2015-112

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE POSCO AND POSCO AMERICA CORP.,
Petitioners.

AMICUS CURIAE BRIEF OF THE UNITED STATES

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April 22, 2015

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STATEMENT OF INTEREST

The Office of Foreign Litigation, United States Department of Justice, protects the interests of the United States in all litigation pending in foreign courts, whether civil or criminal, affirmative or defensive. When operating as the Office of International Judicial Assistance (OIJA), we serve as the United States Central Authority for incoming requests for international judicial assistance in civil or commercial matters involving service of process or evidence under several treaties, including the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. *See* 28 C.F.R. § 0.49. As the United States Central Authority, the OIJA, in concert with the Offices of the United States Attorneys, utilizes section 1782 to present letters rogatory or letters of request, under certain circumstances, to the United States District Courts on behalf of foreign tribunals. Accordingly, the United States has a substantial interest in the proper construction

of 28 U.S.C. § 1782, which plays an important role in encouraging international cooperation, facilitating the resolution of disputes, and fostering international comity.

STATEMENT OF THE ISSUES

1. Whether, in light of the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), 28 U.S.C. § 1782 provides the exclusive means for securing documents from another party for use in a foreign proceeding in the circumstances of this case?

2. Whether 28 U.S.C. § 1782 in all circumstances provides the exclusive means for securing documents from another party for use in a foreign proceeding, when such documents have already been obtained in the course of discovery?

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioners POSCO and POSCO America Corp. filed a writ of mandamus challenging the district court's order to amend a protective order.

II. Statement Of The Relevant Facts And Course Of Proceedings Below

This case involves a suit between two multi-national companies, POSCO and POSCO America Corp (POSCO) and Nippon Steel & Sumitomo Metal Corp. (NIPPON), that are also involved in litigation in Japan and the Republic of Korea (Korea). During discovery in the United States litigation, the district court issued a

protective order that prohibited the use of disclosed discovery materials in the foreign proceedings.

Subsequently, NIPPON moved to amend the protective order to enable it to present certain documents obtained from POSCO to the courts in Japan and Korea. Over POSCO's objections, the court modified the protective order to enable NIPPON to "cross-use" certain documents in the foreign litigation. In amending the protective order, the court placed various conditions upon NIPPON, including requiring foreign counsel to sign a confidentiality order, requiring NIPPON to submit to the district court's jurisdiction to consider alleged violations, and requiring NIPPON to withdraw any documents submitted to the foreign court, if that court did not recognize the confidentiality of the documents. *See* July 11, 2014 Order of Special Master at 2; June 5, 2014 Special Master Letter Opinion at 21-23.

POSCO petitioned this Court for a writ of mandamus, maintaining that the district court applied the wrong legal standard when amending the protective order. POSCO contended that the district court failed to apply *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the governing circuit precedent. NIPPON opposed the writ. After POSCO filed its reply brief, this Court asked the parties to address 28 U.S.C. § 1782. Noting that Federal courts are courts of limited jurisdiction, POSCO argued that a Federal court may "assist in gathering

evidence for use in foreign tribunals" only in accordance with section 1782 or, in criminal cases, by "mutual legal assistance treaties" (MLATs). POSCO Addt'l Br. at 1, 3, 5. POSCO further argued the Federal Rules of Civil Procedure (FRCP or Rules) cannot be used to "avoid" the "limits" of section 1782. Id. at 6. Though maintaining the reasoning of *Intel* is relevant to the question of cross-use, NIPPON argued that section 1782, by its plain language, does not govern U.S. litigation. NIPPON Add'l Br. at 6. Evidence obtained in domestic litigation, argued NIPPON, is controlled by the Rules. *Id.* at 1-2.

Thereafter, by order dated February 20, 2015, this Court invited the United States to file a brief. The United States does not take a position on the merits of POSCO's writ of mandamus, but because the questions presented implicate issues of international comity, foreign judicial assistance, and reciprocity, we respectfully submit this amicus answering both questions in the negative.

SUMMARY OF ARGUMENT

Discovery in domestic litigation is governed by the Federal Rules of Civil Procedure. Those Rules permit a litigant to freely use disclosed evidence, unless a district court has, for good cause, issued a protective order. Under the Rules, a trial court possesses discretion to modify a protective order.

There is no indication that section 1782 displaces the Rules as to domestic litigation. Rather, section 1782 addresses instances in which there is no domestic

litigation and, thus, the district court does not otherwise have jurisdiction over the witness from whom evidence is requested, and the requested evidence is not otherwise relevant to a domestic proceeding. In analyzing section 1782, the Supreme Court in *Intel* did not address the questions at issue here, and *Intel* did not hold section 1782 was the exclusive manner in which evidence located in the United States may be obtained for use in a foreign proceeding. To hold that section 1782 is the only manner in which such evidence may be obtained for use in foreign litigation would create a conflict with other statutes. It also would be inconsistent with the legislative history of section 1782 and could hamper international judicial cooperation.

ARGUMENT

I. Whether, in light of the Supreme Court's decision in *Intel*, 28 U.S.C. § 1782 provides the exclusive means for securing documents for use in a foreign proceeding in the circumstances of this case

Section 1782 is not the "exclusive" means for "securing documents from another party for use in a foreign proceeding" in the circumstances of this case.

In domestic litigation, discovery is governed by the Rules. *Cf. Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002) ("The liberal principles of Rule 26 of the Federal Rules of Civil Procedure are clearly applicable even in cases where the documents at issue were created in foreign countries."). Under the Rules, a party normally may use evidence it has obtained

in discovery as it sees fit. *See*, *e.g.*, *Jepson, Inc. v. Makita Electric Works, Ltd. et al.*, 30 F.3d 854, 858 (7th Cir. 1995); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988); *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981); *United States v. Villegas*, 2012 WL 2395168 (E.D.N.C. 2012); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973); *cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (assessing First Amendment rights to discovered information).

As an exception to that basic principle, the court may, for good cause, issue a protective order. Fed. R. Civ. P. 26(c). Whether to grant a protective order is within the trial court's discretion. *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003); *Dove v. Atlantic Capitol Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) ("The grant and nature of protection is singularly within the discretion of the district court"); *AT&T Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978); *Jepson*, 30 F.2d at 858. Likewise, whether to amend a protective order is within the discretion of the trial court. *Public Citizen*, 858 F.2d at 790; *AT&T Co.*, 594 F.2d at 597.

Because nothing in the Rules prohibits a party not subject to a protective order from using material obtained in discovery in separate litigation, whether foreign or domestic, it follows that a protective order, where appropriate, may

permit cross-use, *i.e.*, use in foreign litigation of evidence obtained in domestic litigation. Indeed, the courts regularly permit use of discovered materials in collateral litigation, as cross-use is in the interest of judicial economy. *See, e.g.*, *Jepson*, 30 F.3d at 861 (refusal to modify protective order to permit cross-use was wasteful); *Largan Precision Co., Ltd. v. Fujinon Corp.*, 2011 WL 1226040 (N.D. Ca. 2011) (citing *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) for the proposition that the Ninth Circuit "strongly favors" access to discovery materials in collateral litigation); *In re Ethylene Propylene Diene Monomer Antitrust Litigation*, 255 F.R.D. 308, 317 (D. Conn. 2009) (noting presumption in several circuits in favor of modification to protective order where intervening party involved in bona fide collateral litigation); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tx. 1980); *In re Upjohn Co. Antipiotic Cleoncin Pdts Liability Litigation*, 81 F.R.D. 482 (E.D. Mich. 1979); *cf. Dove*, 963 F.2d at 19 ("where the discovery sought is relevant to a good faith defense in the federal case, the mere fact that it may be used in other litigation does not mandate a protective order"). Cross-use of discovery materials is permissible, even where the collateral proceeding is abroad. *In re Kolon Industries Inc.*, 479 F. App'x 483 (4th Cir. 2012) (modifying protective order to allow submissions to South Korean government); *Johnson Foils*, 61 F.R.D. at 410 ("[u]nless it can be shown that the discovering party is exploiting the instant litigation solely to assist in a foreign

forum, federal courts do allow full use of the information in other forums"); *cf. Linerboard Antitrust Litigation*, 333 F.Supp.2d 333 (E.D. Pa. 2004) (litigant before foreign tribunal may intervene under Rule 24(b), where protective order is only bar to voluntary production); *Int'l Equity Investments, Inc. v. Opportunity Equity Partners Ltd.*, 2010 WL 779314 (S.D.N.Y. 2010) (permitting intervention by Brazilian litigant, but denying request to modify protective order).

POSCO contends that, where disclosed evidence might be used in a foreign proceeding, section 1782, and not the Rules, must control. But, for the Rules to be inapplicable, there must be a "plain statement" in section 1782 pre-empting application of the Rules. *See Société Nationale Industrielle Aérospatiale And Société De Construction D'avions De Tourisme v. United States District Court For The Southern District Of Iowa*, 482 U.S. 522, 539 (1987); *see also Republic of Argentina v. NML Capitol, Ltd.*, 134 S. Ct. 2250, 2256 (2014). There is no such plain statement in section 1782. To the contrary, section 1782 explicitly refers to the Rules, providing that requested evidence be taken in accordance with the Rules. 28 U.S.C. § 1782(a).

Moreover, section 1782 is designed to address situations where there is no domestic litigation pending, such that a district court might otherwise lack the statutory authority to order the witness to produce the requested materials. *Compare* 28 U.S.C. § 1781(b)(2) (addressing obtaining evidence for use in

domestic litigation); S. Rep. No. 88-1580, 1964 U.S.C.C.A.N. 3782 (distinguishing international judicial assistance provisions from provisions for obtaining evidence for use in domestic litigation); *cf. United States v. Reagan*, 453 F.2d 165, 172 (6th Cir. 1971); *In re Application of the Pacific Railway Commission*, 32 F. 241, 256-57 (1887) (discussing court's power to provide international judicial assistance while analyzing authority to act where there is a case or controversy). Section 1782 enables a district court to order a witness to produce documents "for use in a proceeding in a foreign or international tribunal." In contrast, a court considering whether to issue or modify a protective order is not ordering the production of material for use in a foreign proceeding but defining, where good cause is presented, what the recipient may do with the materials produced in a domestic proceeding. Fed. R. Civ. P. 26(c)(1); *see Kolon*, 479 F. App'x at 485 ("modified protective order does not compel Kolon to do anything; it merely allows Dupont to disclose documents it already possesses").

In short, section 1782 does not address the district court's authority to issue orders in domestic cases that have the effect of permitting (or prohibiting) materials obtained in discovery to be used in foreign proceedings. POSCO's primary argument, that federal courts are courts of limited jurisdiction, is thus inapposite, as the district court possesses jurisdiction over the litigants here and the

authority to supervise discovery, which authority includes the power to issue and to modify the protective order, as appropriate. Fed. R. Civ. P. 26(c)(1).

This Court has already held: "Case law interpreting the requirements of section 1782 is not relevant to a determination whether a protective order may be modified to permit the release of deposition testimony, already discovered, to another court." *In re Jenoptik AG*, 109 F.3d 721 (Fed. Cir. 1997). In *Jenoptik*, the party seeking a writ of mandamus, like POSCO, challenged a modification to a protective order that would permit use of deposition testimony in German proceedings. *Id.* at 721-22. Although the petitioner did not argue that section 1782 is the exclusive manner to obtain materials for use in a foreign proceeding, it argued by analogy that the district court should have considered the "discoverability" of the deposition transcripts in the German proceedings, a factor relevant under section 1782. *Id.* at 723. Noting the petitioner did not argue that, but for the protective order, the transcripts could not be presented to another court, this Court reasoned the confidentiality of the transcripts was the relevant inquiry. *Id.* The Court accordingly considered whether the trial court abused its discretion in modifying the protective order without regard to section 1782. *Id.* at 724.

Nothing in *Intel* requires a different analysis here. The Supreme Court in *Intel* considered the circumstances in which a district court may assist in obtaining evidence "for use in a foreign or international tribunal;" it did not consider what a

litigant in a domestic case may do with evidence obtained in discovery. 542 U.S. at 247. Analyzing the plain language of the statute, the Supreme Court held that section 1782 authorizes, but does not require, the district court to aid a foreign tribunal or interested party. 542 U.S. at 255. It concluded the term "interested party" was not limited to litigants in the foreign proceeding and the proceedings at issue were before a foreign tribunal. *Id.* at 256. The Supreme Court rejected the notion that only evidence "discoverable" in the foreign jurisdiction could be obtained under section 1782. *Id.* at 260-61. The Court also rejected the notion that an applicant must show the requested evidence is discoverable in analogous domestic litigation. *Id.* at 263. The Supreme Court explained that "[s]ection 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here." *Id.* at 263.

Since *Intel*, the district courts have consistently held that section 1782 does not control the disclosure or use of evidence in domestic litigation. *See, e.g., Invista North America S.A.R.L. v. M&G USA Corp.*, 2013 WL 1867345 (D. Del. Mar. 28, 2013); *Oracle Corp. v. SAP AG*, 2010 WL 545842 (N.D. Cal. Feb. 12, 2010); *Infineo Tech. AG v. Green Power Tech. Ltd.*, 247 F.R.D. 1, 4 (D.D.C. 2005). This is because the issues addressed in *Intel* are distinct. As established above, section 1782 addresses a district court's authority to order a witness, over

which the court might not otherwise possess jurisdiction, to produce evidence for use in a foreign proceeding. Here, in contrast, the district court possessed jurisdiction over the party litigants, and the question before the court was whether it was appropriate to limit the litigants' use of evidence relevant to the domestic litigation.

II. Whether 28 U.S.C. § 1782 in all circumstances provides the "exclusive" means for "securing documents from another party for use in a foreign proceeding" when such documents have already been obtained in the course of discovery

Section 1782 does not provide the "exclusive" means for "securing documents from another party for use in a foreign proceeding" when such documents have been obtained in the course of discovery in a domestic proceeding and their use is unrestricted. Section 1782(a) addresses when "judicial assistance" may be provided by a United States District Court to a foreign court or interested person, but there are several others ways that evidence in the United States may be obtained for use in foreign proceedings.

First, as discussed above, evidence produced in discovery in a domestic proceeding may be used for any purpose, including litigation in a foreign court, absent a protective order restricting use. *See, e.g.*, *Invista*, 2013 WL 1867345; *Oracle Corp.*, 2010 WL 545842; *Infineo*, 247 F.R.D. 1, 4.

Second, anyone within the United States may voluntarily give testimony or produce a document for use in a foreign proceeding without any involvement from

the United States Government or any United States Court. 28 U.S.C. § 1782(b). Significantly, the legislative history of section 1782 confirms this provision merely "reaffirm[ed] the pre-existing freedom of persons within the United States to voluntarily give testimony or . . . produce tangible evidence in connection with foreign or international proceedings . . . . This explicit reaffirmation is considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area in the United States." S. Rep. No. 88-1580; 1964 U.S.C.C.A.N. at 3790. It follows that Congress did not consider section 1782 to be the only way to obtain evidence for use in foreign litigation.

Third, judicial assistance may be requested pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) or other bilateral agreement. Korea is a member of the Hague Evidence Convention; Japan is not. A Convention request comes to the OIJA, as the United States Central Authority. *See* Article 1 of the Hague Evidence Convention. The OIJA, working with the Office of the United States Attorney where the evidence is located, seeks to obtain the requested evidence. If the evidence is provided voluntarily, section 1782 is not implicated. If the evidence is not provided voluntarily, the United States applies to the district court for an order pursuant to section 1782 compelling the production of evidence. *See* Article 10 of the Hague Evidence Convention (requiring members to "apply the appropriate

measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings"). Once the evidence is obtained, the OIJA transmits it to the foreign tribunal.

Fourth, requests for judicial assistance from non-Convention countries like Japan are received by the OIJA through diplomatic channels. See 28 U.S.C. § 1781. The OIJA processes the letters rogatory in the same manner as Hague Evidence Convention Requests. Accordingly, section 1782 is not invoked if a witness provides the requested evidence voluntarily.[1] And, section 1781(b)(1) clarifies that foreign courts may directly transmit such letters of requests to United States courts, as occurred before the statute's enactment. Congress explained that section 1781(b) "explicitly leaves unaffected the freedom directly to transmit

[1] Letters rogatory are products of civil law procedure, which was employed in England in admiralty, ecclesiastical, and equity matters. The earliest examples of United States courts employing letters rogatory are in admiralty cases. *See*, *e.g.*, *Nelson v. United States*, 17 F. Cas. 1340 (1816) (issue letter rogatory in admiralty case, recognizing that in some civil law countries, "[a]ny attempt to take testimony . . . [would be] deemed an interference with the rights of judicial tribunals"). The common law used commissions, which lacked the power to compel. *Cf. Rogatory Commissions*, 7 U.S. Op. Atty Gen. 56 (1855) ("[r]ogatory commissions from abroad . . . [were] executed . . . *voluntarily*, there being in the laws of the country nothing to forbid this, and the execution of such commissions being a proper act of national comity"). Beyond the court's power to provide judicial assistance in the form of voluntarily-produced evidence, the predecessor to section 1782 was enacted to enable United States courts to *compel* production of requested evidence. *Id.*

letters rogatory and requests to tribunals, officers, or agencies." S. Rep. No. 88-1580, 1964 U.S.C.C.A.N. at 3788. Congress's clarification again signals that it did not consider section 1782 to be the only manner in which judicial assistance could be obtained.

Fifth, separate statutes authorize the provision of assistance in, for example, consumer protection and securities proceedings. The Federal Trade Commission (FTC), in accordance with 15 U.S.C. § 46, is authorized to provide assistance to foreign law enforcement agencies. This authority includes the ability of the FTC, with concurrence from the Department of State, to negotiate international agreements "for the purpose of obtaining such assistance, materials, or information." 15 U.S.C. § 46(j)(4)[2]. Similarly, the Securities and Exchange

[2] While criminal matters are not directly implicated in the instant litigation, a ruling that section 1782 is the exclusive means to obtain evidence for foreign proceedings has the potential to negatively implicate or prompt confusion regarding existing mechanisms to provide such assistance in criminal matters. Evidence needed in a foreign criminal prosecution or investigation may be compelled pursuant to either 28 U.S.C. § 1782(a) or any of the various authorities specified in 18 U.S.C. § 3512. See 18 U.S.C. § 3512(g) ("Nothing in this section shall be construed to preclude any foreign authority or interested party from obtaining assistance . . . pursuant to section 1782"). Further, many of the mutual legal assistance treaties in criminal matters and many multilateral conventions to which the United States is a signatory obligate the United States to provide assistance and evidence to foreign law enforcement partners. These treaties and conventions are limited to criminal matters and certain related proceedings; by their terms, exist for the sole benefit of the treaty partners, not private parties; and as equal to acts of Congress, bind the courts. *Asakura v. City of Seattle, Washington*, 265 U.S. 332, 341 (1924); *United States v. The Peggy*, 5 U.S. 103 (1801); *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003).

Commission possesses statutory authority, separate from section 1782, to assist its foreign counterparts, including the authority to compel the production of testimony or documents. *See* 15 U.S.C. § 78u.

Finally, a foreign tribunal or "interested person" may invoke section 1782 to seek direct assistance from a United States District Court, without the participation of the OIJA or the Department of State. 28 U.S.C. § 1782(a). In that circumstance, the district court appoints a "commissioner" authorized to compel production of the requested evidence for use in a civil or criminal foreign proceeding. *Id.; see, e.g.*, *In re Letter Rogatory from the Justice Court, District of Montreal, Canada*, 523 F.2d 562, 564 (6th Cir. 1975).

Construing section 1782 as the "exclusive" manner in which evidence in the United States may be secured for use in a foreign proceeding would thus conflict with section 1781, 15 U.S.C. §§ 46(j)(1) and 78u, and 18 U.S.C. § 3512. Holding that section 1782 is the "exclusive" manner of obtaining evidence is also contrary to the legislative intent, which was to "liberalize" the procedures for assisting foreign tribunals and litigants in hopes of comity and reciprocity. S. Rep. No. 88-1580, 1964 U.S.C.C.A.N. at 3788; *see Via Vadis Controlling GMBH v. Skype, Inc.*, 2013 WL 646236 (D. Del. 2013). In enacting section 1782, Congress meant to take "a major step in bringing the United States to the forefront of nations adjusting their procedures . . . [to] provid[e] equitable and efficacious procedures

for the benefit of tribunals and litigants involved in litigation with international aspects." S. Rep. No. 88-1580; 1964 U.S.C.C.A.N. at 3783.

Interpreting section 1782 as exclusive also could hamper international judicial cooperation, cooperation from which United States litigants greatly benefit. Pursuant to Article 2 of the Hague Evidence Convention, the United States designated the OIJA as the United States Central Authority, and agreed that the OIJA will receive Requests to obtain evidence or perform certain judicial acts from other State Parties and transmit those Requests to authorities competent to execute such Requests. Most other State Parties consider use of the Convention mandatory.[3] *See* Hague Prel. Doc. No. 10, Dec. 2008. Many State Parties to the Hague Evidence Convention will thus seek judicial assistance via the Convention and not section 1782. Consequently, an interpretation that section 1782 provides the exclusive means to obtain evidence in the United States for use in proceedings in Member States could limit the ability of the United States to implement the Hague Evidence Convention for voluntarily-provided evidence in response to judicial requests. *Cf.* Article 27 (recognizing the internal law of Contracting States may provide for "less restrictive conditions" for taking evidence).

[3] The United States does not take this view. *See Société Nationale*, 482 U.S. at 539, 542.

Significantly, United States courts have repeatedly held, after taking account of relevant considerations and equities, that United States litigants may obtain evidence in accordance with the Rules, even where the evidence is located in a country with a blocking statute.[4] *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *Wutz v. Bank of China Ltd.*, 910 F.Supp. 2d 548, 553 (S.D.N.Y. 2013) (rejecting defendant's reliance upon China's bank privacy laws, describing likelihood of sanctions "doubtful"); *In re Global Power Equip. Grp. Inc.*, 418 B.R. 833 (Bankr. D. Del. 2009) (granting motion to compel discovery in France under Federal Rules despite blocking statute); *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 533-34 (D.N.J. 2009) (party's reliance on Swiss penal law to compel parties to use Hague Evidence Convention procedures unavailing); *see* S*ociete Int'l Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (dismissal of complaint unwarranted where plaintiff's production of requested documents would constitute a violation of Swiss law). Given this liberal practice, it would seem unduly restrictive to then require foreign courts, whatever their own procedural rules may allow, to obtain evidence located in the United States only by

[4] A blocking statute is a statute, sometimes criminal in nature, that prescribes sanctions for those engage in the discovery process of a foreign judicial system without using the procedures established under the Hague Evidence Convention. *See Global Power Equip.*, 418 B.R. at 839.

seeking judicial assistance from a United States District Court pursuant to section 1782. *Cf. Intel*, 542 U.S. at 264 (in considering aid under section 1782, district courts may consider whether the "the person from whom discovery is sought is a participant in the foreign proceeding"). Further, as a matter of judicial economy, requiring the initiation of a section 1782 action, whenever evidence is located in the United States, on the off-chance the witness in possession of the evidence obtained it during discovery, could unnecessarily burden district courts.

Accordingly, section 1782 is not the exclusive manner in which evidence located in the United States may be secured for use in a foreign proceeding. As established above, there are numerous ways in which evidence may be used abroad, and the legislative history shows Congress understood there were various means and did not seek to replace those avenues. In enacting section 1782, Congress sought to facilitate international judicial cooperation, and requiring foreign courts and litigants to initiate proceedings under section 1782 every time evidence located in the United States is sought for use in a foreign proceeding could have the opposite effect.

CONCLUSION

For the foregoing reasons, section 1782 is not the exclusive means by which evidence obtained in the United States may be secured for use in a foreign proceeding.

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April 22, 2015

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, counsel for the United States is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32, I certify the Brief for Respondent is proportionally spaced using Times New Roman typeface, has a typeface of 14 points, and contains 4995 words and 486 lines of text.

S/ Ada E. Bosque
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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