1782 (1988). For the text of the statute, see *supra* text accompanying note 27.

90. See *supra* note 32 (describing the three standards currently employed by courts).

91. There are only thirteen MLATs currently in force. See *supra* note 4. In the absence of a treaty or some kind of executive agreement creating an obligation on the part of the requested party to produce testimonial or documentary evidence, countries primarily rely on the execution of letters rogatory to gather evidence. See Sandi R. Murphy, Note, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1301 (1990) (discussing the use of MLATs and noting that the "traditional method of obtaining evidence . . . [remains] letters rogatory"). In addition, the principal means of obtaining evidence for use in the investigation and prosecution of economic crimes crossing transnational borders, such as money laundering or fraud, are requests for the execution of letters rogatory. See Clark, *supra* note 22, at 53.

92. Common law systems on the whole tend to refuse assistance when the case is still in the investigative stage. Clark, *supra* note 22, at 53-54.

93. See, e.g., *Brazil III*, 936 F.2d 702, 707 (2d Cir. 1991) (denying assistance to a Brazilian court after determining that formal charges, i.e., an adjudicatory proceeding, were not "imminent"); *Crown Prosecution*, 870 F.2d 686, 694 (D.C. Cir. 1989) (granting assistance to the Crown Prosecution Service because judicial proceedings were within reasonable contemplation); *Trinidad & Tobago*, 848 F.2d 1151, 1155-56 (11th Cir. 1988) (executing a letters rogatory because formal adjudicatory proceedings were very likely to occur), *cert. denied*, 488 U.S. 1005 (1989); *Fonseca v. Blumenthal*, 620 F.2d 322, 323-24 (2d Cir. 1980) (*per curiam*) (denying assistance to the Superintendent of the Exchange Control of Colombia because he lacked sufficient impartiality to be considered a "tribunal" within the meaning of § 1782); *In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea*, 555 F.2d 720, 723 (9th Cir. 1977) (granting judicial assistance where the request was made by a foreign or international tribunal and the testimony or material requested was for use in a proceeding before the tribunal); *Tokyo*, 539 F.2d 1216, 1219 (9th Cir. 1976) (executing a letters rogatory where the information sought from witnesses in the United States was for use in criminal

While there seems to be a general consensus that under § 1782 the foreign proceeding need not be pending, courts have imposed substantial, and at times conflicting, restrictions on the ability of foreign governments to make requests under such circumstances.⁹⁴ Two issues generally arise when a foreign government makes a request for judicial assistance. First, the court must determine the nature of the foreign proceeding currently pending in the requesting country.⁹⁵ Second, in the absence of a pending adjudicative proceeding, the court must determine the likelihood of such a proceeding taking place in the future.⁹⁶ Based on the various interpretations of these two issues, the court may or may not grant the request.

A. *The Nature of the Request*

Section 1782 provides that a request for judicial assistance may be made by a "foreign or international tribunal, or upon the application of any interested person."⁹⁷ In addition, the statute requires that the evidence be "for use in a proceeding in a foreign or international tribunal."⁹⁸ United States courts generally agree that Congress intended to grant assistance for proceedings other than those before a conventional court, such as those conducted by an investigating magistrate.⁹⁹ Courts, however, have struggled to determine exactly what types of proceedings are appropriate under the statute. While some courts narrowly interpret this requirement relying solely on the "tribunal" language of § 1782, other courts employ the "interested per-

investigations and in subsequent criminal trials in Japan); *Montreal*, 523 F.2d 562, 565 (6th Cir. 1975) (authorizing the execution of letters rogatory requesting evidence sought for use in a foreign criminal proceeding); *Manitoba II*, 488 F.2d 511, 512 (9th Cir. 1973) (refusing to grant judicial assistance in response to a letters rogatory when the requesting party's sole purpose was to conduct an investigation unrelated to a judicial or quasi-judicial controversy); *India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (denying a request from an Indian income tax officer because the officer was not a "tribunal" within the meaning of § 1782); *In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-Au-Prince, Rep. of Haiti*, 669 F. Supp. 403, 405-06 (S.D. Fla. 1987) (holding that judicial assistance should be granted when a proceeding is before a foreign administrative or quasi-judicial tribunal, or before an investigating magistrate).

94. See *infra* notes 194-196.

95. See *Brazil III*, 936 F.2d at 705. The inquiry into the nature of the proceeding entails determining the purpose for which the evidence is requested to ensure that the request is made by a party authorized under the statute to make such a request. See also *infra* notes 97-145 and accompanying text.

96. See *Brazil III*, 936 F.2d at 705-06.

97. 28 U.S.C. § 1782 (1988).

98. *Id.*

99. See, e.g., *Tokyo*, 539 F.2d 1216, 1219 (9th Cir. 1976) (recognizing that Congress intended to authorize assistance to foreign investigating magistrates). See also *infra* notes 110-111 and accompanying text.

son” doctrine, recognizing that Congress’ expansion of § 1782 in 1964 makes clear that a request need not originate in a tribunal.

1. *What Constitutes a Tribunal—The Second Circuit and The Impartiality Test*

The first case interpreting the “tribunal” language of § 1782 reached the United States Court of Appeals for the Second Circuit in 1967.¹⁰⁰ *In re Letters Rogatory Issued By the Director of Inspection of the Government of India* presented the issue of whether an Indian income tax officer was considered a “tribunal” within the meaning of § 1782.¹⁰¹ The case arose out of a letters rogatory issued by the Director of Inspection under the Government of India’s Income Tax Act,¹⁰² requesting the production of documents from Chase Manhattan Bank and Brown Brothers, Harriman & Co. to be used in a tax assessment pending in India.¹⁰³ The United States District Court for the Southern District of New York found that the Indian income tax officer was a “tribunal” within the meaning of § 1782 and issued a subpoena ordering production of the documents.¹⁰⁴

On appeal, the Second Circuit interpreted the word “tribunal,” as used in § 1782, to mandate that the party requesting the evidence be impartial.¹⁰⁵ The Second Circuit held that the party requesting the evidence, the Indian income tax officer, was not an impartial tribunal as required by § 1782.¹⁰⁶ The court, therefore, denied the request for assistance.¹⁰⁷ The Second Circuit reasoned that while § 1782, as amended, gives courts substantial discretionary power,¹⁰⁸ it does not give courts *carte blanche* authority to execute

100. *India*, 385 F.2d 1017, 1019-20 (2d Cir. 1967).

101. *Id.*

102. *Id.* at 1017.

103. *Id.* at 1017-18. The request stated that the documents “might be relevant to the determination of the amount . . . [that] should be assessed [in taxes].” *Id.* at 1018.

104. *Id.* at 1019. A motion to quash the subpoena was subsequently denied and an appeal to the Second Circuit followed. *Id.* at 1018.

105. *Id.* at 1020-21 (requiring a requesting party to show some degree of impartiality).

106. *Id.* at 1020.

107. *Id.* at 1020-21.

108. *Id.* at 1020. The court traced the evolution of § 1782 from 1863 through its most recent amendment in 1964, and interpreted the rationale underlying the latest amendments to demonstrate the liberalization of the statutory language over the years. *See id.* at 1018, 1019 (explaining that the statute authorized courts to execute foreign requests for assistance for a “‘suit for the recovery of money or property depending in any court in any foreign country’, 12 Stat. 769 (1863), ‘in any civil action pending in any court in a foreign country’, 62 Stat. 949 (1948) ‘. . . in any judicial proceeding pending in any court in a foreign country’, 63 Stat. 103 (1949),” and finally “‘for use in a proceeding in a foreign or international tribunal,’” 28 U.S.C. § 1782). This statute leaves the decision of whether to provide assistance and what

letters rogatory whenever a foreign country requests assistance.¹⁰⁹ Instead, the court stated that in order for the requesting party to qualify as a "tribunal" within the meaning of § 1782, it must show some degree of separation between its prosecutorial and adjudicative functions.¹¹⁰

The Indian income tax officer failed to satisfy Judge Friendly's "impartiality" test. Unlike the French *juge* submitting the request in 1854, who had no interest in the outcome of the case,¹¹¹ the Indian income tax officer's sole responsibility was to assess and recover a tax on behalf of the Government of India.¹¹² Therefore, the officer could not request judicial assistance under § 1782.¹¹³

The *India* impartiality test was subsequently reaffirmed by the Second Circuit in *Fonseca v. Blumenthal*.¹¹⁴ In *Fonseca*, the Colombian Exchange Control requested the return of a suitcase containing \$250,000 in United States currency, which had been seized by the United States Customs Service upon its arrival at John F. Kennedy Airport in New York.¹¹⁵ *Fonseca* brought an action to recover his suitcase¹¹⁶ and, while that action was pending, the Superintendent of the Colombian Exchange Control made his request.¹¹⁷

The Second Circuit, in a per curiam opinion, held that the Superintendent was not a "tribunal" within the meaning of § 1782.¹¹⁸ Referring to its anal-

kind of assistance is appropriate "to the discretion of the court, which . . . may refuse to issue an order or may impose conditions it deems desirable." SENATE REPORT, *supra* note 23, at 7.

109. *India*, 385 F.2d at 1020.

110. *Id.* at 1021. Judge Friendly recognized that the term "tribunal" was used to enable courts to respond to the increased number of requests issued by investigating magistrates, and the growth in administrative and quasi-judicial proceedings throughout the world. *Id.* at 1020 (citing SENATE REPORT, *supra* note 23, at 7). However, the Court was not willing to extend this qualification to any entity claiming to fall within the purview of the statute. *Id.* at 1021. Instead, the court held that the requesting party must have some degree of neutrality. *Id.*

111. *Id.* at 1020. The *juge* acts as the equivalent of the grand jury in the United States, in that he decides whether there is sufficient evidence to bring the accused to trial. *Id.* The *juge* also performs certain prosecutorial functions, such as directing the investigation and questioning the witnesses. *Id.* However, while the *juge* performs prosecutorial functions, he has no interest in the outcome of the case other than "to ensure that justice is done." *Id.* (quoting A.E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441, 443 (1960)).

112. *Id.*

113. *Id.* at 1021. In addition, the court pointed to the fact that most United States legislators would not view a tax assessor as a tribunal. It distinguished between the assessment of taxes from proceedings where "the sovereign affords 'the taxpayer an opportunity at some stage to have mistakes rectified.'" *Id.* at 1021 (quoting *Bull v. United States*, 295 U.S. 247, 259-60 (1935)).

114. 620 F.2d 322 (2d Cir. 1980) (per curiam).

115. *Id.*

116. *Fonseca* alleged that the airline "misdirected" his suitcase while he was traveling from Bogota, Colombia to Lima, Peru. *Id.*

117. *Id.* at 322-23.

118. *Id.* at 323.

ysis in *India*, the Second Circuit reasoned that "Congress intended 'tribunal' to have an adjudicatory connotation."¹¹⁹ Therefore, a foreign entity must have some attributes of an impartial adjudicator in order to be considered a tribunal.¹²⁰ The Superintendent failed this test because the court found his position to be inherently partial; his sole responsibility was "to act in the [Colombian] government's interest to enforce the law."¹²¹ Accordingly, the request was denied.¹²²

In these cases, the Second Circuit ruled solely on the issue of what constitutes a "tribunal" under § 1782. The court determined that if the entity making the request was not an "impartial adjudicator" assistance should not be granted. The court implicitly based its conclusion on the following premise: If the request did not come from an impartial adjudicative authority, the evidence was not "for use in a foreign or international tribunal."¹²³

2. Interested Person—The Alternative to the Tribunal Requirement

Other courts interpret § 1782's definition of "proceeding" differently. These courts examine whether the evidence is "for use in a proceeding," as contemplated under the statute, instead of automatically reaching a conclusion based solely on whether the requesting party is a "tribunal."¹²⁴ Therefore, if the evidence is requested by a "tribunal" or an "interested person," and is "for use in a proceeding," the request generally will be granted.

The decision in *In re Letters of Request to Examine Witnesses From the Court of the Queen's Bench for Manitoba, Canada (Manitoba I)*,¹²⁵ while not directly addressing the issue of what constitutes an "interested person," suggested that a court's inquiry should not end with a determination of whether the requesting party is a "tribunal." The court supported its interpretation of the proper analysis under § 1782 by suggesting that an interested person may request the production of evidence that will be used in a proceeding.¹²⁶

119. *Id.*

120. *See id.* at 324.

121. *Id.*

122. *Id.*

123. *See India*, 385 F.2d 1017, 1020-21 (2d Cir. 1967); *Fonseca* 620 F.2d at 323-24. At the time of the *India* and *Fonseca* decisions, it appears that the court and the litigants assumed that the requesting party had to qualify as a "tribunal" under § 1782, because no argument was made for, and the court did not address, the possibility of an "interested person" making the request.

124. First, these courts determine if the party making the request is impartial and qualifies as a "tribunal" under the statute. Second, if the requesting party is not a tribunal, these courts ascertain whether the requesting party is an "interested person." Finally, the courts determine whether the evidence sought is "for use in a proceeding" as required by § 1782.

125. 59 F.R.D. 625, 629 (N.D. Cal. 1973), *aff'd per curiam*, 488 F.2d 511 (9th Cir. 1973).

126. *See id.*

In *Manitoba I*, the Canadian Commission of Inquiry caused the Court of Queen's Bench for Manitoba, Canada, to issue a letters rogatory for testimony regarding a multi-million dollar forestry and industrial project in Manitoba, Canada.¹²⁷ The request was forwarded to a federal district court in California, which subsequently denied the requested assistance.¹²⁸ The district court recognized that the Canadian court qualified as a tribunal,¹²⁹ but denied the request because it was made on behalf of another body whose purpose was to conduct an investigation *unrelated* to a judicial or quasi-judicial proceeding.¹³⁰ The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling in a per curiam decision in *Manitoba II*.¹³¹

In *In re Letters Rogatory From the Tokyo District, Tokyo, Japan (Tokyo)*,¹³² the Ninth Circuit again focused on the purpose of the evidence rather than who was requesting it. In *Tokyo*, the Tokyo District Court in Japan issued a letters rogatory to a federal district court in California on behalf of the Tokyo public prosecutor who was investigating alleged improper payments from a United States corporation and its officers and agents to Japanese citizens.¹³³ The request sought assistance in taking *in camera* depositions "to be used in criminal investigations and possible future criminal trials in Japan."¹³⁴ The district court found that the letters rogatory satisfied § 1782 and granted the request.¹³⁵

The Ninth Circuit, without directly addressing whether the Tokyo District Court was acting as a tribunal in this case,¹³⁶ held that the evidence was "for use in a proceeding" before a tribunal and affirmed the district court's

127. *Id.* The Commission was authorized "to enquire into, ascertain and report upon the facts and circumstances relating to the development of the forestry and industrial complex . . . [and] to make recommendations." *Id.* at 512 (quoting Order of Feb. 6, 1973, which created the Manitoba Commission of Inquiry).

128. *Id.*

129. By definition, a "tribunal" is some type of court. See BLACK'S LAW DICTIONARY 1350 (5th ed. 1979) (defining "tribunal" as "the place where [a judge] administers justice . . . a judicial court").

130. *Manitoba I*, 59 F.R.D. at 629. The Commission's purpose was specifically to conduct an investigation and report to the legislative branch of the Canadian government. *Id.*

131. 488 F.2d 511, 512 (9th Cir. 1973). The Ninth Circuit quoted the district court's decision, stating that "'§ 1782 was not intended to and does not authorize the United States courts to compel testimony on behalf of foreign governmental bodies whose purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies.'" *Id.* at 512 (quoting the district court).

132. 539 F.2d 1216 (9th Cir. 1976).

133. *Id.* at 1218.

134. *Id.*

135. *Id.* at 1217.

136. Relying primarily on *Manitoba I*, the witnesses argued that the Tokyo District Court, while technically a "tribunal," was not acting as an "adjudicatory body" in this case because

decision to grant the request.¹³⁷ Recognizing that Congress intended to broaden the power of district courts to respond to letters rogatory,¹³⁸ the court again took a more liberal approach than the *India* court in defining the nature of the request. After examining the legislative history surrounding the 1964 amendments to § 1782, and concluding that Congress intended to provide assistance to foreign investigating magistrates,¹³⁹ the panel analyzed the Japanese judicial system and the nature of the Tokyo District Court's role in making the request.¹⁴⁰ The Ninth Circuit determined that the request satisfied the requirements of § 1782 because the Tokyo District Court issued the letters rogatory on behalf of a Tokyo public prosecutor whose investigation *was related to* a judicial or quasi-judicial controversy.¹⁴¹ Unlike *India*, the determinative issue in *Tokyo* was not whether the Tokyo District Court was a "tribunal" within the meaning of § 1782; rather, the Ninth Circuit focused on the question of whether the evidence was "for use in a proceeding before a foreign or international tribunal."¹⁴²

Through its decisions in *Manitoba II* and *Tokyo*, the Ninth Circuit alerted future litigants that a letters rogatory will not automatically be executed simply because it comes from a "tribunal."¹⁴³ Instead, the evidence requested must be "for use in a proceeding" as contemplated under § 1782.¹⁴⁴ This trend away from the *India* court's exclusive reliance on the tribunal require-

its purpose was to conduct an investigation in the absence of a judicial or quasi-judicial controversy. *Id.*

137. *Tokyo*, 539 F.2d at 1217-18. In reaching its decision, the court looked to the legislative history of § 1782 and examined the role of the Tokyo District Court in issuing the request. *Id.* at 1218-19. The court concluded that while the Tokyo prosecutor initiated the request, the Tokyo District Court actually determines "whether or not an investigation is entitled to judicial assistance." *Id.* at 1219.

138. *See id.* at 1218-19.

139. *Id.* at 1218 (citing the House Report accompanying the amendments to § 1782, *see supra* note 23). The court also acknowledged that in the past, United States district courts have issued letters rogatory to foreign countries requesting evidence for use in a grand jury proceeding. *Id.* at 1219.

140. *See supra* note 137.

141. *Tokyo*, 539 F.2d at 1220. Although the court applied the rule adopted in *Manitoba II*, it nevertheless held that the facts in *Manitoba II* were distinguishable. *Id.* In *Manitoba II*, the Ninth Circuit's refusal to grant assistance stemmed from the fact that the Canadian Commission of Inquiry's investigation was unrelated to a judicial or quasi-judicial proceeding. *Manitoba II*, 488 F.2d 511, 512 (9th Cir. 1973). In *Tokyo*, however, the Tokyo District Court was investigating possible criminal activity and requested evidence that would be used in future criminal trials in Japan. *Tokyo*, 539 F.2d at 1217. Therefore, the investigation was closely related to a judicial proceeding.

142. *Tokyo*, 539 F.2d at 1218.

143. *See Manitoba II*, 488 F.2d at 512 (denying assistance to a foreign court which issued a letters rogatory on behalf of an investigative body whose purpose was unrelated to a judicial proceeding).

144. *See Tokyo*, 539 F.2d at 1219.

ment has continued. Several decisions since *Manitoba* and *Tokyo* grant assistance when the requesting party issues the letters rogatory as an "interested person" and the evidence is "for use in a judicial proceeding."¹⁴⁵ The analysis, however, does not end here. While these cases meet the statutory requirements for a requesting party, courts must further consider how likely the judicial proceeding will be in order to grant the requested assistance.

B. *A Likely Proceeding Under 28 U.S.C. § 1782*

When Congress amended § 1782 in 1964, the word "pending" was dropped from the statute without explanation.¹⁴⁶ The courts generally agree that this change negates the requirement that a proceeding actually be "pending" at the time of the request for assistance.¹⁴⁷ Given that a proceeding need not be "pending," the circuit courts have struggled to determine how likely a proceeding must be in order to qualify it for assistance under § 1782. There are currently three standards employed by the circuit courts, each of which sets different limits on the ability of district courts to render judicial assistance.¹⁴⁸

1. *Trinidad & Tobago—The "Very Likely to Occur" Standard*

In *Trinidad & Tobago*,¹⁴⁹ the United States Court of Appeals for the Eleventh Circuit directly addressed the issue of timing in the absence of a pending proceeding.¹⁵⁰ The court recognized that § 1782 does not require a pending proceeding in order to execute a foreign request for judicial assist-

145. See *Crown Prosecution*, 870 F.2d 686, 687 (D.C. Cir. 1989) (treating the Crown Prosecution Service as an "interested person" within the meaning of § 1782 in order to grant the requested assistance); *Trinidad & Tobago*, 848 F.2d 1151, 1155-56 (11th Cir. 1988) (granting assistance to the Attorney General and Minister of Legal Affairs of Trinidad and Tobago who qualified as an "interested person" under the statute), *cert. denied*, 488 U.S. 1005 (1989). See also *infra* notes 154, 177 and accompanying text.

146. See *supra* note 88.

147. See *Brazil III*, 936 F.2d 702, 705-07 (2d Cir. 1991) (acknowledging the deletion of the word "pending" from § 1782 before adopting the imminence standard); *Crown Prosecution*, 870 F.2d at 690 (quoting Professor Smit, explaining that it is unnecessary for a proceeding to be pending to execute a letters rogatory request); *Trinidad & Tobago*, 848 F.2d at 1152 (holding that § 1782 does not require a proceeding to be pending at the time of the request); *Tokyo*, 539 F.2d at 1219 (acknowledging Congress' intent to permit assistance for investigating magistrates).

148. See *infra* notes 194-196 for the three prevailing standards currently employed.

149. 848 F.2d 1151 (11th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989).

150. *Id.* In 1976, the Ninth Circuit alluded to the fact that a pending proceeding is not always necessary for the execution of a letters rogatory. *Tokyo*, 539 F.2d 1216, 1217 (9th Cir. 1976) (ordering depositions of witnesses for use "in criminal investigations and possible future criminal trials in Japan"). While the *Tokyo* court did not specifically address the "pending" issue, the fact that proceedings were not pending at the time of the request indicates the court's recognition that a "pending proceeding" was no longer a requirement under § 1782. *Id.*

ance.¹⁵¹ The court concluded, however, that a proceeding must be “very likely to occur” to satisfy the requirements of § 1782.¹⁵² The court further restricted requests for evidence which were for use in such a proceeding.¹⁵³

In *Trinidad & Tobago*, the Attorney General and Minister of Legal Affairs in Trinidad and Tobago requested bank records in connection with a criminal investigation of violations of a local Exchange Control Act by citizens of Trinidad and Tobago.¹⁵⁴ Joseph Azar, the target of the investigation, argued that when a request is made by a foreign official as an “interested person,” the proceeding must already be pending.¹⁵⁵ The Eleventh Circuit, after analyzing the legislative history of § 1782,¹⁵⁶ rejected this argument and granted the request.¹⁵⁷

The panel set forth a two-part test to determine the circumstances under which judicial assistance could be granted pursuant to a letters rogatory. First, the district judge must conclude that the requesting party is an “interested person” or “tribunal” within the meaning of the statute.¹⁵⁸ Second, “the evidence [must be] . . . ‘for use in a proceeding’ as required by § 1782.”¹⁵⁹ The court refused to make § 1782 applicable to all requests sub-

151. *Trinidad & Tobago*, 848 F.2d at 1155 (“We believe that Congress’ elimination of the word ‘pending’ . . . compels us to conclude . . . that a pending proceeding is not absolutely necessary.”).

152. *Id.* at 1156.

153. *Id.* at 1155. The court stated that the decision to grant assistance will not depend on whether the proceeding is pending, but the likelihood that the requested evidence will be used in a judicial proceeding. *Id.* (citing Professor Smit).

154. *Id.* at 1152. The Minister requested the information as an “interested person” under § 1782.

155. *Id.* at 1155. Azar pointed to the use of the word “litigant” in the legislative history of § 1782. *Id.* He claimed that the word “litigant” denoted Congress’ intent only to authorize courts “to provide assistance to an ‘interested person’ who is presently involved in a pending proceeding.” *Id.*

156. *Id.* at 1152-54. The court analyzed the development of the statute and concluded that “the history of Section 1782 reflects a congressional desire to increase the power of district courts to respond to requests for international assistance.” *Id.* at 1154. The court also relied on commentary by Professor Smit, stating that the term “interested person” was intended to include “foreign officials as well as actual litigants.” *Id.*

157. *Id.* at 1155. The court logically concluded that it is no longer necessary for a proceeding to be pending in order to make a request for judicial assistance. *Id.* The court, in support of its conclusion, again cited Professor Smit’s law review article and stated that “[i]t is not necessary . . . for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually used in such a proceeding.” *Id.* (quoting Smit, *supra* note 22, at 1027).

158. *Id.*

159. *Id.* It is noteworthy that the second part of this test is substantially more liberal than the “very likely to occur” threshold the court ultimately set. See *infra* text accompanying note 161. As the court points out, the language of the statute only requires that the evidence requested be “for use in a proceeding.” 848 F.2d at 1155 (emphasis added). It does not state the

mitted by an "interested party" before a judicial proceeding has begun in order to prevent abuse of the statute by foreign investigative authorities.¹⁶⁰ In this regard, the court directed the district judge to look at the totality of the circumstances and "satisfy himself that a proceeding is very likely to occur."¹⁶¹

The Eleventh Circuit found that the request by the Minister of Legal Affairs in Trinidad and Tobago met the threshold requirement.¹⁶² First, the Minister of Legal Affairs qualified as an "interested person" under § 1782 based on his legal responsibility for the enforcement of the Exchange Control Act.¹⁶³ Next, the court considered whether the evidence was "for use in a proceeding."¹⁶⁴

The circuit judge looked to the totality of the circumstances and noted three main factors considered by the district court in reaching its decision to grant the requested assistance. First, in his request for judicial assistance, the Minister "set forth the documents he desired, the information he expected to find, and the reason he would use the documents in the eventual proceeding."¹⁶⁵ Second, the Minister requested the evidence in a manner that would assure its admissibility in any future criminal proceeding conducted in Trinidad and Tobago.¹⁶⁶ Finally, the court noted that the Minister offered to pay certain witnesses to travel to Trinidad and Tobago to testify to the authenticity of the documents.¹⁶⁷ According to the Eleventh Circuit, "this suggests that a proceeding is imminent" and allows a reasonable person to conclude that the evidence would be used in a proceeding as

time period in which the proceeding must occur. *See supra* text accompanying note 27 for text of the statute.

160. *Trinidad & Tobago*, 848 F.2d at 1155. The court was concerned that foreign authorities might attempt to use the statute as a "blanket" approval for execution of letters rogatory, allowing them to conduct "fishing expeditions" for evidence. *Id.* at 1156.

161. *Id.*

162. *Id.* at 1156.

163. *Id.* at 1155. The panel pointed out that several previous cases indicate that the Minister could not be classified as a "foreign tribunal" under § 1782. *Id.* at 1155 n.10 (citing *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) (per curiam) (refusing to grant assistance to the Superintendent of the Exchange Control of Colombia because he did not qualify as a tribunal under the statute); *India*, 385 F.2d 1017 (2d Cir. 1967) (refusing to recognize the Indian income tax officer as a tribunal); *Manitoba I*, 59 F.R.D. 625 (N.D. Cal. 1974) (denying assistance to the Canada Commission of Inquiry because it was not related to a judicial or quasi-judicial controversy)). According to the panel, this determination had nothing to do with the Minister's status as an "interested person." *Id.* The court held that the Minister could be considered an "interested person," and could properly make a request for judicial assistance in this matter, provided that he had some measure of legal responsibility. *Id.*

164. *Id.* at 1155-56.

165. *Id.* at 1156.

166. *Id.*

167. *Id.*

required by § 1782.¹⁶⁸ Having satisfied itself that the request was not a “fishing expedition,” the court affirmed the district court’s decision to grant the requested assistance.¹⁶⁹

2. Crown Prosecution—*The Reasonable Contemplation Standard*

One year later, the United States Court of Appeals for the District of Columbia concurred with the Eleventh Circuit’s ruling that a foreign proceeding did not have to be pending when the letters rogatory is issued.¹⁷⁰ However, in *Crown Prosecution*,¹⁷¹ the D.C. Circuit applied a more lenient standard than the Eleventh Circuit had applied in *Trinidad & Tobago*. According to the *Crown Prosecution* court, it “suffices that the proceeding in a foreign tribunal and its contours be *in reasonable contemplation* when the request is made.”¹⁷² Therefore, district court judges must look for “reliable indications of the likelihood that proceedings will be instituted within a reasonable time.”¹⁷³

In *Crown Prosecution*, the Crown Prosecutor for the United Kingdom issued a letters rogatory seeking the production of evidence regarding the criminal investigation of a stock manipulation scheme.¹⁷⁴ The D.C. Circuit, upon review of the nature of the request, rejected the argument that a proceeding must be pending at the time of a request.¹⁷⁵ The court distinguished the ruling by the Second Circuit in *India*, which refused a similar request,

168. *Id.*

169. *Id.*

170. *Crown Prosecution*, 870 F.2d 686, 690-91 (D.C. Cir. 1989). The D.C. Circuit also recognized Congress’ desire to facilitate the gathering of evidence for use in a foreign proceeding, and refused to treat the deletion of “pending” as an oversight by Congress. *Id.* at 691. The court not only relied on the House and Senate Reports and materials submitted by the Commission, but like the Ninth Circuit in *Trinidad & Tobago*, cited the law review article written by Professor Smit to support its conclusion. *Id.* at 690. The court concluded that the drafters eliminated the word “pending” “to facilitate the gathering of evidence *prior to the institution of litigation abroad.*” *Id.* (quoting Smit, *supra* note 22, at 1026, 1027 n.72) (emphasis added). However, as in *Trinidad & Tobago*, the *Crown Prosecution* court expressed concern about the possibility of foreign “fishing expeditions” and stated that it would not endorse assistance for all future proceedings. *See id.*

171. 870 F.2d 686 (D.C. Cir. 1989).

172. *Id.* at 687 (emphasis added).

173. *Id.* at 692.

174. *Id.* at 688. The scheme involved several Guinness officials who were accused of manipulating stocks in order to effect a “takeover by Guinness of the Distillers Company.” *Id.* Thomas Ward, a Guinness director and the subject of the investigation, argued that because “the evidence was not sought ‘for use in a [judicial] proceeding’ as required by § 1782,” the request should not be executed. *Id.* The district court issued a subpoena ordering the production of the requested documents. *Id.* Ward moved to quash the subpoena. *Id.* The district court refused to quash and this appeal followed. *Id.*

175. *Id.* at 691.

because *India* dealt solely with the issue of what constitutes a tribunal.¹⁷⁶ The Crown Prosecutor, however, had applied for judicial assistance as an "interested person."¹⁷⁷ The requested evidence was for use against several individuals in criminal proceedings which, although not currently pending, were within reasonable contemplation.¹⁷⁸ Because there were reliable indications that these judicial proceedings would take place within a reasonable period of time, the *Crown Prosecution* court executed the letters rogatory request.¹⁷⁹

III. *BRAZIL III*—THE IMMINENCE REQUIREMENT

The Second Circuit's approach in *Brazil III*¹⁸⁰ is the most restrictive interpretation yet adopted by a court regarding the standard for letters rogatory requests in the absence of a pending proceeding. The decision substantially limits the ability of district courts to render assistance in foreign judicial proceedings.

A. *The District Court's Decision*

In *Brazil III*, the district court executed the letters rogatory and ordered the production of the documentary and testimonial evidence requested by Brazilian authorities.¹⁸¹ The court reasoned that, although no adjudicatory

176. *Id.* at 690-91.

177. *Id.* at 691.

178. *Id.* at 692. The Court took into account that proceedings had already commenced against other individuals involved in the alleged stock support scheme. *Id.* at 691. In addition, Ward was listed as one of the co-conspirators in the indictment. *Id.* The court concluded that the evidence was sought "for use in criminal proceedings in a British court . . . [and] there is no question that British courts qualify as tribunals." *Id.*

179. *Id.* at 694.

180. 936 F.2d 702 (2d Cir. 1991).

181. *Id.* at 703. The original letters rogatory, issued September 24, 1991, was revised and resubmitted by Brazilian authorities on October 13, 1987. On January 28, 1988, Morgan Guarantee was ordered to produce account documents controlled by Panamanian corporations on behalf of Brazilian citizens, from which former Vice-President Gebauer had taken money. *Brazil I*, 687 F. Supp. 880, 882 (S.D.N.Y. 1988). The Panamanian corporations moved to quash the subpoena *duces tecum* on the ground that the evidence sought was not "for use in a proceeding in a foreign or international tribunal" as required by § 1782. *Brazil III*, 936 F.2d at 704. District Judge Haight initially stayed enforcement of the subpoena. *Brazil I*, 687 F. Supp. at 886, 887. Judge Haight maintained that the decisive issue in determining whether a request for judicial assistance may be granted is whether the requested evidence is "for use in a proceeding in a foreign or international tribunal." *Id.* at 885. Judge Haight therefore refused to execute the letters rogatory simply because it was issued by a judge. *Id.* Instead, he requested further affidavits from both parties to determine "whether the Brazilian court automatically forwards such prosecutorial letters rogatory, or whether there is a 'proceeding' presently before the Brazilian court which requires that court to exercise an *independent adjudicative function*," as set forth in *India*. *Id.* (emphasis added).

judicial criminal proceeding was currently pending in Brazil,¹⁸² one was “probable” given the totality of the circumstances. Therefore, Judge Haight granted the requested assistance.¹⁸³ An appeal to the Second Circuit ensued.

B. *The Second Circuit's Review*

The issue addressed by the Second Circuit is the same question that has plagued federal courts since the enactment of § 1782 in 1964: “whether and under what circumstances Congress has authorized a district court to order the production of evidence pursuant to a foreign government’s letter[s] rogatory in advance of the commencement of an adjudicative proceeding.”¹⁸⁴ Circuit Judge Newman divided this issue into two, now familiar, subissues. First, he examined the nature of the proceeding to determine whether there was an adjudicatory judicial proceeding currently pending in Brazil.¹⁸⁵ Second, after finding that no adjudicatory judicial proceeding was pending, he analyzed the likelihood and timing of such a proceeding occurring in the future.¹⁸⁶

1. *The Nature of the Proceeding*

The panel closely followed the Second Circuit’s previous decisions in *India* and *Fonseca*, requiring that the underlying foreign proceeding serve an impartial adjudicatory function.¹⁸⁷ According to the record, the Brazilian judge who issued the letters rogatory was not conducting the investigation.¹⁸⁸ The judge merely requested assistance on behalf of Brazilian police, tax, and currency officials who were in charge of the investigation.¹⁸⁹ The Second Circuit concluded that these officials could not be considered “tribunals” within the meaning of § 1782.¹⁹⁰ The resolution of this issue, however,

182. *Brazil II*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *rev'd*, 936 F.2d 702 (2d Cir. 1991). See also *supra* note 44.

183. See *Brazil II*, 700 F. Supp. at 725. Judge Pimentel, the Brazilian judge, and the Brazilian prosecutor also submitted official letters to Judge Haight for the record. *Id.* Judge Pimentel stated in her letter that the Brazilian prosecutor was investigating “probable illicit acts related to tax evasion in connection with probable defalcations in accounts maintained by Brazilian citizens at the Morgan Guarantee [sic] Trust Company of New York.” *Id.* Judge Pimentel also confirmed in her letter that “the information requested is to be used exclusively as evidence in a judicial proceeding [and that it will] not be used for any other purpose.” *Id.*

184. *Brazil III*, 936 F.2d at 703.

185. *Id.* at 705.

186. *Id.* at 705-07.

187. See *id.*

188. See *Brazil II*, 700 F. Supp. 723, 724 (S.D.N.Y. 1988); *Brazil III*, 936 F.2d at 705.

189. *Brazil III*, 936 F.2d at 705.

190. *Id.* These officials, by their very nature, cannot be considered impartial adjudicators because, like the income tax official in *India*, they solely represent the Brazilian government’s interest in investigating individuals suspected of violating their laws. See *supra* notes 100-113

was not dispositive in determining whether assistance should be granted under § 1782.¹⁹¹ The court acknowledged that there is no requirement that a judicial proceeding be "pending" before a foreign or international tribunal,¹⁹² and turned to the "likelihood" of an adjudicatory judicial proceeding taking place in the future. Consequently, the critical issue was timing.

2. *Timing of the Proceeding*

The circuit court agreed with Judge Haight that there was no adjudicatory proceeding currently in progress in Brazil.¹⁹³ The court rejected, however, the standards adopted in *Crown Prosecution*¹⁹⁴ and *Trinidad & Tobago*,¹⁹⁵ and formulated a more rigid standard of its own.¹⁹⁶ The panel held that, in the absence of a pending judicial proceeding, evidence could be produced only in the event that the judicial proceeding is "imminent, *i.e.*, very likely to occur within a brief interval from the request."¹⁹⁷

The Government¹⁹⁸ argued that judicial assistance should be provided "whenever it appears that an adjudicative proceeding will 'eventual[ly]' occur."¹⁹⁹ In support of its argument, the Government relied heavily on a law review article authored by Professor Hans Smit, the chief draftsman of the 1964 amendments, and argued that the article provides the only direct evidence of why the word "pending" was dropped from § 1782.²⁰⁰ The Government argued that the court should therefore adopt the view of Professor

and accompanying text (describing the rationale for declining to extend assistance to prosecuting or tax authorities whose primary responsibility was to protect the government's interest in the case). The court did not address the issue of whether the Brazilian officials qualified as "interested persons" under § 1782. See *Brazil III*, 936 F.2d at 705.

191. *Id.*

192. See *id.* at 705-07.

193. *Id.* at 705.

194. 870 F.2d 686, 694 (D.C. Cir. 1989) (requiring judicial proceedings to be "within reasonable contemplation").

195. 848 F.2d 1151, 1156 (11th Cir. 1988) (requiring foreign criminal proceedings to be "very likely to occur"). Although the panel approved of the Eleventh Circuit's interpretation of § 1782, it implemented a stricter standard. See *Brazil III*, 936 F.2d at 706. The court also rejected Judge Haight's standard that the proceeding be "probable" as being "too lenient." *Id.*

196. *Brazil III*, 936 F.2d at 706 (requiring adjudicative proceedings to be "imminent").

197. *Id.* at 703. The Second Circuit's "imminence" standard was implemented with the view of avoiding abuses, such as the "fishing expeditions" that concerned the courts in *India* and *Fonseca*. See *id.* at 705-07.

198. Generally, the foreign authority issuing the request is represented by an Assistant United States Attorney in federal court. MANUAL, *supra* note 2, § 9-13.540. In this case, the Brazilian authorities were represented by the United States Attorney's Office for the Southern District of New York. *Brazil III*, 936 F.2d at 703. Therefore, the "Government" refers to the United States government.

199. *Brazil III*, 936 F.2d at 706.

200. *Id.*

Smit and conclude that it is not necessary for a proceeding to be pending at the time a letters rogatory is issued.²⁰¹ The Government suggested that the only limitation imposed by § 1782 is that the evidence sought must eventually be used in such a proceeding.²⁰²

The Second Circuit, however, declined to accept Professor Smit's conclusions regarding Congress' intent when it passed the statute.²⁰³ Instead, the panel focused on the lack of authoritative statements by House and Senate committee members as to what was intended by the deletion of the word "pending."²⁰⁴ The court then entertained the possibility that the deletion of the word "pending" might have been inadvertent.²⁰⁵ In the final analysis, the court concluded that the Brazilian investigators did not meet the "imminence" standard because "there is nothing in the record to show that adjudicative proceedings are very likely and very soon to be brought against any particular perpetrators of such illicit acts,"²⁰⁶ and thus denied the requested judicial assistance.²⁰⁷

201. See *supra* note 88 and accompanying text.

202. *Brazil III*, 936 F.2d at 706 (citing Smit, *supra* note 22, at 1026).

203. *Id.* ("Though Professor Smit was undoubtedly in a good position to know what the congressional committees had in mind, we do not believe it appropriate in this case to accept his commentary as persuasive evidence of the meaning of the statute that the Congress ultimately enacted."). Specifically, the court reasoned that if Congress had intended to allow the execution of letters rogatory requesting evidence for use in a proceeding that would eventually occur, it would have said so. See *id.*

204. *Id.* ("If the omission of 'pending' was intended to mean 'eventually occurring,' we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees."). However, in this case, no reports were issued by the Senate and House committees. The only reports in existence are the House and Senate Reports drafted and submitted by the Commission itself. Congress' actions were limited to creating the Commission and charging it with improving United States procedures regarding requests for judicial assistance. Congress passed the Commission's proposed bill without amendment. This indicates that Congress made a conscious decision to leave the task of drafting the statute to the experts it specifically recruited for that purpose. See *supra* note 71.

205. *Brazil III*, 936 F.2d at 705. But see *Trinidad & Tobago*, 848 F.2d 1151, 1154-55 (11th Cir. 1988) (refusing to "treat Congress' deletion of the word 'pending' as a mistake or mere accident"), *cert. denied*, 488 U.S. 1005 (1989). The Eleventh Circuit noted that when "the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute." *Id.* at 1154-55 (citing *United States v. Canadian Vinyl Indus.*, 555 F.2d 806, 810 (3d Cir. 1977); 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 22.01 (4th ed. 1984)).

206. *Brazil III*, 936 F.2d 702, 707 (2d Cir. 1991). The court relied on the letter submitted by the Brazilian prosecutor, which identified four individuals under investigation for "possible violations" and refers only to "possible prosecution." *Id.* The letter failed to give any indication of how likely formal proceedings against these individuals were. *Id.*

207. *Id.*

V. *BRAZIL III*'S ILLOGICAL OUTCOME AND ITS FUTURE IMPLICATIONS

The Second Circuit's interpretation of § 1782 in *Brazil III* is counterintuitive. The court's decision turns on the disposition of one key issue: the reasoning behind the deletion of the word "pending" from § 1782.²⁰⁸ Judge Newman's opinion focuses on the lack of legislative history regarding this change,²⁰⁹ and uses this to justify the court's application of a draconian "imminence" standard which will, in effect, strip § 1782 of its utility.

A. *The Court's Failure to Properly Interpret § 1782*

In the absence of an explicit statement by Congress in the House and Senate Reports accompanying the 1964 amendments, the Second Circuit refused to look any further for evidence of congressional intent. The panel even entertained the highly remote possibility that the deletion of the word "pending" was inadvertent.²¹⁰ In reality, however, there are several sources other than the statute's legislative history explaining Congress' rationale for expanding § 1782.²¹¹

The evolution of § 1782, from its enactment in 1855 through its most recent amendment in 1964, provides a very good indication of Congress' intent regarding the application of the statute.²¹² Congressional support for international judicial assistance is reflected in the continual expansion and liberalization of the statute and the motivational factors underlying each amendment.²¹³ The fact that Congress consistently deleted qualifying phrases such as "civil action" and "pending" in response to the surge in international litigation following World War II and simultaneously corrected the procedural inadequacies of § 1782,²¹⁴ necessarily implies an intent to expand the instances in which the statute's provisions are available.²¹⁵ The Second Circuit acknowledged the expansion of § 1782 over the years in

208. *Id.* at 705. See also *supra* notes 193-207 and accompanying text.

209. *Brazil III*, 936 F.2d at 705-07.

210. *Id.* at 706 (considering the "distinct possibility that the deletion [of 'pending' may] . . . have been inadvertent"). *But see supra* note 205.

211. See *supra* notes 20, 22-23.

212. "When interpreting statutes, courts *must* consider relevant prior statutes," D.N. MACCORMICK & ROBERT S. SUMMERS, "INTERPRETING STATUTES" A COMPARATIVE STUDY 423 (1991) (emphasis added), as well as the "[h]istorical conditions the statute was intended to remedy as evidence of ultimate legislative intent or purpose." *Id.* at 426.

213. See *supra* notes 50-90 and accompanying text.

214. See *supra* notes 68, 88.

215. *Supra* note 205 and accompanying text. "[A]ny change of the scope or effect of an existing statute, by . . . omission . . . of provisions . . . indicates a legislative intention that the meaning of the statute has been changed and raises the presumption that the legislature intended to change the law." 1A SINGER, *supra* note 205, § 22.01

a brief footnote.²¹⁶ However, unlike other courts interpreting this statute, it failed to recognize the *history* of § 1782 as evidence of congressional intent to facilitate international judicial assistance.²¹⁷

The Commission on International Rules of Judicial Procedure was given a clear congressional mandate when it was created in 1958.²¹⁸ Its task was to improve the procedures “necessary or incidental to” international judicial assistance through the drafting and recommendation of proposed letters rogatory legislation.²¹⁹ The Commission proposed an amendment to § 1782 which, among other things, deleted the word “pending.” This omission indicates that a pending proceeding was no longer a prerequisite, but left open the question of exactly how likely a proceeding must be in order to grant the requested assistance.²²⁰ Neither the statute nor the notes accompanying it address this issue.²²¹ However, Hans Smit, the chief draftsman of the statute, does.

Professor Smit’s law review article is the only direct evidence of the meaning behind the deletion of the “pending” requirement.²²² According to Professor Smit, “[i]t 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.”²²³ While the Second Circuit acknowledged that Smit was “in a good position to know what the congressional committee had in mind,”²²⁴ it declined to accept his statement as persuasive evidence of

216. *Brazil III*, 936 F.2d 702, 704-05 n.1 (2d Cir. 1991).

217. While the court did acknowledge that the 1964 amendments authorized assistance for a “broader range of proceedings,” *id.* at 705, it appeared to rely solely on the House and Senate Reports which accompanied the proposed amendments and prior case law. *But see Trinidad & Tobago*, 848 F.2d 1151, 1154 (11 Cir. 1988) (concluding that “the *history* of section 1782 reflects a congressional desire to increase the power of district courts to respond to requests for international assistance” following close consideration of the statutory amendments made over the years) (citing *Tokyo*, 539 F.2d 1216, 1218 (9th Cir. 1976) (emphasis added)). *See also supra* notes 108, 137, 156 and accompanying text.

218. Pub. L. No. 85-906, § 2, 72 Stat. 1743 (1958) (instructing the Commission to study procedures regarding letters rogatory and recommend appropriate changes to *facilitate* international judicial assistance).

219. *Id.* *See also* House Report, *supra* note 23, at 13 (citing congressional mandate).

220. *See* 28 U.S.C. § 1782. *See also supra* notes 88, 205 and accompanying text.

221. *See* 28 U.S.C. § 1782 (1988). *See also* HOUSE REPORT, *supra* note 23, at 43-47; SENATE REPORT, *supra* note 23, at 7-9.

222. Smit, *supra* note 22, at 1026; Telephone Interview with Hans Smit, Professor, Columbia University Law School (Sept. 26, 1991) (reaffirming that, by its deletion of “pending” from § 1782, Congress intended to require only that the evidence requested is eventually used in a judicial proceeding).

223. Smit, *supra* note 22, at 1026.

224. *Brazil III*, 936 F.2d 702, 706 (2d Cir. 1991).

such intent.²²⁵ Ironically, Professor Smit was a key member of the Commission's Drafting Committee,²²⁶ which was responsible not only for this amendment to § 1782, but also for the drafting of the Commission Report and the Historical and Explanatory Notes accompanying the proposed bill.²²⁷ Ultimately, the bill was passed without amendment,²²⁸ and Professor Smit's explanation of the change can therefore be said to indicate Congress' unequivocal approval of the amendment as drafted by Professor Smit and others.²²⁹

Congress has also ratified thirteen mutual legal assistance treaties, each of which reaffirms Congress' intent to provide assistance in foreign investigations since the 1964 amendment to § 1782.²³⁰ These treaties specifically provide for assistance in foreign prosecutions and investigations.²³¹ In addition, the treaties provide that the request be executed according to the laws of the requested state.²³² In the United States, the applicable law governing the execution of foreign requests for the production of evidence is § 1782.²³³ Thus, by ratifying these treaties mandating the execution of evidentiary requests for purposes of investigation, Congress must have understood § 1782 to authorize these types of requests.

Based on the perceived "lack" of legislative history, the Second Circuit rejected the "eventual use" standard proposed in *Brazil III*,²³⁴ as well as the

225. *Id.* The Second Circuit could have relied on Professor Smit's article and reached the same conclusion if it were clear that the Brazilian officials did not contemplate a proceeding. Professor Smit, like the D.C. Circuit in *Crown Prosecution*, does not advocate assistance unless the tribunal or party seeking the information reasonably contemplates a proceeding. In this case, however, based on the letter forwarded by the Brazilian judge, *supra* note 183, it is clear that formal proceedings were not only contemplated, but probable.

226. *See supra* note 76. Professor Smit was also Director of the Columbia Project, the source of funding for the Commission's work. *See supra* note 74 and accompanying text.

227. *See Smit, supra* note 22, at 1017. In addition, Professor Smit is cited as an authority throughout this report to Congress. *See generally* HOUSE REPORT, *supra* note 23; SENATE REPORT, *supra* note 23.

228. Smit, *supra* note 22, at 1017.

229. The Second Circuit cites approvingly to the Eleventh Circuit's standard in *Trinidad & Tobago*, while simultaneously refusing to consider the opinion of Professor Smit. *Id.* at 706. The irony of this stems from the fact that the Eleventh Circuit supports its conclusion by citing to Professor Smit's law review article. *See Trinidad & Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988); *see also Crown Prosecution*, 870 F.2d 686, 690 (D.C. Cir. 1989).

230. *See supra* note 4.

231. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, *supra* note 4, art. II(1).

232. *See, e.g., id.* art. VII (2).

233. *See* 28 U.S.C. § 1782 (1988).

234. *Brazil III*, 936 F.2d 702, 706 (2d Cir. 1991). The Government proposed a standard consistent with the D.C. Circuit's standard in *Crown Prosecution*, which would allow for judicial assistance whenever it appeared that criminal adjudicatory proceedings would "even-

“probable” standard applied by the district court,²³⁵ as “too lenient.”²³⁶ Without sufficient consideration for the future implications of its decision,²³⁷ the Second Circuit imposed an arbitrary and unworkable standard requiring an “adjudicative proceeding [to] be imminent” before a court may grant assistance.²³⁸

The *Brazil III* court, while appropriately concerned about potential “fishing expeditions” and the “risks inherent in making confidential material available to investigative agencies of countries throughout the world,” failed to appreciate protective safeguards already in place.²³⁹ For example, letters rogatory in criminal cases are usually not submitted directly to United States courts for execution. In most cases, the issued requests are sent through the appropriate diplomatic channels, encountering numerous checkpoints along the way.²⁴⁰ Accordingly, the Brazilian request was reviewed several times before being submitted to the New York district court for execution.²⁴¹ In fact, the original request was returned to Brazilian authorities for revisions.²⁴² Therefore, by the time the request reached the court, the judge could have considered the totality of the circumstances and fairly concluded that, the Brazilian authorities were not on a “fishing expedition.”²⁴³

B. Future Implications

Three likely negative effects on international judicial assistance stem from *Brazil III*. First, because the “imminence” standard adopted by the Second Circuit is ambiguous and its adoption aggravates the existing conflict among the circuits as to the appropriate standard to apply, the decision will create

tual[ly] occur.” *Id.* This standard was consistent with Professor Smit’s explanation of the intent of the statute. *See Smit, supra* note 22, at 1017.

235. *Brazil III*, 936 F.2d at 706.

236. *Id.*; *But see supra* note 82.

237. *See infra* notes 244-254 and accompanying text.

238. *Brazil III*, 936 F.2d at 706. This standard is unworkable because the court fails to define how imminent a proceeding must be in order to qualify under this standard. *See infra* text accompanying notes 246-247.

239. *Brazil III*, 936 F.2d at 706. *See supra* notes 11-17 and accompanying text.

240. *See supra* note 17.

241. *See Brazil I*, 687 F. Supp. 880, 882 (S.D.N.Y. 1988).

242. *See id.*

243. All courts should be aware of potential foreign “fishing expeditions,” and exercise their discretion to deny a request if there is no basis for the investigation. *See supra* notes 109-110, 169, 170 and accompanying text. However, when foreign investigative authorities clearly demonstrate that a viable investigation of certain individuals exists and that the evidence requested will “be used *exclusively* . . . in a [probable] judicial proceeding,” *Brazil II*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988) (emphasis added) (quoting the Brazilian judge’s declaration to the court), it should be apparent that no “fishing expedition” exists.

an increase in litigation.²⁴⁴ Second, as a result of the inevitable uncertainty that will surround the "imminence" standard, foreign prosecutors may be encouraged to prematurely bring charges against innocent individuals who would have otherwise been cleared by the evidence requested from the United States. Third, the decision will cause foreign courts to be more suspect of requests for judicial assistance by the United States. Ultimately, if left in place, *Brazil III* will restore the obstacles that § 1782 was designed to remove and, as a result, will greatly impede international law enforcement efforts.²⁴⁵

The Second Circuit's "imminence" standard is subjective and ambiguous. While the term "imminence" suggests that a proceeding is going to take place within a very short period of time, the panel provides no guidance in determining what exactly it means by "very likely to occur and very soon to occur."²⁴⁶ For example, there is no indication of whether the proceeding must take place within a week, a month, or the next two hours. Given this uncertainty and the varying standards now adopted in three circuits, litigation surrounding § 1782 will increase until a workable standard, consistent with the statute's purpose and congressional intent, is adopted by the federal courts.²⁴⁷

The "imminence" standard may also encourage the premature filing of charges against individuals who would otherwise be cleared by a thorough and complete investigation. The "[u]se of letters rogatory [to obtain evidence abroad] is a time-consuming process,"²⁴⁸ one which does not necessarily guarantee results.²⁴⁹ *Brazil III* implies that pending criminal charges are essentially a prerequisite to a foreign tribunal obtaining the requested evidence. Therefore, if the requesting party wants to avoid the risk of having its request denied, the party may file formal charges before submitting the letters rogatory, even if the evidence necessary to bring charges is the very

244. See *supra* notes 194-196.

245. In 1990 alone, the United States Marshals Service opened 508 international investigations. 1990 ATT'Y GEN. ANN. REP. 50.

246. See *Brazil III*, 936 F.2d 702, 706 (2d Cir. 1991).

247. The Supreme Court has not yet addressed this issue. See *Trinidad & Tobago*, 488 U.S. 1005 (1989) (denying petition for certiorari).

248. Clark, *supra* note 22, at 54 (describing the lengthy process facing a letters rogatory before execution).

249. In the end, the execution of a request is at the discretion of the court in the receiving country. See *supra* notes 19-20 and accompanying text.

evidence requested.²⁵⁰ This circular effect will undermine the privacy interests the Second Circuit presumably was trying to protect.²⁵¹

Brazil III will serve as a signal to other countries that the United States is not willing to provide international judicial assistance to foreign entities legitimately requesting it.²⁵² The *Brazil III* decision will cause inconsistent results when dealing with similar requests made by treaty partners and requests made pursuant to the letters rogatory statute. Treaty partners will gain access to requested information that non-treaty partners, subject to the discretion of the courts, will obtain only if formal charges are pending.²⁵³ In reaction to this, foreign courts may adopt the "imminence" standard for requests by the United States or, in the alternative, even refuse to grant assistance altogether. Either reaction would pose a major obstacle for our law enforcement community to overcome and could possibly foster the growth of international crime.²⁵⁴

VI. CONCLUSION

The Second Circuit's decision in *Brazil III* is inconsistent with Congress' intent to improve the procedures for providing international judicial assistance in obtaining evidence located in the United States. Unfortunately, this decision is part of a disturbing series of Second Circuit § 1782 decisions over the years. Each decision places an added limitation on what was intended to be a broad and liberal statute. Given the express purpose of § 1782, to improve the ability of United States courts to provide international judicial assistance, the interpretations of § 1782 by the Second Circuit are overly restrictive. The standards imposed by the Second Circuit are also unworkable, reflecting the court's continued hostility toward granting judicial assist-

250. Telephone Interview with Hans Smit, Professor, Columbia University Law School (Sept. 26, 1991) (pointing out the dilemma now facing foreign prosecutors who are requesting information in the United States in order to determine whether to bring formal charges against the individual under investigation).

251. *Brazil III*, 936 F.2d 702, 706-07 (2d Cir. 1991).

252. In the past, lack of cooperation on the part of the United States regarding international judicial assistance resulted in similar treatment of United States' requests abroad. See Jones, *supra* note 10, at 556-59 (describing the isolationist policies of the United States from 1854 until the end of World War II, and the subsequent effects of these policies). See also MANUAL, *supra* note 2, § 9-13.540.

253. See *supra* notes 230-233 and accompanying text; see also *supra* note 4.

254. See 1990 ATT'Y GEN. ANN. REP. 47-52 (reporting on the efforts of the United States Department of Justice to coordinate their efforts with nations worldwide in order to combat international crime). To combat the illicit drug trade, federal government agencies often combine their efforts with foreign counterparts in the investigation and prosecution of those fostering its development. *Id.* Without the ability to conduct these "international investigations," the law enforcement community of the United States, as well as its foreign counterparts, will suffer tremendously.

ance to foreign tribunals. The most recent standard announced by the Second Circuit in *Brazil III* will undoubtedly add to what is already a confusing and discouraging process. Ultimately, the Second Circuit's "imminence" standard will effectively limit the ability to obtain judicial assistance to a select few: those who can prove that judicial proceedings are currently underway.

Amy Jeanne Conway