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## Antitrust and Trade Policy in the United States and the European Community

David G. Gill\*

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# Antitrust and Trade Policy in the United States and the European Community

David G. Gill

## **Abstract**

This review states that this volume presents the contributions of four specialists in the field and goes on to state how the volume is divided almost equally between the analysis of United States law and decisions and of the application of anti-trust principles within the European Community.

## BOOK REVIEWS

ANTITRUST AND TRADE POLICY IN THE UNITED STATES AND THE EUROPEAN COMMUNITY. 1985 FORDHAM CORPORATE LAW INSTITUTE. EDITED BY BARRY E. HAWK. New York, N.Y.: Matthew Bender & Co., 1986. xxvii + 796 pp. \$85.00. LC 86-70029.

*Reviewed by David G. Gill\**

This weighty volume was received a few days after I had attended the 1986 Thirteenth Annual Fordham Corporate Law Institute. The proceedings of these Institutes, each volume a little fatter than its predecessor, have become an important part of the study and nurture of antitrust principles, within the United States and in the European Economic Community. Benefitting from its close association with the Fordham Center on European Community Law and International Antitrust, the Annual Institute has become a principal annual occasion for the exchange of legal views and opinions on international antitrust policy in both the United States and the European Community.

The current volume presents the contributions of thirty-four specialists in the field. Its 796 pages are divided almost equally between the analysis of United States law and decisions and of the application of antitrust principles within the European Community.

The U.S. contributions deal with trade, the ongoing revision of the 1977 Antitrust Guide for International Operations, the several related issues dealing with the consequences of state involvement in business decisions, and the continuing discussion as to the proper limits on United States jurisdiction over business conduct and transactions outside of the United States.

James T. Halverson (ch. 7), the then-Chairman of the Antitrust Section of the American Bar Association, notes at the outset that the economic landscape has been completely transformed in the last few years:

The United States is now completely integrated in a global

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\* Member of the New York Bar. LL.B., 1951; A.B., 1947, Harvard University.

economy that it can neither escape nor ignore . . . . Between 1970 and 1980, U.S. exports and imports more than quadrupled . . . ." (pp. 152-53)

When these massive figures are measured against the antitrust concerns relating to imports and exports, the latter become almost lilliputian. Douglas Riggs (ch. 8) of the Department of Commerce tries valiantly to merchandise the Administration's antitrust reform package as a program designed to seek "changes in those laws and policies which may unduly hamper international competition" (at p. 163) and similarly defends the Export Trading Company Act of 1982. A. Paul Victor (ch. 9) is skeptical of the claim that the legislative proposals deal either with a real problem ("that somehow the antitrust laws have prevented American businessmen from competing in world markets") or with a valid solution. As for the 1982 Act, Halverson reports that only "sixty certificates have been issued in the two years of availability." He seems to conclude, as does Victor, that the 1982 Act has been oversold as a trade panacea.

Charles Stark (ch. 2) and Eleanor Fox (ch. 4) discuss the question whether the Antitrust Division's Guide for International Operations requires revision.<sup>1</sup> Stark lists the long litany of developments that make a reappraisal of the Guide both timely and necessary: intervening decisions such as *GTE Sylvania*;<sup>2</sup> the enactment of such legislation as the Export Trading Company Act of 1982 and the National Cooperative Research Act of 1984; the change in antitrust policies, particularly those related to mergers and vertical restraints; and the accelerated internationalization of the marketplace in which American business operates.

Fox, who has closely analyzed the Antitrust Guide, concludes that the Guide requires updating. She observes that "new and different" Justice Department policies involve

by my magic calculus, ninety-seven percent of the change between the 1977 Guide and the hypothetical new Guide analyzing the same problems . . . . We have moved from a view of the world in which antitrust would protect important opportunities of competitors to a view of the world in

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1. Earlier this year, the Antitrust Division announced that a new Guide was being prepared and would be available for distribution some time in 1987.

2. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

which acts of firms, including big firms, are all deemed procompetitive unless a plaintiff can show that those acts are likely to result in a lessening of the sum of producer profits and consumer benefits. (pp. 118-19).

One portion of the Guide which receives particular attention is its analysis of the effect of foreign governmental action on antitrust suits. James Atwood (ch. 16) discusses blocking statutes and foreign sovereign compulsion. He notes that sovereign compulsion has become a timely topic "not so much as a defense on the *merits* in antitrust litigation but as an important element in a *procedural* battle which is often now the centerpiece of an antitrust suit: international discovery" (p. 325).

Atwood considers the extent to which foreign blocking statutes will be honored by U.S. courts. Section 436 of the Restatement of the Foreign Relations Law of the United States (Revised)<sup>3</sup> provides the generally accepted rule concerning foreign government compulsion that "(1) a person generally may not be required by a state (a) to do an act in another state that is prohibited by the law of that state or by other law of the state of which he is a national." Section 437 applies the defense in the area of discovery and suggests that where blocking statutes prevent disclosure of information located outside the United States and the party to whom the order is directed has made a good faith but unsuccessful effort to obtain the prohibited discovery, the courts should not ordinarily impose sanctions on the party that has failed to make discovery but may, in *appropriate* cases, make findings of fact adverse to a party even if that party has made an unsuccessful but good faith effort to secure the information. (pp. 350-51). Atwood criticizes this last provision and suggests that the provision should be adjusted to take account of the good-faith effort of the party to achieve discovery. Another approach would impose findings only in accordance with burden of proof obligations.

Joel Davidow (ch. 3) also deals with foreign compulsion and the act of state defense in his remarks. He interprets the *Southern Motor Carriers*<sup>4</sup> case as holding that "clear state ap-

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3. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) §§ 436-437 (Tent. Draft No. 6 1985) (latest draft at time of 1985 Fordham Corp. L. Inst.).

4. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721 (1985).

proval for a public purpose, accompanied by supervision by public officials, is sufficient to justify an exemption, even absent compulsion." (p. 53).

Recent remarks at the Thirteenth Annual Institute<sup>5</sup> by Charles F. Rule, Deputy Assistant Attorney General of the Antitrust Division, raise serious questions about the future of the foreign sovereign compulsion defense in suits brought by the U.S. Government. In connection with the current revision of the Antitrust Guide, Rule reports that the current thinking of the Division is similar to the position which it took in the *Matsushita* case.<sup>6</sup> In that case, the Division's brief asserted that the defense, strictly speaking, was applicable only in private suits and did not apply in actions brought by the Government. Rule regards the doctrine as a matter of justiciability: the Executive Branch, in making an affirmative prosecutorial decision, "removes the dangers that would otherwise attend the policy choice," arising from the conflict of laws, since the Executive Branch has made the choice of law in bringing the case in the first place. To those of us in the private sector, this rationale sounds very much like the old refrain that "the king can do no wrong." It completely ignores the issue of fairness that has been the most important rationale for the foreign sovereign compulsion defense: that it is unacceptable to submit a private defendant to the conflicting demands of different sovereigns.

The related issue of jurisdiction is reviewed by a number of the participants. Donald Turner (ch. 11), a former head of the Antitrust Division, lends his support to the adoption of the jurisdictional rule of reason most recently proposed by the Revised Restatement, Foreign Relations Law. Turner considers it not only appropriate but essential for courts to "weigh and balance foreign and domestic interests in the process of formulating general jurisdictional rules regarding various kinds of conduct." (p. 245). On the other hand, Turner becomes nervous at the prospect of courts attempting "to weigh and balance the conflicting national interests involved in a particular case, for the purpose of determining whether the case should

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5. 1986 FORDHAM CORP. L. INST. — (B. Hawk ed. 1987).

6. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 494 F. Supp. 1161 (E.D. Pa. 1980), *aff'd in part, rev'd and remanded in part sub nom. In re Japanese Elec. Prod. Litig.*, 723 F. 2d 238 (3d Cir. 1983), *rev'd and remanded sub nom. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

be treated as an exception to the applicable general rule of jurisdiction or no jurisdiction." (p. 245). Turner believes that it should be the function of the Executive Branch, not the courts, to make the balancing decision. For this reason he would support the adoption of provisions that would require the courts to dismiss private treble damage suits when the Executive Branch certifies to the court that the action would seriously harm the foreign relations of the United States.

Douglas Rosenthal (ch. 14) straightforwardly confronts the problem of how to resolve jurisdictional conflicts as to competition law between sovereign nations. He proposes ten principles to reduce such extraterritorial conflicts for a wide variety of disputes ranging beyond antitrust conflicts. His "golden rule" is that "a nation should not do to another nation or its citizens what it would find intolerable if the other nation were to do to it or its citizens." (p. 309).

Jurisdictional limits are also discussed by various representatives from the European Community's antitrust regulators. Kurt Stockmann (ch. 12) of the German Cartel Office notes that the Commission of the European Communities and a number of European countries having antitrust laws claim jurisdiction based on effects in their respective territories whether or not these effects have been caused by conduct within their territories. He cites thirteen European countries as examples. By his count, the following have had practical experience in the extraterritorial application of their antitrust laws: "very limited in Norway and Switzerland, somewhat broader in Sweden, and by contrast relatively broad in the European Communities and in the Federal Republic of Germany." (p. 258). Stockmann recounts that, in *Bayer/Firestone*,<sup>7</sup> the Berlin Court of Appeals overruled the Cartel Office's prohibition of the merger of two French companies, noting that the merger's "center of gravity" was outside Germany. In a related decision, the Court of Appeals reasoned that the suit was barred by "generally recognized principles of public international law; that is, the principle of reasonable forum contacts in international administrative law, and the public international law principle of non-interference." (p. 272).

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7. Berlin Court of Appeals, "Synthetischer Kautschuk II," decision of 26 November 1980, WuW/E OLG 2419ff.

Bastiaan van der Esch (ch. 13) of the Community's Legal Service reviews the extraterritorial enforcement of the Community's competition rules against the backdrop of the *Aluminium*<sup>8</sup> and *Wood Pulp*<sup>9</sup> decisions. He notes that there are some important distinctions between U.S. and Community practices in this matter: the Community rules apply only to restrictions affecting intra-Community trade and not to foreign commerce (as in the U.S.), and, most important, the Community limits its extraterritorial jurisdiction to those instances where implementation takes place within the Community:

[t]he assertion of jurisdiction is strictly proportional to the efficient protection of the integrity of the Community's legal order. . . . This combination of the principle of proportionality and of the protective principle ensures that no valid claims can be made of violations of the principle of non-intervention or under the doctrine of abuse of rights.

Van der Esch goes on to note that such balancing of interests "further ensures the compatibility of the Commission's action with public international law as it stands today." (p. 294).

Both U.S. and European participants discuss the arbitration of antitrust disputes. Victor and Jeffrey Bialos (ch. 9) analyze the Supreme Court's *Mitsubishi* decision<sup>10</sup> and agree with Justice Blackmun that it is "necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." (p. 196). Victor and Bialos concede that a number of questions remain after *Mitsubishi*. How is the line to be drawn between "international" and "domestic" antitrust disputes? What are the public policy limits? Is the limited judicial review permitted under the Arbitration Act and the New York Convention acceptable in the antitrust field? Victor and Bialos discuss the pros and cons of the many issues left by the decision for future resolution and conclude on balance that the judicial enforcement of agreements to arbitrate antitrust disputes will be beneficial to antitrust enforcement, not least in freeing the courts of the need to decide frivolous and less important antitrust claims.

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8. *Aluminium Imports from Eastern Europe*, O.J. No. L 92/1, Comm. Mkt. Rep. (CCH) ¶ — (1985).

9. *Wood Pulp*, O.J. No. L 85/1, Comm. Mkt. Rep. (CCH) ¶ — (1985).

10. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, — U.S. —, 105 S. Ct. 3346 (1985).

Professor Ernst Steindorff (ch. 20) addresses the treatment of Common Market antitrust law in civil proceedings before national courts and arbitrators. In his remarks, Professor Steindorff reports that only two arbitral awards have been set aside for violation of Article 85. His overall conclusion is that not only are arbitrators not deterred by Article 85 from deciding disputes but that, judging from the awards, they often seem to ignore the applicability of Articles 85 and 86. This conclusion does not differ from that which he reaches with respect to civil proceeding to national courts where he finds that, despite all the efforts of the Commission, there are very few instances where national courts have in fact applied the EEC antitrust rules. Taking Germany as an example, he notes that Community law is "more or less unknown to most judges in civil law courts" and that "a great majority of German judges have no access to the sources of Commission antitrust law and, above all to, the judgments of the European court and the decisions of the Commission."

Limited space prevents the discussion of a number of insightful contributions on Community law. Sir Gordon Slynn, Advocate General of the Court of Justice, discusses EEC competition law from the perspective of the Court of Justice (ch. 19); Dr. Manfred Caspari, Director General for Competition of the Commission, reviews the evolving Community policy toward joint ventures (ch. 22); Colin Overbury (ch. 23), Alexis Jacquemin (ch. 24), Bernard Spinoit (ch. 24) and Angus K. Maciver (ch. 25) discuss the related Community rules relating to cooperative research and high technology; J. H. J. Bourgeois (ch. 27), Guy Pevtchin (ch. 28), Clive Stanbrook (ch. 29) and John Temple Lang (ch. 30) debate EEC antidumping rules and judicial review of trade safeguard measures; Michael Reynolds (ch. 32) and Ivo Van Bael (ch. 33) discuss the practical aspects of notifying agreements and the Commission's settlement practices.

What emerges from this collection of brilliant essays on European competition law is a collage reflecting the truly breathtaking achievement of a handful of dedicated administrators, civil servants and lawyers. A coherent, vibrant and self-renewing body of laws, decisions and administrative procedures has replaced the scattered decisions and rulings of a little more than a decade ago. A highly skilled and knowledge-

able corps of experts is administering the machinery thus created. Most important, the principle of competition is ever more fully accepted and better functioning. For those of us outside Europe who are concerned with the regime of competition, it is very satisfying to see the regime take hold and flourish in what not so many years ago was a relatively inhospitable environment.

For a comparativist, certain distinctions between the two antitrust systems, of the U.S. and Europe, may be discerned:

(1) The European antitrust apparatus is clearly still expanding. Most American antitrust practitioners would agree that the U.S. antitrust regime, if not actually contracting, at a minimum is now going through an acute period of doubt and self-examination.

(2) The Europeans, accordingly, are much more optimistic and hopeful than are the Americans about the policy objectives that may be served by an active competition policy. Compare the far-sighted vision of Manfred Caspari, who sees his Commission's policy on joint ventures to be inextricably linked with the crucial question of the Community's industrial policy, with the criticism of antitrust policy and practice implicit in the remarks of Douglas Riggs.

(3) The European antitrust programs clearly gain in coherence and unified conception from the fact that they are almost entirely the creation of the Commission or the Cartel Office. On the other hand, the U.S. program is able to obtain greater coverage, if not coherence, from the assistance of the private parties who bring antitrust actions. The Europeans are now trying to extend the enforcement of their competition rules through utilizing the efforts of their national courts, but they must be prepared to pay the price of divergent, inconsistent and often anti-competitive results, which have been part of the U.S. experience with "private Attorneys-General."

(4) Finally, both U.S. and European antitrust experts recognize the problems created by conflicting national jurisdictions and the impact of foreign governmental action. If anything, the Europeans appear to have recognized more clearly than the Americans the need to weigh competing interests and to follow a jurisdictional rule of reason.

One final observation: scholarly gatherings such as those

afforded by the Annual Institutes are invaluable occasions for reviewing and reassessing competition policy, aided by the opportunity to compare one's own policy with that of others. The Annual Institute deserves all of our support.

WORLD LITIGATION LAW AND PRACTICE, UNIT B, EUROPE: VOL. 1, ENGLAND AND WALES, BY LAURENCE J. COHEN; VOL. 2, ITALY, BY MAURO RUBINO-SAMMARTANO AND GIROLAMO ABBATESCIANNI. Ronald E. Myrick, Ed. New York, N.Y.: Matthew Bender, 1986. Looseleaf. \$230.00. 3 volumes. Unit A, Canada; Unit B, England and Wales, Italy. Lib. Cong. No. 85-70305.

*Reviewed by Peter E. Herzog\**

Professor Leflar once referred to choice of law as a "well watered plateau."<sup>1</sup> Though some might object to his characterization of choice of law as a plateau,<sup>2</sup> few would disagree about the rivers of printers' ink that have inundated it. But much of the resulting academic writing has concerned itself with general conflict of laws theory; procedural problems have received rather less attention. The reason may well be, as a German author recently (approximately) put it, that in the procedural area the clown, "conflicts methodology," may engage in his funny tricks in the foreground, but the real problems lie much more in depth.<sup>3</sup> That severe practical problems exist in that area for individuals engaged in international litigation was forcefully pointed out more than thirty years ago.<sup>4</sup> In some ways, the problems have since become worse and have led to a fair amount of friction between the United States and a number of its allies and trading partners, who resent the supposedly excessively aggressive assertion of American procedural principles in international litigation pending in the United States, while American courts dislike the restraints put on their fact-gathering processes by foreign courts.<sup>5</sup> That con-

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\* Crandall Melvin Professor of Law, Syracuse University; Professeur Associé, Université de Bourgogne (Dijon), Spring Term 1987.

1. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS., Spring 1977, 10.

2. Dean Prosser referred to the area as a "dismal swamp." Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

3. Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in R. Stürner, D. Lange, & Y. Taniguchi, *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA* 3 (1986).

4. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515 (1953).

5. A number of the incidents having caused friction between the United States and foreign countries are detailed by Stürner, *supra* note 3, at 5-8.

flicts methodology alone cannot solve these problems is clearly due to the "in depth" differences in basic conceptions and ideas concerning civil procedure. Solutions are thus impossible without an awareness of these differences. For this reason, the Columbia University Project on International Procedure sponsored, some twenty-five years ago, the publication of works discussing the civil procedure of France, Italy and Sweden.<sup>6</sup> These works, however, appeared in hard-bound volumes not permitting easy supplementation and law reform in the field of civil procedure has been so rapid that they, as well as some others describing the procedure of foreign countries<sup>7</sup> are, to a greater or lesser degree, out-of-date.<sup>8</sup> Much later, the Columbia Project resulted in the publication of a work on civil procedure in Japan in loose-leaf form,<sup>9</sup> thus facilitating updating in an area increasingly the object of reforms everywhere.<sup>10</sup>

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6. M. CAPPELLETTI & J. PERILLO, *Civil Procedure in Italy* (H. Smit ed. 1965); R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* (H. Smit ed. 1965); P. HERZOG (with the collaboration of M. WESER), *CIVIL PROCEDURE IN FRANCE* (H. Smit ed. 1967).

7. *E.g.*, 2 E. COHN, *MANUAL OF GERMAN LAW* 162-260 (2d ed. 1971); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 *HARV. L. REV.* 1193 (1958).

8. The process of change has been particularly rapid in France where a reform of court organization and civil procedure, begun in 1958, did not end with the promulgation of a new Code of Civil Procedure in 1975. But rapid change makes supplementation of procedural studies necessary everywhere as the volume on England and Wales, reviewed here, shows. It discusses the Civil Jurisdiction and Judgments Act, 1982, by which the United Kingdom implemented the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which the original six Member States of the European Economic Community had concluded on September 27, 1968, effective February 1, 1973. *See* 1972 O.J. No. L 299, p. 32 (official English text at 1978 O.J. No. L 304, p. 36). The United Kingdom, together with Denmark and Ireland, acceded to that convention by the Convention of October 9, 1978, 1978 O.J. No. L 304, p. 1. Entry into effect of most provisions of the Jurisdiction and Judgments Act, 1982, was made dependent on the entry into effect of the 1978 Convention, which had to be ratified by the signatories. At the time the study on England and Wales was written, it was confidently expected that ratification and entry into effect of the Convention would be completed by 1985, that is, before the publication date of the book, and the study so advises its readers. *See* § 4.04[7], note 24. But because of a delay by Belgium in ratifying the Convention, a separate sheet had to be added to the book, informing the readers that the Convention, and thus also the Jurisdiction and Judgments Act, 1982, were not yet in effect. Shortly after the book came off the press, Belgium ratified the Convention so that this special notice now has to be cancelled again, not a difficult thing given the loose-leaf presentation of the book.

9. T. HATTORI & D. HENDERSON, *CIVIL PROCEDURE IN JAPAN* (1985).

10. Even the recent discussion of procedural problems in R. SCHLESINGER, *COM-*

The planned publication, in an easily-supplemented loose-leaf format, of a series on "World Litigation Law and Practice," of which in Unit B "Europe" two volumes have appeared to date,<sup>11</sup> is thus a welcome event. The two studies attempt to provide not only details as to the civil procedure of the country concerned, but also information concerning the general institutional background in which civil litigation takes place. Consultation of the series is facilitated by the use of a fairly uniform outline: Chapter 1 - The Legal System and Tradition; Chapter 2 - The Courts; Chapter 3 - Attorneys and other Legal Professionals; Chapter 4 - Exercise of Domestic Judicial Power, Jurisdiction, Competence and Venue; Chapter 5 - Parties; Chapter 6 - Procedure in Domestic Cases of First Instance; Chapter 7 - Special Proceedings; Chapter 8 - Enforcement Proceedings; Chapter 9 - Recognition of Foreign Judgments; Chapter 10 - Appellate Procedures; Chapter 11 - International Judicial Assistance (Assistance in Aid of Foreign Courts); Chapter 12 - Summary of Key Considerations for a Foreign Lawyer; Chapter 13 - Insolvency and Bankruptcy Proceedings; Chapter 14 - Arbitration. Nevertheless, the outlines and contents even of the two volumes available to this reviewer are not completely parallel. There are, of course, some variations due to differences in domestic legal structures. Furthermore, the recognition and enforcement of foreign judgments constitutes a separate chapter in the study on Italy, while it is included in the chapter on judgments and their enforcement in the study on England and Wales. Beyond these differences in structure, there are also occasional variations in substantive coverage. The volume on England and Wales contains, in its chapter 9 on Appeals, a section concerning the reference of questions on Community law to the Court of Justice of the European Communities, a matter not covered in the country study on Italy. Likewise, in the English study, the chapter on insolvency and bankruptcy deals, at least in a general way, with the structure

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PARATIVE LAW 329-461 (4th ed. 1980) is no longer quite up-to-date in all details. Comprehensively comparative in scope, it does not, of course, attempt to take the place of detailed country studies.

11. A section on Belgium is to be included subsequently into the binder now limited to Italy. Additional countries to be covered in the Unit on Europe are Austria, Germany, France and Spain, as well as the European Economic Community. Thus far, in Unit A ("North America"), the study on Canada has appeared.

of corporations, which the Italian study essentially ignores.<sup>12</sup>

The chapters with the more detailed descriptions of court organization and procedure should always be consulted only after a careful examination of chapter 1 which, as noted, gives some basic information on institutional structures and legal traditions. In the Italian volume additional and very helpful material on the same point is also contained in the chapter on Key Considerations for the Foreign Lawyer. The Italian volume also includes a useful glossary of Italian legal terms that should help to reduce terminological confusion.<sup>13</sup> The use of a fairly standardized outline, conceived primarily for the American reader, insures that points of particular concern or possible misconception for such a reader are not ignored. There are thus discussions on, for example, the role of precedent.

As what has already been said indicates, both volumes contain a very large amount of information that will be quite helpful to the attorney involved in transnational litigation in the country concerned. (There is also much discussion on problems of service of process abroad, on obtaining evidence for use in foreign litigation, etc.) While neither volume purports to be a detailed comparative study, each one furnishes much material for such an endeavor. The series, when completed, should greatly facilitate broad-based comparative procedural research. A few suggestions may, however, be appro-

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12. Compare chapter 12, especially § 12.02[1] of the study on England and Wales with the corresponding § 13.01 of the Italian study. Presumably, this variation is due to the differing approaches in the two countries. In England, a "company" (corporation) is "wound up;" only individuals can be subject of "insolvency proceedings." See § 12.01 of the study on England and Wales. In Italy, on the other hand, both companies and individuals are subject to the same bankruptcy proceedings. See § 13.01 of the Italian study.

13. App. XI of the Italian study. Even so, there is one instance of such confusion in the Italian volume: chapter 6 on proceedings in first instance refers to the writings by which the parties assert their claims and defenses as "pleadings." The chapter discusses the drawn-out manner of Italian proceedings in detail, thus readers are not likely to be misled by the use of that term though the "pleadings" in an Italian court may occur also at stages subsequent to the commencement of the action. But in chapter 3, dealing with law professionals, the authors, when describing the difference between the lawyer known as *procuratore* and the lawyer known as *avvocato*, state that the *procuratore* may amend pleadings — thus obviously using the word pleading essentially in its American sense, in the same way as in chapter 6 — but state immediately afterwards that the *avvocato* will plead the case in court, here obviously using the word plead with the same connotation as the French term *plaider*, i.e., to present a case in court through argument and the submission of (written) evidence.

priate for its continuance. In the first place, full use should be made of its loose-leaf format. If there is a significant development in a country already covered, especially a development of interest to foreign litigants, supplements can be issued reasonably quickly. Secondly, the term "procedure" should, not, in subsequent volumes, be defined too narrowly. The Italian volume, for instance, contains a brief reference, in section 10.01[9], to the procedural effects of *res judicata* in barring further review, but nothing as to its substantive scope or the existence or absence of principles such as collateral estoppel in its various forms (issue preclusion as opposed to claim preclusion, third-party issue preclusion). The matter is, however, of increasing importance in international litigation, in the light of the development of American rules in that area<sup>14</sup> and the increase in transborder litigation involving multiple parties. One would hope also that volumes dealing with non-European countries will eventually appear, where, especially in the Far East, the attitude towards litigation may be quite different from that prevailing in the United States.<sup>15</sup> In addition, the inclusion of a study on the United States in the Unit on North America would certainly be helpful. Of course there is not any shortage of works on United States procedure directed to the American practitioner. However, large damage awards and procedural devices, such as extensive discovery, attract a considerable amount of international litigation to this country.<sup>16</sup> A compact description of procedure in the United States will thus undoubtedly be helpful to many foreign attorneys involved in litigation here. Beyond this practical use, the controversies between the United States and other countries over procedural issues are due only in part to lack of information on foreign procedures in the United States. The converse is also true. In foreign countries, there is often an insufficient understanding of the basic reasons for some aspects of American

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14. See Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962) and, more recently, Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510 (1981).

15. For Japan, there is, of course, the recent volume by T. HATTORI & D. HENDERSON, mentioned *supra* note 9.

16. See Lord Denning's statement: "[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith-Kline and French Laboratories v. Bloch*, [1983] All E.R. 72, 74, [1983] 1 W.L.R. 730, 733 (C.A. 1982).

procedure. A work on procedure in the United States, conceived for the non-United States reader, might thus help to calm the conflicts mentioned. This would be even more the case if the series were eventually to lead to the publication of an extensive and up-to-date set of country studies for most major countries of the world.