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A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance

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Eileen P. McCarthy

Abstract

This Note argues that U.S. courts should examine requests for international judicial assistance from non-U.S. courts by using a standard that looks to both the characteristics of the requesting party and the nature of the non-U.S. proceeding. Part I discusses international judicial assistance generally and examines the 1964 amendments to the Judicial Assistance Statute. Part II of this Note details the different approaches by which the U.S. circuit courts have dealt with the deletion of the word “pending” from the amended Statute. Part III suggests that U.S. courts responding to letters rogatory should uniformly institute a two-part test that reflects not only the congressional intent and public policy concerns that prompted the 1964 amendments, but that also acknowledges the countervailing privacy interests of U.S. residents subjected to such requests. First, courts should look to whether the non-U.S. party is a tribunal or an interested party. If an adjudicatory tribunal is the source of the judicial assistance request, a lesser degree of development of the non-U.S. proceeding should be required for the granting of assistance. If an interested person, however, is the source of the request, the non-U.S. party should be required to show a more developed non-U.S. proceeding before assistance is granted. This Note concludes that, in light of the present confusion over prevailing approaches to the “non-pending” standards, courts should adopt a uniform standard that negotiates a middle path between granting all requests for international judicial assistance and refusing requests for assistance from all but the most advanced non-U.S. proceedings.

A PROPOSED UNIFORM STANDARD FOR U.S. COURTS IN GRANTING REQUESTS FOR INTERNATIONAL JUDICIAL ASSISTANCE

INTRODUCTION

Traditionally, courts have sought assistance from judicial bodies in foreign jurisdictions when faced with the need for discovery proceedings outside their national jurisdictions.¹ The letter rogatory, or letter of request, is one method by which courts request international judicial assistance.² Although a grant of international judicial assistance may encourage comity between nations and international cooperation, it may also endanger residents' privacy rights.³ Often a degree of self-interest informs such perspectives, because a country that refuses a request today might be refused its own request tomorrow.⁴

1. See generally Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953) (discussing background, methods, and problems in judicial assistance).

2. See, e.g., *The Signe*, 37 F. Supp. 819, 820 (E.D. La. 1941) (defining letters rogatory as "the medium . . . whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country"); see also *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 134 n.2 (3d Cir. 1985) (defining letters rogatory); Jones, *supra* note 1, at 515-16 (defining international judicial assistance and discussing nomenclature in non-U.S. jurisdictions).

3. *The Signe*, 37 F. Supp. at 820 (stating that letters rogatory are usually granted because of comity between nations); Note, *Reciprocity for Letters Rogatory Under the Judicial Code*, 58 YALE L.J. 1193, 1194 (1949) (noting that letters rogatory are "device[s] of direct international judicial cooperation" that depend on comity for their effectiveness). But see *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991) (stating that U.S. residents' privacy rights need protection and consequently denying judicial assistance); Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1018 & n.19 (1965) (noting other domestic interests "worthy of protection" to justify denying international judicial assistance include "protecting a nation's residents against physical force or the threat thereof, and the safeguarding of military or other state secrets").

4. *Petition of the Comm'r for Reh'g and Suggestion for Reh'g En Banc at 6-7, In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702 (2d Cir. 1991) (No. 90-6229) (quoting U.S. Department of State letter brief to Second Circuit panel dated 3/28/91 [hereinafter Letter Brief]; see Smit, *supra* note 3, at 1020 n.30 (stating that "American refusal to process foreign letters rogatory was not helping to improve the U.S. balance of payments" and not-

In 1964, the U.S. Congress amended the international judicial assistance statute (the "Judicial Assistance Statute" or "Statute"),⁵ a codification of procedures for dealing with other nations' requests for judicial assistance. The 1964 amendments were part of a general bill dealing with judicial procedures in litigation with international aspects.⁶ These amendments sought to encourage reciprocity in the exchange of information between the U.S. and other countries and to reaffirm the U.S. district courts' broad discretion to consider these requests.⁷ In deciding whether to grant requests for in-

ing financial incentives prompted 1964 amendments that broadened judicial assistance legislation).

5. Act of Oct. 3, 1964, Pub. L. 88-619, § 9(a), 78 Stat. 997 (codified as amended at 28 U.S.C. § 1782(a) (1988)) [hereinafter the Judicial Assistance Statute or the Statute]. The Statute, in pertinent part, provides for

[a]ssistance to foreign and international tribunals and to litigants before such tribunals.

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure . . . for taking the testimony. . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

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

28 U.S.C. § 1782(a) (1988).

6. 110 CONG. REC. 596-99, 22,857 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3782-83.

7. S. REP. NO. 1580, 88th Cong., 2d Sess. 2, 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788-90; H.R. REP. NO. 1052, 88th Cong., 1st Sess. 4-9 (1963). Both reports noted that

[s]ubsection (a) of the proposed revised section 1782 [the Judicial Assistance Statute] also describes the foreign proceedings in connection with which U.S. judicial assistance may be granted. A rather large number of requests for assistance emanate from investigating magistrates. The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial

ternational judicial assistance, two factors that the U.S. courts consider include the nature of the requesting party and the stage of development of the non-U.S. proceeding.⁸ As a result of this broad discretion, courts disagree over whether a non-U.S. proceeding must be pending, and if they do not, to what degree the non-U.S. proceeding must have developed before judicial assistance may be granted by a U.S. district court.⁹

This Note argues that U.S. courts should examine requests for international judicial assistance from non-U.S. courts by using a standard that looks to both the characteristics of the requesting party and the nature of the non-U.S. proceeding. Part I discusses international judicial assistance generally and examines the 1964 amendments to the Judicial Assistance Statute. Part II of this Note details the different approaches by which the U.S. circuit courts have dealt with the deletion of the word "pending" from the amended Statute. Part III suggests that U.S. courts responding to letters rogatory should uniformly institute a two-part test that reflects not only the congressional intent and public policy concerns that prompted the 1964 amendments, but that also acknowledges the countervailing privacy interests of U.S. residents subjected to such requests. First, courts should look to whether the non-U.S. party is a tribunal or an interested party. If an adjudicatory tribunal is the source of the judicial assistance request, a lesser degree of development of the non-U.S. proceeding should be required for the granting of assistance. If an interested person, however, is the source of the request, the non-U.S. party should be required to show a more developed non-U.S. proceeding before assistance is granted. This Note concludes that, in light of the present confusion over prevailing approaches to the "non-pending" standards, courts should adopt a uniform standard that negotiates a middle path between granting all requests for international judicial assistance

agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.

S. REP. NO. 1580, at 7, *reprinted in* 1964 U.S.C.C.A.N. at 3788 (citations omitted); H.R. REP. NO. 1052, at 9 (citations omitted).

8. S. REP. NO. 1580, *supra* note 7, at 7-8, *reprinted in* 1964 U.S.C.C.A.N. at 3788.

9. *See infra* notes 103-42 and accompanying text (discussing interpretation of deletion of "pending" from Statute).

and refusing requests for assistance from all but the most advanced non-U.S. proceedings.

I. INTERNATIONAL JUDICIAL ASSISTANCE

A. Background of the U.S. International Judicial Assistance Statute

When a non-U.S. party needs information for litigation outside of the United States and a witness resident in the U.S. refuses to cooperate voluntarily, the non-U.S. party may request international judicial assistance from the U.S. district court in the district in which the witness resides.¹⁰ The information sought may include "testimony or statement . . . a document or other thing."¹¹ Such international judicial assistance often is requested in tax and currency control cases and, to a lesser extent, in criminal prosecutions.¹²

A party may pursue international judicial assistance in the United States through diplomatic channels, according to international law, or under federal or state statutes.¹³ Some nations

10. 28 U.S.C. § 1782(a) (1988). The Statute includes a provision for voluntary production of evidence. *Id.* § 1782(b).

11. *Id.* § 1782(a). The "other thing" sought under the Statute may be a blood sample, for example, for use in a paternity suit. See *In re Letters Rogatory from the City of Haugesund, Nor.*, 497 F.2d 378 (9th Cir. 1974); accord *In re Letter of Request from the Local Court of Pforzheim*, 130 F.R.D. 363 (W.D. Mich. 1989).

12. See, e.g., *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 936 F.2d 702 (2d Cir. 1991) (tax investigation); *Young v. United States Dep't of Justice*, 882 F.2d 633 (2d Cir. 1989) (currency investigation), *cert. denied*, 493 U.S. 1072 (1990); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151 (11th Cir. 1988) (currency investigation), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989); *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) (currency investigation); *In re Letters Rogatory Issued by the Director of Inspection of the Gov't of India*, 385 F.2d 1017 (2d Cir. 1967) (tax investigation); *In re Application of Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988) (bank records requested for Argentine criminal fraud proceeding); *In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, Seoul, Korea*, 428 F. Supp. 109 (N.D. Cal. 1977) (currency investigation), *aff'd*, 555 F.2d 720 (9th Cir. 1977); see also 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. B. ASS'N D.C. 24, 32 (1965) (discussing letters rogatory in criminal proceedings); Brian E. Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look at Recent Problems with Discovery in the United States for Use in Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 432 & nn.10-11 (1989) (discussing expansion of international judicial assistance to include criminal proceedings).

13. BRUNO A. RISTAU, 1 INTERNATIONAL JUDICIAL ASSISTANCE CIVIL AND COMMERCIAL §§ 2-2-1, 2-2-4, 5-2-7 (1990). The non-U.S. party may use diplomatic channels, and send the request to the Department of State, which transmits the request to the appropriate authority or agency. 28 U.S.C. § 1781 (1988); 22 C.F.R. § 92.67(a)

have signed treaties to facilitate international discovery.¹⁴ In 1970, the United States signed the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Convention"), a treaty which to some extent overlapped the expanded Judicial Assistance Statute. Unlike the Statute, the Hague Convention is limited to civil or commercial matters.¹⁵ Furthermore, the Statute is broader with regard to standing and to the parties permitted to utilize the Statute.¹⁶ Because the Hague Convention is non-exclusive in the United States for non-U.S. litigants seeking evidence for use abroad, U.S. practice under the Judicial Assistance Statute is unchanged.¹⁷

(1991); see Note, *Judicial Assistance for the Foreign "Tribunal,"* 1968 DUKE L.J. 981, 982. A letter rogatory should be accompanied by an English translation. 22 C.F.R. § 92.67(b) (1991); Morris H. Deutsch, *Judicial Assistance: Obtaining Evidence in the United States, Under 28 U.S.C. § 1782, for Use in a Foreign or International Tribunal,* 5 B.C. INT'L & COMP. L. REV. 175, 181 (1982); see UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 3.02, 13 U.L.A. 492 (1980) (proposed state statute addressing requests for international judicial assistance); see also RISTAU, *supra*, at 36-37; Jones, *supra* note 1, at 484.

14. See, e.g., Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention].

15. *Id.* at 2557, 847 U.N.T.S. at 241; see also Bomstein & Levitt, *supra* note 12, at 433 n.13.

16. Hague Convention, *supra* note 14, art. I, 23 U.S.T. at 2557, 847 U.N.T.S. at 241; see, e.g., Bomstein & Levitt, *supra* note 12, at 433 n.13; Deutsch, *supra* note 13, at 179-81 nn.24-28.

17. See, e.g., *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 539-40 (1987) (holding that Hague Convention was non-exclusive); see also RISTAU, *supra* note 13, at 227. However, Mr. Ristau argues that if a non-U.S. litigant seeks evidence under the Hague Convention, the district court's discretion regarding letters rogatory is removed. *Id.* at 227-28. But see Philip Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 AM. J. INT'L L. 104, 105 (1973) (stating that ratification of Hague Convention would effect "no major changes in U.S. procedure [nor require any] changes in U.S. legislation or rules"). Mr. Amram's statement was repeated at the Senate advice and consent hearings. S. EXEC. REP. No. 92-95, 92d Cong., 2d Sess. 5 (1972); RISTAU, *supra* note 13, at 228 n.83.

In *Société Nationale*, the Court noted that "the scope of American discovery is often significantly broader than is permitted in other jurisdictions." *Société Nationale*, 482 U.S. at 542; see also Jones, *supra* note 1, at 530-32. Indeed, "discovery conducted by the parties, as is common in the United States, is alien to the legal systems of civil-law nations, which typically regard evidence gathering as a judicial function." *Société Nationale*, 482 U.S. at 550 (Blackmun, J., concurring in part and dissenting in part). Many civil law courts do not allow extensive pre-trial discovery, unlike those in the United States. See, e.g., *id.* at 526 n.6 (discussing French blocking statute which prohibits some kinds of discovery requests); Brief for the Federal Republic of Germany

In the United States, litigation involving discovery for use in non-U.S. courts or tribunals has largely involved the Judicial Assistance Statute.¹⁸ If a non-U.S. party seeks information from a cooperative witness, the non-U.S. party may appoint a commission.¹⁹ A commission does not act through the U.S. district courts, but pursues the evidence itself.²⁰ However, if the U.S. witness will not cooperate voluntarily, the non-U.S. party can apply to the district courts for aid by sending a letter rogatory.²¹

as *Amicus Curiae* at 13-17, *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (No. 85-1695) (discussing blocking statutes). Furthermore, civil law jurisdictions require specific, often formal, questions. *See, e.g., Jones, supra* note 1, at 530-31 (discussing civil law procedural problems); Brief for the Republic of France as *Amicus Curiae* Supporting Petitioners at 15-16, *Société Nationale* (No. 85-1695) (discussing specifics of French discovery). Therefore, a non-U.S. attorney accustomed to continental discovery processes and unfamiliar with U.S. discovery rules, is less likely to engage in any "fishing expeditions," whereas his U.S. counterpart, accustomed to broad pretrial discovery, takes the opposite approach. *See RISTAU, supra* note 13, at 231. Comity, therefore, is not served by a course of action that renders resort to the Hague Convention optional, because it does not "further[] . . . the development of an ordered international system." *Société Nationale*, 482 U.S. at 567 (Blackmun, J., concurring in part and dissenting in part).

18. Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 599 (1990). U.S. litigation and commentary on the Hague Convention has focused on using the treaty to obtain evidence that is available outside of the United States for use in U.S. proceedings. *See, e.g., Société Nationale*, 482 U.S. 522 (allowing U.S. plaintiffs access to information from foreign national that was party to litigation under Hague Convention).

19. *United States v. Mosby*, 133 U.S. 273, 282 (1890) (discussing unofficial consular acts including execution of commission for taking testimony under authority of state or territorial tribunal).

20. *See, e.g., Nelson v. United States*, 17 F. Cas. 1340, 1341 n.2 (C.C.D. Pa. 1816) (No. 10,116) (discussing denial of commission's request for assistance in Havana because of perceived interference with judiciary's rights); Werner Gallecki, Address, in *LETTERS ROGATORY—A SYMPOSIUM* 35-43 (Bernard A. Grossman ed., 1956) (discussing difficulties inherent in commissions); Stahr, *supra* note 18, at 600 n.13 (stating alternative to letter rogatory is commission); Note, *supra* note 3, at 1193-94 (comparing commissions and letters rogatory with commentary on problems inherent in commission). A commission may be executed only with willing witnesses, because the commission has no access to judicial procedures to enforce compliance with discovery requests. Gallecki, *supra*, at 37.

21. 28 U.S.C. § 1782(a) (1988); 22 C.F.R. § 92.67(a), (c) (1991); *see, e.g., Nelson*, 17 F. Cas. at 1341 (discussing letters rogatory issued from U.S. district court to Havana tribunal when authorities prevented execution of commission); *see also RISTAU, supra* note 13, at 38-39 (discussing procedure and suggesting strongly that non-U.S. parties employ an attorney to pursue discovery); Note, *supra* note 13, at 982 (discussing procedures of international judicial assistance). According to the Advisory Committee notes, a party should issue both a commission and a letter rogatory requesting international judicial assistance, providing that the letter rogatory is to be executed if

International judicial assistance by use of letters rogatory has been available in the United States by statute since 1855.²² Letters rogatory can be more effective than commissions because the executing courts have recourse to their own procedures to compel recalcitrant or reluctant witnesses to comply with their judicial decrees.²³ The evidence may be inadmissible in the non-U.S. proceeding, however, due to procedural differences between the jurisdictions and the fact that the petitioned courts may employ their own procedures to procure the requested evidence.²⁴

Under the Judicial Assistance Statute, a request for assistance may be sent either by a non-U.S. tribunal or court or by an interested person.²⁵ The non-U.S. individual files a "sec-

the commission is unable to obtain the necessary information. FED. R. CIV. P. 28 advisory committee's note to 1963 amendment. The non-U.S. party may set forth its request in any written form. 22 C.F.R. § 92.67(c) (1991); RISTAU, *supra* note 13, at 38. Civil law courts can use letters rogatory for purposes other than the production of evidence. *See, e.g., In re Letters Rogatory from the City of Haugesund, Nor.*, 497 F.2d 378 (9th Cir. 1974) (using letters rogatory to give notice of suit); Stahr, *supra* note 18, at 600 n.12 (citing cases that deal with alternative civil law uses for letters rogatory). *But see In re Request from L. Kasper-Ansermet*, 123 F.R.D. 622 (D.N.J. 1990) (holding that Swiss magistrate cannot use discovery statute to pronounce indictment at deposition).

22. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855) (codified as amended at 28 U.S.C. § 1782(a) (1988)) [hereinafter Act of 1855]. The Act of 1855 granted broad powers to U.S. circuit courts to compel witnesses to appear in court and to be deposed as though the witnesses were in a U.S. judicial proceeding. *Id.* The Act of 1855 addressed requests from non-U.S. courts and permitted only the gathering of testimony. *Id.* The Act of 1855, however, was omitted from the index of the Federal Register for several years and then ignored by the federal courts. *See Jones, supra* note 1, at 540-41.

23. 28 U.S.C. § 1782(a) (1988); 22 C.F.R. § 92.67(a) (1991). *See generally Jones, supra* note 1 (discussing problems with letters rogatory, including lengthy delays). *See also Deutsch, supra* note 13, at 176-79 (discussing procedural problems with letters rogatory, including delays); Stahr, *supra* note 18, at 600 n.13 (comparing letters rogatory and commissions). By the 1964 amendment, Congress hoped to "provid[e] equitable and efficacious procedures" of international judicial assistance. S. REP. NO. 1580, *supra* note 7, at 2, reprinted in 1964 U.S.C.C.A.N. at 3783; H.R. REP. NO. 1052, *supra* note 7, at 4.

24. *See* 28 U.S.C. § 1782(a) (1988) (giving district court discretion to prescribe procedure and, if not prescribed, providing that evidence be taken in accordance with Federal Rules of Civil Procedure); 22 C.F.R. § 92.67(a) (1991); *see, e.g., In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 692-93 (D.C. Cir. 1989) (discussing English court's request that evidence be taken according to English procedure); *see also Stahr, supra* note 18, at 600 n.13.

25. 28 U.S.C. § 1782(a) (1988) (providing that "any interested person" may pursue discovery).

tion 1782" request with the applicable U.S. district court,²⁶ or the non-U.S. tribunal or court requests assistance from the district court through a letter rogatory.²⁷ If the U.S. court initially denies either request, it returns the request to the non-U.S. party, which may choose to modify the request and send it back to the U.S. court.²⁸

If the U.S. district court decides to grant assistance to the non-U.S. party, it issues an order appointing an individual whose task is to execute the letter rogatory.²⁹ The district court may order an individual to comply with the evidentiary request, often by subpoena.³⁰ If the subpoenaed party, or the party that is being investigated, believes that the information should not be released, it may move to vacate the court order and quash the subpoena.³¹

Since the Statute's enactment in 1855, Congress has vacillated over the extent to which information should be available for use in litigation outside the United States, and over the parties to whom such information should be accessible.³² Initially, the Statute espoused an expansive view towards granting inter-

26. *Id.*; see *supra* note 5 (quoting text of Statute with relevant procedure). If the witness is reluctant to testify or if there is a problem under state law regarding the evidence sought, the non-U.S. party must resort to the courts. 28 U.S.C. § 1782(a) (1988); see RISTAU, *supra* note 13, at 38.

27. 28 U.S.C. § 1782(a) (1988); 22 C.F.R. § 92.67(a) (1991); Bomstein & Levitt, *supra* note 12, at 434; Deutsch, *supra* note 13, at 179.

28. *Cf.* 22 C.F.R. § 92.67(d) (1991); Jones, *supra* note 1, at 539.

29. 28 U.S.C. § 1782(a) (1988); 22 C.F.R. § 92.67(a) (1991); see, e.g., RISTAU, *supra* note 13, at 45. The individual is referred to as a Commissioner, and may be a U.S. Magistrate, an Assistant U.S. Attorney, a court clerk, a private attorney, a court reporter, a non-U.S. consular official, or a non-U.S. judge. *Id.* at 45; see also *id.* at 41 (reproducing copy of order); Lucien LeLievre, Address, in LETTERS ROGATORY—A SYMPOSIUM, *supra* note 20, at 9-21 (discussing U.S. procedure and appointment of commissioner).

30. LeLievre, *supra* note 29, at 12-13.

31. See, e.g., *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 687 F. Supp. 880, 882-83 (S.D.N.Y.) (concerning Panamanian corporations that moved to quash subpoenas seeking bank records allegedly relating to embezzler), *modified*, 700 F. Supp. 723 (1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991); *In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-au-Prince, Republic of Haiti*, 669 F. Supp. 403 (S.D. Fla. 1987) (concerning former government official who moved to quash subpoenas seeking bank records allegedly relating to criminal activity while official was in office).

32. Compare 28 U.S.C. § 1782(a) (1988) with Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855) (codified as amended at 28 U.S.C. § 1782(a) (1988)) and Act of Mar. 3, 1863, ch. 95, 12 Stat. 769-70 (1863) (codified as amended at 28 U.S.C. § 1782(a)

national requests for judicial assistance.³³ A later version of the Statute required that the requested information be used in a suit for the recovery of money or property, and that the government of the court requesting assistance be a party to the litigation or have an interest in the suit.³⁴ The revised Statute thus severely limited the scope of the Judicial Assistance Statute.³⁵ After World War II, Congress began to expand the scope of the Statute once again.³⁶

B. *The 1964 Amendment and Its Impact*

In 1964, Congress made four changes to the Judicial

(1988)) and *supra* note 22 and *infra* note 34. See, e.g., Stahr, *supra* note 18, at 600-05 (discussing development of international Judicial Assistance Statute).

33. Compare 28 U.S.C. § 1782(a) (1988) with Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (1855) (codified as amended at 28 U.S.C. § 1782(a) (1988)) and Act of Mar. 3, 1863, ch. 95, 12 Stat. 769-70 (1863) (codified as amended at 28 U.S.C. § 1782(a) (1988)) and *supra* note 22 and *infra* note 34. See, e.g., Stahr, *supra* note 18, at 600-05 (discussing development of international Judicial Assistance Statute).

34. Act of Mar. 3, 1863, ch. 95, 12 Stat. 769-70 (1863) (codified as amended at 28 U.S.C. § 1782(a) (1988)). Indeed, one commentator noted that in the period from 1863 to 1948, "federal courts . . . generally denied discovery for use abroad, relying on the limits of the 1863 Act, and dismissing the 1855 Act as procedural. In no reported federal case from this period was discovery for use abroad allowed." Stahr, *supra* note 18, at 601-02 (citations omitted). By 1949, congressional sentiment had begun to return to a more expansive view of international judicial assistance. See *infra* note 36 (quoting, in pertinent part, 1948 version of Statute).

For a complete list of the texts of the international Judicial Assistance Statutes and their subsequent amendments, see the Appendix in *In re* Letter Rogatory from the Justice Court, District of Montréal, Can., 523 F.2d 562, 566-69 (6th Cir. 1975).

35. See *In re* Spanish Consul's Petition, 22 F. Cas. 854, 854 (S.D.N.Y. 1867) (No. 13,202) (denying assistance because request did not fit within narrow confines of 1855 Act or 1863 Act); see also Jones, *supra* note 1, at 540 (discussing pre-1948 versions of Judicial Assistance Statute).

36. Act of June 25, 1948, ch. 646, 62 Stat. 949 (1948) (codified as amended at 28 U.S.C. § 1782(a) (1988)). The 1948 Statute provided for

[t]estimony for use in a foreign country.

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

The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Id. The Statute was further amended in 1949 to state that "[t]he deposition of any witness within the United States to be used in any judicial proceeding pending in any court." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)).

Assistance Statute in an attempt to broaden the scope of international judicial assistance and to spur reciprocity.³⁷ First, Congress expanded the category of information that could be requested from a court to include "testimony or [a] statement or . . . a document or other thing."³⁸ Second, it replaced a "judicial proceeding" with "a proceeding in a foreign or international tribunal."³⁹ Third, Congress broadened the statutory definition of the requesting body from a "court" to a "foreign or international tribunal or . . . any interested person."⁴⁰ Fourth, Congress deleted the adjective "pending," which had previously modified the prior "judicial proceeding."⁴¹

While commentators and courts have disputed the significance of the changes, most agree that by enacting the 1964 amendments Congress intended to broaden the ambit of the Judicial Assistance Statute.⁴² However, the deletion of the "pending" requirement in addition to the expanded category of the requesting fora has proven troublesome for U.S. courts in deciding whether to grant international judicial assistance.⁴³

U.S. courts have experienced difficulty in interpreting the congressional intent expressed in the 1964 amendments because Congress did not discuss the language of the amendments.⁴⁴ Congress did not redraft the Statute, nor address the

37. S. REP. NO. 1580, *supra* note 7, at 7-9, reprinted in 1964 U.S.C.C.A.N. at 3788; H.R. REP. NO. 1052, *supra* note 7, at 1-3, reprinted in 1964 U.S.C.C.A.N. at 3792-94.

38. 28 U.S.C. § 1782(a) (1988); *see, e.g.*, Bomstein & Levitt, *supra* note 12, at 433-34; Stahr, *supra* note 18, at 604-05. The 1964 expansion of the types of information available by statute was the first since the Act of 1855 was adopted. Stahr, *supra* note 18, at 604-05.

39. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)) with 28 U.S.C. § 1782(a) (1988).

40. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)) with 28 U.S.C. § 1782(a) (1988).

41. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)), with 28 U.S.C. § 1782(a) (1988). *See* Bomstein & Levitt, *supra* note 12, at 438-40; Stahr, *supra* note 18, at 623-24.

42. Compare *In re* Letters Rogatory from the Tokyo Dist., Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976) (no pending procedure necessary) with *In re* Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991) (proceeding must be imminent); *see also* Bomstein & Levitt, *supra* note 12, at 431; Deutsch, *supra* note 13, at 178; Smit, *supra* note 3, at 1018; Stahr, *supra* note 18, at 604; Note, *supra* note 13, at 985.

43. *See infra* text accompanying notes 103-42 (discussing split among U.S. circuit courts regarding interpretation of deletion of "pending" from Statute).

44. 110 CONG. REC. 596-97 (1964) (discussing only whether U.S. citizens could be compelled to testify in non-U.S. litigation); *see, e.g.*, Amram, *supra* note 12, at 26

individual changes suggested.⁴⁵ Instead, Congress incorporated as legislative history the Fourth Annual Report of the Commission on International Rules of Judicial Procedure.⁴⁶ Courts have focused on the individual changes, and some courts and commentators argue that this absence of congressional debate reflects an absence of congressional intent.⁴⁷ Consequently, the Senate and House Reports are not dispositive, and should not control an interpretation of the amended Statute. However, although the specific deletion of the word "pending" was unaccompanied by congressional comment, the Statute as a whole was aimed at "improv[ing] practices of international cooperation in litigation" and encouraging reciprocity from other countries in international judicial assistance proceedings.⁴⁸ Therefore, any reading of the Statute should be done in the context of the intent behind the Statute as a whole, not only in light of the intent behind individual textual changes.

1. The Characteristics of the Requesting Party

The 1964 amendments broadened the scope of the Statute by replacing the phrase, "a judicial proceeding," with the phrase "a proceeding in a foreign or international tribunal."⁴⁹ The phrase "tribunal," chosen for its "neutral and encompassing" character, therefore widened the range of parties that may pursue discovery in U.S. courts for information to be used outside the United States.⁵⁰ This phrase admits quasi-judicial

(noting that law as signed was almost identical to original recommendations); Bomstein & Levitt, *supra* note 12, at 439 (stating that Congress did not redraft Statute, but only adopted committee report); Note, *supra* note 13, at 984 (commenting that Congress enacted Commission report "verbatim").

45. See 110 CONG. REC. 596-99, 22,857 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3782-83.

46. H.R. DOC. NO. 88, 88th Cong., 1st Sess. (1963); see 110 CONG. REC. 596-98, 22,857 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3782-83; see also Bomstein & Levitt, *supra* note 12, at 439. For more on the Commission, see, e.g., Amram, *supra* note 12, at 24-25; Smit, *supra* note 3, at 1015-17 & n.11.

47. See, e.g., *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991) (noting that deletion of word "pending" from Statute "might have been inadvertent"); Bomstein & Levitt, *supra* note 12, at 439.

48. 110 CONG. REC. 22,857 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782.

49. Compare *supra* note 36 (quoting text of 1948 Statute) with *supra* note 5 (quoting text of 1964 Statute).

50. Smit, *supra* note 3, at 1021 n.36.

and administrative proceedings that were not included under the prior versions of the Statute.⁵¹ For example, the Statute now encompasses the French *juge d'instruction*, an official who conducts investigations, interviews witnesses and the accused, compiles a *dossier* of all of the evidence pertaining to an investigation, and evaluates evidence to determine whether the prosecution should proceed.⁵² Although the amended Statute has a wider reach than its predecessors, it is not wholly unrestricted.⁵³ The requesting party must still fit within the statutory scheme in order to receive the requested information.⁵⁴

a. A "Foreign or International Tribunal"
as Requesting Party

The scope of the "tribunal" provision⁵⁵ in the 1964 amendment was first interpreted by the U.S. Court of Appeals for the Second Circuit in *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*.⁵⁶ The Director in *India* sought an individual's bank records to determine a tax assessment that was at issue in Indian proceedings.⁵⁷ In *India*, the Second Circuit acknowledged the broader import of a "tribunal" as opposed to a "judicial proceeding," but found that the

51. See S. REP. NO. 1580, *supra* note 7, at 7-8, reprinted in 1964 U.S.C.C.A.N. at 3788-89 (including investigating magistrates under statutory umbrella).

52. A.E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441, 442 (1960); see also Bomstein & Levitt, *supra* note 12, at 441. A French *juge d'instruction* acts in a fashion "somewhat parallel" to the grand jury in the Anglo-American legal system. *In re Letters Rogatory Issued by Director of Inspection of the Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967). The *juge d'instruction* oversees the investigation and examines the witnesses. *Id.* However, "[t]he *juge d'instruction* represents neither the interest of the police nor that of the state prosecutors, the *parquet*, and his aim is simply to ensure that justice is done." Anton, *supra*, at 443. Before the 1964 amendments, investigations of French *juges d'instruction* "were only dubiously within" the Statute. *India*, 385 F.2d at 1020. A 1956 paper noted that about half of the letters rogatory received were from *juges d'instruction*. *Id.* But see Note, *supra* note 13, at 986-93 (criticizing Second Circuit's interpretation of Statute and description of French *juge d'instruction* as example of "tribunal").

53. See *India*, 385 F.2d at 1021 (noting "that concept [of a tribunal] is not so broad as to include all the plethora of administrators whose decisions affect private parties and who are not entitled to act arbitrarily").

54. *Id.* at 1020.

55. 28 U.S.C. § 1782(a) (1988) (referring to "request made . . . by a foreign or international tribunal").

56. 385 F.2d 1017 (2d. Cir. 1967).

57. *Id.* at 1017-18.

tribunal requirement still limited parties' access to discovery.⁵⁸ The Second Circuit held that an Indian Income Tax officer was not a "tribunal" within the meaning of the Statute.⁵⁹ A tribunal, according to the court, was adjudicatory in nature, and maintained a certain amount of objectivity in that its prosecutorial and adjudicative functions were separate.⁶⁰ The court held that, unlike an impartial tribunal, the Indian Income Tax official had an "institutional interest" in a particular result.⁶¹ Consequently, because the court decided that the Indian Income Tax official had an institutional interest in the outcome of the proceeding and was not an adjudicatory investigating magistrate, the court denied assistance.⁶²

A subsequent Second Circuit decision followed the *India* standard and denied assistance to the Colombian Superintendent of Exchange Control who, suspecting a violation of Colombia's currency laws, sought access to a suitcase that contained US\$250,000 that had been left in a New York airport.⁶³ The court denied assistance to the Colombian Superintendent because the Superintendent needed the suitcase to *begin* the investigation.⁶⁴ The court concluded that the Superintendent's function was merely investigatory and that he had an "institutional interest" in the outcome.⁶⁵

Although the U.S. courts denied judicial assistance in the aforementioned instances, they did acknowledge the congressional intent to expand the definition of "tribunal" to encom-

58. *Id.* at 1020. In *India*, a Director of Inspection had presented letters rogatory for the District Court in the Southern District of New York pursuant to the Income Tax Act of the Government of India. *Id.* at 1017. At the Director's request, the court appointed a commissioner who moved for the issuance of a subpoena requiring the New York bank to produce books and papers in response to the letters rogatory. *Id.* at 1017-18. The individual under audit moved to vacate the order, to quash the subpoenas, and to deny the Indian Income Tax Officer access to the requested financial information. *Id.* at 1018.

59. *Id.* at 1020-21. The court quoted S. REP. No. 1580, *supra* note 7, at 7-9, reprinted in 1964 U.S.C.C.A.N. at 3788-90. *India*, 385 F.2d at 1019.

60. *In re* Letters Rogatory Issued by Director of Inspection of the Gov't of India, 385 F.2d 1017, 1020-21 (2d Cir. 1967).

61. *Id.*

62. *Id.* at 1021-22.

63. *Fonseca v. Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980).

64. *Bomstein & Levitt*, *supra* note 12, at 443 n.62 (discussing facts of *Fonseca* not mentioned in appellate decision).

65. *Fonseca*, 620 F.2d at 324 (quoting *In re* Letters Rogatory Issued by Director of Inspection of the Gov't of India, 385 F.2d 1017, 1020 (2d Cir. 1967)).

pass non-traditional courts and administrative agencies.⁶⁶ The nature of a non-U.S. party is not always easily defined, given the differences among judicial systems that exist world-wide.⁶⁷ To qualify as a tribunal, the requesting party must retain a degree of impartiality—an “adjudicatory connotation.”⁶⁸ U.S. courts have determined that the requesting party possesses the requisite adjudicatory characteristics and impartiality when no connection exists between the governmental interest in prosecution and the fact-finder.⁶⁹

b. An “Interested Party” as Requesting Party

In addition to requests from non-U.S. tribunals, the 1964 version of the Statute provides an alternate route to international discovery in U.S. courts.⁷⁰ If a “tribunal” is insufficiently adjudicatory to qualify under the Statute, an “interested person” or a representative individual may be able to

66. *India*, 385 F.2d at 1020 (quoting S. REP. NO. 1580, *supra* note 7, at 7-8, reprinted in 1964 U.S.C.C.A.N. at 3788); see also *Fonseca*, 620 F.2d at 323 (quoting S. REP. NO. 1580, *supra* note 7, at 7-8, reprinted in 1964 U.S.C.C.A.N. at 3788).

67. See Jones, *supra* note 1, at 530-32. Difficulties commonly arise due to the differences in discovery procedures among common law and civil law countries. *Id.*

68. *Fonseca v. Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980).

69. See, e.g., *id.* at 323; *India*, 385 F.2d at 1020; *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 687 F. Supp. 880, 884 (S.D.N.Y.), modified, 700 F. Supp. 723 (S.D.N.Y. 1988), stay granted, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 474 reporters' note 4 (1986). The *Restatement* notes that “[t]he critical factor in determining whether a foreign body qualifies as a tribunal under the [S]tatute is whether both parties to a litigation are represented before it and receiving fair hearing and impartial determination.” *Id.* However, some commentators find that this definition is too narrow. See, e.g., Stahr, *supra* note 18, at 617-19 (asserting that “‘common meaning’ of term ‘tribunal’ argues against limiting it to courts and other judicial bodies” and concluding that courts should rely on discretion rather than narrow definition of tribunal).

70. 28 U.S.C. § 1782(a) (1988) (allowing “any interested person” to pursue discovery); see, e.g., *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 689-90 (D.C. Cir. 1989) (deciding that Crown Prosecution Service was an “interested person”); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1154-55 (11th Cir. 1988) (holding that Minister of Legal Affairs was “interested person” under Statute), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989); *In re Letter Rogatory from the Justice Court, Dist. of Montréal, Can.*, 523 F.2d 562, 566 (6th Cir. 1975) (allowing Canadian prosecutor as “interested person” to pursue discovery for criminal investigation); see also Bomstein & Levitt, *supra* note 12, at 446 (interpreting “interested person” as individual with “independent interest in a potential case; or . . . actual litigant in a pending case”).

pursue the discovery.⁷¹ Persons that might be considered "interested parties" for the purpose of the Statute include an attorney for the non-U.S. party, an executor for a non-U.S. estate, a non-U.S. bankruptcy trustee, a non-U.S. consular official, and any other non-U.S. official with an interest in the litigation.⁷² Moreover, a non-U.S. litigant himself may qualify as an "interested person."⁷³ For example, although a prosecutor may have an institutional, and therefore, insufficiently adjudicatory interest in the outcome of the proceedings, the Statute nonetheless allows the individual to pursue the compelled discovery, limited only by the discretion of the district courts.⁷⁴

2. The Nature of the Proceedings

In determining whether to grant assistance, U.S. courts often distinguish between investigations that precede an adjudicatory proceeding and the adjudicatory proceedings themselves.⁷⁵ The U.S. Court of Appeals for the Ninth Circuit in *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*⁷⁶ denied judicial assistance to the Canadian Commission of Inquiry when it sought to compel testimony relating to all aspects of a multi-million dollar for-

71. 28 U.S.C. § 1782(a) (1988); *see, e.g., United Kingdom*, 870 F.2d at 689-90; *Trinidad & Tobago*, 848 F.2d at 1155; *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976). *But see In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 704 (2d Cir. 1991); Stahr, *supra* note 18, at 618-19.

72. RISTAU, *supra* note 13, at 38; *see, e.g., Trinidad & Tobago*, 848 F.2d at 1155 (holding non-U.S. legal affairs minister to be "interested person"); *Young v. United States Dep't of Justice*, No. 87 Civ. 8307, 1988 WL 131302 (S.D.N.Y. Nov. 28, 1988) (holding attorney general to be "interested person"), *aff'd in part*, 882 F.2d 633 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990).

73. *See, e.g., Smit, supra* note 3, at 1027.

74. *See, e.g., In re Letter Rogatory from the Public Prosecutor's Office at the Regional Court of Hamburg, F.R.G.*, No. M-19-88, 1988 U.S. Dist. LEXIS 14,088, at *3 (S.D.N.Y. June 21, 1988) (holding that "letters rogatory do not lie under [the Statute] if the applicant is a member of a foreign nation's executive branch"). *But see United Kingdom*, 870 F.2d at 689-90 (permitting prosecutor to pursue discovery under 28 U.S.C. § 1782(a) as interested person); Stahr, *supra* note 18, at 618-19.

75. *See, e.g., In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Man., Can.*, 59 F.R.D. 625, 629 (N.D. Cal. 1973), *aff'd*, 488 F.2d 511 (9th Cir. 1973); *Brazil*, 936 F.2d at 705; *Deutsch, supra* note 13, at 187; *see also supra* notes 103-42 and accompanying text (discussing different interpretations of deletion of word "pending" from Statute).

76. 488 F.2d 511 (9th Cir. 1973).

estry and industrial development project in Manitoba.⁷⁷ The Ninth Circuit noted that the district court found that the Canadian Commission's purpose in seeking the information was investigatory and unrelated to a judicial or quasi-judicial controversy.⁷⁸ The district court found that the Commission was not a "tribunal" because it lacked the power "to make a binding adjudication of facts or law as related to the rights of litigants."⁷⁹ The Ninth Circuit, affirming the district court, held that the investigation was divorced from a judicial or quasi-judicial controversy.⁸⁰

Similarly, in *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*,⁸¹ the Ninth Circuit found that the Japanese court that issued the letters rogatory did not act in an adjudicatory capacity.⁸² Instead, the court believed that the Japanese court, which was investigating the alleged payment of bribes to Japanese citizens by a U.S. aircraft corporation, acted in an investigatory capacity at the request of the Tokyo District Public Prosecutor's Office.⁸³ Although the individuals who were subpoenaed were neither defendants nor subjects under investigation,⁸⁴ unlike the decision in *Manitoba*, the Ninth Circuit in *Tokyo* used its discretion to issue the requested subpoenas.⁸⁵

The most recent case to speak to this issue, *In re Letter of Request from the Government of France*,⁸⁶ was decided by the U.S.

77. *Id.* at 512 (affirming *Manitoba*, 59 F.R.D. at 629).

78. *Manitoba*, 488 F.2d at 512. The district court noted that nothing in the legislative history indicated an intent "to include institutions whose purpose is to investigate and report to the executive or legislative branches of government." *Manitoba*, 59 F.R.D. at 629.

79. *Manitoba*, 59 F.R.D. at 630.

80. *Manitoba*, 488 F.2d at 512.

81. 539 F.2d 1216 (9th Cir. 1976).

82. *Id.*

83. *Id.* at 1218.

84. *Id.*

85. *Id.* at 1218-19. The *Tokyo* court distinguished its decision from the *Manitoba* cases by noting that

[in the *Manitoba* cases] the letters rogatory . . . were presented by an entity whose sole power was to make recommendations to a non-judicial body [whereas] . . . the Tokyo public prosecutor is empowered to make a final decision as to whether or not to prosecute an individual and the Tokyo District Court is empowered to determine whether or not an investigation is entitled to judicial assistance.

Id. at 1219.

86. 139 F.R.D. 588 (S.D.N.Y. 1991).

District Court for the Southern District of New York. In *France*, the non-U.S. party, a French *juge d'instruction*, sought documents and physical evidence pertaining to a criminal investigation.⁸⁷ The court decided that the proceedings instituted by the French *juge d'instruction* were sufficiently adjudicatory in nature to qualify for assistance under the Statute.⁸⁸ The supporting facts included accounts of court proceedings and a parallel criminal investigation.⁸⁹ Thus, the district court focused on the identity of the requesting party to determine that the proceedings came within the meaning of a "foreign or international tribunal" under the Statute.⁹⁰

C. Countervailing Concerns in Granting Requests for International Judicial Assistance

Although international comity may be a powerful motive counselling U.S. courts to grant international assistance, it is not the sole factor in U.S. courts' consideration of requests for international judicial assistance. U.S. courts may also consider the rights of those against whom the discovery is sought⁹¹ and other considerations, such as reciprocity, admissibility and discoverability.⁹²

1. District Courts Have Broad Discretion in Deciding Requests for International Judicial Assistance

Congress gave U.S. district courts wide discretion to consider many factors in evaluating requests for international assistance.⁹³ Neither the amended Statute nor its implementing regulations includes standards to guide the exercise of that discretion.⁹⁴ In the legislative history of the Statute, Congress

87. *Id.* at 589; *see supra* note 52 (discussing role of French *juge d'instruction*).

88. *Id.* at 591.

89. *Id.* at 589.

90. *Id.* at 590-91.

91. *See, e.g., In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991). Other dangers may include overuse of discovery, indiscretion, invasions of privacy, or general abuse of judicial processes. Note, *supra* note 13, at 992.

92. *See infra* text accompanying notes 93-98 (discussing district courts' discretion and factors considered by district courts in evaluating requests for international assistance).

93. 28 U.S.C. § 1782(a) (1988) (stating that "district court . . . may order" an individual to comply with a letter rogatory) (emphasis added).

94. *Id.*; *see* Taking of Depositions in the United States Pursuant to Foreign Let-

referred to several factors that U.S. courts might consider, including the "nature and attitudes" of the requesting country's government or the "character of the proceedings" in that country or before the non-U.S. tribunal.⁹⁵ A court can use its discretion to grant or deny assistance based on an evaluation of the probable merit of the information sought, on the identities of the litigants or the requesting parties, on the likelihood of success of the requesting party in the non-U.S. proceeding, or on the political importance of a case.⁹⁶

Additional factors that courts may include in the international judicial assistance calculus may be the existence of reciprocity and the degree to which the information requested is admissible or discoverable in the non-U.S. jurisdiction.⁹⁷

ters Rogatory, 22 C.F.R. § 92.67(a) (1991) (stating that district court "may order" an individual to testify or produce evidence) (emphasis added); Bomstein & Levitt, *supra* note 12, at 447. Some commentators have suggested that this grant of discretion is too broad because it allows a district court to bypass some of the steps in the statutory analysis. See, e.g., *id.* at 447-58 (discussing discretion and lack of standards); Deutsch, *supra* note 13, at 185 (noting that Ninth Circuit in *Tokyo* did not address "tribunal" inquiry, and may have abused its discretion).

95. S. REP. NO. 1580, *supra* note 7, at 7, reprinted in 1964 U.S.C.C.A.N. at 3788; H.R. REP. NO. 1052, *supra* note 7, at 9.

96. 28 U.S.C. § 1782(a) (1988) (stating "district court . . . may order [a witness] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal") (emphasis added); see Smit, *supra* note 3, at 1029; see also Bomstein & Levitt, *supra* note 12, at 447-50 (discussing lack of guidelines for discretion); *id.* at 448 n. 84 (quoting Reporter for U.S. Commission on International Rules of Judicial Procedure who stated that district court could have used its discretion to "properly have refused to order the production of evidence for use in the Soviet Union's criminal prosecution of Gary Powers"); Deutsch, *supra* note 13, at 186 (arguing that *India* and *Tokyo* decisions are irreconcilable with regard to "tribunal" issue, and either interpretation of "tribunal" could result, "[d]epending upon a court's desire to aid foreign nations" under Statute). *But see* Stahr, *supra* note 18, at 608 n.55 (criticizing notion that courts cannot make political decisions, because courts regularly decide cases with foreign policy implications); Note, *supra* note 13, at 993 (advocating use of discretion rather than "destructively narrow" interpretation of tribunal).

97. See, e.g., *In re Lo Ka Chun v. Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988) (remanding for determination as to discoverability of evidence sought); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (holding district court must decide whether information would be discoverable in non-U.S. country before proceeding with grant of assistance), *cert. denied sub nom.* Azar v. Minister of Legal Affairs, 488 U.S. 1005 (1989); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 137 (3d Cir. 1985) (holding reciprocity is not required for granting international judicial assistance request); *In re Court of Comm'r of Patents for the Republic of S. Afr.*, 88 F.R.D. 75, 77 (E.D. Pa. 1980) (prohibiting non-U.S. litigant from circumventing his country's discovery rules by using U.S. letters rogatory); see also Amram, *supra* note 12, at 28 (stating no reciprocity required);

None of these factors, taken in isolation, is definitive, and commentators and courts disagree as to the extent to which these factors should control the outcome of a request for international judicial assistance.⁹⁸

2. Privacy Concerns May Block the Judicial Assistance Request

A chief reason for denying requests for international assistance is the concern that the broader U.S. discovery rules, combined with an equally broad grant of international assistance, would render U.S. residents vulnerable to harassment by means of international litigation.⁹⁹ Alternatively, U.S. courts fear that international parties might seek otherwise confidential information in discovery on the basis of only the vaguest hint of wrongdoing to justify the investigation.¹⁰⁰ Such concerns may be grouped under the rubrics of "due process"¹⁰¹ and "privacy."¹⁰²

II. DIFFERING INTERPRETATIONS OF THE "PENDING" REQUIREMENT

The 1964 amendment to the Judicial Assistance Statute deleted the word "pending" when it modified the Statute's re-

Bomstein & Levitt, *supra* note 12, at 450-52 (arguing that because Congress wanted to stimulate reciprocity by means of 1964 amendment, it is inappropriate for courts to consider existence of reciprocity in their evaluation of requests for assistance); *id.* at 454-57 (discussing admissibility); Stahr, *supra* note 18, at 609-13 (contending that federal courts should not look at discoverability in evaluating requests for international assistance).

98. See, e.g., RISTAU, *supra* note 13, § 2-1-4(7) n.5 (noting that U.S. courts may consider existence of reciprocity as one factor in analysis). *But see, e.g.*, Stahr, *supra* note 18, at 608-09 (arguing that reciprocity is not important factor).

99. See, e.g., Note, *supra* note 13, at 992-93. The United States has much broader discovery rules than many civil law countries. See *supra* note 21. A lower threshold for access to this broader discovery prompts fears of abuse. Bomstein & Levitt, *supra* note 12, at 462-69.

100. See, e.g., *Trinidad & Tobago*, 848 F.2d at 1156 (referring to possibility of non-U.S. party conducting "fishing expedition").

101. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); see also *Mathews v. Eldridge*, 424 U.S. 319, 322 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clause of the 5th or 14th Amendment.").

102. See *Katz v. United States*, 389 U.S. 347, 350 (1976) ("[A] general right to privacy . . . [is] the right to be let alone by other people.").

quirement of "a pending judicial proceeding" to "a proceeding in a foreign or international tribunal."¹⁰³ Despite the deletion of the word "pending," however, U.S. courts have adopted standards that still require some degree of development in the non-U.S. proceeding.¹⁰⁴ Judicial interpretations of the new phrasing differ widely.¹⁰⁵ The Ninth Circuit, with the most relaxed standard, holds that a proceeding need not be pending to merit judicial assistance.¹⁰⁶ The standard of the U.S. Court of Appeals for the District of Columbia is stricter and requires that a proceeding be in "reasonable contemplation" for the request to be granted.¹⁰⁷ The U.S. Courts of Appeals for the Eleventh Circuit and the Second Circuit, adopting the strictest standard, both require that a proceeding be "very likely to occur."¹⁰⁸

A. *The Ninth Circuit: No Pending Requirement Needed*

The Ninth Circuit in *Tokyo* implicitly acknowledged that a proceeding need not be "pending" to merit a grant of judicial assistance.¹⁰⁹ In this case, the Tokyo District Public Prosecu-

103. Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (1949) (codified as amended at 28 U.S.C. § 1782(a) (1988)) with 28 U.S.C. § 1782(a) (1988).

104. Compare *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991) (requiring that non-U.S. proceeding be imminent) with *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 687 (D.C. Cir. 1989) (requiring that non-U.S. proceeding be in reasonable contemplation) and *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (requiring that non-U.S. proceeding be very likely to occur), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989).

105. See, e.g., *Brazil*, 936 F.2d at 706; *United Kingdom*, 870 F.2d at 690-91; *Trinidad & Tobago*, 848 F.2d at 1156.

106. *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1217, 1218-19 (9th Cir. 1976). "Pending" means "begun, but not yet completed. . . . [A]n action or suit is 'pending' from its inception until the rendition of final judgment." BLACK'S LAW DICTIONARY 1134 (6th ed. 1990).

107. *United Kingdom*, 870 F.2d at 694.

108. *Brazil*, 936 F.2d at 706; *Trinidad & Tobago*, 848 F.2d at 1156.

109. *Tokyo District*, 539 F.2d at 1218-19. The court held that "[a] purpose of the 1964 amendment was to allow federal district courts to consider Letters Rogatory issued by foreign investigating magistrates. . . . Nothing has been brought to our attention which suggests the investigation . . . is 'unrelated' to 'judicial or quasi-judicial controversies.'" *Id.* (referring to *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Man., Can.*, 59 F.R.D. 625, 627 (N.D. Cal.), *aff'd*, 488 F.2d 511 (9th Cir. 1973)).

tor's office issued the letters rogatory.¹¹⁰ The U.S. court permitted the issuance of subpoenas to enforce the request for judicial assistance in the investigatory phase of the Japanese proceeding despite the lack of any pending adjudicatory proceeding.¹¹¹ The Ninth Circuit interpreted the amended Statute literally, and neither required an ongoing proceeding in the Japanese courts, nor inquired into the eventual likelihood of a judicial proceeding.¹¹²

B. *Differing Interpretations of the Pending Requirement*

When the D.C. Circuit and the Second Circuit addressed the significance of the deletion of "pending" from the Statute, they professed to follow the Eleventh Circuit's standard that a proceeding must be "very likely to occur and very soon to occur" to receive judicial assistance.¹¹³ Despite this apparent consensus, each Circuit adopted different approaches that implicate the various policy concerns that shaped their decisions to grant or deny the requested assistance.¹¹⁴

1. The Eleventh Circuit: A Proceeding Must Be "Very Likely To Occur"

The Eleventh Circuit stated in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*¹¹⁵ that an adjudicatory proceeding in a non-U.S. court must be "very likely to occur" to permit a U.S. court to grant a request for judicial assistance under the Statute.¹¹⁶ In *Trinidad & Tobago*, the Minister of Legal Affairs of Trinidad and Tobago sought assistance from the U.S. Attorney in obtaining the bank records of a Trinidad and Tobago national in connection with a criminal inves-

110. *Id.* at 1218.

111. *Id.* The Ninth Circuit noted that the information requested in the letters rogatory was for use in "in camera depositions of certain residents . . . to be used in criminal investigations and possible future criminal trials in Japan." *Id.* at 1217 (emphasis added).

112. *Id.* at 1218-19.

113. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706-07 (2d Cir. 1991); *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 691 (D.C. Cir. 1989).

114. *Brazil*, 936 F.2d at 706; *United Kingdom*, 870 F.2d at 692.

115. 848 F.2d 1151 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989).

116. *Id.* at 1156.

tigation of violations of the Exchange Control Act.¹¹⁷ The Eleventh Circuit decided that the Statute did not require that a matter be “pending” for a federal court to grant judicial assistance to a non-U.S. official pursuing a request as an interested party.¹¹⁸

The Eleventh Circuit examined the legislative history of the Statute, and in particular its 1964 amendment.¹¹⁹ The court noted that in amending the Statute Congress had expanded prior law and reiterated the broad discretion of the district courts in dealing with requests for international assistance.¹²⁰ The court concluded that the district court judges should determine whether a proceeding “is very likely to occur” prior to granting judicial assistance.¹²¹ If the U.S. court has not decided that a proceeding “is very likely to occur,” or if the district court judge suspects that the request is a “fishing expedition” or a vehicle for harassment, the court should deny the request.¹²² The Eleventh Circuit standard does not require that a proceeding have started, but only that it be “very likely to occur.”¹²³ After finding that the Trinidadian suit was very likely to occur, the Eleventh Circuit granted the assistance requested.¹²⁴

2. The D.C. Circuit: “Reasonably Contemplated” Proceedings

In *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*,¹²⁵ the Crown Prosecution Service sought information regarding an apartment sale by parties that it believed to be involved in an illegal takeover of a British distillery.¹²⁶ The court in *United Kingdom* held that on-going British criminal

117. *See id.* at 1152 (citing Laws of Trinidad and Tobago, Ch. 79:50). The Trinidadian national appealed to the Eleventh Circuit the district court’s sustaining of a subpoena which enforced a letter rogatory directed at the U.S. bank in which the national’s accounts were located. *Id.*

118. *Id.* at 1155-56.

119. *Id.* at 1152-54.

120. *Id.* at 1154.

121. *Id.* at 1156.

122. *Id.*

123. *Id.*

124. *Id.*

125. 870 F.2d 686 (D.C. Cir. 1989).

126. *Id.* at 687-88.

proceedings were not required for the court to enforce the letters rogatory.¹²⁷ The D.C. Circuit quoted the Eleventh Circuit's *Trinidad & Tobago* decision with approval and added that the judicial proceedings had to be "reasonabl[y] contemplat[ed]."¹²⁸ Indeed, under the D.C. Circuit approach, in which assistance was granted for a police proceeding, a judicial proceeding need not have started; rather, there must be a showing that an adjudicatory proceeding "would eventuate."¹²⁹

3. The Second Circuit: A Proceeding Must Be "Imminent"

The Second Circuit, in *In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*,¹³⁰

127. *Id.* at 691. The Crown Prosecution Service was an interested party according to the court. *Id.* at 689-90. At the time of the issuance of the letter rogatory, a police investigation was being conducted. *Id.* at 687-89. One individual, who was not the subject of the letters rogatory, had been arrested and charged. *Id.* After the issuance of the letters, the subject of those letters was changed, and a warrant for his arrest was issued. *Id.*

128. *Id.* at 687 (stating that "proceeding in the foreign tribunal and its contours be in reasonable contemplation when the request is made"). Later, the court stated that "[i]n sum, we agree that, to guard against abuse of section 1782, the district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time." *Id.* at 692; see *In re Letter Rogatory from the Public Prosecutor's Office at the Regional Court of Hamburg, F.R.G.*, No. M-19-88, 1988 U.S. Dist. LEXIS 14088, at *4-*5 (S.D.N.Y. June 21, 1988) (stating that "proceeding in a foreign tribunal need not be actually pending at the time the request is made, given the deletion of the word 'pending' from § 1782 when it was amended").

129. *United Kingdom*, 870 F.2d at 691. The court stated that

[r]ecognizing that judicial proceedings in a tribunal must be within reasonable contemplation, although they need not be pending, we turn to the question decisive for proper application of section 1782: Was there sufficient indication that a proceeding in court would eventuate in which the evidence gathered can be weighed impartially?

Id.

130. 936 F.2d 702 (2d Cir. 1991). The district court had initially stayed the enforcement of the subpoena pending further testimony via affidavits. *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 687 F. Supp. 880 (S.D.N.Y.), *modified*, 700 F. Supp. 723 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991). The "threshold issue" was whether the subpoenaed documents were "for use in a proceeding in a foreign or international tribunal." *Id.* at 883. The fact that the letters rogatory were signed by a Brazilian judge was not decisive. *Id.* at 885. The court noted that "[a] foreign judge's signature, in and of itself, does not resolve the issue" of whether the letters rogatory are for use in a foreign or international tribunal. *Id.* In a subsequent proceeding, *Brazil II*, the district court judge declined to decide technical questions of foreign law. *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 700 F. Supp. 723, 724 (S.D.N.Y. 1988) (quoting John

applied the Eleventh Circuit standard articulated in *Trinidad & Tobago*, but came to the opposite conclusion, quashing the subpoenas that sought enforcement of the letter rogatory.¹³¹ In *Brazil*, the Brazilian officials sought the bank records of six Panamanian corporations suspected of affiliations with a convicted embezzler.¹³² Under the Second Circuit's holding, a district court may grant a request for judicial assistance in advance of the commencement of an adjudicative proceeding only if such proceeding is imminent.¹³³ In reaching this determination, the Second Circuit looked to its precedent in *India*¹³⁴ as well as to the lower court's opinion in the *Brazil* litigation.¹³⁵

The Second Circuit's holding relied upon its interpretation of the 1964 amendment's deletion of the word "pending" and the accompanying legislative history.¹³⁶ The Second Circuit found that the deletion either could have been intentional or inadvertent because the legislature did not directly address the deletion or the impact of that deletion.¹³⁷ The court held,

Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3rd Cir. 1985)), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991). The court quoted the Eleventh Circuit, defining the "pending" standard as meaning "a proceeding is very likely to occur," and concluded that a proceeding was "probable." *Id.* at 724-25 (quoting *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989)). The district court denied the motion to quash the subpoena. *See In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 130 F.R.D. 283, 284-85 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

131. *Brazil*, 936 F.2d at 706-07.

132. *Id.* at 704.

133. *Id.* at 703. The Second Circuit stated that "[e]vidence may be produced pursuant to a letter rogatory in the absence of a pending adjudicative proceeding, but only if such a proceeding is imminent, i.e., very likely to occur within a brief interval from the request." *Id.*

134. *Id.* at 705; *see supra* notes 55-62 and accompanying text (discussing *In re Letters Rogatory Issued by Director of Inspection of the Gov't of India*, 385 F.2d 1017 (2d Cir. 1967)).

135. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 703-04 (2d Cir. 1991); *see supra* note 130 (discussing lower court opinions in *Brazil* litigation). The Second Circuit noted that the district court had not decided that the investigation being conducted by the Brazilian police, tax and currency officials was adjudicatory. *Brazil*, 936 F.2d at 705. Rather, the district court had based its denial of the motion to quash the subpoenas on its finding that a sufficiently adjudicatory proceeding was forthcoming. *Id.*

136. *Brazil*, 936 F.2d at 703-07.

137. *Id.* at 705. Moreover, the court noted that there was a "distinct possibility" that the deletion was inadvertent. *Id.* at 706.

however, that the Statute had to be read as written, and asserted that doing so would not contravene any expressed legislative intent.¹³⁸ The court did not consider the commentaries by the committee members who drafted the 1964 amendment to be dispositive,¹³⁹ and it concluded that the lower court's standard of "probable" was "too lenient" to protect the interests implicated by the Statute.¹⁴⁰ Instead, the court held that the standard should require that adjudicative proceedings be "imminent, i.e., very likely to occur and very soon to occur" for the courts to grant assistance.¹⁴¹ This standard would afford judicial assistance to non-U.S. parties when they are "on the verge" of instituting a proceeding while also protecting the "legitimate privacy interests" of U.S. residents.¹⁴²

III. REQUESTS FOR INTERNATIONAL JUDICIAL ASSISTANCE SHOULD BE EVALUATED UNDER A UNIFORM STANDARD

In implementing the Statute, the D.C., Second, and Eleventh Circuits have variously interpreted the meaning of the deletion of the word "pending" from the 1964 statutory amendment, thereby engendering a spectrum of confusing standards that alter the congressional intent implied in the lan-

138. *Id.* The omission "[did] no violence to any articulated congressional objective." *Id.*

139. *Id.* The *Brazil* court quoted Professor Smit's statement 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 to be used in such a proceeding." *Id.* (quoting Smit, *supra* note 3, at 1026).

140. *Id.* The court did not explicitly list those interests. *Id.*

141. *Id.*

142. *Id.* The court stated that

we think it prudent, in the absence of any indication as to why Congress deleted the word "pending" and in view of the distinct possibility that the deletion might have been inadvertent, to require that adjudicative proceedings be imminent—very likely to occur and very soon to occur. That standard permits foreign governments to obtain judicial assistance from American courts when they are on the verge of instituting adjudicative proceedings in which the uses of disclosed material may be carefully controlled but avoids the risks inherent in making confidential material available to investigative agencies of countries throughout the world at preliminary stages of their inquiries. The latter course poses dangers to legitimate privacy interests of our citizenry that we do not believe Congress intended to imperil.

Id.

guage of the Statute.¹⁴³ The standard for granting judicial assistance under the Statute should be amended to consider both the nature of the party requesting the evidence and the development of the non-U.S. proceeding for which the party seeks the assistance. Such an inquiry would therefore enforce the congressional aim of broad judicial assistance while retaining district court discretion to guard U.S. residents' interests against potential abuse of judicial process.

A. "Imminent" Problems with the Current Standards

The current standards for evaluating letters rogatory were articulated by the D.C., Second, Ninth, and Eleventh Circuits in an attempt to interpret the meaning of the deletion of the word "pending" from the Statute.¹⁴⁴ When evaluating letters rogatory, U.S. courts consider factors that include comity among nations, reciprocity of discovery rules, the admissibility and discoverability of the information requested, and the protection of privacy rights of U.S. residents.¹⁴⁵ U.S. courts must weigh these factors according to their own evaluation of the importance of each in the overall scheme of international judicial assistance because Congress gave the district courts broad discretion to evaluate these factors without any guidelines governing the exercise of that discretion.¹⁴⁶ These standards require the courts to make largely subjective determinations. This subjectivity is problematic, because it leads to indefinite standards and conflicting results, both of which may lead to frustrated litigants and protracted, expensive litigation.

143. See, e.g., *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991); *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 690-701 (D.C. Cir. 1989); *In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989); see *supra* notes 103-42 and accompanying text (discussing "pending" standards); see also 28 U.S.C. § 1782(a) (1988); S. REP. NO. 1580, *supra* note 7, at 1-2, *reprinted in* 1964 U.S.C.C.A.N. at 3782-83; H.R. REP. NO. 1052, *supra* note 7, at 2-4.

144. See *supra* notes 103-42 and accompanying text (discussing standards for deletion of "pending").

145. See *supra* notes 3, 96-97 and accompanying text (discussing comity, discoverability, and admissability).

146. 28 U.S.C. § 1782(a) (1988); see Deutsch, *supra* note 13, at 188-89 (noting that few cases address scope of courts' discretion in international judicial assistance).

1. The Current Standards Require Use of Courts' Discretion

The circuit courts' different standards reflect the broad discretion granted by Congress to the district courts in the 1964 amendment.¹⁴⁷ For example, the Ninth Circuit in *Tokyo* read and applied the amendment as it was written, without adding terms clarifying the significance of the deletion of the word "pending."¹⁴⁸ While the Eleventh Circuit and the D.C. Circuit standards usually result in grants of judicial assistance, the Second Circuit's stricter approach has resulted in the denial of assistance.¹⁴⁹

One of the most important factors that U.S. courts consider in the "pending" analyses is the nature of the requesting party.¹⁵⁰ In *Trinidad & Tobago*, the Eleventh Circuit considered the Minister of Legal Affairs of Trinidad and Tobago to be an "interested party" and granted judicial assistance.¹⁵¹ The Ninth Circuit, in *Tokyo*, granted assistance to a purely prosecutorial party, also an interested person.¹⁵² Likewise, the D.C. Circuit granted assistance to the U.K. Crown Prosecution Service, a body held to be an interested party.¹⁵³ However, the

147. See S. REP. NO. 1580, *supra* note 7, at 7-9, reprinted in 1964 U.S.C.A.N. at 3788-89; H.R. REP. NO. 1052, *supra* note 7, at 9-10.

148. *In re* Letters Rogatory from the Tokyo Dist., Tokyo, Japan, 539 F.2d 1216, 1219 (9th Cir. 1976); see *supra* notes 81-85 and accompanying text (discussing *Tokyo* and its analysis of statutory deletion of pending).

149. See, e.g., *In re* Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991) (denying judicial assistance); *In re* Letter of Request from the Crown Prosecution Serv. of the U.K., 870 F.2d 686, 691-92 (D.C. Cir. 1989) (granting judicial assistance); *In re* Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom.* Azar v. Minister of Legal Affairs, 488 U.S. 1005 (1989) (granting judicial assistance).

150. See, e.g., *Brazil*, 936 F.2d at 705; *United Kingdom*, 870 F.2d at 689-90; *Trinidad & Tobago*, 848 F.2d at 1155; *Tokyo*, 539 F.2d at 1219.

151. *Trinidad & Tobago*, 848 F.2d at 1155; see *supra* notes 70-74 and accompanying text (discussing interested persons under Statute). In *Trinidad & Tobago*, the U.S. Department of Justice sought the enforcement of letters rogatory in furtherance of a criminal investigation involving possible currency control violations. *Trinidad & Tobago*, 848 F.2d at 1152. The court did not make a *de novo* determination as to the standard to be used in determining whether to grant a request for international judicial assistance from an interested person but considered only whether the district court had abused its discretion. *Id.* at 1154-55.

152. *Tokyo*, 539 F.2d at 1218-19. The Ninth Circuit granted assistance to the *Tokyo* court, which had sent the letters rogatory at the request of the Tokyo Public Prosecutor's Office. *Id.* at 1218.

153. *United Kingdom*, 870 F.2d at 690. The D.C. Circuit standard is "reasonable

Second Circuit, in *Brazil*, denied judicial assistance to a Brazilian court that issued letters rogatory on behalf of a Brazilian prosecutor.¹⁵⁴

These results are contradictory when one considers that a "tribunal" is defined as a disinterested and adjudicatory body, whereas an "interested party" has an institutional interest in the outcome of the litigation.¹⁵⁵ The Statute should be amended so that if a U.S. court finds that a "tribunal" is the source of the request for judicial assistance, the U.S. resident's rights should be protected because of the impartial and adjudicatory nature of the proceeding.¹⁵⁶ In contrast, a request from an interested party does not necessarily include the same procedural safeguards of impartiality or neutrality.¹⁵⁷ The requested assistance thus should be granted more readily to a requesting tribunal than to an interested person in light of the countervailing interests in independent judicial review and individual privacy.¹⁵⁸

The distinction between a "tribunal" and an "interested person" is not a false one.¹⁵⁹ To ignore the difference between a tribunal and an interested party devalues the countervailing interests that balance an evaluation of a request for judicial

contemplation" of an applicable proceeding. *Id.* at 691. The D.C. Circuit refused to allow a "potential target" of a letter rogatory to prohibit the appointment of an enforcing commission. *Id.* at 689.

154. *In re* Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991).

155. *See, e.g.*, In the Matter of Letters Rogatory Issued by the Director of Inspection of the Gov't of India, 385 F.2d 1017, 1019-21 (2d Cir. 1967) (discussing adjudicative qualities of tribunal).

156. *Id.*

157. *See supra* notes 70-74 and accompanying text (discussing "interested party").

158. *See, e.g.*, *Brazil*, 936 F.2d at 706 (discussing privacy interests of U.S. residents faced with internationally-based discovery request); *India*, 385 F.2d at 1019-21 (discussing tribunal).

159. Bomstein & Levitt, *supra* note 12, at 445. The authors, on the contrary, argue that considerations of judicial economy support

grant[ing] the request when presented, thereby recognizing that a prosecutor would have access to the information once the case is filed, either because he would then be a litigant in a pending proceeding or because the tribunal itself would make the request. Simply put, to deny a particular tribunal's section 1782 request for information when that request is presented prior to trial is merely to advocate form over substance.

Id.

assistance.¹⁶⁰ Additionally, combining “tribunals” and “interested persons” discounts the possibility of international assistance used as an abuse of judicial process that may violate U.S. residents’ rights that are protected by the Statute itself.¹⁶¹

In the reports considered and adopted by the Congress addressing the 1964 amendments to the Statute, Congress endorsed a position that favored the granting of requests for international judicial assistance with references to comity and international cooperation.¹⁶² To effectuate the stated congressional intent, U.S. courts evaluate the non-U.S. proceeding and U.S. residents’ privacy rights that protect them from unnecessary or improper discovery.¹⁶³ This evaluation, however, must be made in the context of Congress’s “pro-assistance” preference to ensure international reciprocity in the exchange of information.¹⁶⁴

2. Current Interpretations of the Statute Lend Themselves to Judicial Legislation

The interpretations of the deletion of the word “pending” have produced inexact standards that lead to conflicting results among the courts.¹⁶⁵ The terms used to qualify the deletion are inherently subjective and can lead, therefore, to judi-

160. See *supra* note 96 (discussing interests that balance interests that favor granting assistance).

161. 28 U.S.C. § 1782(a) (1988) (stating, in pertinent part, that “[a] person may not be compelled to give his testimony . . . in violation of any legally applicable privilege”); see Note, *supra* note 13, at 992.

162. See, e.g., H.R. REP. NO. 1052, *supra* note 7, at 1-3, reprinted in 1964 U.S.C.C.A.N. at 3792-94 (quoting letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure, to John McCormack, Speaker of the House (May 28, 1963)); see also Letter Brief, *supra* note 4 (discussing policy considerations that support grant of judicial assistance).

163. *In re Request for Int’l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991).

164. See Letter Brief, *supra* note 4, at 7 (arguing that “[i]f the U.S. does not itself provide international legal assistance . . . the availability of this assistance to persons within the United States is threatened”); Smit, *supra* note 3, at 1029.

165. See *infra* notes 103-42 and accompanying text (discussing standards for interpreting statutory deletion). Compare *Brazil*, 936 F.2d at 706 (denying assistance to Brazilian prosecutors that had Brazilian court’s assistance in issuing letter rogatory) with *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1217-18 (9th Cir. 1976) (granting assistance to Japanese prosecutor that had Japanese court’s assistance in issuing letter rogatory).

cial legislation.¹⁶⁶ Courts have not precisely defined the terms, such as "imminent," with which they have explained the deletion of the word "pending" from the Statute.¹⁶⁷ When discussing the "pending" deletion, courts have used "eventual,"¹⁶⁸ "reasonably contemplated,"¹⁶⁹ "probable,"¹⁷⁰ and "very likely to occur and very soon to occur."¹⁷¹ These additional terms do not clarify the meaning of the deletion of "pending;" instead, they merely muddy already murky waters.

B. *A Proposed Uniform Standard*

The standards for granting international judicial assistance under the Statute are inherently subjective and lead to uncertainty in the application of the Statute to requests for assistance.¹⁷² U.S. courts need to adopt a uniform standard. Absent further clarification of congressional intent regarding the deletion of the word "pending" from the Statute, U.S. courts should rely on the legislative intent underlying the 1964 statutory amendments as a whole.¹⁷³

The uniform standard proposed here employs a two-part test under which the interpretation of the deletion of the word "pending" would hinge on a prior analysis of the nature of the

166. Bomstein & Levitt, *supra* note 12, at 448-49 (discussing judicial approaches to Statute).

167. *Compare Brazil*, 936 F.2d at 706 (defining "imminent" as "very likely to occur and very soon to occur") with *In re Request for Assistance from the Ministry of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (describing proceedings as "imminent"), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989).

168. *In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686, 691 (D.C. Cir. 1989).

169. *Id.*

170. *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

171. *In re Request for Int'l Judicial Assistance (Letter Rogatory) from the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991).

172. *See supra* notes 147-58 (discussing discretionary aspects of courts' analyses of requests for international judicial assistance).

173. *See* S. REP. NO. 1580, *supra* note 7, at 2, 7-9, *reprinted in* 1964 U.S.C.C.A.N. at 3783, 3788-89; H.R. REP. NO. 1052, *supra* note 7, at 4, 8-9. Congress, when it passed the 1964 statutory amendments, articulated two aims. *Id.* First, Congress wanted to provide district courts broad discretion in considering requests for international judicial assistance. *Id.* Second, it wanted to liberalize current standards for granting judicial assistance in the hope that a more liberal U.S. policy regarding international discovery would prompt other nations to reciprocate in kind. *Id.*

party seeking the international judicial assistance. First, the courts should perform a "tribunal" analysis to determine whether the party requesting the letters rogatory represents a "tribunal" or an "interested person."¹⁷⁴ Depending on this determination, the court should apply one of two different standards to determine the stage of development of the proceedings in the non-U.S. forum.

If the court finds that the entity requesting judicial assistance is a tribunal, then an impartial adjudicatory body is considered to be conducting or overseeing the proceeding.¹⁷⁵ A tribunal, by definition, does not have an "institutional interest" in the outcome of the proceeding.¹⁷⁶ When the requesting party is adjudicatory, the U.S. courts may grant requests for assistance for proceedings that are less developed because the impartiality of the adjudicatory body protects U.S. residents from harassment or "fishing expeditions."¹⁷⁷ Using this relaxed standard, the U.S. district courts, at their discretion, may determine whether proceedings in the non-U.S. tribunal are "probable."¹⁷⁸ Determining whether a proceeding is probable does not require a U.S. court to predict when the non-U.S. proceeding will start. Rather, "probable" merely implies that a proceeding need not be pending.¹⁷⁹

When the district court defines the non-U.S. party as a tribunal, the district court acknowledges that a sufficient adjudicatory process has commenced or become "pending."¹⁸⁰ The court should grant assistance if it finds that proceedings are

174. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 687 F. Supp. 880, 885 (S.D.N.Y.), *modified*, 700 F. Supp. 723 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991). To some extent, the courts already perform this type of analysis. *Id.* (requesting affidavits addressing questions of Brazilian law, including whether Brazilian judge automatically forwarded letter rogatory, or whether she had more active role in proceeding).

175. *See, e.g., In re Letters Rogatory Issued by the Director of Inspection of the Gov't of India*, 385 F.2d 1017, 1020-21 (2d Cir. 1967).

176. *See id.*

177. *In re Request for Assistance from the Ministry of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), *cert. denied sub nom. Azar v. Minister of Legal Affairs*, 488 U.S. 1005 (1989).

178. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 700 F. Supp. 723, 725 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

179. *See supra* note 106 (defining "pending").

180. *In re Letters Rogatory Issued by the Director of Inspection of the Gov't of*

only probable. The added safeguard of the impartial proceeding would help counter the subjective quality of a "probable" standard.

In contrast, if the court decides that the party seeking judicial assistance is not a tribunal but rather an "interested party," including prosecutors with an institutional interest in the outcome of the proceeding, the courts should apply a more rigorous standard. For example, the court should require the requesting party to present sufficient proof that an adjudicatory proceeding is "very likely to occur very soon." In other words, the requesting party should prove that it has a reasonable basis for its request—a basis supported by more than implication, innuendo, or circumstance. The uniform standard thus adheres more closely to the expressed, though sparse, congressional intent behind the Statute because it focuses on the overall result rather than individual textual changes.

C. *Future Implications for International Judicial Assistance*

This two-prong test should more efficiently safeguard the privacy interests of U.S. residents to which the Second Circuit referred in *Brazil*.¹⁸¹ Allowing "interested persons" and prosecutorial bodies to pursue letters rogatory will enforce the congressional intent to further international reciprocity and to broaden the category of parties to whom judicial assistance is available.¹⁸² By requiring interested parties to meet a higher standard of development in their non-U.S. proceeding, congressional objectives are still met in most cases and the privacy rights of U.S. residents are more fully protected.¹⁸³ Such an inquiry should allow U.S. courts to determine that there is

India, 385 F.2d 1017, 1020-21 (2d Cir. 1967); *In re* Letter of Request from the Government of France, 139 F.R.D. 588, 589 (S.D.N.Y. 1991).

181. *In re* Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz., 936 F.2d 702, 706 (2d Cir. 1991).

182. See S. REP. NO. 1580, *supra* note 7, at 7-9, reprinted in 1964 U.S.C.C.A.N. at 3782-83; H.R. REP. NO. 1052, *supra* note 7, at 9 (expanding scope of parties that can seek international judicial assistance under Statute); see also *supra* notes 70-74 and accompanying text (discussing interested persons under Statute).

183. See S. REP. NO. 1580, *supra* note 7, at 7-9, reprinted in 1964 U.S.C.C.A.N. at 3782-83; H.R. REP. NO. 1052, *supra* note 7, at 9 (expanding scope of parties that can seek international judicial assistance under Statute); see also *Brazil*, 936 F.2d at 706 (noting need to protect U.S. residents' privacy rights in granting international judicial assistance under Statute); *supra* notes 70-74 and accompanying text (discussing interested persons under Statute).

enough evidence in the non-U.S. forum to commence a proceeding, although additional evidence may be necessary from the United States to complete the proceeding.

1. The Uniform Standard Provides a Structure for the District Courts' Analysis

a. District Courts Must Analyze the Nature of the Requesting Party

U.S. district courts, in deciding requests for international judicial assistance under the uniform standard, must look not at the name of the requesting party, but at the nature of the requesting party.¹⁸⁴ This would ensure that non-U.S. parties that are granted assistance under the relaxed "probable" standard in fact possess the procedural protections implied by the title "tribunal."¹⁸⁵ Since the district court's analysis for a grant of assistance involves a determination of whether the requesting party possesses the procedural safeguards implicit in its structure, the U.S. courts must look at the degree of involvement that the tribunal has in the non-U.S. proceeding.¹⁸⁶ For example, the U.S. court must decide whether the requesting tribunal actively oversees the investigatory aspects of the non-U.S. proceeding, as a French *juge d'instruction* does, or whether the non-U.S. tribunal automatically forwards the letter rogatory on behalf of a prosecutorial body without interacting in the proceeding.¹⁸⁷ The burden of proof should fall on the party requesting the information, not the U.S. district court.¹⁸⁸ Such an inquiry does not place an undue burden on the district courts. At present, the district courts make similar analyses of non-U.S. fora in deciding *forum non conveniens* motions.¹⁸⁹

184. See, e.g., *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 687 F. Supp. 880, 885 (S.D.N.Y.), *modified*, 700 F. Supp. 723 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991).

185. See, e.g., *In re Letters Rogatory Issued by the Director of Inspection of the Gov't of India*, 385 F.2d 1017, 1019-20 (2d Cir. 1967) (defining "tribunal" in terms of its functions).

186. See, e.g., *Brazil*, 687 F. Supp. at 885.

187. *Id.*

188. *Id.* For example, in *Brazil*, the district court judge requested affidavits on Brazilian law to determine the degree of the Brazilian judge's involvement with the tax and currency investigations. *Id.*

189. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (dismissing

b. District Courts Must Analyze the Development of the Non-U.S. Proceeding

The uniform test might compel U.S. courts to decide questions of non-U.S. law in making determinations regarding the sufficiency of the non-U.S. proceeding. Because the district court must determine when a non-U.S. party may receive access to information for use in a non-U.S. proceeding, the district court may find itself examining details of the non-U.S. forum's judicial procedure in an attempt to discover the degree of the proceeding's development. Such determinations currently are made by the district courts in deciding requests for judicial assistance.¹⁹⁰ Under the uniform procedure, the party requesting the assistance should bear the burden of proving that it possesses the necessary degree of procedural development. This is the most logical solution because it is the requesting party that possesses the most accurate knowledge of its own procedures and the information that it still requires. With such information at its disposal, the party requesting the information should have little difficulty convincing a U.S. court of the necessity of its request.

2. Adoption of the Uniform Standard Protects the Rights of U.S. Residents

The adoption of the uniform standard would help to safeguard U.S. residents' privacy rights in two ways. First, standardization of the inquiry would result in more predictable outcomes for all parties. U.S. residents who seek to avoid such requests will know what information will be required to quash a letter rogatory by addressing the non-U.S. party's characteristics. This foresight will enable U.S. residents to prepare themselves for litigation by knowing what they will need to

wrongful death action arising from plane crash in Scotland from federal court on *forum non conveniens* grounds). The common law doctrine of *forum non conveniens* remains applicable where an alternative forum exists in a foreign country. *Id.* at 256. A district court may exercise discretion regarding jurisdiction when an alternative forum would have jurisdiction and a trial in the plaintiff's chosen forum would be disproportionately oppressive or administratively problematic for the court. *Id.* at 241.

190. *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 687 F. Supp. 880, 886 (S.D.N.Y.), *modified*, 700 F. Supp. 723 (S.D.N.Y. 1988), *stay granted*, 130 F.R.D. 283 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 702 (2d Cir. 1991) (requesting affidavits on questions of Brazilian law to determine nature of non-U.S. proceeding).

prevail. Second, by standardizing the inquiry, U.S. residents become insulated from unwarranted international discovery actions. To compel the U.S. resident to testify or provide evidence, the non-U.S. proceeding must either be well-developed with a clear need for such testimony, or the proceeding must be overseen by an impartial adjudicatory body that would not institute such proceedings heedlessly.

One might argue that the uniform test reads too much into the deletion of "pending" and wrongly infers congressional intent. Congress, however, did not directly address these issues.¹⁹¹ The courts, therefore, must implement the amended Statute to effectuate the expressed intent of Congress while also protecting the rights of U.S. citizens.¹⁹² Indeed, it is evident from the decisions since the promulgation of the 1964 amendments that the courts have not always provided "more efficient, more effective, and more economical" international judicial assistance.¹⁹³ The uniform standard set forth here accomplishes these goals by clearly structuring the judicial inquiry.

3. The Uniform Standard Clarifies Non-U.S. Parties' Rights

Non-U.S. parties will also benefit from the improved predictability of the uniform standard. The two-prong test will more clearly demarcate the information that non-U.S. parties must supply to parties requesting international judicial assistance. The "unbridled discretion" of the district courts has led to a collection of standards that differs from jurisdiction to jurisdiction.¹⁹⁴ This jurisdictional patchwork confuses and frustrates non-U.S. parties seeking evidence in the United States because a similar request might be treated differently in neigh-

191. See *supra* notes 44-48 and accompanying text (discussing potential absence of congressional intent behind adoption of 1964 amendments).

192. See *supra* notes 44-48 and accompanying text (discussing potential absence of congressional intent behind adoption of 1964 amendments); *supra* note 5 (quoting text of Statute).

193. H.R. REP. NO. 1052, *supra* note 7, at 2, reprinted in 1964 U.S.C.C.A.N. at 3792 (quoting letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure, to John McCormack, Speaker of the House (May 28, 1963)).

194. See, e.g., Bomstein & Levitt, *supra* note 12, at 438 (discussing district court discretion); see *supra* notes 103-42 (discussing different standards for deletion of word "pending" from Statute).

boring states.¹⁹⁵ Thus, the uniform standard must be adopted to realize fully Congress's aspiration to provide international judicial assistance.

CONCLUSION

U.S. courts should restructure the statutory analysis to reaffirm the district courts' broad discretion while promoting reciprocity in international judicial assistance. Such a restructuring should be guided by the legislative intent as expressed in the 1964 amendments in their entirety. To most fully accomplish these dual goals, the statutory analysis should be conducted in two stages. Therefore, courts should first determine whether a party requesting judicial assistance is an adjudicative tribunal or an interested person. The outcome of this analysis should direct the courts to apply either a more relaxed standard of "probable" or the stricter standard of "imminent," with proof that the request is not a "fishing expedition." Such a test would encourage reciprocity while safeguarding the privacy rights of U.S. residents. Such a uniform standard would enable courts and litigants, both U.S. and foreign, to anticipate more clearly the outcome of a request for international judicial assistance under the Statute.

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195. Compare *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702 (2d Cir. 1991) with *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216 (9th Cir. 1976).

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