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## Serving Subpoenas Abroad Pursuant to the Futures Trading Act of 1986

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# Serving Subpoenas Abroad Pursuant to the Futures Trading Act of 1986

Peter G. McGonagle

## **Abstract**

Part I examines the 1986 amendment's legislative history and explains how the new subpoena powers will operate. Part II analyzes the new subpoena powers with respect to current standards of extraterritorial discovery under international law. Finally, Part III proposes an appropriate approach to serving CFTC subpoenas abroad which will promote their enforceability while not affronting the sovereignty of foreign nations.

# SERVING SUBPOENAS ABROAD PURSUANT TO THE FUTURES TRADING ACT OF 1986

## INTRODUCTION

The Futures Trading Act of 1986<sup>1</sup> granted the Commodity Futures Trading Commission<sup>2</sup> (CFTC) the power to issue extraterritorial subpoenas to obtain information in cases involving violations of the Commodity Exchange Act<sup>3</sup> (CEA). This was intended to remedy the problem of regulating foreign participants in the United States commodities market, who would otherwise evade the CEA's requirements.<sup>4</sup> The CFTC had difficulty serving investigative subpoenas outside the United States because both United States courts and foreign nations were reluctant to give effect to these subpoenas.<sup>5</sup> Because of this, Congress amended the agency's subpoena powers in 1986, enabling the CFTC to enforce its extraterritorial subpoenas in United States courts.<sup>6</sup> Nonetheless, foreign

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1. Pub. L. No. 99-641, § 103, 100 Stat. 3557, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS \_\_ .

2. In 1974, Congress amended the Commodity Exchange Act (CEA) by passing the Commodities Futures Trading Commission Act. *See* Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. §§ 1-26 (1982)). Section 101 of the Commodities Futures Trading Commission Act created the Commodity Futures Trading Commission (CFTC) which replaced the Commodity Exchange Authority, that had previously been charged with the enforcement responsibility. *See* 7 U.S.C. § 4(a) (1982). Congress modeled the CFTC after the Securities and Exchange Commission. *See* H. FRIEDMAN, *SECURITIES AND COMMODITIES ENFORCEMENT* 159 (1981); Note, *Extraterritorial Application of Fraud Provisions of the Commodity Exchange Act*, 41 WASH. & LEE L. REV. 1215, 1215 n.1 (1984).

3. 7 U.S.C. §§ 1-26 (1982).

4. *See infra* note 10 and accompanying text (discussion of legislative history).

5. *See* Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 258-59 (1980); Markham & Bergin, *The Role of the Commodity Futures Trading Commission in International Commodity Transactions*, 18 GEO. WASH. J. INT'L L. & ECON. 581, 619-20 (1985); Note, *Tamari v. Bache & Co. (Lebanon) S.A.L.: The Extraterritorial Application of the Antifraud Provisions of the Commodity Exchange Act*, 11 BROOKLYN J. INT'L L. 615, 615 n.5 (1985).

6. *See* Futures Trading Act of 1986, Pub. L. No. 99-641, § 103, 100 Stat. 3557, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS \_\_ . This section amended section 6(b) of the CEA, 7 U.S.C. § 15 (1982), approved November 10, 1986. The section states:

A subpoena [sic] issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpoena [sic] to be served on a person who is not to be found within the territorial

sovereigns can still negate the effectiveness of these extraterritorial subpoenas.<sup>7</sup>

The 1986 amendment unfortunately does not provide adequate guidance to the CFTC as to which methods it should utilize in serving extraterritorial subpoenas. This Note argues that two of the CFTC's five permitted methods for serving subpoenas outside the United States are offensive to the sovereignty of foreign nations, and the CFTC should resort to those questionable provisions only after exhausting the other, less offensive methods of service. Part I examines the 1986 amendment's legislative history and explains how the new subpoena powers will operate. Part II analyzes the new subpoena powers with respect to current standards of extraterritorial discovery under international law. Finally, Part III proposes an appropriate approach to serving CFTC subpoenas abroad which will promote their enforceability while not affronting the sovereignty of foreign nations.

## I. THE CFTC'S EXTRATERRITORIAL SUBPOENA POWERS UNDER THE FUTURES TRADING ACT OF 1986

### A. Legislative History

Prior to the 1986 amendment,<sup>8</sup> the CEA was not specific

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jurisdiction of any court of the United States may be issued only on the prior approval of the Commission.

*Id.*; see also *infra* note 8 (text of section 6(b) prior to the amendment).

7. See *infra* notes 58-66 and accompanying text. Many nations have enacted blocking statutes designed to frustrate United States discovery efforts. See, e.g., Protection of Trading Interests Act 1980 ch. 11 (United Kingdom); Lightman & Sharpe, *Discovery for the United Kingdom: A British Perspective*, in *EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION* 303-18 (1984); see also Note, *Recent Canadian Blocking Legislation: A Vehicle to Foster Cooperation Between the United States and Canada?* 10 *FORDHAM INT'L L.J.* 671 (1987).

8. Prior to the 1986 amendment, section 6(b) of the CEA, 7 U.S.C. § 15 (1982) provided:

For the purpose of securing effective enforcement of the provisions of this chapter and for the purpose of any investigation or proceeding under this chapter, any member of the Commission or any Administrative Law Judge or other officer designated by the Commission may administer oaths and affirmations, subpoena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing. In the case of contumacy by, or

as to whether the CFTC possessed extraterritorial subpoena powers.<sup>9</sup> The legislative history of the CEA is also not helpful on this question.<sup>10</sup> These legislative oversights hindered the efforts of the CFTC to regulate the activity of foreign participants on United States commodities markets, at times limiting its enforcement powers to domestic participants.<sup>11</sup> Although some United States courts broadly interpreted the CEA to al-

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refusal to obey a subpoena [sic] issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found.

7 U.S.C. § 15 (1982) amended by Futures Trading Act of 1986, Pub. L. No. 99-641, § 103, 100 Stat. 3557, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS — (emphasis added).

9. Parts of the CEA suggest an expansive reading of the CFTC's extraterritorial subpoena powers. For instance, interstate commerce is broadly defined in section 2 of the CEA, 7 U.S.C. § 2 (1982), as "commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof . . ." (emphasis added). Section 3 defines an interstate commerce transaction in commodities as one in the "current of commerce" among the States. 7 U.S.C. § 3 (1982). "State" is defined for purposes of this section to encompass "[t]erritory, the District of Columbia, possession of the United States, and foreign nation." *Id.* (emphasis added). However, one court specifically held that the CEA's language and legislative history was inconclusive as to whether the CFTC could extend its enforcement jurisdiction abroad. *Tamari v. Bache & Co. (Lebanon)*, 730 F.2d 1103, 1106-07 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984) (the court examined the antifraud provisions of the CEA); *see Note, supra* note 5, at 622-25.

10. *Tamari*, 730 F.2d at 1106-07; *see* H.R. REP. NO. 624, 99th Cong., 2d Sess. 6, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 6005, 6007 [hereinafter H.R. REP. NO. 624] ("New trading instruments or contracts have attracted major new market participants, resulting in an almost sevenfold increase in futures and options trading activity in the past 10 years."); S. REP. NO. 1131, 93d Cong., 2d Sess. 14, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5843, 5856 (The CEA was devised to ensure the integrity of the domestic commodity markets, but international trading on domestic markets was not considered.); Markham, *Regulation of International Transactions Under the Commodity Exchange Act*, 48 *FORDHAM L. REV.* 129, 131-33 (1979); *see also Note, Expanding the Transnational Scope of Federal Subject Matter Jurisdiction Under the Commodity Exchange Act*, 10 *N.C.J. INT'L L. & COM. REG.* 239, 240 (1984); *Note, supra* note 5, at 626.

11. *See Johnson & Sackheim, Long-Arm Powers for the CFTC*, 5 *INT'L FIN. L. REV.* 13, 14 (1986); *Note, supra* note 2, at 1216 n.6.

low the CFTC to exercise its regulatory powers over violators located abroad,<sup>12</sup> this was not, by far, a uniform approach.<sup>13</sup>

In *CFTC v. Nahas*,<sup>14</sup> the court invalidated service of a CFTC extraterritorial subpoena upon a Brazilian national. The court held that service of compulsory process upon a foreign citizen on foreign soil violates international law, unless the foreign sovereign consents.<sup>15</sup> The *Nahas* court partly relied on *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*<sup>16</sup> in reaching its decision. In *Saint-Gobain*, the court also invalidated an extraterritorial subpoena, holding that "the act of service *itself* constitutes an exercise of one nation's sovereignty within the territory of another sovereign. . . . constitut[ing] a violation of international law."<sup>17</sup> The *Nahas* court expressly did not challenge Congress' ability to enact such a law, but stated that it was unwilling to allow enforcement, absent a clearer indication of congressional intent to allow such service.<sup>18</sup>

In response to the *Nahas* decision, the CFTC asked Congress to clarify its extraterritorial subpoena powers.<sup>19</sup> The CFTC believed that if this problem remained unsolved, violators would be able to evade the CEA merely by remaining outside the United States.<sup>20</sup> The CFTC also recognized, however, that international law might proscribe certain extraterritorial subpoena powers and that the possibility of potential conflicts must be minimized.<sup>21</sup> The CFTC assured Congress

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12. See, e.g., *CFTC v. Muller*, 570 F.2d 1296 (5th Cir. 1978) (relying on CEA antifraud provisions, court upheld subject matter jurisdiction over extraterritorial transactions on the basis of Congressional intent); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983) (same).

13. See *CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984).

14. 738 F.2d 487 (D.C. Cir. 1984).

15. *Id.* at 493-94.

16. 636 F.2d 1300 (D.C. Cir. 1980); see *Nahas*, 738 F.2d at 495.

17. 636 F.2d at 1313.

18. 738 F.2d at 495.

19. See H.R. REP. NO. 624, *supra* note 10, at 6028.

20. *Text of S. 2045 and Explanation of the Bill by the Commodity Futures Trading Commission* [1986 Transfer Binder] Comm. Fut. L. Rep. (CCH), Special Rep. 1, No. 272, 16-17 (Feb. 28, 1986) [hereinafter *Senate Report of Feb. 28, 1986*].

21. See *Text of Senate Report No. 99-291 and S. 2045 as reported by the Senate Comm. on Agriculture, Nutrition and Forestry with amendment*, [1986 Transfer Binder] Comm. Fut. L. Rep. (CCH), Special Report 2, No. 277, 33-34 (May 9, 1986) [hereinafter *Senate Report of May 9, 1986*]. Congress received two communications objecting to the amendment's negative impact on the sovereignty of Great Britain. One communication, a note dated February 20, 1986, from the government of the United Kingdom to the

that such powers would be invoked sparingly, and only after careful consideration by all five of the CFTC commissioners.<sup>22</sup>

During the legislative hearings on the amendment, at least one Congressman noted the potential conflict with international law posed by the subpoena powers, and argued against their passage.<sup>23</sup> Nevertheless, Congress promulgated the amendment granting extraterritorial subpoena powers, but with the express reservation that the CFTC make all efforts to comply with international law.<sup>24</sup> Additionally, Congress re-

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United States Department of State, stated that the CFTC should request information from sources in Great Britain only through bilateral agreement. The other communication, a statement issued February 21, 1986, by five London commodity exchanges, contained similar concern. The CFTC responded to these two communications in a letter dated March 24, 1986 to the Chairman of the Senate Committee on Agriculture, Nutrition and Forestry by stating that:

although dependent on the facts and circumstances of a particular case, where appropriate the Commission intends to consult through the State Department with the representative of the receiving nation with a view toward minimizing any perceived intrusion upon that nation's sovereignty. In addition, where there are particular treaties or governmental mutual assistance guarantees, the Commission would contemplate utilizing them to the extent practicable.

*Id.* at 34.

22. See H.R. REP. NO. 624, *supra* note 10, at 6057. In a letter dated May 1, 1986, from Commission Chairman Phillips to the Chairman of the House Subcommittee on Conservation, Credit, and Rural Development, the CFTC repeated their "assurances that the Commission's authority to issue extraterritorial subpoenas embodied in H.R. 4613 would not be used routinely." *Id.*

23. See H.R. REP. NO. 624, *supra* note 10, at 6034-35 (comments of Congressman Daschle). Congressman Daschle offered an amendment to H.R. 4613 (the House version of the Futures Trading Act of 1986) that would delete the provision authorizing extraterritorial subpoena service for the CFTC, because he believed the provision was an unnecessary extension of the CFTC's powers and would constitute a violation of international law. *Id.* at 6034. Congressman Coleman argued against the Daschle amendment, stating that the internationalization of commodities trading necessitated the special subpoena powers. *Id.* In addition, if the Daschle amendment were defeated, Congressman Coleman would offer a statement of Committee intent to clarify the provision and address the concerns of Congressman Daschle. *Id.* The Daschle amendment was subsequently defeated on a voice vote, and Congressman Coleman's statement of Committee intent was adopted. *Id.* at 6035.

24. See H.R. REP. NO. 624, *supra* note 10, 6016, at 6019-20 (Section-By-Section Analysis). This section states, in relevant part:

The Committee expects the Commission to exercise the new authority appropriately in light of pertinent international factors. The Commission has assured the Committee that it is sensitive to the issues raised by foreign governments and foreign exchanges with respect to this authority and that it desires to exercise the authority in a way that will take those concerns into consideration.

*Id.* at 6020.

quired that the entire Commission approve issuance of an extraterritorial subpoena, and not just a single commissioner.<sup>25</sup>

Congress intended the 1986 amendment to parallel two other federal statutes,<sup>26</sup> which grant extraterritorial powers to

25. The legislative history is unclear whether "prior approval of the Commission" requires unanimity among the commissioners. See *Joint Explanatory Statement of the Committee of Conference*, H.R. CONF. REP. NO. 995, 99th Cong., 2d Sess. 21, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 6066, 6067 [hereinafter *Joint Explanatory Statement*]. The original Senate proposal provided that "[a] subpoena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country." See *Senate Report of Feb. 28, 1986*, *supra* note 20, at 2. There was no mention that prior approval of the full five person Commission would be necessary for the issuance of an extraterritorial subpoena. *Id.* The initial House proposal stated that "a majority vote of the Commission" was necessary to serve investigatory subpoenas outside the United States. H.R. REP. NO. 24, *supra* note 10, at 6033. The amendment as passed uses the following language: "a subpoena [sic] to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission." 7 U.S.C. § 15 (1982). The present statute does not seem to require the unanimity of the five person Commission, although this is not clear from the statute. See *id.* The Joint Explanatory Statement of the Committee of Conference states:

The House bill provides that an extraterritorial subpoena [sic] could be issued only on the prior approval of the Commission. [citation omitted] . . .

The Senate amendment does not contain a similar provision . . . .

The Conference substitute adopts the House provision. . . .

*The conferees intend that the Commission not routinely serve subpoenas [sic] abroad.* It is further the intention of the conferees that the Commission, when exercising its authority to serve subpoenas [sic], take into consideration the implications of such service on the broader foreign policy objectives of the United States. The conferees expect the Commission to find means of obtaining information in a way that seeks to avoid offending other nations and to consult with representatives of the receiving nation through the Department of State *with a view toward minimizing any perceived intrusion on the sovereignty of that nation, where practicable and appropriate.*

*Joint Explanatory Statement, supra*, at 6067 (emphasis added).

26. *Id.* The Joint Explanatory Statement of the Committee of Conference states:

The conferees expect that the Commission's authority will parallel the current authority of the Department of Justice and the Federal Trade Commission in serving civil investigative demands abroad. It is the intent of the conferees that the Commission's use of subpoena [sic] power abroad be limited to the pre-complaint, investigatory stage of enforcement proceedings. *Id.* See also H.R. REP. NO. 624, *supra* note 10, at 6020.

Commission Chairman Phillips, responding to Congressional criticism of the extraterritorial extension of the CFTC's subpoena powers, stated:

CIDs and the Commission's requested subpoena authority are parallel courses for the obtaining of needed investigatory evidence. In order to clarify any uncertainty about the scope of our proposal, we intend that the use of Commission extraterritorial subpoenas would be limited to the pre-com-

the United States Department of Justice<sup>27</sup> and the Federal Trade Commission<sup>28</sup> (FTC). The analogous subpoena powers provided by these statutes are referred to as civil investigative demands<sup>29</sup> (CIDs). The only substantial difference noted between the CFTC powers and the CIDs is that the entire Commission must approve the issuance of a CFTC subpoena,<sup>30</sup> whereas the other agencies' subpoenas can be issued by a single individual.<sup>31</sup> These analogous subpoena powers provide guidance to a United States court defining the CFTC's extraterritorial subpoena powers.<sup>32</sup>

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plaint, investigatory stage of enforcement proceedings. As a result, the scope of our requested subpoena authority would be very similar to that which presently exists for CIDs. We would not object to appropriate report language to make this clear. Moreover, there is an additional procedural safeguard for the issuance of a Commission subpoena. Under H.R. 4613, the full Commission must approve the issuance of an extraterritorial subpoena, while CIDs can be issued by a single individual.

H.R. REP. NO. 624, *supra* note 10, at 6056-57 (letter dated May 1, 1986 from Commission Chairman Phillips to the Chairman of the House Subcommittee on Conservation, Credit, and Rural Development).

27. See 15 U.S.C. § 1312(d)(2) (1982). The language of this section is almost identical to the CFTC amendment. This section states, in part, that "any such demand . . . may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country." *Id.* (emphasis added). Although this section was promulgated in 1976, there are no reported cases directly interpreting this section as of the time of this writing. For the legislative history of this section, see Pub. L. No. 94-435, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572.

28. See 15 U.S.C. § 57b-1(c) (1982). The language of this section is also almost identical to the CFTC amendment. This section states, in part, that "[a]ny such demand . . . may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country." *Id.* (emphasis added). The section was added in 1980, and there are no reported cases directly interpreting this section at the time of this writing. *But see* FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson, 636 F.2d 1300, 1325 n.140 (D.C. Cir. 1980) (discussion of the statute is dictum since the statute was passed during the pendency of the case); Note, *Use of Registered Mail by Federal Trade Commission to Subpoena Foreign Citizens Abroad Violates International Law*, 14 VAND. J. TRANSNAT'L L. 663, 673 & n.37 (1981). For the legislative history of this section, see Pub. L. 96-252, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1073; see also Note, *International Trade: FTC Service of Subpoena Abroad—FTC Improvements Act of 1980*, 22 HARV. INT'L L. J. 458 (1981).

29. See 1 B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTI-TRUST: A COMPARATIVE GUIDE 704-09 (2d ed. 1985).

30. See *supra* note 25 and accompanying text.

31. See *supra* notes 27-28.

32. In CFTC v. Nahas, 738 F.2d 487, 493-94 (D.C. Cir. 1984), the court thoroughly analyzed and applied the FTC's extraterritorial subpoena powers to the CFTC. The court stated that the "[CFTC] ignored guidance by this court in *Saint-*

### B. *The Operation of the New CFTC Subpoena Powers*

The 1986 amendment allows service of subpoenas according to the methods prescribed in Rule 4(i) of the Federal Rules of Civil Procedure (FRCP) for service of process in a foreign country.<sup>33</sup> The FRCP provide five alternative methods for service of process in a foreign country: 1) in the manner prescribed by the law of the foreign country, 2) as directed by the foreign authority in response to a letter rogatory, 3) by personal service upon an individual, or upon a corporation or partnership or association, 4) by any form of mail, requiring a signed receipt, or 5) as directed by order of the United States court.<sup>34</sup>

The amendment's legislative history does not state why this FRCP provision for service of process in a foreign country was chosen over other FRCP provisions for foreign discovery.<sup>35</sup> This provision is identical to the provisions in the Department of Justice and FTC statutes.<sup>36</sup> One reason might be that FRCP 4(i) provides five alternative methods which gives the CFTC flexibility and discretion in choosing the most ap-

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*Gobain* concerning methods of extraterritorial service that would minimize intrusion on another nation's sovereignty . . . ." *Id.* at 494 n.15; see *infra* notes 71-78 and accompanying text (discussion of *Saint-Gobain*). Traditionally, United States courts have applied securities law to the adjudication of commodities violations, because the law in the securities area is more developed. See, e.g., *Psimenos v. E.F. Hutton*, 722 F.2d 1041, 1044 (2d Cir. 1983) (securities law analogy is useful in commodities cases because extraterritorial securities violations are more extensively litigated); *Tamari v. Bache & Co. (Lebanon)*, 547 F. Supp. 309, 311 (N.D. Ill. 1982), *aff'd*, 730 F.2d 1103, 1106-07 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Mormels v. Girofinance S.A.*, 544 F.Supp. 815, 817 (S.D.N.Y. 1982). However, the SEC does not possess the same extraterritorial subpoena powers as the CFTC. *Johnson & Sackheim*, *supra* note 11, at 13.

33. See *supra* note 6 (text of the CFTC amendment); FED. R. CIV. P. 4(i).

34. Fed. R. Civ. P. 4(i). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed adding two more methods of service to this subdivision. FED. R. CIV. P. 4(i) advisory committee's note (1963). The proposed methods permit: 1) service pursuant to any applicable treaty or convention, and 2) service by diplomatic and consular officers when authorized by the United States Department of State. *Id.*

35. See *supra* notes 22-36 and accompanying text. Congress modeled the CFTC amendment after the parallel CID powers, which incorporate Rule 4(i) of the Federal Rules of Civil Procedure (FRCP). See *supra* notes 28-29 (legislative history of the CID powers); *infra* notes 111-12 (other FRCP provisions that deal with foreign discovery).

36. See *supra* notes 26-28 (text of the statutes, and comparison of the CFTC amendment and the CID powers).

propriate method, depending on the country involved.<sup>37</sup>

The FRCP Advisory Committee Notes explain that Rule 4(i) is intended to accommodate the policies and procedures of the foreign country.<sup>38</sup> The law of the country in which process is to be served should be examined before a choice is made among the methods of service allowed by the subdivision.<sup>39</sup> This approach conforms with the congressional intent behind the new CFTC extraterritorial subpoena powers.<sup>40</sup>

## II. EXAMINING THE CFTC'S SUBPOENA POWERS UNDER INTERNATIONAL STANDARDS OF EXTRATERRITORIAL DISCOVERY

The 1986 amendment requires the CFTC to comply with international standards, where possible, in exercising its extraterritorial subpoena powers.<sup>41</sup> There are, however, different standards under international law,<sup>42</sup> ranging from the traditional territorial principle that proscribes extraterritorial

37. The legislative history of FRCP 4(i) states:

Subdivision (i) introduces considerable . . . flexibility by permitting the foreign service and the return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. . . . The enforcement of a judgement in the foreign country in which the service was made may be embarrassed or prevented if the service [does] not comport with the law of that country. . . . One of the purposes of subdivision (i) is to allow accomodation to the policies and procedures of the foreign country.

FED. R. CIV. P. 4(i) advisory committee's note (1963 amendments).

38. See J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* 173 (2d ed. 1974), which discusses Federal Rule 4(i) as follows:

The intention of these provisions [was] to provide American attorneys with an extremely flexible framework to permit accomodation to the widely divergent procedures for service of process employed by the various nations of the world. This accomodation is necessary *in order to avoid violating the sovereignty of other countries* by committing acts within their borders that they may consider to be "official" and to maximize the likelihood that the judgement rendered in the action in this country will be recognized and enforced abroad.

*Id.* (emphasis added); see also Note, *United States Foreign Subpoena Power Subdued: The Case of the Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 8 *BROOKLYN J. INT'L L.* 499, 511-12 (1982).

39. See FED. R. CIV. P. 4(i) practice commentaries, in 28 U.S.C.A. § 4, at 73 (1985).

40. See *supra* note 24 and accompanying text.

41. *Id.*

42. See 1 B. HAWK, *supra* note 29, at 74; Statute of the International Court of Justice, art. 38 (1).

power without the sovereign's consent,<sup>43</sup> to the Restatement of the Foreign Relations Law of the United States (Revised), which puts an emphasis on the reasonableness of the extraterritorial discovery request.<sup>44</sup>

### A. *The Territorial Principle*

The traditional view is that a state's enforcement powers extend to the boundaries of that state, and not beyond.<sup>45</sup> A state may not exercise its powers in any form in the territory of another state, unless the other state gives its consent.<sup>46</sup> This viewpoint is known as the territorial principle and is very constrictive in an internationalized trading system, in which people and commerce move regularly across state lines.<sup>47</sup> Nonetheless this view is predominant in many nations.<sup>48</sup> Any claim of extraterritorial power is in direct conflict with international law pursuant to this view, absent consent by the sovereign involved.<sup>49</sup> Under this view, therefore, the CFTC would have to request permission from the sovereign in order to issue a sub-

43. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (3d ed. 1979); 2 D. O'CONNELL, *INTERNATIONAL LAW* 599 (2d ed. 1970); G. SCHWARZENBERGER & E. BROWN, *A MANUAL OF INTERNATIONAL LAW* 74 (6th ed. 1976).

44. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437 (Tent. Draft No. 7, 1986) [hereinafter RESTATEMENT, 7th Draft]; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 431 (Tent. Final Draft, 1985) [hereinafter RESTATEMENT, Tentative Final Draft].

45. See *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10 at 18, reprinted in 2 M. HUDSON, *WORLD COURT REPORTS* 20, 35 (1927-32).

46. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (Holmes, J.); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

47. See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 3346, 3355 (1985); Comment, *Exercising Federal Long-Arm Jurisdiction Over A Non-Resident Alien Corporation to Enforce a Subpoena Compelling Production of Documents in Violation of the Law of the Situs*, 30 N.Y.L. SCH. L. REV. 71, 79 (1985) ("The international processes of authoritative decision making have had to reconcile the historical facts and theory of territoriality with the exigencies of the developing international trading system, in which persons and commerce frequently moved across state lines.").

48. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 9, 95 (Hague Academy of Int'l Law 1984). The strict territoriality approach is still especially popular in the United Kingdom. See D. ROSENTHAL & W. KNIGHTON, *NATIONAL LAWS AND INTERNATIONAL COMMERCE: THE PROBLEM OF EXTRATERRITORIALITY* (1982).

49. See Collins, *International Law Aspects of Obtaining Evidence Abroad*, in *EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO* 184 (C. Olmstead ed. 1984). Foreign objections to U.S. discovery, however, have almost invariably been

poena within its borders. Any nation subscribing to this view would have no obligation to allow or enforce such a subpoena.

### B. *The Restatement Viewpoint*

The territorial principle was originally adopted by the Restatement (Second) of the Foreign Relations Law of the United States,<sup>50</sup> but in its latest revision, the Restatement changed its position, and now permits extraterritorial discovery if the means used are reasonable.<sup>51</sup> The reasonableness concept is akin to the principle of comity,<sup>52</sup> or, respect for the laws of other nations. This approach incorporates the "effects doctrine," which allows a nation to assert jurisdiction over an ex-

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linked to challenges to the validity of the underlying jurisdiction or the substance of the claim. *Id.* at 186-89.

50. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965) [hereinafter SECOND RESTATEMENT].

51. RESTATEMENT, 7th Draft, *supra* note 44, § 437 (1)(c); RESTATEMENT, Tentative Final Draft, *supra* note 44, § 431 comment d. The seventh draft imposes two specific limitations on United States foreign discovery. First, orders to produce documents or information located abroad should be issued by a court, or an administrative agency where authorized by statute, and not by a private party. Justice Department and Federal Trade Commission CIDs, and CFTC subpoenas are expressly authorized by statute, so a court order is not required. RESTATEMENT, 7th Draft, *supra* note 44, § 437 (1) & comment a. Second, requests for extraterritorial discovery should meet a more stringent test of direct relevancy, necessity and materiality than is required for requests for information located in the United States. *Id.*

Section 437 of the Restatement states that a court should take into account a number of factors when directing production of information located abroad, including, among other factors: the importance of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the extent to which compliance would undermine important interests of the foreign state; and the possibility of alternative means of securing information. *Id.* § 437 (1)(c); *see, e.g.*, *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162 (C.D. Cal. 1983) (relying on an earlier provision to section 437 of the Restatement).

52. Comity is a general concept connoting mutual respect for the sovereignty and interests of other states. *See Note, Compelled Waiver of Bank Secrecy in the Cayman Islands: Solution to International Tax Evasion or Threat to Sovereignty of Nations?* 9 FORDHAM INT'L L.J. 680, 715 n.158 (1986). The principle is well-established in United States law. *See Hilton v. Guyot*, 159 U.S. 113 (1895). Comity is frequently defined in terms of deference to foreign government action or interests. *See, e.g.*, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum"). Comity does not require deference to foreign interests which are fundamentally contrary to significant public policies of the forum state. *See, e.g.*, *Hilton*, 159 U.S. at 164; *Tahan v. Hodgson*, 662 F.2d 862, 864, 866 (D.C. Cir. 1981); *see also Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 282 (1982).

tratrerritorial actor who causes effects within that nation's territory.<sup>53</sup> In such cases, the use of extraterritorial subpoena power is justifiable. Clearly, foreign market participants have an effect on domestic commodities markets, and thus they are subject to the CFTC's extraterritorial subpoena powers under the effects doctrine.<sup>54</sup>

In its most recent revision, the Restatement also provides that any person who executes a commodities transaction on a United States exchange is subject to United States jurisdiction.<sup>55</sup> This view enhances the CFTC's ability to enforce its subpoena powers over foreign market participants. However, the Restatement view represents the United States viewpoint of international law, and not necessarily the international community's viewpoint.<sup>56</sup> Moreover, even United States legal commentators have not fully accepted the Restatement view.<sup>57</sup>

### C. Blocking Statutes

Statutes that block discovery requests are a considerable obstacle to the service of extraterritorial subpoenas.<sup>58</sup> Blocking statutes are often enacted by civil law countries which do not have pre-trial discovery and which are usually antagonistic towards foreign pre-trial discovery requests, especially when issued by non-judicial parties.<sup>59</sup> Concerns for privacy are an-

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53. SECOND RESTATEMENT, *supra* note 50, § 18.

54. See RESTATEMENT, 7th Draft, *supra* note 44, § 416 (1)(b) & comment c.

55. *Id.*

56. See, e.g., 1 B. HAWK, *supra* note 29, at 78-79.

57. See *id.*

58. See, e.g., Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61 (1983); Rosdeitcher, *Foreign Blocking Statutes and U.S. Discovery: A Conflict of National Policies*, 16 N.Y.U. J. INT'L L. & POL. 1061 (1984); Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982); Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 YALE L. J. 612 (1979).

59. See, e.g., Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L. Q. 646, 650 (1969) ("Discovery . . . is not known to continental systems of law because there the testimony is taken by the court and assistance is not given to the parties to the proceedings to obtain evidence."); Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States - A Practical Guide*, 16 INT'L LAW. 575 (1982); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465, 467-68 (1983) ("Under German law, the examination of the witness is usually conducted by the judge . . . Normally, no verbatim transcript of the testimony will be

other reason for the enactment of these statutes.<sup>60</sup> These statutes usually operate by prohibiting compliance with a subpoena unless it is processed through an official channel for obtaining evidence.<sup>61</sup> Some blocking statutes subject the target of the subpoena to both civil and criminal penalties for compliance with the subpoena, leaving the party receiving the subpoena in the dilemma of risking sanctions by either government.<sup>62</sup>

The presence of a foreign blocking statute could result in the non-enforcement of a CFTC subpoena by a United States court, as well as non-recognition by the foreign sovereign. Although United States courts often do not honor blocking statutes,<sup>63</sup> they apply a balancing test to weigh the foreign sovereign's interest in prohibiting discovery against the United States' interest in obtaining information.<sup>64</sup> If the foreign interests are deemed legitimate, a United States court will not order compliance with the subpoena.<sup>65</sup> However, even if the court finds that United States interests prevail, and enforces the subpoena on penalty of sanction, the foreign nation may consider

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made . . . . Rather, the judge usually dictates the testimony of the witness in summarized form to the clerk of the court.''); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1058 (1961); see also Seidel, *Introduction and Overview*, in *EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION* 22-24 (1984); Heck, *Federal Republic of Germany and the EEC, Transnational Litigation-Part II: Perspectives from the U.S. and Abroad*, 18 INT'L LAW. 771, 794-95 (1984).

60. See STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 98TH CONG., 1ST SESS., *CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES* 7 (Comm. Print 1983). Swiss bank secrecy laws are an example of this. *Id.*

61. See *supra* notes 58-59.

62. See 1 B. HAWK, *supra* note 29, at 726; see also *infra* note 75 (text of the note from the French embassy describing the legal consequences for a French company complying with an unauthorized United States request for discovery).

63. Some courts adopt a balancing test, considering such factors as the relative interests of the two nations, the hardship to the subpoenaed party due to compliance, and the availability of alternate means of compliance, and general principles of comity. See, e.g., *United States v. First Nat'l City Bank*, 396 F.2d 897, 902 (2d Cir. 1968). These decisions rely in part on section 40 of the Restatement (Second) of the Foreign Relations Law of the United States, which calls for a general balancing test with respect to jurisdiction. See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

64. See *supra* note 63.

65. See, e.g., *United States v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

this an affront to its sovereignty, and refuse to enforce the subpoena.<sup>66</sup> Thus, the presence of foreign blocking statutes is one of the most difficult problems the CFTC will face in exercising its extraterritorial subpoena powers.

### III. AN APPROPRIATE APPROACH TOWARDS SERVING CFTC SUBPOENAS ABROAD

An approach is needed for serving CFTC investigative subpoenas abroad that minimizes conflicts with the sovereignty of other nations. Although Congress intended to minimize such conflict, the 1986 amendment does not specifically require any procedure for minimizing conflicts with international law.<sup>67</sup> The CFTC can satisfy the requirements of the 1986 amendment by choosing any of the five methods listed in FRCP 4(i).<sup>68</sup> However, these methods are received in dramatically different ways by the international community.<sup>69</sup> The third and fourth provisions of FRCP 4(i) service, service by registered mail, and personal service, are the most offensive to international law and should only be employed if the other methods are unavailable or ineffective.<sup>70</sup>

#### A. Methods Disfavored Under International Law

The third method of service of subpoenas under FRCP 4(i), service by registered mail, is highly intrusive upon the sovereignty of another nation, even by expansive jurisdictional standards.<sup>71</sup> In *FTC v. Compagnie de Saint-Gobain-Pont-à-Mousson*,

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66. See *supra* notes 58-59.

67. The statutory intent of the CFTC amendment requires methods to be sought which "minimiz[e] any perceived intrusion on the sovereignty of that nation," but only "where practicable and appropriate." *Joint Explanatory Statement, supra* note 25, at 6067. This suggests that Congress intended the CFTC to first resort to the first, second and fifth alternatives of FRCP 4(i) service, and only after that, resort to service by registered mail and personal service, which are considered intrusive methods on sovereignty. See *infra* notes 71-82 and accompanying text.

68. See *supra* note 6 (text of the CFTC amendment).

69. For example, during the pendency of *CFTC v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the Brazilian Ministry of Foreign Affairs sent a letter to the United States Secretary of State protesting the fact that personal service was carried out in Brazil, contrary to the Brazilian requirement of either service pursuant to letter rogatory or service pursuant to a letter of request transmitted through diplomatic channels. *Id.* at 490, 494.

70. See *supra* note 67.

71. "Even within the United States, and even upon a United States citizen, ser-

the United States Court of Appeals for the District of Columbia Circuit invalidated an FTC CID sent by registered mail to a corporation located in France.<sup>72</sup> The court stated that “[w]hen process in the form of summons and complaint is served overseas, the informational nature of that process renders the act of service relatively benign.”<sup>73</sup> However, “[g]iven the compulsory nature of a 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 . . . established channels of international judicial assistance, is perhaps maximally intrusive.”<sup>74</sup> Thus, such service violates international law.<sup>75</sup>

The *Saint-Gobain* court emphasized that a basic problem with FRCP 4(i) service is that it is primarily intended for service of summons and complaint, and not for service of subpoenas, which normally is provided for in FRCP 45.<sup>76</sup> FRCP 45,

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vice by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.” *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980).

72. *Id.* at 1306.

73. *Id.* at 1313.

74. *Id.*

75. Following argument on remand, a note was sent to the State Department by the French Embassy expressing disfavor with the FTC’s direct transmittal of its subpoena to the defendant’s Parisian headquarters, and declaring such an act a “failure to recognize French sovereignty.” *Id.* at 1306 n.18. The relevant text of the French note read as follows:

The Embassy of France informs the Department of State that the transmittal by the FTC of a subpoena directly by mail to a French company (in this case Saint-Gobain-Pont-à-Mousson) is inconsistent with the general principles of international law and constitutes a failure to recognize French sovereignty . . . . Moreover, the French Government has expressed formal reservations regarding the application in France of the principle of pre-trial discovery of documents characteristic of common law countries.

Furthermore, the response to certain of the requests from the FTC could subject the directors of Saint-Gobain-Pont-à-Mousson to civil and criminal liability and therefore expose them to judicial proceedings in France.

Consequently, the Embassy of France would be grateful if the Department of State would make this position known to the various American authorities concerned by informing them that the French Government wishes such steps both in this matter and in any others which may subsequently arise, to be taken solely through diplomatic channels.

*Id.*

76. See FED. R. CIV. P. 45. Service of subpoenas is specifically excluded under the provisions of FRCP 4(f). Rather, it is governed by FRCP 45 which mandates personal service of subpoenas in all cases except where foreign service is necessary, in

which governs subpoena service within the United States, does not permit any form of mail service.<sup>77</sup> Therefore, service of an extraterritorial subpoena, sent by registered mail pursuant to FRCP 4(i), is a form of service which would not be allowed if served within the United States. It is understandable that a foreign sovereign would find such a method of service objectionable, because the United States itself requires more rigorous methods for serving compulsory process within its borders.<sup>78</sup>

The fourth method of service, personal service, is similarly intrusive. In *CFTC v. Nahas*, the United States Court of Appeals for the District of Columbia Circuit held that personal service violated international law, even though the service was accomplished through a local attorney.<sup>79</sup> The service violated international law because it circumvented Brazilian requirements of a letter rogatory or a letter of request sent through diplomatic channels.<sup>80</sup>

If the *Nahas* court had allowed service of the subpoena despite the conflict with international law, the receiving party probably would have complied because the lower court attached a judicial lien to the party's considerable assets in the United States.<sup>81</sup> If a foreign recipient does not possess any assets in the United States and does not plan to travel to the United States during the pendency of the litigation, the CFTC or any United States court can do little to enforce personal ser-

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which case the provisions of 28 U.S.C. § 1783 are controlling. Section 1783 (a) allows subpoena service in a foreign country in accordance with the methods enumerated in Rule 4(i) but such service may only be effected upon "a national or resident of the United States who is in a foreign country." The subpoena of foreign nationals is not provided for in this section nor in any of the other Federal Rules of Civil Procedure. Thus, federal civil procedure does not fully regulate subpoena service on an alien in a foreign country. Note, *supra* note 37, 512.

77. *Saint-Gobain*, 636 F.2d at 1313.

78. *Id.* at 1324; cf. Note, *supra* note 52, at 727 n.222 (discussion of this problem in context of international tax evasion and bank secrecy).

79. 738 F.2d 487, 489 n.1 (D.C. Cir. 1984).

80. *Id.* at 494.

81. *Id.* at 490. The district court in *Nahas* issued orders freezing Nahas' assets in the United States and directing Nahas to show cause why he should not be held in civil contempt. *Id.* Nahas' assets in the United States at this time were valued at US\$12,000,000. *Id.* at 490 n.3. Nahas was subsequently ordered to pay a fine of US\$5,000 for each day after December 28, 1983 that he failed to satisfy the subpoena. *Id.* at 490 n.6. If Nahas did not comply by January 6, 1984, the daily fine would increase to US\$10,000 and a bench warrant for his arrest would issue. *Id.*

vice without the cooperation of a foreign court.<sup>82</sup> Thus, the method is often impracticable as well as intrusive.

### B. *Methods Favored Under International Law*

The first method, conforming with the laws of the local forum, is the most likely to secure the cooperation of the foreign sovereign.<sup>83</sup> This method also complies with international standards of extraterritorial discovery, because it complies with the territorial principle and principles of comity.<sup>84</sup> Additionally, this method is consistent with the Congressional intent of respecting foreign laws where possible.<sup>85</sup> However, there is no guarantee of enforcement despite deference to foreign laws, because the sovereign might statutorily bar compliance with extraterritorial discovery requests.<sup>86</sup> Both France and the United Kingdom have blocking statutes that absolutely ban compliance with extraterritorial subpoenas, absent government approval, no matter how deferential the method of service.<sup>87</sup>

The letter rogatory method is also an inoffensive method to obtain testimony in civil law countries, because it does not interfere with the sovereignty of the foreign country.<sup>88</sup> Normally, a letter rogatory is a formal request from a United States court to a foreign court that the latter exercise its usual process to compel testimony or the production of documents, but this request might also be accomplished through diplomatic channels.<sup>89</sup> However, in the absence of a treaty, such letters are only honored on the basis of comity, so enforcement by a for-

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82. Newman & Burrows, *Obtaining Evidence Abroad Introduction*, N.Y.L.J., September 25, 1984, at 2, col. 2. A subpoena will only be effective against an uncooperative witness if he is susceptible to the contempt provisions of the United States court, without the cooperation of the foreign court. *Id.* The subject of the subpoena must have significant assets in the United States or plan to travel to the United States during the pendency of the litigation for the court to have any effect over him. *Id.*

83. *See supra* notes 48-49 and accompanying text (territorial approach, which requires getting the cooperation of the foreign sovereign, still prevalent in many nations).

84. *See supra* notes 45-49, 52 and accompanying text.

85. *See supra* notes 23-25.

86. *See supra* notes 58-66 and accompanying text.

87. I B. HAWK, *supra* note 29, at 718-23.

88. *See Peloso, CFTC Subpoena Power*, N.Y.L.J., June 26, 1986, at 2, col. 2.

89. *Id.* at 2, col. 5.

foreign court is uncertain.<sup>90</sup> Additionally, even if a letter rogatory is honored, the process is very time consuming.<sup>91</sup>

Letters rogatory are acceptable under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>92</sup> (Hague Convention), and in fact are the primary method specified for foreign discovery.<sup>93</sup> However, only eighteen nations are signatories,<sup>94</sup> and thus even if an extraterritorial subpoena conforms to Hague procedures, many nations may not recognize it. Also, many nations that are signatories entered with the reservation that the Convention will not apply to pre-trial discovery.<sup>95</sup> In addition, the Hague Convention only applies to "civil and commercial matters," possibly excluding the CFTC's investigatory subpoenas, because disclosure to the CFTC can lead to criminal liability.<sup>96</sup>

Moreover, the Hague Convention applies only to requests

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90. *Id.*

91. Newman & Burrows, *supra* note 82, at 2, col. 4.

92. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, *reprinted in* 28 U.S.C.A. § 1781 (West Supp. 1986) [hereinafter 1970 Hague Convention]. The 1970 Hague Convention, which entered into force for the United States on October 7, 1972, is designed to improve mutual cooperation between countries in matters affecting litigation. *Id.* (preface). This convention allows evidence abroad to be obtained by means of a "Letter of Request" sent to the competent authority in the receiving country. *Id.* arts. 1-2. The central authority established pursuant to the 1965 Hague Convention, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6338, 658 U.N.T.S. 163, *reprinted in* FED. R. CIV. P. ANN. 4 app. (West Supp. 1986), presumably suffices as a "competent authority." *See* Note, *supra* note 38, at 513 n.74. In *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980), France designated its diplomatic officials as its competent authority. *See supra* note 75.

93. *See* 1970 Hague Convention, *supra* note 92, arts. 1-14 (the Convention refers to letters rogatory as "Letters of Request").

94. As of 1986, sixteen countries are signatories to the 1970 Convention besides the United States: Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom. OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, PUB. NO. 9943, TREATIES IN FORCE 261-62 (1986).

95. The United Kingdom and France do not allow the 1970 Hague Convention to be used for the purposes of furthering pre-trial discovery. Collins, *supra* note 49, at 191; *see* Newman & Burrows, *supra* note 82, at 4, col. 1; *see also* Murphy v. Reifenhauer KG Maschinenfabrik, 101 F.R.D. 360, 361 (D. Vt. 1984) ("Germany has exercised its right not to execute letters of request 'issued for the purpose of obtaining pre-trial discovery of documents as known in Common law countries.'" (quoting 1970 Hague Convention, art. 23, n.2b)).

96. Newman & Burrows, *supra* note 82, at 4, col. 1.

issued by a court and not by an administrative agency such as the CFTC.<sup>97</sup> Thus, the CFTC would be required to obtain court approval for issuance of a subpoena. Also, Article 12 of the Convention permits a signatory nation to declare that it will neither execute nor enforce a letter rogatory for pretrial discovery if doing so would infringe on its "sovereignty or security."<sup>98</sup> Additionally, a signatory may refuse to execute a letter rogatory if the target of the subpoena is able to claim a privilege pursuant to the signatory's laws.<sup>99</sup>

United States courts have interpreted the Hague Convention inconsistently. Some United States courts hold that the Hague Convention is not the exclusive means of obtaining evidence located abroad, especially in light of the language in the Convention.<sup>100</sup> Other United States courts hold that principles of comity require using the Convention initially before resorting to the discovery methods of the FRCP.<sup>101</sup> Still other United States courts have held that consideration of the Convention is not required at all.<sup>102</sup> However, despite these drawbacks, if the party receiving the subpoena resides in a country that belongs to the Convention, the Convention provides a valuable method for obtaining evidence.<sup>103</sup> Thus, resort to the Convention is an important initial step in issuing a CFTC extraterritorial subpoena.

Non-signatories to the Hague Convention also use letters

97. *See id.*

98. 1970 Hague Convention, *supra* note 92, art. 12.

99. *Id.* art. 11 (the target of a subpoena "may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence - under the law of the State of execution.").

100. *See, e.g., In re Société Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), *cert. granted*, 106 S. Ct. 2888 (1986); *Compagnie Française d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26-36 (S.D.N.Y. 1984). *But see Pain v. United Technologies Corp.*, 637 F.2d 775, 788-90 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

101. *See, e.g., Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 3d 874, 176 Cal. Rptr. 876 (1982).

102. *See, e.g., In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985), *cert. vacated*, 106 S. Ct. 2887 (1986) (mem.); *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *appeal docketed*, 106 S. Ct. 52 (1985).

103. *See, e.g., Heck, U.S. Misinterpretation of the Hague Evidence Convention of the Hague Convention*, 24 COLUM. J. TRANSNAT'L L. 231, 274-276 (1986); Comment, *Anschuetz, International Discovery: American-Style, and the Hague Evidence Convention*, 19 N.Y.U. J. INT'L L. & POL. 87 (1986).

rogatory, but the problem with these non-Convention letters is that they allow a foreign court to follow its own procedural rules.<sup>104</sup> Since under the procedural rules of some foreign courts there is no verbatim transcript taken of the testimony, nor an oath administered, this may lead to the collection of evidence inadmissible in a United States court.<sup>105</sup> The FRCP addresses this problem in part by providing that "[e]vidence obtained in response to a letter rogatory need not be excluded merely for the reasons that it is not a verbatim transcript or that the testimony was not taken under oath."<sup>106</sup> However, this provision may not apply to the 1986 amendment.<sup>107</sup> Even if the provision does apply, it is not binding on a United States court, because the admission of evidence is at the court's discretion.<sup>108</sup>

Despite the problems with letters rogatory, they are still the best method for extraterritorial discovery because they are widely accepted under traditional international law and are sometimes the only method of obtaining the evidence.<sup>109</sup> In addition, there is considerable United States case law and statutory law that can guide the CFTC in this area.<sup>110</sup> For example, the Walsh Act,<sup>111</sup> which applies to subpoenas of United States residents and citizens located abroad, but not foreign nationals, prescribes specific procedures for this form of service. FRCP 28(b) also prescribes specific procedures for letters rogatory, although it does not apply to FRCP 4(i).<sup>112</sup> Moreover,

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104. Newman & Burrows, *supra* note 82, at 2, cols. 4-6.

105. *Id.* at 2, cols. 4-5.

106. FED. R. CIV. P. 28(b).

107. Newman & Burrows, *supra* note 82, at 2, col. 5.

108. *Id.*

109. See *Ings v. Ferguson*, 282 F.2d 149, 152-53 (2d Cir. 1960). In *Ings*, the Second Circuit held that there should be initial resort to letters rogatory, if a Canadian statute blocked United States discovery efforts. *Id.* The court characterized letters rogatory as "the time honored custom of seeking evidence in foreign countries, particularly in cases in which the aid of foreign courts may be necessary." *Id.* at 151.

110. See *e.g.*, *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960); *United States v. Staples*, 256 F.2d 290 (9th Cir. 1958); *DeVilleneuve v. Moraing Journal Ass'n*, 206 F.70 (S.D.N.Y. 1913).

111. 28 U.S.C. §§ 1781-84.

112. FED. R. CIV. P. 28(b)(3). See *e.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 63 F.R.D. 94 (S.D.N.Y. 1973). FRCP 28(b) provides three methods of obtaining foreign discovery: notice, commission and letter rogatory. FED. R. CIV. P. 28(b). Under the commission procedure the party seeking the examination must apply to the district court in which the action is pending for the issuance of a commis-

United States courts have traditionally found it among their inherent powers to issue letters rogatory, unless there is a contrary federal statute.<sup>113</sup>

The last form of service under FRCP 4(i), by direction of the court in which the action is brought, is not always as intrusive as the previous two methods. The extent of the intrusiveness depends on the particular method employed by the court to effect service, and the court's respect for the foreign law involved.<sup>114</sup> However, in some foreign jurisdictions, greater judicial involvement in the discovery process is considered less of an intrusion on their sovereignty, because discovery is sought through judicial channels, rather than by private parties, as is the case in most United States pre-trial discovery.<sup>115</sup> This provision is also consonant with the Revised Restatement, which encourages judicial intervention in foreign pre-trial discovery.<sup>116</sup>

It should be noted that United States courts do not have to respect international standards for extraterritorial discovery, if an unambiguous statute, like the 1986 amendment, permits such service.<sup>117</sup> However, to enforce a subpoena in a

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sion appointing a person before whom the examination will take place. The commission itself provides the authority to administer any necessary oath and to take testimony. *Id.* A commission will not necessarily be issued to officials or members of the judiciary of the foreign requested state. See 1 B. HAWK, *supra* note 29, at 712. Some foreign countries are hostile to allowing a deposition to be taken in their country under these circumstances. von Mehren, *Discovery of Documentary and Other Evidence in a Foreign Country: Perspective of a U.S. Private Practitioner*, in *EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO* 194, 205-6 (C. Olmstead ed. 1984); see also FED. R. CIV. P. 28(b) advisory committee's note (1963).

113. See *United States v. Staples*, 256 F.2d 290 (9th Cir. 1958); *DeVilleneuve v. Moraing Journal Ass'n*, 206 F. 70 (S.D.N.Y. 1913).

114. The statutory intent of the CEA probably binds any court applying the CEA to seek discovery "with a view toward minimizing any perceived intrusion on the sovereignty of that nation, where practicable and appropriate." *Joint Explanatory Statement*, *supra* note 25.

115. In fact, "[f]oreign courts and other agencies frequently attempt to limit or block U.S. discovery efforts, particularly in the case of discovery by private parties without court order of intervention." 1 B. HAWK, *supra* note 29, at 711; see also von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U. J. INT'L L. & POL. 985 (1984).

116. See RESTATEMENT, 7th Draft, *supra* note 44, § 437.

117. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1180 n.42 (E.D. Pa. 1980), *rev'd on other grounds*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S. Ct 1863 (1985). "We emphasize again that it is United States law which we are bound to apply. The international law which we apply is not that expounded by the commentators, but that which has been accepted as part of our do-

United States court, there must be jurisdiction over the parties<sup>118</sup> and control of the evidence sought.<sup>119</sup> These two requirements lessen the intrusiveness of United States subpoenas, but still do not bring these subpoenas within international standards.<sup>120</sup>

If the jurisdiction involved has a blocking statute that totally prevents compliance with a CFTC subpoena,<sup>121</sup> the method of service chosen is irrelevant, because all forms of service would violate international law.<sup>122</sup> In this circumstance, the CFTC need only consider which method is most likely to

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mestic law; as a district court, we are not at liberty to write on *tablusa rasa* as [defendant] urges we should." *Id.* This is contrary to the situation in other countries, such as the Federal Republic of Germany, where the constitution provides that a German statute is invalid if it is contrary to fundamental international law principles. Grundgesetz art. 25 (FRG). United States courts must follow Congressional declarations even if contrary to international law, as long as they are consistent with the due process clause. *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959). Section 135 of the Restatement's Tentative Final Draft states that a congressional act supersedes an earlier rule of international law if preemption is clearly intended and if the act and the earlier rule cannot be fairly reconciled. RESTATEMENT, Tentative Final Draft, *supra* note 44, § 135.

118. A United States court may not exercise its adjudicatory authority over an individual unless it has power to reach him, as circumscribed by the due process clause of the Constitution. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Due process is not satisfied unless the defendant has sufficient "minimum contacts" with the forum such that the maintenance of a lawsuit against him in that forum does not offend "traditional notions of fair play and substantial justice." *Shaffer v. Heitner*, 433 U.S. 186 (1977). Procedural due process further requires that a court not exercise its adjudicatory authority over a person, even when it has the power to do so, unless that person has been given adequate notice and opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Fuentes v. Shevin*, 407 U.S. 67 (1972); see *F.T.C. v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1319 (D.C. Cir. 1980).

119. See, e.g., *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 204-05 (1958); *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir.), *appeal docketed*, 106 S. Ct. 52 (1985); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968). Control of the documents, not their location, is determinative in enforcement of a subpoena. See *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co.*, 72 F. Supp. 1013, 1020 (S.D.N.Y. 1947); see also *In re Grand Jury Proceedings (the Bank of Nova Scotia)*, 740 F.2d 817, 828 n.17 (11th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (law of situs of documents does not necessarily control in cases of conflict); *In re Grand Jury Subpoena Directed to Marc Rich & Co.*, 707 F.2d 663, 667 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

120. Heck, *supra* note 59, at 794-95.

121. See *supra* notes 58-59 and accompanying text.

122. See D. ROSENTHAL & W. KNIGHTON, *supra* note 48, at 75-76.

meet the requirements of a United States court.<sup>123</sup> Another alternative is to bar participation by foreign nationals in United States commodity markets if they reside in a jurisdiction which bars compliance with the CFTC's extraterritorial discovery requests.<sup>124</sup>

### CONCLUSION

Two of the five possible ways the CFTC can serve extraterritorial subpoenas abroad are clearly offensive to the sovereignty of foreign jurisdictions and international principles. The CFTC should resort to those questionable provisions only after exhausting the other, less offensive means of service. Congress intended that the CFTC respect foreign sovereignty to the extent possible in issuing extraterritorial subpoenas. In the final analysis, the cooperation of the foreign government may be the only way that the CFTC can obtain the information it needs to enforce the CEA.

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123. See *supra* notes 118-19 and accompanying text.

124. The CEA authorizes the CFTC to impose record-keeping and position-reporting requirements on persons holding substantial positions on United States commodities markets. 7 U.S.C. §§ 6g, 6i (1982). These reporting requirements apply to foreign nationals. 17 C.F.R. § 15.00(a)(2) (1984). The CFTC has restricted foreign trading on United States commodities markets for failure to comply with these reporting requirements, despite the fact that those parties claimed that the local sovereignty blocked compliance with the request. See, e.g., *In re Wiscope, S.A.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,785, *rev'd on other grounds*, 604 F.2d 764 (2d Cir. 1979).

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