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# Discovery

Ed Morgan\*

## Abstract

*The purpose of this article is to explore the theoretical basis for, and nature of, the discovery process in transnational litigation. In particular, the article examines the case-law interpreting 28 U.S.C. § 1782, a provision of American federal procedure authorizing the discovery of documents and the deposition of witnesses in aid of foreign litigation where the relevant documents or witnesses are located in the United States. The central doctrinal question is whether the evidence that is the subject of the US-based discovery must be 'discoverable' in the jurisdiction of the litigation itself, or must only be discoverable under the typically more lenient US procedural rules. This debate over doctrine, in turn, raises a debate on the level of theory: Are civil procedure rules rooted in the jurisdiction in which they arise, or do they potentially span jurisdictions in a way which detaches them from any specific political/legal system? Moreover, why does the answer to this question vary from court to court? The article examines the parallels between an existentialist theory of personality and the operation of procedural rules, concluding that there is 'no exit' from the debate over the relationship between competing jurisdictions' rules and thus no pre-determined outcome for the given doctrinal controversy.*

## 1 International Litigation: 'Hell is — Other People'<sup>1</sup>

One ambition of this article is to boldly go where international law theory has rarely gone before: to the Rules of Civil Procedure.<sup>2</sup> While those otherwise banal paradigms

\* Associate Professor, University of Toronto, Faculty of Law. This paper was first presented at the conference on 'Human Rights into the 21st Century' at the University of Toronto in September 1998. Many thanks to Ron Daniels, David Kennedy, Karen Knop, Patrick Macklem, Kent Roach, Ayelet Shchar and Alex Stein for their helpful comments. Thanks also go to Gal Dor for her up-to-date research assistance and to Deborah Steggle and Larry Thacker for their research assistance long ago.

<sup>1</sup> J.-P. Sartre, 'No Exit', in *No Exit and Three Other Plays* (S. Gilbert, trans., 1955), at 47.

<sup>2</sup> Comparative law scholars have done recent work in the field of civil procedure, surveying jurisdiction-specific reform movements and drawing lessons for cross-system amendments. See 'Symposium on Civil Procedure Reform in Comparative Context', 45 *Am. J. Comp. Law* (1997); and also Stein, 'A Political Analysis of Procedural Law', 51 *Mod. L. Rev.* (1998) 659. Generally, see O. Fiss, *The Structure of Procedure* (1979). For an application of comparative law studies of civil procedure to the rules of international arbitrations, see Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure', 7 *Mich. Y.B. Int'l Legal Studies* (1985) 163. For an overview of the attempt by the European Court of Justice at procedural harmonization and the issues associated therewith, see Kerameus, 'Procedural

of legal form hardly qualify as the explorer's last frontier, the exploration followed here is entirely concerned with the existence of those rules and the discovery of their essence. To this end, the article looks at procedural rules through an existentialist lens, in an effort to determine whether there is an essential meaning to those rules in the face of conflicting judicial interpretations. In order to do this, the rules in issue are anthropomorphized, or attributed corporeal qualities, so that they can be analysed in the same way as persons and objects are examined in existentialist literature. Thus, for example, if Jean-Paul Sartre's vision of personal torment entails spending eternity in the company of other equally tormented people, the equivalent for a doctrine of civil procedure must be to be condemned to an eternity of competing and equally cogent doctrines.

In order to determine the meaning of a disputed rule of procedure — especially a rule that crosses jurisdictions — one must first ask a number of generic questions. Are the specifics of civil procedure constrained by issues of jurisdiction and authority, or do they permeate legal process constrained only by issues of justice and the cited authorities? In existentialist terms, does a process rule enjoy objectivity like a scissors, produced in a certain way and having an antecedent purpose or essence;<sup>3</sup> or, contrarily, is it a matter of subjectivity, prior to which is no particular purpose, such that through judicial interpretation it self-consciously 'hurls [it]self toward a future'?<sup>4</sup> Forum to forum, state to state, is process intrinsically due, or is it wilfully doable?

The procedural doctrine with which this paper is principally concerned involves the discovery stage of civil litigation. More specifically, the focus is on 28 U.S.C. § 1782, which provides for US federal<sup>5</sup> judicial assistance to foreign courts and litigants<sup>6</sup>

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Unification: The Need and the Limitations', in I. R. Scott (ed.), *International Perspectives on Civil Justice, Essays in Honour of Sir Jack I.H. Jacob, Q.C.* (1990), at 47; and also Kennett, 'The Production of Evidence within the European Community', 56 *Mod. L. Rev.* (1993) 342; and for an early but particularly perceptive review of European procedural developments, see Cappelletti, 'Social and Political Aspects of Civil Procedure — Reforms and Trends in Western and Eastern Europe', 69 *Mich. L. Rev.* (1971) 885.

<sup>3</sup> Sartre, 'The Humanism of Existentialism', in W. Baskin (ed.) *Essays in Existentialism* (1993), at 34–36. ('He [i.e. the artisan or manufacturer] referred to the concept of what a paper-cutter is and likewise to a known method of production, which is part of the concept ... Thus, the paper-cutter is at once an object produced in a certain way and on the other hand, one having a specific use; and one can not postulate a man who produces a paper-cutter but does not know what it is used for.')

<sup>4</sup> *Ibid.*, at 36.

<sup>5</sup> Section 3.02 of the Uniform Interstate and International Procedure Act provides a model state counterpart to 28 U.S.C. § 1782, but has been adopted by only a handful of states. See, e.g., 42 Pa. Cons. Stat. Ann. § 5326 (Purdon 1981); Mass. Gen. Laws Ann. Ch. 223A, § 11 (West Supp. 1985); Mich. Comp. Laws Ann. § 600.1852(2) (West 1981). Numerous other states have adopted one form or another of discovery assistance statute not necessarily modelled on the uniform Act. See, e.g., Del. Code Ann. Tit. 10, § 4311 (1974); N.Y. Civ. Prac. L. & R. 3102(e) (McKinney 1970); Cal. Civ. Proc. Code § 2029 (West Supp. 1988). For a more thorough review, see Mullin, 'Interstate Deposition Statutes: Survey and Analysis', 11 *U. Balt. L. Rev.* (1981) 1; and Stahr, 'Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings', 30 *Vir. J. Int. Law*, n. 5, 598.

<sup>6</sup> Requests for discovery may be directed to US courts through a number of potential routes. A foreign court may address letters rogatory to a US federal court through the medium of the Department of State, 28 U.S.C. § 1781 (1988), or, alternatively, a foreign court may address letters rogatory directly to a US district court. *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F. 2d 1017 (2d Cir. 1967). Foreign governments may request discovery in pending criminal cases through the

seeking discovery of documents or persons located in the United States.<sup>7</sup> This statutory provision, whose venerable origins can be traced at least to the early nineteenth century,<sup>8</sup> is entirely and unilaterally a US creation, enacted by Congress as part of federal procedure unrelated to the Hague Evidence Convention<sup>9</sup> or any other treaty or international mechanism. It thus represents an effort to deal with discovery issues as they arise in foreign litigation — any foreign litigation — from strictly a civil process point of view, without reference to bilateral relations,<sup>10</sup> foreign policy,<sup>11</sup> reciprocity<sup>12</sup> or any other matters extrinsic to the litigation context. Accordingly, it provides a rare opportunity to consider the territorial bounds of procedural rules on their own terms,

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Department of Justice which, in turn, represents the foreign government in the federal court application. See, *In re Request from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F. 2d 1151 (11th Cir. 1988), cert. denied 109 S. Ct. 784 (1989). In addition, a foreign court may appoint a commissioner for the collection of evidence abroad, who may, in turn, present her commission to the relevant district court for US judicial assistance. See *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 488 F. 2d 511 (9th Cir. 1973). The most direct route, of course, is for a foreign litigant to apply directly to a United States district court, which application may be done either *ex parte* or with notice to the other parties to the foreign litigation. See *John Deere, Ltd. v. Sperry Corp.*, 754 F. 2d 132 (3rd Cir. 1985).

<sup>7</sup> This article is not concerned with the voluntary taking of evidence from US persons for use in foreign legal proceedings, as provided for in 28 U.S.C. § 1782 (b) (1988). Rather, the focus is on judicially compelled discovery pursuant to 28 U.S.C. § 1782 (a) (1988) ('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.

<sup>8</sup> See, *McKenzie's Case*, 2 Parson's Sel. Equity Cas. 227 (Pa. Ct. Com. P1. 1843); and Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.

<sup>9</sup> Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 UNTS 231. As implemented in the United States, the Convention requires that application be made by a foreign court to the Department of Justice. See Weiner, 'In Search of International Evidence: A Lawyer's Guide through the United States Department of Justice', 58 *Notre Dame L. Rev.* (1982) 60.

<sup>10</sup> The requirement that the request come from a 'foreign country with which the United States is at peace' was removed from section 1782 in 1964. See, 1964 U.S. Code Cong. & Admin. News 3782, 3789. For a general history of section 1782 and the policy behind the 1964 reforms of the section, see Smit, 'International Litigation under the United States Code', 65 *Columbia L. Rev.* (1965) 1015.

<sup>11</sup> Some concern has been raised by commentators as to the position of requests coming from the courts of countries not recognized by the United States government. See Smit, *supra* note 10, and *Stahr*, *supra* note 5, at 606-607.

<sup>12</sup> *Soci t  Nationale Industrielle A rospatiale v. United States District Court for the Southern District of Iowa*, 482, U.S. 522, 529-530 (1987) ('foreign litigants [are granted under section 1782], without any requirement of reciprocity, special assistance in obtaining evidence in the United States').

and to reflect on whether the typical jurisdictional confines of such rules<sup>13</sup> represent appropriate legal policy or an unwarranted elevation of form and formalities over legal substance.

The second ambition of this article is to discern in each case not only the essential meaning of the procedural rule at hand, but to discover, in Sartre's sense, the *other* rule that co-exists, and competes, with the one at hand. The case law on depositions and documentary production, like the two sides of a universe folding in on itself, vacillates between visible and invisible dimensions. For every case limiting judicial assistance to the discoverability policies of the parties' local jurisdiction<sup>14</sup> is another, invisible to the eye but conceptually accessible through the wormhole, expanding rights of discovery to American horizons barely dreamt of by the foreign litigants.<sup>15</sup> Each critical argument that US courts 'should not give a foreign litigant assistance that the litigant's own court would not give',<sup>16</sup> stands back to back with a laudatory argument that Congress has 'enable[d] a foreign court or litigant to obtain evidence in the United States, production of which could not be compelled under foreign law'.<sup>17</sup> And each of those, in turn, is a ripple whose reverberations flow from an obscure source to fill an entire view of the world of legal rights. As civil process rules peek at each other across jurisdictional lines, they play a wry, and sometimes tortured game of procedure and substance, social policy and human rights, local rules and transnational justice.

The spectre raised by international litigation, then, is that the law will engage in continuous re-evaluation, and that in gazing at other jurisdictions and their processes the courts will fall into a debilitating cycle from which there is no exit. On its own, domestic civil procedure can be personified as both insular and alive, and like all such creatures is subjectively free to fashion its own rules through conscious policy choice; however, the presence of the other, foreign system, gazing back at the domestic

<sup>13</sup> It goes without saying that the discovery and other civil procedure rules of one jurisdiction cannot themselves be imposed on or applied in another. Indeed, it was the contrast between the generosity of state rules regarding discovery assistance rendered to foreign courts and the narrowness of the equivalent federal rule relating to this issue that for the most part prompted the outpouring of criticism from commentators that sparked the 1964 reform of section 1782. See, Jones, 'International Judicial Assistance: Procedural Chaos and a Program for Reform', 62 *Yale L.J.* (1953) 515; *Stahr, supra* note 5, at 602, n. 23. As part of the overall civil procedure package enacted by various legislatures, the discovery assistance rules of any one jurisdiction cannot themselves be applied in another jurisdiction.

<sup>14</sup> See, e.g., *In re Application of Asta Medica*, 981 F. 2d 1 (1st Cir. 1992) (hereinafter *Asta Medica*); *Lo Ka Chun v. Lo To*, 858 F. 2d 1564 (11th Cir. 1988); discussion Section 2, *infra*.

<sup>15</sup> See, e.g., *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F. 2d 1095 (2nd Cir. 1995) (hereinafter *Euromepa*); *In re Malev Hungarian Airlines*, 964 F. 2d 97 (2nd Cir. 1992); discussion Section 2, *infra*.

<sup>16</sup> Smit, 'Recent Developments in International Litigation', 35 *So. Tex. L. Rev.* (1994) 215, at 236. See, e.g., *Selas Corporation of America v. The Electric Furnace Co.*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). ('Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals.')

<sup>17</sup> *Ibid.*, at 235. See, e.g., *In re Application of Sarrio S.A. for Assistance Before Foreign Tribunals*, 173 F.R.D. 190, 196 (S.D. Tex. 1995). ('Assistance by United States district courts in this endeavour would presumably be welcomed by foreign courts, and, at the same time, this show of cooperation may inspire those courts to adopt similar procedures for use by American citizens.')

process in objectification, brings this system to the world of the dead.<sup>18</sup> In a manner that suggests the Sartrean motto of 'bad faith',<sup>19</sup> the courts in transnational cases proceed by half recognizing<sup>20</sup> their own doctrinal defects in the eyes of the other jurisdiction,<sup>21</sup> and then acting almost painfully, as if their freedom of process were truly and inescapably restrained.<sup>22</sup>

It is this insistent self-reflection of international cases that creates anxieties of a qualitatively different kind from those experienced in ordinary civil litigation,<sup>23</sup> and that intensifies the search for the parameters, or essence, of legal process. The chain of continuous references to universal procedures and particular rules might resolve with an answer that philosophically anchors the process of discovery, or it might go on in an infinite deferral or repetitive loop, in which legal process is fundamentally 'absurd, irreducible, nothing — not even a profound, secret upheaval of nature — could

<sup>18</sup> The excessive self-contemplation provoked by the continuous presence of others is the existentialist hallmark of death. 'No Exit', *supra* note 1, at 40:  
'Estelle: You think too much, that's your trouble.

Garcin: What else is there to do now? I was a man of action once ... Oh, if only I could be with them again for just one day — I'd fling their lie in their teeth. But I'm locked out; they're passing judgment on my life without troubling about me, and they're right, because I'm dead. Dead and done with. [*Laughs.*] A back number.'

<sup>19</sup> The act of bad faith goes a step beyond role playing and deceiving others; it entails Sartre's recognition that it is 'from myself that I am hiding the truth'. J.-P. Sartre, *Being and Nothingness* (H. Barnes, trans., 1982), at 87. See Cumming, 'Role-playing: Sartre's Transformation of Husserl's Phenomenology', in *The Cambridge Companion to Sartre* (1992), at 49. ('This reflexive reorientation is the warrant for my having translated *mauvaise foi* by "self-deception".')

<sup>20</sup> Self-deceivers are believers in the deceit who know, although not explicitly, that they deceive themselves. By contrast, according to Sartre, '[s]incerity is the antithesis of bad faith', Sartre, *supra* note 19, at 100. Self-deceit is more of 'a semiknowing, a pseudoknowing.' Fretz, 'Individuality in Sartre's Philosophy', in *The Cambridge Companion to Sartre*, *supra* note 19, at 84.

<sup>21</sup> According to Sartre, one knows that the Other is alive and subjectively free, but one nevertheless experiences the Other as object. It is therefore not quite accurate to speak of perceiving oneself in the Other's eyes. Sartre, *supra* note 19, at 258. ('The Other's look hides his eyes; he seems to go in front of them.')

<sup>22</sup> Sartre's writings up until and including *Being and Nothingness*, *supra* note 19, represent the 'existentialist conception of man, in which the unique individual [is] essentially still free even when in chains'. Fretz, *supra* note 20, at 68. The chains, however, are real. See 'No Exit', *supra* note 1, at 46:

'What a lovely scene: coward Garcin holding baby-killer Estelle in his manly arms! Make your stakes, everyone. Will coward Garcin kiss the lady, or won't he dare? What's the betting? I'm watching you, everybody's watching. ... Look how obedient he is, like a well-trained dog who comes when his mistress calls. You can't hold him, and you never will.'

<sup>23</sup> Since the Anglo-American judicial system exhibits what has been labelled a 'mild ordering of authority', a certain anxiety exists in respect of all judicial decisions. See, Damaska, 'Structures of Authority and Comparative Criminal Procedure' in R. M. Cover and O. M. Fiss (eds), *The Structure of Procedure* (1979), at 302 ('Characteristically, a penumbra of uncertainty exists in circumscription of judicial authority in the United States.'). In the international context, with 'other people' on the horizon, the anxiety may turn to outright fear. 'No Exit', *supra* note 1, at 8–9:

'Garcin: ... Well, now that we've broken the ice, do you really think I look like a torturer? And, by the way, how does one recognize torturers when one sees them? Evidently you've ideas on the subject.

Inez: They look frightened.

Garcin: Frightened! But how ridiculous! Of whom should they be frightened? Of their victims?

Inez: Laugh away, but I know what I'm talking about. I've often watched my face in the glass.'

explain it.<sup>24</sup> The existence of other people, the other system or set of rules in each case, torments the courts into a search for doctrinal essence and propels a discovery of either rationality or absurdity as the end product of that search.

## 2 The Discoverability Question: ‘Existence Precedes Essence’<sup>25</sup>

The discoverability doctrine, as it has been analysed and pronounced by various district and circuit courts, exhibits little silver lining and more than a touch of grey. The results have been divided, with some courts strictly enforcing the discoverability requirement and others choosing to ignore it altogether. Indeed, so sharp has the division been that, although it has generally fallen along circuit court lines — with the First,<sup>26</sup> Fifth,<sup>27</sup> Eleventh<sup>28</sup> and a couple of other Circuits<sup>29</sup> holding fast to the discoverability rule, and the Second Circuit<sup>30</sup> leading the charge against it — at least one appellate court has gone both ways in an effort to ‘clarify’ its thinking on the issue.<sup>31</sup> The overall effect has been jarring, with each relatively short decision pointing in its own staccato way to a harmony line in discord with its alternative accompanying tune. The only way to proceed, therefore, is to parse one strand at a time, hoping to discover within the isolation of each the key to some harmonization of the rule’s various strands.

The overall object of the exercise, of course, is to determine whether the all-knowing civil procedure God, the deified rationality that seems so prevalent in ordinary litigation,<sup>32</sup> does in fact exist. In the existentialist account, if there is to be a discernible nature, an underlying meaning to the character of a rule or set of rules, there must be

<sup>24</sup> J.-P. Sartre, *Nausea* (1964), at 129.

<sup>25</sup> Sartre, *supra* note 3, at 35.

<sup>26</sup> *Asta Medica*, *supra* note 14.

<sup>27</sup> *In re Letters Rogatory from the Court of First Instance in Civil matters, Caracas, Venezuela*, 42 F. 3d 308 (5th Cir. 1995).

<sup>28</sup> *Lo Ka Chun v. Lo To*, *supra* note 12; *In re Request For Assistance From Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151 (11th Cir. 1988).

<sup>29</sup> *In re Letter of Request From the Crown Prosecution Service of the United Kingdom*, 870 F. 2d 686 (D.C. Cir. 1989); *In re Letter Of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F. 3d 590 (4th Cir. 1996); *Okubo v. Reynolds*, 16 F. 3d 1016 (9th Cir. 1994).

<sup>30</sup> *Euromepa*, *supra* note 15; *Metallgesellschaft AG v. Hodapp*, 121 F. 3d 77 (2nd Cir. 1997); *Malev Hungarian Airlines v. United Technologies International Inc.*, *supra* note 15; *Foden v. Gianoli*, 3 F. 3d 54 (2nd Cir. 1993); *Esses v. Hanania*, 101 F. 3d 873 (2nd Cir. 1996).

<sup>31</sup> See, *John Deere Limited v. Sperry Corporation*, 754 F. 2d 132 (3rd Cir. 1985) (hereinafter *John Deere*) (no discoverability requirement under 28 U.S.C. §1782(a)); *In re Application Pursuant to 28 U.S.C. 1782 For An Order Permitting Bayer AG To Take Discovery of Betachem, Inc.*, 1998 WL 297502 (3rd Cir. 1998) (unreported) (clarifying *John Deere* ruling, stating that discoverability requirement does exist and has been satisfied in present case).

<sup>32</sup> Cover and Fiss, *supra* note 23, at 75. (‘The idea of trans-substantive procedural values and rules is related to, but not identical to, the ideal of procedural autonomy and procedural “neutrality” (here speaking of the neutrality of the process rather than of the decision maker) — an ideal that lies at the heart of John Rawls’ attempt to lay the philosophic foundation of the liberal-egalitarian institutions of contemporary American society. J. Rawls, *A Theory of Justice* (1971).’)

some essential force which creates it or which drives it forward.<sup>33</sup> On the other hand, if procedural doctrines are indefinable, it is because they, like the Sartrean man herself, are preceded by nothing.<sup>34</sup> That they may be meaningless from inception, however, is not to say that they are paralysed, as they clearly are not. In Sartre's famous café illustration, there is content even in emptiness: 'the café by itself with its patrons, its tables, its booths its mirrors, its light its smoky atmosphere, and the sounds of voices rattling saucers and footsteps ... [may be seen as] a fullness of being',<sup>35</sup> or it may be seen as an absence of being, a nothingness, since the friend one was to meet at the café is not there. Either way, action advances in the café scene, and, for present purposes, the case law moves forward whether the rules are full or void of precast meaning. The question is whether the cases are propelled by an essential rationality, or are in some way self-propelled in the absence of such essence, the very existence of legal process preceding its meaning.

### ***A Asta Medica: The First Circuit Contemplates its Equal***

The First Circuit's leading section 1782 case arose in the context of multi-party and multi-national patent litigation by European drug manufacturers,<sup>36</sup> who sought production of documents and witnesses from the American pharmaceutical giant, Pfizer, Inc. The Court found an implied requirement of foreign discoverability in the otherwise silent language of the statute, and arrived at this conclusion after pursuing two distinct paths to equal treatment of the entities before it. In the first place, the Court noted that the litigating parties must themselves be accorded the fair play and respect entailed in the notion of treating them as equals, disregarding for all procedural purposes any issues of nationality, geography, or the location of and access to the information sought to be discovered.<sup>37</sup> Secondly, the Court reasoned that as a United States institution it must itself accord the foreign jurisdiction, with its procedural rules and laws of evidence, the respect and sense of fairness entailed in the notion of sovereign equality, disregarding for the purposes of its ruling any issues of national preference, politics, or the civil process policies engaged by the discovery request.<sup>38</sup> However, in an ironic twist for a judgment whose guiding principle on both

<sup>33</sup> Sartre, *supra* note 3, at 36 ('... there is no human nature since there is no God to conceive it').

<sup>34</sup> *Ibid.* ('If man, as the existentialist conceives him, is indefinable, it is because he is at first nothing.')

<sup>35</sup> Sartre, *supra* note 19, at 41.

<sup>36</sup> The lead applicant in the United States proceedings, Asta Medica, S.A., was the defendant in a Belgian patent enforcement action brought by Pfizer, Inc. For a review of the factual and procedural background, see both the First Circuit decision in *Asta Medica*, *supra* note 14, and the District Court decision at first instance, *In re Application of Asta Medica, S.A.*, 794 F. Supp. 442 (D. Me. 1992).

<sup>37</sup> *Asta Medica*, *supra* note 14, at 5–6. ('Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. This result would be contrary to the concept of fair play embodied in United States discovery rules'.)

<sup>38</sup> The First Circuit reacted to the District Court's contrary reasoning by issuing a somewhat ominous warning. *Asta Medica*, *supra* note 14, at 7 ('Interpreting Section 1782 as a congressional mandate to allow discovery as long as "the subject matter is generally pertinent," although such discovery may not be available in the foreign jurisdiction — in fact, it might be prohibited — would lead some nations to conclude that United States courts view their laws and procedures with contempt.').

the domestic and international levels is that of universal equality, the ruling embraces the existing state of fundamental difference between the parties and, ultimately, sounds in a counsel of unequal treatment.

In turning its mind to the position of the litigants relative to each other, the First Circuit in *Asta Medica* came to the conclusion that to enforce section 1782 under the circumstances (and, as far as one can tell, virtually all circumstances) would be to the disadvantage of the American party. Thus, despite the Court's acknowledgement of Congress' intent in enacting and amending the section 'to provide more "equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects"',<sup>39</sup> the appellate decision limited those procedures in a way for which the lower court had concluded '[t]here is absolutely no evidence in [section 1782], the legislative history or the academic commentary explaining the statute's enactment'.<sup>40</sup> While the statute was expansive in its implementation of transnational procedural equity, the Court's implementation of it was restrictive in its overriding concern for nationally focused equitable treatment.

Moreover, in preserving the difference between foreign and domestic discovery rules, the Court ignored the US policy demand of mutual full disclosure.<sup>41</sup> In its place, apparently as a policy matter of equal importance, was a concern to preserve the inequality of knowledge and information existing prior to the discovery process. For the sake of fairness it was essential, in the First Circuit's view, that the American litigant with relevant information in its possession not be subjected to 'the floodgates [of] unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction'.<sup>42</sup> The judicial blessing of American-style pre-trial discovery was thus transformed into a curse, with full-blown disclosure of information and documents morphing almost imperceptibly into a full-blown nightmare of evidentiary revelations compulsorily disgorged by the favoured side.

Whereas the inequality of US and foreign procedures was invoked to preserve the ostensible equality of the litigants, it was the equality of the US and foreign sovereigns that was called upon to preserve the inequality of their respective civil processes and rules. In the international relations branch of its judgment, the First Circuit started off by suggesting that the federal courts are to exercise a power over civil process not typically exercised by similarly situated foreign tribunals;<sup>43</sup> the expressed hope for reform of foreign procedures and the concurrent acknowledgement of normative differences with foreign jurisdictions signalled what could have been a call to dispense

<sup>39</sup> *Ibid.*, at 5, citing the amendments to section 1728 contained in Public Law No. 88–619, 78 Stat. 997 (1964).

<sup>40</sup> *In re Application of Asta Medica, S.A.*, 794 F. Supp. 442, 445.

<sup>41</sup> *Asta Medica*, *supra* 14, at 6, quoting *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for Southern District*, 482 U.S. 522, 540 n. 25; 107 S.Ct. 2542; 96 L.Ed. 2d 461 (1987), in turn quoting *Hickman v. Taylor*, 329 U.S. 495, 507; 67 S.Ct. 385, 392; 91 L.Ed. 451 (1947). ('[A]ll the relevant facts gathered by both parties is essential to proper litigation.')

<sup>42</sup> *Asta Medica*, *supra* note 14, at 5.

<sup>43</sup> *Ibid.*, citing S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 3782 (purpose of the 1964 amendments to section 1782 is 'to encourage foreign countries to revise their judicial procedures similarly').

with deference and comity.<sup>44</sup> The First Circuit, however, turned that reasoning around, noting that in order to fulfil Congress' desire to encourage procedural liberalization outside the United States, the US courts cannot be seen to impose discovery rules that are substantially more liberal than their foreign counterparts.<sup>45</sup> Although mandated to pursue the doctrine of expansive discovery, the Court did not want either the parties or their home judiciaries smarting from a thoughtless doctrinal wound.

The Court's primary international relations concern, however, was not so much with the secondary concept of comity as with the primary concept of sovereignty.<sup>46</sup> Accordingly, the judgment is careful to neither impose American rules on the conduct of non-American litigation nor to make American rules available as alternative avenues of recourse for parties to an action where distinctly un-American rules might otherwise apply.<sup>47</sup> In protection of the foreign jurisdiction's inherent legal sovereignty, therefore, the Court chose to disregard what it dubbed 'Congress' unilateral decision to broaden the procedures to obtain evidence in the United States for use abroad — without regard to whether other nations would reciprocate'.<sup>48</sup> In other words, foreign tribunals and legislatures were raised above both Congressional enactment and US judicial policy in civil process; all of which was necessary, of course, in the name of sovereign equality. While the Court understandably felt that the foreign jurisdiction may be undermined through the undue application of American civil norms, it somehow failed to see that the inverse — that Congress' legislative supremacy may be undermined through undue deference to foreign procedures — must also be the case.

The *Asta Medica* litigation therefore ended its stint in the United States with a victory

<sup>44</sup> The District Court reasoned that it need not concern itself with the sensitivities of a foreign tribunal, since 'Congress showed no such fear ... in enacting a statute that does not depend on reciprocity.' *In re Application of Asta Medica, S.A.*, 794 F. Supp. 442, 444, n. 9. The First Circuit, in reversing this ruling, stated that the District Court confused the congressional dispensing with the requirement of reciprocity with the requirement of comity, which was not eliminated from section 1782. *Asta Medica*, *supra* note 14, at 6 and n. 5, citing *Hilton v. Guyot*, 159 U.S. 113, 163–4; 16 S. Ct. 139, 143; 40 L. Ed. 95 (1895) for the definition of international comity as including recognition of the legislative, executive or judicial acts of another nation, but with due regard for various competing factors such as the rights of the domestic jurisdiction's own citizens.

<sup>45</sup> *Asta Medica*, *supra* note 14, at 7 ('the broader goal of the statute — stimulating cooperation in international and foreign litigation — would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782').

<sup>46</sup> While US courts have, at least since the time of Chief Justice Marshall, recognized that the imposition of civil process on a foreign sovereign itself may violate international law's protection of sovereignty, *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) (immunity from suit for ship in American waters flying foreign flag), it has been more rare, although not unheard of, for courts to perceive the application of one jurisdiction's procedural as implicating the notion of legal sovereignty, see *Boreri v. Fiat S.P.A.*, 763, F. 2d 17, 19 (1st Cir. 1985) ('In [civil law] countries, discovery [United States]-style is often considered an affront to the nation's judicial sovereignty.').

<sup>47</sup> *Asta Medica*, *supra*, at 6. ('In amending Section 1782, Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation.')

<sup>48</sup> *Ibid.*

for Pfizer<sup>49</sup> premised on two equally applicable and equally defective versions of equality. The individual (or corporate) parties were held to different and unequal levels of knowledge and information, which translated into the preservation of two different and unequal regimes of pre-trial disclosure. This fundamental inequality of process was premised on the rationale that the rights and obligations of each must remain rigorously equal out of a sense of fair play. At the same time, the norms applicable in the two sovereign jurisdictions were kept intentionally unequal and distinct, and the liberal American discovery rules mandated by Congress and the US courts were avoided. Truncated discovery was adopted as a means of encouraging procedural liberalization, and US policy was overlooked as a means of enforcing sovereignty.

By comparison with domestic civil procedure, the *Asta Medica* decision graphically demonstrates that the self-awareness spawned by a relationship with other jurisdictions is a form of legal inferno. Indeed, it is this tortured enterprise of perceiving the *other* that defines the section 1782 machinations, since the section presupposes not only examining the other jurisdiction but ‘the permanent possibility of being seen by the other’.<sup>50</sup> Thus, the First Circuit experiences American process doctrine in the eyes of others,<sup>51</sup> and in a moment of obvious shame simultaneously limits itself and perceives the freedom of the *other* to fashion *its* policy. The way to live with the shame, or to disguise its anguish, is to deceive itself through role playing, creating equity between the jurisdictions while objectifying its own process rule. Animated domestic policy is turned into a new-found, restrictive doctrine of interpretation as if it were an object of contemplation — caught in the act, as it were — by another equivalent legal system.<sup>52</sup>

## B Euromepa: *The Second Circuit Swallows All Others*

By contrast to the First, the Second Circuit, in a case arising from a New York-based jewellery company’s claim against its insurance broker in France,<sup>53</sup> perceived section 1782 as a strictly ‘one way street’,<sup>54</sup> in which foreign rules were viewed as mysterious

<sup>49</sup> The Court embraced the conclusion reached by the Eleventh Circuit in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1156 (‘the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance’). It pointed out, however, that there was no need to explore whether the information sought is admissible (as opposed to discoverable) in the foreign jurisdiction. See *In re Request for Judicial Assistance from Seoul District Criminal Court*, 555 F. 2d 720, 723 (9th Cir. 1977).

<sup>50</sup> *Sartre*, *supra* note 19, at 344.

<sup>51</sup> *Ibid.*, at 475 (describing the embodiment of Sartre’s conflicted ‘being-for-others’).

<sup>52</sup> *Ibid.*, at 97. (‘The hand rests inert between the warm hands of her companion — neither consenting nor resisting — a thing. . . . We shall say that this woman is in bad faith.’)

<sup>53</sup> *Euromepa*, *supra* note 15.

<sup>54</sup> *Ibid.*, at 1097, citing its own prior decision in *In re Malev Hungarian Airlines*, 964 F. 2d 97, 100 (2d Cir. 1991), quoting Amram, ‘The Proposed International Convention on the Service of Documents Abroad’, 51 *A.B.A.J.* (1965) 650, at 651. The concern over French policy and sovereignty had been central to the judgment of the District Court at first instance. *Application of Euromepa, S.A.*, 155 F.R.D. 80, 83 (S.D.N.Y. 1994). (‘Granting this petition would undeniably infringe on the power that the French legislature has bestowed on its courts . . . [and] would be contrary to the policy formulated and instituted by the French

technical material<sup>55</sup> into which the courts need not delve.<sup>56</sup> The Second Circuit did not, of course, entirely overlook the arguments made in favour of a section 1782 discoverability rule. On the other hand, neither did the Court address these arguments head-on; rather, it resolved the arguments by pointing the way to alternative solutions to the problem of imbalance between the open, party-oriented style of American discovery and the closed, court-supervised style of European discovery: either the US court granting the section 1782 application could attach conditions,<sup>57</sup> or the French court ultimately considering the evidence could limit or enjoin unsupervised discovery. In a classic stand-off, the US court could restrict its incursion into France by acknowledging the French court's power to interfere with the implementation of the United States' own federal legislation.

In reiterating its view, expressed in several previous Second Circuit decisions, that section 1782 contains no 'implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country',<sup>58</sup> the Court perceived itself as implementing the statute's 'twin aims'<sup>59</sup> of providing effective discovery to participants in foreign litigation and encouraging foreign countries by example to provide similar discovery rights to Americans whose evidence needs to be discovered abroad.<sup>60</sup> In fact, so expansive was the Second Circuit's view of the applicability of US discovery procedures to non-US litigation that it insisted that there is no 'quasi-exhaustion requirement'<sup>61</sup> implicit in section 1782. In the Court's view, a litigant in France need not seek its remedy first from the stingy French courts where

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legislature.') Likewise, Justice Jacobs, dissenting in the Second Circuit, accentuated the infringement of prevailing French civil procedures entailed in granting *Euromepa's* application. *Euromepa*, *supra* note 16, at 1105. ('In this way, we both interfere with French discovery and clog the French appeals court with the random harvest of the American discovery.')

<sup>55</sup> *Ibid.* at 1096. ('This case raises the question of the degree to which federal district courts, in deciding whether to order discovery under 28 U.S.C. §1782(a) in aid of a foreign litigation, should delve into the mysteries of foreign law.')

<sup>56</sup> *Ibid.* at 1099. ('We do not believe that an extensive examination of foreign law regarding the existence and extent of discovery in the forum country is desirable. . . . [W]e do not read the statute to condone speculative forays into legal territories unfamiliar to federal judges.') This attitude toward examination of foreign law has been expressed by commentators seeking to spare courts of the exercise. See, Stahr, 'Discovery under 28 U.S.C. § 1782 for Foreign and International Proceedings', 30 *Va. J. Int. L.* (1990) 597, at 613 ('a debate over foreign discovery law ... would ... place a significant burden on the litigants and the federal district courts'), cited in *Euromepa*, *supra* at 1099.

<sup>57</sup> This approach was suggested by the Senate Report accompanying the 1964 amendments to section 1782. S. Rep. No. 1580, 88<sup>th</sup> Cong., 2nd Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3782, 3788 ('[Section 1782(a) leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable.'). See, *Euromepa*, *supra* note 16, at 1103, n. 2.

<sup>58</sup> *In re Application of Aldunate*, 3 F. 3d 54, 59 (2d Cir. 1992).

<sup>59</sup> *In re Malev Hungarian Airlines*, 964 F. 2d 97, 100 (2d Cir. 1991).

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

disclosure is thin, but may rather transport directly to America, where depositions are bountiful and the doors of discovery are always open.<sup>62</sup>

In an acknowledgement of its hegemonic view of section 1782's impact, the Second Circuit noted that '[t]here are, admittedly, many ways in which a blanket, "American-style" grant of discovery to one side in a foreign lawsuit may confuse or skew that litigation'.<sup>63</sup> The Court's solution, however, would not have been to dispense with the US procedures in such a case, but rather to have 'conditioned relief upon the parties' reciprocal exchange of information ... [or] "reciprocal discovery"'.<sup>64</sup> In deference to the foreign jurisdiction, in other words, the entire foreign discovery process — not just as it relates to a US-based party, but in respect of all parties to the foreign action — is subsumed under the US procedure, the pre-trial evidence gathering for the upcoming French hearing becoming an entirely American affair. The attitude is almost imperial, as the solution to the problem of the US invasion of French civil process becomes more, not less US procedure.

All of which raises the question, if the much invoked ability of the US courts to exercise their discretion in 'issuing a closely tailored discovery order'<sup>65</sup> translates into an all-encompassing American-style discovery order for the foreign action, what will be the response, if any, of the foreign court? The Second Circuit's answer is that, from experience, the foreign court might either take great offence, or might not. On the one hand, the Court surmised, 'the French court can always enjoin [Euromepa] from pursuing discovery in a manner that violates the judicial policies of France',<sup>66</sup> while on the other hand it cited England's House of Lords to the effect that American discovery pursuant to section 1782 is not 'conduct which is oppressive or vexatious or which interferes with the due process of the [British] court'.<sup>67</sup> One never knows what the foreign jurisdiction will see in 28 U.S.C. § 1782, and this fundamental unknown seems to torment the courts in interpreting the section itself.

The Second Circuit's conclusion that historic US policy at home dictates present process in France exudes a deceptive aura of determinism. And while taken on its own it may seem that the past has compelled the move toward the future, when compared with the First Circuit in *Asta Medica* it is apparent that the consciousness of the past is a false one; as Sartre would say, it is not the gambler's past that causes him to roll the

<sup>62</sup> This was the point on which the dissent most vigorously took issue. *Euromepa*, *supra* note 15, at 1103 (Jacobs, J. dissenting) ('I think that it was appropriate for the district court to consider that American discovery is sought here — by one party against another party — as a substitute for discovery in France rather than as an aid and supplement to the procedures of a French tribunal.'). Indeed, the dissent concluded with an admonishment that United States courts are in danger of becoming 'global "Special Masters for Discovery."' *Ibid.* at 1105, quoting *In re Malev Hungarian Airlines*, 964 F. 2d 97, 103 (2d Cir. 1991) (Feinberg, J. dissenting).

<sup>63</sup> *Euromepa*, *supra* note 15, at 1101.

<sup>64</sup> *Ibid.* at 1102, quoting in part *In re Malev Hungarian Airlines*, 964 F. 2d 97, n. 4 (2d Cir. 1991).

<sup>65</sup> *Euromepa*, *supra* note 15, at 1101.

<sup>66</sup> *Ibid.*

<sup>67</sup> *South Carolina Insurance Co. v. Assurantie Maatschappij 'De Zeven Provinciën' N.V.*, [1986] 3 W.L.R. 398 (H.L.); *Euromepa*, *supra* note 15, at note 3.

dice, it is the gambler himself at the moment he approaches the table.<sup>68</sup> What keeps the court going is the ability to disguise possibility as necessity. It is, after all, the court itself that confers meaning onto the statute, much as it is a person that confers meaning on an alarm clock as it rings the day's schedule into one's head each morning,<sup>69</sup> and not the other way around. Each case 'await[s] [it]self in the future'.<sup>70</sup>

### C John Deere: *The Third Circuit Finds No Exit*

With a disagreement between the First and Second Circuits, one inevitably turns to the Third in the hope of resolving the impasse. The promise of the Third Circuit's leading decision in *John Deere*,<sup>71</sup> however, fades almost as soon as one starts to read the decision, and is quickly replaced with a sense of bemusement as to how the decision became a leading one on the discoverability question;<sup>72</sup> after all, the issue was apparently not argued by the parties as a ground of the appeal and was not stated as central in the Court's characterization of the issues before it.<sup>73</sup> Nevertheless, precedent is in the eye of the beholder, and, having almost inadvertently stumbled on some novel section 1782 insights, *dicta* in the Third Circuit's reasons for judgment have taken on a life of their own. Moreover, the Court felt obliged to later clarify its statements regarding the discoverability doctrine, in the result clarifying only that it has two good eyes but it still can't see. Ultimately, therefore, the voyage along this route is more interesting than the destination, but for that reason alone it is worth travelling.

The case involved patent litigation in Canada over the design of a hay harvesting machine, during the course of which John Deere, who had already been successful in parallel US patent proceedings,<sup>74</sup> sought discovery of two key employees of the Canadian patent holder, Sperry Rand. Of the two issues specifically addressed by the Third Circuit — reciprocity of procedures and admissibility of the evidence whose discovery was sought — it was the notion of reciprocity that was seen to flow most

<sup>68</sup> Sartre, *supra* note 19, at 69 (gambler 'who has freely and sincerely decided not to gamble anymore and who when he approaches the gaming table suddenly sees all his resolutions melt away').

<sup>69</sup> *Ibid.*, at 77 ('there exist concretely alarm clocks, signs, tax forms, policemen — so many guardrails against anguish. But ... as soon as I am referred to myself ... then I discover myself suddenly as the one who gives its meaning to the alarm clock ...').

<sup>70</sup> *Ibid.*, at 73.

<sup>71</sup> *Supra* note 32.

<sup>72</sup> The decision is frequently cited on the discoverability issue. See, e.g., *In re Application Pursuant to 28 U.S.C. § 1782 for an Order Permitting Bayer AG to Take Discovery of Betachem, Inc. for Use in an Action Pending in the First Instance Court No. 25 of Barcelona, Spain*, 1998 WL 297502, 4 (3rd Cir. 1998) (hereinafter 'Bayer'). ('The inquiry begins with the districts court's interpretation of *John Deere Ltd. v. Sperry Corp.* ..., this court's oft-cited opinion addressing s. 1782.')

<sup>73</sup> *John Deere*, *supra* note 31, at 133 ('This appeal presents the question whether 28 U.S.C. §1782(a), which governs judicial assistance rendered to foreign and international tribunals and to litigants before such tribunals, requires a district court to consider: (1) the availability of reciprocal foreign procedures, and (2) the ultimate admissibility of evidence in the foreign jurisdiction prior to granting a discovery order requested by a foreign litigant.')

<sup>74</sup> *Deere & Co. v. Sperry Rand Corporation*, 322 F. Supp. 397 (E.D. Cal. 1970), *aff'd* 513 F. 2d 1131 (9th Cir.), *cert. denied* 423 U.S. 914, 96 S.Ct. 218, 46 L.Ed. 2d 142 (1975).

directly against the grain of the statute.<sup>75</sup> Indeed, rarely has such a requirement been imposed, even in prior cases emanating from Canada,<sup>76</sup> which the District Court in *John Deere* seemed to think represented a special case of non-reciprocity. Generally, section 1782 has been characterized as an enactment that encourages future reciprocity rather than one that requires an existing state of reciprocity with the relevant foreign jurisdiction.<sup>77</sup> A condition of foreign reciprocity would therefore seem an unusual prerequisite to be judicially read into a statute whose aspirations can be characterized as ‘an attempt to *stimulate* reciprocity’.<sup>78</sup>

It is in its deliberations on whether there is a requirement of admissibility of the sought-after evidence in the ultimate foreign proceeding that the Third Circuit’s judgment has had its most lasting effect. Of course, this was a largely pointless exercise, as the case law is replete with the altogether logical conclusion that, in assessing a discovery request, there is no need for a US court to speculate as to the eventual use of the evidence abroad; the foreign tribunal is inevitably (and self-evidently) in control of its own processes at that stage.<sup>79</sup> In the process of making that obvious point, however, the Third Circuit stumbled into the controversy at hand, stating in an off-hand way that, ‘[w]here, in the first instance, the matter sought would be discoverable were all persons within the foreign jurisdiction, the foreign tribunal should decide what use it wishes to allow the elicited documents and testimony’.<sup>80</sup> In solving one obvious problem, the next one never seems to have crossed the Court’s mind.

In embarking upon the discoverability controversy, the Third Circuit was both fortunate and unfortunate in the way in which the underlying Canadian proceedings complemented its own ruling. Between the time of the District Court’s decision and the appellate judgment, the Federal Court of Canada ordered Sperry to produce one of its employees — McCarty, the corporate officer, but not Glass, the non-officer — for an oral examination for discovery pursuant to the ordinarily applicable Canadian procedural rule.<sup>81</sup> As a consequence of that fortuitously timed ruling, the Third Circuit could characterize the admissibility question as one of the several types of ‘technical questions of foreign law’<sup>82</sup> from which a US court should keep its distance, and could

<sup>75</sup> The District Court had based its reasoning on the protection of foreign procedures. *John Deere Limited v. Sperry Corporation*, 100 F.R.D. 712, 714 (E.D. Pa. 1983) (‘the section 1782 order would represent an unwelcome intrusion into the judicial processes of a foreign tribunal’).

<sup>76</sup> See, e.g., *In re Letter Rogatory from the Justice Court, District of Montreal, Canada*, 523 F. 2d 562, 565 (66th Cir. 1975).

<sup>77</sup> *John Deere*, *supra* note 31, at 135, quoting Amram, ‘Public Law No. 88-619 of October 3, 1964 — New Developments in International Judicial Assistance in the United States of America’, 32 *D.C. Bar. J.* (1965) 24, at 33 (‘[section 1782] would furnish an “example of unilateral, nonreciprocal, internal legislation ...”’). See also *In re Request for Judicial Assistance from Seoul*, 428 F. Supp. 109, 112 (N.D. Cal. 1977).

<sup>78</sup> *John Deere*, *supra* note 31, at 135 (emphasis added).

<sup>79</sup> See, *In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea*, 555 F. 2d 720, 723 (9th Cir. 1977); and also *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F. 2d 1216, 1219 (9th Cir. 1976).

<sup>80</sup> *John Deere*, *supra* note 31, at 136–137.

<sup>81</sup> *Federal Court Rules*, C.R.C. 1978, c. 663, rule 465(5), (19).

<sup>82</sup> *John Deere*, *supra* note 31, at 136.

consider the discoverability issue to be no issue at all. Indeed, even in requiring discovery of the second Sperry employee, who had been exempted from the Canadian court's own order, the Third Circuit could portray its decision as the application of a US rule rather than an interference with a foreign procedure.<sup>83</sup> If each court keeps within its own confines, then neither ruling can be said to interfere with the other — a logic which seems to apply even if the two ensuing orders are entirely contradictory.

If the Canadian court in ordering discovery was opaque in respect of McCarty,<sup>84</sup> the Third Circuit's posturing was transparent in respect of Glass. These difficulties in reasoning were made all the more evident in the Third Circuit's follow-up judgment in the *Bayer* case,<sup>85</sup> where the Court felt obliged to rewrite its *John Deere* letter. In later revisiting its own reasons for judgment, the Third Circuit provided a near caricature of the reasoning process, explaining simply that it had ordered Glass to testify because 'the Canadian court had held that McCarty's testimony would be material and required by the equities'.<sup>86</sup> If the harvester discovery motion played out in a convoluted way, that confusion, the Third Circuit made clear, was sowed by none other than the hayseed jurisdiction from which the case came.

In the process of clarifying its position, the Third Circuit Court in *Bayer* expressed some surprise that a number of appellate courts have interpreted *John Deere* as requiring proof of foreign discoverability before issuing a section 1782 order.<sup>87</sup> It is apparent, however, that the Court came to the discoverability issue from an altogether different conceptual perspective than it had on its previous visit. The primary legal concept at play in *John Deere* had been the sovereign insularity of the foreign jurisdiction, and the cases cited therein emphasized respect for foreign civil process as a normative value in and of itself.<sup>88</sup> The primary concept at play in *Bayer*, on the other hand, was the sovereign authority of domestic civil procedure in the absence of any

<sup>83</sup> *Ibid*, at 138 (foreign court 'may question its own power to devise and grant an order for the discovery of a corporate employee resident outside its jurisdiction ... [but not] the application of section 1782').

<sup>84</sup> The Third Circuit cited the Federal Court of Canada's reliance on a Canadian federal rule of procedure, Federal Court Rule 465 (19), allowing for additional discovery if undefined 'special reasons' exist for doing so. *John Deere*, *supra* note 31, at 137, n. 6.

<sup>85</sup> *Supra* note 32.

<sup>86</sup> *Ibid*, at 4.

<sup>87</sup> *Ibid*, at 5, citing *Asta Medica*, *supra* note 14, *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1156 (11th Cir. 1988), *In re First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F. 3d 308, 310 (5th Cir. 1995), *In re Crown Prosecution Service of the United Kingdom*, 870 F. 2d 686, 692–3, n. 7 (D.C. Cir. 1989). In support of its own reinterpretation of the *John Deere* case, the Third Circuit in *Bayer* relied on Second Circuit decisions, which have an analytic approach in distinct contrast from that of the original *John Deere* decision. See *Bayer*, *supra* note 72, at 6, 7, quoting *In re Gianoli Aldunate*, 3 F. 3d 54, 60 (2nd Cir. 1993) ('... the Second Circuit read *John Deere* as we do ... That case said, insightfully, "*John Deere* is not a case about whether section 1782 requires discoverability ..."',), and quoting *In re Metallgesellschaft AG*, 121 F. 3d 77, 80 (2nd Cir. 1997) ('through s. 1782 Congress has seen fit to authorize discovery which, in some cases, would not be available in foreign jurisdictions').

<sup>88</sup> See *John Deere*, *supra* note 31, at 136, citing *In re the Court of the Commissioner of Patents for the Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). ('Concern that foreign discovery provisions not be circumvented by procedures authorized in American courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant.')

unusual legislative policy or other aberrant intervention.<sup>89</sup> From these two starting points the Third Circuit derived diverse conclusions which, although posed as a clarification of the former by the latter, were as incompatible as the results reached by the First and Second Circuits in *Asta Medica* and *Euromepa*. The solution, such as it was, only restated the question.

Thus, although *Bayer* commences with the first person historical narrative actively reconsidering the Third Circuit's own past case, it ultimately lacks a reflective consciousness of its own place in the universe of case law.<sup>90</sup> The judicial problem seems to be a general one. When confronted with an explicit action of their own past, the courts relate to their subject matter as an interplay of what was done in the past and what is said, or imagined, about what was done. As Sartre would say, the court is observing not Maurice Chevalier (who is himself only an actor playing given roles), but a Maurice Chevalier impersonator; 'a hybrid state develops, which is neither altogether perceptual nor altogether imaginative'.<sup>91</sup> The rendition of reality is inevitably imagistic, since the subject matters — here civil process rules, there Maurice Chevalier — are a fluid 'wave among waves'.<sup>92</sup> The court is, of course, both audience and play actor for the next audience, and so experiences the self-deception of watching the impersonator slip momentarily into Chevalier as well as the deception of others perpetrated by the impersonator herself. When the Third Circuit lays *John Deere Bayer*, so to speak, the essence of the past is nothing more than a new creation.

### 3 Discovering the Flies

The two views of legal sovereignty — the impregnability of foreign policies and the inviolability of governing principles — are, of course, irreducible as analytic starting points, and represent both the beginning and the end of the discoverability question. This dichotomy, in turn, is reminiscent of the debate over the justiciability of

<sup>89</sup> See *Bayer*, *supra* note 72, at 3–4, citing *In re Esses*, 101 F. 3d 873, 875 (2nd Cir. 1996). ('In light of the absence of any language in the text of s. 1782 that limits its application to cases in which the materials sought to be discovered would be discoverable in the foreign jurisdiction, ... we must examine the basis for the district court's exclusive focus on whether the materials sought by Bayer would be discoverable in Spain.')

<sup>90</sup> In Sartre's words, 'absolute consciousness, when it is purified of the "I", has nothing of a subject about it.' J.-P. Sartre, *The Transcendence of the Ego* (F. Williams and R. Kirkpatrick, trans., 1962), at 87. When applied to courts and their consideration of their own doctrines, this inability to locate their own rational essence, would almost have to be the case. In existentialist terms, it would be impossible to imagine the court contemplating its own objective essence, since only objects with a designed purpose — a scissors in Sartre's famous example — enjoy such objectivity precisely because they lack freely willed contemplation. Sartre, *supra* note 3, at 34, 36 ('Man [in contrast to a "paper-cutter, a patch of moss, a piece of garbage, or a cauliflower"] is nothing else but what he makes of himself.')

<sup>91</sup> J.-P. Sartre, *The Psychology of Imagination* (B. Frechtman, trans., 1948), at 81.

<sup>92</sup> *Ibid.* For a review of Sartre's use of the impersonator as a phenomenological device and its centrality to the theory of role playing, see Cumming, 'Role Playing' in C. Howells (ed.), *The Cambridge Companion to Sartre* (1992) 39.

international rights generally,<sup>93</sup> with some cases pointing to direct incorporation into the domestic legal system,<sup>94</sup> and others requiring legislative, executive or other transformation of that law before it can be internalized and judicially enforced.<sup>95</sup> While one approach suggests universal adherence to such rights as a matter of principle and regardless of the policy of the particular jurisdiction where implementation is sought,<sup>96</sup> the other suggests that policy choices of governments are sacrosanct in relation to international norms that are by definition imposed from without the relevant polity.<sup>97</sup>

Accordingly, in a monist world where legal rights reign over the states that violate them, incorporation of universal norms is a direct judicial phenomenon. By contrast, in a dualist world where the sovereignty of states is paramount over normative interference, incorporation of extra-national norms is an indirect legislative one.<sup>98</sup> The entire world, however, is as unstable as the multiplicity of approaches implies. The courts and the doctrine effectively point to either an unreflective or a self-deceptive state of mind.

<sup>93</sup> The Supreme Court's well-known declaration that customary international law is 'part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination'. *The Paquete Habana*, 175 U.S. 677, 700 (1900), does not answer the question of when and how those laws are to be judicially enforced.

<sup>94</sup> *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (acknowledging the 'frequently reiterated' point that international law forms part of federal common law).

<sup>95</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 823–7 (D.C. Cir. 1984) (Robb, J. concurring) (international dispute 'nonjusticiable' within meaning of political question doctrine). *Diggs v. Shultz*, 470 F. 2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973) (international law not enforceable by court if Congress does not implement it).

<sup>96</sup> See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421, 424 (2nd Cir. 1987) ('international tort' actionable where it is definable, obligatory, and universally condemned); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953), quoting *The Charming Betsy*, 6 U.S. (2 Cranch) 34, 36 (1804) ('an act of Congress ought never to be construed to violate the law of nations'); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815) (US courts are 'bound by the law of nations, which is a part of the law of the land').

<sup>97</sup> See *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986) (the law 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the political branches'); *American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989) (Congressional silence with respect to international norm pre-empts operation of that norm).

<sup>98</sup> Some courts have suggested a 'monist' approach whereby international legal norms are directly absorbed into the judicial forum, *Filitarga v. Pena-Irala*, 630 F. 2d 876 (2nd Cir. 1980) ('Appellees ... advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress'), while other courts have suggested a 'dualist' approach whereby international legal norms are seen to operate on their own plane and must be adopted through legislation in order to be absorbed into the domestic legal system, *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929 (D.C. Cir. 1988) ('This conclusion reflects the United States' adoption of a partly "dualist" — rather than strictly "monist" — view of international and domestic law. "Dualists" view international law as a discrete legal system [which] ... operates wholly on an inter-nation plane'), quoting the *Head Money Cases*, 112 U.S. 580, 598 (1884).

While such approaches have rarely been explicitly applied to civil litigation,<sup>99</sup> the divergence reflects a similar debate over the transnational application of criminal process rights. Much as in their task of assessing the frontiers of civil process, the criminal courts have wavered between the borderless rights of litigants and the policies of the various national communities which the defendants confront. One is never sure, for example, whether a statement extracted in the absence of counsel offends concepts of justice itself,<sup>100</sup> or whether it offends one society but not another such that the society earns protection rather than the accused.<sup>101</sup> Likewise, it is consistently unclear whether a warrantless search by foreign officials cuts deep enough into criminal proceedings to impugn due process,<sup>102</sup> or whether a warrantless search on foreign soil is to be assessed solely in terms of the foreign legal system and the society which it serves and presumably reflects.<sup>103</sup> In the case of foreign wiretaps, the courts have eased in and out of the two dimensions with remarkable flexibility, distinguishing between the conduct of the police in Denmark and the police in Italy investigating the same conspiracy to import narcotics into California, all based on factors that were at once connected and unconnected to the relevant societies — i.e., the degree of joint venture with US authorities, adherence to applicable foreign process, and the severity of the affront to rights.<sup>104</sup> The law of procedure, it can safely be said, is everywhere at once.<sup>105</sup>

It is likewise between the conflicting positions of the universal and the local that the federal courts vacillate under section 1782. An organic view of procedural rules, which views those rules as growing out of and reflecting the society from which they

<sup>99</sup> See, e.g., *Chiriboga v. International Bank for Reconstruction and Development*, 616 F. Supp. 963 (D.D.C. 1985) (applying as a matter of customary law and general principle international law immunity from civil suit for international institution).

<sup>100</sup> *United States v. Toscanino*, 500 F. 2d 267, 276 (2nd Cir. 1974) (evidence obtained through physical torture so egregious as to 'shock the judicial conscience' and is therefore excluded).

<sup>101</sup> *United States v. Hensel*, 509 F. Supp. 1364, 1370 (D.C. Me. 1981) (evidence admissible even though obtained after interrogating Canadian police refused defendant's request for attorney, stating 'you are not in the United States now, son').

<sup>102</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259 265, -1 10 S.Ct. 1056, 1060–61, 108 L.Ed. 2d 222 (1990) (while Fourth Amendment applies to the 'People of the United States' and is inapplicable to Mexican police search of Mexican citizen's Mexicali residence, Fifth Amendment applies to 'persons' and is potentially applicable).

<sup>103</sup> *United States v. Peterson*, 812 F. 2d 486 (9th Cir. 1987) (force of the Fourth Amendment abroad depends on whether search was reasonable and in accordance with foreign country's law).

<sup>104</sup> *United States v. Barona*, 56 F. 3d 1087, 1096 (9th Cir. 1995) ('the finding that the Milan wiretap was not a joint venture is not clearly erroneous. The finding that the Danish wiretaps were conducted pursuant to a joint venture is also not clearly erroneous, but Danish law was complied with for each Danish wiretap').

<sup>105</sup> On the one hand, criminal process rights have been portrayed as open and worldwide in scope, *Reid v. Covert*, 354 U.S. 1, 6, 77 S.Ct. 1222, 1225, 1 L.Ed. 2d 1148 (1957). ('When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.'). On the other hand, the same rights have been portrayed as exclusive and nationally bound, *United States v. Verdugo-Urquidez*, 856 F. 2d 1214, 1233–1236 (9th Cir. 1988) (Constitution is 'social contract', and 'the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear').

spring, seems to animate the First Circuit in its *Asta Medica* ruling importing a discoverability requirement into section 1782. By contrast, a detached institutional view of civil process, which sees formal procedural rules as part of an elite and transplantable legal system,<sup>106</sup> seems to underlie the Second Circuit's thinking in applying section 1782, and the attendant US discovery procedures, to European civil litigation. Since one view bumps squarely up against the other, there is little prospect of a resolution in sight.

Indeed, as the Third Circuit aptly illustrates, the problem is not so much that the courts choose between two views of civil process and legal sovereignty; rather, each case is an impersonator's repeat performance, an imagined hybrid of the two fundamentally incompatible creations. When the human and the insect — the civil process grounded in civil society and the procedural rules spanning and detached from all societies — get caught putting on their show in the transport machine, what results is a symbol of decrepit judgment that is almost impossible to bear.<sup>107</sup> It is not so much that each case represents a merger of two different creatures with the head of one and the body of the other.<sup>108</sup> Instead, what emerges is a mutated analysis in which both life forms — both visions of legal process — are fused at the genetic level into a logically grotesque creation.<sup>109</sup> Even with the best of deductive science, the splicing of incompatible theories produces a very twisted tissue of thought.

The monster of judicial consciousness, ironically, results from both its existential freedom and its foundational structures. On the one hand, process rules have a difficult time coping with the tireless, 'monstrous spontaneity'<sup>110</sup> that characterizes their personified self. These rules, like the human consciousness from which they are derived, can be, from time to time, anything the courts want them to be; they suffer a 'vertigo of possibility'<sup>111</sup> and are, in a terrifying way 'monstrously free'<sup>112</sup> from internal constraint. The cases seek an undercoat of rational essence — akin to an ego

<sup>106</sup> For a review of the legal theory origins of the conflicting societal vs. institutional views of procedural rules and legal systems in general, see Ewald, 'Comparative Jurisprudence II: The Logic of Legal Transplants', 43 *Am. J. Comp. Law* (1995) 489. For the way in which this debate plays out in the context of cross-jurisdictional transfers of procedural rules, see Langbein, 'The German Advantage in Civil Procedure', 52 *U. Chi. L. Rev.* (1985) 823 (stressing the cross-jurisdictional transportability of essentially detached procedural rules), and Chase, 'Legal Processes and National Culture', 5 *Cardozo J. Int'l & Comp. Law* (1997) 1 (stressing the rootedness of procedural rules in national culture).

<sup>107</sup> J.-P. Sartre, 'The Flies' in *No Exit and Three Other Plays*, *supra* note 1, at 55:  
 'Zeus: Steady, my friend. Don't blame the gods too hastily. Must they always punish? Wouldn't it be better to use such breaches of the law to point to a moral?  
 Orestes: And is this what they did?  
 Zeus: They sent the flies.  
 The Tutor: The flies? How do the flies come in?  
 Zeus: They are a symbol....'

<sup>108</sup> *The Fly* (20th Century Fox Film Corp., 1958) (1950s science fiction film in which Vincent Price discovers his scientist brother whose body parts are interchanged with fly).

<sup>109</sup> *The Fly* (20th Century Fox Film Corp., 1986) (1980s version of science fiction film in which Jeff Goldblum is scientist genetically fused with fly).

<sup>110</sup> Sartre, *supra* note 90, at 99.

<sup>111</sup> *Ibid.*, at 100.

<sup>112</sup> *Ibid.*

— in interpreting and re-interpreting discovery rights, in an effort to ‘mask from [judicial] consciousness [their] very spontaneity’.<sup>113</sup>

Despite the fact that the case law can offer no excuses,<sup>114</sup> it is inevitably, as a product of its own history of practice, institutionalized and structured in its variables. Thus, civil process rules move forward like a Sartrean railroad, containing ‘not only ... the actual work of the railwaymen ... but also finished, “crystallised” work — machinery, rails, etc’.<sup>115</sup> They are both inert and alive, and, like language in attaching names to creations, are as structured and falsified as they are human and free.<sup>116</sup> Thus, the vacillation between globalized and localized discovery can be both innovated and calcified with each successive consideration, creating a process doctrine that is as alienating as it is welcoming, and, like Sartre’s flies, as foreign as it is familiar, and as liberating as it is oppressive.<sup>117</sup>

It is not easy for lawyers to either identify or to find their way out of the process problems at hand. The courts in applying procedural concepts to transnational litigation appear to have become caught in the more generalized debate over globalization and localization of political systems and culture.<sup>118</sup> Thus, one can observe procedural reform transported from one jurisdiction to another to the extent that it reflects more broadly shared cultural/ideological values, and at the same time resisting such transplant to the extent that local systems assert an independence of allegiance and set of values.<sup>119</sup> The internal dynamics of doctrinal logic reflect the structured freedom of interpretation highlighted by the Sartrean portrait, and can effectively delineate the contours of the underlying debate; they cannot, however,

<sup>113</sup> *Ibid.*

<sup>114</sup> D. D. Palmer, *Sartre for Beginners* (1995), at 101 (‘If you had to summarize existentialism in two words, they would be NO EXCUSES!’).

<sup>115</sup> J.-P. Sartre, *Critique of Practical Reason* (A. Sheridan-Smith, trans., 1976), at 480.

<sup>116</sup> *Ibid.* For a thorough examination of the structuralist tendencies of Sartre’s philosophy, despite structuralist critiques to the contrary, see Caws, ‘Sartrean Structuralism?’ in *The Cambridge Companion to Sartre*, *supra* note 19, at 314 (‘Sartre was the one contemporary philosopher whom [Roland] Barthes did not renounce amid the general deconstruction of the 1960s and 1970s, to whom he repeatedly referred as an admired influence ...’).

<sup>117</sup> Sartre, ‘The Flies’, *supra* note 107, at 53:

‘The Tutor: ... Well, this should please you — you who are always complaining of being a stranger in your native land. These charming insects, anyhow, are making you welcome; one would think they know who you are. [*He drives them away.*] Now leave us in peace, you buzzers.’

<sup>118</sup> Chase, ‘Some Observations on the Cultural Dimension in Civil Procedure Reform’, 45 *Am. J. Comp. Law* (1997) 861, at 862. (‘The movement of which I speak is in fact a dialectic, that between globalization and localization: The supreme paradox of this decade is the simultaneous acceleration of a globalized world and the vigorous reassertion of local claims to allegiance.’)

<sup>119</sup> *Ibid.*, at 866, and n. 24, citing Merryman, ‘The French Deviation’, 44 *Am. J. Comp. Law* (1996) 109 (describing the failed 18th-century attempt to import the jury system into post-revolutionary France).

explain how formal rules of procedure become socially familiar in a way which allows civil process to globally expand or to locally contract.<sup>120</sup>

The lessons of civil procedure, therefore, are as complex as the existential world of legal process and, ultimately, political culture, of which they form a part. Broad discovery of all evidence and witnesses everywhere vie for the same legal space with the often narrow discovery policies of each home jurisdiction. The First, Second, Third and as many other Circuits as one cares to count all take circuitous routes to these antagonistic ends, creating monsters of structured freedom — of patterned illogic — in the process. It takes an eye to universal civil norms and another to particular legal or social policies to discover the entire, flexible civil process.

Even as one comprehends the spectrum of procedural possibilities, the objective essence, or prefabricated purpose that lawyers crave is elusive. As it turns out, the law's creations, like their creators themselves, exist in a tormented state of continuous self-reflection and self-propulsion. Although the possibilities seem limited, we simply do not know which rule will prevail until we get there. One can make an appointment with the doctrinal future,<sup>121</sup> but one can never quell the anxiety over that future. The blend of genetically mutant doctrines gives rise to an interminable process of discovery.

<sup>120</sup> Some scholars claim that the social sciences provide a more satisfying explanation. See, e.g., E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (1988), at 233–235 (childhood socialization processes instil fundamental attitudes which reflect later procedural justice values). See also, Chase, 'Cultural Dimensions in Civil Procedure Reform', 45 *Am. J. Comp. Law* (1997) 861, at 866–868 (providing anthropological analysis of oracular justice system of Central African peoples and attributing cultural and other social/political characteristics to dispute resolution procedures).

<sup>121</sup> Sartre, *supra* note 19, at 73 ('I make an appointment with myself on the other side of that hour').