Comity and Computers in the Common Market: The IBM Case

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NOTE

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INTRODUCTION

In December of 1980, the Commission of the European Communities informed the International Business Machines (IBM) Corporation that the Commission was initiating proceedings against it under Article 86 of the Rome Treaty for alleged abuse of a dominant economic position within the Common Market. The Commission's action was the culmination of a formal investigation of IBM the Competition Directorate of the Commission began in July of 1974. Although the Commission did not release the statement of objections it had forwarded to IBM because of its tentative nature, public statements by IBM indicated that the alleged abuses of the company's dominant posi-

2 Article 86 provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts.


4 "The Commission does not divulge information on cases in which it has not yet adopted a final position." Reply of the Commission of the European Communities to Written Question No.
tion "relate[d] to including minimum main memory in the pricing of certain processors, providing interface information to competitors and certain software issues."5

The European Court of Justice confirmed this description of IBM's alleged abuses in an opinion dismissing an action brought by IBM to halt the Commission's proceedings against it.6 The Court summarized the alleged abuses (the statement of objections received by IBM ran to 1152 pages) as consisting of the bundling of certain products; refusal to disclose details of interface changes in new products for use with its compatible series of computer systems until after the first customer shipment; and refusing "to supply certain valuable software to users of IBM computer systems unless such software is used with a central processing unit of IBM manufacture, whether or not such unit was supplied by IBM."7 These practices resulted, it is alleged, from IBM's desire "to protect its position against undertakings described as 'plug compatible manufacturers' (manufacturers of peripheral devices with compatible plugs), which produce certain processing elements which may be used by the central processing units produced by IBM."8

The activities characterized as abusive by the Commission9 encompass practices that IBM's competitors have challenged unsuccessfully in American courts.10 However, any penalty that the Commission might decide to impose on IBM has the potential of having a significant adverse impact on IBM's business practices within the United States. Because of this, IBM supported its action to halt the proceedings with the argument that, inter alia,11 the Commission's action was contrary to

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5 Id.
6 The Court of Justice dismissed IBM's application to enjoin or modify the Commission's proceedings. Its decision was based on the timing of IBM's application, coming as it did before the Commission had taken a final decision regarding the allegations against IBM. Because of the tentative status of the Commission's position, IBM was unable to show the possibility of sustaining serious and irreversible damage should the action continue. IBM Corp. v. E.C. Commission, 32 Comm. Mkt. L. R. 93, 95, 99 (1981).
7 Id. at 94-95.
8 Id. at 94.
9 In response to the allegations, IBM has denied that the bundling of basic software and disclosure of interface information are unlawful. It also says that the bundling of basic software is an industry-wide practice and that IBM has begun to price such software separately. In regard to the charges of bundling of main memory and the failure to make installation productivity options available for the installation of IBM software on competitors' computers, IBM contends the Commission has a flawed understanding of the nature of both products. EEC Antitrust Case Against IBM, supra note 3, at 1032.
10 See infra notes 80-82 and accompanying text.
11 IBM's other claims were:
the principle of comity in international law,¹² defined by IBM as the principle of noninterference in the internal affairs of another sovereign.¹³ The principle of comity has recently emerged as a significant factor in decisions by United States courts in cases involving the extraterritorial application of United States antitrust laws.¹⁴ The renewed sensitivity of United States courts to considerations of comity in such cases can be seen as a response to the vehement criticism that the exercise of extraterritorial antitrust jurisdiction by the United States has aroused abroad.¹⁵ Since much of this criticism has come from European Economic Community (EEC) member states,¹⁶ the question raised by IBM of what role comity will play in Community international antitrust jurisdiction is especially compelling.

The fundamental conflict between the policies of competition laws, which are concerned with markets that transcend national boundaries, and those of the traditional territorial approach to jurisdiction, which are derived from those boundaries,¹⁷ will be the focus of this note. This conflict is manifested in the transnational application of those competition laws and in the enactment of laws designed to oppose such application. A recent trend in American decisions is to try to resolve this conflict by reference to the doctrine of comity. Although there are a

¹² Opinion of Karl M. Meessen, Dr. iur, Professor of Public Law, International Law and European Law at the University of Augsburg, Germany, Appendix 1 to IBM's Answer on Admissibility, at 9 (submitted to the E.C. Commission) (a copy of this unpublished opinion is on file at the offices of the Northwestern Journal of International Law & Business).

¹³ One commentator defines “international comity” as follows:

International comity, comitas gentium, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighborliness, mutual respect, and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from customs duties. Oppenheim writes of “the rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them.” Particular rules of comity, maintained over a long period, may develop into rules of customary law.

Apart from the meaning just explained, the term comity is used in four other ways: (1) as a synonym for international law; (2) as equivalent to private international law (conflict of laws); (3) as a policy basis for, and a source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law.


¹⁴ See infra notes 66-69 and accompanying text.

¹⁵ See infra notes 45-46 and accompanying text.

¹⁶ See infra notes 45-46 and accompanying text.

¹⁷ See infra notes 24-30 and accompanying text.
number of convincing reasons for the Court of Justice to take this doctrine into consideration in the IBM case, in so doing the Court may create another level of jurisdictional conflict, this time between itself and the executive and legislative branches of Community government. This note will conclude that because the Court of Justice may infringe on functions allotted to other Community political organs by considering questions of international comity in the IBM case, the Court's competence to do so is called into question.\(^8\)

This note will survey the law of the Community\(^9\) and its member states,\(^20\) United States law,\(^21\) and international law.\(^22\) The factual aspects of the EEC case against IBM which highlight the tensions underlying the comity question in international antitrust will also be explored.\(^23\) Before turning to these issues, however, the historical and theoretical context of the comity question in international antitrust will be examined.

**COMITY AND JURISDICTION**

The notion of comity, whether viewed as part of a threshold inquiry into the existence of jurisdiction or as a doctrine of abstention from the exercise of jurisdiction, presupposes some colorable preexisting basis for jurisdiction.\(^24\) The most widely accepted and least controversial theory of jurisdiction is the territorial principle. This principle recognizes a sovereign's exclusive right to legislate and enforce rules pertaining to activity occurring within the territorial boundaries of that sovereign. Since this right is generally perceived as being essentially absolute,\(^25\) the doctrine of comity can be seen as a necessary concomitant to the territorial principle of jurisdiction: if the sovereign's...
power within its territories is to be preserved, it must not be subject to interference by other nations.

Unfortunately, the abstract notion of a border cannot contain or exclude all human activity and its effects, and the two categories of behavior implied by the territorial principle (i.e., territorial and extra-territorial) do not provide an adequate conceptual framework for dealing with acts that have a transnational influence. As a result, the territorial principle of jurisdiction has been expanded. The doctrine which has been developed in order to reach activity initiated outside of, yet having impact within, the territory of the sovereign claiming jurisdiction is referred to as the "objective territorial principle." 26

The objective territorial principle has received wide approbation, and is considered a valid basis for the exercise of jurisdiction under international law. 27 It is also relatively uncontroversial, at least when applied to rather simple factual situations, as when the courts of state B exercise jurisdiction over a murderer whose victim was felled in that state by a shot fired from state A. 28 This illustration, although the archetypal example of the objective territorial principle (judging from its popularity among commentators), is lacking in the elegance usually expected in a legal rule. The more generally applicable verbal formulation used to define situations amenable to such a jurisdictional basis is that state A may exercise jurisdiction over crimes occurring in state B, so long as one of the essential and constituent elements of the crime occurs within the boundaries of state A. 29

A certain important distinction should be noted here: as long as state A is exercising prescriptive or rule-making jurisdiction only over activities part of which take place in state B, state B's sovereignty is not in any important sense challenged. It is when state A seeks to exercise enforcement jurisdiction over those activities that state B's sovereignty is undermined. Of course, the exercise of prescriptive jurisdiction is


26 Similarly, the "subjective" territorial principle refers to the exercise of jurisdiction over behavior initiated in the forum's territory, but consummated on foreign soil. Id. at 293.

27 The Permanent Court of International Justice lent its imprimatur to this principle in The S.S. Lotus (Turk v. Fr.), 1927 P.C.I.J., ser. A, No. 10. In this case, the court found that Turkey had validly exercised jurisdiction over the officers of a French ship that had collided with a Turkish ship, causing the latter to sink, drowning the Turkish crew members and passengers.

28 "The classical illustration is the firing of a gun across a frontier causing a homicide on the territory of the forum. . . ." I. BROWNLIE, supra note 13, at 293.

generally meaningless without, and is therefore usually coupled with, the exercise of enforcement jurisdiction.

**OBJECTIVE TERRITORIALITY AND ANTITRUST**

The objective territorial principle first made its appearance in antitrust jurisprudence with Judge Learned Hand’s opinion in *Alcoa.* United States courts were held to have antitrust jurisdiction over foreign activities which were intended to and did have an effect on United States foreign commerce.

The *Alcoa* “effects” test differs from the formulation of objective territoriality given above in that it substitutes the constituent element of the crime standard with an inquiry into the impact of foreign actions on United States foreign commerce. This alteration is laudable inasmuch as it avoids the characterization problems endemic to any attempt to define the constituent elements of a crime. As a result of this alteration, however, the effects test does not exhibit the sensitivity to the limits of sovereign power reflected in the constituent element standard’s requirement of a physical connection between the proscribed act and the forum’s territory.

One commentator has suggested that this lack of reference to territorial concerns in the effects doctrine is due to the nature of antitrust law, specifically, its foundation in the concept of the “relevant market.” Such markets commonly encompass more than one nation, suggesting that, to be totally effective, antitrust law requires application without regard to national boundaries. Although such universal application is possible only to a limited extent, the effects approach to antitrust jurisdiction does further this policy, which may also account for its popularity among those entrusted with the enforcement of competition laws.

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30 United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (Court of Appeals for the Second Circuit sitting as a special court of last resort because of the inability to achieve a quorum in the United States Supreme Court) [hereinafter cited as *Alcoa*].

31 See infra notes 41-43 and accompanying text. Mayras might just as easily have confined his description of an infraction of the competition laws to specific acts, and not broadened it to include the effect of those acts on the market.


33 See Imperial Chem. Indus. v. E.C. Commission, 1972 C.J. Comm. E. Rec. 619, 696, 11 Comm. Mkt. L.R. 557, 607 [hereinafter cited as *Dyestuffs*] (submissions of Advocate General Mayras: “Surely the Commission would be disarmed if, faced with a concerted practice the initiative for which was taken and responsibility assumed exclusively by undertakings outside the Common Market, it was deprived of the power to take any decision against them?”).
The Effects Doctrine in the EEC

The Commission first displayed its enthusiasm for the effects doctrine in the Aniline Dyes Cartel case. In that case, the Commission fined nine companies for their role in a price-fixing scheme involving the aniline dyestuffs market. Three of these companies, Imperial Chemical Industries, a British firm, and Geigy and Sandoz, two Swiss firms, were based in non-EEC countries. The Commission based its jurisdiction over these companies on the effects doctrine. To support its adoption of that doctrine, the Commission relied on language in Article 85(1) of the Rome Treaty prohibiting all agreements, decisions, and concerted practices whose effect is to prevent, restrict, or distort competition within the Common Market.

The Court of Justice did not, however, adopt the effects basis for jurisdiction as suggested by the Commission. Instead, it relied on a "single economic unit" theory whereby the acts of the foreign companies' subsidiaries located within the Common Market were imputed to the parent because the subsidiaries were deemed to have no autonomy. The parents could then be seen as having acted within the territory of the Common Market, allowing jurisdiction to be based on the territorial principle. In subsequent cases dealing with both Articles 85 and 86, the Court of Justice has relied on the "single economic unit" basis of jurisdiction and has not, contrary to some reports, adopted the ef-

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34 Id. at 696, 11 Comm. Mkt. L.R. at 607.
36 The Commission stated:

The competition Rules of the Treaty are . . . applicable to all restrictions of competition which produce within the Common Market effects set out in Article 85(1). There is therefore no need to examine whether the undertakings which are the cause of these restrictions of competition have their seat within or outside the Community.

Id. at D-33.

Article 85(1) of the Rome Treaty provides:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of the undertakings and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.

Rome Treaty, art. 85(1), supra note 2.

fects doctrine. This is not to suggest, however, that the effects doctrine is dead in the Common Market; the Court of Justice has not explicitly rejected the doctrine. Moreover, while the Court could probably apply the single economic unit approach to the IBM case, the fact that the Commission has made its complaint against the United States parent, and not its European subsidiary, may indicate that the Commission is again advocating the effects doctrine.

Although the Court has avoided the controversy that would probably have ensued had it adopted the effects doctrine, the single economic unit theory still allows it to reach foreign centered conduct. Consequently, the comity issues raised by IBM will be valid no matter what theory of jurisdiction is used in that case. The Court's reluctance to accept the effects doctrine would, in fact, seem to support IBM's contentions, inasmuch as it implicitly reflects the Court's sensitivity to problems created by a too aggressive extraterritorial application of competition laws.

THE INFLUENCE OF MEMBER STATE LAW

In deciding whether or not to adopt the doctrine of comity as part of the jurisdictional jurisprudence of EEC competition law, the Court of Justice will turn first to the law of the Community member states. From this source, the Court will discern two ostensibly conflicting signals. On the one hand, there are the competition laws of the member states. For the most part, these laws are to be applied to restrictive

("[T]he Court of Justice for the EEC has interpreted Article 85(1) . . . as embodying the economic effects doctrine.").  

40 Id.

41 "[T]he Europeans had a choice of either bringing the case against IBM Europe or bringing it directly against the parent company, IBM U.S. They chose to bring it against the parent company, so they have engaged in their own form of extra-territoriality." Causes, Solutions To International Disputes Are Assessed by Former Antitrust Official, [Jan.-June] ANTITRUST & TRADE REP. (BNA) No. 1014, at AA-6 (May 14, 1981) (interview with Joel Davidow).

42 Norton, supra note 39, at 392 n.32 ("Although circumventing the 'effects' doctrine, the Court reached the same conclusion with its single enterprise doctrine. Moreover, the Court avoided major international reactions against a broad extension of the extraterritorial jurisdiction doctrines.").

43 Two commentators state:

Treaties, like the rules of public international law, are influenced by the rules of municipal law. More than that they are derived from the laws of the six founding states. It is natural, therefore, that the Community Court should turn for guidance to the laws of the member states.

practices no matter where the offending parties are located, within or without national boundaries, so long as the activities of those parties have some impact on the relevant internal markets. On the other hand, there are the laws enacted by some of these same states which are designed to protect against the intrusion of foreign, and particularly United States, antitrust laws. Complementing these latter laws are statements made to the United States Justice Department protesting the extraterritorial application of American antitrust laws.

Although these dissonant strains may be attributed to a failure of the involved nations to practice what they preach, less cynical attempts have been made to harmonize them. One notable example is

Advocate General H. Mayras stated:

* * *

The German Statute of 1975 [GWB] . . . applies "to all restrictions on competition which have an effect . . . in the territory in which it is applicable (i.e. that of the Federal Republic of Germany) even if such restrictions result from acts performed outside that territory."

In France the prices ordonnance of 30 June 1945 and the unfair competition ordonnance of 25 September 1962 make a distinction between dominant position, where there is a monopoly situation or a clear concentration of economic power, which must exist on the internal market, and the prohibition of cartels which does not involve any limitation of that nature.

On several occasions the Technical Committee on Cartels, compulsorily consulted by the Minister of Economic and Financial Affairs before the bringing of any judicial proceedings, has applied that statute to foreign undertakings.

* * *

The territorial effect criterion is applied by the Belgian Statute of 27 May 1960 against abuse of economic power . . .

Section 1 of the Dutch Statute on economic competition of 16 July 1958 . . . has been interpreted . . . as follows: "To avoid any misunderstanding, it is to be noted that the nationality of the members of a cartel operating in Holland or of those who hold a dominant position on the Dutch market is of no importance." (emphasis in original) (footnotes omitted). Dyestuffs, 1972 C.J. Comm. E. Rec. 665, 688-89, 11 Comm. Mkt. L. R. 537, 595-97 (submissions of Advocate General H. Mayras). See also I. BROWNLIE, supra note 13, at 300 ("It must be noted that anticartel legislation in Austria, Denmark, and the German Federal Republic imitates the American [effects] doctrine.").

Countries which have enacted laws to protect against the intrusion of foreign antitrust laws include EEC member states France, Holland, and the United Kingdom; and non-member states Finland, India, Norway, Sweden, and the Canadian Provinces of Ontario and Quebec. Ellis, Antitrust and International Law as Viewed from the United States and the European Common Market, 25 Rec. A.B. City N.Y. 206, 220 (1970).

Countries which have publicly protested extraterritorial application of United States antitrust laws include EEC member states France, Germany, Italy, The Netherlands, Denmark, and Ireland. Non-EEC protesting states include Canada, Finland, India, and Japan. Id. at 219.


The 1968 Convention [on Jurisdiction and the Enforcement of Judgments in the E.E.C.] does two things which are of interest in [the context of comity]. As between E.E.C. members it limits the exercise of certain bases of jurisdiction, which are categorised as exorbitant, but as against non-E.E.C. members, it extends them. As regards the first point, when it comes into domiciliaries the following bases of jurisdiction (inter alia): the notorious Article 14 French jurisdiction based on nationality of the plaintiff; the German and Scots jurisdiction based the mere presence of the defendant, however short the period. But as regards non-E.E.C. domiciliaries, the jurisdiction will be extended. . . .
the argument made by Advocate General H. Mayras in the *Aniline Dye-stuffs* case in support of the effects doctrine. In his submissions to the Court of Justice in the *Dyestuffs* case, Advocate General Mayras downplayed the effects doctrine's "interventionist" potential by noting that the national courts applying it generally require a "direct and substantial" connection between the proscribed foreign conduct and the internal economy. He also made the cogent suggestion that these "direct and substantial" effects be viewed as providing the "essential and constituent element of a crime" necessary to trigger the objective territorial principle. This is an intriguing assertion and, although no doubt meant to make the effects doctrine more compatible with the territorialist viewpoint, it acknowledges, albeit implicitly, the irrelevance of the border-bound conceptualism of the territorialists to the market issues which are the subject of competition laws.

In order to complete his portrait of the effects doctrine as simply another facet of the objective territorial principle, the Advocate General had to explain the "anti-antitrust" laws enacted by member states that seem so unalterably opposed to this doctrine. He suggests that such laws are, in fact, compatible with effects-based prescriptive jurisdiction, and that the object of those laws is to protect only against effects-based enforcement jurisdiction. In other words, these nations are willing to tolerate foreign adjudication of issues arising from domestic conduct, so long as the remedies granted have no "coercive" impact within the legislating nation's boundaries.

One such non-coercive remedy, Mayras suggests, is the fines the Commission levied against the defendant companies in the *Dyestuffs* case. Those fines, he asserts, satisfy the policies behind both the effects doctrine and the anti-antitrust laws because they punish the foreign conduct without challenging the sovereignty of the nation on whose territory the conduct took place. To support this analysis, Mayras draws a distinction between "[t]he imposition of a pecuniary penalty to punish anticompetitive conduct" and "a decision sanctioned by fine to obtain communication of certain documents or which would

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51 *See supra* note 32 and accompanying text.
53 *See supra* notes 45-46 and accompanying text.
55 *Id.* at 695, 11 Comm. Mkt. L. R. at 606.
constitute a means of pressure to obtain the annulment of certain clauses considered unlawful."

The validity of this distinction depends on the absence of any coercive potential from the former class of fine. Mayras, however, acknowledges that a fine to punish anti-competitive conduct may also serve "to prevent (the conduct's) continuance and renewal." This admission makes it apparent that the principal distinction between the two types of fines is that one is explicitly coercive, while the other is only tacitly so.

Perhaps it is too much to expect to be able to reconcile the competing goals of the effects doctrine and the anti-antitrust laws with one form of remedy. When it is shown that there is no such thing as a non-coercive fine, Mayras' attempt at such a reconciliation fails. Indeed, to suggest that the conflict between the two policies can be resolved by remedies which punish conduct but exert no pressure toward its cessation is in fact to ignore the conflict: either the policy of the effects doctrine must prevail through remedies that reach foreign conduct deleterious to the domestic economy, or the policy reflected in the antitrust laws must prevail because of the ineffectiveness of the remedy. Therefore, it appears inevitable that any effective attempt to apply national competition law to transnational markets, which is the essential purpose of the effects doctrine, will involve a certain amount of tram- meling upon the territorial interests reflected in the anti-antitrust laws.

Mayras' flawed analysis leaves us with a sense of the tenacity of the problem of resolving these conflicting policies. It also shows, however, that there is a common thread of restraint which does, to a certain extent, unify the two policies. This restraint is seen in the direct and substantial connection which is a prerequisite in most forums to the application of the effects doctrine, and in the delineation of a specific group of interests to be protected by the anti-antitrust laws, as opposed to those laws having a blanket applicability to foreign competition.

56 Id. (emphasis in original).
57 Id.

Companies engaged in obvious offenses of the European Community's competition laws can expect much higher fines in the future, according to an EC enforcement official.

Outlining the Competition Directorate's new 'get tough' policy in an exclusive BNA interview on December 5, Restrictive Practices Director John Ferry stressed: 'Deterrence is now the order of the day.'

* * * *

The Commission revised its policy on fines when it was realized that many companies engaging in blatant anticompetitive practices regard Commission penalties as 'little more than a parking fine.'
law.\textsuperscript{59}

It appears, then, that the message the Court of Justice will ultimately distill from analysis of member state law is that the tension between the policies of extraterritoriality and protectionism is unavoidable, but that both policies should be pursued with as much restraint as possible. A principled model of effectuating this restraint has appeared in embryonic form in recent decisions in the United States.

**COMITY IN UNITED STATES ANTITRUST**

Early in the history of the United States antitrust laws, courts construed the laws to apply only within the national borders of the United States.\textsuperscript{60} This conservative jurisdictional policy was decisively broadened by Judge Learned Hand in *Alcoa*.\textsuperscript{61} Judge Hand based jurisdiction over a Canadian aluminum manufacturer that participated in a Swiss-based aluminum cartel on the effects of that manufacturer’s anticompetitive behavior on the United States market, although none of that behavior occurred in the United States.\textsuperscript{62}

Other courts were quickly influenced by and eager to apply this jurisdictional rule. In the *Swiss Watchmakers* case,\textsuperscript{63} the zeal of the court in decreeing extensive alteration of the subject industry led to the intervention of both the United States and Swiss governments.\textsuperscript{64} Reli-

\textsuperscript{59} *Dyestuffs*, C.J. Comm. E. Rec. 665, 695, 11 Comm. Mkt. L. R. 557, 605 ("It will also be noted that the counter-legislation adopted in France as in Holland and in other countries is aimed basically at prohibiting their own nationals from submitting to inquiry and supervision and to orders imposed by foreign authorities."). *See also* Recent Development, *supra* note 38, at 730 n.31:

[The Protection of Trading Interests Act] is similar to past measures in that it restricts compliance with foreign pretrial discovery procedure and protects British defendants from liability in foreign courts for acts which would be permissible under British law. Unlike past measures, however, the Act is also aimed at countering the consequences of treble damage awards rendered against British defendants.

(footnote omitted).

\textsuperscript{60} *See, e.g.*, American Banana v. United Fruit, 213 U.S. 347, 356 (1909) (Justice Holmes, speaking for the Court, said: "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where that act is done.").

\textsuperscript{61} *Alcoa*, 148 F.2d 416 (2d Cir. 1945).

\textsuperscript{62} *Id.* at 443-44.


[T]he district court found that the basic agreements constituting the Swiss watchmaking industry, which had been in effect since the early 1930’s, evidenced a conspiracy to restrain such commerce that as such, the basic agreements were contrary to United States antitrust laws. Prior to direct negotiations between the Swiss and United States Governments with respect to
ance on the effects doctrine by United States courts prompted criticism and protest from other governments, and led them to enact laws to protect their citizens from certain aspects of the extraterritorial application of the antitrust laws.\textsuperscript{65}

Courts in the United States have begun to respond to this intense reaction to their exercise of extraterritorial jurisdiction. In \textit{Timberlane v. Bank of America},\textsuperscript{66} the Ninth Circuit employed a three part approach for finding subject matter jurisdiction over foreign activity. After first establishing that the alleged conduct affected or was intended to affect the foreign commerce of the United States, the court asked whether the conduct was of sufficient magnitude to be cognizable as a violation of the Sherman Act. Answering these two questions affirmatively, the court then considered whether, as a matter of international comity and fairness, the extraterritorial jurisdiction of the United States should be asserted to reach that activity.\textsuperscript{67}

The court listed seven criteria dealing with different facets of the possible conflict between United States and foreign interests that it decided must be considered in making this latter determination.\textsuperscript{68}

\begin{itemize}
\item\hspace*{1em} (1) the degree of conflict with foreign law or policy,
\item\hspace*{1em} (2) the nationality or allegiance of the parties and the locations or principal places of business of corporations,
\item\hspace*{1em} (3) the extent to which enforcement by either state can be expected to achieve compliance,
\item\hspace*{1em} (4) the relative significance of effects on the U.S. as compared with those elsewhere,
\item\hspace*{1em} (5) the extent to which there is explicit purpose to harm or affect American commerce,
\item\hspace*{1em} (6) the foreseeability of such effect, and
\item\hspace*{1em} (7) the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad.
\end{itemize}

\textsuperscript{65} See supra note 45 and accompanying text.
\textsuperscript{66} 549 F.2d 597 (9th Cir. 1976). The case involved an embargo by the Honduran government on some of Timberlane's assets imposed at the behest of a creditor of Timberlane in order to protect that creditor's security interest in the assets.
\textsuperscript{68} The criteria are:

After the direct intervention of the Swiss Government with the U.S. Department of State and Department of Justice, important changes were made in the final judgment, including the insertion of a provision that nothing contained in it would limit or circumscribe the sovereign right and power of the Swiss Government to control and regulate its own domestic or foreign commerce or to apply regulations to the watchmaking industry.
ing the record incomplete as to these issues, the court remanded the case to the district court for determination of the comity question.

A similar list of factors to be reviewed in deciding whether the exercise of jurisdiction is consistent with the comity doctrine was promulgated by the third circuit in *Mannington Mills, Inc. v. Congoleum Corp.*69 However, in remanding the case to the district court for development of a fuller record, the Court of Appeals stated that the comity issue should determine whether or not the court should abstain from exercising otherwise valid jurisdiction. The court's analysis thus differed from that in *Timberlane*, where comity was viewed not as an abstention doctrine but rather as a threshold jurisdictional question.70

Comity considerations are a recent and, as yet, unsettled element of the jurisdictional analysis for applying the United States antitrust laws.71 The Justice Department, however, has and will continue to consider comity when determining whether or not to bring an antitrust action.72

Because of certain basic differences between the policies underly-

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69 595 F.2d 1287 (3d Cir. 1979). The action questioned the validity of patents obtained in 24 different countries. In addition to adopting all of the *Timberlane* criteria, with the exception of one (relative significance of the effects on the United States compared to effects elsewhere), the court listed for consideration the following: (1) availability of a remedy abroad and the pendency of litigation there; (2) possible effect upon foreign relations if relief is granted; (3) whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (4) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (5) whether a treaty with the affected nation has addressed the issue. *Id.* at 1297-98.


71 See Kraft, *Antitrust Law: Extraterritoriality—In re Uranium Antitrust Litigation (Westinghouse Electric Corp. v. Twenty-nine Foreign & Domestic Uranium Producers)*, 5 Trade Reg. Rep. (CCH) ¶ 63,183 (7th Cir. Feb. 15, 1980), 21 *HARV. INT'L L.J.* 515, 518 (1980), where the author suggests that the *Westinghouse* court "narrowly construed the substantial effects analysis [in *Timberlane*] as reaffirming the *Alcoa* intended effects test and regarded the further [comity] balancing inquiry employed in *Timberlane* as mere dictum."


A recent speech by another Antitrust Division official noted that the Division has long abided by the balancing test [of *Timberlane*] in determining whether to prosecute and that "the interdependence of the world economy and legitimate interests of foreign sovereigns must be considered in private as well as public antitrust enforcement under American law."

ing United States and EEC competition law, it is uncertain what influence the recrudescence of comity in American antitrust law will have on the Court of Justice when it considers the issue. The problems created by the extraterritorial application of competition laws are not peculiar to such application of the Sherman Act, however, and coping with them in a manner akin to that gaining currency in United States courts would appear preferable to ignoring them. Action by the Court of Justice also seems called for since no international organization has yet made a substantive contribution to the resolution of these problems.

**Comity Issues Raised by the IBM Case**

The need for Community adoption of some method to deal with the problems of extraterritorial jurisdiction is most persuasively illustrated by examining the EEC action against IBM in light of the criteria developed by United States courts for use in deciding the comity issue. Since the interests weighed in addressing this question may be expressed in a number of ways, no definitive list of criteria has been or is likely to be agreed upon. The formulation in *Timberlane, Mannington Mills*, and section 40 of the *Restatement (Second) of United States Foreign Relations Law* each emphasize slightly different facets of the com-

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73 Grendell, *The Antitrust Legislation of the United States, the European Economic Community, Germany and Japan*, 29 INT'L & COMP L.Q. 64, 74 (1980). Unlike the United States laws, the competition laws of the EEC do not define a class of *per se* illegal activities. This reflects a willingness on the part of the Community to look beyond the impact an activity has on competition for some other justification for that activity (e.g., allowing concentration of a domestic business in order to enhance the foreign trade posture of that business). United States courts generally look no further than the competitive impact of an activity.

74 See, e.g., J. Cunningham, *The Competition Law of the EEC* 72 (1973) ("The United Kingdom does not accept the 'effects' principle as made clear in the Aide Memoire submitted to the Commission by the United Kingdom Government in connection with the *Aniline Dyes* case.").

75 There have been a number of attempts in this direction, however. See Norton, *supra* note 64, at 596. Norton states:

Implementing its 1967 recommendation respecting voluntary consultation and cooperation among antitrust officials of the member States, the OECD Council recommended in 1973 that every member State, which considered itself injured by the restrictive trade practices of an enterprise situated in another member country, should consult with the appropriate governmental authorities of the latter. If the two countries cannot reach a mutually satisfactory solution, they may submit the dispute for reconciliation to the OECD's Committee of Experts on Restrictive Practices, comprising antitrust officials from 22 OECD countries.

ity issue, but there is a generic similarity underlying all of them. In the following analysis, all three definitional approaches will be represented.

The allegations against IBM involving its alleged failure to release interface redesign information to its competitors have significant international implications; this analysis of the comity issue will, therefore, focus on them. It should also be noted that the following discussion presupposes a decision by the Commission compelling IBM, through direct order or oppressive monetary penalty, to release such information to its competitors in a manner adequate to obviate the competitive advantage IBM is alleged to enjoy. As pointed out above, any other kind of relief would be of little aid in vindicating EEC competition policy and also would not implicate issues of international comity.

While the locus of the disputed conduct is the fundamental threshold inquiry in the comity issue, concern with the extraterritorial nature of that conduct does not end there. Because determination of the comity question is essentially a matter of balancing domestic and foreign interests in the subject conduct, the degree to which such conduct can be said to be based in the foreign jurisdiction, in more than simply the physical sense, is of utmost importance. To discern the strength of this connection, suggested criteria include the relative importance of foreign and domestic conduct to the alleged violation, and the nationality of the parties. Applying these criteria to IBM's conduct—decisions made by a United States company within the United States and effectuated there—confirms that the conduct is centered in the United States.

The nationality of the parties is also looked to in determining where the dispute is centered. While the Commission's status as one of those parties adds an international character to the dispute, this character is diluted by the fact that the Commission's action was prompted, in part, by Memorex SA, an affiliate of Memorex U.S. Memorex U.S.

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76 Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965) lists the following considerations:

1. the vital national interest to each of the states, (2) the extent and nature of hardship which inconsistent enforcement would create for the involved parties, (3) the extent to which the required conduct is to take place in the territory of the other State, (4) the parties' nationalities, and (5) the State's ability to enforce compliance.
77 See infra notes 83-88 and accompanying text.
78 See supra notes 57-58 and accompanying text.
79 See supra notes 68-69, 75.
80 "By an order of 13 May 1981 the Court allowed Memorex SA, a company incorporated under Belgian law, which had lodged a complaint against IBM with the Commission, to intervene in the case in support of the conclusions of the defendant." IBM v. E.C. Commission, 32 Comm. Mkt. L. R. 93, 95 (1981).
brought an unsuccessful antitrust action in the United States against IBM. Although a factual determination regarding the domination of a subsidiary by its parent should precede the attribution of the subsidiary’s action to the parent because of the lack of real autonomy in the subsidiary, application of the Court of Justice’s “single economic unit” analysis to the involvement of Memorex SA in the EEC case against IBM could lead to the conclusion that such involvement is a means by which Memorex SA’s American parent is pursuing its complaint against IBM. Such a conclusion would reinforce the perception that the Commission’s action is a European manifestation of an essentially United States-centered dispute.

The place where any remedial acts are to occur is another important factor in the decision on the exercise of jurisdiction. Since IBM’s compliance will consist of either paying fines to the Community or releasing the desired information to its European competitors, that place of performance is ostensibly on Community “turf.” It should be remembered, though, that any remedy decided on by the Commission and approved by the Court will have as its object the modification of conduct centered in the United States. As the jurisdiction which is being considered is based on the domestic effects in Europe allegedly occasioned by IBM’s conduct in the United States, it would be inconsistent not to take notice of the externalities created by the required “domestic” conduct.

This is especially true when the effect in the United States of the putatively European conduct involves the compromise of profitable business practices based within the United States and found not to violate United States competition laws. Such is the case with IBM’s practice of not revealing changes in interface design to competitors in advance of the first shipment to customers. In a number of civil actions brought against IBM by its American competitors in the peripherals market, this practice has been found to be permissible under United States antitrust law. In California Computer Products v. IBM, the

81 See supra notes 37-39 and accompanying text.
82 Another ramification of Memorex’s involvement in both the American and European actions against IBM is the violation of the maxim, ne bis in idem, the notion that a person should not be tried twice for the same act. Although IBM is not being exposed to “double jeopardy” in a strict sense because of the differences between United States and EEC law, the possibility that Memorex’s involvement in the EEC action gives to it a second chance against IBM would appear to run contrary to the fundamental notion of fairness informing the “double jeopardy” doctrine. See Causes, Solutions to International Disputes Are Assessed By Former Antitrust Official, supra note 41, at AA-6-AA-7 (“[O]ne can see the [IBM] case as a kind of second chance, i.e., American plaintiffs losing a case in the U.S., taking another shot at it by becoming complainants in the Common Market.”).
83 613 F.2d 727, 744 (1979).
court found that, even assuming IBM was a monopolist, IBM "was under no duty to help CalComp or other peripheral equipment manufacturers survive or expand," and, to this end, IBM was not obliged to tailor "its product development . . . to facilitate sales of rival products." The loss by IBM of incentive to invent if it were deprived of the lead time needed to recoup product development costs was noted by the court in *Memorex Corp. v. IBM*. The court in this case also observed that the requested disclosures "would reveal valuable information about the design of the products." Any disincentive to technological improvement runs contrary to the goal of free competition to promote an efficient market, which implies provision of the best product at the lowest price. Ordering IBM to make the requested disclosures, then, would have the potential of adversely affecting not only IBM's legitimate (as determined by United States courts) business interests, but also the proper functioning of the market for computer technology.

While it is possible that the release of information to IBM's European competitors would not compromise the competitive advantage IBM enjoys in the American market through the withholding of that information, it is more likely that IBM's competition in Europe would enter the American market, or would communicate such information to an American affiliate. This is clearly a possibility in the case of Memorex.

Analysis of IBM's conduct, the dispute arising from it, and the impact of the remedial steps that the Commission and the Court might require in response to it, indicates that the IBM matter is essentially an American concern. This impression is reinforced by consideration of yet another of the factors suggested by United States jurisprudence on

84 *Id.*
85 458 F. Supp. 423, 437 (W.D. Cal. 1978), aff'd, 636 F.2d 1188, (9th Cir. 1980).
86 *Id.*
87 See also Transamerica Computer Co. v. IBM Corp., 481 F. Supp. 965 (N.D. Cal. 1979) (since the challenged design changes by IBM had some purpose other than excluding competition in the peripherals market, no relief was granted to Transamerica); Telex Corp. v. IBM Corp., 510 F.2d (10th Cir. 1975) (Telex alleged that IBM's refusal to disclose interface design changes violated the Sherman Act; IBM successfully counterclaimed for misappropriation of trade secrets).
88 See *Baxter Urges EC Competition Officials Not to Force Interface Disclosures by IBM*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 42, at 278 (Feb. 4, 1982):

[Assistant Attorney General William F.] Baxter warned [Manfred Caspari, Director General of the Directorate General for Competition] that requiring IBM to disclose its computer software interface specifications would adversely affect U.S. exports. Any order requiring such a solution for alleged anticompetitive activities in Europe would have worldwide consequences and would constitute a 'quasi confiscatorial' action highly unfavorable to the U.S. trade position, Baxter recounted in an interview with BNA.
the comity question: the pendency of litigation abroad.\textsuperscript{89} 

Although the currency of IBM's assertion that its activities are already subject to judicial proceedings in the United States is diminished somewhat by the Justice Department's decision to drop its thirteen year old suit against IBM, this decision should have little effect on the deliberations by the Court of Justice. For IBM's assertion to influence the Court, the Court would have to acknowledge the primacy of the decisions of the United States judiciary as they pertain to activity on United States soil. From the perspective of European deference to this jurisdiction, any decision that might have come in the Justice Department's action against IBM would have been a superfluity: such a decision would have no more legitimacy, in spite of its increased scope, than the decisions in \textit{Memorex}, \textit{CalComp}, or \textit{Telex}. 

\section*{Whither Comity?}

The above analysis indicates that, in light of the criteria which American jurisprudence suggests should be utilized in considering the effect of comity on extraterritorial jurisdiction, there are compelling reasons for the Court of Justice to decline to exercise its jurisdiction over the IBM matter. Assuming that this analysis is correct and the United States interest in the IBM case outweighs the interest of the Community, the Court may nevertheless be constrained to hear the case and reach a judgment on the matter, including, if the merits of the case indicate, ordering the requested disclosure. 

The comity issue, by its nature, arises in dilemmas which involve governmental functions that have been traditionally allocated exclusively to different branches of government. Judicial deference to foreign interests can, thus, result in jurisdictional conflicts on a level different from the jurisdictional conflict which provoked it. Such deference usurps the legislative function by vindicating policies other than the ones required by the legislature to be vindicated, while the failure to so defer may result in encroachment upon foreign relations policy, traditionally the preserve of the executive. The delicate balancing of competing national interests necessary to resolve the disputes arising from the extraterritorial application of antitrust laws is probably beyond both the capacity and political competence of the judiciary in both the EEC and the United States.\textsuperscript{90} 

The problematic nature of any judicial excursion into the realm of 

\textsuperscript{89} See supra notes 59-60, 67 and accompanying text. 
\textsuperscript{90} Although some tempering of the effects doctrine is clearly appropriate, the judicial application of comity is a less than ideal solution. Comity is in the eye of the beholder and any long list of factors, such as those in \textit{Timberlane}, is simply an open invitation to the court to
foreign policy was noted in a recent critique of the comity analysis suggested by the court in *Timberlane*. The author suggests that although the factors listed by the *Timberlane* court seem to constitute a principled method of balancing domestic and foreign interests, the efficacy of their application is questionable. For example, even if a court were able adequately to discern and characterize the policy of the foreign sovereign (an endeavor likely to antagonize that foreign sovereign), the *Timberlane* analysis gives no guidance as to where that policy should stand in relation to United States policy. Should this analytical hurdle be overcome and a court decide that foreign interests ought to predominate, the author notes that, as traditionally understood, "comity [should not be practiced] if doing so would be contrary to [the forum] nation's interests or policy."

The logistic and diplomatic difficulties inherent in any attempt to define and weigh the policies of a foreign sovereign would be present in any such effort by the Court of Justice. The institutional framework created by the Rome Treaty would also lead one to conclude that it is beyond the power of the Court to subjugate Community policy to the concerns of the United States.

It can be seen that, when hearing the IBM case, the paramount concern of the Court will be the underlying policy of the Rome Treaty, which is the promotion and cultivation of the Community economy.
The condition of the European market in computers will, therefore, carry more weight before the Court than IBM’s pointed challenge of the Community’s extraterritorial reach. The clear policy of the Treaty must have dispositive influence over the Court which derives its power from that Treaty, no matter the international controversy that might be provoked by decisions bowing to that influence.

In a sense, then, the limits of the power of the judiciary to engage in executive or legislative capacities is what is put into sharpest relief by the Commission’s action against IBM. Although the consideration of comity-related issues by the courts may help avoid exacerbating these disputes, their ultimate resolution must be reached through diplomatic exchange.96

CONCLUSION

The Commission’s action against IBM raises once again the issue of the proper role for the doctrine of international comity in actions involving the extraterritorial application of competition laws. Application to the IBM case of the criteria developed by United States courts in dealing with the issue indicates that United States interests in the dispute may very well outweigh those of the Community. The fact that any effective remedy prescribed by the Court of Justice must have as its aim ending profitable activity by IBM already found to be legal by United States courts makes this especially clear. Because deference to United States interests usurps to a degree legislative power not reserved to the Court, there is some considerable doubt whether it is within the power of the Court to so defer. It would, therefore, seem incumbent upon the governmental organs charged with the formulation and execution of the foreign policy of the interested parties to reach a resolution of this and other similar disputes.

Terrance L. Bessey

Free and unimpeded competition is not the purpose of the EEC law, but rather is a tool to achieve its goal. That goal is an improved standard of living among the member states, promoted in part by greater market integration. Where competition inhibits growth, however, the former must give way. This balancing process is the essence of European Community antitrust law.

Id. at 251.

96 See Kadish, supra note 91, at 171. Kadish states: “If [extraterritorial] enforcement gives rise to problems in the international sphere, then these difficulties are best handled by the political branches of government, not the courts.” Id. There is some indication that the political branches of the two governments are, in fact, taking care of such difficulties. See also EEC Antitrust Case Against IBM, supra note 3, at 1030. (United States Justice Department and EEC Commission “actively discussing” IBM proceeding). But see id. (“Frans Andriessen, the EEC commissioner responsible for competition policy . . . commented: ‘Given the complexity of the case, I think there are several more years to go before it is completed.’ ”).