The Multinational's Dilemma: The IBM Proceeding in Europe

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I. Introduction

Increased volume of international trade, availability of modern communications, proliferation of the multinational enterprise, and increased specialization on the part of industrial nations has created a world of international economic interdependence. Unfortunately, the legal, economic, and commercial systems confronted by the international business community are neither interrelated nor uniform. The rise in transnational activities has placed individuals and businesses in the midst of a conflict between the policies and laws of different governments. The conflict results from a direct collision of national goals being applied with equal force and vigor. Because multinational corporations typically have contacts with subjects of different nations, they are particularly affected by the problems arising from this conflict. One area in which this international conflict of laws is most apparent is in the modern application of antitrust laws.¹

Formerly, the United States was the only country with comprehensively developed antitrust legislation.² Today, however, antitrust is no longer an exclusively American concept. The significance of the international market and the desire for free competition between buyer and seller has forced major industrial democratic countries to adopt antitrust legislation.³ In the last half century Japan,⁴ Germany,⁵ and the European Economic Community⁶ (EEC) have adopted antitrust legislation similar to that enacted by the United

⁵ See Heil & Vorbrugg, Anti-Trust Law in West Germany: Recent Developments in German and Common Market Regulation, 8 INT’L LAW. 349 (1974).
States. This Comment will focus on the EEC's competition laws. The EEC has enacted antitrust legislation which is no less extensive than United States antitrust laws. Like the United States, the EEC seeks to assure unhindered operation of the free market. Additionally, the EEC enactments are rigorously enforced, even though enforcement mechanisms and antitrust philosophy may differ from those of the United States. To the uncertainty created by the lack of uniformity among antitrust laws is added the chauvinism of many local lawmakers and jurists, both American and foreign. These policymakers believe that their individual courts and administrative bodies must exercise extraterritorial jurisdiction in order to protect the policy embodied in their respective antitrust laws.

The problematic application of foreign antitrust laws is a major concern for American multinational corporations. This is especially the case when the adversary includes a trading entity as valuable as the EEC. There are two ways an American multinational corporation can engage EEC antitrust legislation. "First, there is the aspect of direct economic activity within the Community through subsidiaries and branches; second, there is the aspect of multinational activity outside the Community which may be deemed to have an effect within the Community." The effect of EEC antitrust legislation on American multinational corporations is well illustrated by the recent IBM case. In 1980 the Commission of European Communities initiated proceedings against IBM for alleged anticompetitive activities. Although the case was ultimately settled, a few important questions remain unanswered. The most important question concerns the extent to which the Treaty of Rome and principles of international fairness and comity permit extraterritorial application of EEC antitrust laws. This Comment will analyze the IBM case and then move into a discussion of both the extraterritorial application of antitrust legislation in general and the international conflicts produced thereby. The Comment will conclude that considerations of international fairness and comity should have precluded assertion of jurisdiction by the EEC over the IBM case.

7. West Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Denmark, the United Kingdom, Ireland and Greece are the members of the EEC.
8. Articles 85-94 of the Treaty are the competition rules. See Treaty of Rome, supra note 6, at arts. 85-94.
12. See Treaty of Rome, supra note 6, at art. 86.
II. Background—IBM in the Common Market

IBM is the largest computer company in the world. In Europe IBM is estimated to control two-thirds of the market for mainframe computers and is the foremost supplier of mainframe computers in practically every country. The company’s revenues in Europe for 1983 were ten billion dollars, a figure nearly equal to the sales of the ten next largest companies combined. Much of IBM’s success may be attributed to the marketing approach it developed. IBM defined the computer business broadly to serve a wide variety of customer functions all in one package. The company perceived its business not as selling equipment, but as providing “data processing systems.”

IBM encouraged its customers to rent rather than purchase its equipment in order to avoid technological obsolescence. This marketing strategy facilitated trade-ins because the consumer could turn his old system in for a better and generally more costly new system. The new systems were less expensive than the older systems on a performance/price basis and represented a savings to the customer. Upgrading of a customer’s computer system to a newer system was profitable for IBM because customers used them more extensively as performance and quality improved.

The original marketing approach developed by IBM advocated free service, software, and consultancy to its customers for one hardware rental charge. In the late 1960’s, however, under threat of antitrust prosecution, IBM began to charge separately for these items. The company instituted a standard base contract for all equipment. The basic rental charge covered use of the machine for a specified number of hours per week. Additional use of the system

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14. “Mainframe—There are at least three definitions: (1) A big computer, generally priced above $150,000, that performs various sophisticated tasks. (2) The electronic guts of a computer, including the central processing unit. (3) The mother computer in a computer network.” N.Y. Times, Aug. 3, 1984, at D14, col. 5.
15. “Its customers include numerous government departments and state-run industries, as well as many of the leading privately owned corporations operating in Europe.” DeJonquieres, IBM, E.C. Settle Competition Case, EUROPE (Sept.-Oct. 1984), at 18 [hereinafter cited as DeJonquieres].
16. Id.
17. Id.
18. Id. at 32.
19. Id. at 33.
20. Id.
22. ABELL, supra note 13, at 33.
meant additional rental. The story of plug-compatible manufacturer encroachment into the peripheral market and IBM's subsequent response can only be understood by visualizing an electronic data processing system. The system consists of several major devices known as hardware. The most notable piece of hardware is the central processing unit (CPU). All other pieces of hardware are called peripherals. The CPU performs calculations involved in the computer process after receiving information from the peripherals. The entire computing process is controlled by software, which tells the CPU and peripherals what to do. IBM produced and marketed the entire system. The increase in the number of IBM customers created an expanded market for peripheral devices.

The plug-compatible manufacturers (PCMs) focused on customers willing to sacrifice the benefits of a systems purchase for peripherals of equal or better quality and much lower prices. These smaller competitors attacked IBM's hold on the computer industry by defining their business much more narrowly. They developed and marketed certain peripheral components which were directly adaptable to IBM main computers. The initial introduction of PCM products did not cause great anxiety at IBM. Nonetheless, as announcements of new PCM companies and products continued, the resistance to using non-IBM peripheral equipment faded. Eventually, PCMs attained a profitable position in the peripheral market at the expense of declining IBM sales in peripheral equipment.

IBM responded to the burgeoning competition from PCMs with new corporate strategy designed to alter the situation to IBM's advantage. New programs forced PCMs to make price reductions and to copy changing IBM products. General concern arose about the long-term viability of PCMs in light of the aggressive position IBM

23. Id.
24. Peripheral equipment is any equipment that is not a central processing unit or a control box. Id. at 57.
26. See infra note 20.
27. "Central processing unit—The most important hardware inside a computer. As the heart of the computer, it contains the electronic circuitry that does calculations, stores information and operates various features including data and word processing." N.Y. Times, Aug. 3, 1984, at D14, col. 4.
28. See infra note 23.
30. Id. at 33.
31. Id. at 35. "In October 1969, the General Accounting Office of the Federal Government released a study of PCM equipment. The study found that 'substantial savings are realizable by purchasing peripheral equipment from independent manufacturers.'" Id.
32. Id. at 40-41.
had taken. PCMs continued to announce new products and make
technical improvements in an effort to keep pace with increasing
IBM attempts to slow PCM advancement. In July 1972 IBM un-
veiled the SMASH program in a final effort to eliminate PCM com-
petition. This final series of maneuvers by IBM increased the com-
petitive pressure on PCMs to such an extent that the program might
have been successful in fully countering PCM competition. IBM's
strategy led to several private antitrust suits in the United States.

Contemporaneous with the IBM litigation in the United States,
the EEC directed a series of informal and formal investigations
against IBM. The EEC's concern arose out of complaints made by
various IBM rivals in the EEC computer market. Among the com-
petitors filing complaints were United States based manufacturers of
plug-compatible equipment including Amdahl and Memorex. The
complaints concerned the legality of IBM business practices similar
to those litigated in United States courts.

In December 1980 the Commission of the European Communi-
ties informed IBM that it was initiating proceedings against IBM
under article 86 of the Treaty of Rome for exploiting its domina-
tion of the continent's computer business. The Commission alleged
that IBM had abused its dominant market position by engaging in
business practices designed to protect its position against PCMs. In
the statement of objections sent to IBM, four policies were cited as constituting an abuse:

(a) failing not to offer System/370 central processing units without the basic software included in the price;  
(b) failing not to offer System/370 central processing units without a main memory capacity being included in the price;  
(c) failing to supply other manufacturers in sufficient time with the technical information needed to permit competing products to be used with Systems/370;  
(d) discriminating between users of IBM software: IBM refused to supply certain software installation services to users of non-IBM central processing units.

The charges made by the EEC were essentially the same as those which were at issue in the United States. IBM subsequently sought to have the EEC proceeding dismissed. In support of its application IBM made three submissions, one of which is relevant to this Comment. IBM submitted that the measures taken by the Commission were illegal because they violated principles of international law. IBM contended that the principle of international comity ought to be applied because the business practices in question were already being challenged in the United States.

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40. ABEll, supra note 13, at 34. The System/370 was IBM's largest product line during the 1970's. It consisted of a series of compatible mainframe computers that let customers buy larger or smaller models while using the same programs.  
41. 32 Common Mkt. L.R. 93, 94 (1981), [1979-1981 Transfer Binder] COMMON Mkt. REP. (CCH) ¶ 8708, at 8458. This technique is termed bundling. Bundling occurs when one product is supplied with another at no separate price.  
42. This is the interface issue. Interface is "[t]he equipment or program that allows computers to communicate with one another." N.Y. Times, Aug. 3, 1984, at D14, col. 5.  
44. See supra note 33.  
46. International comity has been defined as follows:  
International comity, comitas gentium, is a species of accommodation not unrelated to morality but to be distinguished from it nevertheless. Neighbourliness, 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.

mission's case extended only to IBM's operations in the EEC, the extraterritorial application of its antitrust legislation would affect IBM's business worldwide. Naturally this would lead to unfavorable business repercussions in the United States.

III. Abuse of Dominant Position—Article 86

The antitrust law of the EEC is fundamentally different from that of the United States. Free and unrestricted competition is not the purpose of EEC law.48 The main purpose of the Treaty of Rome is to promote harmonious development of economic activities throughout the Community by establishing a common market. The markets of member states are merged into a single European Community market with features similar to a domestic market. Competition policy plays a substantial part in the process.49

Competition rules of the EEC may be found in articles 85 through 94.50 Articles 85 and 86 are the most important. Article 85 pertains to restrictive business practices. Article 86 concerns the abuse of a dominant position.51 Essentially, article 86 is the EEC prohibition of monopolization. It is not, however, an unqualified antimonopoly act. Prior to 1970 article 86 was a dormant provision of the Treaty of Rome.52 The paucity of cases under this article may be attributed to its ambiguous language. Article 86 states a general principle using broad terms which are not defined by the Treaty.53 Not until the Commission's decision in Europemballage Corp. v. Commission54 and the Court of Justice's subsequent judgment, did the full potential of article 86 become apparent. Since 1973 there have been several decisions which have expanded the use and meaning of the article. Three of these proceedings have involved American multinationals: Continental Can, United Brands,55 and IBM.

A dominant firm violates article 86 when its actions interfere
with the objectives of an undistorted system of competition and are likely to affect trade between member states. Article 86 prohibits "any abuse by one or more undertakings of a dominant position within the common market or a substantial part of it . . . in so far as it may affect trade between member states." To infringe article 86, four elements are required: presence of a dominant position; occupation of a substantial part of the market; abuse of a dominant position; and an effect on trade between member states. The interpretation of these general concepts should be examined with respect to IBM.

A. Dominant Position

Article 86 is silent as to what constitutes a dominant position. Dominance may be less than a complete monopoly; but it must be more than mere dominance in terms of market share. Since Continental Can, the primary emphasis has been on the overall independence of behavior displayed by the firm being characterized as dominant. Three factors must be examined to determine whether a firm holds a dominant position: (1) the relevant product market; (2) the relevant geographic market; and (3) the degree of economic strength held by the firm.

A relevant product market encompasses those products which are clearly distinguishable from others in their particular features and which are not reasonably interchangeable with others. In Continental Can, the Court of Justice for the European Community ruled against the Commission concerning its interpretation of the relevant product market. The Commission found that Continental Can held

56. See Treaty of Rome, supra note 6, at art. 3(f). Article 3(f) requires the institution of a system designed to ensure that competition in the common market is not distorted.
57. See supra note 37.
58. These are the ambiguous terms which were attacked for uncertainty and lack of specificity in Hoffman-LaRoche. See Hoffmann-LaRoche & Co. AG v. E.C. Comm'n, 26 Common Mkt. L.R. 211 (1979), [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527.
61. Id.
62. See Europemballage Corp. and Continental Can Co. v. Commission, 12 Common Mkt. L.R. 199 (1973), [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8171. Continental Can Company, New York, was the majority shareholder of Schmalbach-Lubeca Werke AG (SLW), the leading German manufacturer of metal containers, and had a minority interest in Thomassen and Drijver-Verbilita (TDV), a Dutch corporation, which was the largest producer of metal containers in the Benelux countries when it created a Delaware holding company called Europemballage in 1970. Later, Continental Can transferred its shareholdings in SLW and TDV. Europemballage made an offer to buy large amounts of TDV shares for cash. It also stated that other leading European manufacturers of metal containers would pool their respective interests and participate as shareholders in the company. The EEC Commis-
a dominant position on the market for light metal containers for canned meat and seafood and for metal closures for the food packing industry. The Court criticized the Commission for failing to properly identify the relevant product market. In order to be a distinct market, products or services must be considered by consumers to be similar to one another by reason of their characteristics, price, or use. The Commission’s failure to distinguish the three markets as separate precluded the Court from finding Continental Can in violation of article 86.

In United Brands v. Commission the Commission argued that the relevant market consisted solely of bananas. United Brands maintained that the banana market was part of a general fruit market, because bananas are reasonably interchangeable with other types of fruit. The Court refused to concede that bananas are interchangeable with other fruits. The Court concluded that there was only a small degree of interchangeability between bananas and other fruits because there exists a relatively stable demand for bananas, while the demand for general groups of fruit tends to fluctuate. The Court found that bananas as a whole were “sufficiently homogeneous and distinct from the market of other fresh fruits” to constitute a relevant market.

The IBM proceeding posed interesting questions concerning the definition of the relevant market. IBM’s presence in Europe is immense. In 1983 the company employed in excess of 100,000 people and garnered European revenues of 10 billion dollars. More importantly, IBM has already installed a huge base of equipment in Europe. This allows IBM to control many of the industry standards. At the proceeding, however, IBM stressed that it accounted for only forty percent of all computer sales in Europe. The Commission, on the other hand, contended that the relevant product market was narrower. Common market officials alleged that IBM made sixty-five percent of all mainframe sales in Europe and even more of IBM

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63. Id. at 226, COMMON MKT. REP. (CCH) ¶ 8171, at 8301.
64. Id. at 226-27, COMMON MKT. REP. (CCH) ¶ 8171, at 8301.
65. United Brands Co. v. E.C. Comm’n, 21 Common Mkt. L.R. 429(1978), [1977-1978 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8429. United Brands (UBC) cut off supplies to its distributor in Denmark because the distributor had started to deal in competing products. UBC subsequently refused to supply the distributor with its products in an attempt to enforce an exclusivity agreement.
66. Id. at 482, COMMON MKT. REP. (CCH) ¶ 8429, at 7705.
67. Id. at 483, COMMON MKT. REP. (CCH) ¶ 8429, at 7706.
68. Id. at 484, COMMON MKT. REP. (CCH) ¶ 8429, at 7706.
69. See supra note 15.
70. Industry standards are “the technical specifications that allow competing manufacturers to build peripheral devices compatible with IBM computers.” N.Y. Times, July 11, 1984, at D2, col. 1.
compatible mainframes. Essentially, the Commission promulgated a market definition which was limited to IBM products, the large mainframe computers.

The Commission's definition is a broad extension of the relevant market definition espoused in United Brands. Obviously, IBM would have a very large share in a market consisting of its own product. IBM would maintain a perpetual dominant position. Under this particular market definition, a successful manufacturer doing business in Western Europe will virtually always maintain a dominant position. This unusual definition of the relevant market was not advanced in any of the cases brought in United States courts.

The relevant market determination requires an examination of the relevant geographical area. Article 86 suggests that the dominant position be within the common market or a substantial part of it. The Court expressed this principle clearly in United Brands:

> In order to determine whether UBC (United Brands Corporation) has a dominant position on the banana market it is necessary to define this market both from the standpoint of the product and from the geographic point of view. The opportunities for competition under Article 86 of the Treaty must be considered having regard to the particular features of the product in question and with reference to a clearly defined geographic area in which it is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.

After the relevant product market is established, an analysis of the economic position enjoyed by the firm is necessary. A dominant position is determined by the degree of control a firm holds over the product market. Initially, dominance in a market was assessed according to the percentage of shares held in the market by the enterprise. In United Brands, the Commission based its view that United Brands had a dominant position on a number of considera-

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71. EEC Commission, supra note 35, at 1031.
73. See supra note 37. Article 86 provides: "Any abuse . . . of a dominant position within the common market or a substantial part of it . . . ."
75. See Deutsche Grammophon Gesellschaft mbH v. Metro—SB—Grossmärkle GmbH & Co. KG, 10 COMMON Mkt. L.R. 631, 658 (1971), [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8106, at 7193 ("[I]t is also necessary that the producer have, alone or together with other enterprises in the same group, the ability to prevent effective competition on an important part of the relevant market . . . .")
tions. These considerations, when aggregated, gave United Brands a permanent ascendancy over its competitors in Europe. The criteria listed by the Court included: "[m]arket share, the firm's relative access to the market, the number of competitors in the market and the market shares held by them, the market structure of supply, and the firm's access to capital or technological knowledge." 

When these factors are applied to IBM's position in Western Europe a similar conclusion is obtained. Although estimates vary, the company controlled at least forty percent of the European market for data processing equipment. This percentage was even higher when the proceedings began in 1980. In Western Europe's market for large scale mainframe computers IBM's market share was greater. Its percentage in that market was close to sixty-five percent. IBM's access to capital and technological knowledge was the principal issue concerning the EEC. The Commission contended that IBM was eliminating competition by not releasing interface information about new computers. Consequently, PCMs did not have an opportunity to manufacture peripheral equipment in competition with IBM.

The Court of Justice's holding in United Brands was significant with respect to the Commission's decision to proceed with its action against IBM. The United Brands's case expanded the scope of the dominant position test. Until United Brands, the Court had not concluded that an enterprise with a market share below fifty percent was in a dominant position. The Court based its decision on the enterprise's overall economic strength within the market and refrained from employing a rigid application of the relevant market theory.

The holding in United Brands displays an increased desire by the EEC to avoid use of a concrete rule in determining a firm's position in the relevant market. In United Brands, the Commission examined a variety of structural characteristics of both the market and the firm to ascertain the degree of a firm's dominance over the market. The factors examined included: UBC's "market share compared with that of its competitors, the diversity of its sources of supply, the homogenous nature of its product, the organization of its production processes."
and transport, its marketing system and publicity campaigns, the diversified nature of its operations, and finally its vertical integration."  

By incorporating various factors, this test allows the Court and Commission to act with greater flexibility in the application of the term "dominant position."

B. Abuse of a Dominant Position

Beyond the preliminary finding of a dominant position, article 86 requires that there be an abuse. Presence of a dominant position is not itself prohibited. What is prohibited is any abuse which interferes with the objective of undistorted competition with the economic life of the Community set forth in article 3(f). Four types of general practices are described as abuses of a dominant position: Imposing unfair buying and selling prices or other unfair trading conditions; limiting production, markets, or technical development to the prejudice of the consumers; discriminating in commercial transactions; and tying arrangements. The listing is illustrative and not exhaustive of the abuses prohibited under article 86. Nonetheless, the listing is broad enough to incorporate most activities which could be deemed abusive.

An activity which falls within the article 86 classification will be deemed abusive regardless of fault or intent. Except for General Motors v. Commission, the European Court of Justice has not treated intent as important. Both the Continental Can judgment and Hoffman-La Roche establish that the test is whether behavior is objectively contrary to the Treaty. One commentator has explained intent as follows:

Intent is relevant only when the dominant firm did not know and could not reasonably have known that its practice was anti-competitive or exploitive, and when it corrected its error after it discovered it: if it knew or should have known of the anti-competitive effects of what it was doing, any intent which the

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84. See EEC Monopoly Law, supra note 59, at 196.
85. See Treaty of Rome, supra note 6 at art. 86. Article 86 provides: "Any abuse by one or more undertakings...
86. See, e.g., Lang, Monopolisation and the Definition of "Abuse" of a Dominant Position under Article 86 EEC Treaty, 16 COMMON Mkt. L. REV. 345, 362 (1979) ("Community law does not object to the existence of a monopoly or dominant position...") [hereinafter cited as Lang].
87. See supra note 56.
88. See Treaty of Rome, supra note 6, at art. 86.
law requires is sufficiently proved.91

This rationale reflects the idea of fair, as opposed to free, competition and coincides with the Community's theory of effective competition.

In IBM's reply to the Commission's statement of objections it denied that it held a dominant position and that it committed any of the alleged abuses.92 By the commencement of the formal EEC proceeding, IBM had already informed the Commission that company policy was changing and two of the alleged abuses were in the process of being remedied. IBM would supply software installation services to users of non-IBM CPUs and would unbundle93 all it software.94 This, however, was not enough. The Commission insisted that IBM sell its System/370 computers separate from memory to allow increased competition from common market suppliers.96 More importantly, the Commission insisted on its demand that IBM provide European competitors with interface information.98

The interface information controversy concerned the timeliness of IBM's new product disclosures. IBM usually announced new products well in advance of the date the product were shipped. By withholding technical information concerning plug-compatibility of the computers until they were marketed, IBM placed their competitors at a tremendous disadvantage. When IBM products reached Europe, the PCMs had to modify them in order to build printers, disc drives, and other computer accessories which would be compatible with IBM designs. Withholding interface information provided IBM with a monopoly for a one- to two-year period immediately following the launch of a new IBM product.97

The Commission contended that the combination of IBM's early announcements and the timing of its disclosure of specifications for compatible equipment was an unfair exploitation of the company's market dominance. By keeping these standards secret, IBM effectively prohibited competitors from marketing compatible equipment for a profit. The solution proposed by the Commission was unique. IBM would disclose the interfaces on components at the time new

91. Lang, supra note 86, at 363 (emphasis in original).
93. See supra note 40.
94. See generally EEC Commission, supra note 35. Although IBM agreed to alter its policy with regard to software bundling and availability of installation productivity options, the company continued to argue that each practice was common to the industry.
95. Id.
96. Id.
products were announced. 98

IBM argued that such design information was proprietary. The company contended that the Commission's definition of interfaces was too broad and that compliance with the EEC edict would result in providing competitors with proprietary information concerning computer design. 99 According to the company, any publication of the technical details of new equipment before the product came to the market would stagnate IBM expansion and product innovation. While the immediate result of this forced disclosure might benefit the European computer industry, technological innovation would subsequently decline. 100 IBM's competitors countered that the design changes were merely "technical manipulation" which did nothing to enhance performance of the computer.

IV. Extraterritorial Application of Antitrust Legislation

It is settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory. 101 The traditional example of this principle involves transnational homicide: when a malefactor in state A shoots a victim across the border in state B, state B can proscribe the harmful conduct. 102 To take a more likely example, forging of United States Treasury checks in a foreign country may certainly be controlled by the United States. 103

Extraterritorial application of antitrust laws met early resistance in United States' courts. Neither the Sherman Act 104 nor its legislative history gives any clear indication of the law's extraterritorial effect. 105 In the landmark decision of American Banana v. United Fruit Company, 106 the Supreme Court declined to extend the Sherman Act extraterritorially because it was unclear whether Congress intended to Act to include conduct perpetuated beyond United

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98. See generally Baxter Urges EC Competition, supra note 72, at 279. (Baxter stated any order requiring IBM to disclose its computer software specifications would constitute "quasi-confiscatorial" action.).
99. EEC Commission, supra note 35.
100. Id.
101. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
103. See, e.g., United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974).
105. See Kintner & Griffin, Jurisdiction over Foreign Commerce Under the Sherman Antitrust Act, 18 B.C. INDUS. COM. L. REV. 199 (1977) [hereinafter cited as Kintner & Griffin].
106. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). In Banana, United Fruit Company, an American corporation, persuaded Costa Rica to expropriate the plaintiff's railroad equipment which was to be used in the plaintiff's own banana business. As a result, the United Fruit Company was accused of monopolizing and restraining banana trade between Central America and the United States. No effects on United States foreign commerce were alleged.
States' borders.\textsuperscript{107} The opinion exemplified a conservative territorial doctrine which reflected judicial prudence and respect for international boundaries.\textsuperscript{108} This limited interpretation of the Sherman Act did not last. Two years after the Supreme Court's refusal to extend the Act, the Court overturned \textit{American Banana} in \textit{United States v. American Tobacco Co.}\textsuperscript{109}

In \textit{American Tobacco}, the Sherman Act was applied extraterritorially to agreements and contracts made by American and English tobacco firms to divide world markets and eliminate competition between themselves. Unfortunately, the Court did not expressly address the extraterritorial issue. The extraterritorial issue was not discussed until 1945.

In \textit{United States v. Aluminum Co. of America (Alcoa)}\textsuperscript{110}, the court formally departed from its previous adherence to a conservative territorial doctrine. The \textit{Alcoa} case represents the extreme limit to which courts have gone in the extraterritorial application of antitrust statutes.\textsuperscript{111} Judge Learned Hand, speaking for the court, concluded that the Sherman Act reached conduct having consequences within the United States if the conduct was intended to and actually did have an effect upon United States imports or exports.\textsuperscript{112} Such

\textsuperscript{107} Id. at 357. Justice Holmes stated: "The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. [A]ll legislation is \textit{prima facie} territorial." (quoting \textit{Ex parte Blain, In re Sowers}, [1879] 12 Ch. D. 522, at 528).

\textsuperscript{108} Id.

\textsuperscript{109} 221 U.S. 106 (1911).

\textsuperscript{110} 148 F.2d 416 (2d Cir. 1945).

\textsuperscript{111} See Kintner & Griffin, supra note 105. See also Raymond, \textit{A New Look at the Jurisdiction in Alcoa}, 61 AM. J. INT'L L. 558 (1967) (development of Alcoa doctrine).

\textsuperscript{112} 148 F.2d at 443-44. Judge Hand stated:

That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so; as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws." We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States . . . . On the other hand, it is settled law—as "Limited" itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize . . . . It may be argued that this Act extends further. Two situations are possible. There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. Such agreements may on the other hand intend to include imports into the United States, and yet it may appear that they have had no effect upon them. That situation might be
conduct could be prohibited even though the parties had no ties to the United States.

In Alcoa, a foreign corporation which had been shipping aluminum to the United States was held in violation of the Sherman Act. The court based its opinion on the fact that Alcoa made contracts abroad which established a production quota for the aluminum produced by each contracting party. This conduct affected United States imports of aluminum by restricting sources of supply. The effect on United States imports gave the United States jurisdiction to apply its statutes.

The effect on United States commerce test which arose from Alcoa became the basis for extraterritorial antitrust jurisdiction. Its popularity may be attributed to both the ease by which the effects test is satisfied, and the test's ability to transcend national markets in order to comport with the concept of the relevant market theory.

Although the Alcoa rationale has been applied religiously in United States courts, critics believe the holding is too broad. Western Europeans argue for a narrower interpretation of extraterritorial antitrust jurisdiction, one which would prevent infringements upon national sovereignty. Later cases applying the effects test thought to fall within the doctrine that intent may be a substitute for performance in the case of a contract made within the United States; or it might be thought to fall within the doctrine that a statute should not be interpreted to cover acts abroad which have no consequence here. We shall not choose between these alternatives; but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied, the situation certainly falls within such decisions as United States v. Pacific & Artic R. & Navigation Co., 228 U.S. 87, 33 S. Ct. 443, 57 L. Ed. 742; Thomsen v. Cayser, 243 U.S. 676, 37 S. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322 and United States v. Sisal Sales Corporation, 274 U.S. 268, 47 S. Ct. 592, 71 L. Ed. 1042. (United States v. Nord Deutcher Lloyd, 223 U.S. 512, 32 S. Ct. 244, 56 L. Ed. 531, illustrates the same conception in another field). It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot.

Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.

Id. (citations omitted).

113. 148 F.2d 416.


115. Id. at 404.


117. A number of states now have "blocking" legislation to frustrate or resist foreign enforcement actions in their territories. These states include Canada, United Kingdom, Aus-
have not only raised substantial concerns about fairness and comity but have caused international protest.118

V. International Conflicts Precipitated by Extraterritorial Enforcement of American Antitrust Laws

There were no serious international repercussions from the *Alcoa* decision. Nevertheless, it has served as precedent for extreme applications of United States antitrust law. Extraterritorial enforcement of United States antitrust laws has produced numerous conflicts with major United States trading partners, especially the United Kingdom. Governments consider such extraterritorial enforcement to be an infringement on their sovereignty.119 The most famous case in this area is *United States v. Imperial Chemical Industries, Ltd.*120 The litigation concerned agreements entered into by DuPont and I.C.I., a British corporation. The United States District Court held that DuPont and I.C.I. violated the Sherman Antitrust Act by contracting to divide up the world for the purpose of marketing nylon. The court ordered a cancellation of patent assignments to I.C.I. by DuPont, which were made pursuant to the contract. This order negated the exclusive nature of rights secured by British Nylon Spinners (BNS) in a later agreement with I.C.I.121 The contract between I.C.I. and B.N.S. was legal and enforceable in England where it was made and performed.122

The American order created three problems: (1) it deprived BNS, a company not within the jurisdiction of an American court, of a right legally contracted for; (2) it forced BNS to bring suit to challenge the American order; and (3) it placed I.C.I. in a position of undue hardship. In complying with the order of the United States court, I.C.I. invited legal action on the part of BNS. BNS brought...
suit and obtained an injunction stopping I.C.I. from parting with the British patents. An escape clause in the order allowed I.C.I. to reconcile the conflicting orders and perform its contract with BNS. The American order had forced I.C.I. to violate a contract with another not subject to the United States court’s jurisdiction. The United States was heavily criticized for its actions.

Another early case involving the extraterritorial enforcement of antitrust provisions against foreign defendants abroad was United States v. Watchmakers of Switzerland Information Center, Inc. Here a convention among the various elements of the Swiss watch and watchparts manufacturing industry regulated the sale of watches, watch parts, and machinery. These agreements were approved by the Swiss Government. The United States District Court for the Southern District of New York found that the convention and contracts made under it violated the Sherman Act because they were intended to and did affect United States markets. The court subsequently issued injunctions against the two main Swiss associations of watchmakers and against Swiss entities that had never been served in the case. The decree ordered termination of all agreements affecting world trade with the United States. Following direct intervention by the Swiss Government and the United States Departments of State and Justice, the court modified its order to affect only Swiss agreements with United States distributors. The most notable aspect of the district court’s decision was that it expanded the “intended effects” test doctrine of the Alcoa decision into a pure effects approach, without any regard to actual intent. Actions could be prohibited as long as they had a “substantial” effect on United States commerce.

VI. American Response to Criticism of the Effects Doctrine

United States courts interpret the effects doctrine more broadly

124. See British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., [1955] 1 Ch. 37, 49 (1954) (quoting United States v. Imperial Chem. Indus. Ltd., art IV, ¶ 3, No. 24-13 (S.D.N.Y. July 30, 1952) (“No provision of this judgment shall operate against I.C.I. for action taken in compliance with any law . . . of any foreign government or instrumentality thereof, to which I.C.I. is at the time being subject.”). The sovereign compulsion defense operates to avoid liability when the defendant’s activities abroad are required by foreign law.
127. Norton, Extraterritorial Jurisdiction of U.S. Antitrust and Securities Law, 28 INT’L & COMP. L.Q. 575, 582 (1979). See also United States v. The Watchmakers of Switzerland Information Center, Inc., (1963) Trade Cas. (CCH) ¶ 70,600 at 77,457 (“[A] United States court may exercise its jurisdiction as to acts and contracts abroad, if . . . such acts and contracts have a substantial and material effect upon our foreign and domestic commerce.”).
than most foreign countries would consider permissible. Although the effects doctrine conforms to the objective territorial principle of jurisdiction permitted under international law, and is codified in the national legislation of several European states as well as in a European Economic Community Convention, there has been an attempt by the United States to modify the effects doctrine in recent years. United States courts have adopted a balancing approach through which principles of international comity are considered in extraterritorial application of antitrust laws.

Since the decision in Alcoa, many commentators have recommended that a conflict of laws approach be used in order to eliminate international friction. In Timberlane v. Bank of America, the Ninth Circuit adopted this approach. Timberlane, an Oregon lumber company, established two new companies in Honduras to export lumber to its United States operations. The Bank of America Corporation, through a wholly owned subsidiary, had large financial interests in three Honduran mills. One of these mills was forced to dissolve because of financial difficulty. Timberlane purchased this third plant and reactivated the mill. The mill now competed directly with the other two Bank America plants. The Bank refused Timberlane's efforts to quiet title and through its agent obtained embargoes on the properties of Timberlane's companies in Honduras, ostensibly to prevent the diminution in available assets from which the Bank's claim might be satisfied. In federal court Timberlane contended that this act affected commerce in violation of the antitrust laws.

The Ninth Circuit refused to apply or reaffirm an inflexible and all encompassing rule. The court noted that the effects test by itself...

128. See supra notes 117-20 and accompanying text.
132. See supra note 45.
135. Timberlane, 549 F.2d at 601.
is incomplete because it fails to consider other nations' interests. The court concluded that a three-part analysis should be applied for all cases involving the extraterritorial reach of antitrust laws. The first test addresses whether the alleged restraint affects, or was intended to affect, United States commerce. The second test concerns whether the activity in question is of a type which would violate the Sherman Act. The third test considers whether extraterritorial jurisdiction should be extended in view of principles of international comity and fairness. By consolidating its analysis into a single jurisdictional equation, the Timberlane court purported to create a "jurisdictional rule of reason."

The comity question is the most complicated. The first two tests determine whether a court can assert jurisdiction and whether a claim exists. Test three attempts to remedy the possibility of overextension and the resulting conflict with foreign nations by examining whether jurisdiction should be asserted once it has been recognized. To insure that competing interests of nations are considered, Judge Choy, writing for the court, set forth the following criteria:

The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with conduct abroad.

The standards promulgated by Judge Choy were not new. In fact, the basic text of the court's criteria was a combination of borrowings from section 40 of the Restatement (Second) of the Foreign Relations Law of the United States and Kingman Brewster. The court's contribution lies in making these comity considerations a fundamental step in the analysis of whether jurisdiction should be asserted in an international antitrust case.

The balancing process adopted by the Ninth Circuit to determine whether extraterritorial jurisdiction should be exercised was later employed by the Third Circuit in Mannington Mills v. Con-
goleum Corp. The Mannington Mills court formulated a new jurisdictional test. The test permits a court which has subject matter jurisdiction to abstain from exercising such jurisdiction in the interest of international comity.

The Third Circuit's test is comprised of two parts: (1) whether jurisdiction exists according to the "effects" test, and (2) once jurisdiction is found to exist, whether it should exercise jurisdiction based upon an assessment of international comity considerations. The distinction between Timberlane and Mannington Mills is that the Timberlane court construed section 40 of the Restatement (Second) of the Foreign Relations Law of the United States to mean that extraterritorial jurisdiction may exist only if permitted by international comity. The Mannington Mills court, on the other hand, suggests that jurisdiction may exist before international comity is considered but may be negated by principles of international comity.

Relying on the balancing process promulgated in Timberlane, the Third Circuit proposed various comity factors to be weighed in determining whether jurisdiction should be exercised. The court espoused a doctrine of discretionary jurisdiction grounded upon international comity considerations. "Accordingly, after finding jurisdiction existed, the court remanded the case in order to allow the district court either to abstain or accept jurisdiction upon further evaluation of the comity factors relevant to the abstention choice."

The Mannington Mills court has thus suggested that international comity is an abstention doctrine in the realm of international law.

VII. Extraterritorial Application of EEC Law

The Commission's power to apply EEC competition law to foreign based companies may be derived directly from the language of articles 85 and 86 of the Treaty of Rome. References to "effect" between member states or within the common market provide an explicit source for employment of an "effects" doctrine for extraterritorial application of antitrust laws. The wording of the statute resembles American formulations of the effects doctrine. In fact the institutions of the EEC have taken a stance that is nearly identical...
to that adopted in the United States. In *Bequelin Import Co. v. G.L. Import Exports*,\(^{148}\) the European Court of Justice demonstrated that it was willing to expand jurisdiction to activities outside the Community. The Court noted in dicta that "the fact that one of the undertakings participating in the agreement is situated in a nonmember country is no obstacle to that application of that provision, so long as the agreement produces its effects in the territory of the Common Market."\(^{149}\) The *Bequelin* decision suggests that the EEC does not consider itself to be bound by a strict territorial application of its own antitrust laws.

In a series of cases known as the *Dyestuffs* cases,\(^{150}\) the EEC for the first time made a decision to enforce jurisdiction over antitrust conduct occurring wholly outside the common market. The Commission fined nine companies for their role in a price-fixing scheme involving the entire dyestuffs market. Three of the nine companies charged with violating article 85 were not within the common market.\(^{151}\) The Commission ruled that:

> The competition rules of the Treaty are consequently, 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.\(^{152}\)

Although the Commission based its jurisdiction over non-EEC companies on the "effects" doctrine, the Court of Justice declined to acknowledge it as the source of jurisdiction. The Court of Justice provided an alternative argument to support jurisdiction—the single enterprise theory.\(^{153}\) Under the single enterprise theory, acts of foreign companies' subsidiaries located within the common market are imputed to the parent because the subsidiaries are deemed to be part of the parent.\(^{154}\)

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\(^{149}\) *Id.* at 95, Common Mkt. Rep. (CCH) ¶ 8149, at 7704.


\(^{151}\) Imperial Chemical Industries was domiciled in Great Britain; Giegy and Sandoz were domiciled in Switzerland.


\(^{154}\) *Id.*

If the subsidiary does not in fact have autonomy in determining its course of conduct on the market, the prohibition of Article 85, paragraph 1, is inapplicable to the relationship between it and the parent company, with which it forms
The opinion of the European Court of Justice is curious in that it does not reject the American concept of the “effects” doctrine. It simply ignores it. This is attributable to the Court’s fear that to adopt any decision involving the concept of “effect” would establish a dangerously broad interpretation of the theory. The single economic unit theory still allows the Commission to reach foreign based conduct. Because the single economic unity test still results in an extraterritorial extension of jurisdiction, all comity issues relevant to the use of the effects test remains with the single economic unit theory.

VIII. The Role of Comity in the IBM Case

Although the EEC and IBM reached a settlement in August 1984, the EEC antitrust proceeding against IBM serves to illustrate the uncertainty and lack of uniformity confronting a multinational enterprise operating in international markets. The proceeding also illustrates the Commission’s willingness to disregard comity considerations which would appear to have precluded the Commission’s assertion of jurisdiction over IBM.

Comity is an elusive concept. According to IBM, comity is the principle of noninterference in the internal affairs of another sovereign. More precisely, comity is a necessary outgrowth of our international system of interdependent nation states. Just as people and products move freely between countries, so national interests also cross territorial borders. But no nation can expect its laws to reach further than its jurisdiction to prescribe, adjudicate, and enforce those laws. There is no definitive list of criteria provided by the United States to address the comity issue present in IBM. The main sources, Timberlane, Mannington Mills, and the Restatement (Second) of the Foreign Relations Law of the United States are similar. Each requires a balancing test which relies on a list of contacts to be evaluated and weighed against those of the foreign country.

an economic unity. Since an affiliated group so structured forms a unity, the parent company can, under certain circumstances, be held responsible for the actions of the subsidiary . . .

Under these circumstances, the separation between parent firm subsidiaries arising out of the fact that each has a distinct legal personality does not prevent their conduct on the market from being viewed as a unity for purposes of the application of the rules of competition. For this reason, it is the plaintiff that brought about the concerted practice within the Common Market.


156. See supra note 46.


158. See supra note 46.
An initial evaluation of comity considerations requires determination of the locus of the conduct and the nationality of the parties. With regard to the first consideration, the operative decisions to engage in the alleged anticompetitive activities were made in IBM's corporate headquarters in the United States. Consequently, the alleged anticompetitive activities had their origin in the United States although some of the effects were manifest in Europe. It is important to note at this point that most of the issues raised by the EEC had already been litigated in the United States.

With regard to the second consideration, it is clear that IBM is a United States corporation. The fact that the EEC ultimately initiated the proceeding gives the affair a decidedly international character. Nevertheless, this distinction between nationalities is weakened when the whole picture is viewed. The proceeding was prompted, in part, by complaints which were filed by other American companies—companies which had already had an opportunity to press their claims in United States courts. In fact, Memorex S.A., an affiliate of Memorex, was permitted to intervene in the EEC proceeding in support of the Commission. Memorex had also brought suit in the United States on similar issues. The IBM proceeding in Europe evolved into a second forum for American plaintiffs who lost in United States courts.

Equally important is the consideration that any sanction imposed by the EEC, although ostensibly applied solely to IBM's conduct within Europe, would have significant repercussions in America. For example, in Memorex Corp. v. IBM, the district court held IBM's practice of withholding interface design changes upon announcement of a new product did not violate American antitrust laws. The court reasoned that PCMs were able to compete with IBM under such circumstances. In fact, the court concluded that competition was improving because the PCMs were producing better products in less time and that forcing IBM to disclose interface design early would hinder its drive for technological improvement.

An EEC order forcing IBM to release interface information would result in the EEC redefining American business practices

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159. Memorex v. IBM, 636 F.2d 1188 (9th Cir. 1980) (per curiam), cert. denied, 452 U.S. 972 (1981).
160. See generally Comity and Computers, supra note 47; Causes and Solutions to International Disputes are Assessed by Former Antitrust Official, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1014, AA-1, at AA-6-7 (May 14, 1981) ("[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.").
161. 458 F. Supp. 423 (N.D. Cal. 1978), aff'd, 636 F.2d 1188 (9th Cir. 1980).
162. California Computer Prods. v. IBM, 613 F.2d 727, 744 (9th Cir. 1979).
163. Id. at 437.
164. Id.
which had already been judicially sanctioned. It would appear that an EEC determination opposed to IBM would have a greater effect on American commerce than it would have on the beneficial promotion of competition in Europe.

In light of the foregoing analysis, it appears that considerations of comity should have precluded the EEC's assertion of jurisdiction over the case. The matters had already been litigated in the United States and decided in IBM's favor. The EEC case could have served to subvert the American court decisions by giving the plaintiffs a second crack at IBM. Moreover, an EEC order compelling broad disclosure of technical information would have contravened the American courts' rulings that such disclosure was not required. Indeed, American courts had determined that mandatory disclosure would have a negative rather than a positive effect on competition.

IX. Conclusion

Although considerations of comity alone may have dictated that the EEC refrain from exercising jurisdiction, the doctrine of comity is not applied in a vacuum. Nor is it a mandatory rule of law. Political pressures and considerations play a large role in such determinations. Judicial deference to a foreign interest may usurp the legislative function. The EEC's decision to exercise jurisdiction was undoubtedly based, in part, on its determination to vindicate the Treaty of Rome and the policies contained therein. Furthermore, the doctrine of comity is not a mandatory rule of law. Even in the United States, where the rationale originated, courts increasingly refuse to adopt it.

Similarly, economic and political pressures led to the IBM settlement. Europeans feared IBM might cease making investments in Europe if the EEC imposed its sanctions. It is unlikely that IBM would have totally abandoned Europe because European sales account for thirty percent of its overall revenues. Nevertheless, the Europeans could not withstand the threat of an IBM decision to stop expanding its operations on the continent. This concern is attributable to IBM's position as a major source of employment and technological innovation.

The settlement, upon first glance, appears to have given the EEC significant concessions from IBM. IBM agreed to disclose suffi-

166. See supra note 34.
cient information to allow competitors to connect hardware and software products to System/370. IBM also agreed to disclose adequate and timely information to competitors to enable them to connect their systems with IBM's System/370 using Systems Network Architecture.

Most experts feel that the information which IBM is providing will not aid European manufacturers seeking a larger share of the market. Nor will the release of information slow IBM's growth in Europe. In fact, some feel that if the agreement helps anyone, it may be the Japanese who are the main manufacturers of IBM compatible computers.

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