

Federal Republic of Germany and the EEC

“Litigation in the United States is a horror show”, the man said, not looking very happy, “they put you through this ordeal they call ‘pretrial discovery’; and on top of it, you don’t get those prohibitive attorneys’ fees reimbursed, even if you win . . . ! So, don’t ever sue in the United States,” he resumed, “and if you ever get sued, settle . . . !” If someone asked me to reveal the source of this statement, I would not have to claim any client-attorney privilege; I would make full disclosure, pointing to an entire species: foreign clients.

There is, of course, the other side; the American lawyer who, when confronted, for example, with the fact that U.S.-style pretrial discovery for all practical purposes does not exist elsewhere, would utter in total disbelief: “How can there ever be justice in those countries . . . !”

I. Discovery Abroad

A. GERMANY AND U.S. CONTRASTED

The conceptual difference regarding discovery that exists between the United States and, I dare say, the rest of the world can be epitomized by contrasting the following statements of the U.S. Supreme Court and German Supreme Court; each, it should be noted, was made in a purely domestic context. The purpose of pre-trial discovery, the U.S. Supreme Court has held, is to “make a trial less a game of a blind man’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”¹ In contrast, the German Supreme Court has held that “a

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1. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958). *See also* FED. R. CIV. P. 26(b)(1), which reads in pertinent part: “. . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . .” (emphasis added).

party is not required to help its opponent to victory by making available material that [the opponent] does not have at its disposal already.”² Accordingly, German courts do not entertain requests for the taking of evidence without the party making such a request having laid a proper foundation that the facts to be proven are not taken “out of the blue” but rather suggest a certain degree of certainty; in other words and in diametrical contrast to, for example, Federal Rule Civil Procedure 26, German courts will not grant a motion for the taking of evidence that is not directed at proving plausible facts, but rather is designed to produce such facts. Furthermore, production of documents, the heart of pretrial discovery in the United States, does not exist in civil litigation in Germany. All this is designed to protect both third-party witnesses and opponents from what German law would consider unreasonable intrusions into a person’s constitutionally guaranteed sphere of personal freedom.

B. CIVIL LITIGATION IN GERMANY³

Typical for civil law systems, the conduct of civil litigation in Germany is controlled by the court; there are no juries. It is for the parties to decide what factual circumstances they want to bring before the court. Thereafter, the court takes over; and, while it will use its authority to help the parties prove the facts they have alleged, the court will not assist in procuring those facts.

Litigation starts with the filing of a complaint. In contrast to American practice, however, in German civil litigation a complaint should be conclusive as to the factual circumstances alleged in support of the relief sought. If it does not stand on its own feet (that is, if the facts, assuming they are true, do not carry the case presented), the court, on its own motion, will dismiss the complaint. Thus, in such a situation, the defendant does not even have to answer; there will be no default judgment against him.

A complaint also must proffer proof for the facts alleged; typically, this is done by identifying witnesses and by attaching relevant documents. The same applies to the defendant’s answer. Thereafter, the court will discuss the case with the parties (and their attorneys) in what is called oral argument; it being the court’s statutory duty to see to it that the parties make full statements regarding all material facts, make the appropriate motions, and indicate means of proof. And while the parties are free to choose what

2. Author’s translation from BGH, NJW 1964, 1414.

3. Obviously, only a brief overview of German law can be given here. For a more elaborate, if somewhat outdated, analysis, see Kaplan, von Mehren, Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193; 1443 (1958). See also Kutschelis, *The Legal System*, in BUSINESS TRANSACTIONS IN GERMANY (B. Rüster, ed., 1983).

factual circumstances they want to bring before the court, those facts have to be complete and in accordance with the truth.

After the court has discharged its so-called duty of clarification, it determines which material facts remain disputed, who has the burden of proof, and whether that party has proffered any proof. It is on this basis that the court then decides whether to summon witnesses or to appoint an expert; only under very limited circumstances can the court order the production of documents by the opponent or third-parties.

At the evidence hearing, the court first examines the witness to establish that he or she has sufficient general knowledge of the facts as to which it shall testify. (Incidentally, parties are not qualified to testify as witnesses; this rule is based on the notion that parties cannot be expected to be impartial to their own case). If the court is satisfied the witness is sufficiently knowledgeable, it will proceed to ask such specific questions as it deems necessary to fulfill its duty to find the truth. After the court has completed its questioning, counsel for the parties have, under the court's supervision, the right to question the witness, but only on the matters set forth in the order by which the court had summoned the witness. There is no cross-examination. The witness' statements are not transcribed verbatim; rather, a summary is dictated by the judge at certain intervals during testimony. Thus, in contrast to litigation in the United States, a German plaintiff has to be fairly certain that he has a case and the necessary evidence before he goes to court. Otherwise, he will not only lose his case, but will also have to reimburse his opponent's legal fees, which is the rule in most foreign countries.

C. HAGUE EVIDENCE CONVENTION

Against this background, the Hague Evidence Convention⁴ constitutes a remarkable concession by civil law countries, such as Germany, to the desire of the United States to have U.S. style discovery executed and enforced abroad. The following addresses certain problem areas concerning the Convention's scope and application.⁵

4. Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, done March 18, 1970.

5. See also, e.g., Message from the President to the Senate, reprinted at 12 I.L.M. 323 (1972), also containing the Secretary of State's Letter of Submittal, *id.* at 324-26, and the official explanatory report of the Hague Rapporteur, *id.* at 327-42 (hereinafter cited as the "Message from the President"); Reports of the Work of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, reprinted at 17 I.L.M. 1417 (1978) (hereinafter cited as the "1978 Report"); Augustine, *Obtaining International Judicial Assistance under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation* 10 GA. J. INT'L & COMP. L. 101 (1980).

1. *Preemptive Effect*

In contrast to the rather confusing situation in the United States, there is no question that, under German treaty law, the Hague Evidence Convention takes precedent over any conflicting rules of German civil procedure. The district court in Munich held the following in the sole case to this date resulting from requests made by American courts under the Convention:

The provisions of [the German Code of Civil Procedure] apply only to the extent the [Hague Evidence Convention], which as the more pertinent and recent law takes precedence over the [German Code of Civil Procedure], does not require a different result.⁶

The majority of the (lower) courts in the United States that to date had an opportunity to address the issue of the Hague Evidence Convention, however, has taken the position that the Convention is not preemptive, but rather only the primary vehicle that must be used when discovery is to be had abroad; thus, American law on the subject of discovery abroad is left fully intact.⁷ The reasons typically advanced in support of this position are the fact that the Convention does not state that it is exclusive, that its Article 27 provides that a contracting state remains free to maintain or introduce procedures that are more liberal than those provided in the Convention and that, moreover, American officials have stated that the Convention does not require the United States to change its laws.⁸

The logic of this reasoning is not apparent for these facts prove the exact opposite of what these courts inferred from them. It is precisely for the reason that the Convention does have the preemptive power of a treaty that Article 27 had to be incorporated therein.⁹ Otherwise, it would have superseded those national laws that already provide for more liberal procedures than are mandated by the Convention as, for example, the United States has in 28 U.S.C. § 1782. Moreover, without a provision like Article 27, unilateral introduction of more liberal procedures, under the various treaty laws of the respective contracting states, might not be possible without amending the Convention. The purpose of the Convention, therefore, is to set *mini-*

6. Author's translation from LG München I, ZZP 1982, 363. (A descriptive account of that case is provided by Platto, *Taking Evidence Abroad for use in Civil Cases in the United States—A Practical Guide*, 16 INT'L LAW. 575, 581 (1982).

7. See, e.g., *Graco, Inc. v. Kremlin, Inc. et al.*, 101 F.R.D. 503 (N.D. Ill. 1984) (hereinafter cited as "Graco"); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983) (hereinafter cited as "Lasky"); *Compagnie Française d'Assurance pour le Commerce Extérieur et al. v. Phillips Petroleum Co.*, 81 Civ. 4463-CLB (S.D.N.Y., Jan. 24, 1983) (hereinafter cited as "Coface"); *Pierburg GmbH & Co. v. Superior Court*, 186 CAL. RPTR. 876, 137 Cal. App. 3d 236 (1982) (hereinafter cited as "Pierburg").

8. *Id.*

9. See also, e.g., *Cuisinart, Inc. v. Robot Coupe, S.A. et al.*, D.N. CV 80 0050083 S (Super. Ct. Stamford/Norwalk Jud. Dist., July 22, 1982) (hereinafter cited as "Cuisinart").

mum standards, thus permitting a contracting state to maintain more liberal standards, or to introduce them in the future.¹⁰

Another confusing element that can be found in these cases is that although they acknowledge the treaty status of the Convention, they still apply principles of comity. In a treaty context, however, there is no need to resort to such principles; they have been absorbed by the treaty, which constitutes a binding contract between and among sovereign nations.

Finally, it is interesting to note that as regards the Hague Convention on Service of Process Abroad,¹¹ which has a treaty structure that, *mutatis mutandis*, is identical with that of the Evidence Convention, there is a plethora of American cases that unequivocally acknowledge its treaty and, therefore, preemptive status.¹² The fact that the Hague Evidence Convention, in effect, might limit the power American courts would otherwise have, particularly when they have personal jurisdiction, surely does not justify breaching a treaty and thereby violating the Supremacy Clause of the U.S. Constitution.¹³

2. *Discovery of Documents*

A real problem exists, however, as regards the issue of discovery of documents. Most contracting states have made use of Article 23, which provides in pertinent part: "A Contracting State may . . . declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."¹⁴ As a result, Germany, for example, does not execute requests for production of documents.¹⁵ It appears, however, that this categorical refusal by civil law countries like Germany to execute requests for document production is

10. See, e.g., Message from The President, *id.* at 324, 326, 342. See also Cuisinart, *id.* at 6; Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, reprinted at 8 I.L.M. 804, 818 (1969) (hereinafter cited as the "1969 Report").

11. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, done Nov. 15, 1965.

12. See cases cited in U.S. Brief submitted to the Supreme Court in response to the Court's invitation in Volkswagenwerk Aktiengesellschaft v. Falzon, reprinted at 23 I.L.M. 412, 414 (1984), appeal dismissed, 52 U.S.L.W. 3609, rehearing denied 52 U.S.L.W. 3857. (1984) (hereinafter cited as "Solicitor General").

13. See also Solicitor General, *id.* at note 3.

14. The Declarations and Reservations made by the Contracting States are reprinted together with the text of the Convention at 28 U.S.C.A. § 1781.

15. Given the Declaration made by the German government under Article 23 and the clear mandate of Section 14, para. 1, of the German Law of December 22, 1977, implementing the Convention, the Munich Court of Appeals in the above reported case had no choice but to deny the request for production of documents made by the American court. Section 14, para. 1, provides: "Letters of Request for a proceeding under Article 23 . . . will not be executed." See also Platto, *supra* note 6 (but note that the German court did permit the taking of testimony regarding the content of the documents requested).

largely attributable to the lack of knowledge these countries have of the concept of litigation in the United States.¹⁶

To a European lawyer the term "pre-trial" suggests a degree of detachment from the actual case that does not correspond with the realities of litigation in the United States. German civil procedure, for example, does not distinguish between a pre-trial and a trial phase; rather oral argument, although it often requires several sessions including special ones for the taking of evidence, is regarded as a continuum.¹⁷ This contrasts with the precepts of litigation in the United States, where pre-trial discovery of documents forms part of pre-trial discovery and, accordingly, is a *conditio sine qua non* for the trial itself.

While I do not foresee that, in the future, civil law countries would agree to execute just any request for production of documents, I do believe that, for example, the German *ordre public* would permit the execution of requests that stay within reasonable limits.¹⁸ The standard suggested for the revision of Section 40 *Restatement (Second) of the Foreign Relations Law of the United States* may serve as a yardstick; it proposes that discovery proceedings directed at documents, information, and persons located abroad be ordered by a court and be "directly relevant, necessary, and material to an action or investigation."¹⁹

3. Sanctions

Another problem area regarding the operation of the Hague Evidence Convention is the issue of sanctions. Again, its analysis has to start with the viewpoint of American law for, here too, the arsenal of sanctions available to courts in the United States in cases of non-compliance with their discovery orders is unique. While, for example, a German court has the power to fine and jail a recalcitrant witness, its authority to "punish" a party for violation of its orders, or other infringements of the rules of civil procedure, is reduced to an admission-of-fact sanction.²⁰

16. See also 1978 Report, *supra* note 5, at 1421-24.

17. The German Civil Code is devised to dispose of a case, including the taking of evidence, at one session of oral argument; reality, however, often has it different.

18. From the very narrowly drafted escape clauses, Articles 9, para. 2, and 12, it can be inferred that only under extreme circumstances can a contracting state refuse to execute a request properly made under the Convention. This conclusion finds further support in the fact that, as its preamble suggests, the Convention must be construed liberally and, furthermore, that generally accepted principles of international law require that a treaty be performed in good faith. See, e.g., Article 26 of the Vienna Convention on the Law of Treaties (opened for signature May 23, 1969), reprinted at 8 I.L.M. 679 (1969). Note also that Section 14, para. 2, of the German Law of December 22, 1977, implementing the Convention, provides that requests for pretrial discovery of documents may be executed within the parameters of a still to be devised Regulation.)

19. AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised)*, Section 420, (Tentative Draft No. 3).

20. Since, as noted above, parties do not qualify as witnesses under German law, their "testimony" cannot be compelled; thus, the sole risk a party runs that chooses not to answer

Under American law, if a court has personal jurisdiction, a foreign context in and of itself does not affect its power to order discovery and impose sanctions.²¹ For example, as regards the most notorious form of discovery, production of documents, location abroad as a general rule does not impair a court's power to order disclosure; as stated, for example, by the Second Circuit Court of Appeals in the *Marc Rich* case: "The test for the production of documents is control, not location."²² However, a comity-related "balancing-of-interest" test is being applied when sanctions are being sought in cases where compliance with a court's order has been refused on the ground that this would violate the laws of the country where, for example, the documents are located.²³

The crucial question in this context, therefore, is whether ratification of the Hague Evidence Convention has changed anything in the way the issue of sanctions has to be resolved? The *quid pro quo* function of the Convention (as a treaty and, therefore, binding on ratifying nations) requires that as requests for judicial assistance must be made in accordance with the Convention, the courts in the requested state must execute and enforce such requests. Accordingly, the obligation to disclose, traditionally imposed on a private person, has been superseded by the treaty obligation of the contracting states to execute and enforce such requests. In light of this shift in responsibility, there is no reason or, indeed, legal ground left for the imposition of sanctions; rather, in matters covered by the Convention, an imposition of sanctions would constitute a breach of the treaty.²⁴

This, of course, does not deprive the requesting court of its power to impose proper sanctions as regards the disposition of the case, or to punish any abusive use of the Convention like, for example, the anticipatory removal of documents into a jurisdiction where discovery would be limited. However, since the requested court, under the Convention, must exercise its jurisdiction over a private person (including, under Article 10, the use of compulsory process), the requesting court loses its power to impose sanctions regarding the same factual circumstances.

4. Blocking Statutes

Finally, the relevance of so-called "blocking" statutes in the context of the Convention is raised, because France is, except for England, the only

questions posed by the court is that the court might consider as admitted the underlying fact alleged by the opponent.

21. See, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 699 (1982); and *FED. R. CIV. P. 37(b)*.

22. *Matter of Marc Rich & Co. A.G.*, 707 F.2d 663, 667 (2d Cir. 1983). See also, e.g., *FTC v. SPM*, 707 F.2d 1304 (2d Cir. 1983).

23. This test was adopted in *AMERICAN LAW INSTITUTE RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 40*, and has found broad recognition by the courts. See, e.g., Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 *YALE L.J.* 612, 619-21 (1979).

24. See also *Solicitor General*, *supra* note 12, at 418.

signatory to the Hague Evidence Convention that has passed "blocking" legislation.²⁵

Although no cases have been reported to date in which the French "blocking" statute (passed into law on July 16, 1980, that is, after France ratified the Convention)²⁶ has been invoked by the French authorities, it appears that this legislation is neither intended nor does it affect the taking of evidence under the Convention. This conclusion is suggested by the fact that the French statute expressly renders itself inoperative as regards conflicting international treaties or agreements, and that it addresses requests made by "foreign public authorities," which does not seem to encompass requests made by foreign courts, as is the procedure under the Convention. Thus, the conclusion follows that the French "blocking" statute is directed against discovery attempts made outside the Hague Evidence Convention.²⁷

Review of American cases that to date had occasion to address this issue, however, suggests that this aspect of the French statute is not being observed.²⁸ These cases also manifest another phenomenon: the tendency to either not engage in any independent review by the courts of issues of foreign procedural aspects, or to embark on speculations about these laws,²⁹ which as, for example, Articles 9, para. 1, and 10 of the Convention demonstrate, always have to be considered in addition to the provisions of the Convention itself.³⁰

While experience shows that it is advisable for the requesting court to, through proper sources, determine the general parameters of foreign law, it is only the actual dialogue with the foreign authorities designated in the Convention that can give a conclusive and authoritative answer as to what a request for discovery in a particular contracting state can and what it cannot achieve. As regards the heart of the Hague Evidence Convention, its Letter of Request procedure, this can only be ascertained if the courts make use of this procedure.

25. For a discussion of the English statute see, Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. OF INT'L L. 257 (1981).

26. See Herzog, *Current Developments: The 1980 French Law on Documents and Information*, 75 AM. J. OF INT'L L. 382, 384, 385 (1981); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 INT'L LAW. 585, 593-99 (1981). (Both articles also provide English translations of the French statute).

27. See Toms, *supra* note 26, at 596.

28. See, e.g., Graco, *supra* note 7, at 508-12; Coface, *supra* note 7 at 10.

29. *Id.*

30. American law encourages courts to independently determine issues of foreign law. SEE FED. R. CIV. P. 44.1; see also *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 343-44 (7th Cir. 1983).

II. Extraterritoriality in Germany and EEC

A. EFFECTS DOCTRINE

The following is not a quotation from an American enactment; rather it is Section 98, para. 2, of the German antitrust statute: "This Act shall apply to all restraints of competition which have effects within the territory covered by this Act, including restraints that result from actions taken outside such territory."³¹ Similarly, "The EEC Treaty's rules on competition apply to restrictive or abusive practices by undertakings situated in non-member countries where their conduct has an appreciable impact within the common market."³² The so-called effects doctrine, introduced into American (antitrust) law by Judge Learned Hand's landmark opinion in the *Alcoa* case,³³ is not at all a notion that is unique to American law.³⁴ Moreover, it is interesting to note that the European Court of Justice has developed, alongside the effects doctrine, the concept of imputing the behavior of a subsidiary to its parent company and, furthermore, the economic-entity theory for structured groups of companies. These concepts are being used where subsidiaries in the Common Market act upon instructions from outside the Common Market.³⁵

B. ADMINISTRATIVE ENFORCEMENT

As regards the transnational procedural aspects of, for example, the administrative enforcement of antitrust laws, however, the European approach appears to be more conservative than what appears to be the practice in the United States. Under, for example, German antitrust procedure, the Federal Cartel Office in Berlin cannot require the German subsid-

31. Gesetz gegen Wettbewerbsbeschränkungen ("GWB") ["Act against Restraints of Competition"] of 1957, as amended. An English translation (with annotations) of the GWB is provided in the OECD GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, Vol. 1. See also COMMON MARKET REPORTER (CCH), *Doing Business in Europe*, para. 23,501.

32. Commission of the European Communities, Eleventh Report on Competition Policy ("Comp. Rep. EC 1981"), at 36. See also, e.g., GLEISS AND HIRSCH, COMMON MARKET CARTEL LAW, at 16-21 (3d ed. 1981).

33. *United States v. Aluminium Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945). See also the excellent analysis of the present status of the effects doctrine and related issues under American antitrust laws by Judge Wilkey in *Laker Airways Limited v. Sabena and KLM*, 731 F.2d 909 (D.C. Cir. 1984), reprinted at 23 I.L.M. 519, 527-32 (1984) (hereinafter cited as "Laker"). (For a discussion of the impact the *Alcoa* case had on American antitrust and American law in general see, ABA, ANTITRUST LAW DEVELOPMENTS, 356-58 (1975). See also, Foer, *International Implications of Section 7*, 50 ANTITRUST L.J. 819, 822-24 (1981-82).)

34. See also, Steiner and D. Vagts, TRANSNATIONAL LEGAL PROBLEMS at 1014-16 (2d ed. 1976); Gleiss and Hirsch, *supra* note 32; Rahl, *Economic Imperialism or Protecting Competition against Foreign Invasion?* 50 ANTITRUST L.J. 617, 632-33 (1981).

35. See e.g., Steiner and Vagts, *id.* at 1417-19; Gleiss and Hirsch, *id.* at 18; Comp. Rep. EC 1981, at 36-37.

ary of a foreign company to provide information about, or obtain documents from, its foreign parent company, unless this is directly related to the activities of the German subsidiary itself.³⁶ Furthermore, German law requires that service of process abroad must be effected through proper foreign assistance; particularly, it does not suffice to solely serve the German subsidiary.³⁷

As regards the issue of transnational judicial assistance in government-conducted antitrust investigations, i.e., administrative matters, the Hague Evidence Convention does not apply since it only relates to civil or commercial matters. However, as between the United States and Germany, these issues are covered by bilateral governmental agreement.³⁸

C. U.S. EXPORT LAWS

Finally, I should like to make some observations on the issue of the extraterritorial application of the United States Export Administration Laws, which figured so prominently, for example, in the Russian pipeline controversy.³⁹ At issue is not so much the question whether the United States has the right to exercise control over foreign corporations incorporated and located abroad, if the sole nexus such corporations have with the United States is the fact that they happen to be subsidiaries of American parent companies and/or are using technology that has been licensed to them by American licensors. For it is difficult to see how such an exercise of extraterritorial jurisdiction can be reconciled with established principles of international law,⁴⁰ existing treaties to which the United States is a party,⁴¹

36. See, Immenga/Mestmäcker, *GWB-KOMMENTAR*, 327-42 Abs. 2 § 98 (1981). See also, *FTC v. SGPM*, 707 F.2d 1304, 1318.

37. See, Immenga/Mestmäcker, *id.* at 321. But note that the European Commission, as well as the European Court of Justice, regard substituted service upon a subsidiary within the Common Market as constituting proper notice also as regards its non-Common Market parent company. See, Gleiss and Hirsch, *supra* note 34 at 19-20.

38. Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to Mutual Cooperation regarding Restrictive Business Practices of September 11, 1976, *reprinted at Doing Business in Europe*, COMMON MARKET REPORTER (CCH), para. 23,529.

39. See, generally, Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 *LAW & POLICY IN INT'L BUS.* 1 (1983).

40. See, e.g., District Court at The Hague Judgement in *Campagnie Europeenne des Petroles S.A. v. Sensor Nederland B.V.* of September 17, 1982 (English translation *reprinted in* 22 *I.L.M.* 66 (1983)). Moyer & Mabry, *supra* note 39 at 108-16.

41. For example the Treaties of Friendship, Commerce and Navigation between the United States and a number of foreign countries all acknowledge the principle of international law that companies constituted under the laws of a particular country have the nationality of that country. See, e.g., Article XXV, para. 5, U.S.-German Treaty of Friendship, Commerce and Navigation of July 14, 1956, 7 UST 1839, TIAS 3593; Article XXIII, para. 3, U.S.-Netherlands Treaty of Friendship, Commerce and Navigation of March 27, 1956.

as well as American jurisprudence itself.⁴² Rather, the issue is that the United States appears to accord the general rules of international law less value than other countries do.⁴³ Under German law, for example, the general rules of international law apply directly, supersede any conflicting domestic law (except the Constitution itself), and cannot be overridden by the legislature.⁴⁴ This is not so in the United States where an act of Congress may expressly override principles of international law.⁴⁵

Thus, as the world grows smaller, the need to establish, and adhere to, common rules increases. And while this creates additional responsibilities for and between governments, it also calls for the courts to exercise their role as creator, preserver, and enforcer of international law.

42. *See, e.g.*, *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S. Ct. 2374, 2379 note 11 (1982); and *Bell & Howell : Mamiya Co. v. Masel Supply Co.*, 548 F. Supp. 1063, 1076 (E.D.N.Y. 1982).

43. The general rules of international law comprise the rules of the unwritten customary law of the nations as well as the general principles of laws recognized by civilized nations. *See*, Article 38, para. 1, lit. b and c, respectively, of the Statutes of the International Court of Justice, *reprinted* and annotated at 12 *DIGEST OF INT'L L.* 1368.

44. Article 25 of the German Constitution. *See, e.g.*, Schmidt-Bleibtreu, Klein, *KOMMENTAR ZUM GRUNDGESETZ*, at Art. 25 (6th ed. 1983).

45. *See, Moyer & Mabry, supra* note 39, at 115.

SYMPOSIUM

**ANTIDUMPING AND COUNTERVAILING
DUTY LAWS: U.S. AND EEC**

