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**OUT OF BOUNDS?
APPLICABILITY OF FEDERAL DISCOVERY ORDERS
UNDER 28 U.S.C. SECTION 1782 BY INTERNATIONAL
ATHLETIC GOVERNING BODIES FOR USE IN INTERNAL
DISPUTE RESOLUTION PROCEDURES**

I. INTRODUCTION

In today's world, renowned athletes are considered society's last connection with mythological gods. Their awesome abilities, international fame,¹ and immense wealth² elevate the athletes' status above that of ordinary citizens. Unfortunately, as in many of the ancient legends, controversy and trouble invariably seem to gravitate towards these modern-day heroes. These problems often result in competition in far less popular arenas: formal proceedings within a myriad of domestic and international judicial settings.³ Spoils going to the victors in these judicial contests do not result from physical agility or speed, but rather from legal maneuvering governed by a quite different sets of rules.

Litigants in international athletic disputes frequently seek to resolve their disputes via international athletic governing bodies' alternative dispute resolution ("ADR") proceedings.⁴ In doing so, the parties to the dispute often attempt to obtain evidence located within the United States which is necessary to resolve their controversies elsewhere.⁵ In 1948, Congress enacted a federal discovery order statute to aid both legal

1. See Larry Stewart, *NBC Rates Well With Super Bowl*, L.A. TIMES, Jan. 27, 1998, at C6. (stating 8 of the 10 most watched TV programs in history are Super Bowls, including the top 6 programs ever).

2. In 1997, the average income for the top 40 salaried players was over \$17 million per year. See Peter Spiegel, *Money & Sports: Jordan & Co.*, FORBES, Dec. 15, 1997, at 180; see *infra* Part II. During the 1997-98 season, 103 players in the National Basketball Association made over \$3 million in salaries, and 39 players made over \$5 million. See Steve Aschburner, *Lockout At A Glance*, NEWS & OBSERVER (Raleigh), Dec. 20, 1998, at C10.

3. See Bradley I. Ruskin & Douglas Wilens, *Letter from America: International Sports "Arbitrations" and 28 U.S.C. § 1782: No Assistance from United States Courts*, 5 SPORTS L. ADMIN. & PRAC. 6 (Mar./Apr. 1998).

4. See AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 671 (1997).

5. See *id.*

competitors and other international litigants.⁶ Title 28, section 1782 of the U.S. Code section authorizes federal district courts to order the giving of testimony, or the production of documents or things, upon the application of a foreign party or court “for use in a proceeding in a foreign or international *tribunal*.”⁷

Congress created section 1782 with the goal of providing equitable discovery procedures in U.S. courts and encouraging foreign countries by example to provide similar assistance to American courts.⁸ While section 1782 was originally intended to apply exclusively to international courts, in 1964 Congress broadened its reach for use in private arbitral⁹ proceedings.¹⁰ However, despite Congress’s intention, one U.S. court has failed to extend the statute beyond conventional court proceedings.¹¹ The District Court for the Southern District of New York has twice adopted a narrow application of section 1782, declaring that international commercial arbitrations are not tribunals, and therefore are not covered by the statute.¹²

These two district court decisions, *In re Medway Power Limited*¹³ and *In re National Broadcasting Co.*,¹⁴ may have a significant impact on dispute resolution procedures within the sports world.¹⁵ The international governing bodies for almost every sport have established ADR procedures that mirror traditional arbitrations.¹⁶ Without the ability to rely on section 1782, disputing parties within international athletic controversies may find it extremely difficult, if not impossible, to obtain evidence from third parties located within the U.S.¹⁷ Parties would be forced to obtain evidence by other methods, such as by filing a court action in the U.S. and thereby

6. See 28 U.S.C. § 1782 (1998) (originally enacted as Act of June 25, 1948, ch. 646, 62 Stat. 949). For full text of section 1782 see *infra* Part III.

7. *Id.* (emphasis added).

8. *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996) (quoting S. REP. NO. 88-1580, at 2 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3783).

9. Arbitration is “[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.” BLACK’S LAW DICTIONARY 105 (6th ed. 1990).

10. See discussion *infra* Part III.A.

11. See discussion *infra* Part III.B.

12. See *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997); *In re National Broad. Co.*, No. M-77 (RWS), 1998 WL 19994, at *1 (S.D.N.Y. Jan. 21, 1998).

13. *Medway Power Ltd.*, 985 F. Supp. at 402.

14. *National Broad. Co.*, 1998 WL 19994, at *1.

15. See *Ruskin & Wilens*, *supra* note 3, at 7.

16. See *id.*

17. See *Ruskin & Wilens*, *supra* note 3, at 6.

availing themselves of more formal discovery procedures.¹⁸ However, forcing parties to do so is contrary to Congress's intention and the judicial system's long-standing policy of encouraging disputing parties to resolve their matters in alternative forums, rather than congesting court dockets.¹⁹

This Comment contends that recent court decisions limiting the applicability of section 1782 are incorrect and contrary to both statutory intent and public policy. Private international arbitrations should be afforded the benefits of section 1782. In order to settle any confusion among courts attempting to interpret section 1782, and to clarify the statute's purpose, Congress should amend this section to expressly include international arbitrations within its application.

Part II discusses sports international governing bodies' ADR procedures. Part III discusses the construction of section 1782 and its subsequent amendment. It explores Congress's intentions and analyzes federal courts' interpretations of the statute's reach. Part IV applies section 1782 to sports arbitrations and argues that the statute should apply to such proceedings. Part V concludes that recent district court cases have been incorrectly decided, section 1782 is an appropriate avenue for discovery within international sports' arbitrations, and Congress should amend the statute to expressly provide for its applicability to such proceedings.

II. INTERNATIONAL SPORTS GOVERNING BODIES' ADR PROCEDURES

The use of arbitration for sports disputes has become widespread both domestically and internationally.²⁰ Most American professional leagues and international federations have created their own arbitration procedures enforced by binding arbitration clauses to resolve disputes.²¹ Nevertheless, international arbitrations are adversely effected by the narrow application of section 1782.²²

In North America, several professional sports leagues exist on a multi-national level.²³ For example, Major League Baseball ("MLB"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") include teams from both the U.S. and Canada.²⁴ These leagues further internationalize by: (1) playing exhibition games in

18. See Ruskin & Wilens, *supra* note 3, at 8.

19. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

20. See WISE & MEYER, *supra* note 4, at 671.

21. See *id.*

22. The statute only applies to "foreign or international tribunal[s]." See *infra* note 83.

23. See WISE & MEYER, *supra* note 4, at 586.

24. See *id.*

Europe, Asia, Mexico and other countries; (2) licensing their merchandise worldwide; (3) selling television rights for foreign broadcasts;²⁵ and (4) participating in special international events to promote their image and products.²⁶

In Europe, several organizations control multi-national leagues for several sports. For example, the Union of European Football Associations ("UEFA") regulates several professional soccer leagues throughout the European Community ("EC").²⁷ The Federation Internationale de Basketball ("FIBA") is the governing international basketball federation for the EC.²⁸ The International Ice Hockey Federation ("IIHF") regulates ice hockey within the EC.²⁹

A. Arbitrable Sports Disputes

Conflicts requiring arbitration within international sports bodies arise in a variety of ways. Frequent litigants include clubs, sports organizations and associations, athletes, sponsors, suppliers and television companies.³⁰ For example, in July 1998, professional tennis player Petr Korda tested positive for steroids at Wimbledon.³¹ He escaped a suspension by the governing International Tennis Federation ("ITF") after he insisted that the substance was taken inadvertently.³² After widespread public criticism for its decision, the ITF sought a one-year suspension of Korda in January, 1999.³³ To appeal its previous decision, the ITF sought assistance from the Court of Arbitration for Sport ("CAS").³⁴ CAS and other international commercial arbitrators have intervened in various disputes with increasing

25. See WISE & MEYER, *supra* note 4, at 587.

26. For example, the McDonald's Open basketball tournament, held annually in Europe, features the best European national and club teams against at least one NBA team. *See id.* Also, MLB has been in negotiations with Japan's professional baseball league to hold a "Super World Series" between the U.S. World Series winner and Japan's championship major league team. *See* WISE & MEYER, *supra* note 4, at 588. Additionally, the NHL has stated that it might participate in a tournament against Europe's best national hockey teams. *See id.* The NBA, NHL, and Major League Soccer have also allowed their players to participate in Olympic competitions. *See* WISE & MEYER, *supra* note 4, at 588-89.

27. See WISE & MEYER, *supra* note 4, at 1030-31.

28. See WISE & MEYER, *supra* note 4, at 1035.

29. See WISE & MEYER, *supra* note 4, at 1055.

30. See International Olympic Committee, *The Court of Arbitration for Sport* (visited Feb. 8, 1999) <http://www.olympic.org/family/ioc/arbitration/arb_e.html>.

31. See *Korda Triumphs In Court*, ORANGE COUNTY REG., Jan. 30, 1999, at D3.

32. *See id.*

33. *See id.*

34. For discussion and explanation of CAS, *see infra* Part II.B.

regularity over the past fifteen years. More than 170 cases have been referred to CAS alone since its inception.³⁵

Beyond possible drug-related conflicts, the need for effective internal ADR procedures for international sports governing bodies becomes obvious when potential economic consequences are analyzed. Salary disputes must be resolved as amicably and efficiently as possible to protect the commercial interests of the athletes, owners, and leagues. The salaries of today's professional athletes are astronomical. For example, Michael Jordan of the NBA's Chicago Bulls earned a total of \$63.28 million in salary from the 1996-97 and 1997-98 seasons alone, more than the total payroll of seventeen of the league's twenty-nine teams.³⁶

The NBA is not alone in awarding generous contracts.³⁷ Over the years, the amount of money earned by athletes in many professional sports has skyrocketed.³⁸ To settle salary disputes as amicably and efficiently as possible, MLB has instituted its own arbitration system, utilized by many players and teams each year.

These incredible salaries are not limited to American athletes in the "Big Four"³⁹ leagues. For example, international soccer players,⁴⁰

35. See International Olympic Committee, *supra* note 30.

36. See David DuPree, *Jordan's \$33.14M Tops NBA*, USA TODAY, Feb. 26, 1998, at 1C. Also, 21 year-old Kevin Garnett signed a \$128 million deal with the NBA's Minnesota Timberwolves. See Steve Wilstein, *Garnett's Big Deal Bigger Than Believed*, L.A. TIMES, Oct. 9, 1997, at C7. In fact, 103 players made at least \$3 million during the 1997-98 season. See Aschburner, *supra* note 2.

Moreover, the recent changes to the NBA players' pay scale, resulting from the 1998-99 NBA lockout, did not dramatically decrease similar player agreements. For instance, the Los Angeles Lakers signed 19 year-old Kobe Bryant to a \$71 million deal for a period of only six years. See Tim Kawakami, *Kobe Is Getting a Big Deal*, L.A. TIMES, Jan. 28, 1999, at D1. Several other young players soon received the same contract amount. See Chris Tomasson, *Another View: Maximum Salaries Can Help NBA Cap Madness*, FORT WORTH STAR-TELEGRAM, Feb. 1, 1999, at 2. Antoine Walker, Allen Iverson, Shareef Abdur-Rahim, and Zydruna Ilgauskas also received six-year \$71 million contracts. *Id.*

37. In the NFL, the average salary of a professional football player is about \$700,000 per year. See *Is Football a Sport of a High Dollar Game?* (visited Oct. 25, 1998) <<http://www.206.76.136.3/trails/rec/foot/recreation.html>>. In the NHL, the average salary for the 1998 season was \$1.1 million. See Vartan Kupelian, *NHL Owners Miscalculated Players' Resolve* (visited Oct. 25, 1998) <<http://www.detnews.com/1998/sports/9801/20/01200142.html>>. These salaries have nearly quadrupled since 1991, when the average NHL player's salary was \$271,000. See *id.*

38. For example, MLB's largest salary in 1979 was Nolan Ryan's \$1 million per year for four seasons. See *Kevin Brown: Money Pitcher*, L.A. TIMES, Dec. 13, 1998, at D10. Currently, Los Angeles Dodgers pitcher Kevin Brown earns \$15 million per year. See *id.* In fact, the average MLB player salary was \$1.4 million during the 1998 season. See *id.* (emphasis added).

39. The "Big Four" includes the NBA, NFL, MLB, and NHL. See WISE & MEYER, *supra* note 4, at 586.

40. Twenty year-old Brazilian soccer phenom Ronaldo earns \$34 million annually between

women's⁴¹ and men's⁴² professional tennis players, and professional golfers⁴³ can also earn significant amounts of money over the course of their careers. Additionally, the individual teams within each league also often generate a great deal of earnings.⁴⁴ Because of the high stakes involved in these professional sports and the potentially exorbitant cost of litigation, internal ADR procedures were developed.⁴⁵ These internal procedures provide private, expeditious, less confrontational avenues for aggrieved parties which increases the potential for resolution to disputes.

B. International Sports' ADR Procedures

International sports' governing bodies have attempted to create systems of private arbitration that facilitate resolution of disputes without the involvement of traditional courts of law.⁴⁶ For instance, in 1983, the International Olympic Committee ("IOC") created a unique internal dispute resolution agency to facilitate the settlement of disputes pertaining to Olympic sports.⁴⁷ This agency, the Court of Arbitration for Sport ("CAS"), is headquartered in Switzerland and has developed its own rules of arbitration.⁴⁸ The CAS is composed of over 150 arbitrators who are specialists in sports law, and its procedures are flexible, protective of confidentiality, and inexpensive.⁴⁹

The IOC encourages all recognized sports federations⁵⁰ to utilize the CAS by inserting mandatory CAS arbitration clauses in their internal

salary and endorsement deals. See Scott Reid, *What In The World*, ORANGE COUNTY REG., July 1, 1998, at D7. Three of his national teammates earn over \$25 million as well. See *id.*

41. Women's Tennis Association players Martina Navratilova and Steffi Graf have earned over \$20 million each in prize money over their careers. See *Net Return*, USA TODAY, Feb. 27, 1998, at 1C.

42. In 1998, 17 Association of Tennis Professionals tennis players earned more than \$1 million in prize money. See *Final 1998 Men's Tennis Leading Money Winners* (visited Feb. 1, 1999) <<http://www.geocities.com/Colosseum/Gym/2788/pm122198.txt>>.

43. The total purses for 1999's the Professional Golfers Association, the Senior Tour, and Nike (amateur) tours is \$153 million. See Sid Dorfman, *The Barbarians At Gates Of Golf*, STAR-LEDGER (Newark), Jan. 20, 1999, at 57.

44. Annually, the average team in MLB earns about \$66 million, NFL teams earn about \$64 million, NBA teams bring in about \$50 million, and NHL teams generate about \$35 million. See WISE & MEYER, *supra* note 4, at 13.

45. See WISE & MEYER, *supra* note 4, at 671.

46. See *id.*

47. See WISE & MEYER, *supra* note 4, at 673-74.

48. See WISE & MEYER, *supra* note 4, at 674.

49. See International Olympic Committee, *supra* note 30.

50. "According to Article 5, CAS Statute, the IOC, NOCs [National Olympic Committees], international federations, national federations, sports associations, and in general, 'any natural person or corporate body having the capacity or power to compromise' [that is, to agree to

dispute resolution procedures.⁵¹ The response to this suggestion has been overwhelming, with most federations expressing an intent to comply.⁵² By the end of 1994, the number of federations and organizations providing for CAS arbitration was significantly higher than in the past.⁵³

The CAS procedures are substantially similar to those of the American Arbitration Association⁵⁴ (“AAA”).⁵⁵ This is not surprising because AAA rules are globally the most extensive, prevalent, and widely utilized arbitration standards.⁵⁶ Undoubtedly, the success of the AAA is largely the result of U.S. judicial support for private arbitration. Currently, the U.S. court system recognizes arbitration associations and their resolution procedures.⁵⁷ In addition, every state has legislation that supplements federal law to permit the conversion of an arbitration award into a court judgment.⁵⁸ Logically, the CAS and other arbitration systems similar to the AAA should receive the same judicial deference and support as the AAA.

The CAS asserts that its procedures satisfy the essential conditions of independence and objectivity found in official tribunals, and international courts have agreed.⁵⁹ In 1993, a CAS award was contested before the

arbitrate] can submit a dispute to the CAS.” WISE & MEYER, *supra* note 4, at 674–75.

51. *See id.*

52. *See id.*

53. *See id.*

54. Established in 1926, the American Arbitration Association (“AAA”) is a non-profit, public service organization dedicated to resolving disputes through ADR procedures. *See* American Arbitration Association, *American Arbitration Association Fine-Tunes International Arbitration Rules To Accelerate Process, Clarify Arbitrator’s Authority* (visited Feb. 1, 1999) <http://www.adr.org/press/intarb_rules_revised.html>. “In 1996, more than 200 international cases were filed with the Association’s International Center. With 38 offices nationwide and cooperative agreements with arbitral institutions in 53 other nations, the Association offers hundreds of educational and training programs worldwide.” *Id.*

55. *See* WISE & MEYER, *supra* note 4, at 674. “The parties can agree, for example, on extensive discovery procedures, cross examination, can even agree on the application of a complete body of procedural rules such as the USA’s Federal Rules of Civil Procedure.” WISE & MEYER, *supra* note 4, at 676.

56. *See* EDWARD J. COSTELLO, JR., *CONTROLLING CONFLICT: ALTERNATIVE DISPUTE RESOLUTION FOR BUSINESS* 95 (1996).

57. *See id.*

58. *Id.* at 87. In fact, former Chief Justice Warren E. Burger was quoted as saying, “I cannot emphasize too strongly to those in business and industry—and especially to lawyers—that every private contract of real consequence to the parties ought to be treated as a ‘candidate’ for binding private arbitration.” *Id.*

59. *See* International Olympic Committee, *supra* note 30. The CAS is split into two divisions: (1) an ordinary arbitration division, which resolves disputes submitted to the ordinary procedure, and (2) an appeals arbitration division, responsible for resolving disputes arising from disciplinary tribunals, sports federations, associations, or other sports bodies. *See id.*

Swiss Federal Tribunal.⁶⁰ The Swiss Federal Tribunal upheld the award, holding that CAS procedures sufficiently guaranteed independence for two parties to submit a dispute.⁶¹

The CAS has been utilized often since its creation. For example, 130 cases were referred to the CAS in its first ten years of existence.⁶² In the following two years, forty more cases were brought.⁶³ The CAS was even used by the IOC *ad hoc*⁶⁴ for the first time at the 1996 Summer Olympics in Atlanta,⁶⁵ and was used again for the 1998 Winter Olympics in Nagano, Japan.⁶⁶

In Nagano, the CAS arbitrated four cases,⁶⁷ including the well-publicized appeal of a Canadian snowboarder whose gold medal at the 1998 Winter Olympic Games was taken away by the IOC after testing positive for marijuana.⁶⁸ After Canada's Olympic Association appealed to the CAS, the athlete's medal was returned.⁶⁹ The athlete successfully argued that the IOC lacked an agreement with the international ski federation governing marijuana use.⁷⁰

In addition to the CAS, international sports bodies have contracted to submit their disputes to specific types of ADR.⁷¹ For example, international arbitration in accordance with the U.N. Commission on International Trade Law ("UNCITRAL") Arbitration Rules⁷² is utilized for all disputes between FIBA and the NBA.⁷³ Similarly, the NHL and the

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. "Ad hoc arbitration" is the "[s]ubmission of a particular issue to arbitration." BLACK'S LAW DICTIONARY 41 (6th ed. 1990).

65. *See* International Olympic Committee, *supra* note 30.

66. *See id.*

67. *See* Olympic Review, *The Court of Arbitration for Sport in Nagano* (visited Jan. 11, 1999) <http://www.olympic.org/news/review/1998_20/en/j_tas_e.html>.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See* Ruskin & Wilens, *supra* note 3, at 7.

72. The UN Commission on International Trade Law ("UNCITRAL") Arbitration Rules "were adopted in 1976 by the UN Commission on International Trade Law, a worldwide organization that includes representatives from the various legal, economic, and social systems and geographic regions. The General Assembly of the United Nations has recommended the UNCITRAL Arbitration Rules for inclusion in international commercial contracts." American Arbitration Association, *Procedures for Cases Under the UNCITRAL Arbitration Rules* (visited Sept. 25, 1998) <http://adr.org/rules/uncitral_rules/html>.

73. *See* Ruskin & Wilens, *supra* note 3, at 7.

IIHF have agreed to submit their disputes to arbitration.⁷⁴ Several other nations have also created sports arbitration associations to resolve disputes without involving the courts.⁷⁵ The wide array of potential legal disputes facing international sports bodies and their members often require effective and fair means of obtaining evidence located within the U.S. U.S. Supreme Court decisions clearly support international arbitration as a specially favored process.⁷⁶ In addition to providing advantages of time and cost, these proceedings also tend to be more inquisitorial than adversarial.⁷⁷ This is important where fragile on-going business relationships must continue throughout the dispute.⁷⁸

III. TITLE 28, SECTION 1782 OF THE UNITED STATES CODE

Before considering the applicability of the current version of section 1782 to international ADR procedures, it is necessary to understand the development and growth of the statute. Such review suggests that section 1782 should be applied to arbitrations, and courts ruling otherwise have been incorrect.

A. Legislative History

The original text of section 1782 provided for the taking of a deposition “to be used in any civil action pending in any court in a foreign country.”⁷⁹ Accordingly, discovery orders issued pursuant to section 1782 were permissible to aid judicial proceedings in a foreign court context.⁸⁰ However, over the years Congress has sought to broaden the statute’s applicability as a means of discovery for foreign parties.⁸¹ For instance, section 1782 was amended in 1949 to allow a court order “in any judicial

74. See WISE & MEYER, *supra* note 4, at 657.

75. See WISE & MEYER, *supra* note 4, at 1108, 1166, 1518.

76. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) (“A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate [contractual] purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.”); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”).

77. See CENTER FOR INT’L LEGAL STUDIES, *DISPUTE RESOLUTION PROCEDURES* xi (1995).

78. See *id.*

79. Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (current version at 28 U.S.C. § 1782 (1998)).

80. See *id.*

81. See *Ruskin & Wilens*, *supra* note 3, at 6.

proceedings" in any court in a foreign country.⁸² Additionally, in 1964, Congress amended the statute to its current form to allow court order assistance in "a foreign or international *tribunal*."⁸³

One proposed reason for changing the term "court" to "tribunal" in the 1964 amendment was the belief that assistance should be available to administrative⁸⁴ and quasi-judicial⁸⁵ proceedings.⁸⁶ The term "tribunal" within section 1782 has been interpreted to "embrace[] all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, and administrative courts."⁸⁷ A scholarly

82. 63 Stat. 1505, at 103 (1949) (emphasis added).

83. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9(a), 78 Stat. 997 (emphasis added). The text of section 1782 now reads as follows:

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.

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

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

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1782 (1998).

84. An "Administrative Hearing" is defined as "[a]n oral proceeding before an administrative agency consisting of argument or trial or both. Procedural rules are more relaxed at such hearings as contrasted with civil or criminal trials; e.g. rules governing admissibility of evidence are quite liberal." BLACK'S LAW DICTIONARY 46 (6th ed. 1990).

85. "Quasi judicial" is defined as "[a] term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Id.* at 1245.

86. See *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Can.*, 523 F.2d 562 (6th Cir. 1975).

87. Bruce I. McDaniel, Annotation, *What is Foreign "Tribunal" Within 28 USC § 1782 (As Amended in 1964) For Use In Which District Court May Issue Discovery Orders In Response To Letters Rogatory*, 46 A.L.R. FED. 956, 958 (1980) (agreeing with Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1014 (1965)).

interpretation has also contended that the substitution intended to provide assistance to all bodies with adjudicatory functions.⁸⁸ “Clearly, private arbitral tribunals come within the term the drafters used.”⁸⁹

The legislative history indicates that Congress’s purpose behind the change from conventional courts to all official adjudicatory proceedings was to broaden the applicability of the statute.⁹⁰ Indeed, Congress recognized “the constant growth of administrative and quasi-judicial proceedings all over the world.”⁹¹ The legislative evolution of section 1782 clearly supports these arguments and demonstrates Congress’s intent to include international arbitrations within the statute’s definition of tribunal.⁹²

Congress also sought to expand section 1782 to clarify foreign affairs provisions found in 22 U.S.C. sections 270–270(c).⁹³ Under these sections, assistance was available to international tribunals established pursuant to international agreements to which the U.S. was a party.⁹⁴ Certainly, international arbitral tribunals were included in those tribunals.⁹⁵ In fact, sections 270–270(c) asserted “legislative jurisdiction of unparalleled scope” to international arbitral tribunals.⁹⁶ The amended version of section 1782 not only attempted to continue such assistance, but also eliminated the requirement that the U.S. be a party in the international tribunal.⁹⁷ Hence, the new section 1782 utilized the term “international tribunal” in a broad manner, encompassing all international arbitrations.

B. *Judicial Interpretation of Application of Section 1782*

Despite Congress’s intent to broaden section 1782, courts interpreting the statute have struggled to create a uniform definition of “tribunal” applicable to proceedings distinct from criminal or civil court litigation.⁹⁸ One reason given for this difficulty is that U.S. courts lack “familiarity with the varied and distinct procedural law and practices established by

88. See Hans Smit, *American Assistance to Litigation in Foreign & International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L. L. & COM. 1, 5 (1998).

89. *Id.*

90. H.R. REP. NO. 88-1052, at 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

91. *See id.*

92. *See Smit, supra* note 88, at 5.

93. H.R. REP. NO. 88-1052, at 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

94. *See* 22 U.S.C. §§ 270–270(c) (1930) (repealed 1964).

95. Smit, *supra* note 88, at 5.

96. *See* Hans Smit, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 COLUM. L. REV. 1264, 1267 (1962).

97. *See Smit, supra* note 88, at 5.

98. Ruskin & Wilens, *supra* note 3, at 6.

countries around the world.”⁹⁹ Regardless, the recent trend of decisions have not applied section 1782 to international arbitral tribunals.¹⁰⁰

1. Early Decisions Defining “Tribunal” Under Section 1782

One of the first reported decisions to discuss the term “tribunal” after the 1964 amendment to section 1782 was *In re Letters Rogatory Issued By Director of Inspection of Government of India*.¹⁰¹ In that case, the Second Circuit determined that the term must encompass only those foreign bodies or entities that exercised impartial adjudicative power, not those whose primary function was investigative.¹⁰² The court ruled that section 1782 could not be used to obtain evidence for use in an Indian proceeding to fix a tax assessment that could be appealed to appellate tribunals.¹⁰³ The court reasoned that the statute was not so broad as to include all of the administrators whose decisions affect private parties and who are not entitled to act arbitrarily.¹⁰⁴ The court stated that a useful guideline to determine whether a proceeding is a tribunal is “the absence of any degree of separation between the prosecutorial and adjudicative functions.”¹⁰⁵ If there is none, the proceeding is not a tribunal under section 1782.

Other courts have followed suit when the putative tribunal’s primary function is not at least quasi-judicial. For example, in *In re Letters of Request to Examine Witnesses From the Court of Queen’s Bench for Manitoba, Canada*,¹⁰⁶ a Canadian Commission of Inquiry was determined not to be a tribunal.¹⁰⁷ In *Queen’s Bench*, a California resident opposed an order under section 1782 which compelled his testimony. The court decided that section 1782 was not intended to authorize U.S. courts to compel testimony on behalf of foreign governmental bodies whose purpose was investigative rather than judicial.¹⁰⁸

Similarly, in *Fonseca v. Blumenthal*,¹⁰⁹ the Second Circuit determined whether the Colombian Superintendent of Exchange Control was a tribunal

99. *Id.*

100. See *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997); see also *In re National Broad. Co.*, No. M-77 (RWS), 1998 WL 19994, at *1 (S.D.N.Y. Jan. 21, 1998); *In re Wilander*, No. CIV.A.96 MISC 98, 1996 WL 421938, at *1 (E.D. Pa. July 24, 1996).

101. 385 F.2d 1017 (2d Cir. 1967).

102. See *id.* at 1020.

103. See *id.*

104. See *id.* at 1021.

105. *Id.*

106. 59 F.R.D. 625 (N.D. Cal. 1973), *aff’d*, 488 F.2d 511 (9th Cir. 1973).

107. See *id.* at 630–31.

108. See *id.* at 625.

109. 620 F.2d 322 (2d Cir. 1980).

under section 1782.¹¹⁰ In *Fonseca*, a suitcase containing \$250,000 in U.S. currency was seized by the U.S. Customs Service.¹¹¹ Fonseca opposed a section 1782 request by the Colombian Superintendent of Exchange Control to have the contents delivered to determine if the owner had violated any Colombian laws.¹¹² The court concluded that the Superintendent had “an institutional interest in a particular result.”¹¹³ Therefore, his interest was “inconsistent with the concept of impartial adjudication” and was not a tribunal within section 1782.¹¹⁴

Nevertheless, at least one court has determined that certain foreign proceedings that are analogous to American court proceedings are tribunals within the meaning of section 1782.¹¹⁵ In *In re Letter of Request from the Government of France*,¹¹⁶ where a French judge d'instruction was described as being parallel to an American grand jury, the court held that such a foreign agency was a tribunal.¹¹⁷ The court decided that neither agency had a biased interest in the outcome of the dispute, and that both agencies had a common interest in seeing that justice was ensured.¹¹⁸

Interestingly, the *Queen's Bench*, *Fonseca* and *Government of France* courts stated that the 1964 amendments broadened the statute significantly, and implied that international commercial arbitrations may seek assistance under section 1782.¹¹⁹ For instance, the court in *Queen's Bench* indicated that Congress intended to ignore any distinctions between purely judicial and quasi-judicial administrative bodies, as well as those between conventional courts and adjudicative institutions or individuals—Congress intended that all be included in the term “tribunal.”¹²⁰

2. Recent Decisions Exclude Arbitrations from Section 1782

U.S. courts have only recently discussed whether an international commercial arbitration is a “tribunal” qualifying under section 1782. The District Court for the Southern District of New York first addressed the

110. *See id.*

111. *See id.*

112. *See id.* at 323.

113. *See id.* at 324 (quoting *In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967)).

114. *Id.*

115. *See In re Letter of Request from Gov't of France*, 139 F.R.D. 588, 589 (S.D.N.Y. 1991).

116. *Id.*

117. *See id.*

118. *See id.* at 590.

119. *See* McDaniel, *supra* note 87.

120. *See* McDaniel, *supra* note 87, at 959.

issue in *In re Technostroyexport*.¹²¹ In *Technostroyexport*, a Russian economic association sought discovery from its New York-based opponent for arbitration proceedings in Moscow and Sweden.¹²² The district court concluded, in dicta and without citation to authority, that an arbitrator or arbitrations were to be considered a "tribunal" under section 1782.¹²³

Three years after *Technostroyexport*, the same district court reached an entirely opposite conclusion. In *In re Medway Power Ltd.*,¹²⁴ an arbitrator authorized a party to seek discovery from third parties located within New York in aid of arbitration in the United Kingdom.¹²⁵ The court analyzed the plain meaning of section 1782 and the procedural differences between arbitrations and litigations, concluding that an arbitration was not a "tribunal" for purposes of the statute.¹²⁶ It determined that the legislative history of section 1782 did not suggest an intent to encompass private arbitrations. This court reasoned that Congress and the courts have consistently treated private arbitrations as creatures of a contract which should be judicially enforced just like any other obligation imposed by a private agreement.¹²⁷

The *Medway* court supported its decision by noting that while the term "tribunal" is often used colloquially, the proper definition excludes international commercial arbitrations.¹²⁸ Relying on Webster's Dictionary, the court defined "tribunal" as "'seat or bench upon which a judge or judges sit in a court' or 'a court of justice.'"¹²⁹ However, the court failed to include the additional language under the definition given by Webster's Dictionary, "or forum of justice."¹³⁰ This omission offers a much broader meaning of the term which would encompass arbitral proceedings.¹³¹

121. 853 F. Supp. 695, 696 (S.D.N.Y. 1994).

122. *See id.* at 696-97.

123. "The court is of the view that an arbitrator or arbitration panel is a 'tribunal' under § 1782." *Id.* at 697. Nevertheless, the court denied the petition for assistance on the ground that the discovery issue had not yet been presented to the foreign arbitrators and the parties should not be permitted to bypass the arbitration agreement and proceed directly to federal court. *See id.* at 697-99.

124. 985 F. Supp. 402 (S.D.N.Y. 1997).

125. *See id.* at 403.

126. *See id.*

127. *See id.*

128. *See id.*

129. *Id.* (quoting WEBSTER'S NEW WORLD DICTIONARY 1427 (3d College ed. 1986)).

130. WEBSTER'S NEW WORLD DICTIONARY 1427 (3d College ed. 1986).

131. Citing to foreign legislation that included arbitrations within the meaning of tribunals, the court admitted, "It is true that Section 1(a) of the English Arbitration Act of 1996 states, 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.'" *Medway*, 985 F. Supp. at 403 (quoting Arbitration Act of 1996, Ch. 23 § 1(a) (Eng.), *reprinted* in 2 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION,

Moreover, both the UNCITRAL Arbitration Rules¹³² and the International Arbitration Rules of the AAA¹³³ use the term “tribunal” in describing an arbitration.¹³⁴ Therefore, the court’s supposed reliance on the literal meaning of “tribunal” is unjustified since the definition accepted by the court was incomplete and misleading.

Only two months after *Medway*, the same district court in *In re National Broadcasting Co.*¹³⁵ similarly held that section 1782 did not provide assistance to commercial arbitrations because they were not foreign or international tribunals.¹³⁶ *National Broadcasting Co.* concerned an arbitration in France over a contractual dispute.¹³⁷ National Broadcasting Company sought discovery in the U.S. from six third-party financial institutions relating to certain advice given to its opponent, a Mexican television company.¹³⁸ Once again, the court analyzed the statute’s legislative history and purpose and narrowly defined the term “tribunal” to include only sovereign tribunals.¹³⁹ The court stated that to conclude otherwise would encourage parties to breach arbitration agreements by allowing American discovery, regardless of the parameters dictated by foreign arbitrators or the agreed arbitral rules.¹⁴⁰ Hence, the parties would not be bound to contractual restrictions against use of such evidence in their private disputes even if they expressly agreed to as much. Consequently, this result would undermine the federal policy in favor of arbitration.¹⁴¹

INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION ANNEX I (Pieter Sanders & Albert Jan Van Den Berg eds. 1998).

132. See American Arbitration Association, *supra* note 72.

133. The Rules were developed to encourage greater use of ADR processes and, ironically, to “avoid the uncertainty of having to petition a local court to resolve procedural impasses.” American Arbitration Association, *International Arbitration Rules* (visited on Sept. 25, 1998) <http://www.adr.org/rules/international_arb_rules.html>.

134. UNCITRAL uses the term beginning in Section II of the Rules entitled, “Composition of the Arbitral Tribunal.” See American Arbitration Association, *supra* note 72, at § II. The International Arbitration Rules of the AAA also uses the term beginning in Section II entitled, “The Tribunal.” See American Arbitration Association, *supra* note 133.

135. No. M-77 (RWS), 1998 WL 19994, at *1 (S.D.N.Y. Jan. 21, 1998).

136. See *id.*

137. See *id.*

138. See *id.* at *1–*3.

139. See *id.* at *4–*7. Sovereign power is “[t]hat power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish legitimate ends and purposes of government.” BLACK’S LAW DICTIONARY 1396 (6th ed. 1990).

140. See *National Broad. Co.*, 1998 WL 19994, at *8.

141. *Id.*

3. Limited Applicability of Section 1782 Is Contrary to Public Policy

The *National Broadcasting Co.* court held that application of section 1782 to arbitrations would be contrary to the U.S. policy of encouraging ADR. This is incorrect. The *National Broadcasting Co.* decision places international arbitrations in an unfavorable position. Without the ability to rely on section 1782, parties may be discouraged from bringing their claims to arbitration. Instead, they would opt for court actions that guarantee the fullest amount of discovery.¹⁴²

The *National Broadcasting Co.* court held that, "the Court's role here is to interpret the intent of Congress, not to legislate a discovery tool for arbitrations."¹⁴³ However, this is exactly what the court accomplished by setting limitations on discovery within the arbitral process. The legislature clearly intended section 1782 to apply to international commercial arbitrations,¹⁴⁴ yet the court disregarded that intention and created its own standard.¹⁴⁵ This is an unconstitutional usurpation of legislative power. Although caution is appropriate in dealing with discovery requests from arbitral tribunals, the statute does not expressly provide for such assistance, and courts must avoid interfering with the arbitral process.¹⁴⁶ Assisting in discovery does not interfere with the process, but rather facilitates the parties contractual intentions. Failure to allow arbitral tribunals the use of section 1782 places them in a disfavored position, which is contrary to Congress's wishes.¹⁴⁷

The *Medway and National Broadcasting Co.* courts' refusal to expand the statute to international arbitrations is not only contrary to the established policy of encouraging ADR, but it also hinders lawyers' ability to represent their clients sufficiently. Procedural aspects of international arbitrations are often unfamiliar and confusing to the vast majority of lawyers in the U.S.¹⁴⁸ In order to be properly prepared for an international

142. The AAA has stated that arbitration is increasingly considered:

[A]n effective, preferred way to resolve international commercial disputes. Avoiding the uncertainty of foreign courts is a critical concern for every company involved in cross-border business. Through arbitration, disputing business partners can resolve disputes in a cost-effective and timely manner through a forum conducive to a fast-paced global marketplace.

American Arbitration Association, *supra* note 54.

143. See *National Broad. Co.*, 1998 WL 19994, at *8.

144. See Smit, *supra* note 88, at 5.

145. See *National Broad Co.*, 1998 WL at 19994, at *6.

146. See Smit, *supra* note 88, at 6.

147. See *id.*

148. See INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS, EVIDENCE IN INTERNATIONAL ARBITRATION PROCEEDINGS 4 (Peter V. Eijsvoogel ed. 1994).

arbitration, an attorney must not only grasp the applicable arbitration guidelines and law, but must also attempt to predict and influence how the proceedings will be conducted.¹⁴⁹ The absence of a uniform discovery statute for evidence located within the U.S. may impair attorneys' ability to provide their clients with the best possible representation.¹⁵⁰ Thus, construing section 1782 to apply to international arbitrations would facilitate discovery and improve representation of clients.

The Second Circuit recently hinted that it may wish to examine the decisions of *Medway* and *National Broadcasting Co.*¹⁵¹ Whether the court will affirmatively reverse these decisions remains unclear, but the Second Circuit in *In re Application of Euromepa*¹⁵² indicated that the issue may not be totally resolved.¹⁵³ The *Euromepa* court discussed *In re Letters Rogatory By Director of Inspection of Government of India*,¹⁵⁴ in which the court held that a proceeding is not a tribunal if the role of the government is closer to that of a prosecutor "than that of a *neutral arbitrator*."¹⁵⁵ The fact that the *Euromepa* court made a distinction between investigative proceedings, which were held to not be a tribunal in *Government of India*, and an arbitration, may be an indication of the court's willingness to reexamine *Medway* and *National Broadcasting Co.*

C. Similarities Between FAA and Section 1782

Unlike international arbitrations held in other parts of the world, international arbitrations in the U.S. are subject to federal law. While different in application, both section 1782 and the U.S. Arbitration Act, usually called the Federal Arbitration Act ("FAA"),¹⁵⁶ share similarities. The FAA contains an evidence-related provision which gives an arbitrator the right to direct witnesses to appear and/or produce documents for the arbitration.¹⁵⁷

Commentators have noted that this evidence-related provision is not surprising considering the notion that a party to a controversy should have

149. *See id.*

150. *See id.*

151. *See In re Euromepa*, 154 F.3d 24 (2d Cir. 1998).

152. *Id.*

153. *See id.*

154. *See* 385 F.2d 1017 (2d Cir. 1967).

155. *See Euromepa*, 154 F.3d at 27 (emphasis added).

156. 9 U.S.C. §§ 1-14 (West 1998).

157. *Id.* at § 7 (stating in part, "The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.").

an opportunity to evoke testimony from people with relevant information, and have access to documents on which the decision could depend.¹⁵⁸ Failure to provide such discovery may fall short of the minimal constitutional requirements of due process.¹⁵⁹ Admittedly, U.S. courts do not insist that all due process requirements under U.S. law be satisfied in foreign arbitrations and have frequently upheld arbitral awards so long as a fair hearing occurred.¹⁶⁰ These decisions strike a realistic balance between the autonomy of parties to an arbitration agreement and the requirements of due process.¹⁶¹ Reluctance to extend section 1782 to international arbitrations outside the U.S. may result in harsh consequences inconsistent with the policies behind the FAA. The fundamental policy of the FAA, to respect the parties' declared intentions to arbitrate their dispute rather than to litigate,¹⁶² will be advanced if section 1782 is expanded to cover international arbitrations as well.

The FAA contains language that should also be adopted by courts that are confronted with a section 1782 request. Under the FAA, if an arbitrator decides that the presence of a person is required but that person refuses to appear, the U.S. district court in the district where the arbitrator is sitting may issue an order to compel an appearance at the arbitration.¹⁶³ However, compulsion by federal courts under the FAA has been limited to arbitrations proceeding in the same district as the court,¹⁶⁴ and courts are extremely reluctant to compel discovery in situations other than when they are enforcing orders given by arbitrators themselves.¹⁶⁵

Similarly, section 1782 also gives district courts the power to issue orders to produce evidence for use in foreign or international.¹⁶⁶ The only forum for which cooperation by U.S. courts is not granted by the FAA is

158. See Smit, *supra* note 88, at 15.

159. See Smit, *supra* note 88, at 16.

160. See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 975-76 (2d Cir. 1974); see also *Joseph F. Mittleman Corp. v. Murray L. Spies Corp.*, 129 N.Y.S.2d 822, 827.

161. See CENTER FOR INTERNATIONAL LEGAL STUDIES, *supra* note 77, at 434.

162. See INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS, *supra* note 148, at 280.

163. See 9 U.S.C. § 7 (1998); see also *Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988); *Recognition Equip. Inc. v. NCR Corp.*, 532 F. Supp. 271 (N.D. Tex. 1981); *Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735 (Tex. Ct. App. 1990). The court may also treat the failure to appear as if the witness had refused a subpoena to come before the court itself, whereby the non-complying witness may be jailed or fined, or both, for contempt of the federal court. See 9 U.S.C. § 7 (1998).

164. See INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS, *supra* note 148, at 280-81.

165. See *Lutz Eng'g Co. v. Sterling Eng'g & Constr. Co.*, 314 A.2d 8, 11 (R.I. 1974) (stating "a complaint seeking discovery in aid of arbitration . . . will not lie . . .").

166. See 28 U.S.C. § 1782 (1998).

private international arbitrations located outside the U.S. The FAA provides assistance in international arbitrations inside the U.S., and section 1782 provides assistance in foreign or international tribunals outside the U.S. A combination of the assistance afforded by the FAA and section 1782 would provide international arbitrations both inside and outside the U.S. the evidentiary assistance they may need.

IV. APPLICATION OF SECTION 1782 TO SPORTS ARBITRATIONS

The *Medway* and *National Broadcasting Co.* decisions may have a significant impact on parties involved in proceedings before international athletic bodies when discovery is needed from within the U.S. Following a trend of submitting disputes to arbitration rather than litigation, international sports bodies have developed internal ADR procedures identical to those of conventional arbitrations.¹⁶⁷ If *Medway* and *National Broadcasting Co.* cases hold form, international commercial arbitrations will not be treated as “tribunals” within section 1782 and the parties involved may be prevented from obtaining relevant and essential evidence to their case.¹⁶⁸

A. In re Application of Wilander

Despite congressional intent to include sports arbitrations within the definition of “tribunal,”¹⁶⁹ and the attempts by sports governing agencies to establish arbitral systems congruent with those favored by the courts,¹⁷⁰ U.S. courts following *Medway* and *National Broadcasting Co.* would refuse to apply section 1782 to such proceedings. For instance, the court in *In re Wilander*¹⁷¹ has already held that an athletic appeals committee of an international governing body is not a “tribunal” within section 1782.¹⁷²

1. Facts of Wilander

In *Wilander*, two professional tennis players challenged the ITF’s drug testing procedures before the appeals committee set up pursuant to the ITF drug testing program.¹⁷³ The athletes filed an application under section

167. Ruskin & Wilens, *supra* note 3, at 7.

168. *See id.*

169. *See* discussion *supra* Part II.A.

170. *See* discussion *supra* Part III.

171. No. CIV.A.96 Misc. 98, 1996 WL 421938, at *1 (E.D. Pa. July 24, 1996).

172. *Id.*

173. *See id.* Tennis players Mats Wilander and Karel Novacek tested positive for cocaine

1782 for an order compelling discovery of certain documents in Pennsylvania that belonged to the doctor and his assistant who coordinated the drug tests.¹⁷⁴

The athletes claimed that the appeals committee was a tribunal under section 1782 because it was deemed to be a "domestic tribunal" by English courts.¹⁷⁵ Additionally, the tennis players relied on several U.S. cases¹⁷⁶ in which a "sports federation tribunal" had been termed an "administrative agency" for purposes of section 1782.¹⁷⁷ However, the *Wilander* court rejected these claims, ruling that the English case law was irrelevant to a section 1782 analysis,¹⁷⁸ and that the American cases cited did not specifically discuss the statute in dispute.¹⁷⁹

The doctor and his assistant both objected to the discovery order and requested that the district court deny the players' application.¹⁸⁰ Their objections were based on several arguments. In addition to claiming that the application was untimely,¹⁸¹ that the athletes already had obtained all relevant materials through voluntary disclosure,¹⁸² and that the discovery request was unduly burdensome,¹⁸³ the objectors also argued that the appeals committee was not a "tribunal" under section 1782.¹⁸⁴ The court analyzed section 1782 in the same manner as *Medway* and *National Broadcasting Co.* and concluded that "nothing in the statute or legislative history suggests that the tribunals which Congress referred to included those within a completely non-governmental private agency such as the ITF."¹⁸⁵ Because the players could offer "no persuasive basis for considering the ITF appeals committee to be a 'foreign or international tribunal' as contemplated by section 1782," the court denied their application.¹⁸⁶

following the 1995 French Open. *Id.*

174. *See id.*

175. *See id.* at *2.

176. The cases were not cited in the text of the opinion. *See id.*

177. *See Wilander*, 1996 WL 421938, at *2.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.* at *4.

182. *See id.*

183. *See Wilander*, 1996 WL 421938, at *1.

184. *See id.*

185. *Id.* at *2.

186. *Id.*

2. *Wilander's* Shortcomings

The *Wilander* court failed to consider the purpose of ITF's dispute resolution procedures.¹⁸⁷ While it remains unclear whether the players were afforded alternative methods for contesting the drug test results, the policy supporting arbitral tribunals nevertheless applies to this situation.¹⁸⁸ One of the distinctive advantages of arbitration is that it allows the parties to tailor the arbitral procedure to the needs of the particular case.¹⁸⁹ The players and the ITF voluntarily entered into proceedings before the appeals committee.¹⁹⁰ Hence, both parties agreed to settle their disputes pursuant to established guidelines. Accordingly, these guidelines, not U.S. courts, should govern whether the evidence sought within the U.S. shall be used within the proceedings. Unfortunately, the *Wilander* court never allowed the appeals committee to have that option.¹⁹¹

The court's refusal to permit evidence under section 1782 also undermined the established arbitral policy allowing broad discovery beyond that of conventional courts.¹⁹² Unlike conventional courts, arbitrators are expected to hear all evidence relevant to the dispute.¹⁹³ One of the few grounds for vacating an arbitrator's award is to show that the arbitrator refused to hear "evidence pertinent and material to the controversy."¹⁹⁴ Because arbitration invokes traditionally broad discovery, and is considered legislatively and judicially favored policy for resolving disputes, any court-imposed limitations against the availability of evidence is contrary to arbitral policy.

The *Wilander* court analyzed the discoverability of evidence in a foreign jurisdiction.¹⁹⁵ The court cited *John Deere, Ltd. v. Sperry Corp.*¹⁹⁶ and partly based its holding upon dicta suggesting such a requirement

187. *See id.* at *2 n.2.

188. *See Smit, supra* note 88, at 8.

189. *See id.*

190. *See Wilander*, 1996 WL 421938, at *1.

191. *See id.*

192. *See COSTELLO, supra* note 56, at 117-19 (explaining the admissibility of evidence in arbitrations).

193. *See id.* at 117.

194. *Id.* (quoting the United States Arbitration Act, 9 U.S.C. § 10 (1999)).

195. *See Wilander*, 1996 WL 421938, at *2 ("[T]he applicants admit that the discovery sought would not be available under the rules governing either the ITF action or the High Court action. As such, a finding that § 1782 does include a discoverability requirement would result in denial of the application.").

196. 754 F.2d 132 (3rd Cir. 1985). Note that this case did not directly involve a discoverability issue. *Id.*

exists.¹⁹⁷ However, a discoverability requirement is not necessary to a section 1782 analysis and is reversible error.¹⁹⁸ The Third Circuit has since abandoned any discoverability requirement within section 1782,¹⁹⁹ nullifying this requirement set forth in *John Deere* and *Wilander*. Therefore, since the rationale behind the *Wilander* court's denial may no longer be viable, subsequent court decisions interpreting section 1782 are not limited by such restrictions.²⁰⁰

B. International Arbitrations' Discovery Procedures Are Inappropriately Stifled

Commentators argue that any confusion existing as to whether such evidence should be admissible within the international arbitral tribunal should not be the final decision of the U.S. courts.²⁰¹ Thus, as the court ruled in *Technostroyexport*, American courts should honor an application under section 1782 only if it is first approved by the arbitral tribunal.²⁰² The reasoning behind such a requirement is sensible and logical because the exact arbitral procedure to be used will not be known in advance.²⁰³ The tribunal and parties first have to determine the particular procedure to follow.²⁰⁴ Also, judicial inquiry regarding admissibility of evidence in international arbitrations would provide an unnecessary burden on the courts considering the complexity and lack of uniformity among such arbitrations.²⁰⁵ Therefore, the application of section 1782 seems futile unless an arbitrator's approval is granted.

197. See *Wilander*, 1996 WL 421938, at *3 ("Dicta in the opinion . . . supports the finding of a discoverability requirement.").

198. See *In re Bayer*, 146 F.3d 188 (3rd Cir. 1998).

199. See *id.* at 193 ("This case presents us with our first opportunity to revisit our opinion in *John Deere*, and we use the occasion to make explicit our view that imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute.").

200. See *id.*

201. See Smit, *supra* note 88, at 8.

202. See *id.* at 9 (citing *In re Technostroyexport*, 853 F. Supp. 695, 698-99 (S.D.N.Y. 1994)). A completely different result was reached by the *Medway* and *National Broadcasting Co.* courts. While the *National Broadcasting Co.* court utilized the same analysis as in *Technostroyexport*, the application had not been approved by the arbitrator. See *In re National Broadcasting Co.*, No. M-77 (RWS), 1998 WL 19994, at *1 (S.D.N.Y. Jan.21, 1998). However, in *Medway* the court refused to grant an order despite evidence that the arbitrator had "direct[ed] that GE's documents] are relevant and necessary for the fair determination of the dispute." *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997).

203. Smit, *supra* note 88, at 8-9.

204. See *id.*

205. See INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS, *supra* note 148, at 6-7. "Unfortunately, the use of arbitration rules is rather difficult to monitor . . . [N]o reporter has

Because international arbitrations are functioning in a judicial capacity, evidence located within the U.S. boundaries that is discoverable by an arbitrator should be discoverable under section 1782. If courts limit the availability of evidence for arbitration, irrespective of existing arbitration agreements, the powers granted to the arbitrators by the parties will be stripped away. Such judicial behavior is contrary to the established principles encouraging ADR because it disregards the intentions of the contracting parties in dispute.²⁰⁶ It has been acknowledged that one reason arbitration is chosen over litigation is to avoid the complicated sets of requirements present in the judicial forum.²⁰⁷

In *Sherrill v. Grayco Builders*,²⁰⁸ the New York Court of Appeals stated that dismissing the entire traditional preliminary discovery process of litigation was a sort of *quid pro quo* for choosing arbitration as the means for resolving disputes.²⁰⁹ Yet, the application of section 1782 to international arbitrations would alleviate parties' need to travel through the maze of judicial civil procedure resulting from filing suit. Furthermore, this is an overreach of judicial powers since the parties did not avail themselves to the jurisdiction of the U.S. courts for resolution, but rather to rule upon requests for evidence.²¹⁰

V. CONCLUSION: THE FUTURE OF SECTION 1782

Arbitration provisions are frequently included in international contracts of various types which directly or indirectly involving sports.²¹¹ For instance, the "Big Four" American professional leagues, as well as international sports federations, either establish their own institutional arbitration procedures, or place binding arbitration clauses in their charters, by-laws, rules and regulations, and contracts.²¹² Even though no other disputes regarding the meaning of "tribunal" under section 1782 currently

given (exact) figures as to the frequency with which certain [arbitration] rules are applied" *Id.*

206. See COSTELLO, *supra* note 56, at 1. Discussing the benefits of ADR, the author states, "the parties consent at the outset of their relationship to resolve disputes in a particular way. Such an agreement alone gives the parties to it more control than businesses which do not have one, because the parties *know in advance* exactly how disputes will be resolved." *Id.* (emphasis in original).

207. See *Sherrill v. Grayco Builders, Inc.*, 486 N.Y.S.2d 159, 164 (Ct. App. 1985).

208. *Id.* at 159.

209. See *id.* at 163.

210. See 28 U.S.C. § 1782 (1998).

211. WISE & MEYER, *supra* note 4, at 671.

212. See *id.*; see also discussion *supra* Part II.

exist within the courts, controversy is inevitable unless the statutes' meaning is clarified.

While Congress has changed section 1782's wording from "court" to "tribunal," district courts have failed to extend the reach of the statute. Congress specifically stated that section 1782 was created in response to the extraordinary expansion of administrative and quasi-judicial proceedings all over the world.²¹³ Nevertheless, the courts failed to permit parties in international arbitrations the availability of section 1782.²¹⁴

Because the courts' narrow interpretation of section 1782 is contrary to both legislative intent and public policy, their decisions should no longer be followed. However, until such a time, sports' international arbitrations face the dangerous peril of proceeding without assurances of obtaining vital evidence from within the U.S.

The only method available to Congress to remedy this situation is to amend the statute. While the current language of the statute provides that evidence may be discoverable "for use in a proceeding in a foreign or international tribunal,"²¹⁵ such terminology should be clarified to support the statute's purpose. Over thirty-five years have passed since the reach of section 1782 was extended to "tribunals," thus the statute should be evaluated in response to advancements in ADR during this time. Specifically, the phrase "or other adjudicative international dispute resolution procedures" could be inserted within subsection (a).

The result would allow courts to permit section 1782 applications in all forums which are premised on neutral alternative proceedings. The internal dispute resolution proceedings in international sports would no longer be unable to obtain relevant evidence just because it is "unofficial."

Until the courts revisit their prior decisions or the legislature expressly amends the statute, section 1782 will remain unavailable to litigants in foreign arbitrations. The established alternative dispute programs created by sports' international governing bodies will be unfairly limited. Any party who would otherwise wish to have their dispute settled

213. See H.R. REP. NO. 88-1052, at 9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

214. See discussion *supra* Parts III & IV.

215. 28 U.S.C. § 1782.

in a timely, cost-effective, private manner would risk proceeding without assurances of obtaining all evidence and materials relevant to the dispute.

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