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ARTICLES

THE EXTRATERRITORIAL REACH OF 28 U.S.C. § 1782 IN AID OF FOREIGN AND INTERNATIONAL LITIGATION AND ARBITRATION

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I. INTRODUCTION

Section 1782 of Title 28 of the United States Code affords federal district courts in the United States discretion to order persons "resid[ing]" or "found" in the United States to give testimony or produce documents or other things "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person."[1] Section 1782 is a powerful tool – broadly available to foreign and international tribunals, foreign litigants, and any other "interested person"[2] – to obtain discovery of documents and testimony from individuals or business entities located in the United States.[3] The statute's principal objective, as

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[1] 28 U.S.C. § 1782(a) states as follows:

> (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, including criminal investigations conducted before formal accusation. 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.
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> 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.

[2] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256-57 (2004) (defining "interested persons" within the meaning of the statute to include not just party litigants to a foreign proceeding but also anyone else that "possesses a reasonable interest in obtaining judicial assistance" under the statute) (internal quotations and citation omitted).

[3] A "person" within the meaning of the statute includes a corporation, company, association, firm, partnership or joint stock company, as well as an individual, but

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illuminated by the United States Supreme Court, is "to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but . . . cannot obtain under their own laws."[4] A majority of U.S. courts have held that at least some species of international arbitral tribunals qualify as "a foreign or international tribunal" within the meaning of § 1782, thus making the construction and application of § 1782 in the U.S. courts a topic of considerable interest among practitioners of international arbitration.[5]

In this latter connection, many courts have expressed doubts about whether § 1782 authorizes a U.S. court to order a person "residing" or "found" in the United States to produce documents within that person's possession, custody or

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excludes sovereign governments. *See* 1 U.S.C. § 1; Al Fayed v. CIA, 229 F.3d 272, 274 (D.C. Cir. 2000).

[4] *Intel Corp.*, 542 U.S. at 262. The Second Circuit Court of Appeals, expanding on the same theme in a passage frequently cited and quoted by other courts, describes the statute's objective as "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 2004) (quoting *In re* Malev Hungarian Airlines, 964 F.2d 97, 100 (2d Cir. 1992)).

[5] *See, e.g., In re* Application of Veiga, Misc. Action Nos. 10-370(CKK)(DAR), 10-371(CKK)(DAR), 2010 WL 4225564, at *8-9 (D.D.C. Oct. 20, 2010) (granting § 1782 discovery in aid of Bilateral Investment Treaty arbitration under the UNCITRAL Arbitration Rules, including before the tribunal had addressed whether it had jurisdiction); *In re* Application of Chevron Corp., 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) (arbitral tribunal appointed pursuant to international treaty and the UNCITRAL Arbitration Rules constituted a "foreign or international tribunal" within the meaning of § 1782); OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265(JBA), 2009 WL 2877156, at * 2-4 (D. Conn. Aug. 27, 2009) (arbitral tribunal appointed pursuant to the UNCITRAL Rules and under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce constituted a "foreign or international tribunal" within the meaning of § 1782); *In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 238-40 (D. Mass. 2008) (arbitral tribunal appointed under the International Chamber of Commerce Rules of Arbitration constituted a "tribunal" under § 1782); Comisión Ejecutiva, Hidroeléctrica Del Río Lempa v. Nejapa Power Co., No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) (private foreign arbitrations fall within the scope of § 1782); *In re* Hallmark Capital Corp., 534 F. Supp. 2d 951, 956-57 (D. Minn. 2007) (same); *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1226-28 (N.D. Ga. 2006) (same). Other courts have concluded that private arbitrations do not fall within the statute to the extent that they do not provide for any form of review of the arbitral tribunal's decision. *See, e.g., In re* Operadora DB Mexico, S.A. DE C.V., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9-12 (M.D. Fla. Aug. 4, 2009) (ICC arbitral tribunal does not qualify as a foreign or international tribunal within the meaning of § 1782); *In re* Arbitration in London, No. 09 C 3092, 2009 WL 1664936, at *4 (N.D. Ill. June 15, 2009) (private arbitrations do not fall within the scope of § 1782); La Comisión Ejecutiva, Hidroeléctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008), *aff'd* 341 F.App'x 31 (5th Cir. 2009) (same).

control that are located *outside* the United States.[6] These courts, some of them after considerable treatment of the subject, opine – in *dicta*, based on *dicta*, in a kind of snowball effect – that § 1782 permits discovery through a U.S. court only of documents located *inside* the United States.[7] However, virtually every one of these decisions has gone on to conclude that it need not decide the issue on the facts because the request for document discovery that was presented to the court

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[6] *See* Kestrel Coal Pty Ltd. v. Joy Global Inc., 362 F.3d 401, 404 (7th Cir. 2004) (quoting commentary from Professor Hans Smit, the principal draftsman of § 1782 in its revised form, that the statute was "not intended to enable litigants to obtain in Spain evidence located in Spain that could not be obtained through proceedings in Spain" but concluding that "[w]e need not determine whether § 1782 ever permits a district judge to require evidence to be imported from a foreign nation so that it may be handed over here and then exported" for use in a foreign proceeding); Four Pillars Enterprises Co. v. Avery Dennison Corp., 308 F.3d 1075, 1079 (9th Cir. 2002) (suggesting there is "some support" for the view that § 1782 does not authorize discovery of material located in foreign countries but resolving the appeal on other grounds, stating "[w]e need not rule . . . on whether § 1782 can ever support discovery of materials outside the United States"); Edelman v. Taittinger, 295 F.3d 171, 176-77 (2d Cir. 2002) (holding that a witness who lives abroad may be ordered to provide testimony in the United States under § 1782 if served with the subpoena while physically present in the district of the court that issued the discovery order, but stating in *dicta* that "there may be reason to treat documentary evidence . . . different from testimonial evidence"); Chase Manhattan Corp. v. Sarrio S.A., 119 F.3d 143, 147 (2d Cir. 1997) (stating in *dicta* that "despite [§ 1782's] unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States" but concluding that "[a] change of circumstances on appeal makes it unnecessary for us to decide . . . the geographic reach of § 1782"); *In re* Application of Nokia Corp., No. 1:07-MC-47, 2007 WL 1729664, at *5 n.4 (W.D. Mich. June 13, 2007) (discussing whether § 1782 authorizes discovery of documents located outside the United States in a footnote, prefaced by the observation that "this Court need not decide the issue"); *In re* Microsoft Corp., 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (finding resort to § 1782 "both unnecessary and improper" where the documents sought were available to the foreign tribunal without the assistance of a U.S. court and then stating unnecessarily in a footnote that "[f]urthermore, § 1782 does not authorize discovery of documents held abroad"); Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, 384 F. Supp. 2d 45, 50-55 (D.D.C. 2005) (addressing the issue at length, finding that the available "caselaw suggests that § 1782 is not properly used to seek documents held outside the United States" but then concluding that the documents in question "are not discoverable for another reason").

[7] *See, e.g., Norex Petroleum Ltd*., 384 F. Supp. 2d at 50-55 (discussing at length a considerable line of cases all finding reasons not to decide whether § 1782 authorizes discovery in the United States of documents outside the United States for use in a foreign proceeding, and similarly finding it unnecessary to decide the issue, but not without opining in *dictum* that the available *dicta* from all of the preceding cases "suggest that extraterritorial application of § 1782 would not be in keeping with the aims of the statute, and indeed that documents held outside the United States are beyond the statute's intended reach.").

ultimately turned on other grounds.[8] Only a few courts have purported squarely to address whether § 1782 can be used to obtain documents outside the United States from a person residing or found inside the United States. Those that have, disagree with each other.[9]

Apart from taking issue with the snowball of *dicta* that continues to accumulate the weight of precedent undeservedly, this article challenges the prevailing view that § 1782 does not authorize discovery of documents located abroad. At first glance, the notion that U.S. law would make available to foreign and international tribunals and litigants in a U.S. court documents that are located outside the United States, for use in a foreign or international proceeding conducted – whether actually or constructively – outside the United States, may seem like an extraterritorial application of U.S. law at its worst. What business does a U.S. court have providing U.S.-style discovery of documents outside the United States for purposes of foreign or international proceedings outside the United States? On closer reflection, however, there may well be circumstances where the availability of such assistance from a U.S. court is desirable. As a matter both of the plain text of § 1782 and its underlying policy and comity objectives, the better view is the presently minority one that § 1782 authorizes U.S. courts to order the production of documents located outside the United States, in their discretion, when such documents are subject to production in U.S. courts in accordance with the Federal Rules of Civil Procedure.

The same question arises in relation to witness testimony, as § 1782 authorizes U.S. courts to provide testimonial discovery in addition to document discovery. Is a U.S. court empowered under § 1782 to order a "person" "residing" or "found" in the United States to provide testimony or a statement from a witness located abroad, to the extent that the Federal Rules of Civil Procedure would empower a U.S. court so to do in a U.S. proceeding? The question may arise in at least two scenarios: (i) an individual witness from outside the United States who is served with a subpoena under § 1782 for his testimony while traveling in the

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[8] *See* cases cited *supra* note 6.

[9] *Compare In re* Gemeinshcaftspraxis Dr. Med. Schottdorf, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 28, 2006) (rejecting the argument that § 1782 assistance cannot extend to the production of documents located abroad and ordering the consulting firm, McKinsey to produce in the United States documents located in Germany for use in proceedings in Germany) *with In re* Godfrey, 526 F. Supp. 2d 417, 423-24 (S.D.N.Y. 2007) (expressly disagreeing with *Schottdorf*, and concluding that "[t]he bulk of authority in this Circuit, with which this Court agrees, holds that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States," citing cases that did not so "*hold*," but that suggested so in *dicta*). *See also In re Veiga*, 2010 WL 4225564, at *11-12 (recognizing a circuit split). Arguably, the court in *Godfrey* did not need to address the issue, concluding as it did that even if documents abroad were discoverable under § 1782 "this would not be a case for exercising discretion to provide the requested assistance, because the connection to the United States is slight at best and the likelihood of interfering with Dutch discovery policy is substantial." 526 F. Supp. 2d at 424.

United States (so-called "tag" jurisdiction) but who then returns home. Can that witness be compelled by a U.S. court to return to the United States to give testimony in accordance with the subpoena for purposes of a foreign or international proceeding? and (ii) in relation to a corporate or legal entity "person." Can a corporate person "found" or "residing" in the United States be compelled to bring to the United States a corporate officer, director, or managing agent from outside the United States to give testimony on behalf of the entity for use in a foreign or international proceeding?

As a matter of the plain language of §1782, this article concludes – just as with documentary evidence – that the extent of testimonial evidence a U.S. court is authorized to provide under § 1782 is equal to that authorized under the Federal Rules of Civil Procedure. That said, the Federal Rules applicable to testimonial discovery present some yet-to-be answered interpretive questions when applied under § 1782, which do not arise in relation to documents. This article concludes that courts do not have the power under the Federal Rules as applied under § 1782 to compel testimony from individual witnesses and corporate officers who live and work outside the United States, except in narrow circumstances, which will be described.

II. THE PREVAILING VIEW THAT SECTION 1782 DOES NOT AUTHORIZE DISCOVERY OF DOCUMENTS LOCATED ABROAD

The prevailing view is that documentary discovery available under § 1782 from a person "resid[ing]" or "found" in the United States is confined to documents that are located in the United States.[10] Apart from the momentum this view has acquired from repetition, substantively it derives from: (i) a threshold presumption that the plain language of § 1782 does not explicitly address whether the statute may reach documents outside the United States, leading courts to secondary sources of legislative intent, which include (ii) an influential law review article authored by Professor Hans Smit, who was one of the principal draftsmen of revised § 1782,[11] and (iii) an oft-repeated passage from the legislative history of § 1782 that refers to "oral and documentary evidence *in the United States*."[12]

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[10] *See* cases cited *supra* notes 6 and 9.

[11] *See, e.g., In re Godfrey*, 526 F. Supp. 2d at 423-24; *Norex Petroleum Ltd.*, 384 F. Supp. 2d at 50-55 (collecting cases); Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1 (1998). Professor Smit's article is widely cited and discussed by courts addressing § 1782, including by the U.S. Supreme Court. *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 262 n.13, 265 n.17.

[12] S. REP. NO. 88-1580 (1964) *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("The proposed revision of section 1782, . . . clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence *in the United States*") (emphasis added).

Professor Smit's article, published in 1998, reflected on the development of § 1782 in the courts and commentary coming on thirty-five years after its revision (largely under his direction) in 1964.[13] One of the several subjects reflected upon in his article was whether the evidence sought by a foreign or international tribunal or litigant under § 1782 must be located in the United States.[14] Specifically, Professor Smit took to task the application of a Spanish plaintiff in a recent case at the time, *In re Sarrio S.A.*,[15] to compel Bank of America and its direct and indirect subsidiaries to produce documents and testimony in the federal district court for the Southern District of New York from witnesses located in Spain and Great Britain, for purposes of a litigation in Spain.[16] Professor Smit intimated that "[t]he drafters of § 1782 did not anticipate recourse to § 1782 for this purpose" and offered four reasons "for not giving § 1782 the extraterritorial effect sought in th[e *Sarrio*] case."[17] These included:

(1) that "the evident purpose of Section 1782 is to make available to foreign and international tribunals and litigants evidence to be obtained in the United States" – not evidence in the very jurisdiction where the foreign proceeding was pending;[18]

(2) by contrast, "Section 1782 was *not* intended to enable litigants [in Spain] to obtain [in the United States] evidence in Spain that could *not* be obtained through proceedings in Spain," as this would "interfere with. . . the court processes" of other countries, not assist them;[19]

(3) if § 1782 could be used in the manner sought in the *Sarrio* case, "American courts would become clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world";[20] and

(4) "if American courts were to assume the role of clearing houses for world-wide [discovery]" this would inevitably lead to conflicts with foreign

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[13] *See* Smit, *supra* note 11, at 2.

[14] *See id.* at 10-12.

[15] No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995), *rev'd on other grounds sub nom* Chase Manhattan Corp. v. Sarrio S.A., 119 F.3d 143,147 (2d Cir. 1997).

[16] *See* Smit, *supra* note 11, at 10-12.

[17] *Id.* at 11. Incidentally, the discovery requested in *Sarrio* was denied by the district court, which concluded, relying on legislative history and a sworn declaration submitted by Professor Smit, that "Section 1782 was not intended to provide discovery of evidence maintained within a foreign jurisdiction." *Sarrio*, 1995 WL 598988, at *2. The district court's decision was subsequently reversed by the Second Circuit but on different grounds, for which the Second Circuit did not have occasion to address the question of § 1782's "geographic reach." 119 F.3d at 147.

[18] Smit, *supra* note 11, at 11.

[19] *Id.* (emphasis added).

[20] *Id.*

> countries upon which the American courts would be imposing their unfamiliar (and potentially unwelcome) U.S. discovery procedures.[21]

From Professor Smit's commentary addressing the circumstances of a particular case and the problems to which it could lead, the majority of courts have come to the categorical conclusion that § 1782, as a matter of statutory intent (Professor Smit, after all was in charge of the 1964 revisions), does not authorize the production of documents located outside the United States.[22] Courts have reinforced this conclusion with a passage from the Senate Report on the legislative changes to § 1782 in 1964, which explained that the revised text of the statute "clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence *in the United States*."[23] Courts have cited the reference to "oral and documentary evidence *in the United States*" as indication that § 1782 was not intended to permit discovery of documents outside the United States.[24]

III. A LONE DISSENTING VOICE THAT OTHERS HAVE DECLINED TO FOLLOW

In apparently the only decision of its kind, Judge Jones of the Southern District of New York has come to a different conclusion.[25] Unlike virtually all of the other cases on the subject, Judge Jones squarely had to decide on the facts presented to the court whether § 1782 authorizes a U.S. court to order a person residing or found within its jurisdiction to produce documents located overseas, for purposes of a proceeding overseas. The operator of a laboratory in Germany had sued in Germany to challenge a reduction in the fee schedule paid to the laboratory for its services.[26] The consulting firm McKinsey Company, headquartered in New York, had conducted a study and authored a report, in

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[21] *Id.* at 12.

[22] *See In re Microsoft Corp.*, 428 F. Supp. 2d at 194 n.5 ("§ 1782 does not authorize discovery of documents held abroad"); *Norex Petroleum Ltd.*, 384 F. Supp. 2d at 50-55 (reaching the same conclusion based upon all of the available case law, but not expressly holding so); *In re Godfrey*, 526 F. Supp. 2d at 423-24 ("[T]he bulk of authority in this Circuit, with which this Court agrees, holds that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States").

[23] S. REP. NO. 88-1580 (1964) *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 (emphasis added).

[24] *See, e.g., In re Godfrey*, 526 F. Supp. 2d at 423; *In re Sarrio*, 1995 WL 598988, at *2.

[25] *Schottdorf*, 2006 WL 3844464, at *5. Two other courts have cited to Judge Jones' decision with approval, but without further discussion or analysis of the split of authority or any apparent need to address whether documents outside the United States are discoverable under § 1782. *See In re* Eli Lilly & Co., No. 3:09MC296(AWT), 2010 WL 2509133, at *4 (D. Conn. June 15, 2010); Minatec Finance S.A.R.L. v. SI Group Inc., Civ. No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 n.8 (N.D.N.Y. Aug. 18, 2008).

[26] *See Schottdorf*, 2006 WL 3844464, at *1.

German, in Germany, which served as the basis for the change in the fee schedule. The operator of the laboratory initiated proceedings in federal court in New York under § 1782 to obtain from McKinsey in New York a copy of the report and related documents that were held by McKinsey in Germany for use in the German proceedings. For reasons unclear on the record before the U.S. court, a copy of the report had not been obtained through the German proceedings even though the German court had expressed a desire to have a copy of the report.[27]

The court rejected McKinsey's argument that "Section 1782 assistance cannot extend to the production of documents located abroad" and held that the location of the documents at issue is a factor to be weighed by a U.S. court on a case-by-case basis, in its discretion either to grant or refuse the requested assistance.[28] The court then exercised its discretion to grant the requested discovery and compelled McKinsey to produce the document from Germany in New York, for purposes of the litigation in Germany. The court concluded as a matter of statutory construction that there is no "express restriction in the statute" prohibiting a court from ordering the production of documents from overseas and that the text of the statute "requires only that the *party* from whom discovery is sought be 'found' here; not that the *documents* be found here."[29] To imply such a restriction, the court reasoned, would conflict with the Supreme Court's decision in *Intel*[30] which had addressed other, unrelated issues concerning the scope of § 1782 but had admonished courts not "to include requirements [in the statute] that are not plainly provided for in the text of the statute."[31]

As respected Professor Smit's policy considerations, Judge Jones declined to consider them for purposes of construing the statute's plain language, reasoning that "such considerations cannot supplant the policy expressed by Congress in the plain words of the statute. Rather, . . . such considerations should be weighed on a case-by-case basis along with the other discretionary factors."[32] Having said as much, however, the court did not then weigh those considerations when proceeding to exercise discretion to compel the production in New York of documents located in Germany, for use in proceedings in Germany where the documents had not been obtained through the German courts.

In a case following Judge Jones' decision, Judge Rakoff, also of the Southern District of New York, expressly disagreed with her decision.[33] Judge Rakoff, like Judge Jones, proceeded from the apparent threshold view that the plain language of § 1782 does not explicitly resolve whether a district court may order the production of documents located outside the United States. This led the court to consider three secondary sources: (i) the existing "bulk of authority" which had

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[27] *See id.* at *2-3.
[28] *Id.* at *5 & nn.12 & 13.
[29] *Id.* at *5 (emphasis in original).
[30] *See* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).
[31] Schottdorf, 2006 WL 3844464, at *5 (citing *Intel Corp.*, 542 U.S. at 260).
[32] *Id.* at *5 n.13.
[33] *See In re Godfrey*, 526 F. Supp. 2d at 423-24.

concluded that such documents could not be ordered produced under § 1782; (ii) the legislative history, described above, referring to "oral and documentary evidence *in the United States*"; and (iii) Professor Smit's law review article indicating the views and policy concerns of the drafters of § 1782.[34] As respected Judge Jones' reliance on the Supreme Court decision in *Intel* for the proposition that limitations should not be read into § 1782 when they do not appear on the face of the statute, Judge Rakoff interpreted the same decision to "implicitly assume[] that evidence discoverable under § 1782(a) would be located in the United States."[35]

IV. A CRITICAL REVIEW OF THE EXISTING DEBATE

It is the author's view that the courts on both sides of the issue have not been sufficiently rigorous in their plain reading of § 1782 when concluding that the statute does not explicitly address the availability of documents located outside the United States, and, consequently, that courts have resorted prematurely to secondary sources in search of legislative intent. As further expanded upon below, the plain language of § 1782 authorizes district courts, in their discretion, to order the production of documents located outside the United States when those documents are subject to production under the Federal Rules of Civil Procedure. What is more, the secondary sources of legislative intent, to which courts on both sides of the issue have turned ostensibly because the plain language of the statute is not explicit, do not necessarily support the conclusion that § 1782 cannot be used to obtain documents abroad. Finally, the oft-repeated policy objectives of § 1782 support the conclusion that district courts are vested with the discretion to provide document discovery to the full extent afforded by the Federal Rules when assisting foreign and international tribunals or other interested persons obtain documentary evidence, including by ordering a person residing or found in the United States to produce documents located abroad. Taking account of the other discretionary considerations that courts must weigh in deciding whether to provide assistance under § 1782, there are circumstances, which will be described, where a U.S. court's authority to compel the production of documents located outside the United States may serve the statute's objectives and promote, or at the very least not offend, principles of international comity.

A. *The Plain Language of Section 1782*

Settled rules of statutory construction in the United States require courts to "begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose" and to "enforce plain

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[34] *See id.* (emphasis added).

[35] *Id*. (quoting a passage from *Intel*, 542 U.S. at 264, which referred to "evidence, available in the United States").

and unambiguous statutory language according to its terms."[36] The plain language of § 1782 specifies that a court "may prescribe the practice and procedure" for the production of documents but that, to the extent the court does not order otherwise, "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure."[37] Thus, barring an exercise of a court's discretion under the statute to order some alternative "practice and procedure" for the production of documents (for example, and as the statute explicitly suggests a court may do, in accordance with the practice and procedure of the foreign country or tribunal at issue), § 1782 clearly prescribes a default rule that the production of documents "*shall be . . . in accordance with the Federal Rules of Civil Procedure*" – the procedural Rules that define the universe of a U.S. court's discovery powers to begin with.[38]

The Federal Rules of Civil Procedure, Rule 34 (governing document discovery from parties) and Rule 45 (governing document discovery from non-parties by issuance of a subpoena), both encompass relevant documents in the "possession, custody, or control" of the producing party or non-party, without regard to the location of the document.[39] It is settled law and practice under the Federal Rules that the obligation to produce documents within the "possession, custody, or control" of the producing party or non-party is without geographical limitation, as it is the respondent's "control" of a document and practical ability to produce it that is determinative – not whether the document is located in the

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[36] Hardt v. Reliance Standard Life Ins. Co., 130 S.Ct. 2149, 2156 (2010) (internal quotations and alterations omitted); *see also* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal citations and quotations omitted)); *Edelman*, 295 F.3d at 177 (construing § 1782 in connection with a different issue, but applying the familiar principle that "the starting point of inquiry is of course the language of the statute itself. Where the statutory terms are clear, our inquiry is at an end") (internal citation omitted).

[37] 28 U.S.C. § 1782(a).

[38] *Id.* (emphasis added). One subsidiary question that arises from this is whether § 1782 authorizes a U.S. court to order discovery in accordance with the "practice and procedure of the foreign country or the international tribunal" if that practice and procedure would *exceed* the discovery powers a U.S. court otherwise has under the Federal Rules. The responsible answer, it seems, should be no, inasmuch as the Federal Rules comprehensively provide the extent of a U.S. court's discovery powers and it would seem odd indeed to read § 1782 to have unbridled those powers entirely, with a single sentence, to include whatever any foreign country or international tribunal may be able to do. The sound conclusion is that § 1782's language authorizing the use of practices and procedures exercised by foreign countries or international tribunals is bounded in all events by what a U.S. court is authorized to do under the Federal Rules (which is hardly constraining).

[39] FED. R. CIV. P. 34(a)(1); FED. R. CIV. P. 45(a)(1)(A)(iii).

United States.[40] Since § 1782 specifies that the production of documents shall be in accordance with the Federal Rules of Civil Procedure unless a court exercises discretion to order otherwise, by its plain terms it *authorizes* a district court to order the production of documents located outside the United States to the same extent that it may do so under the Federal Rules.[41] There is no occasion on the face of the statute to resort to legislative history, law review articles or any other secondary sources to determine whether § 1782 was intended to reach documents located outside the United States. That is not to say that a district court *must* allow the production of documents located overseas under § 1782 when permitted

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[40] *See, e.g.,* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204 (1958) (affirming lower court's conclusion that a Swiss party had control of documents located in Switzerland and was obligated to produce them under Rule 34; reversing and remanding on other grounds); Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd., 242 F.R.D. 1, 12-13 (D.D.C. 2007) ("documents may be in the control of a party [under Rule 34] even if the documents are located abroad"); *In re* Flag Telecom Holdings, Ltd. Securities Litigation, 236 F.R.D. 177, 180 (S.D.N.Y. 2006) ("The concept of 'control' has been construed broadly. If the producing party has the legal right or the practical ability to obtain the documents, then it is deemed to have 'control,' . . . . The test for the production of documents is control, not location. Documents may be within the control of a party even if they are located abroad." (internal quotations and citations omitted)); Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984) ("The fact that the documents are situated in a foreign country does not bar their discovery" under Rule 34); *see also* Fed. R. Civ. P. 45 advisory committee's note ("The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request [for documents] is addressed pursuant to Rule 34"); David D. Siegel, Practice Commentaries to Rule 45 ("The scope of a subpoena *duces tecum* is intended to be as broad against a nonparty as against a party, . . . As long as the subpoena is served on the subpoenaed person within the proper territorial range of the subpoena . . ., it makes no difference that the materials sought are located beyond that range. Control of the documents or other things sought is the key, and if the entity servable locally has control, it must exercise that control to bring the materials in. Perhaps the most common example of this in practice is where a broad-based corporation present and served locally is required to produce locally records that it maintains at some distant place (e.g., at its main office, some other branch, etc.).").

[41] *See In re* Letters Rogatory from the Tokyo Dist. Prosecutor's Office, Tokyo, Japan, 16 F.3d 1016, 1019 & n.2 (9th Cir. 1994) (where district court order authorizing § 1782 discovery did not specify the procedures or practices to be followed, "the clear language of § 1782(a) bound th[ose appointed by the court to collect the evidence] to follow the Federal Rules of Civil Procedure"); S. REP. NO. 88-1580 (1964) *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789 ("If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature"). *Cf. Intel*, 542 U.S. at 260 n.11 (observing that the text of § 1782 instructing courts to follow the Federal Rules of Civil Procedure, barring an exercise of discretion to prescribe some alternative practice and procedure, "imposes no substantive limitation on the discovery to be had"); *Edelman*, 295 F.3d at 178 (interpreting the scope of § 1782(a) expansively, in light of the Federal Rules which they incorporate).

by the Federal Rules.[42] It is merely to recognize that § 1782, like the Federal Rules it incorporates by reference, vests the statutory authority to do so within the discretion of the courts, which they may exercise as appropriate in the circumstances of a particular case.

B. *The Limitations of the Secondary Sources of Statutory Intent*

Apart from overlooking the statute's plain text expressly incorporating the Federal Rules of Civil Procedure – which squarely identifies what documents *may* be ordered produced under the statute – courts have placed undue reliance on secondary sources of legislative intent.

Whether it was Professor Smit's intention that his law review article be adopted by courts as evidence of a legislative intent that categorically confines § 1782 to documents physically within the United States is not entirely clear from the article.[43] Regardless, such a conclusion *need not* follow from Professor Smit's article, as his treatment of the issue was focused on the circumstances presented in the *Sarrio* case.[44] Professor Smit's point was that it should be up to a Spanish court to provide discovery of documents in Spain for use in proceedings in Spain, and up to an English court to provide discovery of documents in England for use in Spain – not a U.S. court acting as a global discovery clearinghouse for documents in foreign countries relevant to proceedings in foreign countries.

But the circumstances presented in *Sarrio* were only one of a virtually limitless number of possible permutations. Consider a case where the documents sought are under the control of a person residing or found in the United States and are clearly subject to production under the Federal Rules of Civil Procedure in

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[42] *See Intel*, 542 U.S. at 264 ("[A] district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so"); *cf. also In re Veiga*, 2010 WL 4225564, at *11-12 (declining to choose a side in the circuit split over whether courts may reach documents located outside the United States under § 1782 through a person found in the United States; exercising discretion, regardless, to deny discovery sought from a witness found in the United States of documents located in Ecuador for use in proceedings in Ecuador, particularly where the allegations at issue concerned the sovereign government of Ecuador).

[43] At a later point in the article, when discussing the exercise of discretion under § 1782 to permit discovery, Professor Smit would appear to have had a categorical bar in mind prohibiting discovery of documents overseas inasmuch as he recommends, without qualification or limitation to the particular circumstances of the *Sarrio* case, that a district court should "use its discretion to refuse assistance to compel production of evidence located in a foreign country under the control of a person in the United States in an action between foreign litigants in a foreign country." Smit, *supra* note 11, at 15. To the extent that Professor Smit intended that § 1782 categorically proscribe discovery of documents overseas, as opposed to vesting that power in the discretion of the courts (putting aside arguments over how that discretion ought to be exercised), this article respectfully disagrees for the reasons expressed.

[44] Smit, *supra* note 11, at 10-12.

U.S. courts but: (i) are located in a foreign country different from where the foreign proceedings at issue are contemplated; (ii) cannot practicably be obtained through the courts of the country where the documents are located (for example, because those courts have no comparable § 1782 procedures for providing such assistance to the foreign or international tribunal involved or because they are otherwise unable to provide meaningful relief);[45] (iii) cannot be obtained by the tribunal or court before whom the foreign proceedings are pending (for example, because the person in control of the documents is not a party to the foreign or international proceeding and not subject to the jurisdiction of that court or tribunal);[46] and (iv) the foreign or international tribunal specifically requests the assistance of the U.S. court in obtaining the documents from the person residing or found in the United States, as the documents are critical to the determination of the foreign or international proceeding at issue. Professor Smit did not purport to address such a permutation of the facts in his discussion of the *Sarrio* case. And yet, courts have relied on Professor Smit's discussion of *Sarrio* to broadly and categorically conclude as a matter of statutory construction that "the drafters of § 1782 did not intend that the statute be used to compel documents located in a foreign country for use in a foreign proceeding," a conclusion that would leave U.S. courts without authority to do so under the above, or any, circumstances.

Similarly unwarranted is the reliance placed by courts on a passage from the legislative history of § 1782 to conclude that the statute cannot be used to reach documents outside the United States. The relevant passage, contained in the Senate Report concerning the 1964 revisions to the statute, states:

> The proposed revision of section 1782, set forth in section 9(a) clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States and adjusts those procedures to the requirements of foreign practice and procedure.[47]

As Judge Jones appreciated in the *Schottdorf* case, "this passage is at best ambiguous on the issue of whether documents abroad could be obtained through [§ 1782]."[48] Specifically, it is unclear whether the phrase "in the United States" modifies "oral and documentary evidence" or refers back generally to the location for "assisting foreign and international tribunals and litigants in obtaining oral and

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[45] The courts of Britain and Spain, as were at issue in the *Sarrio* case, need not warrant the same analysis and conclusion as the courts of Myanmar and Kyrgyzstan. *See infra* discussion in Section IV(c).

[46] The broader the definition of a "tribunal" falling within § 1782 – as, for example, to include various kinds of international arbitral tribunals, *see* cases cited *supra* note 5 – the more frequently it may be the case that the tribunal before which the foreign or international proceedings are contemplated cannot obtain the documents other than through the assistance provided under § 1782.

[47] S. REP. NO. 88-1580 (1964) *reprinted at* 1964 U.S.C.C.A.N. 3782, 3788.

[48] *Schottdorf*, 2006 WL 3844464, at *5 n.13.

documentary evidence." Section 1782, by its terms, requires that the person from whom oral or documentary evidence is sought be "resid[ing]" or "found" in the United States, and that the practice and procedure for producing such evidence follow the Federal Rules of Civil Procedure, barring a court order otherwise. In this sense, the scope of the statute *is* restricted to oral and documentary evidence available "in the United States" – from persons residing or found there, pursuant to the rules that apply there. The above-quoted passage introducing generally the 1964 revisions made to § 1782 does not purport to address, or naturally seem to have been intended to address, the narrow question of whether documentary evidence located outside the United States but within the control of a person residing or found in the United States, and therefore subject to production in a U.S. court, may be obtained under § 1782. At most, the legislative history is inconclusive on the subject. In any event, as the Supreme Court has said, "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[49]

C. *The Policy Objectives of Section 1782*

The question remains whether a reading of the statute to authorize the production of documents held outside the United States, when permitted under the Federal Rules of Civil Procedure, is consistent with § 1782's recognized objectives and, in particular, the policy concerns identified by Professor Smit in relation to the *Sarrio* case. In short, is it ever a good idea?

As prefaced above, § 1782's principal objective is to render efficient assistance to "foreign or international tribunal[s]" – a concept broadly defined – in obtaining relevant information that they may find useful but that they cannot obtain by their own means.[50] As an initial matter, simplicity is always a virtue in matters of statutory construction, to the extent that it can be achieved. There is simplicity to be had in affording district courts the same discretion to order the production of documents in aid of foreign or international proceedings that they possess under the Federal Rules of Civil Procedure for purposes of a U.S. proceeding. A district court can always carve back on the scope of discovery assistance it provides under § 1782 when the context of a particular case warrants it (just as courts may do under the Federal Rules generally). But the notion that § 1782 defines a district court's discovery authority differently than do the Federal Rules – implicitly, and based on variable policy or comity considerations of the kind identified by Professor Smit – results in a statute lacking in clarity or simplicity.

As to the particular point of discovery at issue, the "location" of documents either inside or outside the United States might facially seem like a simple line to draw, even if implicit policy and comity considerations are a slippery surface upon which to draw it. But on further reflection, assigning a physical location to a

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[49] PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001).

[50] *Intel*, 542 U.S. at 262; *Schmitz*, 376 F.3d at 84.

document is an anachronistic exercise in this computer age of electronically stored information. Most "documents" these days exist in the form of digital bits and bytes on a computer system, email platform, the internet, or otherwise in an intangible, electronic form that easily defies geographical and political borders. Is an email that is readily viewable, accessible, alterable and printable to someone sitting at a computer in New York, but that is stored on a server in Japan, "located" in the United States for purposes of § 1782?[51] Should the happenstance of evolving technology and computer system architecture be determinative of a U.S. court's statutory authority to render assistance to a foreign or international tribunal?

Bearing § 1782's objective in mind – to provide information relevant to foreign or international proceedings that can be obtained in the U.S. by a U.S. court and that may be helpful to, but that cannot be obtained by, the foreign or international tribunal in the proceeding before it – why limit what those tribunals can obtain through assistance from a U.S. court to something less than what a U.S. court can provide under U.S. rules of procedure? Specifically, Professor Smit's policy and comity concerns, well-taken in relation to the *Sarrio* case, may not arise when some combination of the following circumstances prevails in a particular case:

(1) The documentary assistance made available in U.S. courts under the Federal Rules of Civil Procedure – to compel the production of documents outside the United States by a person residing or found in the United States in control of them – is requested or desired by the foreign or international tribunal;[52]

(2) The documentary discovery is sought from a "person" residing or found in the United States that is not a party before the foreign or international tribunal and cannot be made to produce the documents in the proceeding for which the documents are sought;[53]

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[51] *See, e.g., In re Veiga*, 2010 WL 4225564, at *11-12 (declining to grant § 1782 discovery of documents located in Ecuador from a person found in the United States, but ordering that person to produce "electronically stored information accessible from within this District").

[52] *Cf. Intel*, 542 U.S. at 262 ("When the foreign tribunal would readily accept relevant information discovered in the United States, application of a [categorical statutory limitation on the assistance that may be provided, premised on comity concerns] would be senseless"). The Supreme Court has made clear that this is a discretionary consideration for courts to weigh in any case in which § 1782 assistance is requested. *Id.* at 264.

[53] The non-party status of the "person" from whom § 1782 discovery is sought in the foreign or international proceeding is also a discretionary factor that the Supreme Court has directed the lower U.S. courts to consider upon any request for § 1782 assistance. *See Intel*, 542 U.S. at 264 ("[W]hen the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter

(3) The foreign or international proceeding for which the documents are sought is not before the courts of a foreign sovereign state that exercises powers equivalent to those of a U.S. court; rather the proceeding at issue is before an alternative adjudicative body, such as a regulatory authority or international arbitral tribunal, with more limited jurisdiction and powers than the courts of a sovereign state;[54]

(4) The documents at issue are within the possession, custody or control of a person found or residing in the United States but either their location is obscured (perhaps because they exist in digital form and defy any geographic location to begin with, or have multiple "locations" around the world inasmuch as they are accessible on a global computer network, or because they have been moved precisely in an effort to frustrate their availability to a foreign or international tribunal) or their location is identifiable but it is a country that does not offer any alternative means for obtaining them other than through § 1782 assistance from a U.S. court.

Because circumstances will vary from case to case, and may present permutations along the preceding lines, the discretion of a U.S. court to compel the production of documents outside the United States for use in a foreign or international proceeding, when empowered to do so by U.S. rules of procedure, may serve § 1782's objective to afford discovery assistance to foreign and international tribunals that otherwise would be unavailable, but helpful, to them. Confining a U.S. court's discretion under § 1782 to documents physically located in the United States is a cumbersome rule to adopt in a modern era of electronically stored information, and needlessly ties a court's hands in cases where such discretion may serve to advance the statute's policy objective.

Importantly, it is not an indictment of the competence of other courts, nor an interference in their affairs, to recognize, as did the Supreme Court in *Intel*, that

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arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.").

[54] *See Intel*, 542 U.S. at 258 (quoting with approval Professor Smit's conclusion that "the term 'tribunal' includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts" and holding that the Directorate-General for Competition of the Commission of the European Communities constitutes a "tribunal" under § 1782). The broader and more inclusive the concept of "tribunal" – which U.S. courts have held in the wake of *Intel* is expansive enough to embrace various kinds of international arbitral tribunals in addition to various investigative and regulatory bodies, *see, e.g.,* cases cited *supra* note 5 – the more likely this scenario will arise. For example, should an international arbitral tribunal seated in the United States be precluded from obtaining through the assistance of a U.S. court documents in the control of a person in the United States that are desired and relevant to the proceedings before it, but located abroad?

another foreign nation "may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions – reasons that do not necessarily signal objection to aid from United States federal courts."[55] The Supreme Court had in mind the jurisdiction of the requesting tribunal in so concluding. The same logic holds true when the requesting tribunal seeks assistance from a U.S. court to obtain documents located in a third country, or otherwise outside its own jurisdiction, where assistance along the lines of § 1782 is unavailable to the requesting tribunal for reasons that may have nothing to do with whether the third country would object to a U.S. court ordering a person in the United States to produce documents available to it in that country. Comity considerations are best left to a court's discretion in the circumstances of a particular case rather than used to fashion a categorical rule, preclusive in all cases. Notably, courts in the United States routinely exercise discretion to weigh similar considerations in other contexts implicating comity concerns.[56]

It may be true that the prospect of obtaining documents outside the United States through a § 1782 application in the United States will encourage more § 1782 applications.[57] But Professor Smit's valid concern that U.S. courts not become "clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world"[58] can be addressed by courts sensibly exercising their discretion to provide discovery assistance in the United States only when, and to such extent as, the circumstances of the particular case justify. A U.S. court can always consider in its discretion whether the requested discovery is better directed to the courts of another jurisdiction.[59]

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[55] *Intel*, 542 U.S. at 261.

[56] *See, e.g.,* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 189-90 (2d Cir. 2009) (application of the *forum non conveniens* doctrine requires federal courts to assess whether an "adequate and presently available alternative forum" exists for the action. The courts of another country do not provide an adequate alternative forum to a U.S. court if such a forum "does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all."); Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 157-60 (2d Cir. 2005) (defendant failed to carry its burden to show that the Russian Federation provided an adequate alternative forum where plaintiff's claims would be barred in Russian court).

[57] It seems more likely that foreign and international tribunals, parties and other "interested persons" will decide, in the first instance, whether to seek assistance from a U.S. court under § 1782 based upon whether a person with relevant information resides or can be found in the United States – without knowing particularly where or in what form that person may maintain relevant information, a subject that tends to emerge only after efforts are underway to obtain the information they possess.

[58] Smit, *supra* note 11 at 11.

[59] The Supreme Court in *Intel* explicitly left to the discretion of the U.S. courts "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country." 542 U.S. at 265.

V. EXTRATERRITORIAL WITNESS DISCOVERY UNDER SECTION 1782

In light of the foregoing discussion of documentary evidence under § 1782, the question arises as to the scope of a U.S. court's authority to provide testimonial evidence for use in a foreign or international proceeding. The text of § 1782 requires a "person" to "reside" or be "found" in the United States to be subject to its terms. This language imposes a threshold geographic limitation that applies differently in respect of testimonial evidence than documentary evidence. As the Second Circuit Court of Appeals has observed, "a subpoena is served on a person who has custody of or access to the documents, not on the papers themselves."[60] Thus, whereas a person may be served with a subpoena commanding the production of documents he controls somewhere else, "[w]hat a person will testify to is located wherever that person is found."[61]

However, this language goes only so far. It does not necessarily resolve whether or when a foreign witness may be compelled by a U.S. court to give testimony for use in a foreign or international proceeding. There are at least two circumstances in which a foreign witness located abroad *might* fall within the reach of § 1782. The first scenario is when a foreign witness is "found" and served with a subpoena for his testimony in the United States while traveling in the United States. If the witness then leaves the United States, can a U.S. court order him to return to give testimony in accordance with the subpoena for use in a foreign or international proceeding? A second possibility is where a corporate or other legal entity "resides" or is "found" in the United States. Can a U.S. court order the testimony or statement of that legal entity for use in a foreign or international proceeding through representative officers, directors or managing agents of that entity who are not in the United States?

A. *The Federal Rules Applied to Witnesses Abroad*

Section 1782 provides with respect to testimonial evidence, just as it provides in relation to documentary evidence, that absent a court exercising its discretion to fashion an order otherwise, "the testimony or statement shall be taken . . . *in accordance with the Federal Rules of Civil Procedure.*"[62] If the Federal Rules of Civil Procedure define the scope of testimonial discovery available under § 1782, where does that plain reading of the statute lead?

To explore these issues more closely, some basic background on how the Federal Rules deal with witness discovery is in order. The Federal Rules draw two basic distinctions in their treatment of witnesses. One distinction is between an individual witness testifying in his personal capacity versus a witness testifying

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[60] *See Edelman*, 295 F.3d at 177.
[61] *Id.*
[62] 28 U.S.C. § 1782(a) (emphasis added).

in a representative capacity on behalf of a corporate or other legal entity. When the testimony of a legal entity is sought, the party seeking that testimony is entitled to designate specific officers, directors or managing agents of the entity to testify on its behalf.[63] Such testimony may be secured by service of a notice of deposition (in the case of a corporate party) or subpoena (in the case of a corporate non-party) on the legal entity rather than the individual representative.[64]

A second distinction is between a "party" and a "non-party." Courts have held that a party before a U.S. court, whether an individual or a corporate or other legal entity, can be served with a simple notice of deposition and may be ordered by the court, in the court's discretion, to appear and give oral testimony in the United States even when that party or its corporate representative lives and works outside the United States.[65] A failure to appear for deposition in the United States will subject the party to sanctions, which may include adverse inferences, a prohibition on supporting or opposing designated claims or defenses, the striking

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[63] Alternatively, the requesting party may designate topics for examination and leave it to the entity to designate one or more representative witnesses to testify on those topics. *See, e.g.*, E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 268 F.R.D. 45, 48 (E.D. Va. 2010) ("The examining party may request that the organization select and produce a representative deponent who is an officer, a director, or a managing agent of the entity; alternatively, the examining party may select a particular officer, director, or managing agent for deposition and order the organization to produce the person.").

[64] *See, e.g.,* Price Waterhouse LLP v. First Am. Corp., 182 F.R.D. 56, 59-61 (S.D.N.Y. 1998) (subpoena seeking corporate representative depositions of non-party UK accounting partnership from officers located overseas was validly served on partnership through its U.S. affiliate in New York, as its agent, and on partner of UK partnership resident in New York; declining to compel the depositions, however, on other grounds, discussed *infra* below); *In re* Johnson & Johnson, 59 F.R.D. 174, 178 (D. Del. 1973) (a witness who is an officer of a corporate non-party may be compelled to appear pursuant to a subpoena validly served within the court's jurisdiction on the non-party corporate entity); Less v. Taber Instrument Corp., 53 F.R.D. 645, 646-47 (W.D.N.Y. 1971) (same; reasoning that because the deposition of a corporate party may be taken from a director named in a notice served on the corporation without having to serve the director personally, and the Federal Rules (pre-1991 amendments) do not distinguish between parties and non-parties in this respect, the same is true in relation to a subpoena that is served on a corporate non-party designating specific officers to testify on its behalf).

[65] *See, e.g.*, *E.I. DuPont de Nemours & Co.*, 268 F.R.D. at 54-56 (ordering Korean corporate defendant to produce representative witnesses located in Korea for depositions in Virginia); New Medium Tech. LLC v. Barco N.V., 242 F.R.D. 460, 465-68 (N.D. Ill. 2007) (ordering Japanese corporate defendant to produce representative witnesses located in Japan for depositions in California and Illinois); *In re* Vitamin Antitrust Litig., Misc. No. 99-197 TFH, MDL NO. 1285, 2001 WL 35814436, at *3-11 (D.D.C. Sept. 11, 2001) (granting motion to compel corporate representative witnesses in Germany, France, Switzerland and Japan to appear for depositions in the United States; *In re* Honda Am. Motor Co., Inc. Dealership Relations Litig., 168 F.R.D. 535, 537-42 (D. Md. 1996) (ordering corporate representative witnesses of Japanese defendant based in Japan to appear for depositions in Maryland).

of pleadings in whole or in part, dismissing the action in whole or in part, rendering a default judgment, or treating the failure to obey a court order compelling the testimony as a contempt of court.[66]

The testimony of a "non-party" by contrast, whether it is an individual or corporate or other legal entity, can be obtained only by service of a subpoena, pursuant to Rule 45 of the Federal Rules.[67] Rule 45 provides substantial protections to non-party witnesses that are not available to parties or the representative officers of parties before the U.S. court. In particular, a subpoena for the attendance of a non-party witness at a deposition "must issue . . . from the court for the district where the deposition is to be taken."[68] The issuing court must then quash or modify any subpoena, on timely motion, that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person" to attend the deposition.[69] Even if a timely motion is not made to quash or modify a subpoena that fails to comply with the above territorial limitation, "[a] nonparty's failure to obey [the subpoena] must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside th[os]e limits."[70]

The practical effect of the above procedures governing non-parties is that a U.S. court cannot issue a subpoena that contemplates the deposition of a non-party to be taken outside the United States, since Rule 45 subpoenas must issue from the district where the deposition is to be taken.[71] At the same time, however, any subpoena that contemplates a deposition of a non-party witness within the United States, even if it has been validly served so as to secure jurisdiction over the witness, must be quashed or modified, and need not be obeyed, if it requires the individual witness (including a corporate representative of a legal entity) to travel

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[66] *See* FED. R. CIV. P. 37(d)(1)(A)(i), 37(b)(2)(A)(i)-(vii).

[67] *See, e.g.,* United States v. Afram Lines (USA), Ltd., 159 F.R.D. 408, 413 (S.D.N.Y. 1994) ("Only a party to litigation may be compelled to give testimony pursuant to a notice of deposition. . . . . [A] corporate employee or agent who does not qualify as an officer, director, or managing agent [of a party, as is true of any other witness who is not a party or officer, director, or managing agent of a party] is not subject to deposition by notice. Such a witness must be subpoenaed pursuant to Rule 45 of the Federal Rules of Civil Procedure, or, if the witness is overseas, the procedures of the Hague Convention or other applicable treaty must be utilized.").

[68] FED. R. CIV. P. 45(a)(2)(B).

[69] FED. R. CIV. P. 45(c)(3)(A)(ii).

[70] FED. R. CIV. P. 45(e).

[71] *See, e.g.*, *Price Waterhouse LLP*, 182 F.R.D. at 63-64 (subpoena seeking depositions in New York of non-party corporate representative witnesses located in England could not be modified by the court to provide for the depositions to take place in England because this would "create a subpoena that *does not* issue from 'the district in which the deposition is to be taken'" as required by Rule 45) (emphasis in original).

more than 100 miles from where the witness resides, is employed, or regularly transacts business in person.[72]

B. *The Federal Rules Applied to Witnesses Under Section 1782*

Given the dramatic difference in territorial reach between a U.S. court's ability to compel testimony from party witnesses versus non-party witnesses under the Federal Rules, one immediate question that arises in relation to § 1782 is whether persons found or residing in the United States within its terms may be considered "parties" for purposes of obtaining their testimony in U.S. court. In the leading, and apparently only, court of appeals decision to address this question, the Second Circuit Court of Appeals would appear to have answered, yes.[73]

In *Edelman v. Taittinger*, the Second Circuit held that a French citizen served with a subpoena issued under § 1782 while he was traveling in the United States (so-called "tag" jurisdiction), to obtain his testimony for use in a French litigation, was "found" in the United States for purposes of § 1782, even though he thereafter returned to France.[74] The court went on to observe, however, that by concluding that the witness was properly served with a subpoena for his testimony under § 1782 while he was in the United States "does not mean that [he] must be deposed."[75] The court therefore remanded to the district court to consider whether

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[72] *See generally* M'Baye v. New Jersey Production, Inc., 246 F.R.D. 205, 207-08 (S.D.N.Y. 2007) (deposition of a witness who is not a party or a party's officer in the action before the court is barred by Rule 45, "without exception," if the witness would have to travel more than 100 miles from his place of regular business or residence); Nissan Fire & Marine Ins. Co. v. Fortress Re, Inc., No. M8-85, 2002 WL 1870084, at *2-3 (S.D.N.Y. Aug. 14, 2002) (Japanese non-party witnesses served with subpoenas for their testimony while visiting the United States on business were not required to return to the United States to be deposed; questioning, without deciding, whether Rule 45 affords a court discretion to "modify" a subpoena rather than quash it once it has been properly served on the witness to provide for a deposition overseas, declining so to do based on international comity concerns); *Price Waterhouse LLP*, 182 F.R.D. at 59-64 (even though subpoena seeking corporate representative depositions of UK accounting partnership from officers located overseas was validly served on partnership in New York, depositions were barred by Rule 45 because they would have required the individual officers to travel to New York from England, more than 100 miles from where they worked or resided); Stanford v. Kuwait Airlines Corp., No. 85 Civ. 0477 (SWK), 1987 WL 26829, at *3 (S.D.N.Y. Nov. 25, 1987) (Rule 45's territorial limitations "also apply to individual employees who are the subject of a subpoena served upon a corporation").

[73] *See Edelman*, 295 F.3d at 180-81.

[74] *Id.* at 180. It should be noted that "tag" jurisdiction has its limits. *See* Estate of Ungar v. Palestinian Authority, 400 F. Supp. 2d 541, 549-52 (S.D.N.Y. 2005) (service of a subpoena on a corporate officer while travelling in the United States, seeking the testimony of the legal entity he represents, did not confer jurisdiction over the corporate entity necessary to obtain that testimony where the entity was not otherwise subject to personal jurisdiction in New York).

[75] *Edelman.* 295 F.3d at 180-81.

the territorial limitations of Rule 45 of the Federal Rules applicable to non-party witness depositions "requires the subpoena to be quashed."[76] In this connection, the court made an interesting comment: "Petitioner contends that Taittinger qualifies as an 'officer' of a party in the French litigation (Société), and therefore can be compelled to travel more than 100 miles from home and work. If such is found to be the case, the subpoena may be sustained."[77]

The Second Circuit appears to have endorsed the idea that if a person found or residing in the United States is a "party" or "officer of a party" to the *foreign or international proceeding* for which his testimony is sought, he may be treated as a party or officer of a party for purposes of obtaining his testimony in a U.S. court under § 1782 – *i.e.,* by compelling him to travel more than 100 miles to attend a deposition in the United States, something the Federal Rules permit only in respect of a "party" or a "party's officer."[78] *Edelman*'s approach to testimonial evidence under § 1782 would dramatically expand the scope of a U.S. court's discovery powers precisely in the circumstances where it would be least appropriate or necessary to do so. Specifically, as the Supreme Court explained in *Intel*:

> [W]hen the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.[79]

This, too, was at the heart of Professor Smit's policy concerns in relation to the *Sarrio* case, where the discovery requested under § 1782 would have worked more to *supplant* the evidence-gathering process in the very foreign proceeding for which it was sought, rather than *complement or extend* its reach to information otherwise unavailable except through the assistance of a U.S. court.

Treating the "parties" before the foreign or international tribunal as "parties" for purposes of discovery under § 1782 extends a court's discovery discretion in a category of cases where that discretion is unwarranted, while leaving it far more restricted in those cases where, all else being equal, it is more appropriately exercised. There is nothing in the text of § 1782 or the Federal Rules that requires such a result. To the contrary, treating "persons" under § 1782 as "parties" under the Federal Rules if they happen to be parties in the foreign or international proceeding seems at odds with the structure of the Federal Rules. Persons subject to § 1782 discovery in U.S. court are not "parties" to any cause of action before the U.S. court. They are merely before the court for purposes of evidence to be taken in relation to a foreign or international proceeding contemplated elsewhere.

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[76] *Id.*at 181.

[77] *Id.* There is no written decision, either reported or unreported, revealing whether or how Rule 45 was applied by the district court on remand.

[78] *See* Fed. R. Civ. P. 45(c)(3)(A)(ii), 45(e).

[79] 542 U.S. at 264.

Accordingly, the sanctions that would apply to a "party" for failing to comply with a discovery obligation in a U.S. action, under Rule 37 of the Federal Rules, do not make any sense in relation to persons ordered to provide discovery under § 1782, contemplating as they do adverse inferences, dismissal or disregard of claims or defenses, default judgment, and the like.[80] On a § 1782 application, there are no claims or defenses pending before the U.S. court – only a discovery application.

In view of the disconnect engendered by the *Edelman* approach, the better view, one that is more consistent with how and when U.S. courts should exercise their discretion to lend discovery assistance to foreign or international tribunals, is to treat "persons" subject to § 1782 as "non-parties" under the Federal Rules.[81]

C. *The Extraterritorial Reach of Section 1782 to Obtain Oral Testimony From "Non-Party" Foreign Witnesses*

Under the Federal Rules applicable to the testimony of non-parties, there are really only two circumstances in which a witness who does not reside or work in the United States may be compelled to appear and give oral testimony in the United States for purposes of a foreign or international proceeding. The first is where the witness is a national or resident of the United States who is in a foreign country. 28 U.S.C. § 1783 vests U.S. courts with jurisdiction to subpoena a U.S. national or resident in a foreign country to return to the United States and appear as a witness when "necessary in the interest of justice, and, . . . it is not possible to obtain his testimony in admissible form without his personal

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[80] *See* FED. R. CIV. P. 37(b)(2)(A).

[81] Courts that have grappled subsequently with the "tag" jurisdiction recognized by *Edelman* under § 1782, thus far, have seemingly ignored the court's endorsement of treating parties to the foreign or international proceeding as parties for U.S. discovery purposes, and uniformly have declined to compel depositions of foreign witnesses who work and reside more than 100 miles from the court. *See In re* Yukos Hydrocarbons Investments Ltd., No. 5:09-MC-0078 (NAM/DEP), 2009 WL 5216951, at *5 (N.D.N.Y. Dec. 30, 2009) (Russian-based business executive who was born in New York, maintained "significant contacts" and property within the state, and who was personally served in New York with a subpoena issued pursuant to § 1782 to obtain his deposition in relation to a Dutch litigation, could not be compelled under Federal Rule 45 to return to New York from Russia to be deposed, as he did not reside, was not employed, and did not regularly conduct business in person in New York); *In re Godfrey*, 526 F. Supp. 2d at 422-23 (witness personally served with a subpoena for his deposition while "found" within the court's jurisdiction could not be compelled to appear for deposition from Russia under Rule 45); *In re* Microsoft Corp., 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (partner of a New York law firm who worked and lived in Brussels could not be made to appear for deposition in New York by service of a subpoena on his law firm; witness was not "found" in New York but even if he was, he could not be compelled to appear for deposition from outside the 100-mile territorial limitation of Rule 45).

appearance."[82] This statute, called the Walsh Act, is very rarely used even in U.S. proceedings.[83] No one as yet would appear to have attempted to string §§ 1782 and 1783 together to obtain through a U.S. court testimony from a U.S. national or resident in a foreign country for use in a foreign or international proceeding. If and when that day comes, it does not seem inconsistent with § 1782's objective that a U.S. court should have the *discretion* to make available to a foreign or international tribunal the testimony of a U.S. national or resident located abroad – in the interest of justice and if the testimony is not otherwise available as the statute specifically requires – under the same kinds of circumstances, previously described in relation to the discovery of documents located abroad.

The other narrow circumstance in which a non-party foreign witness who lives and works outside the United States may be compelled to appear and give oral testimony in the United States under the Federal Rules is when that witness, having validly been served with a subpoena for his testimony, "regularly transacts business in person" in the United States within the meaning of Rule 45.[84] Here again, the criteria are narrow and inherently contemplate a substantial relationship between the witness and the United States. Section 1782 does not threaten to throw open the floodgates to U.S. depositions of foreign witnesses for use in foreign or international proceedings by allowing U.S. courts to exercise under that statute the same circumscribed discretion they exercise over non-party witnesses generally under the Federal Rules.[85]

D. *The Extraterritorial Reach of Section 1782 to Obtain a "Statement" From a "Non-Party" Foreign Witness*

While the treatment of "persons" subject to discovery under § 1782 as non-parties under Rule 45 circumscribes, as described above, a court's authority to compel their appearance and *oral testimony* in the United States, § 1782 explicitly hints of a possible alternative to oral testimony: authorizing as it does a court to

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[82] 28 U.S.C. § 1783(a); *see also* FED. R. CIV. P. 45(b)(3) (incorporating § 1783 into Federal Rule 45).

[83] *See* Estate of Ungar v. Palestinian Authority, 412 F. Supp. 2d 328, 332-35 (S.D.N.Y. 2006) (authorizing a subpoena for the deposition of a U.S. citizen residing in Egypt for purposes of U.S. judgment enforcement proceedings); Klesch & Co. Ltd. v. Liberty Media Corp., 217 F.R.D. 517, 522-24 (D. Colo. 2003) (authorizing a subpoena for the deposition of a U.S. citizen residing in Frankfurt, Germany for purposes of business dispute pending in the United States).

[84] *See* FED. R. CIV. P. 45(c)(3)(A)(ii).

[85] *See, e.g., In re* Application of Inversiones y Gasolinera Petroleos Valenzuela, S. de R.L., No. 08-20378-MC, 2011 WL 181311, at *13-17 (S.D. Fla. Jan. 19, 2011) (finding that discovery sought from non-party witness in the Southern District of Florida satisfied all of the requirements of § 1782 but denying the requested discovery for failure to satisfy the subpoena requirements of Federal Rule of Civil Procedure 45).

order a witness's "testimony or *statement*."[86] Can a U.S. court order that a foreign witness validly served with a subpoena – who cannot be compelled to appear and give oral testimony in the United States under Rule 45's 100-mile restriction – give evidence in U.S. court in the form of a written statement, from afar?

Outside of the § 1782 context, courts have struggled uncomfortably with the apparent practical effect of the Federal Rules that although a subpoena may be validly served on a witness, for example while he is travelling in the United States, and confer jurisdiction over him, a court may nevertheless be unable to enforce the subpoena as a result of Rule 45's 100-mile territorial restriction if the witness lives and works abroad and simply leaves the United States and refuses to appear.[87] In *Estate of Ungar v. Palestinian Authority*, the court relied on Rule 45(c)(3)(A)'s language authorizing a court either to "quash" *or* "modify" a subpoena that runs afoul of the 100-mile rule to modify subpoenas that had been

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[86] 28 U.S.C. § 1782(a) (emphasis added). No case would appear to have tested what, exactly, the concept of a "statement" may entail under § 1782. The legislative history does not appear to offer any clues. As a matter of statutory construction, "statement" ought to mean something different from "testimony," since the text of the statute distinguishes them disjunctively. A statement need not connote a written statement as it could just as easily be oral. In all probability, its inclusion in the statute as an alternative to "testimony" is intended to provide the evident flexibility that Congress clearly wanted district courts to have to fashion discovery orders under § 1782 "which may be in whole or part the practice and procedure of the foreign country or the international tribunal" where the subject proceedings take place. 28 U.S.C. § 1782(a); *see also* S. REP. NO. 88-1580 (1964), *reprinted at* 1964 U.S.C.C.A.N. 3782, 3789 ("Subsection (a) of proposed revised section 1782 gives the court complete discretion in prescribing the procedure to be followed. It permits, but does not command, following the foreign or international practice."). A "statement" may more accurately describe the form in which oral evidence is taken from a witness under some foreign or international practices than does the concept of "testimony." Nevertheless, and as the discussion *infra* in the text addresses, by prescribing flexibility in the manner in which testimonial evidence may be received from a witness to include the application in a U.S. court of foreign or international practices in the foreign jurisdiction concerned, it need not and should not authorize a U.S. court to apply those procedures, whatever they may be, to a witness who otherwise is not subject to a U.S. court's discovery powers under the Federal Rules of Civil Procedure, which define the sum total of those powers.

[87] *See, e.g.,* Estate of Ungar v. Palestinian Authority, 451 F. Supp. 2d 607, 611-13 & n.1 (S.D.N.Y. 2006) ("[T]he rule in this Circuit permitting service by 'tag' jurisdiction over a non-citizen temporarily present in the district would be a nullity if the 100-mile rule immediately required the quashing of the same subpoena"); *Nissan Fire & Marine Ins. Co.*, 2002 WL 1870084, at * 3-5 (observing the same, but exercising discretion under principles of international comity to quash the subpoenas in any event). *But see In re Edelman*, 295 F.3d at 180-81 ("Our determination that the district court erred by interpreting § 1782(a) too narrowly does not mean that Taittinger must be deposed. Under Rule 45 of the Federal Rules of Civil Procedure, respondent contends that he cannot be forced to testify in the United States. . . . Rule 45 may bar the deposition notwithstanding our holding that Taittinger is not beyond the scope of § 1782(a).").

validly served on foreign witnesses seeking their depositions in New York while they were travelling in the United States, "to require that the witnesses [instead] submit to deposition upon written questions rather than upon oral examination."[88] That case, however, involved judgment enforcement proceedings in the United States. In judgment enforcement proceedings, pursuant to the Federal Rules, the courts of the United States adopt and apply the state-law rules and procedures for judgment enforcement in the particular state in which they sit.[89] The court in *Estate of Ungar* therefore applied procedures that were made available to judgment creditors under New York law, applicable in federal court under Rule 69 of the Federal Rules of Civil Procedure.[90]

Outside of the judgment enforcement context, and for purposes of § 1782, the provisions generally available for obtaining written testimony as opposed to oral testimony under the Federal Rules are found in Rule 31.[91] Rule 31 authorizes depositions by written questions. However, as is plain from its text, the Rule does not contemplate depositions by written questions being taken remotely from distant witnesses. Rather, the rule provides for depositions to proceed by written questions submitted by the parties in advance, in place of oral questions, but in the same manner as an oral deposition. Thus, the witness must be commanded to appear personally at a designated time and place before a duly appointed officer of the court to answer the written questions verbally and under oath, which answers

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[88] *Estate of Ungar*, 451 F. Supp. 2d at 612-13.

[89] *See* FED. R. CIV. P. 64, 69 (applying in federal court the pre and post-judgment enforcement remedies available in the state where the federal court is located).

[90] *See Estate of Ungar*, 451 F. Supp. 2d at 612-13.

[91] The Federal Rules authorize other devices for obtaining written answers to questions, under Rule 33 (Interrogatories) and Rule 36 (Requests for Admission). However, these Rules, by their terms, apply only to parties before a U.S. court and may not be used in relation to non-parties. *See* FED. R. CIV. P. 33; FED. R. CIV. P. 36; Ward v. Empire Vision Centers, Inc., 262 F.R.D. 256, 261 (W.D.N.Y. 2009) ("the federal rules provide that interrogatories may only be served upon parties to the lawsuit"); Andrulonis v. United States, 96 F.R.D. 43, 45 (N.D.N.Y. 1983) ("Based on the clear language of the Rule . . . interrogatories may not be served on a person not a party"); Ed Tobergte Associates Co. v. Russell Brands, LLC, 259 F.R.D. 550, 557 (D. Kan. 2009) (requests for admission are not available with respect to non-parties); New Hampshire Motor Transport Ass'n v. Rowe, 324 F. Supp. 2d 231, 237 n.5 (D. Me. 2004) (same). If "persons" under Section 1782 are treated as non-parties for purposes of discovery in U.S. court, these Rules do not apply to them. Separately, some courts have observed that the language of § 1782 specifically excludes the use of these procedures in relation to foreign or international proceedings. *See, e.g., In re* Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil, 466 F. Supp. 2d 1020, 1033 (N.D. Ill. 2006) ("The statute authorizes the court to order a person 'to give his testimony or statement or to produce a document or other thing.' This court interprets this language to include depositions and document production, but not interrogatories.") (internal citation omitted); *In re* Ishihara Chem. Co., No. 99 MISC. 232(FB), 2000 WL 1898484, at *2 (E.D.N.Y. Dec. 19, 2000) ("28 U.S.C. § 1782 does not permit the use of interrogatories and requests for admissions").

are transcribed verbatim by the officer in the same fashion as in an oral deposition.[92] As subsection (a) of Rule 31 explicitly contemplates, a deposition by written questions requires the witness to physically attend a deposition before an officer of the court to answer the questions, and in the case of a non-party, such "attendance may be compelled by subpoena under Rule 45" – which returns full circle to the territorial limitations that Rule 45 imposes on the attendance of a non-party witness at a deposition, in whatever manner it is proposed to be taken.[93]

In sum, applying the Federal Rules under § 1782 would not appear to empower a U.S. court to compel written testimony from witnesses located abroad who are not subject anyway to the court's authority to compel their oral testimony under Rule 45 – a parity that makes sense. Depositions taken by oral questioning versus written questioning merely describes a difference in the manner for taking the evidence, not unlike the difference between obtaining the "testimony" of a witness or his "statement."[94] Flexibility in the procedure for receiving testimonial evidence from a witness should not expand or contract the universe of foreign witnesses a U.S. court can subject to testimonial discovery under the Federal Rules and § 1782, in whatever form. It makes no appreciable difference in respect of § 1782's policy and comity concerns what form of testimony or statement is taken from a witness. What matters is whether and when a U.S. court exercises the power to command a witness outside the United States to give testimonial evidence in the United States, in whatever form, for purposes of a foreign or international proceeding.

VI. CONCLUSION

A majority of courts have broadly and categorically confined the scope of documentary evidence available to foreign or international tribunals under § 1782 to documents that are located in the United States, even though § 1782 explicitly incorporates the practice and procedure applicable to document production under

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[92] *See* FED. R. CIV. P. 31(b) (specifying that depositions by written questions must proceed before an officer of the court (*i.e.,* a court reporter) in the same manner as oral depositions, pursuant to Rules 30(c), (e) and (f), whereby the witness appears in person before the officer of the court, the questions are read to him, and his verbal answers are recorded by the officer, verbatim and under oath).

[93] *See* Apache Corp. v. Globalsantafe Drilling Co., No. 06-1643, 2009 WL 872893, at *2-3 (W.D. La. Mar. 26, 2009) (subpoena seeking Rule 31 deposition by written questions must comply with the requirements of Rule 45 and was invalid because it was issued from the Western District of Louisiana when it should have been issued from the Northern District of Texas where the witness was located and the deposition was commanded to take place). Rule 31 is seldom used in U.S. practice because parties and their lawyers naturally prefer not to submit written questions to a witness in advance, as this tends to deprive the witness's answers of the "truthful spontaneity" that can be achieved in oral depositions and forecloses one's ability to ask follow-up questions as the testimony unfolds.

[94] 28 U.S.C. § 1782(a).

the Federal Rules of Civil Procedure. Under the Federal Rules, U.S. courts are authorized to order the production of documents that are within the possession, custody or control of a producing party or non-party that is subject to the jurisdiction of the court, regardless of where the *documents* may be located. The ostensible justification for limiting the scope of § 1782 to documents located in the United States is secondary sources of legislative history and policy and comity considerations. But on closer reflection, the plain text of the statute offers a clearer and simpler indication of the scope of documentary evidence available under § 1782. What is more, "location" is an increasingly irrelevant concept in the computer age of documentary evidence. And policy and comity objectives underlying § 1782 are better served by vesting courts with discretion to weigh such considerations in the context of each particular case.

Similarly, § 1782, by its terms, authorizes federal courts in their discretion to provide testimonial discovery for use in foreign or international proceedings to the same extent that it is authorized under the Federal Rules of Civil Procedure in U.S. proceedings. However, the practical consequences of this are different in relation to witnesses than they are in relation to documents. Under the Federal Rules, the power of a court to compel witness testimony depends upon whether the witness is a "party" or officer of a party, or instead a "non-party." While the Second Circuit Court of Appeals has suggested that a person subject to § 1782 may be considered a "party" for purposes of a subpoena seeking their testimony in a U.S. court if they are a "party" in the foreign or international proceeding for which § 1782 assistance is sought, this article concludes the better view is that a person made subject to § 1782 is not a "party" before the U.S. court for purposes of the Federal Rules. As a result, Rule 45 of the Federal Rules governing testimonial discovery from non-parties does not authorize a federal court to compel the testimony of a non-party witness who lives and works outside the United States, except in narrow circumstances that otherwise reflect a meaningful connection to the United States.