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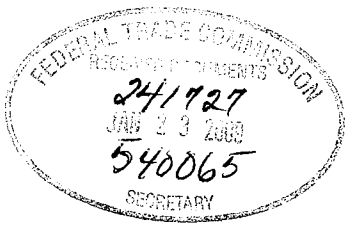


**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

| | | |
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| **In the Matter of** | ) | |
| | ) | **Docket No. 9327** |
| **Polypore International, Inc.** | ) | |
| **a corporation.** | ) | **PUBLIC** |

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF GRAEME FRASER-BELL IN THE UNITED KINGDOM PURSUANT TO 16 C.F.R. § 3.36(b)**

On January 14, 2009, Respondent filed an application pursuant to Rule 3.36 of the Commission's Rules of Practice for leave to obtain evidence through compulsory process issued to Graeme Fraser-Bell, an employee of ENTEK International Ltd., a British subsidiary of third-party ENTEK International LLC ("ENTEK"). As discussed below, Respondent has failed to satisfy the requirements of Rule 3.36(b). Accordingly, Respondent's motion should be denied.

## I. The Requirements of Rule 3.36(b)

The Commission's Rules of Practice specify precise criteria that parties must satisfy in order for an ALJ to grant use of proposed foreign compulsory process. Specifically, Rule 3.36(b) requires a party seeking issuance of a subpoena to be served abroad to satisfy, in its motion, the 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), or, if for an adjudicative hearing, the material is reasonably relevant;

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

(4) the party seeking discovery or testimony 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); 16 C.F.R. § 3.36(b).

As this Court explained in denying respondent's motion for the issuance of subpoenas in the Matter of Chicago Bridge & Iron Co., *et al.*, "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." Order Denying Respondents' Motion for Issuance of Subpoenas (April 18, 2002) (attached as Appendix 1). Explaining the reasons behind the amendments, the Commission stated:

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

*citing* 66 Fed. Reg. 17622 (F.T.C. April 3, 2001) (attached as Appendix 2). 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 (F.T.C. April 3, 2001) (emphasis added). Thus, to effectuate the Commission's policy not to embroil the Commission in unnecessary international conflicts, it is important that Respondent be held to the standards the Commission established by amending Rule 3.36(b) specifically to avoid such conflicts.

## II. Respondent Has Failed To Meet The Requirements of Rule 3.36(b)

In order to prevail in its motion for use of foreign compulsory process, Respondent must demonstrate that all four of the requirements of Rule 3.36(b) have been met. As explained below, Respondent has failed to satisfy its burden.

### A. Respondent has failed to show that the testamentary evidence it seeks 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). Commission Rule 3.31(c)(1) allows discovery of materials reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or to the defenses of any respondent, but also sets forth that discovery "shall be limited by the Administrative Law Judge if he or she determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery outweigh its likely benefit."

16 C.F.R. § 3.31(c)(2). Respondent has failed to provide evidence that the concerns identified in Rule 33.1(c)(2) are not met and that the discovery it seeks from Mr. Fraser-Bell should be allowed.

In its motion, Respondent attempts to satisfy the requirement of 3.36(b)(2) by baldly asserting that Mr. Fraser-Bell "is believed to possess important evidence in this matter" concerning ENTEK's battery separator sales and competitors in Europe, and "[t]his evidence cannot be obtained from sources other than Mr. Fraser-Bell." Respondent's claim is directly contradicted by ENTEK in recent pleadings: ENTEK explained in its January 9, 2009 Motion to Quash Respondent's Subpoenas that ENTEK's Vice President of Sales and Marketing, Mr. Daniel Weerts, who is employed and resides in the United States, is the person most knowledgeable about the specifications in the subpoena served by Respondent on ENTEK. (*See* Third Party ENTEK International LLC's Memorandum in Support of Motion to Quash Subpoenas Ad Testificandum Issued to Graeme Fraser-Bell and Robert Keith Pursuant to 16 C.F.R. § 3.34(c) ("ENTEK Motion to Quash") at 7.) This suggests that the information Respondent seeks from Mr. Fraser-Bell can be obtained more easily from Mr. Weerts, and with less burden and expense. Moreover, since "the vast majority of information sought from Mr. Fraser-Bell" may be obtained by deposing Mr. Weerts, any deposition of Mr. Fraser-Bell by Respondent will be largely duplicative of Mr. Weerts's testimony. *Id.*

Finally, conducting a deposition in the United Kingdom would be a costly endeavor for all concerned. The Court should consider whether the burden and expense of taking discovery in the United Kingdom will likely be outweighed by the benefit of any non-duplicative evidence discovered during the deposition.

**B. Respondent has 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 Respondent to make a specific showing that "the 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, (F.T.C. April 3, 2001) (emphasis added). This is consistent with the express policy of the United States 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.[1] This policy is also embodied in international instruments such as the OECD Recommendation on antitrust cooperation, 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.[2]

Respondent does not explain how it has exhausted other means of obtaining the information that it contends Mr. Fraser-Bell holds. Respondent makes no attempt to explain

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[1] *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.").

[2] 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). *See also* Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations ¶ 4.2 (April 1995).

why it cannot discover the information it seeks from other sources located in the United States. Moreover, since Respondent has issued *subpoenas duces tecum* and *ad testificandum* to ENTEK and a subpoena *ad testificandum* to Daniel Weerts, ENTEK's Vice President of Marketing and Sales, which seeks the same information Respondent seeks from Mr. Fraser-Bell, Respondent cannot be deemed to have exhausted domestic sources.

**C. Respondent has 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 or testimony 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 or testimony is sought and that any additional procedural requirements have been or will be met before the subpoena is served.

Respondent asserts "a good faith belief that the deposition of Mr. Fraser-Bell is permitted in the United Kingdom." Respondent's belief is based on the United States and United Kingdom both being signatories to the "Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters" ("Hague Convention"). Respondent also cites to a U.S. Department of State's briefing paper entitled "Judicial Assistance United Kingdom," for the proposition that "Respondent can hire a British solicitor to take the deposition of Mr. Fraser-Bell in the U.K."

Respondent's "good faith belief" falls short of the requirements of 3.36(b)(4) in at least two respects. First, the Hague Convention does not provide for the use of subpoenas to obtain information abroad. Rather, the three established methods are by letter of request,[3] by consular

[3] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Article (continued...)

or diplomatic official,[4] or by appointed commissioner.[5] The first method can be compulsory, while the latter two can only be used with willing witnesses (an obvious nullity in this case where ENTEK has moved to quash Respondent's subpoena *ad testificandum* to Mr. Fraser-Bell).[6] Thus, Respondent cites no legal authority supporting the issuance of the requested process.

Respondent's motion additionally fails to mention other likely legal impediments to the use of compulsory process to obtain evidence in the United Kingdom. Notably, the United Kingdom[7] has enacted a blocking statute 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 consistent with U.K. law and practice. Additionally, Respondent offers no assurances that discovery of Mr. Fraser-Bell could be completed pre-trial. Complaint Counsel opposes any delay in the proceedings to accommodate superfluous foreign discovery.

In sum, Respondent's 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 country from which the discovery is sought.

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[3] (...continued)
1, *codified at* 28 U.S.C. § 1781.

[4] *Id.*, Article 15.

[5] *Id.*, Article 17.

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

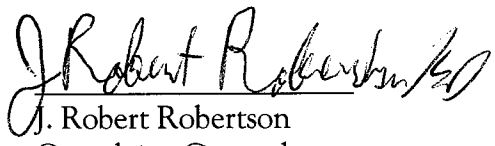
[7] Protection of Trading Interests Act 1980, *reprinted in* 1 Bruno Ristau, International Judicial Assistance Civil and Commercial (1990 Revision) at CI-236.

## III. Conclusion

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

January 23, 2009

Respectfully submitted,



J. Robert Robertson
Complaint Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Telephone: (202) 326-2008
Facsimile: (202) 326-2884

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | **Docket No. 9327** |
| **Polypore International, Inc.** | ) | |
| **a corporation.** | ) | |
| | ) | |

## [PROPOSED] ORDER

Upon consideration of Respondent's Motion For Leave To Take The Deposition Of Graeme Fraser-Bell In The United Kingdom Pursuant To 16 C.F.R. § 3.36(b) dated January 14, 2009, 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, Respondent's motion is DENIED.

ORDERED:

Date:_____

D. Michael Chappell
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2009 I filed *via* hand and electronic mail delivery an original and two copies of the foregoing with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on January 23, 2009, I served *via* electronic mail and mail delivery a copy of the foregoing with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on January 23, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing with:

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202
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By: Linda Cunningham

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Federal Trade Commission
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Washington, DC 20580
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# APPENDIX 1

**§ 337.6 [Amended]**

2. Section 337.6(e) is removed and reserved.

By order of the Board of Directors.

Dated at Washington, D.C., this 26th day of March, 2001.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 01–8100 Filed 4–2–01; 8:45 am]

BILLING CODE 6714–01–P

## FEDERAL TRADE COMMISSION

## 16 CFR Parts 2, 3 and 4

## Rules of Practice

**AGENCY:** Federal Trade Commission (FTC).

**ACTION:** Interim rules with request for comments.

**SUMMARY:** The Commission is updating and making other technical corrections and changes to its regulations on Organization, Procedures and Rules of Practice.

**DATES:** These rule amendments will be effective May 18, 2001. Comments must be received on or before May 4, 2001. These amendments will govern all Commission adjudicatory proceedings commenced on or after May 18, 2001. They will also govern all pending Commission adjudicatory proceedings commenced before May 18, 2001 unless, in the opinion of the Administrative Law Judge (ALJ) or the Commission, the application of one or more amended rules in a particular proceeding would not be feasible or would work injustice.

**ADDRESSES:** Written comments must be submitted with 20 copies to the Office of the Secretary, Room 159, Federal Trade Commission, 600 Pennsylvania Ave., NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** John Graubert, Office of General Counsel, FTC, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2186, jgraubert@ftc.gov.

**SUPPLEMENTARY INFORMATION:** The Commission has periodically examined and revised its rules of practice in the interest of clarifying the rules and making the Commission's procedures more efficient and less burdensome for all parties.[1] The Commission is further amending parts 2, 3 and 4 of its rules, 16 CFR parts 2, 3 and 4, to update and make other technical clarifications, corrections, and changes to the rules, as follows.

### Reports of Compliance

To facilitate the processing and review of compliance reports, Rule 2.41(a) is being amended to provide (1) that an original and one copy of each such compliance report should be filed with the Secretary of the Commission, and (2) that, at the same time, one additional copy should be filed with the Associate Director for Enforcement in the Bureau of Consumer Protection (for consumer protection orders) or with the Assistant Director for Compliance in the Bureau of Competition (for competition orders).

### Pretrial and Discovery

*Responsive Motions:* Rule 3.12(a): In federal court practice, Federal Rule of Civil Procedure 12(a)(4) provides that the filing of a "motion permitted under this rule" tolls the period for answering a complaint. Commission Rule 3.12(a) generally follows the federal rule but mentions only a motion for a more definite statement. Although other motions, such as motions to dismiss, are undoubtedly rare at the outset of FTC administrative proceedings, there is no reason to exclude such dispositive motions from the rule. Making Rule 3.12(a) consistent with Fed. R. Civ. P. 12(a)(4) will spare the parties and ALJ the additional inconvenience of arranging extensions of time to answer in individual cases where such motions are filed.

*Initial Pretrial Conferences:* Rule 3.21(b): Under the Commission's 1996 Rule amendments, the ALJs must hold a scheduling conference not later than seven (7) days after the last answer is filed. Although the 1996 amendments were designed to expedite administrative litigation, this is one instance in which some additional time might actually make the proceedings more efficient. As a practical matter, particularly in cases when service on one or more respondents is complicated for any reason (e.g., overseas service), it has proved difficult to predict when the last answer will be filed and difficult to schedule and plan for a scheduling conference in this narrow seven-day window. Moreover, two days after the initial scheduling conference, no matter how hastily convened, the ALJ is required to issue a prehearing scheduling order based in part on the results of the conference. *See* Rule 3.21(c). Because the Commission wants the parties to exchange disclosures and have meaningful discussions about the proceeding before the scheduling conference in order to identify and attempt to narrow the issues in the case, which will also assist the ALJ in crafting a meaningful pretrial order, the Commission will make a modest enlargement of the period in Rule 3.21(b) from seven to fourteen (14) days.

*Adjudicative Motions:* Rule 3.22: When the Commission amended the Part 3 Rules in 1996, it approved a change to Rule 3.22(b) to require "that all motions in adjudicative proceedings include the name, address, and telephone number of counsel, and attach a draft order containing the proposed relief." *See* 61 FR 50640, 50644. This language was inadvertently omitted from the revised Rule itself, as published in the **Federal Register** and later incorporated into the Code of Federal Regulation (although part of this requirement is contained in Rule 4.2(e)(1)). In addition to making this change in Rule 3.22, the amended rule will also require counsel to provide a fax number and e-mail address, if any, along with name, address and phone number.

*Summary Decision:* Rule 3.24(a)(2): The rule currently provides that a decision shall be rendered "within thirty (30) days." For clarity, the Rule is being amended to specify that the decision is due within thirty (30) days after the opposition or any final brief ordered by the ALJ is filed.

*Expert Discovery:* Rule 3.31(c)(4)(i): Under the Commission's current rule, discovery of experts is handled principally by interrogatory. Further discovery, including depositions, requires an order from the ALJ. The amended Rule, reflecting the development of practice in recent years under the Federal Rules of Civil Procedure, generally provides for disclosure of expert opinions and depositions of experts. Rule 3.31(c)(4)(B)(iii), regarding payment of expert fees for certain discovery, is deleted. The ALJ can address any issues regarding fees or costs under Paragraph (d) of this rule.

*Depositions:* Rule 3.33(a): The amended Rule incorporates a provision modeled on Federal Rule of Civil Procedure 30(b)(7), which permits the parties to stipulate or the court to order that a deposition may be taken by telephone or other remote electronic means.

*Foreign Discovery:* Rule 3.36: Since the 1996 amendments to the Rules, parties may issue subpoenas for depositions or production of documents without prior approval or supervision from the ALJs, except when the discovery request seeks information or testimony from another governmental agency. For discovery involving other

[1] See, e.g., 61 FR 50640 (Sept. 26, 1996); 50 FR 41485 (Oct. 11, 1985).

government agencies, the parties have to file a motion with the ALJ, who determines whether the request is reasonable in scope and whether the information sought cannot be reasonably obtained by other means. *See* Rule 3.36(b). For all other discovery, the parties obtain subpoena forms identifying the Part 3 matter at issue (but executed in blank as to the subpoena target) from the Secretary's office, and deliver them on their own. *See* Rule 3.34(a). These subpoenas include the seal of the agency, are signed by the Secretary, and bear every indication of being official agency documents.

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.[2] 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. 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.[3]

Parties seeking foreign discovery must also make a good faith demonstration before the ALJ 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. This does not mean that the ALJs will be expected to make rulings on questions of foreign law. This showing, together with the other requirements of Rule 3.36(b), will merely assist the ALJ in attempting to prevent unnecessary conflicts with foreign sovereigns.

There is no comparable need at this time for rule revisions regarding discovery requests served within the United States that may require production of documents located abroad (in foreign offices of multinational corporations, for example). Cases arising under similar statutory provisions confirm that such discovery requests are authorized by the FTC Act and are not likely to present the same extraterritoriality concerns as actual service of discovery requests abroad.[4]

Rule 3.36 is also being amended to add a new subsection (c), to make it clear that each subpoena issued pursuant to an order of the ALJ under Rule 3.36 shall be signed by the Secretary, but must have attached to it, and be served in conjunction with, a copy of the Order authorizing its issuance.

Rule 3.34, the rule providing for issuance of subpoenas in blank, is amended to make clear that that procedure does not apply to discovery requests covered by Rule 3.36. Finally, the reference to § 3.31*(b)*(1) in § 3.36(b)(2) to § 3.31*(c)*(1).

*Orders Compelling Witness Testimony:* Rule 3.39(a): For completeness, this rule should specifically include Directors and Deputy Directors of Bureaus, Assistant Directors in the Bureau of Competition, Associate Directors in the Bureau of Consumer Protection, and Regional Directors and Assistant Regional Directors of Commission Regional Offices, to reflect the current organization of the Bureaus.

**Filing of Documents Other Than Correspondence**

In order to facilitate the filing, receipt, and processing of documents submitted to the Commission, in both adjudicative and nonadjudicative proceedings—and to accommodate the need to secure electronic copies of such documents in a routine, systematic, and efficient manner—Rule 4.2 has been amended in a number of respects:

*Copies:* Rule 4.2(c): The present Rule 4.2(c) requires the filing of an original and twenty (20) copies of "all documents before the Commission" and certain motions before an ALJ, and an original and ten (10) copies of all other documents before an ALJ. In light of the rule amendments regarding electronic filing, discussed below, and to reduce the burden of the filing process as much as possible, this rule is amended to require the filing of a paper original and twelve (12) copies of documents filed before the Commission, and the paper original and only one (1) paper copy of each document filed before an ALJ in an adjudicative proceeding. The current Rule 4.2(c) also requires the filing of "an original and one copy of compliance reports" and the filing of "one (1) copy of admissions and answers thereto." As noted above, the first requirement has been transferred to Rule 2.41, which deals with the filing of compliance reports, and therefore need no longer appear in Rule 4.2(c). Similarly, the second requirement replicates the requirement covering admissions and answers thereto already set forth in Rule 3.32, and therefore need no longer appear in Rule 4.2(c) as well. In addition, Rule 4.2(c) currently requires parties filing motions to provide copies to the ALJ at the time such motions are filed with the Secretary. Because this requirement already appears in Rule 3.22, and is being added to Rule 4.4(b), it may also be removed from Rule 4.2(c).

*Electronic Filing:* Rule 4.2: The Rule is amended in a number of respects to reflect current practices and technology. First, the amended rule requires the submission to the Commission of electronic copies of pleadings, motions, briefs, and all other filings in adjudicative proceedings—whether before the Commission or an ALJ—and of all other formal filings before the Commission, such as petitions to limit or quash and appeals from rulings thereon; requests to reopen or modify; and applications for approval of proposed divestitures, acquisitions, or similar transactions.

The Commission notes that other agencies have had electronic filing requirements for many years,[5] and that the burden of this proposal on the public is likely to be negligible at this point. The use of electronic word-processing equipment is virtually universal, certainly among parties appearing before the Commission. In case of extreme hardship, however, the Secretary is empowered to excuse a party from this requirement. The rule follows the format requirements used in the Commission's request for nominations for the Advisory Committee on Online Access and

[2] *See CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984) (district court lacks jurisdiction to enforce a CFTC investigative subpoena served on a foreign citizen in a foreign nation); *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980) (FTC Act does not authorize service of subpoenas abroad by registered mail). These issues are less likely to arise with Civil Investigative Demands served at the behest of Commission staff, because section 20(c)(7)(b) of the FTC Act specifically provides for foreign service of CIDs.

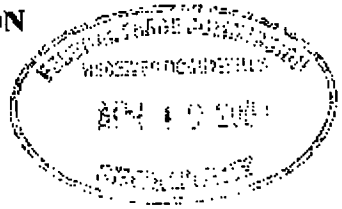
[3] *See, e.g.*, Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C (95)130 (Final) (July 1995) at Appendix ¶ 8(a)–(c); U.S. Dept. of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations § 4.2 (April 1995).

[4] *See FMC* v. *DeSmedt*, 366 F.2d 464 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *accord CAB* v. *Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951 (D.C. Cir. 1979).

[5] *See, e.g.*, 49 CFR 1104.3(a) (Surface Transportation Board).

# APPENDIX 2

**UNITED STATES OF AMERICA**
**BEFORE FEDERAL TRADE COMMISSION**



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

**ORDER DENYING RESPONDENTS' MOTION FOR ISSUANCE OF SUBPOENAS**

I.

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

II.

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

(1) the material sought is reasonable in scope;

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

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

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

16 C.F.R. § 3.36(b).

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

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

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

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

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

66 Fed. Reg. at 17623.

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

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

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

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

III.

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

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

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

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

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

discovery outweighs its likely benefit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**IV.**

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

Dated: April 18, 2002

JAMES P. TIMONY
Administrative Law Judge

# APPENDIX 3

# Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade



27 July 1995 - C(95)130/FINAL

**THE COUNCIL,**

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the fact that international co-operation among OECD countries in the control of anticompetitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5th October 1967 [C(567)53(Final)], 3rd July 1973 [C(73)99(Final)], 25th September 1979 [C(79)154(Final)] and 21st May 1986 [C(86)44(Final)];

Having regard to the recommendations made in the study of transnational mergers and merger control procedures prepared for the Committee on Competition Law and Policy;

Recognising that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

Recognising that the continued growth in internationalisation of business activities correspondingly increases the likelihood that anticompetitive practices in one country or co-ordinated behaviour of firms located in different countries may adversely affect the interests of Member countries and also increases the number of transnational mergers that are subject to the merger control laws of more than one Member country;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices;

Recognising that anticompetitive practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anticompetitive practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with anticompetitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise;

Recognising the desirability of setting forth procedures by which the Competition Law and Policy Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to anticompetitive practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competi-tion laws, they should take into account the present Recommendation and Guiding Principles:

**I. RECOMMENDS** to Governments of Member countries that insofar as their laws permit:

## A. NOTIFICATION, EXCHANGE OF INFORMATION AND CO-ORDINATION OF ACTION

1. When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive prac-tices;

2. Where two or more Member countries proceed against an anticompetitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

3. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices in international trade. In this connection, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

**B.CONSULTATION AND CONCILIATION**

4. a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding;

5. a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive pratices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned;

b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

c) The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests;

6. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 4 and 5 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

7. In the event of a satisfactory conclusion to the consultations under paragraphs 4 and 5 above, the requesting country, in agreement with, and in the form accepted by the Member country or countries addressed, should inform the Competition Law and Policy Committee of the nature of the anticompetitive practices in question and of the settlement reached;

8. In the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

**II. RECOMMENDS** that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

**III. INSTRUCTS** the Competition Law and Policy Committee:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

2. To consider the reports submitted by Member countries in accordance with paragraph 7 of Section I above;

3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 8 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;

4. To report to the Council as appropriate on the application of the present Recommendation.

**IV. DECIDES** that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 21st May 1986 [C(86)44(Final)].

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## APPENDIX

## GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, CO-OPERATION IN INVESTIGATIONS AND PROCEEDINGS, CONSULTATIONS AND CONCILIATION OF ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE

### Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws. It is recognised that implementation of the Recommendation herein is fully subject to the national laws of Member countries, as well as in all cases to the judgement of national authorities that co-operation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.

### Definitions

2. a) "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of a Member country pursuant to the competition laws of that country. Excluded, however, are (i) the review of business conduct or routine filings, in advance of a formal or informal determination that the matter may be anticompetitive, or (ii) research, studies or surveys the objective of which is to examine the general economic situation or general conditions in specific industries.

b) "Merger" means merger, acquisition, joint venture and any other form of business amalgamation that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

### Notification

3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:

a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the prac-tice is purely private or whether it is believed to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

### Procedure for notifying

4.a) Under the Recommendation notification ordinarily should be provided at the first stage in an investigation or proceeding when it becomes evident that notifiable circumstances described in paragraph 3 are present. However there may be cases where notification at that stage could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Competition Law and Policy Committee.

c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the

likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned, and, if applicable, the need to seek information from the territory of another Member country. In the case of an investigation or proceeding involving a merger, notification should also include:

i) the fact of initiation of an investigation or proceeding;

ii) the fact of termination of the investigation or proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties;

iii) a description of the issues of interest to the notifying Member country, such as the relevant markets affected, jurisdictional issues or remedial concerns;

iv) a statement of the time period within which the notifying Member country either must act or is planning to act.

**Co-ordination of Investigations**

5. The co-ordination of concurrent investigations, as recommended in paragraph I.A.2. of the Recommendation, should be undertaken on a case-by-case basis, where the relevant Member countries agree that it would be in their interests to do so. This co-ordination process shall not, however, affect each Member country's right to take a decision independently based on the investigation. Co-ordination might include any of the following steps, consistent with the national laws of the countries involved:

a) providing notice of applicable time periods and schedules for decision-making;

b) sharing factual and analytical information and material, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraphe 10;

c) requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the co-operating countries to share some or all of the information in their possession, to the extent permitted by national laws;

d) co-ordinating discussions or negotiations regarding remedial actions, particularly when such remedies could require conduct or behaviour in the territory of more than one Member country;

e) in those Member countries in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or to be made to other countries.

**Assistance in an investigation or proceeding of a Member country**

6. Co-operation among Member countries by means of supplying information on anticompetitive practices in response to a request from a Member country, as recommended in paragraph I.A.3. of the Recommendation, should be undertaken on a case-by-case basis, where it would be in the interests of the relevant Member countries to do so. Co-operation might include any of the following steps, consistent with the national laws of the countries involved:

a) assisting in obtaining information on a voluntary basis from within the assisting Member's country;

b) providing factual and analytical material from its files, subject to national laws governing confidentiality of information and the principles relating to confidential information set forth in paragraph 10;

c) employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority;

d) providing information in the public domain relating to the relevant conduct or practice. To facilitate the exchange of such information, Member countries should consider collecting and maintaining data about the nature and sources of such public information to which other Member countries could refer.

7. When a Member country learns of an anticompetitive practice occurring in the territory of another Member country that could violate the laws of the latter, the former should consider informing the latter and providing as much information as practicable, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10, consistent with other applicable national laws and its national interests.

8.a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

c) Any requests for information located abroad should be framed in terms that are as specific as possible.

9. The provision of assistance or co-operation between Member countries may be subject to consultations regarding the sharing of costs of these activities.

**Confidentiality**

10. The exchange of information under this Recommendation is subject to the laws of participating Member countries governing the confidentiality of information. A Member country may specify the protection that shall be accorded the information to be provided and any limitations that may apply to the use of such information. The requested Member country would be justified in declining to supply information if the requesting Member country is unable to observe those requests. A receiving Member country should take all reasonable steps to ensure observance of the confidentiality and use limitations specified by the sending Member country, and if a breach of confidentiality or use limitation occurs, should notify the sending Member country of the breach and take appropriate steps to remedy the effects of the breach.

**Consultations between Member countries**

11.a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

b) Requests for consultation under paragraphs I.B.4. and I.B.5. of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.

c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

**Conciliation**

12.a) If they agree to the use of the Committee' good offices for the purpose of conciliation in accordance with paragraph I.B.8. of the Recommendation, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invok-ing conciliation.

b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

d) Any conclusions drawn as a result of the conciliation are not bind-ing on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.