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

PUBLIC RECORD

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S

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

this response. Based on this reason alone, the Court should deny Complaint Counsel's motion.

II. COMPLAINT COUNSEL'S MOTION [redacted] 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 [redacted] 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. 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

[redacted]

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

[redacted]

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.

[redacted]

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 public statements [redacted]

[redacted] should be 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 [redacted] 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 [redacted] 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

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

[redacted]

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

Assistant Director
Bureau of Competition
Federal Trade Commission
[redacted]

Steven L. Wilensky
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
[redacted]

Andrew D. Shapiro

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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

To: The Honorable James P. Timony
Administrative Law Judge

[redacted]

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.

[redacted]

EXHIBIT

1

[redacted] In 2001, the Commission [redacted] numerous issues and potential conflicts that often arise in connection with issuing [redacted]

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 reasonably [redacted]

[redacted]

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 [redacted]

[redacted]

(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 [redacted] requirements have been or will be met before the subpoena is served.

FTC Rules of Practice 3.36(b). Explaining the reasons behind the amended rule, the Commission [redacted]

[redacted]

[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.

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:

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.

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

Further, Rule 3.34(b) requires that any subpoena issued must "specify with reasonable

[redacted]

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

[redacted]

companies. Motion at 5-6.

Respondents have not attached to their motion the discovery requests they propose to

[redacted]

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

[redacted]

convenient, less burdensome, or less expensive, that the party seeking discovery has had ample

[redacted]

[redacted]

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.

[redacted]

submitted declarations in the pre-complaint investigation of this matter. The individuals subpoenaed included asset and project directors, general and technical managers, engineers, and

[redacted]

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

issued *subpoenas duces tecum* and *subpoenas ad testificandum* directing thirteen companies to

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

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 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

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 PSL have established or announced joint ventures or partnerships with various 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 [redacted] 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

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.

3.36(b)(3)

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

[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

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]

with the requirement of Rule 3.36(b)(3) that they exhaust other means of obtaining the

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.

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

[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)

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 [redacted] Skanska/Whessoe's alleged effort to develop [redacted] for U.S. LNG [redacted]

[redacted]

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 [redacted]

[redacted]

first consider requests for voluntary cooperation when practical and consistent with enforcement objectives.

[redacted]

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

[redacted]

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

[redacted]

Motion at 9. Respondents acknowledge that the proposed procedure can be costly and time

[redacted]

Since respondents have not specified the foreign discovery they propose to pursue, it

[redacted]

if respondents were to submit a specific discovery request. Respondents have not made the

[redacted]

Convention, Nov. 15, 1965, art. 1 *et seq.*, 20 U.S.T. 361." However, this Convention[7] pertains

Convention is the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,

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

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

consider a non-criminal antitrust case filed by a government to be a "civil or commercial matter"

[7] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil

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.

http://www.hcch.net/status/stat20e.html; the list of signatories is also in Martindale-Hubbell Law

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

[redacted]

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

[redacted]

of compulsory process to obtain evidence in the jurisdictions in question. Notably, the United

[redacted]

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, [redacted]

VI. Conclusion

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

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:

[redacted]
Chicago, IL 60601-9703

Counsel for Respondents
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 the Federal Trade Commission's Rules of Practice, Respondents' motion is DENIED.

ORDERED:

James P. Timony
Administrative Law Judge

Date: April___, 2002

IN CAMERA