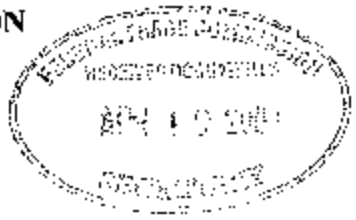
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of	)	
CHICAGO BRIDGE & IRON COMPANY N.V. a foreign corporation,	)	
CHICAGO BRIDGE & IRON COMPANY, a corporation, and	)	DOCKET NO. 9300
PITT-DES MOINES, INC., a corporation.	)	

ORDER DENYING RESPONDENTS' MOTION FOR ISSUANCE OF SUBPOENAS

I.

On April 5, 2002, Respondents filed a motion for the issuance of several subpoenas *duces tecum* and subpoenas *ad testificandum*. Respondents' motion is filed pursuant to Rule 3.36 of the Commission's Rules of Practice which requires a party seeking the issuance of a subpoena to be served in a foreign country to file a motion demonstrating that the requirements of Rule 3.36(b) have been met. 16 C.F.R. § 3.36. Complaint Counsel filed its opposition on April 17, 2002. For the reasons set forth below, Respondents' motion is DENIED WITHOUT PREJUDICE.

II.

Rule 3.36(b) of the Commission's Rules of Practice requires the party seeking issuance of a subpoena to be served abroad to make specific showings that:

(1) the material sought is reasonable in scope;

(2) the material sought falls within the limits of discovery under § 3.31(c)(1);

(3) the information or material sought cannot reasonably be obtained by other means; and

(4) the party seeking discovery has a good faith belief that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

16 C.F.R. § 3.36(b).

In 2001, the Commission, concerned about the numerous issues and potential conflicts that often arise in connection with issuing compulsory process to entities outside the United States, amended its Rules of Practice to require ALJ supervision of proposed foreign compulsory process. Explaining the reasons behind the amendment to the FTC's Rules of Practice, the Commission stated:

> Respondents have from time to time attempted to serve such subpoenas abroad. To the extent the subpoenas appear to have the imprimatur of the Commission, an attempt to serve them on foreign entities outside the territorial limits of the U.S. may raise serious issues of Commission jurisdiction and international law. In the interest of limiting or avoiding conflicts with foreign authorities in this area, the Commission is putting foreign discovery requests back into the category of ALJ-supervised discovery under § 3.36.

Federal Trade Commission Amendments to Rules of Practice, 66 Fed. Reg. 17622, 17623 (F.T.C. April 3, 2001.) The Commission further explained that the requirements of Rule 3.36 are designed to "assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns" and to assure that exercise of compulsory process outside the United States will not

be attempted unless domestic discovery and voluntary arrangements have been exhausted or are not available:

> Indeed, the tests provided in § 3.36(b) provide a framework that closely tracks the prerequisites for foreign discovery as commonly recognized by treaty, custom and practice in many countries: That is, such discovery should only occur if a judge determines that the request is reasonable and that other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.

66 Fed. Reg. at 17623.

The requirement of Rule 3.36(b)(4) stems from the statutory limitations on the subpoena powers of the Federal Trade Commission. Section 9 of the Federal Trade Commission Act authorizes the Commission to compel depositions and the production of documentary evidence from any place in the United States. 15 U.S.C. § 49. In *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the Court of Appeals for the D.C. Circuit, in interpreting the statutory provision similar to Section 9 of the Federal Trade Commission Act which authorized the Commodity Futures Trading Commission to compel the attendance of witnesses and the production of documents "from any place in the United States," held that a district court is without jurisdiction to enforce an investigative subpoena served on a foreign citizen in a foreign nation. *Id.* at 496.

Under *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), a subpoena issued by an administrative agency of the United States must not violate international law. "When an American regulatory agency directly serves its compulsory process upon a citizen of a foreign country, the act of service itself constitutes an exercise of American sovereign power within the area of the foreign country's territorial sovereignty." *Id.* at 1304.

"Such an exercise constitutes a violation of international law." *Id.* at 1313. "The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct." *Id.* at 1315.

To effectuate the Commission's policy not to embroil the Commission in unnecessary international conflicts, Respondents will be held to the standards the Commission established by amending Rule 3.36(b).

III.

As set forth below, Respondents have failed to satisfy its burden of proof in demonstrating that the four requirements of Rule 3.36(b) have all been met.

(1) Respondents have not demonstrated that the material sought is reasonable in scope.

Respondents have not demonstrated with sufficient specificity that the material sought is reasonable in scope. 16 C.F.R. §§ 3.34(b); 3.36(b)(1). Respondents' motion simply lists the foreign companies from which they seek discovery and generally describes the materials they seek. This is not sufficiently specific for a motion seeking discovery from foreign sources.

(2) Respondents have not demonstrated that the material sought falls within the limits of discovery under § 3.31(c)(1).

Commission Rule 3.31(c)(1) allows discovery of materials reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief or the defense of any respondent, but also sets forth that discovery may be limited by the ALJ if the material sought is unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, less burdensome, or less expensive, or if the burden and expense of the proposed

discovery outweighs its likely benefit.

Complaint Counsel, in its opposition, states that Respondents have already issued subpoenas *duces tecum* and *subpoenas ad testificandum* directing thirteen companies to designate one or more officers, directors, managing agents, or other persons to testify on their behalf regarding: (1) foreign and domestic suppliers and manufacturers of cryogenic tanks worldwide; (2) the ability of foreign companies to compete in the U.S. market for cryogenic tanks; (3) the ability of foreign and domestic companies to enter the U.S. market for cryogenic tanks; (4) the ability of foreign companies to hire and utilize U.S.-based field crews in the U.S. market for field erection of cryogenic tanks; (5) attempts by Skanska/Whessoe, Tokyo Kanetsu K.K. (TKK), Entrepose, Bouygues/Technigaz, Tractebel, MHI, IHI, Technip/Coflexip or any other foreign company to enter the U.S. market for cryogenic tanks; (6) the extent to which foreign companies are aware of, and are able to work with, U.S. design codes and the domestic infrastructure needed to compete in the U.S. market for cryogenic tanks; (7) methods used (or able to be used) by foreign companies in conducting the construction phase of field-erected cryogenic tanks; and (8) foreign and domestic suppliers and manufacturers of cryogenic tanks and/or vacuum chambers worldwide. These sources should be able to provide Respondents with the information they seek, such that discovery from foreign sources would be cumulative or duplicative.

Respondents have not shown that they cannot obtain information regarding foreign suppliers' activities in the United States from customers or from the U.S. partners of the foreign suppliers. Because Respondents have not demonstrated that they cannot obtain the information requested from domestic sources, Respondents have not demonstrated that the information is not

available in a manner that is more convenient, less burdensome, and less expensive than foreign discovery.

(3) Respondents have not demonstrated the information or material sought cannot reasonably be obtained by other means.

Rule 3.36(b)(3) requires respondents to make a specific showing that "[t]he information or material sought cannot reasonably be obtained by other means." 16 C.F.R. § 3.36(b)(3). The Federal Register notice accompanying the amendment to Rule 3.36 explains that:

> [foreign] discovery should only occur if a judge determines that . . . other means of obtaining the information (*such as domestic discovery or voluntary arrangements*) have been exhausted or are not available.

66 Fed. Reg. at 17623 (emphasis added). This is consistent with the express policy of the U.S. and other nations to minimize conflicts in the enforcement of antitrust laws that can arise from attempts to enforce discovery outside the territory.

As discussed above, Respondents have failed to demonstrate that they cannot obtain the information from domestic sources. In addition, Respondents have not demonstrated that they cannot obtain the requested evidence voluntarily from the foreign companies. *See* Commission Statement, 66 Fed. Reg. at 17623 (*citing* OECD Revised Recommendation, OECD Doc. C (95)130 (Final) (July 1995); DOJ & FTC, Antitrust Enforcement Guidelines.) The Antitrust Enforcement Guidelines For International Operations issued by the U.S. Department of Justice and the Federal Trade Commission provide:

> In conducting investigations that require documents that are located outside the United States, or contacts with persons located outside the United States, the Agencies first consider requests for voluntary cooperation when practical and consistent with enforcement objectives.

DOJ & FTC, Antitrust Enforcement Guidelines ¶ 4.2. (April 1995). Respondents have made no

showing in their motion that they have contacted the foreign companies to determine whether they will voluntarily provide documents, statements, or deposition testimony.

(4) Respondents have not demonstrated that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served, as is required by law.

Respondents have represented that each of the companies from which they seek discovery are located in countries that have agreed to abide by the terms of the Hague Convention. Respondents further assert that, in general, for countries that have adopted the Hague Convention, the international discovery process can be summarized as the following government to government transaction: a U.S. judicial proceeding makes a request to the U.S. government who in turn makes a request its foreign government counterpart, who likewise makes a request to its judicial equivalent, who then decides whether or not to grant the request and order the discovery on a particular entity or person.

In its opposition, Complaint Counsel asserts that two of the countries from which Respondents seek discovery are not parties to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, which provides for the transmittal of letters rogatory or request in civil or commercial judicial proceedings. Complaint Counsel further argues that another two countries from which Respondents seek discovery may not consider a non-criminal antitrust case filed by a government in an administrative proceeding to be a "civil or commercial matter" within the scope of the Hague Convention. In addition, Complaint Counsel states that two of the countries have enacted blocking statutes that can limit or prohibit subpoenaed parties from producing evidence in connection with a foreign legal proceeding.

To make a good faith showing that the discovery requested would be permitted by treaty requires more than a bald assertion that the countries in which the proposed deponents and materials are located are signatories to the Hague Convention. Although Respondents assert that they intend to prepare the necessary papers in conjunction with local counsel in each of the relevant countries, Respondents have not demonstrated this is legally sufficient or would fulfill all procedural requirements under the laws of each of the countries from which Respondents seek discovery. Accordingly, Respondents have failed to demonstrate that the discovery requested would be permitted by treaty, law, custom or practice in the country from which the discovery is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

IV.

Because Respondents have not satisfied the requirements of Commission Rule 3.36(b), Respondents' motion for issuance of a subpoenas is DENIED WITHOUT PREJUDICE.

Dated: April 18, 2002

JAMES P. TIMONY
Administrative Law Judge