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Extraterritorial Extension of FTC Subpoena Power: *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson*

In *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson*,[1] the United States Court of Appeals for the District of Columbia was faced with the question whether Congress had authorized the Federal Trade Commission (FTC) to serve investigatory subpoenas upon citizens of other countries by registered mail. Although this issue involved an interpretation of the Federal Trade Commission Act,[2] the court, relying on principles of international law, refused to infer statutory authority for service abroad on a foreign corporation by registered mail. This denial of FTC authority to issue a subpoena was the first time in thirty years that the court had halted the FTC in the use of a subpoena to enforce its broad power to "hit at every trade practice" which restrains competition.[3] This new attitude of the D.C. Circuit bench reflected a logical balancing of the interests of a regulatory agency which was attempting to halt unfair trade practices against the interests of a foreign nation in preserving its sovereign power.

Compagnie de Saint-Gobain-Pont-A-Mousson (SGPM), a French holding company headquartered in Paris, was the target of an FTC antitrust investigation. As part of its investigation of patent licensing, exchange of technology, and allocation of raw materials and products in the fiber glass insulation industry,[4] the FTC issued four identical subpoenas duces tecum directing SGPM to produce specified classes of documents relevant to its investigation.[5] The first subpoena was served by registered mail to SGPM's corporate headquarters in Paris. A second subpoena was hand delivered to the New York office of SGPM's general delegate in the United States. The third subpoena was delivered to the New York City residence of the daughter of SGPM's general delegate. The fourth subpoena was served upon a Washington, D.C. attorney who was representing SGPM in a related proceeding. When SGPM refused to comply with the subpoena, the FTC petitioned the District of Columbia Federal District Court for an enforcement order.[6] Despite SGPM's

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[1] 493 F. Supp. 286 (D.D.C.), vacated, 636 F.2d 1300 (D.C. Cir. 1980).

[2] 15 U.S.C. §§ 41-77 (1976).

[3] See F.T.C. v. Cement Institute, 333 U.S. 683, 693 (1948).

[4] 636 F.2d at 1304 n.5.

[5] Id. at 1304-05.

[6] Section 9 of the FTC Act, 15 U.S.C. § 49 (1976) empowers the Commission

objections to the method of subpoena service, the district court found the subpoenas relevant to the FTC investigation and approved of the service.[7] On appeal, the District of Columbia Circuit Court of Appeals, concluding that the latter three methods of service were improper, remanded the record to the district court for reexamination of the validity of service by registered mail.[8] The district court again held that the service by registered mail was within the powers of the FTC and issued a second enforcement order.[9] However, on appeal, the D.C. Circuit refused to approve such service.[10]

In reaching its decision, the D.C. Circuit Court first examined the language of the FTC Act for express authorization of service of a subpoena duces tecum by registered mail upon a foreign corporation in a foreign country. The court recognized that section 5(f)(c) of the FTC Act[11] provided that "complaints, orders and other processes of the Commission under this section may be served by registered mail or certified mail."[12] The court, however, refused to classify the service of a subpoena under the "other processes" label because such subpoenas were specifically provided for under sections 6, 9, and 10 of the Act.[13] The court further added that section 9 of the FTC Act was the only section that dealt with the geographic range of subpoena service. The court, relying on past federal court decisions[14] interpreting similar statutory language, said section 9 empowered the FTC to compel a witness to appear and produce documents only when service of the subpoena was accomplished within the United States.

Due to the absence of express foreign service provisions in both sec-

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> to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation . . . .
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> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States at any designated place of hearing. And in case of disobedience to a subpoena, the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

[7] 636 F.2d at 1305.

[8] No. 78-2160 (D.C. Cir. Nov. 26, 1979) (per curiam).

[9] 493 F. Supp. 286 (D.D.C. 1980). In authorizing the service of a subpoena abroad by registered mail, the court based its decision on the broad authority of the FTC to investigate and regulate foreign and interstate commerce. The court concluded that

> [i]t would thus require strong evidence, which is not apparent either from the face of the statute or its legislative history, for the Court to find that Congress intended to render the FTC powerless to compel the production of documents relevant to a lawful inquiry simply because a foreign company actively doing business here is careful enough to keep its corporate headquarters and its officers and directors abroad. Id. at 294.

[10] 637 F.2d at 1306.

[11] 15 U.S.C. § 45(f)(c) (1976).

[12] 636 F.2d at 1307.

[13] Id.

[14] Id. at 1308-09. See, e.g., FMC v. DeSmedt, 366 F.2d 464 (2d Cir.), cert. denied, 385 U.S. 974 (1966); CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951 (D.C. Cir. 1979) (per curiam).

tions 5 and 9 of the FTC Act, the district court had turned to the constitutional authority given to Congress to regulate commerce to conclude that

> [i]t seems beyond reasonable dispute that the FTC could not faithfully execute its Congressional mandate to investigate and enforce laws regulating foreign and domestic commerce if its process could not reach companies incorporated and headquartered abroad which nevertheless have substantial and continuing impacts on the foreign and domestic commerce of the United States.[15]

The circuit court, however, found this reasoning unconvincing in light of international law principles and the implications of foreign service of subpoenas by registered mail.

Admitting that service of complaints abroad by registered mail was valid service, the court stressed that service of a subpoena was distinguishable from service of a complaint.[16] Service of notice, the court explained, was merely a matter of informing a party of the pendency of an action whereby the recipient may then decide whether to settle or to litigate. Service of a subpoena duces tecum upon a third-party witness, however, is "compulsory" in nature because it compels the witness to obey and threatens him with sanctions of contempt and summary proceedings should he fail to comply.[17] In such circumstances, the district court could "presumably enforce its order by seizing the noncomplying respondent's assets wherever they might be found and lawfully attached, by holding the officers and agents of the corporation in contempt, or by otherwise exercising its discretion to punish a potential witness' recalcitrance."[18] The distinction between service of notice and service of subpoena is further sharpened when a foreign citizen is served a subpoena in a foreign country. Under these circumstances, the court characterized the service itself as "an exercise of one nation's sovereignty within the territory of another sovereign"[19] because the service "carries with it the full array of American judicial power."[20]

The elementary principles of jurisdiction dictate that service of process cannot cross international boundary lines and be enforced in a foreign country.[21] Moreover, the court further found that the district court's order enforcing the subpoena itself was violative of international law. The court distinguished two types of jurisdictions of a state: juris-

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[15] 493 F. Supp. at 292.

[16] 636 F.2d at 1312.

[17] Id. at 1311.

[18] Id. at 1312.

[19] Id. at 1313.

[20] Id. at 1312. The court added that

> [g]iven the compulsory nature of a subpoena . . . subpoena service by direct mail upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance is perhaps maximally intrusive. Id. at 1313 [footnotes omitted].

[21] Ings v. Ferguson, 282 F.2d 149, 151 (2d Cir. 1960).

diction to prescribe and jurisdiction to enforce. As the court stated, "jurisdiction to prescribe signifies a state's authority to enact laws governing the conduct, relations, status or interests of persons or things, whether by legislation, executive act or order, or administrative rule or regulation."[22] As to this prescriptive jurisdiction, the Restatement (Second) of Foreign Relations Law of the United States recognizes that traditionally "each state has plenary power to prescribe rules within its own territorial boundaries,"[23] and that a "state has prescriptive jurisdiction over conduct outside its territory which has or is intended to have substantial effects within its territory [and]. . .conduct of its nationals even when they are outside its borders."[24] The D.C. Circuit Court acknowledged the existence of extra-territorial prescriptive jurisdiction; however, the judges ruled that this case involved the state's enforcement jurisdiction—the authority of the state to compel compliance or impose sanctions for noncompliance with its administrative or judicial orders. Unlike prescriptive jurisdiction, enforcement jurisdiction is limited to the particular state's territory,[25] absent some agreement or consent by the territorial state.[26] The Restatement further provides, as the court pointed out, that if a state should enforce a rule which it does not have jurisdiction to enforce, it violates international law, giving rise to a claim by the state adversely affected which may then be adjudicated in an appropriate international forum.[27] Because of these international principles, the court, in the face of statutory silence, refused to interpret the statute inconsistently with international law.

In order to appreciate the significance of this decision, one must examine existing case law and statutory interpretations of the FTC Act. Congress enacted the FTC Act[28] in 1914, declaring unfair methods of competition and unfair or deceptive trade practices in commerce unlawful.[29] The Act further established the Federal Trade Commission to prevent the use of such methods, acts, or practices. The FTC was empowered by the Act to subpoena witnesses and to request the production of documentary evidence relating to matters under the Commission's investigation. Specifically, section 9 of the Act provided that

> [f]or purposes of sections 41-46 and 47-58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination. . .any documentary evidence of any corporation being investigated or proceeded against, and the Commission shall have the power to require by subpoena the attendance

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[22] 636 F.2d at 1315. See generally Restatement (Second) of Foreign Relations Law of the United States § 6, comment a (1967) [hereinafter cited as Restatement].

[23] 636 F.2d at 1316. See generally Restatement §§ 17-18.

[24] Id. See generally Restatement at § 30.

[25] Id. at § 20.

[26] Id. at §§ 24-25, 44(b) and (c).

[27] Id. at §§ 3(1), 8.

[28] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-77 (1976)).

[29] Id. at § 45(a)(1) (1976).

> and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . .such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena, the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. . . .[30]

Most of the earlier federal court decisions involving similar subpoena authority of other federal regulatory agencies have raised the issue of the scope of the subpoena, not the issue of service. In *Securities and Exchange Commission v. Minas de Artemisa*,[31] the Ninth Circuit was presented the question whether the SEC could subpoena a Mexican corporation to produce books and records located in Mexico. The subpoena was issued by the SEC as part of its investigation of securities sales violations. Service of the subpoena was not disputed in this case because the SEC had served the subpoena upon the corporation's president at his Arizona residence. Instead, the scope of the subpoena, directing Minas to produce documents located in Mexico, was the heart of Minas' objection. In examining Minas' objection, the court interpreted language of the Securities Exchange Act of 1933[32] that was similar to language in section 9 of the FTC Act. Section 19 of the Securities Exchange Act of 1933[33] provided that the SEC may require, as part of its investigation, the attendance of witnesses and the production of documentary evidence "from any place within the United States or any Territory at any designated place of hearing." The court said that, though the statute was ambiguous, this provision was not intended to circumscribe the Commission's inquisitorial powers. The court further stated that

> [w]e are satisfied that § 19(b) was intended broadly to empower the Commission to require the attendance of witness or the production of documentary evidence at any designated place of hearing, provided only that service of the subpoena is made within the territorial limits of the United States. The obligation to respond applies even though the person served may find it necessary to go to some other place within or without the United States in order to obtain the documents required to be produced. Congress having clothed the Commission with broad investigatory powers, we should be slow to impute to it the purpose of creating a loophole for companies incorporated abroad but which, like appellee, are actively doing business and peddling their securities in the United States.[34]

The legislative history of similar statutory language in section 27 of

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[30] Id. at § 49.

[31] 150 F.2d 215 (9th Cir. 1945).

[32] Securities Exchange Act of 1933, ch. 38, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a-77bbbb) (1976 & Supp. IV 1980)).

[33] Id. at § 19 (codified at 15 U.S.C. § 77s(b) (1976)).

[34] 150 F.2d at 218.

the Shipping Act of 1916[35] and section 12 in the Interstate Commerce Act[36] was discussed by the Second Circuit court in *Federal Maritime Commission v. DeSmedt*.[37] In *DeSmedt*, the FMC had served subpoenas duces tecum on officers and agents of the Calcutta, East Coast of India and East Pakistan/U.S.A. Conference (the Calcutta Conference).[38] The subpoenas were issued in connection with an investigation of a rate fixing agreement by the Conference. The subpoenas called for the production of documents located outside of the United States. The carriers, objecting to the scope of the production, argued that the clause in section 27 of the Shipping Act[39] plainly limited production of documents to documents found within the United States. In rejecting this plain meaning approach,[40] Judge Friendly relied on the legislative history of the ICC Act. Examination of the ICC's annual reports from 1889 and 1890 led Friendly to conclude that the purpose of section 27 of the Shipping Act and section 12 of the ICC Act was to clarify that subpoena powers of regulatory agencies were not limited to requiring attendance of the witness within the district of his residence. Judge Friendly concluded,

> [v]ery likely, as the Commission itself recognized, the addition was needless, since, as is now urged by respondents but perhaps was not so clearly apprehended when the first regulating commission was still a fledgling, the territorial limits on district court subpoenas. . .would not apply to subpoenas issued by an administrative agency. . .[t]he purpose of the new provision, which has had so large a progeny, was to enhance or confirm the powers of the ICC, not to thwart it by allowing parties to Commission proceedings to refuse to produce documents from foreign countries. . . .
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> . . .Congress has said, . . . that the Federal Maritime Commission, like the Interstate Commerce Commission, the other regulatory agencies, and the federal courts, can require a resident by subpoena to produce documents under his control wherever they are located, and that unlike the courts, the agencies can require their production at a place far from

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[35] Shipping Act of 1916, ch. 451, § 27, 39 Stat. 737 (amended 1967) (codified at 46 U.S.C. § 826) (1976)).

[36] Interstate Commerce Act, ch. 104, § 12, 24 Stat. 383 (amended) (codified at 49 U.S.C. § 12 (1976) (repealed 1978)).

[37] 366 F.2d 464 (2d Cir. 1966).

[38] The "Calcutta Conference" was a group of common carriers engaged in the transportation of commodities by water from East India and Pakistan ports to United States Atlantic and Gulf of Mexico ports. Id. at 466.

[39] Shipping Act of 1916, ch. 451, § 27, 39 Stat. 737 (1964) (codified as amended at 46 U.S.C. § 826(a) (1976 & Supp. III 1979) provides that

> [F]or the purpose of investigating alleged violations of this chapter in all proceedings under § 821 of this title, the Federal Maritime Commission . . . may by subpoena compel the attendance of witnesses and the production of books, papers, documents and other evidence . . . from any place in the United States at any designated place of hearing.

[40] 366 F.2d at 469. Judge Friendly's opinion pointed out that the plain meaning approach has been discarded by the federal courts; he noted that

> Judge Learned Hand was not preaching novel doctrine when he instructed [that] "there is no surer way to misread any document than to read it literally." citing Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (concurring opinion).

home.[41]

In these "scope" cases, federal administrative agencies were given subpoena power to recover documents located in other countries only after first obtaining service over a U.S. resident within the United States.

Service of a subpoena issued by the FTC itself was questioned in *Hunt Foods and Industries, Inc. v. F.T.C.*[42] In this proceeding by the FTC for an order to enforce a subpoena duces tecum, Hunt objected to the service of the subpoena by registered mail at Hunt's place of business in California. In approving the service of a subpoena within the United States by registered mail, the court said that

> [s]ection 5(f) of the Federal Trade Commission Act. . . , provides that complaints, orders "and other processes of the commission under this section" may be served by registered mail. It has been indicated above that the Commission issued and served the subpoena in question during its conduct of an investigation authorized by section 5, one purpose of which is to determine whether there is reason to believe that Hunt has violated that section. The subpoena is therefore a process of the Commission under section 5, hence it may be served by registered mail.
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> There is no other statute bearing upon the manner of serving subpoenas in such proceedings. Nothing to the contrary appearing in the statute, however, it is reasonable to conclude that Congress did not intend to draw a distinction between sections with reference to the manner of serving subpoenas.[43]

The D.C. Circuit decision, although representing a change in attitude from earlier endorsements of the FTC's actions, is consistent with earlier cases involving administrative subpoenas. It can not be overemphasized that in these earlier cases, such as the *Minas de Artemisa* and *DeSmedt* decisions, the subpoena service was accomplished within the United States and upon United States citizens. Therefore those cases were concerned with the issue of the production of documents located abroad at the time of the initial valid service of subpoenas. The decision is also consistent with the Second Circuit's decision in *Ings v. Ferguson*.[44] The *Ings* court was presented the issue of the effect of subpoenas served upon New York agencies of Canadian banks, calling for the production of records located in Canada. The Second Circuit concluded that the subpoena created only an obligation under United States law to produce the records.[45] In light of Canadian foreign nondisclosure laws prohibiting the release of the requested documents, the court expressed unwillingness to insist on the production of records located abroad, especially since the entity served was merely a third party witness.[46] The court ordered production to be restricted to records in the possession of the New York agencies. Such an order recognized the limits to the subpoena

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[41] 366 F.2d at 470-71.
[42] 286 F.2d 803 (9th Cir.), cert. denied, 365 U.S. 877 (1961).
[43] Id. at 809-10.
[44] 282 F.2d 149 (2d Cir. 1960).
[45] Id. at 151.
[46] Id. at 152.

by weighing the U.S. interests in the litigation, the involvement of the party served in the alleged offense, and the foreign country's interests and applicable laws. The *Ings* court further hypothesized that if subpoena service had been upon Canadian bank branches in Canada, the act of process crossing international borders alone would violate basic international law principles respecting the sovereign powers of individual states.[47] Just as the New York banks in *Ings* faced violating Canadian law in order to answer a subpoena enforceable under American law, SGPM faced criminal and monetary penalties under French law if it complied with the FTC subpoena and the enforcement order of the district court.[48] Even though the FTC was afforded broad discretion by the Ninth Circuit in *Hunt* to determine appropriate methods of subpoena service[49] where there is no statute expressly applicable, *Hunt* dealt only with the validity of subpoena service within the United States, and thus lacks the international overtones which make the *Compagnie* case unique.

In light of the available alternatives to foreign service, the D.C. Circuit sensibly accommodated international interests by limiting subpoena service abroad. The FTC had other options to effect service which would not have violated the sovereignty of the foreign state. These options included service within the United States where possible. If service within this country proved unsuccessful, the FTC could then submit letters rogatory[50] to the foreign country's authorities, thereby enlisting the foreign country's aid in obtaining the desired information. Further, the United States could seek general consent from other countries to service of compulsory process upon foreign nationals by signing an international convention.[51] In addition to this general consent, a nation may also consent to a particular request for service and may specify appropriate procedural mechanisms.[52] This device would satisfy the government's interest in effecting service, while minimally intruding upon the other nation's sovereignty.

These alternatives to foreign service of the FTC's investigatory subpoena may have become less important because Congress recently amended the FTC Act.[53] This amendment, which was enacted after the issuance of the subpoena questioned in *Compagnie* and was discussed in the instant case, gives the FTC express authority to serve its civil investigative demands upon "any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the

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[47] Id.

[48] 636 F.2d at 1326.

[49] 286 F.2d at 810.

[50] See Note, International Trade: FTC Service of Subpoena Abroad—FTC Improvements Act of 1980, Pub. L. No. 96-252, § 13, 94 Stat. 374, 380 (1980), 22 Harv. Int'l L.J. 458, 464 (1981).

[51] 636 F.2d at 1313.

[52] Id.

[53] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 13(c)(6)(B), 94 Stat. 374, 380 (codified at 15 U.S.C. § 57b-1(c)(6)(B) (Supp. IV 1980)).

Federal Rules of Civil Procedure prescribe for service in a foreign nation."[54]

It remains to be seen whether the new statute will survive a court challenge. The *Compagnie* court noted that such a statute may fail to protect subpoena service abroad from a due process attack when the served witness objects to the service on lack of personal jurisdiction grounds.[55] Moreover, it is unclear whether the new amendment authorizes service of subpoenas by registered mail, the method used in the instant case. The language of the amendment refers to service made "in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country." The Federal Rules of Civil Procedure,[56] however, require personal service of subpoenas while authorizing several methods for service of process and complaints, including registered mail. The *Compagnie* court did not find any express congressional intent to provide for registered mail delivery of subpoenas; instead, the court viewed the new amendment as a limitation, rather than an expansion, of the FTC's power to conduct investigations. Thus, the court, in effect, warned that the limitations imposed on the Federal Trade Commission in the pre-amendment *Compagnie* case may also be applicable to cases arising under the new law.[57]

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[54] Id.

[55] 636 F.2d at 1325.

[56] Federal Rule of Civil Procedure 4(i)(1)(D) specifies that service of process abroad may be accomplished by "any form of mail, requiring a signed receipt," yet Federal Rule of Civil Procedure 45(c) provides that

> [a] subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees of one day's attendance and the mileage allowed by law.

[57] 636 F.2d at 1325. The court in footnote 140 to the case added that "the passage of these amendments buttresses the argument already made, for it indicates that when Congress intends to authorize extraterritorial service of investigative subpoenas, it will express that intent explicitly." Id.