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Covey T. Oliver

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# International Law and Foreign Investigatory Subpoenas Sought to Be Served Without the Consent or Cooperation of the Territorial Sovereign: Impasse or Accommodation?

COVEY T. OLIVER\*

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## TRIBUTE

I believe Maitre Pierre Azard, whose professional skills and personal qualities we honor here, would have been interested in the problem discussed in this article. My wife and I knew the Azards only briefly but our recollections of their lavish generosity to hordes of American law students and academics and their keen and dispassionate intelligences are sharp. From my first professional acquaintance I was impressed by Professor Azard's decision to devote the remaining years of his service to the injection of an adequate legal component into the education of students of business management.† When, to my surprise I was later invited to attempt something similar, his example helped induce me to spend a few years in a parallel effort. Above all else, however, I remember Pierre Azard as a vivid, effective communicator to the young of the vast sweep of French social his-

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\* Hubbell Professor of International Law (*emeritus*), University of Pennsylvania Law School; Tsanoff Professor of Public Affairs (*emeritus*), Jones Graduate School of Administration, Rice University. Professor Oliver is also a sometime faculty member of the Institute on International and Comparative Law, University of San Diego.

† Six semester hours of courses on law (mainly public law) and process are required for the degree of Master of Public and Business Management at the Jones Graduate School of Administration of Rice University. Additional courses linking legal and policy problems are either required or offered in the second year of the program. See GREANIS & WINDSOR, *THE COMPONENTS OF THE MBPM CURRICULUM*, Working Paper Series, No. 2 Jones Graduate School of Administration (1980).

tory. The vision I best recall of this slight, deep-blue-eyed Norman, is when he stood on the crumbling parapets of an ancient redoubt high above the lower Seine.‡ There he recreated with words alone, precise but colorful scenes from the grappling history of a great country.

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*In today's interdependent world of economic operations, investigation of possible antitrust violations is the key to effective antitrust administration. Customary international law and the political principle of territorial sovereignty, however, prohibits one state from carrying on investigative functions within another*

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‡ I am indebted to Professor Herbert I. Lazerow for this marvelously Thucydidean note: *Chateau Gaillard* dominates the Seine Valley at *Les Andelys*. Richard I (the Lion-Hearted) of England was also Duke of Normandy and, in the 1190's carried on a series of skirmishes with Philip Augustus, King of France, over control of the area. Normandy proper may be divided into two districts, the western capital being Caen, while the eastern is centered in Rouen. Between the eastern part and Paris lies a district known as the Vexin, an extremely fertile granary. To secure the Vexin and to bar Philip's passage into Normandy, Richard built a line of castles including *Gisors* and *La Roche-Guyon*, but *Chateau Gaillard* was the lynch-pin because it controlled the river and the Seine Valley. *Chateau Gaillard* was built in record time 1196-1198, and *Viollet-le-Duc* six centuries later said everything was sacrificed to defense and the design and workmanship were extraordinarily well done. The castle is built on a rocky spur 300 feet above the Seine, and is accessible only from the south. It is surrounded by three walls each fifteen feet thick, and two moats. Four years after Richard's death in 1199, Philip besieged the castle, which fell after seven months. The accounts dispute whether the cause of its demise was famine or the entry of French soldiers through the latrines. The rest of Normandy fell swiftly to the French.

Subsequent history of the castle was less noble. In 1314, King Philip IV (the Fair) discovered that two of his three daughters-in-law, Marguerite of Burgundy and Blanche of Artois, were carrying on adulterous affairs. The men were executed with a cruelty shocking even for feudal times, and the women were imprisoned at *Chateau Gaillard*. Marguerite was kept at the top of a tower exposed to the icy winter winds. Philip IV died and Marguerite's husband became king of France as John X. Marguerite's messages announcing her repentance and pleading for mercy went unanswered. She died of pleurisy in the winter of 1315, leaving John free to marry Clemence of Hungary. One writer commented that it would have been impolitic to execute a queen, but you could have left her exposed to the elements. Blanche was better lodged lower in the tower for ten years, before being allowed to become a nun.

The castle was used as a prison for years, the most notable prisoners being King David II of Scotland (1334) and Charles II (the Bad) of Navarre (1356). It changed hands several times during the Hundred Years' War, and was finally surrendered to King Henry IV of France in 1591. Between 1598 and 1616, Henry IV and Louis XIII granted to two monastic orders, the Capuchins and the Penitents of *Petit-Andelys*, the right to demolish the castle and use the stone to construct their monasteries, and they did destroy a large portion of the outer ramparts. Richelieu pulled down the *donjon* shortly thereafter. The purpose given for the demolition was to prevent the castle from falling into the hands of powerful nobles and being used against the King. The monks' desire to have low-cost building materials were probably additional motivations. *Chateau Gaillard* is now a romantic ruin of Byronic dimensions. See 1 W. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* 239-41, 247 (1966); A. BROQUELET, *NOS CHATEAUX* 132-35 (1924); J. FAVIER, PHILIPPE LE BEL 527-29 (1978); A. POLLE, *FROM DOOMSDAY BOOK TO MAGNA CARTA* 1087-1216 (*The Oxford History of England*) 375, 383-84 (1955); 4 M. GUIZOT, *HISTORY OF FRANCE* 219 (ca. 1869) (trans. Black n.d.); 5 *ENCYCLOPEDIA BRITANNICA* 38-39, 345 (1970).

*state without consent. Recognizing the existence of these principles, the United States Circuit Court of Appeals for the District of Columbia, in the case of Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson, held that the authority of the United States to prescribe rules of law with international application does not necessarily encompass the power to enforce such rules abroad via service of process. The author demonstrates that this holding is compelled by international law and suggests that the impasse between nations, which results from the enforcement dilemma, must be resolved through cooperation at the international level.*

### INTRODUCTION

This essay deals with the investigation of certain types of business conduct, a necessary step preliminary to the application of national laws seeking to maintain the effectiveness of a national market process by sanctioning anticompetitive practices arranged abroad. In the world of today, and that of the last seven decades,<sup>1</sup> the antinomy between national concern over foreign-based restraints of trade (mainly foreign-based cartels)<sup>2</sup> and foreign-linked monopoly power and the permitted reach of national authority under international law<sup>3</sup> continues to be a serious problem. To date, several attempts to resolve this policy problem by international convention have been thwarted,<sup>4</sup> but a significant group of states, which includes France, have agreed to a supranational law of antitrust designed to ensure against impediments to the free movement of goods within the European Economic Community.<sup>5</sup> The creation of a second vast antitrust area among the

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1. In 1911 the Supreme Court applied the Sherman Antitrust Act of 1890 so as to include in its order, dissolving the American Tobacco Company conglomerate, the British-American Tobacco Company, a company organized under the laws of the United Kingdom. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). See also, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18 Reporters' note 2 (1965) [hereinafter cited as RESTATEMENT].

2. *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd per curiam*, 352 U.S. 903 (1956).

3. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). (Certification from the Supreme Court for lack of quorum of qualified justices). See RESTATEMENT, *supra* note 1; SWEENEY, OLIVER, AND LEECH, THE INTERNATIONAL LEGAL SYSTEM (2d ed. 1981) [hereinafter cited as SWEENEY].

4. L. SCHWARTZ AND J. FLYNN, ANTITRUST & REGULATORY ALTERNATIVES: FREE ENTERPRISE AND ECONOMIC ORGANIZATION (5th ed. 1977); DAVIDOW, QUOXOTIC QUEST: THE SEEKING OF A WORLD COMPETITION CODE (1979).

5. Treaty establishing the European Community, Mar. 25, 1957, Treaty of Rome, arts. 85 and 86, 298 U.W.T.S. 14.

developed nations has tended to diminish an older resistance to the idea of legal intrusion into the private sector for the enforcement of competition.<sup>6</sup> However, the development of this second antitrust area, *vis-a-vis* the Treaty of Rome and subsequent jurisprudence of the European Community Court of Justice, has bred a new resistance. This new resistance focuses on the allocation of authority between enforcement areas to control the phenomena of anticompetitive practices that involve the occasionally incongruent interests of both areas concerned. A further complication arises from the authority of the constituent states of the European Economic Community to develop and adhere to national antitrust policy not pre-empted by Community authority.<sup>7</sup>

More specifically, the investigation of certain types of business conduct is the preliminary step to determine whether probable cause exists for instituting antitrust charges against foreign firms, in the national market sought to be policed. What happens when national investigators, before charges are brought, attempt to secure witnesses and documents from abroad that pertain to an antitrust investigation? What are the teachings of international law as to investigator self-help in this regard? What alternatives exist involving the participation of foreign states where witnesses and documents are found? Is it possible that states which mutually accept the authority under international law of each to apply its

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6. The resistances ranged from trenchant opposition from enterprises within—and sometimes the governments of—the United Kingdom, Belgium, the Netherlands and Switzerland, to disinterest or faint concern, in France, Italy, Spain, and Scandinavia. Cf. Reports and Proceedings of the Committee on The Extra-Territorial Application of Restrictive Trade Legislation, International Law Association, 51st Report, *passim* (Tokyo 1964); Haight, *International Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L. J. 639 (1954). The position taken by the RESTATEMENT, *supra* note 1, was resisted within the American Law Institute to extraordinary lengths by Sir Harley Shawcross and others retained by international oil companies. However, when the Federal German Republic specifically provided for the application of antitrust law on an economic effects basis and the Court of European Community followed suit in interpreting the Treaty of Rome, resistance faded and disappeared with a final rush, jurisdiction to prescribe (*i.e.*, to attach legal consequences to conduct outside the territory that has deleterious economic effects within it) when the internal impact of oil price hikes by the state cartel of oil producing states (OPEC) was felt. See SWENEY, *supra* note 3.

7. The national antitrust laws of constituent states in the European Economic Community vary from the explicit regulation of Germany to the lack of any national antitrust laws in several members. France does not have a fully-developed antitrust law, but approaches some market problems through ministerial oversight of the pricing policies of enterprises. In general, there is more cooperation and mutual toleration as between the West German national and the supranational administrators than between the managers of the dispersed national system of the United Kingdom and the antitrust offices of the European Commission at Brussels. As yet no cases of French national recalcitrance as to community obligation, as have arisen in other areas, have become notorious in the antitrust area.

antitrust law to parties before its courts might nonetheless differ sharply as to the investigatory power of the one in the territory of the other? If so, why? And if so, what can be done?

This article is a situation report presenting issues between France and the United States as to the investigatory phase of antitrust. I shall discuss a recent case in which a leading American court<sup>8</sup> addressed the limits placed on American power pursuant to international law and statutes of the United States (as they were at that time) to command French companies by mail to respond to antitrust investigations conducted in the United States by instrumentalities of the United States. I will also report an existing contradiction between new United States statutory law authorizing investigatory service of subpoenas abroad and new French law forbidding, on civil and criminal penalties, disclosure to foreign investigative agencies of information commanded by them directly within France. Finally, possible lines for resolution of the present difficulty will be briefly considered, not in terms of mechanisms but rather, in terms of national will and possible reciprocal interests.

THE FEDERAL TRADE COMMISSION INVESTIGATION OF THE  
FIBERGLASS INSULATION INDUSTRY: SUBPOENA DUCES  
TECUM TO COMPAGNIE DE SAINT-GOBAIN-PONT-  
À-MOUSSON, MAILED TO FRANCE

In 1977 the Federal Trade Commission (FTC) began a nonpublic<sup>9</sup> investigation of the fiberglass insulation industry in the United States to determine whether there had been possible violations of the Federal Trade Commission Act (FTCA).<sup>10</sup> *Compa-*

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8. The United States Circuit Court of Appeals for the District of Columbia has a very heavy load of public law cases involving the competency of agencies and instrumentalities of the United States Government because provisions of the law of federal venue that favor first instance litigation in the federal district courts below it. The D.C. Circuit enjoys a high reputation amongst tribunals in the United States. As is the case with other busy courts of appeal, "panels" of three judges often act for the court as a whole, although certain decisions are decided or reheard *en banc*. These panels are not "*chambres*" in the continental sense, as no specific linkage to subject matter specialization exists as to the panels.

9. The investigation was a preliminary administrative inquiry as to probable cause for formal action, whether of a quasi-legislative or quasi-judicial nature. The process is comparable to the investigations of possible suits to enforce the antitrust laws undertaken by the Department of Justice before filing a civil suit or bringing a potential criminal case to a federal grand jury.

10. Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson,

*gnie St.-Gobain-Pont-à-Mousson (SGPM)*, a multinational French enterprise, was known to own and control a major producer of fiberglass insulation material in the United States. There was reason to believe that the FTC wished to investigate the overall influence and economic power of *SGPM* in the American market.

For reasons not material to this article three efforts to serve *SGPM* within the United States with investigatory subpoenas failed. The fourth effort, a demand sent to the *SGPM* in France by registered mail, became the subject of the litigation specifically relevant here. The subpoena stated that addressees in France were required to appear before a named examiner for the FTC in the United States and to produce listed documents and records. Failure to appear would subject the addressees to the penalties of (United States) law for failure to appear. When the addressees did not appear or produce the documents, the FTC asked the Federal District Court for the District of Columbia for an enforcement order pursuant to a statutory provision for judicial support to administrative agencies. *SGPM* did not contest the jurisdiction of the district court because the court's process as to the enforcement order had been served in the United States. *SGPM* was denied its motion to stay the enforcement of the investigatory subpoena. On appeal, the Circuit Court for the District of Columbia remanded the case to the trial court and ordered it to reconsider whether, *inter alia*, its construction of the statutory authority of the FTC to issue the investigatory subpoena mailed to France conformed to the principle that American statutes are to be construed in conformity with accepted principles of international law, where a contradiction is not manifestly or unavoidably the intent of Congress.<sup>11</sup> The trial court adhered to its original ruling that a judicial enforcement order should issue holding that the investigatory subpoena was authorized under United States constitutional and statutory law.

After the case had been argued before the district court on remand of the record, but before the consideration of the case by the circuit court on the second appeal, the Embassy of France at Washington, on instructions from the *Quay d'Orsay*, protested the service by mail in France as "inconsistent with . . . general principles of international law . . ." and as constituting "a failure to recognize French sovereignty. . ." The note also recorded that France had previously stated formal reservations "regarding

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636 F.2d 1300 (D.C. Cir. 1980) [hereinafter cited as Saint Gobain]. 15 U.S.C. §§ 41-77 (1976) (Emphasis added).

11. *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); RESTATEMENT, *supra* note 1, § 38 Reporters' notes; RESTATEMENT § 3, comment j, and Reporters' note 2.

the application in France of the principle of pre-trial discovery of documents characteristic of common law countries. . . ."<sup>12</sup>

As far as is known, the Department of State neither responded to this note nor did it communicate the note to the various American authorities as requested by France. According to the opinion of the circuit court the French note appeared in the case as an exhibit to a supplemental memorandum of the appellant (*SGPM*).

The reviewing court concluded:

that, *at the time the subpoena was served*, Congress intended to authorize the FTC to employ only those customary and legitimate methods of service of compulsory process commonly employed by American courts and administrative agencies when serving its subpoenas abroad. Because service of compulsory process by registered mail had not customarily proved a legitimate means of summoning a third-party witness to appear, with or without documents, in an agency investigation, we find that the method of service employed by the FTC in this case was unauthorized and hence invalid.<sup>13</sup>

The district court was ordered to vacate its enforcement orders and to dismiss the case.

The majority opinion by Judge Wilkey is a carefully analyzed decision based upon the difference between the jurisdiction of a state under customary international law to *prescribe* its rule of law to defendants properly before its tribunals, and the lack of jurisdiction by a state (under international law) to conduct governmental investigations in the territory of another without the consent of that state. The latter was characterized as clearly a part of *jurisdiction to enforce*, which under customary international law is always territorial, whereas jurisdiction to fashion the rule may either be territorial on the basis of the *loci* of actions and effects or be based on other principles of jurisdiction to prescribe, such as the nationality and protective principles.<sup>14</sup> In the majority decision the above distinctions, first effectively analyzed in the Restatement (Second) of the Foreign Relations Law of the United States (1965)<sup>15</sup> and now being re-incorporated<sup>16</sup> in a revised version thereof, are applied with precision, particularly at the interface of the two principles of jurisdiction, as discussed in

12. 636 F.2d at 1306.

13. *Id.* at 1306-07.

14. RESTATEMENT, *supra* note 1, §§ 26-29, 33, 34-36.

15. *Id.* §§ 6-9, 31, 44, 79.

16. The American Law Institute does not authorize the citation of work that is still in draft stage; nonetheless, it can be stated without objection from the Institute that the analytical pattern as to jurisdiction of states under customary international law pioneered in the original RESTATEMENT is kept for the revision.



Restatement, section 7, which states, "A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases . . . ."

The court explained:

When an American court orders enforcement of a subpoena requiring the production of documents and threatens penalties for noncompliance with that subpoena, it invokes the enforcement jurisdiction, rather than the prescriptive jurisdiction, of the United States. The two types of jurisdiction are not geographically coextensive—[a] state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases, for unlike a state's prescriptive boundaries, enforcement jurisdiction by and large continues to be strictly territorial.<sup>17</sup>

The distinction just noted was the second major thrust of analysis by a three-judge panel of the court of appeals. The distinction's relevance to the outcome is indicated by the result of the court's prior identification of a hiatus in the statutory authority of the FTC to serve an investigatory order by mail abroad. Section 5 of the FTCA authorizes the FTC to serve "[c]omplaints, orders, and other processes . . ." by registered or certified mail.<sup>18</sup> No territorial limitation is stated. Having determined that the demand made in this case was not in the nature of a complaint initiating quasi-judicial action of the FTC, the Court found the investigatory subpoena to come within section 9 of the FTCA. Section 9 gave the FTC the power to command the attendance of witnesses and the production of documents "from any place within the United States . . . ."<sup>19</sup>

Originating in the earlier Interstate Commerce Commission Act<sup>20</sup> and included in the statutory authorizations of several other independent regulatory agencies of the federal government, section 9 had previously been interpreted in several intermediate federal appellate decisions in language that possibly could have been relied upon to authorize section 9 service on a *notice* basis. Such reliance was possible even though in the prior decisions it had been noted that the quoted phrase, was designed to authorize nation-wide subpoena service, even outside the boundaries of the federal judicial district in which the witness resided.<sup>21</sup> The FTC had argued that as prior decisions had called section 9 service akin to that required for beginning a proceeding (notice service), the total impact of the FTCA, sections 5 and 9, was to set no statutory territorial limits on the FTC's writ.

Notwithstanding this view, the circuit court concluded from the

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17. 636 F.2d at 1316.

18. 15 U.S.C. § 45 (1976). In particular see 15 U.S.C. § 45(f) (1976).

19. 15 U.S.C. § 49 (1976).

20. 49 U.S.C. § 12 (1976).

21. 636 F.2d at 1307-09.

record below that by the time of this review the parties and the court below agreed that the FTCA was “‘wholly silent’<sup>22</sup> . . . regarding which modes of foreign service of investigatory subpoenas were or were not proper . . . .”<sup>23</sup>

The court then directed itself to the ground upon which the district court judge had found for the FTC. The court appraised the rationale used by the district court and concluded that its opinion was unconvincing, stressing that the lower court’s failure to draw two distinctions of critical importance to international law was fundamental error.

The court continued in its opinion to identify those two distinctions:

The first, based on the type of document being served; the second, based on the type of jurisdiction being invoked. By failing to draw these crucial distinctions, the district court failed to give adequate weight to fundamental principles of international law which disfavor methods of extraterritorial subpoena service circumventing official channels of judicial assistance, opposed judicial enforcement of investigatory subpoenas abroad, and prohibit the particular manner of subpoena service employed here.<sup>24</sup>

22. *Id.* at 1309.

23. This conclusion had the effect of leaving the court’s field for interpretation in the light of international law wide open.

24. As a preface to the court’s conclusion it stated:

Confronted with both a silent statute and an unconstructive legislative history, the district court sought guidance in the breadth of authority granted by the Constitution to Congress to regulate commerce with foreign nations—a power ‘as great if not greater, than its power to regulate interstate commerce.’ When Congress created the FTC as the agency charged with investigation and regulation of unfair trade practices, the district court concluded, it must have intended that agency to wield the ‘broadest power to make commerce, foreign and domestic, fair.’ From the FTC’s discretionary authority to investigate and regulate foreign commerce, the district court thus inferred the Commission’s power to serve its process abroad . . . .

Since past judicial interpretations of statutory language identical to that in FTC Act section 9 had studiously avoided ‘reading into the statute artificial limits on the investigatory power of the agencies,’ the district court chose to read that section as presumptively authorizing the FTC to deliver its subpoenas over a limitless geographic area.

By implication, the district court also created a presumption in favor of any means of subpoena service which the FTC might decide to employ. In creating this presumption, the court explicitly rejected the notion that any ‘clear statement’ of congressional intent was required to authorize any particular method of foreign service. Not only had Congress previously authorized direct service of process abroad without such a ‘clear statement,’ the court suggested, but there are no ‘generally applicable principles of international law regarding [permissible or impermissible] methods of service to which Congress might be expected to defer.’

636 F.2d at 1310.

In the court's arrangement of its analysis, which I have reversed for purposes linked to the convenience of the foreign reader, the court proceeded immediately from the foregoing to a showing of the lower court's error as to the weight to be given in American courts to principles of customary international law. These latter principles are discussed fully in the opinion, but to digest every step in the process in this article will deflect its ultimate purpose, which is to identify an unresolved contradiction between what United States agencies are now specifically authorized to do in antitrust investigations and how the circuit courts will rule based on provisions found in customary international law. Suffice it to say that the ultimate teaching of the court in this case, relying upon Supreme Court authority,<sup>25</sup> as to the standard for interpreting acts of Congress that might by some constructions trespass upon international law is that:

Liberal judicial interpretations of agency power are not justified when agency action threatens to have extraterritorial, rather than merely national, impact . . . . [C]ourts are bound wherever possible to construe strictly federal statutes conferring subject matter jurisdiction on domestic agencies to avoid possible conflicts with contrary principles of international law. . . .<sup>26</sup>

So much for the interpretation of the Federal Trade Commission Act of 1914, as such. We turn now to what the Congress in more recent times has provided as to antitrust investigations in which witnesses and documents located abroad are sought to be commanded to appear or to be produced within the United States. We also consider the problems of witnesses and probative documents abroad sought for judicial (and quasi-judicial) processes within the United States where the defendants are properly themselves before the tribunal, both under domestic and international law. Requests for judicial assistance, whether *ad hoc* or under international agreements, are outside the scope of present concern, as they are obvious alternatives that are limited only by their availability through arrangements specifically accepted by both states.

#### THE AMERICAN LEGISLATIVE COMMAND AS TO THE RUNNING OF ANTITRUST SUBPOENAS ABROAD

Under its Constitution the United States is unavoidably a dualist country so far as the relationship of international to municipal law is concerned.<sup>27</sup> Although the Constitution empowers Con-

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25. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

26. 636 F.2d at 1322-23.

27. A monistic theory of law considers international and municipal law parts of a single whole. Normal monism, such as that of Kelsen, treats international law

gress to "define and punish . . . Offenses against the Law of Nations . . ." <sup>28</sup> and the Supreme Court has held that customary international law is a part of federal law and as such overrides state law, <sup>29</sup> it is also well-established that violation of international law does not invalidate an act of Congress. <sup>30</sup>

Parallel to this, and further evidence of inherent dualism, is the principle that even the internal legal effects of an interior treaty may be displaced by later legislation inescapably contrary to the treaty. <sup>31</sup> The former doctrine is contradicted (in words at least) by the constitutions of certain other states, but not France. <sup>32</sup> In France, the general constitutional principle is that a later statute must comport with the terms of an earlier treaty having internal effects as law. <sup>33</sup> It is widely recognized in the United States that,

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as superior to (and as delegating authority to) municipal law. Dualism (sometimes called pluralism) treats international and municipal law as different systems that interact with each other in various ways. In some dualist states the constitution provides that in certain aspects international law shall prevail over, and in cases of conflict, invalidate, national law. In other dualist states international law is treated as applicable only to the extent that it is not conflict with domestic law, or some portions thereof, such as federal law in a federal system. *See generally* SWEENEY, *supra* note 3.

28. U.S. CONST. art. I, § 8, cl. 10.

29. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), approving Jessup's argument, made very shortly after the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), stated that "rules of international law should not be left to divergent and perhaps parochial state [of the Union] interpretations." The court went on to say that Jessup's rationale was equally applicable to the American act of state doctrine, for which the court did not claim the status of international law but only of a court-made rule designed to reduce judge-induced effects on United States international relations. *See* SWEENEY, *supra* note 3. *See also* *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941).

30. *Schroeder v. Bissell*, 5 F.2d 838 (1st Cir. 1925); *United States v. Posal*, 559 F.2d 234 (5th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978) resembles the "rum-runner" cases, where explicit United States statutes providing for boardings and arrests of vessels indistinguishable as foreign in "customs enforcement areas" were applied even though quite dubious as to validity under international law; *Reid v. Covert*, 354 U.S. 1, 18 (1957).

31. *See generally* SWEENEY, *supra* note 3.

32. *Id.*

33. *Id.* Although there are nuances of difference, the constitutions of the 4th and 5th French Republics both provide that treaties cannot be invalidated as to internal effect by subsequent inconsistent national legislation or decree-laws. As to cases under the Constitution of the 4th Republic, see Oliver, *Impediments to American Investment in France*, 2 AM. J. COMP. L. 474 (1953). Article 54 of the Constitution of the 5th Republic is not quite as clear as was the earlier constitution that posterior as well as anterior laws are invalidated by treaties "duly ratified or approved . . . upon publication, [which] have an authority superior to that of laws. . ." French scholars stress that the use of the term "superior" makes it clear that both types of statutes are subordinated, since the norms in treaties are not

although the state may be obligated internationally one way, the national decisionmakers may be obligated by Congress, and theoretically by the Constitution, to rule another way.

In the United States the Constitution is omnipotent. In a national context there is no law above it. Although not specifically stated as a principle in the Constitution, the structure of the federal government provided by it is one of separation of powers. While this doctrine is affected as to its rigor by the power the courts early took to "say what the law is . . .,"<sup>34</sup> no court has ever held that international law is a superior normative order to that of the Constitution.

One effect of the foregoing is the care with which American courts treat issues of foreign affairs policy. The courts are aware that they might, in certain instances, pursue the trails of legal reasoning too far, to the detriment of American international relations.<sup>35</sup> Also, they have been determined to take care not to impute to the Congress a legislative intention to put the United States in violation of international law. The circuit court's decision in the *Saint Gobain* case, as we have seen, is an instance in which this attitude was elucidated.

Thus, whereas the onus of making the United States a violator of international law, in limited ways, lies with the executive,<sup>36</sup> it exists in potentially wider range with the Congress. The courts, when interpreting the Constitution, have reviewed the foreign affairs powers of the President for content.<sup>37</sup> In regards to the Congress, the courts have reviewed possibly illegal statutes to

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equated with legislative acts. Intellectually this argument is reinforced by the fact that the contrary United States rule is logically inevitable once it was deemed that as to internal effect treaties are a species of legislation, as Jefferson asserted in his influential *MANUAL OF PARLIAMENTARY PRACTICE*, Sec. LII, *reprinted in the Constitution, Jefferson's Manual, and Rules and Practice of the House of Representatives*, H.R. Doc. No. 94-403, 95th Cong., 2d Sess. 107 (1978). I am informed by officials of the *Conseil d'Etat* that the administrative courts, unlike the normal law courts, may not invalidate a "law" for inconsistency with a treaty.

34. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803); *U.S. v. Nixon*, 418 U.S. 683 (1974).

35. *See* note 29 *supra*.

36. Since the executive branch (the President, his entourage, and the ministries) takes the lead in international relations, the negative burden or onus usually lies with it when the United States by its conduct lays itself open to criticism that it has violated international law. But under the American version of dualism, Congress has immense potential for directing departures from international law by legislation that the President would, under the Constitution (Article II, § 3), not have the authority to disregard. For an instance involving explanations by the Executive to the congressional leadership as to why it would be in the national interest not to execute a law, see *SWEENEY, supra* note 3 ("First" Hickenlooper Amendment to the Foreign Assistance Act not enforced against Peru for the nationalization of the International Petroleum Company).

37. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

determine only their scope and reach under international law.<sup>38</sup> The difference is potentially significant, not only because of the relative immunity of legislation from judge-made limitations, but because in the United States the President has become the proposer of most legislation, thus giving the executive branch a derivative power to induce legislation including legislation that presents international legal problems.

In this general framework the executive branch of the government has rather consistently taken foreign policy (and international legal) risks in favor of a wide-reaching effectiveness for the administration of federal law against restrictive trade practices and monopoly power (antitrust). When a wide reach for American antitrust law was developing, the United States stood alone as a significant enforcer of public law against anticompetitive conduct. Thus, United States courts have applied (consistent with international law after many years of confusion and disputation),<sup>39</sup> national rules to anticompetitive conduct of actors outside its territory to producing deleterious economic effects within national territory. This result is reached on the same objective territorial principle of jurisdiction that authorizes a state to apply its laws to a person abroad who shoots bullets into the territory, assuming that the person accused has properly been brought before the tribunals of the state, in accordance with the laws as to the adjudicatory power of the tribunal.<sup>40</sup>

In general, there remains little international legal controversy as to prescriptive jurisdiction in antitrust cases, but more recently American efforts to compel witnesses and documents from abroad have again become quite controversial, both as to investigative activities and to processes before tribunals. On its face this controversy seems strange, especially as between the United States and other countries that presently have advanced antitrust systems

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38. Of course, there may be judicial review for other purposes, such as congruity with the enumerated legislative powers of Congress or under separation of powers, *Buckley v. Valeo*, 424 U.S. 1 (1976).

39. See text accompanying notes 13-17 *supra*.

40. A state cannot prescribe a rule to a party over which it does not have personal and subject matter jurisdiction under the relevant domestic law, such as the due process clauses of the Constitution of the United States. If a state having jurisdiction to adjudicate under its domestic law nonetheless does not have jurisdiction to enforce its rule under international law, its action is an international wrong to which it may be liable to another state entitled to extend diplomatic protection to the person aggrieved. *Cf.* RESTATEMENT, *supra* note 1, § 8.

and share a common interest; that a cartel or monopolist not escape national law in the affected state simply by localizing anticompetitive machinations outside its territory.

In the earlier antitrust period mentioned above, it had been assumed that reaction against subpoenas originating in the United States and running to foreign places reflected across-the-board hostility to antitrust laws.<sup>41</sup> Today, however, why should the British House of Lords take serious umbrage when a plaintiff in a *civil*<sup>42</sup> antitrust suit brought in the United States subpoenas rele-

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41. Cf. Haight, *supra* note 6. A number of early-stage resisters of the "economic effects" doctrine as to prescriptive jurisdiction persistently cited, as proof that international law opposed this, instances of diplomatic protests of foreign governments, in countries then often cartel-havens, against attempted discovery or subpoenas of documents or witnesses in United States antitrust proceedings. The extent to which these commentators really did not see the difference between prescriptive and enforcement jurisdiction in the context of the American antitrust laws is difficult to determine. British recalcitrance has persisted, in Labor as in Tory times, leading to the conjecture that, regardless of the ideology of the majority in Parliament, the voice of "the City" is heard throughout the land.

42. See authorities cited in *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1325 n.143 (D.C. Cir. 1980). The reference is to the suits of Westinghouse against the "Uranium Cartel," part of Westinghouse's effort to reduce the disaster of its managerial decisions in regard to the making by it of long-term uranium supply contracts with power companies ancillary to the sale of power generating equipment. The price stipulated in the contracts averaged \$10 per pound for yellowcake. During the term of the contracts yellowcake (uranium oxide) rose to \$26 per pound, with Westinghouse still obligated to supply 65,000,000 pounds of uranium at \$10 per pound. In order to attempt a defense under the Uniform Commercial Code, § 2-615 (1978), the Westinghouse Electric Company sued a number of British and Canadian companies under the provisions of the Sherman Act permitting civil actions for treble damages by private parties injured as a result of antitrust violations. See GREANIS, WINDSOR AND NYGAARD, *THE URANIUM THING: THE WESTINGHOUSE URANIUM CONTRACTS* (1979), ms. in process of publication in a study book on managerial decision-making. The defendants included four companies of the Rio Tinto Mines group, long significant elements of British Private Sector overseas investment in Spain and elsewhere. The British protective reaction, sharp and vigorous as it was, is difficult to explain in terms of confusion about the two types of jurisdiction, in as much as Imperial Chemicals Industries, another bastion of British private sector foreign and domestic investment, had failed to convince the European Community Court, on the eve of British entry into the Common Market, that its participation in the Dyestuffs Cartel through controlled subsidiaries in EEC countries could not be reached under Article 85 of the Treaty of Rome. Thus, the British reaction against discovery in the Uranium Cartel litigation must have been based on a private party-induced British governmental determination not to cooperate with the Americans as to offshore British cartels actually properly brought in as defendants, even in private party civil litigation in the United States. Analytically, British-Canadian official prohibitions cannot be justified under the principle that the American plaintiff's discovery-subpoena efforts violated the principle that enforcement jurisdiction is under international law strictly territorial, at least as that principle is developed by the court of appeals in favor of France (and the French concern) in the Saint Gobain case. It can only be explained under a national policy to protect a cartelized national private sector from antitrust interests of a friendly state, when the United Kingdom itself now pursues anticompetitive activities under both its national law and under the superior law of the EEC. Under these circumstances

vant records kept in the United Kingdom by the defendant who is properly before an American court? Considering British membership in the European Economic Community, which has a highly developed system of antitrust law, to say nothing of the laws of the United Kingdom against restrictive trade practices and monopolies the sharpness of the British rejection is puzzling. Why should France, in 1980, have proscribed the communication to the public authorities of any other country the content of documents of anticompetitive enforcement relevance kept in France?<sup>43</sup>

The major factors in such resistance, even now that antitrust law is no longer a public law monopoly of the United States, may be these:

1. Residual resentment by certain powerful foreign enterprises which, in the democratic societies in which they operate, have great political capacity to mobilize the protective instincts of the governments of the states of their nationalities against remembered historic efforts of United States' agencies to apply American antitrust laws.<sup>44</sup>

2. Substantive and procedural differences in the objectives and modalities of United States and European Economic Community antitrust laws which make companies and governments in Europe prefer the application of the latter.<sup>45</sup>

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talk of "comity" seems ironic. Cf. *Love, Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L LAW 257 (1981).

43. The legal proscription in France is explained in detail in Saint Gobain, 636 F.2d at 1326 n.146. The law was effective July 17, 1980. Court's notes 144 and 145, also, are rich sources of information and citations as to the development of laws in various countries prohibiting response, without state authority, to foreign requests for discovery or production of documents. In note 145 the court usefully explains that these statutes are of two general types: some are designed to protect citizens against official inquiries by authorities in other states (*i.e.*, "investigative" efforts, in the terminology developed in this case by the majority of the circuit court panel). Others prohibit the production of any documents requested in any foreign proceeding (including civil actions by private parties against defendants properly before the court), unless the documents are of a type normally sent outside of the jurisdiction in the normal course of business. The court finds the new French statute to be of the second type, although the language of the statute does not provide specifically the above exception to the prohibition. But it does refer to an exception for international treaties or agreements, and it is through this route that the French statute qualifies as one of the second type. It is not deemed useful to reproduce here, in view of its print-out in note 146 of the opinion, the text of the French statute. The "exception" aside, its language is quite sweeping as to persons, entities, utterances and subject matter within the scope of the prohibition, and the penalties for violation are severe.

44. See notes 7, 41 and 42 *supra*.

45. The EEC antitrust law does not have precisely the same objective as the



3. Resistance to foreign efforts at wielding any semblance of governmental authority within the territory of a state. The exclusivity of the territorial principle as to enforcement jurisdiction is inherent in the very concept of the state and has not been moderated, except by the creation of limited elements of supranationality as a matter of deliberate state choice.<sup>46</sup>

#### IMPASSE OR ACCOMMODATION?

The decision of the circuit court of appeals in *Saint Gobain* effectively created a sharp differentiation between the authority of the FTC and the Department of Justice, pursuant to United States law, to serve an investigative subpoena in France on a French national. Judge McGowan, in his separate, brief concurring opinion explains:

For years it was apparently deemed necessary by the Department of Justice to serve its investigative demands [only] upon officers or directors of foreign corporations found in the United States—as appellant concedes the Commission could have done in this case. In 1976, however, Congress acted to authorize the service of the Department's *civil* investigative demands on foreign nations 'in such a manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country' . . . . Service by registered mail in a foreign country is encompassed in that grant of authority.<sup>47</sup>

Judge McGowan then added that after the *Saint Gobain* case was taken under submission, Congress enacted a law, The Federal Trade Commission Improvement Act of 1980, that Judge McGowan assumes gives the FTC powers equivalent in this respect to those given to the Department of Justice in 1976. However, the majority of the panel limited this change to FTC consumer protection investigations.<sup>48</sup>

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United States laws, as it focuses on anticompetitive practices as clogs on free movement of goods within the Community and has features that permit exemption of certain types of anticompetitive conduct from the sanction of the law. Moreover, the continental Europeans are shocked by criminal liability, especially on the basis of criminal conspiracy, and the awesome powers of a judge sitting in equity with the power to imprison for civil contempt. *See generally* Oliver (rapporteur), *The Harmonization of Laws and the Development of Principles for the Resolution of Conflicts of Enforcement Jurisdiction as to Transnational Monopolistic and Restrictive Trade Practices*, INTERNATIONAL LAW REPORT (Tokyo 1964) 544-56, reprinted in VII THE JOURNAL OF REPRINTS FOR ANTITRUST LAW AND ECONOMICS 97. The Court sets out the proposed norms of the 52nd Conference of the International Law Association (Helsinki, 1965) bearing upon the production of documents in *Saint Gobain*, 636 F.2d at 1327.

46. State choice could include, but so far has not, it seems, cooperation, rather than the balkanization of enforcement efforts.

47. 636 F.2d at 1327.

48. Pub. L. No. 92-252, effective May 28, 1980, adds a new section 20(c)(6)(B) to the FTCA. Note 140 of the majority opinion in *Saint Gobain* states that the authority to mail investigatory subpoenas under this section is limited to certain consumer protection investigations and hence by implication not changing the

The fact of this subsequent congressional specification supported, in Judge McGowan's view, the decision that until the 1980 change the FTC was not authorized to make investigative service by mail abroad, thus he saw no need for his colleagues on the panel<sup>49</sup> to have explored "the jurisdictional distinctions and the intricacies of international law which bulk so large in the majority opinion . . . ."<sup>50</sup>

In substantially the same time frame France enacted the law previously mentioned against removing documents from France, unless the Government of France consents to the foreign governmental investigatory order. While in federal law the frustrated FTC may lack full foreign investigatory powers as a result of the *Saint Gobain* decision and legislative history, the Department of Justice—and presumably plaintiffs in treble damage cases—do have such investigatory powers under explicit national law. Thus there is a flat contradiction between American law and policy and French law and policy. Impasse is inevitable unless the contradiction is ameliorated or eliminated.

The range of possible accommodation is wide, ranging from "blind eye" arrangements, through provision for receiving and ruling impartially on foreign requests through the diplomatic channel, informal understandings of a reciprocal nature, or bilateral treaty arrangements, to over-riding and mutually-accepted multipartite international undertakings. There is another possible accommodation: stopping anti-competitive investigations at national boundaries. This, of course, frustrates through failure of proof effective use of the recognizedly valid prescription of na-

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holding in the instant case as to antitrust investigatory subpoenas mailed abroad. 636 F.2d at 1325 n.140. The concurring opinion may be read as not having focused on such a limitation:

It is also quite significant, I believe, with respect to the issue of Congressional purpose and intent now before us, that after this case was finally taken under submission on February 14, 1980, Congress enacted Public Law 96-252, effective May 28, 1980, the 'Federal Trade Commission Improvements Act of 1980,' which, among other things, gave to the Commission, in language virtually identical to that used in 1976 with respect to the Department of Justice, the same power to serve a civil investigative demand upon a foreign national abroad by registered mail.

*Id.* at 1327-28.

This may weaken the thrust of the concurring opinion and tend to justify the lengthy treatment of international legal issues, which Judge McGowan found unnecessary to the disposition of the case.

49. Explained in note 48 *supra*.

50. 636 F.2d at 1327.

tional law (on the economic effects basis) to defendants themselves properly brought before national courts. Eventually this reduces itself to the absurd cases of evaders of European Economic Community law hiding proof in the United States and of evaders of American antitrust law enjoying *de facto* immunity in states members of the Community.

Presently United States law differentiates between the national legal authorizations to the two antitrust enforcement agencies, the Department of Justice and the FTC. Evenhandedness as to national arrangements seems to dictate that either both agencies have or both be denied external investigatory powers. But in the sometimes less than logical world of international relations, there is one possible reason for restricting only the FTC: it is an independent executive agency whose discretion cannot be controlled (legally) by the President, in the foreign affairs interests of the country. The Department of Justice is subject to presidential command in this and most other matters, although admittedly the White House would sometimes be vulnerable to undesired publicity, especially before congressional committees.

Congress, for its part, seems in both the recent enactments involving service of investigative subpoenas abroad (both the Department of Justice and the FTC) to have relied upon inaccurate linkages to federal civil procedure rule 4,<sup>51</sup> relating to the service of judicial process abroad in order to perfect trial jurisdiction in the federal district courts. Judge Wilkey has stressed<sup>52</sup> that the service of such judicial process is not an effort to exercise governmental authority abroad in the territory of another state; it is simply (jurisdictional) notice of a suit that could either be defended or lost by default. Judge Wilkey also draws attention to the fact that the federal rule governing subpoena service<sup>53</sup> does not permit any form of mail service anywhere, even within the United States.

Congress does not seem, however, to have applied these distinctions in regard to its extensions of the use of the investigative subpoena power in antitrust cases. It does not relieve the violation of international law implicit in these statutes that the investigatory powers sought to be exercised are limited to civil investigations, for these are themselves efforts to perform governmental functions in the foreign state.

As previously indicated the majority of the court of appeals panel in *Saint Gobain* recognized that Congress had made a lim-

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51. FED. R. Crv. P. 4.

52. *Id.*

53. 15 U.S.C. § 49 (1976).

ited change in the FTC authorization while the instant case was *sub judice* on the issue of the FTC's subpoena authorization under the unamended FTCA.<sup>54</sup> The 1980 change did not apply to the dispute before the panel, consequently, no attempt was made to interpret this change in light of the principle calling for the resolution of doubts in favor of congruity with international law. Nonetheless, there may be significance in the fact that under these circumstances the majority of the panel taught so thoroughly the application of the above principle. Instinct should tell the reader that even the 1980 change and the earlier one upon which it was modeled<sup>55</sup> could be found to contain a less than absolute command of Congress to disregard international law. Moreover, in view of the incorrect linkage to the federal rule on the service of notice of suit abroad, a good case for congressional confusion exists. It is relatively rare for a strong and effective court to devote such detailed attention as did the majority in *Saint Gobain* to principles that in the immediate future it could not apply.

Thus, perhaps, it can be hazarded that the impasse still has some possibility of being resolved in the simplest manner possible, by the adjustment of United States law to the international law requirement.

Now I turn to other modalities for resolving the contradiction between an explicit foreign reach for the American investigatory subpoena power and the unwillingness of France to accept even a relatively slight intrusion upon territorial sovereignty (*i.e.*, delivery of an American investigatory subpoena through the French postal service). Perhaps the French sense of proportionality could be induced to distinguish between this technical intrusion and the much more insulting cases of sending a marshall<sup>56</sup> or a consul<sup>57</sup> out into France with similar demands. As indicated above, the United States explicitly forbids governmental conduct (without the consent of the territorial sovereign) by American officials within a foreign state's territory. Thus, might it be plausi-

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54. See note 19 and accompanying text *supra*.

55. See the authorization of the Department of Justice in 15 U.S.C. § 1312(d)(2) (1976) *supra* note 18 and accompanying text.

56. Limitations on the authority of United States Marshalls in this regard extending to the denial of authority to United States Consuls in the premises are set out in SWEENEY, *supra* note 3.

57. Such an inducement was proposed in the study cited in note 45 *supra*.

ble to regard the mailed demand as a tolerated exception, especially if the toleration were to be reciprocal over a wide range of governmental interests, such as United States investigatory interests in antitrust and consumer protection and French investigatory interests as to records and documents in the United States pertaining to wine district "appellation controls," fiscal aspects of French business investment here, and the like. Such a modality certainly seems to offer certain conveniences as to matters of public administration and the mutual advancement of national interests as well as of some of the interests of nationals.<sup>58</sup>

Under the right negotiating circumstances the impasse can elegantly be reduced or eliminated by international agreements or other arrangements for administrative as well as judicial assistance. Reciprocal operations arrangements, modeled on those between United States antitrust authorities<sup>59</sup> and those of the European Economic Community<sup>60</sup> seem also to be of potential, interim or long-term, utility.

In any event, there is always the possibility of an *ad hoc* request for cooperation, made through the diplomatic channel. Success or rejection through this channel depends on many factors, including the reigning "atmosphere" of relations, the presence or absence of collateral inducements to cooperation, reciprocity, sensitivity and the clout in the requested country of the potential subject of the investigation. The diplomatic channel includes not only bilateral exchanges but interactions within international agencies, such as the Organization for Economic Cooperation and Development, itself based in Paris.

The fundamental impediment to the foregoing possibilities is, of course, the attitudinal inhibitions and psycho-political factors previously mentioned. But it has been recently observed:

An interesting question arises whether, as the industrialized nations of

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58. The court's opinion in *Saint Gobain*, 636 F.2d at 1313 n.69 refers usefully to the Multilateral Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163, and points out that France has the power to decide what to honor in the way of foreign requests under this treaty, to which it is a party. Whether the new French law, see note 43 *supra*, is entirely valid in view of Article 54 of the French Constitution, *supra* note 33, is an interesting speculation.

59. Whether France has enough national antitrust law to support interest between French and American authorities is conjectural. The Community enforcement elements definitely do have such interests. See notes 42-45 *supra*, as to the supranationality of Community antitrust law and to France's intransigence in other areas where under the treaties the Community does have legal authority to overrule France.

60. The cooperation has been principally between the Antitrust Division of the Department of Justice and the Antitrust Secretariat of the European Communities Commission.

the world move toward the specific regulation of the same types of private economic activity the differences in their approaches, remedies and tolerations will exacerbate or relieve conflicts of jurisdiction. From one point of view, that of achieving the general objective of social control of particularly types of economic conduct, it does not seem to make much difference which set of rules actually gets applied. But administrators and legislators in nation states as well as in the European Economic Community proceed in economic matters from localized senses of mission. Thus the increased number of potentially applicable sets of rules may threaten the effective conduct of transnational business enterprise and create a common need for some system of rationalization or harmonization of regulatory principles. In the period 1948-52, roughly, the first major effort to create a set of international rules for restrictive trade practices and monopoly, the Havana Charter of the aborted International Trade Organization failed through lack of sufficient agreement among states. Later efforts for the creation of new, positive, universal law in this sector has been slight so far. But perhaps circumstances are changing, due both to the increased array of particularistic regulatory systems and the growth of multinational enterprise.<sup>61</sup>

Perhaps the answer to the impasse lies here.

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61. SWEENEY, *supra* note 3.

