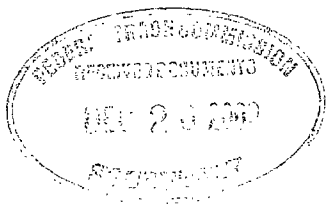
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of	)	
	)	
CHICAGO BRIDGE & IRON COMPANY N.V.,	)	
	)	
a foreign corporation,	)	
	)	
CHICAGO BRIDGE & IRON COMPANY,	)	
	)	
a corporation,	)	Docket No. 9300
	)	
and	)	
	)	**PUBLIC RECORD**
PITT-DES-MOINES, INC.,	)	
	)	
a corporation.	)	
	)	

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO DEPOSE MR. JEAN-PIERRE JOLLY FOR GOOD CAUSE

More than four weeks have passed since Respondents first informed Complaint Counsel of its intention to call Jean-Pierre Jolly as a live witness. On Thursday, December 12, 2002, less than one week prior to Mr. Jolly's scheduled testimony, Complaint Counsel served Respondents with its motion for leave to re-open discovery and depose Mr. Jolly. Further, Complaint Counsel failed to serve Respondents until three days after it filed its motion with the Court. This motion is untimely and unwarranted given the fact that Respondents and Complaint Counsel have each had adequate opportunity to interview and obtain a signed declaration from Mr. Jolly. Additionally, conducting a deposition at this late stage will be extremely disruptive to the on-going trial. For the reasons stated herein, Complaint Counsel's motion should be denied.

I. COMPLAINT COUNSEL INEXPLICABLY FAILED TO SERVE RESPONDENTS UNTIL THREE DAYS AFTER IT FILED ITS MOTION WITH THE COURT.

Despite filing its motion with the Court on Monday, December 9, 2002, Complaint Counsel inexplicably failed to serve Respondents until 1:30 p.m. on Thursday, December 12, 2002. Complaint Counsel's error is significant given the time sensitive nature of its motion; Complaint Counsel presumably plans to depose Mr. Jolly next Tuesday, December 17, 2002. Due to Complaint Counsel's oversight, Respondents have had less than 30 hours to file this response. Based on this reason alone, the Court should deny Complaint Counsel's motion.

II. COMPLAINT COUNSEL'S ASSERTION THAT A DEPOSITION IS NEEDED TO ASCERTAIN WHETHER MR. JOLLY WILL REQUIRE AN INTERPRETER DURING HIS IN-COURT TESTIMONY IS DISINGENUOUS.

Complaint Counsel disingenuously argues that a deposition would afford it the opportunity to determine if Mr. Jolly will require a translator at trial. (Complaint Counsel's Motion at 7.) This argument is surprising given the fact that Complaint Counsel interviewed Mr. Jolly for more than four and a half hours and ultimately persuaded him to sign a declaration. (Complaint Counsel's Motion at Attachment 6.) It is difficult to believe that despite Complaint Counsel's extensive interaction with Mr. Jolly it is still uncertain about his command of the English language. Was Complaint Counsel uncertain when it moved his declaration, written in English, into evidence? Regardless, Complaint Counsel can assuage its concerns by merely scheduling a translator to attend court, just in case, on the day Mr. Jolly is scheduled to testify. A deposition is not required.

III. COMPLAINT COUNSEL OPPOSED RESPONDENT'S MOTION TO ALLOW FOREIGN DISCOVERY.

Complaint Counsel had ample opportunity, before the close of discovery, to seek foreign discovery. In fact, Respondents petitioned this Court to allow foreign discovery. If the

Court had allowed such discovery, both sides would have had the opportunity to depose Mr. Jolly, as well as other foreign witnesses. Complaint Counsel, however, opposed foreign discovery arguing, inter alia, that there were "ample means" of obtaining and presenting evidence without engaging in foreign discovery. (Attachment 1 at 9.) Complaint Counsel now, long after the close of discovery and a week before Mr. Jolly is scheduled to testify, has come to the conclusion that the deposition of a foreign witness is important. It is too late. Complaint Counsel had the opportunity to seek foreign discovery but chose instead to oppose it.

IV. GOOD CAUSE DOES NOT EXIST FOR THIS COURT TO RE-OPEN DISCOVERY AND GRANT LEAVE TO DEPOSE MR. JOLLY.

Complaint Counsel failed to adequately prove the existence of good cause. Upon learning of Mr. Jolly's existence, and his relevance as a foreign competitor, Complaint Counsel contacted Mr. Jolly, conducted more than four and a half hours of interviews and obtained a signed declaration. (Complaint Counsel's Motion at Attachment 6.) Mr. Jolly provided all of this information voluntarily. In fact, Complaint Counsel concedes that "both parties appear to have had equal opportunity to secure information from Mr. Jolly on a voluntary basis." (Complaint Counsel's Motion at 3.) Complaint Counsel argues, however, that despite all of the voluntary information Mr. Jolly provided, it has not had access to Mr. Jolly since he signed his declaration on August 22, 2002. Complaint Counsel is concerned that Mr. Jolly's testimony may have changed since late August.

Mr. Jolly's unavailability and Complaint Counsel's concern that his testimony may have changed do not constitute good cause to re-open discovery and depose him. Complaint Counsel's argument that it has not spoken to Mr. Jolly since August 22, 2002 is immaterial given the fact that Respondents also have not interviewed Mr. Jolly since June 2002. Both parties have had equal access. Complaint Counsel's concern that Mr. Jolly's testimony may have changed

since August 22, 2002, is similarly inconsequential. Facts and circumstances often change from the time a witness signs an affidavit, or gives a deposition, to the time the witness ultimately testifies at trial. As a matter of course, parties do not re-depose witnesses the day before trial to ensure that nothing has changed since they last testified. Complaint Counsel obtained a sworn statement from Mr. Jolly which it can use to cross-examine, and impeach if necessary, Mr. Jolly at trial. Complaint Counsel does not have an inherent right to preview Mr. Jolly's testimony the day before trial.

V. COMPLAINT COUNSEL WILL NOT BE UNDULY PREJUDICED IF THIS COURT DOES NOT GRANT LEAVE TO RE-OPEN DISCOVERY AND DEPOSE MR. JOLLY.

Complaint Counsel is clearly mistaken that it will be unduly prejudiced by not having the opportunity to discuss with Mr. Jolly. (Complaint Counsel's Motion at 4-6.) Complaint Counsel erroneously avers that it did not have the opportunity to discuss this issue with Mr. Jolly because this "recent development" occurred **after** August 22, 2002. (Complaint Counsel's Motion at 6.) Complaint Counsel is incorrect.

Complaint Counsel's characterization of this information as a "recent development" is wrong.

VI. A DEPOSITION IS UNLIKELY TO BENEFIT THE COURT PROCEEDINGS DURING MR. JOLLY'S APPEARANCE.

Complaint Counsel further asserts that a deposition is needed to identify portions of Mr. Jolly's testimony for which Mr. Jolly may seek *in camera* treatment. (Complaint

Counsel's Motion at 7.) Despite Complaint Counsel's noble intentions, this is not an adequate ground to re-open discovery and depose Mr. Jolly. If Mr. Jolly seeks protection, he will file a motion clearly defining all topics he believes require *in camera* treatment. If the Court grants Mr. Jolly's motion, Complaint Counsel will have adequate notice of which topics the Court found worthy of protection and *in camera* treatment.

VII. IF THIS COURT GRANTS COMPLAINT COUNSEL LEAVE TO RE-OPEN DISCOVERY AND DEPOSE MR. JOLLY, IT SHOULD LIMIT THE TIME AND SCOPE OF THE DEPOSITION.

If this Court grants Complaint Counsel's motion, it should limit Mr. Jolly's deposition to topics occurring after August 22, 2002 and allow each party one hour to conduct its examination. Complaint Counsel should not be allowed to depose Mr. Jolly on topics occurring prior to August 22, 2002 because it had ample opportunity to acquire this information during its numerous interviews with Mr. Jolly. The two hour time limit, in which each party would receive one hour of examination time, is necessary to keep the parties focused and limit the disruption the deposition will have on the on-going trial. To further limit disruptions, the Court should order the deposition to commence at the end of trial proceedings on Tuesday, December 17, 2002.

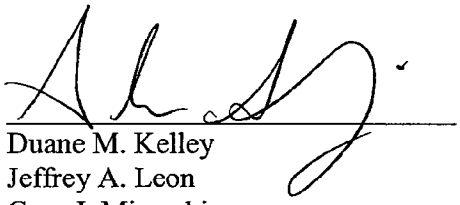
CONCLUSION

Because of the disruptive and untimely nature of Complaint Counsel's motion, Respondents respectfully request that this court deny Complaint Counsel's Motion For Leave To Depose Mr. Jean-Pierre Jolly For Good Cause.

Dated: Washington, D.C.

December 20, 2002

Respectfully submitted,



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Counsel for Respondents
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CERTIFICATE OF SERVICE

I, Andrew D. Shapiro, hereby certify that on this 20th day of December, 2002, I served a true and correct copy of: Respondents' Opposition To Complaint Counsel's Motion For Leave To Depose Mr. Jean-Pierre Jolly For Good Cause, by hand delivery upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, D.C. 20580
(two copies)

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BEFORE FEDERAL TRADE COMMISSION

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CHICAGO BRIDGE & IRON COMPANY	)	
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and	)	Docket No. 9300
PITT DES-MOINES, INC.	)	
a corporation.	)	

To: The Honorable James P. Timony
Administrative Law Judge

COMMISSION COUNSEL'S RESPONSE TO RESPONDENTS' MOTION FOR FOREIGN DISCOVERY PURSUANT TO RULE 3.36

On April 5, 2002, respondents filed an application pursuant to Rule 3.36 of the Commission's Rules of Practice for leave to obtain evidence through compulsory process to be issued to third parties in five foreign countries. Since this is the first motion to be decided under this Rule, as amended in 2001, it is important to establish a clear and proper interpretation of the Rule's requirements.

As discussed below, respondents have failed to satisfy any of the elements of Rule 3.36(b). Accordingly, respondents' motion should be denied.

I. The Requirements of Amended Rule 3.36(b)

As a result of a 1996 amendment of the Commission's Rules, parties in Commission proceedings occasionally sent subpoenas to parties located abroad, without the approval or

supervision of the Administrative Law Judge.[1] 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 and to specify precise criteria that parties must satisfy. Specifically, the amended Rule requires a party seeking issuance of a subpoena to be served abroad to satisfy, in its motion, the same requirements for a subpoena under Rule 3.34 and to make specific showings that:

> (1) The material sought is reasonable in scope;
>
> (2) . . . the material falls within the limits of discovery under § 3.31(c)(1) [*i.e.*, it is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent; it is not unreasonably cumulative or duplicative; it is not obtainable from some other source that is more convenient, less burdensome, or less expensive; the party seeking discovery has not had ample opportunity by discovery to obtain the information sought, and the burden and expense of the proposed discovery does not outweigh its likely benefit] . . . ;
>
> (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.

FTC Rules of Practice 3.36(b). Explaining the reasons behind the amendments, the Commission stated:

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[1] *See, e.g., In the Matter of Hoechst Marion Roussel, Inc., et al.*, FTC Docket No. 9293, Order Granting Motion of Biovail, Melnyk, and Cancellara to Quash Subpoenas and Denying Motion of Andrx to Preclude, July 14, 2000, D. Michael Chappell, ALJ (subpoenas issued pursuant to Commission Rule 3.34 must not violate international law, *id.* at 2, 4) (attached as Appendix 2).

> 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.

66 Fed. Reg. 17623, April 3, 2001 (citation omitted) (attached as Appendix 1). 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 FR 17623, April 3, 2001 (emphasis added, citation omitted). Thus, to effectuate the Commission's policy not to embroil the Commission in unnecessary international conflicts, it is important that respondents be held to the standards the Commission established by amending Rule 3.36(b) specifically to avoid such conflicts.

II. Respondents Have Failed to Make the Required Showing that the Discovery They Seek Is Reasonable in Scope and Satisfies the Requirements of Rules 3.36 and 3.34

There is a long history of hostility of foreign governments to the application of U.S. discovery practices to persons and firms in foreign countries, and most countries' legal systems do not provide for the wide-ranging discovery that characterizes U.S. practice. Thus, Rule 3.36(b)(1) requires respondents to demonstrate the reasonableness of proposed foreign discovery.

Further, Rule 3.34(b) requires that any subpoena issued must "specify with reasonable particularity the material to be produced."

Respondents' motion fails to state with any degree of specificity the information they seek to require foreign third parties to produce. Instead, it merely alleges that respondents need to "obtain evidence directly from those foreign companies" to determine the ability of these companies to compete in the U.S. Motion at 5. The motion lists foreign corporations that respondents claim have either bid on projects or are currently bidding on projects in the U.S. and recites eight questions, some incorporating assumptions advanced by respondents, as among the factual issues on which respondents assert CB&I will need to take evidence from foreign companies. Motion at 5-6.

Respondents have not attached to their motion the discovery requests they propose to issue, but ask instead for carte blanche authority to issue their vaguely described proposed subpoenas. Respondents cannot circumvent the showing required by Rule 3.36 simply by asserting, as they do in their motion, that each subpoena will be reasonable in scope and that each subpoena will satisfy the particularity requirement of Rule 3.34, "as it would seek evidence on a limited number of specific topics, including those" outlined in respondents' motion. Motion at 7.

III. Respondents Have Failed to Make a Showing that the Evidence Cannot Reasonably Be Obtained from Another Source that Is More Convenient and Less Burdensome as Required by Rule 3.36(b)(2)

Rule 3.36(b)(2) requires a specific showing that the material falls within the limits of discovery under § 3.31(c)(1). Rule 3.31(c)(1) directs that use of discovery otherwise permitted under the Rules shall be limited by the ALJ if he determines either that the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more

convenient, less burdensome, or less expensive, that the party seeking discovery has had ample opportunity by discovery to obtain the information sought, or that the burden and expense of the proposed discovery outweigh its likely benefit. Respondents' motion reveals that they already have in their possession, or are in the process of obtaining by other means, evidence relevant to their asserted defenses without resort to foreign compulsory process. Respondents state their belief that several foreign companies are currently either selling LNG tanks or are actively pursuing LNG tank jobs in the United States. Motion at 2. Respondents fail to make any showing why, in light of whatever information respondents rely on to make this representation, foreign discovery is necessary.

Respondents have offered no showing either that they are unable to obtain the requested evidence by subpoenaing their domestic customers or that these customers are otherwise unavailable. Respondents concede that on March 14, 2002, Commission Counsel produced to respondents nearly twenty affidavits from CB&I customers containing the views and experiences of respondents' customers regarding the degree to which foreign companies compete with CB&I in the United States.[2] Motion at 2-4. Respondents have already issued subpoenas to these customers for testimony and documents relevant to the evidence sought by respondents in their motion.

Respondents have issued *subpoenas ad tesitificandum* for deposition of witnesses who submitted declarations in the pre-complaint investigation of this matter. The individuals subpoenaed included asset and project directors, general and technical managers, engineers, and executives from companies involved in the design, construction and purchase of cryogenic tanks

[2] Respondents attached eight of these customer declarations to their motion.

and thermal vacuum chambers. In addition, on April 9 through April 11, 2002, respondents issued *subpoenas duces tecum* and *subpoenas ad tesitificandum* 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.

CB&I and its customers are at least as likely as foreign suppliers to have evidence relevant to respondents' assertions. For example, one factual issue on which respondents propose to take evidence from foreign companies is "what cost advantages do the foreign companies have over CB&I?" Motion at 6. United States customers who have received and compared competing proposals from CB&I, Pitt Des-Moines, and foreign suppliers, and who have negotiated with suppliers for construction of relevant products, are likely to be in the best position to provide first hand comparisons of project costs submitted by competing suppliers. Moreover, CB&I is the

world's leading supplier of the relevant products, has extensive experience bidding against foreign suppliers for projects in various parts of the world outside the United States and can draw on its wins and losses against foreign suppliers in various parts of the world to assemble evidence regarding cost advantages and disadvantages of CB&I and its foreign competitors in various parts of the world.

Respondents have not shown that they cannot obtain the requested evidence from United States subsidiaries of the foreign companies or from domestic companies, which according to respondents' motion, are partnering with the foreign companies for the purpose of competing in the United States. Respondents claim that Tokyo Kanetsu K.K. ("TKK"), Bouygues/Technigaz, Daewoo and BSL have established or announced joint ventures or partnerships with various United States companies, including American Tank & Vessel ("AT&V"), H.B. Zachry, S&B Engineers and Constructors, Ltd., and Bay Tank. Motion at 5-6. These alleged partners and joint venture affiliates have offices and employees in the United States and are subject to discovery by respondents. In addition, the alleged partnerships and joint ventures and any personnel operating in the United States are subject to discovery in the United States.

Respondents claim to have information regarding alleged efforts by foreign suppliers to compete in the United States. *See* Motion at 2, 5-6. For example, respondents claim that Skanska/Whessoe is currently bidding on LNG jobs in the United States including Dynegy's LNG project in Louisiana; that the TKK/AT&V and Technigaz/Zachry joint ventures are currently bidding on the Dynegy project; that Entrepose has made inquiries about LNG projects in the United States; that the Technip Group of France was awarded a preliminary engineering and design contract for an LNG import terminal in Freeport, Louisiana; that Ishikawajima-Harima

Heavy Industries Co., Ltd. has previously sought business in the U.S.; and that BSL and Bay Tank are pursuing a LIN/LOX project for Air Liquide in the U.S. Motion at 5-6. Respondents can obtain additional documents and information regarding foreign suppliers' alleged activities in the United States from customers and from the U.S. partners of the foreign suppliers. If a foreign supplier and its domestic partner jointly develop a bid for a U.S. project, the domestic partner would become apprized of the estimated total cost of the project, including the costs estimated for work done by the foreign supplier and the domestic partner. Additionally, the domestic partner would become aware of the sunk costs involved in developing the bid or proposal.

IV. Respondents Have Failed to Make the Required Showing that the Evidence Cannot Reasonably Be Obtained by Other Means as Required by Rule 3.36(b)(3)

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." The Federal Register notice accompanying the publication of the rule 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. 17623, April 3, 2001 (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, *inter alia*, attempts to enforce discovery outside the territory. Thus, the United States antitrust agencies adhere to principles of international comity by taking into account the interests of the affected foreign country in conducting law enforcement proceedings.[3] This policy is also

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[3] *See, e.g.*, Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations ¶ 3.2 (April 1995) ("DOJ & FTC, Antitrust Enforcement Guidelines") ("In enforcing the antitrust laws, the Agencies consider international comity.").

embodied in international instruments such as the OECD Recommendation on antitrust cooperation,[4] which calls for member countries to consider whether information is available from sources within their national territory before seeking foreign discovery and to seek voluntary production of foreign-located evidence before resorting to the use of compulsory process.[5]

Respondents argue that they "simply do not have the luxury of taking the time" to comply with the requirement of Rule 3.36(b)(3) that they exhaust other means of obtaining the information. Motion at 8. Respondents' haste does not excuse non-compliance with the rule. As discussed *supra* at 5-8, respondents have available to them ample means of obtaining and presenting evidence relevant to their defense without engaging in foreign discovery. Respondents have failed to demonstrate or proffer any attempts to obtain the evidence through other means in the United States.

Section 9 of the FTC Act, which governs the use of subpoenas in Commission investigations and in adjudicative proceedings, authorizes the Commission to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence "from any place in the United States." 15 U.S.C. § 49.[6] Respondents' motion does not state that respondents have attempted to determine whether the companies listed in their motion have

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[4] Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Business Practices Affecting International Trade, OECD Doc. C (95)130 (Final) (July 1995) (attached as Appendix 3).

[5] *Id.*, Appendix ¶ 8; OECD, Competition Law Enforcement: International Cooperation in the Collection of Information (1984) at ¶ 168.

[6] Section 9 imposes the same geographic limitation when compulsory process is sought in a Part III proceeding. 15 U.S.C. § 49 ("Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided").

domestic offices in the United States where process can be served or whether these companies have officers, directors, or agents present in the United States on whom process may be served. As respondents acknowledge in their motion, some of the cited foreign companies have subsidiaries that operate in the U.S. Motion at 8. For example, Skanska/Whessoe has a U.S. subsidiary named Skanska USA Inc. with offices in New York and Connecticut. If this subsidiary is involved in supporting Skanska/Whessoe's alleged effort to develop proposals for U.S. LNG, it should have relevant evidence.

Further, respondents have failed to demonstrate that they cannot obtain the requested evidence voluntarily from the foreign companies. *See* Commission Statement, 66 Fed. Reg. 17623, April 3, 2001, citing OECD Revised Recommendation, OECD Doc. C (95)130 (Final) July, 1995 at Appendix ¶ 8(a)-(c) and 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, cited at note 3 of the FTC's Federal Register notice accompanying publication of revised Rule 3.36, 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 willl voluntarily provide documents, statements, or deposition testimony.

V. Respondents Have Failed to Show that the Discovery Requested Would Be Permitted by Treaty, Law, Custom or Practice as Required by Rule 3.36(b)(4)

Rule 3.36(b)(4) requires that a motion applying for issuance of a subpoena to be served in

a foreign country show:

> that 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.

Respondents have not attached to their motion the particular subpoenas or other discovery demands or discovery requests they ask the Court to authorize. At several points in their motion respondents indicate that they propose to issue subpoenas to foreign entities outside the jurisdiction of the United States. Motion at 6 ("Respondents seek leave to serve each of the companies listed above with a subpoena, seeking to obtain testimonial and documentary evidence on the issues set forth above."); Motion at 6. Elsewhere respondents refer to the "laborious provisions" and "cumbersome nature" of the Hague Convention procedures, Motion at 8, and acknowledge that foreign discovery would entail transmittal of letters of request through diplomatic channels to foreign governments requesting that they seek authorization from the appropriate foreign judicial authorities to secure discovery on a particular person or entity. Motion at 9. Respondents acknowledge that the proposed procedure can be costly and time consuming and report that for that reason they have not prepared such letters of request. *Id.*

Since respondents have not specified the foreign discovery they propose to pursue, it cannot be determined at this time whether the showing required by Rule 3.36(b)(4) could be made if respondents were to submit a specific discovery request. Respondents have not made the required showing with respect to the undefined discovery they propose. We outline below some of the difficulties respondents' proposed foreign discovery would be likely to face.

For the basis of their claimed good faith showing, respondents rely on the "Hague

Convention, Nov. 15, 1965, art. 1 *et seq.*, 20 U.S.T. 361." However, this Convention[7] pertains to the *service* of documents abroad, and does not apply to the seeking of evidence. See, e.g., *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988).[8] The relevant Hague Convention is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *codified at* 28 U.S.C. § 1781, which provides for transmittal of letters rogatory or request in civil or commercial judicial proceedings.

Respondents have not shown that the relevant Hague Convention would provide the requisite basis to satisfy Rule 3.36(b)(4). Respondents acknowledge in their motion that most foreign jurisdictions do not permit pretrial discovery, as practiced in the United States, and only permit evidence to be obtained for use at trial. Motion at 9. However, respondents' motion fails to identify documents for use at trial with the requisite particularity, meaning that it would not be possible based on the motion to frame a legally acceptable Request addressed to most foreign jurisdictions.

Further, neither Japan nor Korea is even a Party to the Convention,[9] rendering it meaningless as to the request for evidence in those countries. France and Sweden may well not consider a non-criminal antitrust case filed by a government to be a "civil or commercial matter"

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[7] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, codified at 28 U.S.C. Appendix following Rule 4, Fed. R. Civ. P.

[8] "The Convention revised parts of the Hague Conventions on Civil Procedure of 1905 and 1954. The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." 486 U.S. at 698.

[9] *See* Hague Conference on Private International Law, Full Status Report #20 available at http://www.hcch.net/status/stat20e.html; the list of signatories is also in Martindale-Hubbell Law Directory, Law Digest Volume (2001) at IC-22-23.

covered by the Convention, but rather an administrative proceeding outside the Convention's scope.[10] Further, France and Sweden have taken reservations under Article 23 of the Convention providing that they will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. Sweden took a further reservation, precluding requests to identify documents relevant to the proceeding to which the Letter of Request relates.[11] Thus, even if an FTC Letter of Request to Sweden under the Hague Convention were not entirely foreclosed, it would be limited to seeking specific documents identified in the Request for use at trial and seeking testimony of witnesses other than testimony regarding what documents the witness may have in his or her possession or custody.

Even with respect to Parties to the Convention as to which the Convention would arguably apply in this case, the United Kingdom, France, and Sweden, the Convention does not provide for the use of subpoenas to obtain information abroad. Rather, the three established

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[10] "Member States whose laws are based on the civil law system are unlikely to honor a request for evidence to be used before an American administrative court or agency, or in a civil action pending before the courts in which "governmental" or "public" - as distinguished from "private" - rights are at issue." *See* 1 Bruno Ristau, International Judicial Assistance Civil and Commercial (1990 Revision), §5-1-4, *citing*, at n. 9, the report of the United States delegate to the Special Commission that met at the Hague in June 1978 to consider, *inter alia*, the scope of the Convention. In contrast, the report states that the United Kingdom delegate concurred in the U.S. interpretation of "civil and commercial" to include proceedings brought by administrative agencies, and that the French delegate indicated the possibility of flexibility in a matter in which the request is made on behalf of a private party in an administrative proceeding.

[11] *Id.*, Declarations and Designations by Member States Under the Hague Evidence Convention, France at A-88-90; Sweden, at A-107; United Kingdom, at A-108-115.

methods are by letter of request,[12] by consular or diplomatic official,[13] or by appointed commissioner.[14] The first method can be compulsory, while the latter two can only be used with willing witnesses.[15] Thus, respondents cite no legal authority supporting the issuance of the requested process.

Respondents' motion additionally fails to mention other likely legal impediments to the use of compulsory process to obtain evidence in the jurisdictions in question. Notably, the United Kingdom[16] and France[17] have enacted blocking statutes that can limit or prohibit subpoenaed parties from producing evidence in connection with a foreign legal proceeding. Impediments to obtaining personal jurisdiction and to effecting valid service can also render it, at a minimum, highly problematic, to obtain evidence in the named jurisdictions consistent with local law and practice.

In sum, respondents' motion does not set forth a basis for "a good faith belief" that their discovery request would be permitted by treaty, law, custom or practice in the countries from which the discovery is sought.

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[12] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Article 1, *codified at* 28 U.S.C. § 1781.

[13] *Id.*, Article 15.

[14] *Id.*, Article 17.

[15] *Id.*, Articles 1, 15, 17.

[16] Protection of Trading Interests Act 1980, *reprinted in* 1 Ristau, *supra*, n. 10, at CI-236.

[17] Law Relating to the Communications of Economic, Commercial, Industrial, Financial, or Technical, Documents or Information to Foreign Natural or Legal Persons, Law No. 80-530, [1980] Journal Officiel, *reprinted in* 1 Ristau, *supra* n. 10, at CI-80.

VI. Conclusion

For the reasons stated herein respondents have not made the necessary showing under Rule 3.36(b) to justify foreign discovery. Accordingly, respondents' motion for authorization to conduct foreign discovery should be denied.

Respectfully submitted,

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April 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Commission Counsel's Response to Respondents' Motion for Foreign Discovery Pursuant to Rule 3.36 to be served this day by hand delivery to:

The Honorable James P. Timony
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room 112
Washington, D.C. 20580

and by facsimile and by first-class mail to:

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Chicago Bridge & Iron Company N.V.
Chicago Bridge & Iron Company, and
Pitt Des-Moines, Inc.

Steven L. Wilensky
Commission Counsel

Dated: April 17, 2002

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 PITT DES-MOINES, INC. a corporation.	)	Docket No. 9300

ORDER

Upon consideration of Respondents' Motion For Leave To Seek Foreign Evidence dated April 5, 2002, and Commission Counsel's response thereto, it is HEREBY ORDERED AND ADJUDGED THAT, based upon Respondent's failure to satisfy the requirements of Rule 3.36 of the Federal Trade Commission's Rules of Practice, Respondents' motion is DENIED.

ORDERED:

James P. Timony
Administrative Law Judge

Date: April___, 2002

IN CAMERA