1981

International Trade: FTC Service of Subpoena Abroad

David K. Millon
Washington and Lee University School of Law, millond@wlu.edu

INTERNATIONAL TRADE: FTC SERVICE OF SUBPOENAE ABROAD — *FTC Improvements Act of 1980*, Pub. L. No. 96–252, § 13, 94 Stat. 374, 380 (1980).

The United States Congress has enacted legislation authorizing the Federal Trade Commission (FTC) to use registered mail for service abroad of investigatory subpoenae. This legislation supersedes a recent decision of the United States Court of Appeals for the District of Columbia Circuit which invalidated this method of service as a violation of international law.

Section 13 of the Federal Trade Commission Improvements Act of 1980[1] (Improvements Act) amends the Federal Trade Commission Act (FTC Act)[2] so as to permit service abroad of investigatory subpoenae[3] according to provisions of the Federal Rules of Civil Procedure (FRCP) for service of process in a foreign state.[4] Among other methods, Rule 4(i) of the FRCP specifically authorizes the use of registered mail.[5]

---

1. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 13, 94 Stat. 374, 380 (1980) (Improvements Act). Section 13 concerns the FTC's authority to issue and serve "civil investigative demands" for documents, written answers, and oral testimony prior to institution of formal proceedings. *Id.* § 13(c)(1). The section "is designed to curtail the issuance by the Commission of overly broad subpoenas [and] . . . includes appropriate safeguards to protect the legitimate rights and interests of every person subjected to investigation." [1980] U.S. CODE CONG. & AD. NEWS 2273. *See also id.* at 2290–93. It requires definite descriptions of the material sought, Improvements Act, Pub. L. No. 96–252, § 13(c)(3–5), statements of the nature of the conduct under investigation, *id.* § 13(c)(2), and allows for petition to the FTC for orders modifying or setting aside investigative demands, *id.* § 13(f)(1).

Other sections of the Improvements Act concern congressional review of final rules (§ 21) and restrictions on FTC investigations of the insurance industry (§ 5), children's advertising (§ 11), trademarks (§ 18), the funeral industry (§ 19), and agricultural cooperatives (§ 20). In addition, the act provides for confidentiality concerning information obtained by FTC investigators (§§ 3,4,14), public notice of proposed rule-making (§ 8), and reconsideration by the FTC of final orders upon showing of changed conditions of law or fact (§ 2).

2. Federal Trade Commission Act, 15 U.S.C. § 41 (1976).

3. The FTC's subpoena powers are defined in section 9 of the FTC Act, 15 U.S.C. § 49 (1976), which provides for gathering of evidence "from any place in the United States." *Id.* The FTC Act makes no explicit reference to service beyond United States territory. Section 45(f) authorizes service of "[c]omplaints, orders, and other processes" by registered or certified mail, but this section does not apply to investigatory subpoenae, for which there is no express provision concerning method of service. *See id.* § 49. Section 13 of the Improvements Act, Pub. L. No. 96–252, § 13(a)(1), does not refer to subpoenae *per se*, instead using the term "civil investigative demand," but does imply that its purpose is to define further the FTC's investigative powers under section 9 of the FTC Act. *Id.* § 13(b). Under the Improvements Act, civil investigative demands appear to be the functional equivalents of investigatory subpoenae.

4. "Any such demand or any enforcement petition filed under this section may be served upon any person who is not found within the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation." Improvements Act, Pub. L. No. 96–252, § 13(c)(6)(B).

5. Permissible methods of service abroad include "any form of mail, requiring a signed receipt." FED. R. CIV. P. 4(i)(1)(D). Other methods of service authorized by Rule 4(i) include:

Prior to the enactment of this legislation, a French corporation challenged the FTC's use of registered mail for subpoena service abroad on the ground that the FTC Act did not authorize this particular method of service.[6] This challenge arose from a FTC subpoena duces tecum, ordering production of documents for use in an antitrust investigation.[7] The subpoena was served in September 1977 by registered mail to the Paris headquarters of Compagnie de Saint-Gobain-Pont-à-Mousson (SGPM).[8] The corporation refused to comply and the FTC petitioned the United States District Court for the District of Columbia for an enforcement order,[9] which was granted.[10] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed,[11] holding that FTC subpoena service abroad by registered mail was an offense against French sovereignty and therefore a violation of international law.[12] According to the court of appeals,

---

the manner prescribed by the law of the state in which service is to be made, the manner directed by a foreign official in response to a letter rogatory, personal service, or some other method ordered by a United States court. *Id.* Rule 4(i). Rule 4 is concerned primarily with service of notice of commencement of an action rather than with service of compulsory process. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063, at 204, § 1083, at 333 (1969). Rule 45(e)(2) governing subpoena service abroad refers to 28 U.S.C. § 1783, but that section concerns only service upon "a national or resident of the United States who is in a foreign country." 28 U.S.C. § 1783(a) (1976). Read strictly, the United States Code does not specifically provide for service of *subpoenae* upon *aliens* resident abroad.

6. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300 (D.C. Cir. 1980). This was an appeal by the company from a district court order. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, Misc. No. 78–0194 (D.D.C. Feb. 14, 1980).

7. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1304–05 (D.C. Cir. 1980).

The FTC's jurisdictional authority to investigate foreign corporations for possible violations of United States antitrust laws, FTC Act, 15 U.S.C. §§ 44, 45(b) (1976), is based on the "effects doctrine," according to which actions of foreigners may be subject to United States jurisdiction if they are intended to and actually do affect United States commercial competition. United States v. Aluminum Co. of America, 148 F.2d 416, 445 (2d Cir. 1945). *Cf.* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) (1965) (jurisdiction if "effect within the territory is substantial" and direct and foreseeable result of activity abroad); Raymond, *A New Look at the Jurisdiction in Alcoa*, 61 AM. J. INT'L L. 558 (1967).

For discussion of the scope of the Sherman Act, 15 U.S.C. § 1 (1975), over foreign commerce, see 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 236 (1978); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 44–75 (2d ed. 1975); Kintner & Griffin, *Jurisdiction over Foreign Commerce under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977).

8. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1304–05 (D.C. Cir. 1980).

9. *Id.* at 1305. The FTC petitioned the district court pursuant to 15 U.S.C. § 49 (1976). The Improvements Act provides that the FTC may file for enforcement orders in the appropriate district court. Improvements Act, Pub. L. No. 96–252, § 13(e).

10. The district court issued an initial enforcement order on Sept. 29, 1978, but on appeal the court of appeals remanded with directions for further deliberation. The district court issued a second order on Feb. 14, 1980. *See* FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1305–06 (D.C. Cir. 1980).

11. *Id.* at 1306, 1327.

12. *Id.* at 1310–18. The court based this conclusion on two factors. First, it distinguished

the FTC Act did not provide for this method of service.[13] Absent an express congressional mandate, the court concluded that it was required to construe the FTC Act in a manner not inconsistent with principles of international law.[14]

The Improvements Act constitutes express congressional authorization of the method of subpoena service at issue in *FTC v. SGPM*. The court of appeals indicated that such authorization would require it to enforce FRCP 4(i) even though to do so might violate international law.[15] The Improvements Act thus clarifies Congress's intent concerning the FTC's subpoena powers, but it raises additional legal and practical issues.

As the court of appeals found in *FTC v. SGPM*, service of compulsory process abroad by direct mail constitutes an offense against international law.[16] Such service is an impermissible exercise of United States sovereignty within the territory of another sovereign.[17] While

---

between service of notice and of compulsory process. The former is a matter simply of informing a party of the pendency of an action, while the latter is a command which, if not obeyed, can subject even a third-party witness to sanctions for contempt. "Given its informational nature," *id.* at 1313, service of notice by mail upon an alien resident abroad was only a minimal intrusion upon the jurisdictional sovereignty of another state, but "the compulsory nature of a subpoena," *id.*, rendered direct service without consultation of the local authorities an act of United States sovereignty performed within the territory of another sovereign, violating a basic norm of international law. *See id.* at 1310–15.

Second, the court of appeals found that the FTC's conduct offended jurisdictional principles of international law. By ordering compliance with the subpoena, the district court was invoking the enforcement jurisdiction of the United States. While a state may validly legislate or prescribe rules concerning conduct beyond its borders, RESTATEMENT, *supra* note 7, § 18, its legal capacity to *enforce* its pronouncements is strictly territorial in scope. *Id.* § 44; 2 D. O'CONNELL, INTERNATIONAL LAW 602–03 (2d ed. 1970). The district court's order therefore violated international law. *See* FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1315–18 (D.C. Cir. 1980).

13. The court of appeals found no such authorization either in the FTC Act itself or in its legislative history. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1307–08 (D.C. Cir. 1980). *See also* note 3 *supra*. The court also held that the district court erred in inferring the FTC's authority to use a particular method of service from its general investigatory and regulatory jurisdiction. *See* FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d at 1318–22.

14. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980). *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21–22 (1962); RESTATEMENT, *supra* note 7, § 3(3).

15. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1323, 1325 (D.C. Cir. 1980). The court of appeals took judicial notice of the Improvements Act, which was enacted after the issuance of the subpoena in question and therefore not dispositive. *Id.* at 1324–25.

16. *Id.* at 1310–18.

17. *See, e.g.*, The S.S. Lotus, [1927] P.C.I.J., ser. A, No. 10 at 18 (a state "may not exercise its powers in any form in the territory of another state"). *See also* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 422 (1980) (judicial act performed within territory of another state is infringement on latter's sovereignty);

certain minimally intrusive judicial acts may not amount to objectionable assertions of sovereignty if performed abroad,[18] a subpoena carries with it the direct threat of sanctions for noncompliance[19] against a foreign national without the approval of its own government. As an exercise of the enforcement jurisdiction[20] of the United States beyond its territory, subpoena service abroad entails application of United States coercive power against an alien subject to the enforcement jurisdiction solely of the state in which he resides.[21] United States courts have recognized that international law limits their authority to exert compulsory jurisdiction over aliens resident abroad;[22] in order to avoid violation of foreign sovereignty, United States courts and administrative agencies would need to enlist the assistance of local judicial authorities in subpoena service.[23]

---

1 L. OPPENHEIM, INTERNATIONAL LAW 288–89 (8th ed. Lauterpacht 1955) (no exercise of administration or jurisdiction is valid within territory of another state).

Recognition of this rule is widespread abroad: "[f]rom the many protests against the attempts of United States courts to secure documents which are located abroad, one thing seems quite clear: every foreign government considers this attempt as an infringement upon its sovereignty and as beyond the jurisdiction of the United States according to international law." Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 NW. U. L. REV. 487, 499 (1969).

18. For example, states differ in their responses to service of notice performed within their borders. Personal service by a United States marshal is less likely to be acceptable than service by mail, because of the more substantial intrusion that the former entails. *See* Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1040–42 (1961).

19. The Improvements Act provides contempt sanctions for failure to comply with court orders issued pursuant to FTC requests. Improvements Act, Pub. L. No. 96–252, § 13(f)(h). *Cf.* FED. R. CIV. P. 45(f) (failure to obey subpoena constitutes contempt). Section 1784 of Title 28 concerns contempt sanctions for noncompliance with subpoenae served abroad, but this section if read in context with section 1783 refers only to United States nationals or residents. 28 U.S.C. §§ 1783–84 (1976).

20. See note 12 *supra*.

21. A state's enforcement jurisdiction within its territory is "normally exclusive." RESTATEMENT, *supra* note 7, § 20, Comment b.

22. "An elementary principle of jurisdiction is that the process of the courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country." Ings v. Ferguson, 282 F.2d 149, 151 (2d Cir. 1960). *See also* United States v. Haim, 218 F. Supp. 922, 926 (S.D.N.Y. 1963) (court has no power to compel attendance of aliens resident abroad); United States v. Best, 76 F. Supp. 138, 139 (D. Mass. 1948).

23. United States law does not explicitly provide procedural rules governing personal or mail service of subpoenae upon aliens resident abroad. See note 5 *supra*. Provision is made, however, for transmittal of letters rogatory from United States tribunals to foreign tribunals. 28 U.S.C. § 1781(a)(2) (1976). By granting their assistance to the service of United States investigative demands within their territory, local authorities would presumably waive any objections under international law to violations of sovereignty.

Relevant international conventions governing judicial assistance contain provisos that limit their utility. *See* Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, *done* Nov. 15, 1965, art. 13, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, which provides that states may refuse to comply if to do so would threaten their sovereignty or national security; Multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* Mar. 18, 1970, art. 23, 23

Congressional authorization of service abroad by mail empowers United States courts to enforce FTC subpoenae, principles of international law notwithstanding. Although the courts are required under United States law to interpret congressional legislation so as not to conflict with international law[24] and will apply international law in the absence of controlling municipal law,[25] the existence of a conflicting rule of international law is not a valid ground for refusing to enforce an act of Congress.[26]

As a practical matter, however, a United States court might decline to enforce a FTC subpoena. Several foreign states have recently enacted legislation prohibiting residents from producing documents for scrutiny in United States judicial or administrative proceedings.[27] These statutes reflect the widespread opposition to application of United States antitrust laws abroad.[28] United States courts have adopted a flexible approach to conflicts between these foreign laws and the need for obtaining evidence. The United States Supreme Court's opinion in *Société Internationale v. Rogers*[29] has been interpreted to require courts to weigh several factors when faced with failures to produce documents

---

U.S.T. 2555, T.I.A.S. No. 7444, which allows states to decline to honor requests to execute pre-trial discovery orders.

24. See note 14 *supra*.

25. *See* The Paquete Habana, 175 U.S. 677, 708 (1899) (rule of international law must be applied absent controlling statute or treaty); Hilton v. Guyot, 159 U.S. 113, 163 (1895).

26. "There is no power in this Court to declare null and void a statute adopted by Congress . . . merely on the ground that such provision violates a principle of international law." Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir.), *cert. denied*. 362 U.S. 904 (1959). *See also* The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925) (contravention of international law no basis for refusal to enforce act of Congress, which may be invalidated only on account of unconstitutionality). For other cases implying that acts of Congress have priority over international law, see The Paquete Habana, 175 U.S. 677, 708 (1899); Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814). A statute enacted subsequent to a treaty will control in the event of conflict between them. *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 194 (1888).

27. *See generally* Onkelinx, *supra* note 17; Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*. 88 YALE L.J. 612 (1979); Note, *Discovery of Documents Located Abroad in United States Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production*. 14 VA. J. INT'L L. 747 (1974); 22 HARV. INT'L L.J. 177 (1981).

Legislation restricting the scope of discovery as applied in foreign states includes Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34 (United Kingdom); Foreign Proceedings (Prohibition of Certain Evidence) Act, s.5, No. 121, Austl. Acts (1976); StGB, C.P., COD. PEN. § 271 (1971) (Switzerland); Economic Competition Act of June 28, 1956, art. 39, Stb. 401, as amended by Act of July 16, 1958, Stb. 413 (Netherlands); Business Records Protection Act, 1 ONT. REV. STAT. c. 54 (1970); Business Concerns Records Act, QUE. REV. STAT. c. 278 (1964). A recent British statute allows government officials to prohibit production at their discretion. Protection of Trading Interests Act, 1980, c. 11 (1980). *See* 21 HARV. INT'L L.J. 727 (1980). For other examples of foreign legislation, see FUGATE, *supra* note 2, ch. 16; Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*. *supra*. at 613 n.4.

28. *See Conference Report of the Committee on Extraterritorial Application of Restrictive Trade Legislation*. *in* INTERNATIONAL LAW ASSOCIATION REPORT OF THE 51ST CONFERENCE AT TOKYO 362, 416 (1964).

29. 357 U.S. 197 (1958) (dismissal of complaint unwarranted when plaintiff made substantial effort in good faith to cooperate in discovery despite Swiss nondisclosure law).

because of conflicting foreign law.[30] These factors include the importance of the United States laws under which production is sought, the importance of the particular documents to the proceedings, and the degree of flexibility in the relevant nondisclosure laws.[31] A series of Second Circuit decisions indicates unwillingness to insist on production of documents located abroad in violation of local laws.[32] It is by no means certain that a United States court would impose sanctions for noncompliance with a FTC subpoena however served.[33]

Still, foreign nondisclosure laws or international law doctrine will not necessarily deter enforcement of United States subpoenae served abroad.[34] With regard to FTC subpoenae, the importance of enforcement of United States antitrust laws[35] and the necessity of obtaining documents located abroad for use in investigations of alien corporations may well overcome defenses based on foreign or international law. Insistence on production could, however, result in intransigent refusals to cooperate and imposition by the United States of sanctions, ultimately including seizure of the noncomplying respondent's assets.[36] Imposition of sanctions might, in turn, result in counterproductive retaliation. Moreover, enforcement of subpoenae served abroad would, as a violation of international law, render the United States liable to suit in an international forum by the offended state.[37]

In the face of these possibilities, the FTC should seek to avoid

---

30. *See* RESTATEMENT, *supra* note 7, § 40, which provides for balancing of the national interests of the states involved, the extent of the hardship threatening the person from whom production is sought, the extent to which the required conduct is to take place in another state, nationality of the person, and the extent to which an enforcement action might reasonably be expected to achieve compliance.

This section has been cited in several decisions. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992, 997 (10th Cir. 1977); United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968).

31. *See, e.g., In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).

32. Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960). *Cf.* First Nat'l City Bank v. I.R.S., 271 F.2d 616 (2d Cir. 1959) (subpoena reinstated because insufficient showing that production would violate Panamanian law). In one case the Second Circuit held that a German law, threatening civil rather than criminal liability, was no excuse for noncompliance with a grand jury subpoena. The court weighed the substantial United States interests in enforcing its antitrust laws against the minor hardship imposed upon the defendant. United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968).

33. *See In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) and cases cited note 32 *supra*.

34. *E.g.*, Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976) (foreign law cannot invalidate an order which local law authorizes); *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979).

35. In affirming a contempt order for failure to comply with a subpoena, the Second Circuit termed the antitrust laws "cornerstones of this nation's economic policies." United States v. First Nat'l City Bank, 396 F.2d 897, 903 (2d Cir. 1968).

36. FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1312 (D.C. Cir. 1980).

37. RESTATEMENT, *supra* note 7, § 3; L. HENKIN ET AL., *supra* note 17, at 115.

intractable conflicts. Service within the United States,[38] where possible, will obviate objections based on violations of sovereignty, though a foreign company may still resist compliance with regard to documents located abroad if there is an applicable nondisclosure law involved. If service abroad is necessary, the FTC should respect local sovereignty by serving subpoenae by means of letters rogatory to local authorities or otherwise seeking their cooperation. These procedures too may fail, however.[39] In the final resort it must be recognized that the problem posed by FTC subpoenae is part of the larger issue of foreign resistance to application of United States antitrust laws beyond United States boundaries. United States courts and agencies must, as a practical fact of international relations, make every effort to accommodate themselves to foreign sensibilities if they are to succeed in enforcing United States antitrust laws.

David Millon

INTERNATIONAL TRADE: GOVERNMENT PROCUREMENT OF TELECOMMUNICATIONS EQUIPMENT — *Japan-United States Agreement on the Government Procurement Code,* Dec. 19, 1980, T.I.A.S. No. 9961, *reprinted in* E. Asian Exec. Reps., Jan. 15, 1981, at 24–30.

On December 19, 1980 the United States and Japan exchanged letters which brought the procurement procedures of Nippon Telegraph and Telephone (NTT) into conformity with the provisions of the Government Procurement Code, one of the agreements signed at the Tokyo Round of the Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade (GATT). The agreement grants Japanese firms access to United States government procurement and opens up Japanese government procurement and the Japanese telecommunications market to United States competition.

The negotiations had joined two separate issues — the extent of government procurement to be placed under the Government Procurement Code[1] and United States access to the Japanese telecom-

38. FTC Act, 15 U.S.C. § 49 (1976).

39. *E.g.*, *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F. 2d 992 (10th Cir. 1977) (upon showing that Canada declined to execute letters rogatory and to waive its nondisclosure laws, contempt order for failure to comply with discovery order reversed).

1. The Government Procurement Code, T.I.A.S. No. ___, *reprinted in* HOUSE COMM. ON WAYS AND MEANS AND SEN. COMM. ON FINANCE, MULTILATERAL TRADE NEGOTIATIONS INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND, 96th Cong., 1st Sess. (1979), at 129–232 [hereinafter cited as Code]. The Code was one of the agreements which resulted from the Multilateral Trade Negotiations carried on within the GATT framework to eliminate