LAKER AIRWAYS AND THE COURTS: A NEW METHOD OF BLOCKING THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS

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1. Introduction

The Laker Airways antitrust litigation [1] has renewed political tensions between the United States and the United Kingdom over the former’s extraterritorial application of its antitrust laws [2]. In November, 1982, the liquidator of Laker Airways, Ltd. (Laker) brought suit in the United States District Court for the District of Columbia against several major airlines [3]. Laker’s complaint alleged that the airlines had engaged in a predatory price fixing conspiracy [4] in violation of the Sherman and Clayton Acts [5]. Instead of directly challenging the district court’s jurisdiction, four defendants, two British airlines and two other European airlines (collectively “the airline defendants”), attempted to escape U.S. jurisdiction by seeking from the British courts [6] an injunction restraining Laker from pursuing its antitrust action.

The airline defendants’ success in obtaining an injunction from the British Court of Appeal enabled them, in effect, to circumvent the jurisdiction of the U.S. courts instead of directly challenging it. The injunction, when combined with the effect of blocking orders issued under the United Kingdom’s Protection of Trading Interests Act of 1980 [7], created a new method of blocking the extraterritorial application of U.S. antitrust laws. Although the House of Lords reversed the Court of Appeal’s issuance of an injunction [8], the House did not provide adequate safeguards against the future issuance of a similar injunction [9].

This Comment will examine the Laker controversy in the context of the political dispute between the United Kingdom and the United States over the latter’s extraterritorial application of its antitrust laws. The first section summarizes the facts of Laker’s complaint and the judicial proceedings. The Comment then explores the irreconcilable differences between the British and U.S. theories of extraterritorial jurisdiction and notes the attempts of some

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U.S. courts to accommodate foreign sovereign interests implicated in private disputes. The next section analyzes the principal judicial actions taken in the Laker litigation. This discussion focuses on the decision by the Court of Appeal [10] to issue a permanent injunction against Laker. The Comment argues that the Court of Appeal not only applied an inappropriate legal standard, but also applied it improperly in order to reach a result compatible with the U.K. executive’s position [11]. The court considered a treaty it had no power to interpret and accepted the validity of an argument based on that treaty’s interpretation. In examining the effect of the blocking order on the litigation, the court gave present effect to a future injury that would not occur. The Comment suggests that the Court of Appeal’s disregard for comity invited retaliation from the U.S. courts whose jurisdiction was threatened [12]. The final section considers the House of Lords’ reversal of the Court of Appeal. The Comment argues that the House of Lords did not adequately protect against a recurrence of the Laker problem. Without such protection, the extraterritorial application of U.S. antitrust laws may again be blocked by an antisuit injunction issued in conjunction with a blocking order.

2. The Laker litigation: allegations and actions

2.1. Factual background

Laker began operations in 1966 as a charter carrier, but in 1971 introduced its “Skytrain” service, offering regularly scheduled flights at low fares [13]. By attracting additional passengers with lower fares and relatively few restrictions, Laker hoped to establish its Skytrain service in the lucrative North Atlantic market [14]. When Laker began its New York to London service, its fare was $115, significantly lower than the comparable $313 economy fare offered by the major airlines. Laker’s Skytrain service was initially very successful, and at its peak of operations in 1981, approximately one of every seven passengers flying between the United States and England was a Laker passenger [15].

Laker alleged that the airline defendants responded to the threat of its price competition by engaging in a predatory pricing scheme. Each time Laker attempted to secure government approval to enter a new route market, defendants Pan American World Airways, Inc. (Pan Am), Trans World Airlines, Inc. (TWA), and British Airways Board (BA) allegedly agreed to offer below-cost services on that route and to arrange their schedules in order to deprive Laker of passengers [16]. The defendants planned to incur short-term losses in order to eliminate Laker as a competitor and to later raise prices to recoup those losses [17].

Laker experienced financial difficulties when it expanded into new route markets and purchased new aircraft [18]. The company suffered additional
losses when Pan Am, TWA and BA lowered their fares to meet Laker's Skytrain fares in response to Laker's refusal to end its price competition [19]. Laker also alleged that these defendants paid travel agents to divert its passengers from Laker, pressured its largest customers to change carriers, and spread false rumors of its impending bankruptcy [20].

Laker temporarily recovered from its financial difficulties by successfully renegotiating its debts with some of its creditors, including McDonnell Douglas Corporation, McDonnell Douglas Finance Corporation, and General Electric Company [21]. In addition, McDonnell Douglas agreed to exchange $9.4 million in loans for Laker stock [22]. Upon learning of this financing scheme, Laker's competitors attempted to block it. Several airlines pressured McDonnell Douglas to withdraw its proposed financing by threatening to suspend future purchases or to demand similar equity participation financing. The airlines successfully influenced Laker's creditors. The proposed financing scheme collapsed and Laker was forced to enter into liquidation proceedings in February, 1982 [24].

2.2. Summary of the Laker litigation

The Laker litigation began on November 24, 1982, when the liquidator of Laker's airline operations filed a complaint with the United States District Court for the District of Columbia [25]. Six airlines and two corporations were named as defendants: Pan Am, TWA, BA, British Caledonian Airways Ltd. (BC), Lufthansa German Airlines (Lufthansa), Swiss Air Transport Co. Ltd. (Swissair), McDonnell Douglas Corporation, and McDonnell Douglas Finance Corporation [26]. KLM Royal Dutch Airlines (KLM) and Sabena Belgian World Airlines (Sabena) later became parties when a second antitrust suit was consolidated with the original one [27]. The complaint alleged a combination and conspiracy to restrain and monopolize commerce in violation of the Sherman Act [28] and requested treble damages under the Clayton Act [29]. The complaint also alleged an intentional tort causing substantial harm to Laker's business [30].

On January 21, 1983, BA filed a declaratory judgment action against Laker in the High Court of Justice, Queen's Bench Division [31]. BA requested a declaration of nonliability to Laker and a permanent injunction preventing Laker from proceeding with its antitrust claim in the United States. Judge Parker of the Queen's Bench Division granted an ex parte interim injunction restraining Laker from taking any steps in its U.S. action or in the British courts that would in any way prevent BA from proceeding in its own British action [32]. BC, Lufthansa, and Swissair immediately obtained similar injunctions [33].

On January 24, 1983, Judge Greene of the district court responded to the British injunctions by issuing a temporary restraining order preventing the
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other defendants from obtaining injunctions that would interfere with his jurisdiction [34]. He issued a similar temporary restraining order against KLM and Sabena on February 15, 1983 [35].

On March 2, Judge Parker issued without notice to either Laker or the district court a temporary injunction preventing Laker from taking any further steps against BA and BC in the district court [36]. Judge Greene, fearing that the remaining defendants would obtain similar injunctions and effectively deprive him of jurisdiction over the case, issued on March 9 a preliminary injunction preventing KLM, Sabena, and the four American defendants from taking any actions in a foreign forum which would interfere with the progress of the pending district court case [37].

Judge Parker considered the British defendants’ motion for a permanent injunction against Laker on May 20 [38]. He denied the motion, holding that the district court properly had jurisdiction over the matter and that there was no ground for English judicial interference [39]. After weighing the private and public interests implicated by the airlines’ request, Judge Parker concluded that the irreparable harm that an injunction would cause Laker outweighed any competing interests [40].

On June 23 and July 1, the British government attempted to block the progress of Laker’s action in the district court. The Secretary of State for Trade and Industry issued an order and directions (collectively, “the blocking order”) [41] under the Protection of Trading Interests Act 1980 [42]. The Secretary determined that British trading interests were threatened by the U.S. antitrust action and a concurrent grand jury proceeding. He ordered that, without his consent, “no person or persons in the United Kingdom” could comply with any request by the Department of Justice, the grand jury or the district court to produce “any commercial information” [43]. This order also reflected the British government’s view that air traffic between the United States and the United Kingdom is regulated exclusively by a treaty between the two countries signed in Bermuda on July 23, 1977, (“Bermuda 2”) [44] and that the continuation of Laker’s antitrust claim was a breach of the U.S. government’s obligations under the treaty [45].

On July 26, 1983, the British Court of Appeal reversed Judge Parker’s denial of a permanent injunction against Laker [46]. After reconsidering the issues in light of the effect of the blocking order [47], the Court of Appeal granted an injunction restraining Laker, or anyone acting on its behalf, from proceeding in the district court [48]. The injunction also required Laker to use its best endeavors to procure the dismissal of the British airlines from the district court action [49]. The Court of Appeal denied Laker permission to appeal to the House of Lords [50].

On November 17, 1983, Judge Greene appointed an amicus curiae to explore ways of breaking the courts’ deadlock [51]. Judge Greene’s opinion criticized the actions of the British courts and reflected his determination to
maintain jurisdiction [52]. The report of the amicus curiae rejected Judge Greene's suggestion that a guardian ad litem be appointed to proceed with the litigation on behalf of Laker [53]. The report also counseled against Judge Greene's proposal that the U.S. government take part in the litigation as an amicus curiae [54]. Finally, the report applied principles of comity to the situation faced by the district court, concluding that such considerations militated against the district court's attempt to proceed further against the British airline defendants [55].

On March 6, 1984, the Court of Appeals for the District of Columbia affirmed Judge Greene's grant of a preliminary injunction restraining KLM and Sabena from seeking a British antisuit injunction [56]. After exploring the issues raised by the Laker controversy, the court's opinion rejected a judicial-political compromise in the name of comity and approved Judge Greene's attempts to retain his jurisdiction [57].

On July 19, 1984, the House of Lords reversed the decision of the Court of Appeal [58]. Although the House of Lords' decision defused the conflict between the British and U.S. courts, it left open the possibility of a recurrence of this type of conflict under similar circumstances.

3. The jurisdictional conflict behind the Laker controversy

The Laker controversy highlights the irreconcilable conflict between U.S. and British theories of extraterritorial jurisdiction in the area of antitrust law. According to the British, principles of international law limit a state's power to prescribe laws regulating economic behavior that occurs outside its territory [59]. Under the U.S. position, however, international law does not prohibit the exercise of jurisdiction over conduct that produces harmful effects on domestic commerce [60].

3.1. The United States' theory of extraterritorial jurisdiction

The territoriality principle is generally recognized as a basis for prescriptive jurisdiction [61]. Under this principle, a state may regulate activity that occurs within its territory [62]. The territoriality principle has been expanded, however, to encompass more complex jurisdictional situations [63].

The effects doctrine [64] is a modern development in the theory of extraterritorial jurisdiction. According to this doctrine, a state may assert jurisdiction over criminal conduct which, although performed outside its territory, produces harmful effects within it [65]. Although the Permanent Court of International Justice first articulated the effects test in 1927 [66], the ambiguity inherent in the term "effects" has led to continuing disagreement over its application [67]. Nevertheless, the doctrine has gained judicial acceptance in
the United States and has been recognized in several western European nations [68].

*United States v. Aluminum Co. of America* ("Alcoa") [69] introduced the effects doctrine into U.S. antitrust law. Although recognizing that principles of international law limited the scope of the Sherman Act, *Alcoa* found that Congress had the power to prescribe legislation prohibiting conduct that occurred outside U.S. Territory [70]. Absent congressional intent to prohibit all foreign restraints of trade affecting U.S. commerce, however, *Alcoa* required that the Sherman Act's extraterritorial reach should apply only to restraints of trade that intended to affect, and in fact produced an effect, upon U.S. commerce [71]. Because of the presence of both requirements, this formulation has been described as an "intent–effects" test [72].

*Alcoa*’s intent–effects test has been criticized by courts, commentators, and foreign authorities [73]. Many critics focus on the test's failure to accommodate other states' interests under notions of international comity [74]. Other critics view the test as inconsistent with principles of international law because it extends jurisdiction not only to criminal acts, but also to economic behavior that many nations sanction [75]. Some commentators criticize the difficulty in applying the test because of the uncertainty of determining intent and defining the degree of effect necessary before asserting jurisdiction [76].

U.S. courts and Congress have accepted a limited version of *Alcoa*’s intent–effects test. The cases require that the adverse effects on U.S. commerce be direct, substantial, and reasonably foreseeable [77]. The Foreign Trade Antitrust Improvements Act of 1982 requires "a ‘direct, substantial, and reasonably foreseeable’ effect on U.S. commerce" [78]. The Act’s drafters intended that the allegedly anticompetitive effect be foreseeable to a "reasonable person making practical business judgments, [whether or not] actual knowledge or intent can be shown" [79].

Despite these efforts to clarify the "intent" and "effects" necessary to assert jurisdiction over non-U.S. defendants, courts still retain the power to define the scope of their jurisdiction. Recognizing the adverse impact of this power, some U.S. courts have limited the extraterritorial reach of the U.S. antitrust laws when sensitive foreign interests are involved. *Timberlane Lumber Co. v. Bank of America* (Timberlane) [80] and *Mannington Mills, Inc. v. Congoleum Corp.* (Mannington Mills) [81], for example, employed considerations of international comity [82] in determining whether to assert jurisdiction over foreign defendants. In *Timberlane*, the court attempted to satisfy the demands of international comity by balancing the competing national interests at stake in the controversy [83]. *Mannington Mills* increased the number of factors to be balanced under the analysis [84]. The balancing tests articulated in these cases require the trial court to conduct a detailed analysis of competing interests. This type of analysis has been praised for its attempt to accommodate foreign interests in U.S. antitrust cases [85].
The analysis proposed by Timberlane and Mannington Mills, however, creates several difficulties. By weighing political and international considerations, courts necessarily become involved in both political and international disputes [86]. Moreover, judicial balancing may produce uncertain outcomes [87]. While uncertainty by itself is a cause for concern, uncertainty in the sensitive area of foreign relations is especially undesirable because to "participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy" [88].

Despite these problems, the Timberlane–Mannington Mills analysis has been followed in several cases [89] and has been substantially adopted by the Justice Department in its International Antitrust Guide [90]. At least one court, however, has explicitly refused to follow Mannington Mills [91].

3.2. The British reaction to U.S. extraterritorial antitrust jurisdiction

The British government objects to the U.S. courts' extraterritorial application of U.S. antitrust laws. The British accept only the territoriality and nationality principles as justifications for a state's regulation of trade or economic behavior [92]. They have criticized the use of the intent–effects test by the United States [93] and the Commission of the European Communities [94]. They view the extraterritorial application of U.S. antitrust law through the intent–effects test as an attempt to export economic and political ideas. The British consider such extraterritorial jurisdiction a violation of international law and an infringement of British sovereignty because it impedes the United Kingdom's right to regulate trade within its territory and over its nationals [95].

The conflict between the United States and the United Kingdom over U.S. extraterritorial antitrust enforcement led the British Parliament to enact the Protection of Trading Interests Act 1980 (the 1980 Act) [96]. The Act grants the Secretary of State of Trade and Industry (the Secretary) broad powers with which to counter foreign measures that, in his opinion, damage or threaten to damage British trading interests. These powers include prohibiting any person conducting business in the United Kingdom from complying with such foreign measures or from obeying a foreign order to produce information located in the United Kingdom [97]. The 1980 Act also provides that foreign judgments awarding multiple damages to successful plaintiffs will not be enforced in the United Kingdom [98]. The most controversial [99] portion of the 1980 Act is a "clawback" provision that enables a defendant to recover in a British court any punitive damage award secured in a foreign court [100].

4. The initial handling of the Laker dispute

Neither the airline defendants nor the British government directly contested Judge Greene's assumption of jurisdiction over the Laker litigation [101].
conflict that later developed between the U.S. and British courts stemmed from an unusual series of events which followed the filing of Laker's claim. The four airline defendants who sought an injunction from the British courts circumvented Judge Greene's jurisdiction instead of directly challenging it. This strategy distorted the normal judicial process and brought the U.S. and British courts into direct conflict. The following section will analyze initial disposi-
tions of the controversy by Judge Greene of the District Court for the District of Columbia and by Judge Parker of the High Court of Justice, Queen's Bench Division.

4.1. The District Court's injunction

On March 9, 1983, Judge Greene enjoined Sabena, KLM, and the four American defendants from taking action in foreign courts [102]. His injunction was a response to Judge Parker's March 2 interim injunction restraining Laker from proceeding in the U.S. courts against BA, BC, Swissair, and Lufthansa, the original airline defendants. After reviewing precedents in which similar injunctions had been issued, Judge Greene concluded that a court could enjoin action in a foreign court "only in the most extraordinary of circumstances" [103]. U.S. courts had issued such injunctions, for example, to ensure the finality of a judgment [104] or to prevent the maintenance of vexatious litigation [105].

Judge Greene balanced the potential injuries to each of the parties and analyzed relevant public policy considerations. He concluded that denial of an injunction could cause irreparable injury to Laker because the remaining defendants might obtain injunctions, such as were eventually obtained by BA and BC, that would block Laker's action [106]. In contrast, Sabena and KLM would be injured only to the extent that they risked U.S. antitrust liability [107]. The risk of such liability, however, is inherent in doing business in the United States [108]. Judge Greene dismissed as speculative the injury that the U.S. defendants would have suffered by having their rights decided in a British court in their absence [109]. The balance of potential injuries favored Laker. Assuming the truth of Laker's allegations and the grant of a British permanent injunction, Judge Greene found substantial public interests at stake: the economic harm to American consumers caused by a transatlantic airline price fixing conspiracy and the emasculation of the U.S. antitrust laws by multinational enterprises obtaining injunctions from a foreign court [110].

Judge Greene's support for the strong public policy underlying the U.S. antitrust laws explains why the airline defendants did not directly challenge his jurisdiction. By pleading comity considerations under the Timberlane, Mannington Mills, and Restatement analyses, the defendants could have brought the issue squarely before the court. In addition, the British government could

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have expressed its views before the district court. Both attempts might have proved futile, however, given the U.S. courts' traditional views of the importance of U.S. antitrust laws. In his March 9 opinion, Judge Greene expressed his view of the Sherman Act's mandate to the courts: "[t]hese actions were brought under a positive command of a crucial American statute that represents a very strong public policy" [111]. This statement suggests that he would not have declined to exercise jurisdiction under a Timberlane-Mannington Mills analysis.

The Court of Appeals for the District of Columbia Circuit later affirmed Judge Greene's "defensive use of an antisuit injunction," stating that there was ample precedent to justify such a protective injunction [112].

4.2. Judge Parker's denial of a permanent injunction

On May 20, 1983, Judge Parker of the Queen's Bench Division denied the airline defendants' application for a permanent injunction restraining Laker from proceeding further in the U.S. courts [113]. In considering the airlines' motion for an injunction, Judge Parker analyzed the public policy considerations implicated by the case [114]. He cited Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [115], for the proposition that specific governmental policy views may be entertained in cases where a potential infringement of British sovereignty could occur [116]. Judge Parker therefore considered it within his discretion to weigh "specific matters of policy, be it judicially recognized public policy as revealed by the cases, or parliamentary as revealed by legislation, or governmental as revealed by treaty or convention" [117].

Judge Parker began his examination of public policy considerations with the 1980 Act [118], which was Parliament's response to perceived threats to U.K. sovereignty in the field of international trade. The 1980 Act empowered the Secretary to issue blocking orders to combat foreign discovery orders, prohibited enforcement of foreign judgments in the United Kingdom, and provided a clawback provision to permit recovery of punitive damage awards [119]. Because Parliament had not addressed a plaintiff's ability to bring such actions, however, nothing in the 1980 Act required Judge Parker to enjoin Laker's action [120].

Judge Parker then examined the effect of the Bermuda 2 treaty on Laker's claim [121]. The airline defendants urged that the treaty, signed by the United States and the United Kingdom, governed the outcome of the Laker dispute [122]. BA and BC argued that one British airline could not sue another British airline for damages alleged to flow from approved tariffs. Such a suit, if successful, would result in a derogation of rights granted to the British government under the treaty [123]. The Attorney General, presenting the British government's position, argued that the United States was in breach of its obligations under Bermuda 2 by allowing an antitrust action to be applied
to tariff agreements approved under the regulatory mechanisms of the treaty [124].

Judge Parker held that the treaty's effect on the antitrust laws was a matter for the U.S. courts to decide [125]. He dismissed the airlines' argument on the grounds that, because the treaty is not a part of English domestic law, it cannot be employed by the airlines to deprive Laker of its right to pursue its action [126]. Even if the treaty could be so used, Laker's complaint alleged that the airline defendants had entered into a tariff agreement that had not been approved pursuant to the treaty [127].

Judge Parker concluded that none of the injuries to the defendant airlines could outweigh the harm to Laker because the injunction would deprive Laker of its sole legal remedy [128]. "What is unjust," he asked, "in allowing the United Kingdom airlines, if the facts are established, from answering alike with the American airlines for breach of the laws of the country by permission of whose government they were operating?" [129]

5. The Court of Appeal's decision to enjoin Laker

On July 26, 1983, the Court of Appeal reversed Judge Parker and permanently enjoined Laker from continuing its action in the U.S. courts [130]. Although the court's appellate review in such a case normally focuses on the trial judge's exercise of discretion [131], the court also analyzed the effect of the blocking order issued by the Secretary after Judge Parker's decision [132]. The court justified the injunction by applying a legal standard adapted from cases in which the British courts had considered a stay of proceedings in one forum so that the action could proceed elsewhere [133].

The standard employed by the court was inappropriate for a case where no alternative forum existed for the enjoined party [134]. In addition, neither Bermuda 2 nor the blocking order should have entered the court's analysis [135]. Moreover, the court gave improper effect to these factors in its analysis [136]. The basis for the injunction was the court's acceptance of the British government's position that extraterritorial application of U.S. antitrust law under the effects doctrine was invalid [137].

5.1. The Court of Appeal's standard for enjoining foreign proceedings

The Court of Appeal recognized that no British court had ever considered restraining the prosecution of a foreign proceeding where such action would deprive the plaintiff of access to any forum to pursue his legal remedy [138]. In rejecting Laker's argument that the existence of an alternative forum is a precondition for enjoining foreign proceedings [139], the court sought guidance
from several cases [140] in which the House of Lords considered enjoining proceedings. These cases, however, presented situations in which the House of Lords examined the propriety of staying domestic proceedings where alternative fora were available. The standards that evolved in these cases were, therefore, never intended to be applied in a situation such as the one before the Court of Appeal [141].

In *MacShannon v. Rockware Glass, Ltd.* [142], the House of Lords examined the legal standards that guided the courts in issuing a stay of domestic proceedings. Lord Diplock distilled from prior decisions a formula that enabled an applicant to more easily obtain a stay of domestic proceedings [143]. This formula required an applicant to show both that a more convenient alternative forum existed and that the stay did not effectively deprive the enjoined party of a legitimate advantage in the stayed proceedings [144]. The formula was intended to resemble the doctrine of *forum non conveniens* [145].

The formula was first used in the context of an injunction of foreign proceedings in *Castanho v. Brown & Root (U.K.) Ltd.* [146]. It required the moving party to show that a more convenient English forum existed and that the enjoined party would not be deprived of an advantage gained from pursuit of his foreign action [147]. *Castanho* relied on an additional standard to guide the court's inquiry: a "critical equation" balancing "any advantage to the plaintiff" and "any disadvantage to the defendant" [148]. Application of the *Castanho* formula to the Laker case would have counseled against issuing an injunction because Laker did not have access to an alternative forum and would have been deprived of a real advantage in pursuing its U.S. action.

The Court of Appeal, however, chose not to apply the *Castanho* formula [149]. Instead, the court modified the critical equation into a balancing of "whether the grant or refusal of the relief sought will create the lesser injustice" [150]. The new equation facilitates the enjoining of foreign proceedings by characterizing the court's inquiry as a balancing of the more general "injustices" instead of a weighing of advantage and disadvantage. The Court of Appeal should not have applied to the facts of the Laker case a standard developed in cases involving alternative fora and stays of domestic proceedings. This approach ignores the admonition of *Cohen v. Rothfield* [151] that extreme caution should be exercised in enjoining foreign proceedings. Even assuming that the new standard were appropriate, however, the court's application of this standard did not adequately weigh the harm that Laker would suffer if it lost its cause of action. The airline defendants' side of the critical equation of relative injustice contained the burdensomeness of American discovery procedures, the illegitimate advantage of Laker's seeking legal relief in the United States, and the potential adverse effects of the blocking order on the airlines' ability to defend in the U.S. action [152]. The inadequacies of the latter two factors will be discussed in the following subsections.
5.2. The effect of the Bermuda 2 treaty

Under English law, a treaty that has not been enacted by Parliament forms no part of domestic law [153]. The Bermuda 2 treaty, although never enacted into domestic law [154], was nevertheless considered by the Court of Appeal in its opinion. It heard the British Attorney-General’s statement that the British government viewed the United States as having breached its obligations under Bermuda 2 by permitting application of U.S. antitrust laws to conduct governed by the treaty [155]. The court also acknowledged that the United States did not interpret Bermuda 2 as precluding application of its antitrust laws [156].

Despite its lack of jurisdiction to interpret the treaty and the disagreement between the two countries over the treaty’s meaning, the Court of Appeal entertained the British airline defendants’ argument based on the meaning of Bermuda 2 [157]. The airlines claimed that Laker could not bring an antitrust claim regarding tariffs approved under the treaty’s regulatory mechanism [158]. The court accepted the airlines’ argument that because Laker enjoyed certain benefits of British government regulation under Bermuda 2, Laker was burdened with the obligation not to bring a U.S. antitrust claim [159]. The court concluded that Laker’s action “cast some doubt on the legitimacy of the juridical advantage which it seeks to preserve in the United States” [160].

The Court of Appeal allowed the Bermuda 2 issue to enter into the critical equation [161]. In reviewing the airlines’ side of the equation, the court stated that they were “entitled to rely indirectly on Bermuda 2” [162]. The British courts, however, lack power to interpret a treaty of this type [163]. The two countries’ conflicting interpretations of the treaty and Laker’s allegations concerning conduct not governed by the treaty also militated against allowing Bermuda 2 to enter in the critical equation. The Court of Appeal may have acknowledged the weakness of justifying the injunction on the basis of this issue when it admitted, “[w]hatever weight may or may not be given to the other factors in the critical equation, in our judgment the effect of the order and directions is decisive” [164].

5.3. The effect of the blocking order

The Court of Appeal considered the effect of the blocking order to be a decisive factor in the critical equation [165]. This reliance on the effect of the blocking order cannot be defended. The court found that the order rendered the district court action wholly untriable in regard to the airlines, “since they will be unable to defend themselves before the district court” [166]. This threat to the airlines tipped the scales in the “critical equation” against Laker and justified issuing the injunction.

Judge Greene criticized the court’s conclusion as speculative:

[The English Court of Appeal is asserting the right to abort this litigation because documents may be needed which may not be made available under the Secretary of State’s directions, and because the nonproduction of the documents may harm the major airlines more than Laker. To state that proposition is to demonstrate its speciousness [167].]
None of the parties had determined which documents necessary to the litigation were located in England [168]. Furthermore, the Court of Appeal could not justifiably base its decision on the speculative harm caused by the airlines' inability to produce documents because the Secretary could consent to disclosure whenever such action would protect British trading interests and prevent harm to the British airline defendants [169].

The court not only speculated about the harm to the defendants, but also ignored the intended effect of the blocking order. The order was designed to reduce the burden of U.S. discovery and to minimize the risk to British trading interests. The issuance of an injunction against foreign proceedings, a remedy never before applied by British courts and acknowledged by them to be an extraordinary measure, would seem unjustified in these circumstances.

5.4. A policy rationale for the injunction

The Court of Appeal recognized that an injunction against Laker would deprive the airline of its remedy against the British airline defendants in the U.S. courts [170]. Nevertheless, the court adhered to the British government's opposition to the extraterritorial application of U.S. antitrust laws, effectively stripping the U.S. district court of jurisdiction over Laker's claim. The Court of Appeal considered public policy in reaching its decision. The court solicited executive statements, reasoning that "it would be strange if in this field the courts and the executive spoke with different voices and they should not do so" [172]. The court accordingly heard the Attorney-General's position: "In general, substantive jurisdiction in antitrust matters, in the view of the British Government, should only be taken on the basis either of the territorial principle or the nationality principle" [173].

The court carefully avoided openly basing its decision on the jurisdictional position recommended by the Attorney-General. Nevertheless, its treatment of the Bermuda 2 treaty, its balancing of injustices, and its reasoning regarding the effect of the blocking order were insufficient to justify its decision.

5.5. Results of the injunction's issuance: violation of principles of comity and invitation to foreign retaliation

Perhaps the greatest flaw in the Court of Appeal's decision was its disregard of principles of comity. The court recognized a political stalemate between the United States and the United Kingdom over their differing interpretations of the Bermuda 2 treaty, but adopted its own government's interpretation as a rationale for interfering with the jurisdiction of a U.S. court [174]. In entertaining its government's views on the illegality of U.S. extraterritorial antitrust enforcement, the court brought into question the laws of another country.
The court’s broad injunction intruded on the functions of the district court. The injunction required the British court to examine which pleadings it would allow Laker to file in the district court and which ones it would forbid [175]. This screening procedure directly interfered with the district court’s efforts to conduct discovery in the case.

Judge Greene criticized the court’s examination of “all the circumstances” [176] of the case for ignoring U.S. interests that would be infringed by the court’s decision. He identified the United States’ interest in protecting transatlantic air passengers, many of whom are Americans [177], and in providing a satisfactory forum for Laker’s creditors, who are primarily American [178]. Had the airlines succeeded in their quest for a permanent injunction, the British courts’ precedent would have allowed similarly situated foreign corporations to escape antitrust liability, thereby damaging the U.S. interest in enforcing its antitrust laws.

The Court of Appeal’s disregard of comity invited retaliation by the U.S. courts. On March 6, 1984, the United States Court of Appeals for the District of Columbia affirmed Judge Greene’s preliminary injunction restraining KLM and Sabena from taking part in any foreign action intended to block the district court’s jurisdiction [179]. The court concluded that the United States and the United Kingdom shared concurrent prescriptive jurisdiction over the events underlying the Laker controversy [180]. Because the British action was instituted for the sole purpose of terminating the U.S. action, the “defensive use” of an antisuit injunction was held to be justified [181].

The court questioned the propriety of the judiciary’s previous attempts to resolve international disputes such as the Laker controversy and concluded that the judiciary’s role should be limited to implementing domestic legislative policies [182]. The stalemate between the British and U.S. courts was due to their inability to resolve international political disputes [183]. The court rejected an appeal to comity which, although appropriate in some cases, would not be advanced by capitulating to a more aggressive adversary:

Accession to a demand for comity predicated on the coercive effects of a foreign judgment usurping legitimately concurrent prescriptive jurisdiction is unlikely to foster the processes of accommodation and cooperation which form the basis for a genuine system of international comity [184].

The court also challenged the efficacy of applying the Timberlane and Mannington Mills analyses to the Laker case: “[T]his approach is unsuitable when courts are forced to choose between a domestic law which is designed to protect domestic interests, and a foreign law which is calculated to thwart the implementation of the domestic law” [185]. The court concluded that the political branches of the governments must resolve their disputes on their own initiative because the courts are not the proper forum [186].
6. The House of Lords' reversal

On July 19, 1984, the House of Lords reversed the judgment of the Court of Appeal and lifted the injunction against Laker [187]. Lord Diplock authored an opinion that was highly critical of the Court of Appeal's decision. Lord Scarman contributed his remarks to the Lords' decision [188]. Although the decision of the House of Lords defused the conflict between the British and American courts, it provides no assurance against the recurrence of similar conflicts.

Lord Diplock questioned the Court of Appeal's reliance on public policy: "[T]he sources of the public policy to which courts of justice give effect are to be found in judicial decisions and in legislation and not in the views of the executive government except in the relatively narrow field of international relations between sovereign states" [189].

The House of Lords confronted the novel problem of an English court enjoining a litigant from pursuing a claim before a foreign court when no other court could provide a remedy [190]. Lord Diplock emphasized the "crucial distinction" between cases in which only one forum can provide a remedy to the party being enjoined and cases in which the court merely chooses between suitable alternative fora [191]. Lord Diplock criticized the Court of Appeal's use of the critical equation as inappropriate in the context of a single forum case. The metaphor simply could not apply to a case in which only one side of the equation existed [192].

Unfortunately, Lord Diplock did not distinguish between the standards to be followed by a judge in exercising his discretion in single forum and alternative fora cases. He noted, however, the grave consequences of issuing an injunction in a single forum case: the trial court would essentially appropriate a "one-sided jurisdiction," deciding the case on its merits [193]. Lord Scarman advocated "cautiousness" on the part of a trial judge exercising such discretion [194]. He nevertheless insisted on the trial judge's power to issue such an injunction: "wide and flexible" equity principles permitted this remedy [195].

The House of Lords recognized a plaintiff's right to seek an injunction to avoid "unconscionable conduct" [196] by the defendant: "[I]f under English law a defence would be available to the injunction-seeker, [then] that defence may be given anticipatory effect as a right not to be sued that is enforceable by injunction in an acting for a declaration of non-liability" [197]. An example of such an anticipatory defense is the equitable right to defend against unconscionable conduct on the part of the defendant [198].

The House of Lords offered few restraints to limit the discretion of a judge in exercising "wide and flexible" principles of equity and in defining the parameters of unconscionable conduct. The Court of Appeal was so biased against the U.S. antitrust laws and their extraterritorial application that it would have considered Laker's action "unconscionable." Similarly, Judge
parker must have considered Laker's conduct not unconscionable. The House of Lords' decision leaves open the question of what type of conduct can justify the extraordinary remedy of enjoining foreign proceedings.

Lord Diplock described BA's argument before the House of Lords as the "admission to the scheduled airlines club" argument [199]. BA asserted that Laker's voluntary submission to the airline regulatory regime precluded it from asserting a cause of action under American antitrust laws [200]. In rejecting this argument, Lord Diplock noted that nothing in English domestic law governing air transport licenses either exempted BA and BC from the obligations imposed by U.S. law or prevented Laker from asserting a claim under U.S. law [201]. Laker's conduct was not unconscionable because all three airlines voluntarily submitted themselves to the private laws of the two nations when they accepted licensing to do business within their jurisdictions [202].

The House of Lords did not consider the Bermuda 2 treaty in its examination of the airlines' claim that the regulatory regime precluded Laker's action. Because Bermuda 2 forms no part of English law, no English court has jurisdiction to assess the parties' relative rights under the treaty [203]. Lord Diplock noted, however, that the Bermuda 2 treaty, the Federal Aviation Act [204], and the Sherman and Clayton Acts are all part of U.S. domestic law and thus subject to interpretation by a U.S. court [205]. He also observed that Laker's claim was based on an agreement that was never approved by the regulatory agency responsible for the treaty's implementation in the United States [206].

The House of Lords also rejected what the Court of Appeal stated to be the decisive factor in its decision, namely the potential harmful effect of the blocking order on BA and BC [207]. These executive actions only disadvantaged Laker, and actually helped BA and BC in defending their interests. The airlines were free to withhold evidence that would harm their defense [208]. If they wished to produce evidence to aid their defense, they could obtain the consent of the Secretary of State who was "on their side" [209]. The Court of Appeal misinterpreted the blocking order as prohibiting the airlines from complying with an adverse judgment. Nothing in the 1980 Act, however, prevents them from paying a damage award [210]. Moreover, the Act allows British airlines to recover through the clawback provision the punitive portion of any damages paid [211].

7. Conclusion

The Laker controversy exposes a new method of blocking U.S. extraterritorial antitrust jurisdiction: an antisuit injunction issued on the basis of a blocking order, both directed at a foreign judicial proceeding. The issuance of an antisuit injunction under these conditions cannot be justified. Its adverse
effects on international relations and private interests are well illustrated in the Laker controversy. The Laker litigation aggravated a political dispute between the United Kingdom and the United States over the issue of prescriptive jurisdiction. The British Court of Appeal, in its self-confessed desire to follow the mandate of its executive government, invoked public policy as a rationale for issuing what it acknowledged to be an unprecedented injunction [212]. The result was the continuation of an unfortunate trend in the British courts' relaxation of the standards for enjoining foreign proceedings [213].

Had the Court of Appeal affirmed the High Court's denial of a permanent injunction, the international conflict would not have been exacerbated. The Court of Appeal, however, issued an antisuit injunction based on the blocking order directed at Laker's U.S. antitrust action. Nothing in the blocking order or the 1980 Act required the court to issue the injunction. Both the Act and the blocking order were intended to minimize threats to British trading interests and to reduce the perceived threat of U.S. discovery procedures [214]. Issuance of an injunction where such remedial steps have been taken is unnecessary and may provoke retaliation.

The House of Lords defused the immediate conflict but did not prevent the recurrence of a similar controversy. Although the Lords' decision requires a court to exercise caution before issuing such an injunction [215], it does not further restrict the court's power to enjoin foreign proceedings. The Lords did not explicitly forbid an antisuit injunction issued on the basis of a blocking order.

There are several reasons why the House of Lords should prohibit antisuit injunctions based on blocking orders. The injunction affords protection that the blocking order already provides. The injunction disregards comity, damages international relations, and invites foreign judicial retaliation. Despite these arguments, the House of Lords did not preclude the possibility of the future issuance of such injunctions. The Lords recognized the existence of a "novel problem" but offered no novel solution.
Notes


[4] While it may take many forms, predatory pricing usually involves "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." 3 P. Areeda & D. Turner, Antitrust Law ¶ 711 (1978). See id. ¶¶ 710–722b for a thorough discussion of predatory pricing.


British Airways, [1984] 3 W.L.R. at 413.

See infra text accompanying notes 190–215.


See infra text accompanying notes 130–73.

See infra text accompanying notes 174–86.

Complaint, supra note 3, at paras. 15–16.

Id. at paras. 13–14.


Complaint, supra note 3, at para. 20.

Id. at paras. 18–20.

Economist, supra note 3, at 66.

Complaint, supra note 3, at para. 27.

Id. at para. 28.


Id. at D7, D9; Economist, supra note 3, at 64–65.

Complaint, supra note 3, at paras. 30–32; Economist, supra note 3, at 64, 66; Wash. Post, supra note 15, at D7, D9.

Complaint, supra note 3, at paras. 31, 32.

Economist, supra note 3, at 64.

Complaint, supra note 3.

Laker Airways, 559 F. Supp. at 1126 n. 3.

Complaint, supra note 3, at paras. 1–2, 33–39.

Id. at para. 43.

Id. at paras. 40–42.

British Airways, [1984] 1 Q.B. at 147.

Id. at 148. The interim injunction is reprinted in Appendix 4 to Report of Amicus Curiae, Laker Airways, 577 F. Supp. at 348.


Laker Airways, 559 F. Supp. at 1124.

Sabena, 731 F. 2d at 918 (discussing Judge Parker’s injunction).


Id. at 165–66.

Id.

Blocking order, supra note 7.


[43] Blocking order, supra note 7 (General Direction of July 1, 1983, at para. 1).


[46] Id. at 202–03.

[47] Id. at 184–85, 195–203.

[48] Id. at 202–03.

[49] Id. at 203.


[52] Id. at 354–56.


[54] Id. at 4–5, 43–46.

[55] Id. at 5, 56–84.

[56] Sabena, 731 F. 2d at 956 (2-1 decision).

[57] Id.

[58] British Airways, [1984] 3 W.L.R. at 413.


[60] See, e.g., United States v. Aluminum Co. of America, 148 F. 2d 416, 443 (2d Cir. 1945) (development of “effects test”).


[63] Restatement, supra note 62, § 18. The objective territorial principle, for example, permits a state to claim jurisdiction over criminal conduct which, although begun outside its territory, is consummated within it. E.g., Jennings, supra note 61, at 156–57. A number of states accept this exercise of jurisdiction where a complaining state can show that a constituent element of the crime occurred within its territory. E.g., id.; see also Akehurst, supra note 61, at 152.

[64] Restatement, supra note 62, § 18; accord Alcoa, 148 F. 2d at 443.

[65] Alcoa, 148 F. 2d at 443.

[66] S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. ser. A, No. 9 (Judgment of Sept. 7). The case arose out of a collision between a French steamer and a Turkish vessel in which eight Turkish nationals perished. The Court concluded that no principle of international law precluded Turkey from prosecuting the French lieutenant who was on watch when the Lotus collided with the Turkish ship. The effects doctrine was applied in the following passage:

It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another state, are nevertheless to be regarded as having been committed in the national territory, if

https://scholarship.law.upenn.edu/jil/vol7/iss1/3
one of the constituent elements of the offence, and more especially its effects, have taken place there.

*Id* at 23.

[67] See Timberlane Lumber Co. v. Bank of America, 549 F. 2d 597, 609–15 (9th Cir. 1976) (discussion of the controversy over the effects doctrine); *see also* Atwood & Brewster, *supra* note 2, at 156–59 (history of debate over doctrine’s acceptance).


[69] 148 F. 2d at 443.

[70] *Id*.

[71] *Id*. at 443–44.


[73] See *Timberlane*, 549 F. 2d at 608–16 (complete discussion of relevant criticisms); Atwood & Brewster, *supra* note 2, at 147–56; Fugate, *supra* note 2, at 127–43.


[76] *Id*.

[77] See, e.g., United States v. Watchmakers of Switzerland Information Center, 1963 Trade Cas ¶ 70,600 (S.D.N.Y. 1962), *judgment modified*, 1965 Trade Cas ¶ 71,352 (S.D.N.Y. 1965); *see also* *Timberlane*, 549 F. 2d at 610–11 (comparing standards applied by different U.S. courts).


[80] 549 F. 2d at 597.


[82] Comity may be defined as the recognition that a nation allows to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of persons who are under the protection of its laws. Black’s Law Dictionary 243 (5th ed. 1979).

[83] The court weighed:

the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of 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 those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

*Timberlane*, 549 F. 2d at 614.

The foregoing factors are similar to those articulated by Restatement (Second) of Foreign Relations Law, *supra* note 62, § 40:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person.
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[84] 595 F. 2d at 1297–98. The court identified ten factors:

(1) Degree of conflict with foreign law or policy;
(2) Nationality of the parties;
(3) Relative importance of the alleged violation of conduct here compared to that abroad;
(4) Availability of remedy abroad and the pendency of litigation there;
(5) Existence of intent to harm or affect American commerce and its foreseeability;
(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.


[87] See, e.g., Kadish, supra note 85, at 160–62.


[91] In re Uranium Antitrust Litigation, 617 F. 2d 1248, 1255–56 (7th Cir. 1980).


[94] See Aide-Mémoire, supra note 59.

[95] N.Y. Times, supra note 2, at D2, col. 1

[97] Id § 1(3).
[98] Id. § 5.


[102] Laker Airways, 559 F. Supp. at 1124.
[103] Id. at 1131.

[104] Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F. 2d 105 (2d Cir. 1953) (court may enjoin purely vexatious litigation, but an injunction is unjustified if plaintiff had legitimate reason to be in a foreign forum).


[107] Id. at 1138.
[108] Id.
[109] Id.
[110] Id. at 1135–36.
[111] Id. at 1134.
[112] Sabena, 731 F. 2d at 915.
[114] Id. at 159–68.
[117] Id. at 159.
[118] Id. at 160, 164.
[121] Id.
[122] Id.
[123] Id.
[124] Id.
[125] Id. at 167.
[126] Id. at 165.
[127] Id at 167.
[128] Id. at 165.
[129] Id. at 166.
[130] Id. at 169–203.
[133] Id. at 186–88.
[139] Id. at 193.


[141] Castanho [1981] A.C. at 557 (although concerned with enjoining a foreign proceeding, nevertheless presented a situation in which alternative fora were available).

[143] Id. at 811.
[144] Id. at 812.
[145] Id.
[147] Id. at 151.
[150] Id. at 188.
[151] [1919] 1 K.B. 410, 415.
[155] Id.
[156] Id.
[157] Id. at 190–93, 199–201.
[158] Id. at 176.
[159] Id. at 200–01; see also British Airways, [1984] 3 W.L.R. at 422–25, 433 (House of Lords' criticism of the Court of Appeal's conclusions).
[161] Id. at 200–01.
[162] Id. at 201.
[163] See Mann, supra note 153; see also British Airways, [1984] 3 W.L.R. at 423 (House of Lords' conclusion on interpretation of Bermuda 2).
[165] Id.
[166] Id.
[168] Id. at 353.
[169] Id. Judge Greene asserted that his jurisdiction over the Laker case permitted him to take appropriate steps to conduct discovery. The effect of the blocking order did not diminish this jurisdiction. He cited cases in which federal courts had addressed comparable situations: Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 213 (1958) (Supreme Court emphasized district court's discretion to achieve compliance with discovery orders, "in whatever manner it deems most effective," where foreign law prohibited such compliance); United States v. Vetco, Inc., 691 F. 2d 1281 (9th Cir. 1981) (Ninth Circuit recommended balancing of competing interests in courts' determination whether to enforce summons when foreign law rendered compliance illegal).
[171] Id. at 193–98.
[172] Id. at 193.
[173] Id. at 194.
[178] Id. U.S. creditors holding two-thirds of Laker's total debt are listed in Report of Amicus Curiae, supra note 53, at 11.
[179] Sabena, 731 F. 2d at 909.
[180] Id. at 926–27.
[181] Id. at 926–31.
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