No. 10-1147

IN THE

Supreme Court of the United States

WHITE & CASE, LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In this case, the Ninth Circuit applied its "*per se* rule" that a grand jury subpoena always trumps a civil protective order, regardless of any countervailing considerations such as the territorial limitations on a grand jury's subpoena power. This holding implicates, as the district court recognized, the rights of foreign sovereigns and the important principle of international comity. The Department of Justice's (DOJ) own policies regarding obtaining foreign evidence reflect international practice but were not followed in this case, nor were the procedures set forth in at least two international agreements to which the United States is a party.

The question *amicus* will address is:

Whether a grand jury subpoena always trumps a civil protective order, thus allowing prosecutors to obtain discovery materials from a parallel civil action, regardless of any countervailing considerations of foreign sovereignty and international comity.

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INTEREST OF AMICUS[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States' economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk. *Amicus* gave notice of intent to file this brief to all parties more than 10 days before this brief was filed.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus adopts Petitioner's Statement of the Case. We highlight the salient facts relevant to our argument here.

In 2006, the United States Department of Justice ("DOJ") was conducting an antitrust investigation into alleged criminal conduct. Soon after this investigation became public, a number of civil suits were filed by private plaintiffs against the companies under investigation. These suits were consolidated in the Northern District of California before District Judge Illston. The litigation resulted in the production by the civil defendants of documents originating outside the United States. The documents at issue came into the possession of the petitioner law firm and other law firms in the United States. Petitioner's App. "(App.") 2a.

After the grand jury investigation became public knowledge, more than 100 putative class actions, seeking treble damages, injunctive relief and attorneys' fees, were filed all over the country.[2]

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[2] DOJ does not dispute the fact that its grand jury investigation instigated the class actions. *See* United States' Notice of Mot. and Mot. to Modify the (continued...)

The Class Actions were transferred to the United States District Court for the Northern District of California, the same district in which the grand jury sits, for coordinated pretrial proceedings. *See* Plaintiffs' Mot. for Transfer and Consolidation of Related Antitrust Actions to the Northern District of California Pursuant to 28 U.S.C. § 1407, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 1827 (J.P.M.L. Dec. 22, 2006) (ECF No. 1).

The civil class action complaints named a number of foreign corporations, including certain Toshiba entities (collectively "Toshiba"), represented by Petitioner White & Case, LLP, as Defendants.[3]

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[2](...continued)
Court's Sept. 25, 2007 Order Granting United States' Mot. to Stay Discovery at 6-7, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. May 18, 2009) (ECF No. 990).

[3] Jurisdiction over the foreign defendants was obtained by service of process under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (the "Hague Service Convention").

DOJ intervened and sought to stay discovery in the civil actions.[4] The district court stayed most discovery and permitted DOJ to review, but not copy, the limited class-certification discovery that was allowed to proceed. The stay order prohibited DOJ from using the civil discovery materials as evidence in the grand jury investigation.

More than two years after the grand jury investigation became public, DOJ asked the parties in the class actions for copies of all civil discovery, including documents and deposition testimony originating outside the United States. Toshiba and other defendants objected. The Special Master in the class actions issued a Report and Recommendation, App. 11a, *et seq.*, prohibiting DOJ from copying the foreign documents and deposition transcripts of

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[4] DOJ argued that because civil discovery is broader than criminal discovery there was the risk that parties in the civil action would be able to discover sensitive grand jury information, thus interfering with the criminal investigation; DOJ also argued, correctly, that if civil discovery proceeded, employees of the companies being investigated could be placed in the position of having to choose between asserting their Fifth Amendment right against self-incrimination in a civil deposition, with the negative inferences that come with that invocation, or testifying in a civil deposition and running the risk of self-incrimination. App. 5a.

defendants in the Class Actions who had not been indicted[5] and from presenting any such materials to the grand jury. App. 14a-15a. The district court adopted the Special Master's Report and Recommendation. App. 9a-10a. The Special Master acknowledged that "[i]t is not disputed that foreign discovery is generally outside the United States subpoena power in criminal proceedings." App. 13a.

Having failed to obtain the foreign-based discovery through modification of the stay order, DOJ had the grand jury issue subpoenas duces tecum to law firms representing defendants in the civil MDL Action, including White & Case. White & Case and the other law firms moved to quash the subpoenas.

Judge Illston, after extensive briefing and a hearing, quashed the grand jury subpoenas, finding that "the DOJ's request for all civil discovery would expand the DOJ's subpoena power beyond its current geographical limits." App. 6a. Judge Illston also noted that the foreign-origin documents and deposition transcripts were present in the United States solely because of compelled civil discovery in the Class Actions that had followed on the heels of the disclosure of DOJ's

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[5] Toshiba has not been indicted.

grand jury investigation, and that DOJ normally would be required to utilize one of the customary methods, such as letters rogatory. App. 7a.

The Ninth Circuit reversed, summarily applying the *per se* rule from its decision in *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995), without considering any countervailing factors: "we apply our *per se* rule that a grand jury subpoena takes precedence over a civil protective order." App. 3a. The Court of Appeals said nothing about the international implications of the use of a grand jury subpoena to obtain evidence that would, save for the compulsion of discovery in the civil case, be located in abroad.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner has shown that there is a clear conflict between the Ninth Circuit's "*per se* rule" and the Second Circuit's presumption that a civil protective order trumps a grand jury subpoena, absent certain exceptional circumstances and the rules in other circuits that presume that grand jury subpoenas take priority over civil protective orders, but permits that presumption to be rebutted based on circumstances.

This case also presents an important additional issue relating to the United States' adherence to principles of international comity and treaty obligations. That issue was referred to by the district court and extensively briefed to that court, but completely ignored by the Court of Appeals.

Business interests cut across national boundaries. Private enterprises export, invest, transfer technology, and engage in many other business activities across national boundaries. Transnational activities are expanding at an unprecedented rate and this trend will accelerate through the growth of globalization and economic interdependence.

The importance of international trade for the United States economy is widely recognized: "[E]xpanding trade and opening markets will lift . . . standards of living" and increase profitability. *See* Remarks by President Barack Obama to the Chamber of Commerce, February 07, 2011, available at http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce (accessed April 15, 2011); *see also*, Remarks by President Barack Obama in the State of Union Address, Jan. 25, 2011, available at http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address (accessed April 15, 2011): "The simple fact is that the more American . . . companies export, the more they produce. The more they produce, the more workers they need. And that means jobs. Good paying jobs here at home. . . exports directly support nearly 10 million U.S. jobs. . . ." (Secretary of Commerce Gary Locke, Remarks at New Markets, New Jobs: The National Export Initiative Small Business Outreach Tour, New Orleans, Louisiana, April 11, 2011, available at http://www.commerce.gov/news/secretary-speeches/2011/04/11/remarks-new-markets-new-jobs-national-export-initiative-small-bus (accessed April 15, 2011).

Transnational economic activities tend to increase economic efficiency and the wealth of trading nations and political cooperation; this was the objective of the post-World War II economic institutions such as the General Agreement on Tariffs and Trade (GATT), the International Monetary Fund, the World Bank, the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), and more recently, the World Trade Organization (WTO).

As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders, but at the same time, the nation-state system is still the political reality in international relations, and the legal or regulatory framework that governs trade is primarily national. National competition law and policy, and objectives, differ from country to country, and this fact may create international friction or conflict among trading nations. This, in turn, may create instability and uncertainty for enterprises that conduct business across national boundaries.

International cooperation among trading nations with regard to the implementation and enforcement of competition law and policy is

necessary and desirable, but a mutual respect for national law, traditions and circumstances need to be maintained. The United States has entered into numerous bilateral cooperation agreements with respect to competition. Cooperation, communication and coordination among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and the fosters competition in markets. *See* John J. Parisi, "Enforcement Cooperation Among Antitrust Authorities," paper delivered to the IBC UK Conferences, Sixth Annual London Conference on EC Competition Law, London, England, 19 May 1999 (Updated October 2000), available at http://apps.americanbar.org/intlaw/regulation/enforcementcooperation.pdf (accessed April 15, 2011)[6]

Here, however, DOJ has, apparently for the first time, exploited civil jurisdictional and discovery rules to sidestep territorial limitations on grand jury subpoena authority. If the Ninth Circuit's *per se* rule is allowed to stand, DOJ will have a

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[6] Mr. Parisi at the time was Counsel for European Union Affairs in the International Antitrust Division of the United States Federal Trade Commission, but the views were his own and did not necessarily reflect the views of the Federal Trade Commission or the United States government.

method, not requiring explicit collusion with any other party, of rendering nugatory our country's obligations to other nations with respect to obtaining documents located abroad during criminal investigations. This circumvention is particularly problematic where, as here, an announcement of a grand jury investigation – not unexpectedly – gives rise to the civil actions. ("It often happens that civil cases are filed on the heels of an announcement about a criminal grand jury investigation, and related foreign-based evidence and depositions may be present in the United States solely because of the civil discovery." Judge Illston's "Statement of Reasoning Involved in Court's Order of February 11, 2010," App. 8a.)

The Ninth Circuit's *per se* rule enables DOJ to circumvent well-established methods for seeking foreign-based discovery, and instead to exploit the broad discovery permitted in the U.S. civil cases that it knows will follow announcement of an investigation. The Ninth Circuit's *per se* rule ignores potential international complications and consequences that might well follow the use of criminal grand jury subpoenas to compel production of foreign company documents and testimony that are in the United States only by reason of the the civil litgation, and against the foreign company's will. This can harm American businesses that may be the subject of foreign

proceedings or which may need discovery in a foreign country. Many such companies are members of the National Association of Manufacturers.

I.

THE COURT SHOULD GRANT THE PETITION TO ENSURE THAT LOWER COURTS RECOGNIZE THAT THE GRAND JURY SUBPOENAS IMPLICATE IMPORTANT ISSUES OF SOVEREIGNTY AND INTERNATIONAL COMITY, MAY JEOPARDIZE RELATIONS WITH FRIENDLY NATIONS, AND RISK RETALIATION BY FOREIGN COUNTRIES

The grand jury subpoenas implicate important issues of sovereignty and comity because they are directed to law firms representing foreign entities and seek foreign companies' documents that would not otherwise be subject to a grand jury subpoena.[7]

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[7] DOJ argued below that because the documents and deposition transcripts are physically in the United States – in the offices of the law firms – "international" considerations are not relevant. The Special Master expressed serious doubts about this argument: "I am troubled by this idea that [a defendant] on the one hand can be ordered to bring

(continued...)

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[7](...continued)
this stuff into the United States, and then the Government can say, ah-ha you brought it in, now we gotcha." Transcript of Proceedings, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, MDL No. 1827 (N.D. Cal. Aug. 12, 2009) at 13:7-10.)

The Special Master noted that the "Defendants did not 'choose to avail themselves' of the US courts or voluntarily 'bring evidence from overseas into the United States.' Rather they were hauled, kicking and screaming, into our courts and have vociferously argued against producing either their documents or their employees into this country during this entire litigation." App. 13a. She stated that "[t]he critical issue is whether allowing the DOJ to have copies of foreign discovery brought into the United States *under court order* does indeed grant to the United States foreign discovery that would otherwise be outside the grand jury's subpoena power." App. 12a (emphasis in original).

A. International Comity

International comity principles are based on the concept of reasonableness. Comity, a long-standing tenet of international law, limits "[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation" because of "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own nationals or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (refusing to enforce French judgment because France did not enforce U.S. judgments).[8] In the absence of comity, "nothing would be more convenient in the promiscuous [*sic*] intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of

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[8] In *Hilton*, this Court defined international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." 159 U.S. at 124.

law." *Emory v. Grenough*, 3 U.S. 369, 370 fn (1797) ("By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.") The existence of national power to prescribe conduct consequently does not mean that exercising such power is wise.[9]

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[9] Justice Robert Jackson characterized comity as essential to the pacific and efficient functioning of the community of nations:

> [International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own . . . [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).

B. There Are Alternative Methods For Obtaining Information

There are alternative methods by which DOJ can obtain foreign documents without issuing grand jury subpoenas to the law firms. As the district court recognized, information could be obtained through the use of letters rogatory[10], requests under treaties and executive agreements, or through informal means. Judge Illston's Statement of Legal Reasoning, App. 7a.[11] DOJ pursued none of these accepted methods.

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[10] "A letter rogatory is a formal request from a U.S. court to the appropriate judicial authorities of another country requesting the performance of an act of assistance, which, unless sanctioned by the foreign court, would constitute a violation of the receiving country's sovereignty." ABA, Section of Antitrust Law, *Handbook on Antitrust Grand Jury Investigations* 281 (3d ed. 2002).

[11] These established methods, which acknowledge the prerogatives of foreign sovereigns and foster international comity, are enumerated in DOJ's own manuals. *See* United States Department of Justice, *Criminal Resource Manual* §§ 267, 274-78. ("Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty.")

Letters rogatory, mutual legal assistance treaties ("MLAT"), and informal requests through regular diplomatic channels are resources available to DOJ to obtain foreign evidence for use in criminal investigations or proceedings. *See* United States Department of Justice, *Criminal Resource Manual* §§ 274 – 278 (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00200.htm, accessed April 15, 2011)). MLATs and letters rogatory are specifically mentioned in DOJ's manuals because they were designed to respect the rights of foreign sovereigns and to preserve international comity.

Two international agreements between the United States and Japan provide procedures for obtaining evidence in a case such as this, and indeed, the DOJ's own policies regarding obtaining foreign evidence reflect international practice, but both the international agreements and the DOJ policies were not followed. These agreements specifically address methods for obtaining evidence or other assistance from foreign countries whose companies have been involved in the civil action and have specific provisions describing the process for obtaining such information, identifying the governmental authorities authorized to make such requests and the information is to be included in the requests.

First, the Treaty Between Japan and the United States of America on Mutual Legal Assistance in Criminal Matters, U.S.-Japan, Aug. 5, 2003, S. Treaty Doc. No. 108-12 (2003) ("Japan MLAT") (available at http://www.justice.gov/atr/public/guidelines/206696.pdf, accessed April 16, 2011) "obligates the Parties to assist one another in investigations, prosecutions and other proceedings in criminal matters through. . . producing documents and other items of evidence." Statement of Mary Ellen Warlow, Director, Office of International Affairs, Criminal Division, United States Department of Justice, Bilateral Law Enforcement Treaties: Hearing Before the S. Comm. on Foreign Relations, 109th Cong. 11 at 11 (2005)) 11. The Japan MLAT was intended to "enhance law enforcement cooperation" with respect to investigations of potential antitrust violations. *Id.* at 10. The Japan MLAT expressly recognizes the parties' rights, as sovereigns, to deny a request on certain enumerated grounds. *See* Japan MLAT, Art. 3. Article 7 permits a sovereign party to attach conditions on the use of documents transmitted under the Japan MLAT.

Second, the Agreement between the United States and Japan Concerning Cooperation on Anticompetitive Activities (the "U.S.-Japan Cooperation Agreement"), Oct. 7, 1999, T.I.A.S., available at http://www.justice.gov/atr/public/

international/docs/ 3740.htm (accessed April 15, 2011) describes procedures for cooperation in antitrust enforcement. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. (Art. I, § 1).[12]

Article VI, § 1 of the U.S.-Japan Cooperation Agreement requires that each Party shall give "careful consideration to the important interests of the other Party throughout *all phases* of its enforcement activities" (emphasis supplied) and Article VI, § 2 requires that "When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall

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[12] The United States has also entered into a number of other bilateral antitrust cooperation agreements antitrust matters that provide for notification and cooperation with respect to enforcement activities affecting other states' important interests. *See generally* United States Department of Justice, Antitrust Division, *Antitrust Cooperation Agreements*, available at http://www.justice. gov/atr/ public/international/int-arrangements.html (accessed April 17, 2011). Besides Japan, Australia, Brazil, Canada, Chile, Germany, Israel, Mexico, the Russian Federation, and the European Communities are parties to such agreements.

endeavor to provide timely notice of significant developments of such enforcement activities." Of particular relevance in this case, Article X, § 2 provides

> In the event that information communicated by a Party to the other Party pursuant to this Agreement, except publicly available information, is needed for presentation to a grand jury or to a court or a judge in criminal proceedings, *that Party shall submit a request for such information to the other Party through the diplomatic channel or other channel established in accordance with the law of the requested Party.* The requested Party will make, upon request, its best efforts to respond promptly to meet any legitimate deadlines indicated by the requesting Party.

(Emphasis supplied)

These antitrust cooperation agreements, specifically the one with Japan, often give the state parties discretion to reject requests for assistance in obtaining evidence if, among other things, the conduct that is the subject of a DOJ investigation or proceeding does not constitute a

crime under their laws.[13] This is particularly significant in some transnational antitrust cases because some states do not attach criminal liability to antitrust violations. The U.S.-Japan Cooperation Agreement contains a specific provision, Articel X(2), for information needed for grand jury proceedings; it only requires "best efforts to respond promptly to meet any legitimate deadlines," but does not mandate compliance with the request.

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[13] The established procedures for obtaining foreign evidence are grounded in jurisdictional limits based on sovereignty and comity and foreign sovereigns' hostility to the use of invasive discovery tools in their territory. When the United States seeks foreign discovery for a criminal investigation, principles of international comity dictate that the United States should follow established procedures and seek documents directly, in order to give foreign sovereigns notice and the opportunity to object to a request. DOJ's argument that "earlier in the investigation" it had notified Japan of "about our investigation" (United States' Opposition to White & Case LLP's Motion to Quash Grand Jury Subpoenas Served on White & Case LLP Dated December 8, 2009 in Case Nos. CR 10-90019 MISC; CR 10-90020 MISC; and CR 10-90029 MISC) is not the equivalent of notifying Japan of the issuance of compulsory process directed at obtaining documents created and normally kept in Japan and the testimony of Japanese nationals in Japan.

DOJ's decision to bypass the accepted procedures deprives Japan of its treaty right to fully consider, and either accept, reject, or apply conditions to the request for documents generated within its borders for use in a United States criminal proceeding.

C. Potential International Consequences

When DOJ seeks to circumvent these established methods in the absence of compelling reasons, there is a two-fold risk: first, other countries may retaliate through the enactment of "blocking statutes" to prevent disclosure[14]; and second, other countries may adopt similarly

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[14] While it is true that "such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute," *Société Nationale v. District Court*, 482 U.S. 522, 544 n.29 (1987) (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U. S. 197, 204-206 (1958)), DOJ has itself accepted, or at least acknowledged, that "[t]here is little that can be done if a foreign corporation, especially one with tenuous contacts with the United States, declines to produce documents." United States Department of Justice, Antitrust Division, *Grand Jury Manual* ("Grand Jury Manual) III.A.2.d.2, available at http://www.justice.gov/atr/ public/guidelines/ 206696.pdf, accessed April 15, 2011.

aggressive policies and practices that may subject Unites States citizens and entities to similar extra-jurisdictional discovery and disclosure requirements.

Other countries, especially civil law countries, generally have markedly different approaches to litigation and discovery than the United States. Broad requests for "all documents referring or relating to" a general subject matter, while typical in the United States, would not be permitted by the laws of major United States trading partners absent a specific showing of the relevance of all of the documents. Hostility to United States discovery practices has been well-documented. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442, reporter's note 1 (1987) ("hostility to United States discovery practice reflects dislike of aspects of substantive American law," particularly antitrust law).[15]

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[15] *See also* RESTATEMENT (THIRD) § 437, Reporter's Note 5, p 42: "On the other hand, the degree of friction created by discovery requests . . . and the differing perceptions of the acceptability of American-style discovery under national and international law, suggest some efforts to moderate the application abroad of U.S. procedural techniques, consistent with the overall principle of reasonableness in the exercise of jurisdiction."

A perception by a foreign government that the United States utilizes private civil discovery requests under such arrangements as the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention"), March 18, 1970, art. 1, 23 U.S.T. 2555, T.I.A.S. No. 744, which applies only civil and commercial matters, to avoid the limitations of that nation's penal code could work to the detriment of United States prosecutors and, indeed, private American litigants who need access to evidence located abroad.

While the State Department is prepared to transmit requests for document production to Japan, attempts to compel such evidence by means of letters rogatory in civil cases have apparently proven unsuccessful. *See* United States Department of State, Bureau of Consular Affairs - Japan Judicial Assistance, http://travel.state. gov/ law/judicial/judicial_678.html#evidoverviewsum (last accessed April 17, 2011).[16]

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[16] Japan is not a party to the Hague Evidence Convention and the only agreement of which we are aware that provides for civil judicial assistance regarding document production is the U.S.-Japan Bilateral Consular Convention of 1963, March 22, 1963, art. 17, 15 U.S.T. 768, which only covers the taking of depositions.

Diminished prospects for Japanese judicial assistance, civil or criminal, as a reaction to overt or covert American circumvention of the U.S.-Japan MLAT or the Cooperation Agreement would be no surprise.

DOJ itself acknowledges that "Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds." United States Department of Justice, Antitrust Division, *Grand Jury Manual* III-11.

DOJ's guidelines relating to foreign evidence recognize the fundamental principle that United States grand jury discovery can have important ramifications in international relations "[b]ecause virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty." United States Attorneys' Manual §§ 9-13.410-9-13.525, available at www.justice.gov/usao/eousa/foia reading room/usarrilindex.html (accessed April 16, 2011); *see also* Criminal Resource Manual § 267 ("[t]he other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather

evidence within its borders as a violation of sovereignty. . . . A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas").

The enactment of "blocking" statutes by other countries frequently has been prompted by United States antitrust litigation.[17] The consequences of such blocking statutes are manifold: parties would be deprived of necessary evidence; litigation would become more expensive and difficult; and relations between nations are strained, often in areas beyond antitrust enforcement. *See* Price, *supra,* note 9, at 327-28.

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[17] *See* R. Edward Price, *Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of U.S. Economic Laws Abroad,* 28 GEO WASH. J. INT'L L. & ECON. 315, 315-17 (1995) ("Attempts to enforce aggressive U.S. antitrust laws against anticompetitive behavior abroad have caused some foreign governments to claim that their sovereignty has been violated. To protect this sovereignty from outside incursion, many of these governments enacted blocking statutes to prevent compliance with U.S. discovery orders within their borders.")

The expansive exercise of subpoena power – whether by the United States or by foreign countries – impairs the purpose of MLATs and other diplomatic agreements and might create impediments to international business.

Foreign countries may also adopt expansive methods to obtain evidence that would normally be beyond their jurisdictional reach or that could only be obtained through use of MLAT provisions to seek assistance from the United States.

United States businesses would be subjected to demands for disclosure of information in foreign tribunals whether or not such information is currently available to those tribunals. The hundreds of United States-based firms, in industries or professions from accounting to television and radio broadcasting that do business and have a "presence" in Japan (*see* American Chamber of Commerce in Japan website, available at www.accj.or.jp/ user/ cm.php. (accessed April 15, 2011) might, as a result of the subpoena of Toshiba's documents, become vulnerable to discovery of their U.S.- located documents and employees, even though those firms have only "tenuous contacts" with Japan (*see* United States Department of Justice, Antitrust Division, *Grand Jury Manual* III-11). Many of these firms are

members of the National Association of Manufacturers.

The Ninth Circuit's *per se* rule enables DOJ to ignore the settled methods for seeking foreign-based discovery, and instead simply to announce an investigation and then exploit the proliferation of civil cases and the broad discovery that it knows will ensue. DOJ will no longer need to notify foreign sovereigns of its intentions and consider their objections. The Ninth Circuit's *per se* rule ignores potential international complications and consequences that might well follow the use of criminal grand jury subpoenas to compel production of foreign company documents and testimony that are not in the United States by reason of the foreign company's will.

As this Court said in *Societe Nationale v. District Court*, 482 U. S. 522, 546 (1987):

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . .When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent

> discovery abuses. . . . In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See Hilton v. Guyot, 159 U. S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

The Ninth Circuit's holding fails utterly to "demonstrate due respect" for foreign litigants or foreign sovereigns.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 20, 2011

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