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Holding the Antitust Line: Laker Airways v. Sabena, Belgian World Airlines

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Holding the Antitrust Line: *Laker Airways v. Sabena, Belgian World Airlines*

Conflicts among nations increase as international economic activity expands. Domestic courts become the arena for international disputes when two nations concurrently assert jurisdiction over a single series of transactions, but seek to apply differing and mutually inconsistent regulatory policies. In *Laker Airways v. Sabena, Belgian World Airlines*[1] the United States Court of Appeals for the District of Columbia Circuit refused to let proceedings in Great Britain prevent United States courts from hearing the antitrust claims of Laker Airways Ltd.,[2] a British corporation. The court found that the conspiratorial acts alleged by Laker caused sufficient harmful effects within United States territory to justify applying United States antitrust law. To protect this jurisdiction from interdictory foreign proceedings, the court approved the issuance of an injunction preventing certain defendants from participating in the foreign proceedings.

Laker Airways arose out of the collapse and liquidation of Laker Airways Ltd. (Laker), which brought suit under the Sherman and Clayton Antitrust Acts[3] in the United States District Court for the District of Columbia.[4] Laker alleged that Pan American Airlines, Trans World Airlines, McDonnell Douglas Corp., McDonnell Douglas Finance Corp., British Airways, British Caledonian Airways, Lufthansa, and Swissair[5] had conspired to fix air fares at predatory levels and had interfered with Laker's financing to eliminate Laker as a

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[1] Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

[2] Laker Airways Ltd. (Laker) burst into prominence in 1977 by offering "no frills" transatlantic passage at approximately one-third the prevailing rates. By 1980 one in seven transatlantic passengers travelled Laker Airways. Laker managed to operate at a profit until mid-1981. The Times (London), Feb. 7, 1982, at 17, col. 1.

[3] 15 U.S.C. §§ 1-7, 12-27 (1982).

[4] The action was brought by its liquidator, Touche Ross, on November 24, 1982. The allegations led to a United States Department of Justice criminal investigation into alleged price-fixing on North Atlantic routes by European and United States airlines. The investigation's requirements for the production of sensitive information on price motives provoked a strong response on jurisdictional grounds by the British Government. British Department of Transportation officials met with United States Deparment of Justice officials several times to head off this investigation. The Times (London), June 25, 1983, at 1, col. 2.

[5] KLM and Sabena were added on February 15, 1983. SAS, a Scandinavian airline, and UTA, a French airline, were made parties on October 4, 1983. The Times (London), Oct. 4, 1983, at 15, col. 1.

competitive force.[6] Laker estimated its damages in excess of $350 million, to be trebled pursuant to sections 1 and 2 of the Sherman Act.

British Airways and British Caledonian applied to British courts for an injunction restraining Laker from prosecuting its American antitrust claim against them, and for a declaration that they were not liable to Laker.[7] Almost immediately, Swissair and Lufthansa applied for similar injunctions and, pending a hearing, were granted interim injunctions. Next, Laker made KLM and Sabena defendants in its American antitrust action. To avoid the "potential *fait accompli*" of all defendants obtaining preemptive interim injunctions from the High Court, the United States district court enjoined KLM and Sabena from participating in the British proceedings.[8]

The Queen's Bench refused the airlines' application,[9] and British Airways and British Caledonian appealed. Before the appeals were heard, the British Secretary of State for Trade and Industry promulgated the Protection of Trading Interests (U.S. Anti-Trust Measures) Order 1983, prohibiting United Kingdom airlines from complying with all orders and prohibitions resulting from the pending American antitrust action, including production of documents.[10]

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[6] Laker alleged that members of the International Air Transport Association (IATA) resisted and for several years delayed British and United States government authorization of Laker's transatlantic service. For the reasons for the delay see Laker Airways v. Dept. of Trade, [1977] Q.B. 643. When Laker eventually inaugurated service in 1977, the IATA airlines perceived a threat to their markets and pricing system, and agreed to set rates at a predatory level. By the beginning of 1982 Laker's finances were overstretched, and it sought refinancing. Laker's financing was complicated by a decline in the value of the pound, because its revenues were largely in pounds, but its debts were in dollars. Laker's competitors further conspired to interfere with attempts to reschedule financing by pressuring its lenders to withdraw from a loan deal without notice. The airlines allegedly forced Laker's leading creditors, General Electric and McDonnell Douglas, to cut off funds to the company by threatening to buy their aircraft elsewhere. Luthansa and Swissair eventually admitted making these threats. The Times (London), July 20, 1983, at 4, col. 3. Pan American, Trans World Airlines, and British Airways reduced rates on their full service flights even further to match Laker's rates and allegedly secretly paid travel agents high commissions to divert passengers from Laker.

[7] Without such orders the American assets of the airlines would be subject to execution. Treble damages against the British airlines would not be enforceable in Britain because of the British Protection of Trading Interests Act 1980 (BPTIA), 50(1) Halsbury's Statutes Edited (3d Ed.) 259-264. This act encapsulates the British view that extraterritorial law may not be applied to govern legitimate British trading interests. "Clawback" provisions appearing in this and other foreign statutes provide that if a court of another state gives a judgment against a protected person, the amount paid in judgment in excess of actual compensation may be recovered in an action.

[8] Laker Airways Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983).

[9] British Airways Board v. Laker Airways, [1983] 3 All E.R. 375. Parker, J. for the Queen's Bench rejected the airlines' arguments that the American action would be unjust to them and contrary to the policy of the BPTIA, holding instead that the Act was directed toward invasions of British sovereignty and did not warrant action in this case.

[10] Stat. Instr. 1983, no. 900. This is the second application of this provision of the Act in less than a year, the British government barring a British company from complying with United States demands involving the Soviet gas pipeline. The Protection of Trading

The British Court of Appeal found the Secretary's order and directions so disabling to the British parties in the American action as to make it unjust to allow Laker to proceed against them.[11]

The United States Court of Appeals for the District of Columbia, in reviewing the propriety of the district court's injunctions, examined the grounds that supported United States and Great Britain jurisdiction. The court found authority to apply United States antitrust law "whenever conduct is intended to, and results in, substantial effects within the United States," reasoning that this authority derives from the universally recognized sovereign right of all nations to control and regulate activity within their own boundaries.[12] Applying antitrust legislation to foreign acts is a legitimate exercise of jurisdiction when the territorial effects are significant and not so inconsequential as to be unreasonable.[13] The involvement of the interests of American consumers, creditors, and the judiciary are sufficient territorial contacts to justify asserting jurisdiction.

The court rejected the argument that British jurisdiction based on nationality overrides territorial-based jurisdiction.[14] Acknowledging that the United States and Britain held jurisdiction concurrently, the court next considered whether the district court's injunction[15] was consistent with concurrent jurisdiction[16] and comity.[17] The court found that such injunctions are warranted only when necessary to protect the jurisdiction of the enjoining court or to prevent the litigant's evasion of important public policies of the forum. The court determined that the sole purpose of the British proceedings was to terminate the American action. Thus, the court concluded that the district court's injunction was a proper measure to protect legitimately conferred jurisdiction, and to prevent KLM

Interests (U.S. Re-export Controls) Order 1982, Stat. Instr. 1982, no. 885, p. 2465 (objecting to provisions in 15 C.F.R. §§ 374, 376, 379, 385, 389 (1984) as applying outside the territorial jurisdiction of the United States pursuant to the Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503).

[11] British Airways Board v. Laker Airways, [1983] 3 All E.R. 395.

[12] 731 F.2d at 925. *See* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1295 (1981).

[13] The court stressed that the territorial effects doctine is not an extraterritorial assertion of jurisdiction. 731 F.2d at 923.

[14] The court rejected an argument of "paramount nationality" which appellants offered as a rule to prioritize the authority of courts to proceed in cases of concurrent jurisdiction. Nationality of the parties, held the court, is but one of the factors to consider in avoiding conflicts stemming from concurrent jurisdiction. *Id.* at 934.

[15] Ordinarily, antisuit injunctions are limited to restrain only residents of the forum state absent treaty provisions to the contrary. In *Laker Airways* the Dutch and Belgian air service treaties made it justifiable to restrain KLM and Sabena, foreign parties, in foreign proceedings. *Id.* at 932.

[16] Concurrent jurisdiction arises when two or more states have legitimate interests in prescribing governing law over a particular controversy. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 37, § 30 comment c (1965).

[17] Comity is the deference a domestic forum must pay whenever possible to the act of a foreign government not otherwise binding on the forum. Hilton v. Guyot, 159 U.S. 113 (1895).

and Sabena[18] from escaping the application of statutes of economic importance to the United States.

Furthermore, the court found that the injunctions of the United Kingdom were not entitled to comity.[19] The court reasoned that, because the goal of comity is to increase the international legal ties that advance the rule of law within and among nations, foreign acts inherently inconsistent with this purpose circumscribe the limits of the principle's application. The district court's injunction, contrasted with the British injunction, was merely a defensive measure intended to preserve jurisdiction, not to quash the power of another court to adjudicate a claim.

The court in *Laker Airways* attempted to reconcile these conflicting assertions of jurisdiction by defining the conflict as one generated by political branches of government.[20] The court rejected a process of judicial interest balancing,[21] finding that a court could not refuse to enforce a law its political branches determined to be necessary and desirable. Political compromise is not the role for the judiciary, but rather is more appropriate to the executive and legislative branches.

Enjoining a citizen from suing in the courts of another nation is an extraordinary remedy.[22] Though it is well settled that courts are empowereed to restrain foreign proceedings where jurisdiction is properly before the court,[23] such power to enjoin is rarely exercised

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[18] KLM and Sabena do not have antitrust immunity under their respective air service treaties. To the contrary, those treaties contain express language subjecting them to the jurisdiction of the United States over predatory pricing and abuse of monopoly power. 731 F.2d at 932.

[19] The court delineated the considerations important in applying United States antitrust laws consistently with the principles of comity: the intent of Congress, the appreciable anticompetitive aspect of the injury, attenuated contacts with the United States, and the existance of strong foreign interests. The court refused to allow this determination to be made in a foreign court. *Id.* at 938. The dissent would narrow the scope of the injunction on grounds of comity, finding no clear United States intent to enforce the claims, contrasted with emphatic British intent. *Id.* at 956.

[20] There was no suggestion that comity should be exercised to avoid hardship to a party who might otherwise be caught between the inconsistent imperatives of two fora. Nor did the government ownership of KLM and Sabena implicate significant interests of Britain as a state. *Id.* at 933. *See generally* Baker, *Antitrust Conflicts Between Friends,* 11 CORNELL INT'L L. J. 165 (1978).

[21] A judicial interest balancing test would have the court weigh the competing national interests and resolve the conflicts of law according to its determination. *See* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), *on remand to,* 547 F. Supp. 1453 (N.D. Cal. 1983), *judgment aff'd by,* No. 83-2008 (9th Cir., Dec. 27, 1984).

[22] *See generally* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973). Cases conflict as to whether the policy of the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), applies when a foreign action is sought to be enjoined in a district court. *Compare* Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577 (1st Cir. 1969), *with* Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), *and* Galco Food Products v. Goldberg, 171 U.S.P.Q. (BNA) 379 (N.D.Ill. 1971).

[23] Cole v. Cunningham, 133 U.S. 107 (1890); Velsicol Chemical Co. v. Hooker Chemical Co., 230 F. Supp. 998 (N.D.Ill. 1964); Western Elec. Co. v. Milgo Elec. Corp., 450 F. Supp. 835 (S.D.Fla. 1978).

because delicate issues of jurisdiction and comity are involved.[24] Concurrent jurisdiction requires that parallel proceedings be allowed to continue until a judgment is reached in one court that is res judicata in the other.[25] Because there is no difference between addressing an injunction to the parties and addressing it to the foreign court itself,[26] antisuit injunctions effectively restrict the foreign court's ability to exercise jurisdiction. Comity compels courts to act with the object of increasing the legal ties among nations.

Courts have countervailing obligations that sometimes justify subordinating the foregoing considerations. Courts have a duty to protect the jurisdiction conferred to them to ensure litigants full justice.[27] Moreover, courts are charged with enforcing the significant policies of the forum. Injunctions have been found proper when necessary to thwart attempts to assert exclusive jurisdiction in an area of concurrent jurisdiction,[28] to enforce an existing judgment,[29] to prevent vexatious litigation,[30] or to prevent circumvention of the laws of the forum.[31] The authority for defensive measures against interdictory proceedings has long been approved by the Supreme Court: "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court."[32] The equitable circumstances surrounding each antisuit injunction are considered in determining the propriety of issuance.

Underlying the injunction in *Laker* is the controversy regarding the reach of American antitrust jurisdiction. The principle that a country is authorized to prescribe laws within its own territory is a fundamental and internationally recognized basis of jurisdiction.[33] American courts have recognized this principle since Chief Justice Marshall stated in *The Schooner Exchange v. M'Faddon*[34] that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by

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[24] Compagnie des Bauxites de Guinea v. Insurance Co. of North America, 651 F.2d 877 (3d Cir. 1981) (duplication of issues and delay in filing foreign actions do not justify breach of comity); Chase Manhattan Bank v. State of Iran, 484 F. Supp. 832 (S.D.N.Y. 1980) (foreign action not vexatious or choice of forum unreasonable); *Velsicol*, 230 F. Supp. at 998 (foreign proceedings involving foreign rights not vexatious); Sperry Rand Corp. v. Sunbeam Corp., 285 F.2d 542 (7th Cir. 1960) (no evidence of vexatious litigation).

[25] *E.g.*, Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939).

[26] Peck v. Jenness, 48 U.S. (7 How.) 612 (1849). *See also Compagnie des Bauxites*, 651 F.2d at 877.

[27] *Peck*, 48 U.S. (7 How.) at 625.

[28] James v. Grand Trunk Western R.R. Co., 14 Ill. 2d 356, 152 N.E.2d 858 (1958).

[29] *Velsicol*, 230 F. Supp. at 998; Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971).

[30] *Harvey Aluminum*, 203 F.2d at 105.

[31] *Cole*, 133 U.S. at 116; Donovan v. City of Dallas, 377 U.S. 408 (1964); *Compagnie des Bauxites*, 651 F.2d at 877.

[32] *Peck*, 48 U.S. (7 How.) at 625.

[33] *See, e.g.*, Island of Palmas Case, 2 U.N. Rep. Int'l Arb. Awards 289 (1928).

[34] 11 U.S. (7 Cranch) 116, 136 (1812).

itself." In its first foreign commerce antitrust case, *American Banana Co. v. United Fruit Co.*,[35] the Supreme Court narrowly construed the reach of American jurisdiction, dismissing a complaint by one United States corporation that another United States corporation had restrained Panamanian and Costa Rican banana trade with the United States. Justice Holmes said "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."[36]

United States v. American Tobacco Co.[37] brought the issue of territorial based jurisdiction before the Court again in a case involving American Tobacco's monopolization of the tobacco trade and agreements to divide world markets with Imperial, a British firm. The court's silence on a lower court ruling that a conspiracy having effects within the United States justifies applying United States law implied a reluctance to extend *American Banana*'s immunity to such an arrangement. Courts in early cases were cautious about departing from *American Banana* in prescribing liability to acts consummated outside the United States, but nevertheless expanded American jurisdiction, usually finding an act or agent within the United States that justified asserting jurisdiction.[38]

United States v. Aluminum Co. of America (Alcoa)[39] extended the territorial jurisdiction principle to include effects within the United States, regardless of origin.[40] *Alcoa* involved agreements entered into in Switzerland by several foreign companies to limit the amount of aluminum to be sold in the United States. Judge Learned Hand decided that Congress did not intend the Sherman Act to reach conduct by foreign nationals outside the United States that did not have an effect on United States imports or exports. Hand noted the limitations observed by nations in the exercise of jurisdiction and expressed concern about the complications likely to arise if the United States were to treat as unlawful every agreement among foreigners that had some repercusssion in the United States. Thus, Hand developed a standard for the extraterritorial application of American antitrust laws: conduct must be intended to restrain and must have

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[35] 213 U.S. 347 (1909).

[36] *Id.* at 356. This no longer reflects the current law of the United States. Though never explicitly overruled by the Supreme Court, lower courts readily disregard it. *E.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1184-87 (E.D.Pa. 1980).

[37] 221 U.S. 106 (1911).

[38] *See, e.g.*, United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 200 F. 806 (C.C.S.D.N.Y. 1911); United States v. Pacific and Arctic Railway and Navigation Co., 228 U.S. 87 (1913); Thompsen v. Cayser, 243 U.S. 66 (1917); United States v. Sisal Sales Corp., 274 U.S. 268 (1927).

[39] 148 F.2d 416 (2d Cir. 1945) (on certification from the Supreme Court, sitting as a court of last resort).

[40] *Alcoa* apparently found no need to apply the restrictive *American Banana* territorial limitations, expanding jurisdiction to encompass the locus of the effect, as well as the conduct. *Id.* at 443.

an effect on American trade.[41] Subsequent pronouncements by the Supreme Court and the American Law Institute firmly entrench the legitimacy of *Alcoa*.[42]

The effects doctrine's presumption of territoriality has been a major source of international controversy.[43] Shortly after *Alcoa* was decided, Canada passed the Business Records Protection Act[44] to thwart discovery in United States extraterritorial regulatory actions. In 1964 Britain enacted the Shipping Contracts and Commercial Documents Act[45] designed to thwart Federal Maritime Commission investigations.[46]

In 1980 that Act was expanded in response to the controversy of *In re Uranium Antitrust Litigation*[47] into the British Protection of Trading Interests Act (BPTIA).[48] The Act allows the Secretary of State to prohibit compliance with discovery orders from foreign courts, renders certain foreign judgments unenforceable in the United Kingdom, and provides a right of action to recover the penal portion of multiple damages awarded by foreign courts.[49] The purpose of these measures is to curb the extraterritorial exercise of United States jurisdiction, which is perceived to infringe British sovereignty in viola-

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[41] *Alcoa's* requirement of intent to affect United States commerce has never been refined, judicial formulations often altogether omitting discussion of intent. *E.g.*, Sabre Shipping Corp. v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968). *But cf. Zenith Radio*, 494 F. Supp. at 1189 n. 65 (requiring only general intent); Antitrust Division, United States Dept. of Justice, Antitrust Guide for International Operations 6 (1977) (effects within the United States must be "foreseeable"). Nor has the substantiality of the effect been clarified beyond requiring "substantial," "material," or "direct" effects. *E.g.*, United States v. R. P. Oldham Co., 152 F. Supp. 818, 822 (N.D.Cal. 1957). *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), § 402, (Tentative Draft No. 2) (1981).

To provide a clearer standard for determining when United States antitrust jurisdiction attaches to international business transactions, President Reagan signed into law the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. 97-290, 96 Stat. 1246 *codified at* 15 U.S.C. § 6a (1982). Under the Act, the Sherman Act applies only when conduct has a "direct, substantial and reasonably foreseeable effect" on United States domestic, import, or export commerce. The Act was first applied and interpreted by a United States federal court in Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984).

[42] *See* American Tobacco v. United States, 328 U.S. 781, 811 (1946); Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (unlawful effects are often decisive); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) (finding irrelevant that the foreign conduct was lawful in the country where it occurred); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965); Antitrust Division, United States Dept. of Justice, Antitrust Guide for International Operations 6 (1977).

[43] *See* Debates in the British Protection of Trading Interests Act, 1980, 404 Parl. Deb. H.C. (5th Ser.) 586 (1980). *See also* Picciotto, *Jurisdicitonal Conflicts, International Law and the International State System*, 11 INT'L J. SOC. L. 11 (1983). Baker, *Antitrust Conflicts Between Friends*, 11 CORNELL INT'L L. J. 165 (1978).

[44] [1947] Ont. Stat. c. 10 *codified at* Ont. Rev. Stat. c. 54 (1970).

[45] 1964, ch. 87, § 1. *See* Parl. Deb. H. C. (5th Ser.) 1215-84 (1964).

[46] *See In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298 (D.D.C. 1960).

[47] 617 F.2d 1248 (7th Cir. 1980). *See* Sabalot, *Shortening the Long Arm of American Antitrust Jurisdiction*, 28 LOYOLA L. REV. 213, 238 (1982).

[48] 50(1) Halsbury's Statutes Edited (3d Ed.) 259-264.

[49] *Id.*

tion of international law and comity, and to dampen exorbitant damage awards.[50]

Many courts have responded to the conflict by taking the "judicial interest balancing" approach adopted by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*.[51] *Timberlane* involved a United States company that was prevented from establishing an operation in Honduras to export lumber to the United States by the concerted efforts of firms already established in Honduras. The *Timberlane* test consists of three elements: whether there is some effect on American commerce; whether the type and magnitude of the restraint makes it cognizable as an antitrust violation; and whether American interests are sufficiently strong to justify an assertion of extraterritorial jurisdiction.[52] The requirement that there be some effect on American commerce is less demanding than the *Alcoa* approach, but the *Timberlane* test treats comity as an essential and limiting consideration in the extraterritorial application of United States law.[53]

Whether *Timberlane*'s standards operate in practice was tested in *Uranium*.[54] Like *Laker Airways*, the prospects for orderly litigation were limited from the outset. Nine of the twelve foreign uranium producers named in Westinghouse's complaint failed to respond to judicial summons, and default judgments were entered against

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[50] *See* Sabalot, *supra* note 47, at p. 234.

[51] 549 F.2d 597 (9th Cir. 1976).

[52] *Id.* at 613. This approach was followed with some modification in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979). The court suggested the following as relevant to the balancing process:

1. Degree of conflict with foreign law or policy;

2. Nationality of parties;

3. Relative importance of the alleged violation of conduct here compared to that abroad;

4. Availability of a remedy abroad and the pendency of litigation there;

5. Existence of intent to harm or affect American commerce and its foreseeablility;

6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7. If relief is granted, 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;

8. Whether the court can make its order effective;

9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10. Whether a treaty with the affected nations has addressed the issue. *Id.* at 1297.

[53] This process of balancing the competing judicial interests has been endosed by the Justice Department and the State Department. Antitrust Guide, *supra* note 42; Letter of J. Brian Atwood, Assistant Sec. of State, to Senator Edward M. Kennedy, Chairman of the Senate Comm. on the Judiciary (Sept. 27, 1979), *reprinted in* S. REP. No. 444, 96th Cong., 1st Sess. 118 (1979).

[54] 617 F.2d 1248. *Cf.* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. [1978] 1 All E.R. 434 (criminal aspects of United States antitrust laws on grounds of territorial effects held an invasion of sovereignty); Re Westinghouse Elec. and Duquesne Power Co., 16 Ont.2d 273 (High Ct. Jus. 1977). This litigation was largely settled during 1981.

them.[55] Three of the foreign governments involved had enacted legislation specifically aimed at nullifying the impact of American antitrust legislation. The district court found it impossible to balance judicially the competing interests of the United States and foreign countries. The court of appeals in *Uranium* upheld the lower court's refusal to apply notions of international comity and rejected the United Kingdom's amicus argument that *Alcoa* no longer retained vitality after the *Timberlane* line of cases.[56]

Laker Airways follows in this vein. The opinion is significant in that it empowers courts to employ defensive antisuit injunctions against interdictory proceedings where there is a legitimate basis of jurisdiction.[57] The opinion reasserts that the right of the United States to regulate conduct that produces effects within United States territorial boundaries is legitimate, self-determined, and cannot be superseded by blocking statutes or vexatious proceedings in foreign tribunals.[58] Comity will not be granted to conduct that frustrates the significant policies of the domestic forum.[59]

Equally significant, *Laker Airways* redefines the judiciary's role in accommodating, in cases of concurrent jurisdiction, the conflicting prescriptive laws of nations. The court finds itself bound to implement the legislated national policies[60] and ill suited to adjust these to contradictory foreign policies.[61] By this formulation, the court must single-mindedly enforce domestic laws, and the responsibility for reconciling these laws with foreign policy shifts to the legislative and executive branches.[62]

The effect of these pronouncements is limited by the fact that they are issued by a federal court of appeals, and the Supreme Court has not recently considered the problems. The unusual facts may further limit the application of *Laker Airways* as a statement of the significance of comity to resolve disputes under concurrent jurisdiction.[63] Nevertheless, the reasoning of *Laker Airways* is sound, and the

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[55] *In re* Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979).

[56] *Uranium*, 617 F.2d at 1254. The touchstone continues to be "intended effects," and considerations of comity and fairness apply only in the determination as to whether American authority should be asserted. *Id.* at 1255.

[57] Interdictory proceedings would seek to prohibit another court's assertion of jurisdiciton. 731 F.2d at 915. By implication, parallel proceedings will rarely be made subject to such injunctions.

[58] *Id.* at 935.

[59] *Id.* at 937.

[60] *Id.* at 949.

[61] *Id.* at 948.

[62] Recognizing the application of antitrust jurisdiction to the establishment of international airline rates, Congress authorized the Civil Aeronautics Board to immunize agreements from antitrust laws. Civil Aeronautics Act of 1938, 52 Stat. 973. Federal Aviation Act of 1958, 72 Stat. 731, (current version at 49 U.S.C. §§ 1301-1552 (1982)).

[63] *Laker Airways*, like *Uranium*, can be read consistently with the emerging *Timberlane* line of cases. Thus, the conclusion that *Laker Airways* advocates the demise of comity is erroneous. *See Uranuim*, 617 F.2d at 1255.

hard facts of this case, as those in *Uranuim*, suggest that balancing judicial interests is impracticable.[64] Antitrust counselors asked to determine the legality of business arrangements that have an effect on United States interests would do well to apply and strictly interpret United States laws, as any controversy might be resolved in a forum adopting the views of *Laker Airways*.[65]

Laker Airways' formulation does little to defuse the current controversy over what is viewed as the exorbitant assertion of United States antitrust laws abroad.[66] The court's position has important international ramifications.[67] Authorizing United States courts to defend United States jurisdiction both thwarts and challenges efforts to nullify United States antitrust legislation. Judicial conciliation between forums becomes restricted to areas where the policies of nations are in agreement or where the conflicts are not significant. Significant conflicts are left to the legislative and executive branches to resolve.

The decision is noteworthy for the legitimacy of the exercise of judicial authority and for the propriety of result. Two principles emerge as fundamental: a sovereign may regulate conduct occurring outside its territory that causes harmful results within its territory; and United States courts are bound to uphold the acts of Congress. The former derives legitimacy from the congressional intent to reach anticompetitive conduct affecting the United States regardless of the conduct's locus,[68] coupled with a conception of territoriality recognized in both United States and international law.[69] The latter principle derives legitimacy from the recognition that comity in an international context necessarily involves political questions,[70] and

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[64] *See* J. ATWOOD & K. BREWSTER, 1 ANTITRUST AND AMERICAN BUSINESS ABROAD, § 6.16 (1981).

[65] *See* Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L. J. 1 (1974).

[66] The British, Swiss, and West German governments have launched strong protests to the Justice Department's investigation and grand jury indictments. The British government fears that an assessment of $ 1.05 billion could bankrupt both British Caledonian and British Airways. Invoking the BPTIA was in part due to the British Government's financial stake in British Airways, a government owned corporation. Other reasons were to prevent the scope of the Justice Department's investigation from expanding, and to make clear the British government's determination to resist the extraterritorial application of American antitrust laws. The Times (London), Mar. 18, 1983, at 1, col. 3.

[67] The court has assumed a role whereby voluntary and discretionary surrender of jurisdiction by the judiciary is restricted. When the United States Government seeks to enforce the law, some discretion will be used in prosecuting the claim if foreign policy interests are involved. Diplomatic pressure similar to that brought to bear on the Justice Department's criminal antitrust investigation relating to *Laker Airways* resulted in abating the criminal investigation connected with *Uranium*. No such buffer exists in civil suits. Such rigid application endangers parties of being trapped by the inconsistent imperatives of the United States and the United Kingdom in these matters.

[68] *See* Pfizer Inc. v. India, 434 U.S. 308, 312 (1978).

[69] *See The Schooner Exchange*, 11 U.S. (7 Cranch) 116; Case of the S.S. "Lotus", [1927] P.C.I.J., Ser. A, No. 10.

[70] Baker v. Carr, 369 U.S. 186, 210 (1962).

from the idea of separation of power, which is fundamental to the United States Constitution.[71]

Jefferson feared that the judiciary, "like gravity, ever acting, with noiseless foot, and alarming advance . . . is engulfing insidiously the special governments into the jaws of that which feeds them."[72] In foreign affairs, the United States Government must speak with one voice; the court in *Laker Airways* is properly restrained, giving unified voice to the political branches. Expanded conceptions of territoriality necessarily accompany the progress of international economic activity. A strong statement of national interest, accompanied by consistent action, clearly defines the parameters of American conduct and inevitably improves international relations. Firm adherence to the principles espoused in *Laker Airways* will foster the growth of international mechanisms to resolve the problems created when conflicting policies of nations intersect in an area of concurrent jurisdiction.[73]

—CHARLES THELEN PLAMBECK

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[71] Marbury v. Madison, 5 U.S. 137 (1803).

[72] THOMAS JEFFERSON ON DEMOCRACY 152 (S. Papover ed. 1949).

[73] In the absence of such international mechanisms, the *Laker Airways* case continues to develop. Soon after this opinion was handed down the district court judge with whom the case remained considered three options should Laker be permanently enjoined: appointment of an American guardian ad litem to proceed for Laker; issuance of a court petition asking the Department of State to handle the case; or issuance of a counterinjunction ordering Laker to proceed with its case. The inquiry was rendered moot by a decision rendered on July 19, 1984, by the House of Lords allowing Laker to proceed. British Airways Board v. Laker Airways [1984] 3 W.L.R. 413. The Law Lords found that the Civil Aeronautics Board could have exempted the alleged predatory fares from U.S. antitrust laws but did not. Had the fares been approved, it would have contravened the Bermuda II treaty, which governs air service between the United States and Great Britain. Moreover, the court chose to recognize American jurisdiction on the ground that the carriers had consented to such jurisdiction. By obtaining licenses to operate under this treaty, the airlines had subjected themselves to a regime under which U.S. law would apply to their operations within their territory. The Law Lords rescinded the injunction, as there was no alternative forum where Laker could seek relief. They did not find, however, that the Secretary of State for Trade and Industry had acted ultra vires by invoking the BPTIA. *Id.*

Judge Harold Greene signed an order dated Oct. 11, 1984, to protect the jurisdiction of the court and the rights of the plaintiff under U.S. law enjoining British Airways and British Caledonian from taking further steps in foreign courts.

The Justice Department's investigation has cleared British Caledonian of thwarting Laker's financing attempt, and President Reagan has called off the investigation. The New York Times, May 11, 1984, at D14, col. 1.

In March 1984 the Philadelphia law firm of Levin and Fishbein initiated a class action suit on behalf of persons who bought tickets on several airlines named as defendants in *Laker Airways*. No. 84-1013 (D.D.C. 1984). The theories are: conspiracy to remove Laker as a competitive force resulting in higher prices, and negotiatations outside the IATA framework, unsanctioned by the Civil Aeronautics Board. The defendants have responded with a motion to dismiss, arguing that any award of treble damages is repugnant to Bermuda II. The British Government's desire to privatize British Airways may improve prospects for a settlement in order that they may sell an unencumbered entity. Conversation with Howard Sedran, attorney at Levin and Fishbein (12-31-84).