1985

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STILL RUNNING AGAINST THE WIND:† A COMMENT ON ANTITRUST JURISDICTION AND LAKER AIRWAYS LTD. V. SABENA, BELGIAN WORLD AIRLINES

C. PAUL ROGERS*

I. INTRODUCTION

The perceived "extraterritorial" jurisdictional reach, as well as, the substance of the United States antitrust laws continues to cause considerable international tension. Whenever restraints of foreign concerns cause the requisite "effect" on United States commerce, the Sherman and Clayton Acts confer jurisdiction against foreign corporations regardless of where the objectionable conduct occurred. Foreign nations often resent the perceived ubiquitous nature of American antitrust law, with its

† Bob Seeger, Against the Wind (1980).

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1 Extraterritorial jurisdiction refers to a court's assertion of jurisdiction over conduct outside of the court's normal jurisdictional territory that has an impact within the jurisdiction. Thus, the focus, for jurisdictional purposes, is on the "territorial" effects of conduct originating elsewhere. See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922-23 (D.C. Cir. 1984) (asserting that the territorial effects doctrine should not be referred to as an extraterritorial assertion of jurisdiction).

2 See United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416, 443-44 (2d Cir. 1945) (agreements made abroad unlawful under Sherman Act "if they were intended to affect imports and did not affect them."). For a fuller discussion of Alcoa and its progeny, see notes 14-41 and accompanying text.
treble damage component, and regard its attempted enforcement within their boundaries as a direct infringement of their sovereignty.

In reaction to this wielding of transnational power, foreign governments have enacted a variety of legislative responses. Such statutes generally curtail discovery of business documents and records, thus effectively thwarting the normal "trial by document" antitrust suit. Other strategies include the statutory non-recognition of foreign judgments for multiple damages, aimed specifically at the

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6 See Protection of Trading Interests Act, 1980, ch. 11 (British law); Foreign Antitrust Judgments (Restriction of Enforcement) Act, AUSTL. ACTS P. No. 13
treble damage entitlement of American antitrust law. Novel “clawback” provisions allow recoupment of any damages paid above the amount of actual damages suffered, transforming United States antitrust judgments from punitive to compensatory. In contrast, diplomatic accords between the United States and foreign governments, in which the governments agree to consult where the interests of one may be affected by the extraterritorial enforcement of the law of the other, have been largely ineffective.

Foreign statutory provisions are thus used to limit the extraterritorial application of American antitrust laws. Initially these “blocking” statutes appear entirely defensive, with apparent goals to protect the enacting country’s jurisdiction and to defer to its courts to resolve antitrust disputes free of foreign interference. These purely defensive attributes come into question in light of the

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(1979). For a discussion of British statutory “clawback” of punitive damages, see infra note 8 and accompanying text.

7 Section 4 of the Clayton Act provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue ... and shall recover threefold the damages by him sustained.” 15 U.S.C. § 15(a) (1982).

8 For instance, Section 6 of the British Protection of Trading Interests Act creates a cause of action which allows recoupment of the amount above actual damages awarded. A “qualifying defendant” who has paid an overseas multiple damage judgment retains a cause of action to “clawback” that portion of the judgment that is penal rather than compensatory in nature. The Protection of Trading Interests Act, 1980, ch. 11 § 6. See generally Note, Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law, 81 COLUM. L. REV. 1097, 1103-04 (1981) [hereinafter referred to as Columbia Note] (discussing British disfavor with multiple damages).


overriding principle of international comity. \(^{11}\) Comity requires that the decision of a foreign tribunal be given deference by domestic courts if at all possible. While the goals of "blocking" statutes appear to be defensive, their effect is often obstruction of the decisions of foreign courts.

The case critiqued here, *Laker Airways Ltd. v. Sabena*, \(^{12}\) illustrates a purely offensive use of foreign statutory mandates against a United States antitrust suit. The resulting jurisdictional conflict, arising from attempts by the United Kingdom to insulate its business entities from United States antitrust law and domestic policies, embodies fundamentally opposed policies regarding the desirability and scope of legislation controlling anticompetitive and restrictive business practices.\(^ {13}\) First, a history of extraterritorial antitrust jurisdiction will be given through a brief discussion of the principal cases.

II. HISTORICAL DEVELOPMENT OF EXTRATERRITORIAL JURISDICTION

A. Judicial Interpretations

The first attempts at the application of extraterritorial jurisdiction of the United States antitrust laws provided little hint of the ensuing international tension and conflict. The first significant international Sherman Act case, *American Banana Co. v. United Fruit Co.* \(^{14}\) involved a treble damage action alleging that the defendant had prompted Costa Rican soldiers to seize the plaintiff's Panamanian banana plantation. The defendant's actions were in furtherance of its plan to prevent competition and monopo-

\(^{11}\) International comity denotes the deference a court pays to the acts of a foreign sovereign and its legal systems. *Laker*, 731 F.2d at 937. See also *Restatement (Second) of the Foreign Relations Law of the United States* § 39 (1965) (comity is one factor to be considered in determining jurisdiction); *Davidow, Extraterritorial Antitrust and the Concept of Comity*, 15 J. WORLD TRADE L. 500, 512-14 (1981) (noting domestic forum rarely sacrifices jurisdiction in interest of comity).

\(^{12}\) 731 F.2d 909 (D.C. Cir. 1984).

\(^{13}\) *Id.* at 955.

\(^{14}\) 213 U.S. 347 (1909).
lize the banana trade. As the plaintiff alleged no effect on American commerce, the lower courts held that no cause of action existed under the Sherman Act. The United States Supreme Court affirmed, finding two bases for its decision. The Court first noted that a foreign immunity attached to the acts of the Costa Rican soldiers who acted under the authority of a foreign government. The Court further held the Sherman Act inapplicable to acts done within the territory of a foreign sovereign.

Subsequently, United States v. Aluminum Co. of America (Alcoa) greatly expanded the jurisdiction of the Sherman Act over acts performed outside of the United States. In Alcoa, a Swiss company, Alliance, entered into an agreement with its shareholders, aluminum production companies incorporated in France, Germany, Switzerland, Britain and Canada, to set a quota for production of aluminum. The agreement required any shareholder exceeding the quota to pay progressive royalties to Alliance. Although the United States corporate co-defendant, Alcoa, benefited from the agreement since exports to the United States were included in the quotas, it was not a party to it.

The agreement originated in Europe, thus raising the issue as to whether the Sherman Act extended to the conduct of foreign nationals outside the United States. Judge Learned Hand, delivering the opinion of the court, found that: "[a]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its bor-

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15 American Banana Co. v. United Fruit Co., 166 F. 261, 264 (2d Cir. 1908).
16 213 U.S. at 359.
17 Id. at 358-59.
18 Id. at 357. Although American Banana appeared to have foreclosed extraterritorial application of the Sherman Act, later cases narrowed its application. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), defendants entered into a conspiracy in the U.S. to monopolize the Yucatan Sisal industry. Distinguishing American Banana, the Supreme Court approved the exercise of jurisdiction because the conduct partially occurred in the U.S. and intentionally affected American trade. Id. at 276. See also United States v. American Tobacco Co., 221 U.S. 106 (1911)).
19 148 F.2d 416 (2d Cir. 1945).
20 Id. at 442.
ders that has consequences within its borders which the state reprehend; and these liabilities other states will ordinarily recognize.\textsuperscript{21} The court envisaged three pertinent situations. First were agreements made outside the United States that affect United States commerce although not intending to do so. The court held mere effect an insufficient ground for the exercise of jurisdiction.\textsuperscript{22} Second were agreements that intend to affect United States imports and exports but fail to achieve this result. Again, the court considered this an insufficient basis of jurisdiction.\textsuperscript{23} Third were agreements that intend to affect U.S. commerce and that actually do affect U.S. commerce. The court held the Sherman Act applicable to the latter situations.\textsuperscript{24} Further, the court found that plaintiff's showing of intent shifted the burden of proof, putting the defendant to the task of showing no effect was actually achieved.\textsuperscript{25}

Subsequent cases utilized the \textit{Alcoa} effects test as a touchstone for analysis\textsuperscript{26} and the \textit{Restatement (Second) of Foreign Relations Law of the United States} incorporates the approach as well.\textsuperscript{27} No subsequent decision, however, has applied the intent/effects test to the exclusively foreign

\textsuperscript{21} Id. at 443.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 441.
\textsuperscript{24} Id. at 444.
\textsuperscript{25} Id. With this shifting of burden of proof, the defendant's task of showing no effect has proved a difficult chore, as the variables of international trade make measurement difficult.
\textsuperscript{26} See, \textit{e.g.}, Timberlane Lumber Co. v. Bank of America, N.T.& S.A., 549 F.2d 597 (9th Cir. 1976); United States v. Watchmakers of Switzerland Information Center, Inc., 1963 TRADE CAS. (CCH) § 70,600, at 77, 414.
conduct of foreign parties. Instead, cases dealing with foreign activities have emphasized participation by an American party. Nonetheless, the effects test has been condemned abroad as a violation of foreign sovereignty.

Timberlane Lumber Co. v. Bank of America, N.T. & S.A. provided a significant alternative to the effects test. Timberlane, an Oregon lumber purchaser and importer, formed two Honduran corporations to acquire forest properties and a lumber mill in that country. It purchased a controlling interest in an insolvent Honduran mill and reopened it. Attempts to purchase the remaining interests in the mill were rebuffed by creditors of the mill, some of whom owned significant interests in competing mills. These creditors initiated legal proceedings in Honduras that resulted in a court appointed conservator’s order to shut down and thus cripple operation of the mill. Timberlane alleged that defendants had conspired to keep control of the Honduras lumber export business in the hands of a few individuals who were financed and dominated by a defendant bank, effectively preventing Timberlane from milling lumber in Honduras and exporting it to the United States, in violation of the Sherman Act.

The Timberlane court began its analysis with a review of Alcoa, noting the extensive criticism of the effects test by foreign commentators. Citing its failure to take the in-
terests of foreign nations into consideration, the court viewed the effects test as an inadequate basis for jurisdiction determination. The court concluded that a tripartite analysis, subsequently referred to by many courts as the judicial interest analysis, was necessary to achieve a more equitable approach to assertions of extraterritorial jurisdiction. This tripartite test required resolution of three questions: One, does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States; Two, is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act; and, Three, as a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it? The court noted that the last portion of the proposed test is often obscured by application of the effects test. To differentiate the two and to provide content to the comity concept, the court proposed seven potential factors to be weighed, including the degree of conflict with foreign law or policy, the nationality or allegiance of the parties, the extent to which enforcement by either country would achieve compliance, a comparison of the effects upon the United States with those upon foreign states, the existence of an 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.

The court, in applying its tripartite test, concluded that


32 Timberlane, 549 F.2d at 613-14.
33 Id. at 615.
34 Id.
35 Id. at 614. See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, supra note 8, at § 40 (incorporation of Timberlane factors).
36 Timberlane, 549 F.2d at 615.
the lower court's dismissal of Timberlane's suit for lack of jurisdiction could not be upheld. In applying comity, the court found that most of the conspiratorial activity took place in Honduras, the most direct economic effort was on Honduras and some of the defendants were foreign citizens. On the other hand, no conflict with Honduras law or policy was indicated nor had a "comprehensive analysis of the relative connections and interests of Honduras and the United States" been undertaken. Accordingly, the court remanded the jurisdictional question to the trial court for a fuller examination of the involved interests of the two countries.

Although Timberlane was hailed as a needed curtailment of the jurisdictional excesses arising from the Alcoa effects test, its tripartite analysis still has generated controversy. The competency and authority of judges to consider the foreign policy issues inherent in the balancing approach as well as their ability to give foreign interests an objective assessment have been questioned. American courts tend to give greater weight and are more sensitive to American interests than foreign interests. These perceived inequities continue to bring criticism from here

37 The court vacated the district court's jurisdictional dismissal and remanded for further analysis pursuant to its tripartite test. Id.
38 Timberlane, 549 F.2d at 615.
39 See Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287, 1296-98 (3d Cir. 1979). At this writing a bill is pending in Congress which would require U.S. courts and enforcement agencies in antitrust cases which may harm foreign interests to balance the foreign state's interests against U.S. antitrust enforcement policy. Under this "jurisdictional rule of reason" the court would dismiss the action if it found that the foreign interests outweighed U.S. interests. It would also allow U.S. courts to limit a plaintiff's recovery to actual damages if necessary to reduce the adverse effects to the foreign interests and would provide for expedited resolution of jurisdictional issues prior to discovery. The bill, if enacted, would be entitled "the Foreign Trade Antitrust Improvements Act of 1985." S. 397, 99th Cong., 1st Sess. (1985).
40 See United Nuclear Corp. v. General Atomic Co., No.50,827, (Santa Fe County N.M. 1972), aff'd, 629 P.2d 231 (N.M. 1980), cert. denied, 451 U.S. 901 (1981) (State of New Mexico's interest in fair trial within its boundaries "must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country."). Cf. In re Westinghouse Elec. Corp. Uranium Contracts Litig., 563 F.2d 992 (10th Cir. 1979) (U.S. firm cannot be sanctioned where production of documents located in Canada would violate Canadian law).
and abroad.\textsuperscript{41}

\section*{B. Document Discovery in Extraterritorial Antitrust Litigation: The Uranium Cartel Litigation}

Extraterritorial, like domestic antitrust litigation, normally involves extensive document discovery.\textsuperscript{42} The recent Westinghouse litigation is illustrative. In the 1960's Westinghouse entered into contracts to supply uranium for nuclear reactors that it manufactured and sold. Long-term, fixed price supply contracts were offered to utilities purchasing reactors. In September, 1975 Westinghouse advised fourteen utilities and utility groups that the uranium supply contracts would not be honored because a drastic increase in the world-wide price of uranium had rendered performance "commercially impracticable" under the Uniform Commercial Code.\textsuperscript{43} Predictably, the


\textsuperscript{43} U.C.C. § 2-615 (1977). The typical Westinghouse contract extended for considerable periods of time at prices fixed at the time of the sale. The contract prices, in the range of six dollars per pound, were dramatically lower than the subsequent
utilities promptly sued Westinghouse, seeking enforcement of the supply contracts.\textsuperscript{44}

In September, 1976, the files of an Australian uranium producer surreptitiously surfaced, revealing an international uranium cartel involving uranium producers and the governments of Australia, Canada, South Africa, and Great Britain.\textsuperscript{45} The cartel had manipulated the market for uranium by restricting output. Westinghouse immediately filed antitrust actions against twenty-nine uranium producers, including seventeen U.S. firms and twelve foreign companies.\textsuperscript{46}

Westinghouse's attempts to discover documents and materials pertinent to the cartel in Australia, Canada, and South Africa met with failure as those governments rushed through legislation making it a criminal offense to release documents for use in "foreign" litigation.\textsuperscript{47}

\textsuperscript{44} The cases were consolidated in \textit{In re} Westinghouse Elec. Corp. Uranium Contracts Litigation, 517 F. Supp. 440 (E.D. Va. 1981).


In a separate action, United Nuclear Corporation (UNC) obtained a default judgment in a declaratory judgment action against General Atomic Company (GAC). UNC, a uranium producer, had contracted to supply uranium to GAC. Alleging commercial impracticability, UNC claimed the uranium price-fixing conspiracy rendered the contracts unenforceable. GAC had agreed prior to Canada's enactment of blocking regulations to produce documents located in Canada. Upon GAC's failure to produce pursuant to court order after the Canadian regulations were enacted, the trial court entered a default judgement on the merits charging GAC with a lack of good faith in its production efforts. United Nuclear Corp. v. General Atomic Co., No. 50,827 (Santa Fe County, N.M. 1972), aff'd, 629 P.2d 231 (N.M. 1980), cert. denied, 451 U.S. 901 (1981).

\textsuperscript{47} See \textit{supra} note 5 and accompanying text. Westinghouse employed several discovery attempts, including document production sought from Rio Algam Corporation, a Delaware corporate subsidiary of a Canadian corporation. The appellate court concluded that attempts to obtain documents located in Canada would subject Rio Algam to criminal sanctions of the Canadian Uranium Information Security Regulations and that this Canadian interest outweighed Westinghouse's need for the information. \textit{In re} Westinghouse Elec. Corp. Uranium Litigation, 563 F.2d 992, 998-99 (10th Cir. 1977).
Although the United Kingdom did not immediately pass similar legislation, Westinghouse's attempts at document discovery there met with English judicial opposition.\textsuperscript{48}

Subsequently, Britain enacted the Protection of Trading Interests Act,\textsuperscript{49} which, \textit{inter alia}, empowers its Secretary of State to forbid individuals within the United Kingdom from producing "commercial documents" or "commercial information" for use in litigation outside the United Kingdom where the request for information "infringes the jurisdiction of the United Kingdom" or is otherwise "prejudicial" to its sovereignty, security or international relations.\textsuperscript{50} In addition, discovery of documents pursuant to so-called "fishing expeditions" is prohibited.\textsuperscript{51} These portions of the act provided much of the impetus for the conflicts arising in the \textit{Laker Airways} litigation.\textsuperscript{52}

III. \textit{LAKER AIRWAYS LTD. V. SABENA, BELGIAN WORLD AIRLINES}

A. Background

In 1977, Laker Airways, Ltd., a British corporation, began operating a "no-frills" transatlantic airline service between London and New York.\textsuperscript{53} As transatlantic air


\textsuperscript{50} Protection of Trading Interests Act, 1980, ch. 11 § 2.

\textsuperscript{51} Id. ch. 11, § 2(3)(a)(b). This provision is specifically designed to block civil investigative demands issued by U.S. enforcement agencies prior to the institution of civil or criminal proceedings and civil requests for "all relevant documents" or the like which do not specify the documents sought. See House of Commons Standing Comm. F., Official Report, Dec. 6, 1979 at 36.

\textsuperscript{52} Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

\textsuperscript{53} Laker attempted to begin transatlantic service as early as 1971, but due to alleged resistance from competitors, procurement of the necessary authorizations from the governents of Great Britain and the U.S. was delayed until 1977. Id. at 916. For an enlightening account of the Laker Airways saga, see A. Sampson,
service prices are "substantially controlled" by the International Air Transport Association (IATA),\(^{54}\) Laker's "no-frills" low cost passenger service jeopardized the existing system of cartelized pricing. Beginning in 1977, the IATA airlines allegedly retaliated by conspiring to set prices at a predatory below cost level in an attempt to eliminate Laker. In 1981, Pan American Airlines, Trans World Airlines, and British Airways dropped their fares even lower on their full-service flights and met the price of Laker's "no-frills" package. These airlines also allegedly paid travel agents secret commissions for diverting potential customers from Laker. Laker, as a result of the cartel, had to reschedule its financial obligations. Sabena, KLM, and other IATA airlines, however, allegedly pressured Laker's creditors to withhold previously promised financing.\(^{55}\) Not surprisingly, Laker was forced to liquidate in 1982.

Through its liquidator,\(^{56}\) Laker initiated an action in the U.S. District Court for the District of Columbia against competing transatlantic airlines, alleging that the collective predatory pricing practices of these rivals had excluded Laker from the transatlantic market.\(^{57}\) Subsequently, the foreign defendants and a British bank in-

\(^{54}\) The IATA, a trade organization of the world's largest air carriers, establishes fixed fares at an annual meeting. Upon authorization by the individual governments of affected nations, these standard fares become effective. Laker's discount fares were approximately one-third of the standard fares established by the IATA cartel. \textit{Laker}, 731 F.2d at 916-17.

\(^{55}\) Laker's financial structure, consisting largely of U.S. debts and expenses in dollars, had been greatly weakened by the decreased value of the English pound sterling. The competing airlines, seizing upon this financial difficulty, allegedly planned to increase their prices after driving Laker out of business. \textit{Id.}

\(^{56}\) The court characterized Laker's antitrust action as primarily an effort to satisfy its creditors, largely U.S. banks and other lending institutions. \textit{Id.} at 924.

\(^{57}\) The defendants in this suit, filed November 24, 1982, included Pan American World Airlines, Trans World Airlines, McDonnell Douglas Corp., McDonnell Douglas Finance Corp., British Airlines, British Caledonian Airways, Lufthansa, and Swissair. KLM and Sabena were named in the second action, filed February 15, 1983 which was subsequently consolidated with the first antitrust suit. \textit{Id.} at 917-19. Actual damages were alleged to be $350 million, which trebled would provide a recovery of over $1 billion. A. Sampson, \textit{supra} note 53, at 159.
volved in Laker’s unsuccessful refinancing attempt obtained interlocutory injunctions from the British High Court of Justice preventing further action by Laker against them in U.S. courts. Laker then began a second antitrust action in the U.S. against KLM and Sabena. The district court consolidated the two actions and granted Laker a preliminary injunction that prevented KLM, Sabena, and the American defendants from taking any action before a foreign tribunal that would impair the jurisdiction of the U.S. court. In May, 1983, the British High Court of Justice held that the injunctive relief requested by the original defendants in Laker’s U.S. antitrust suit was not justified because the United States action did not violate British sovereignty.

Subsequently, the British government invoked the British Protection of Trading Interests Act, which was enacted in 1980. Pursuant to its authority, the British Secretary of State for Trade and Industry issued an order prohibiting entities carrying on business within the United Kingdom from complying with measures arising out of Laker’s U.S. antitrust action, after determining that the American lawsuit “threatened to damage the trading interests of the United Kingdom.” The British Court of Appeal ruled that the order was valid, and concluded “the United States District Court action was ‘wholly untriable’ and could result in a ‘total denial of justice to’ the British airlines.” Thus Laker was enjoined from taking further

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58 Laker, 731 F.2d at 918.
61 Protection of Trading Interests Act, 1980, ch. 11. The Act authorizes the English Secretary of State to require business entities operating in the United Kingdom to refuse to comply with foreign judicial orders, including requests for document production. Id. See also Owles, supra note 49, at 322-23; Comment, supra note 49, at 478.
62 Laker, 731 F.2d at 920.
63 Id. (quoting British Airways Board, [1983] 3 W.L.R. at 573, 591). The English court’s conclusion about the triability of the American suit was, interestingly, compelled by the order of the English Secretary of State barring the two British airlines from Laker’s discovery requests. The English court concluded that the
steps against the British defendants in its U.S. antitrust suit.

Defendants KLM and Sabena, which had been preliminarily enjoined by the U.S. District Court for the District of Columbia from seeking English relief from the American lawsuit, appealed to the Court of Appeals for the District of Columbia. They asserted that the injunction violated their right to initiate "parallel" actions in foreign courts, contravened principles of international comity which ordinarily proscribes interference with foreign judicial proceedings, and impeded Britain's "paramount right" to apply British law to Laker, a British subject. The Court of Appeals refused to overturn the injunction, ruling that the British proceedings were not entitled to comity because they were not intended to protect British jurisdiction but were meant to quash U.S. judicial authority.

Laker had, in the interim, appealed to the House of Lords from the adverse British Court of Appeal holding. In July, 1984, after the United States Court of Appeals decision, the House of Lords overturned the British Court of Appeal injunctions barring Laker's prosecution of U.S. antitrust claims against British defendants. The House of Lords ruled that no valid reason to restrain Laker's antitrust suit existed since all British parties, Laker, and the British defendant carriers British Airways and British Caledonian Airways, were legitimately subject to United States law and since the U.S. court was the only forum competent to determine the merits of the claim.

British defendants would not thereafter be able adequately to defend themselves as a result of the executive order. Laker, 731 F.2d at 947 and n.141.

Laker, 731 F.2d at 915, 921.


Id. at 47. The House of Lords also rejected the view of the Court of Appeal that the order of the Secretary of State arising from the Protection of Trading Interests Act was the "decisive factor" in enjoining Laker from proceeding in the United States. Id. at 55-56. See infra notes 130-131 and accompanying text. The House of Lords decision precipitated serious settlement negotiations between Laker and the twelve defendants. See WALL ST. J., Jan. 14, 1985, p. 17, col. 3 (reporting settlement offer of at least $40 million); 48 ANTITRUST & TRADE REG.
While the House of Lords decision does much to dissipate the jurisdictional conflict which had earlier arisen, the main focus of the balance of this article will be the United States Court of Appeals decision, rendered before the House of Lords opinion, which attempts to protect U.S. antitrust jurisdiction against perceived *pendente lite* interference by a foreign tribunal. The United States decision was a response to the most vigorous opposition yet to a U.S. antitrust claim and demonstrates the limitations that the judiciary has at its disposal in giving recognition to foreign interests.

B. Concurrent Jurisdiction

The U.S. Court of Appeals for the District of Columbia began its analysis of the validity of KLM and Sabena's claim by examining both the U.S. and English bases of jurisdiction. The primary U.S. basis, territoriality, allows a state to address conduct occurring outside its territorial boundaries that intentionally affects commerce within the state.\(^67\) The court noted that a state's regulatory efforts must logically extend beyond geographical boundaries in order to address effectively harmful activities that "pierce its 'sovereign' walls."\(^68\)

According to the court, defendants' predatory pricing conspiracy, if true, would substantially affect American interests and policies. Although Laker was a British corporation, its liquidating creditors included numerous United States claimants.\(^69\) The court reasoned that businesses

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\(^{67}\) *Laker*, 731 F.2d at 921-22. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) discussed *supra* notes 19-28 and accompanying text. Interestingly, the *Laker* court took exception to the term "extraterritorial" jurisdiction, insisting that the basis for jurisdiction resulted from "territorial" effects. *Laker*, 731 F.2d at 923. See also infra note 133.

\(^{68}\) *Laker*, 731 F.2d at 925. This analysis is derived from *Alcoa* and its progeny. See *Picciotto*, *supra* note 27, at 14-15; Rahl, *supra* note 27, at 341.

\(^{69}\) *Laker*, 731 F.2d at 925.
operating within the U.S., such as the defendant airlines, must agree to be bound by U.S. laws so that foreign corporations have the same legal responsibilities as domestic entities. Additionally, the "greatest impact" of a predatory pricing conspiracy would be increased fares for passengers, a large number of whom would be U.S. citizens.\textsuperscript{70}

A cogent argument existed, however, for Great Britain's jurisdiction over litigation initiated by a British corporation since a state retains prescriptive jurisdiction to regulate the activities of its domestic business organizations.\textsuperscript{71} Thus, the U.S. court recognized the concurrent jurisdiction of the U.S. and Great Britain. However, the court noted that such jurisdictional overlap normally does not preclude the advancement of parallel legal actions in both forums.\textsuperscript{72}

The court pointed out that the possibility of simultaneous resolution in both forums was eroded, however, by the injunctive and administrative relief procured in the United Kingdom, which prompted Laker's procurement of a U.S. injunction forbidding Sabena and KLM from attempts to escape liability through similar foreign actions. While courts infrequently act to forbid parties from suing in foreign jurisdictions,\textsuperscript{73} an injunction may issue "when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court."\textsuperscript{74} Thus, taking note of the district court's duty to protect its jurisdiction, the court of appeals concluded that the injunction was a proper remedy.\textsuperscript{75}

\textsuperscript{70} At one point, Laker Airways carried at least one of every seven air passengers travelling between the U.S. and England. \textit{Id.} at 917.

\textsuperscript{71} \textit{Id.} at 926. See \textsc{Restatement (Second) of the Foreign Relations Law of the United States} §§ 27, 38 (1965). By "prescriptive jurisdiction" the court meant that jurisdiction within which nations may legitimately exercise regulatory power. \textit{Laker}, 731 F.2d at 921.

\textsuperscript{72} \textit{Id.} at 926.

\textsuperscript{73} According to the court, this is because the bringing of a suit in one forum does not affect the "preexisting right of an independent forum to regulate matters subject to its prescriptive jurisdiction." \textit{Id.} at 927.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} at 927-30.
In its analysis, the appellate court considered the propriety of protecting Laker's right to litigate the "parallel" proceeding before the U.S. courts. It noted that the alternative forums available to Laker that might properly have considered a "parallel" action do not offer the antitrust remedies sought in the U.S. litigation. The English proceeding was initiated to acquire exclusive prescriptive jurisdiction for English courts even though no comparable remedies were available in that forum. Since the sole purpose of the English action was to terminate the American suit, the two actions were not parallel proceedings in the sense of two courts advancing to separate judgments at the same time pursuant to one cause of action. According to the Laker court, the U.S. district judge "faced the stark choice of either protecting or relinquishing his jurisdiction."

The Laker court also viewed antisuit injunctions as justified when necessary to prevent the evasion of the forum's public policies, such as those underscoring U.S. antitrust laws. Since American antitrust law promotes a free market economy in American commerce, the commercial activities of foreign entities in the U.S. are subject to those economic laws. It should be noted that if a foreign business entity's nationality were permitted to shield it from U.S. antitrust laws, our economic laws would discriminate against American enterprise.

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76 Many European countries apply another country's mandatory laws even when asserting jurisdiction over the dispute where the foreign country's interest is substantial and reflects values showed by the forum country. See European Economic Community Contracts Convention of 1980, Art. 7 reprinted in 19 INT'L LEGAL MATERIALS 1492 (1980). See also B. Grossfeld, PRAXIS DES INTERNATIONALEN PRIVAT- UND WIRTSCHAFTSRECHTS at 95-99 (1975) and Grossfeld & Rogers, supra note 3 at 937-39. The United Kingdom was, however, unlikely to apply United States antitrust law in the Laker litigation given its governmental policy of protecting its individuals against United States antitrust jurisdiction. See supra notes 5-8.

77 Laker, 731 F.2d at 930.

78 Id.

79 Id. at 931 and n.69. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (1971).

80 Discrimination is dissipated, of course to the extent foreign states follow the
Further, the court could not see how British trading interests were adversely affected by a suit brought by a British company against Dutch and Belgian corporations for anticompetitive activities involving U.S.-Dutch and U.S.-Belgian airline markets.\(^8\) Thus, notwithstanding the concurrent jurisdiction of foreign forums, the court of appeals deemed the injunction against Sabena and KLM valid.\(^8\)

The appellate court next addressed KLM and Sabena's contention that Great Britain's jurisdictional basis, the English nationality of Laker, mandated resolution of the dispute in an English forum. Adopting the appellant's label of "paramount nationality," the court stated:

We are asked to recognize an entirely novel rule. Although a court has power to enjoin its nationals from suing in foreign jurisdictions, it does not follow that the United States courts must recognize an absolute right of the British government to regulate the remedies that the United States may wish to create for British nationals in United States courts. The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction.\(^8\)

The rationale of the proposed paramount nationality rule was that important interests of foreign states are infringed when a foreign national sues in another forum

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European model and apply U.S. antitrust laws as a mandatory foreign law. See supra note 76. The U.S. ocean liner industry has long argued that its economic health is impaired by the practical consequence of more limited U.S. antitrust enforcement against foreign liner companies serving U.S. ports than U.S. liners. See generally D. Marx, International Shipping Carrels: A Study in the Self-Regulation of Liner Conferences (1953); G. Sletno & E. Williams, Liner Conference In the Container Age, U.S. Policy at Sea (1981).

\(^8\) Laker, 731 F.2d at 932. British interests would be involved according to the court, only if a British corporation had to pay the judgment. Id. at 933.

\(^8\) Id.

\(^8\) Id. at 935. See also Restatement (Revised) of the Foreign Relations Law of the United States § 402 comment b (Tent. Draft No. 2 1981); Restatement (Second) of the Foreign Relations Law of the United States § 30 comment b (1965).
against the wishes of the foreign state. But the Laker court asserted that the right of the U.S. to control access to its courts was more important, particularly where Congress has conferred specific remedies for certain actions affecting U.S. trade. While Britain can sanction its citizens for availing themselves of U.S. remedies, the U.S. judiciary is not thereby required to retract the availability of the relief. Further, the impracticalities of a paramount nationality rule were apparent to the court because the proliferation of multi-national corporations would render identification of the nationality of a business entity for jurisdictional purposes complex and subject to the claims of many countries, thus continuing the conflicts associated with concurrent jurisdiction. Thus, the nationality of the litigant was found to be only one factor to be considered in the determination of jurisdiction.

Finally, the court noted that appellants were not British subjects. As businesses operating within the U.S., KLM and Sabena would expect and would be entitled to the protection of United States law. The court could not countenance a jurisdictional rule, such as the proposed paramount nationality approach, which would free appellants from obligations under U.S. law while continuing to protect them from the antitrust offenses of other corporations.

C. Comity

KLM and Sabena next contended that principles of international comity mandated dismissal of Laker's United States suit. The court initially defined the "complex and elusive concept of comity" as "the degree of deference that a domestic forum must pay to the act of a foreign

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84 Laker, 731 F.2d at 936.
85 Id.
86 Id.
87 Id. at 935.
88 Id. at 936.
89 Id.
90 Id.
government not otherwise binding on the forum." The court ruled that while comity remains necessary to the relations between sovereigns, its application is limited where one nation seeks to enforce interests "which are fundamentally prejudicial to those of the domestic forum." Significantly, the court characterized the U.S. injunction as defensive, attempting to protect the right of the district court to adjudicate Laker's claim, and the English injunction and administrative order as offensive, entailing an attempt to curtail the power of U.S. courts to adjudicate valid claims under U.S. law. The United Kingdom court had not only refused the initial opportunity to exercise comity, but through issuance of its injunction, interfered with ongoing litigation in the United States.

In addition, the British Protection of Trading Interests Act protects "any person in the United Kingdom who carries on business there." The order promulgated under the act in the Laker proceeding prohibited any person in the United Kingdom from furnishing "any commercial information which relates to the . . . Department of Justice investigation or the grand jury or the District Court proceedings." The order thus barred any airline doing business in England from complying with the discovery orders of the United States court, including, presumably, U.S. airlines serving Great Britain. Further, the English executive order was interpreted by the English Secretary of State to bar the furnishing of any "commercial information," even that located solely within the United States.

These factors interfered with United States interests in enforcing its laws even as to U.S. defendants and underscored the lack of British interests in the defense by two

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91 Id. at 937. See Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT'L. L. 280, 282-84 (1982).
92 Laker, 731 F.2d at 937.
93 Id. at 938.
94 Protection of Trading Interests Act, 1980, ch. 11, § 1.
95 Laker, 731 F.2d at 940.
96 Id.
97 Id.
non-British airlines of an American antitrust suit. According to the court, exercise of comity here would allow a foreign sovereign to dictate the authority of a U.S. court to enforce U.S. laws on behalf of and against corporations doing business in the U.S.\textsuperscript{98} Since the foreign sovereign’s interests were not, at least by comparison to U.S. interests, significant, and since the foreign sovereign’s actions were overbroad and did not solely protect its interests, the court found that comity should not issue.\textsuperscript{99}

D. Judicial Compromise

The \textit{Laker} court identified the source of the conflict as “the fundamentally opposed national policies toward prohibition of anticompetitive business activity” rather than as emanating from the courts of the United Kingdom and the United States.\textsuperscript{100} Britain’s aversion to U.S. antitrust law had, as noted, engulfed the principal branches of its government. The scope of Britain’s objections included the breadth of U.S. prescriptive jurisdiction, the substantive content of U.S. antitrust laws, the treble damage remedy, and the liberal allowance of pretrial “fishing expeditions” (discovery). Judicial reconciliation of the conflict was impossible because the British government had defined “the British interest solely in terms of preventing realization of United States interests” rendering the laws “contradictory and mutually inconsistent.”\textsuperscript{101}

Judicial interest balancing, the so-called interest analysis given prominence in \textit{Timberlane}, was found to be of no help in resolving the conflict. The court expressed reservations about the efficacy of the approach generally, due to the limited ability of a court to balance neutrally competing political factors. According to the \textit{Laker} court, the

\textsuperscript{98} \textit{Id.} The \textit{Laker} court characterized the British government as attempting to “frustrate enforcement of American law in American courts against companies doing business in America” and not as an effort “to see that justice is done anywhere, either in the United States or British courts.” \textit{Id.}

\textsuperscript{99} \textit{Id.} at 941.

\textsuperscript{100} \textit{Id.} at 945.

\textsuperscript{101} \textit{Id.}
neutrality of any court is suspect, as are its qualifications to evaluate comparative political policies from disparate governments. Thus the court found itself "in no position to adjudicate the relative importance of antitrust regulation or nonregulation to the United States and the United Kingdom."103

The court also doubted that the balancing of interests approach "would strengthen the bonds of international comity" since United States courts have, in employing the test, abdicated jurisdiction only when the United States interest was de minimis.104 It pointed out that since most developed nations follow international law only to the extent national law does not supercede it, national interests of the forum are likely to prevail under any balancing test.105 Comity is thus not likely to be served.

The court viewed the interest analysis as perhaps providing a means of assessing the desirability of allocating jurisdiction to one nation's courts over another. Where, however, a court must select one forum's prescriptive jurisdiction over another's, particularly when the assertion

103 Laker, 731 F.2d at 949. See also In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1978).
of foreign jurisdiction is intended solely to thwart domestic law and does not provide any remedy for aggrieved parties, the court believed that the interest analysis was unworkable.\textsuperscript{106} To grant exclusive jurisdiction to the forum was suspect given the general limitations of the interest analysis. To acquiesce to British jurisdiction would amount to a capitulation to the United Kingdom by the U.S. judiciary of authority to regulate a part of the U.S. economy, solely because of British objections.\textsuperscript{107}

The court concluded that, given its limited governmental authority and expertise, it could only act to protect its legitimate jurisdiction. It recognized that nothing it could do would resolve the underlying conflict and that "the ultimate question is not whether conflicting assertions of national interests must be reconciled, but the proper forum of reconciliation."\textsuperscript{108} It concluded by urging that executive and diplomatic sources be used to "exchange, negotiate and reconcile" the conflicts arising from divergent economic policies.\textsuperscript{109}

IV. THE CASE FOR A LIMITED INJUNCTION

The dissent in \textit{Laker}, written by Judge Starr, offered a more conciliatory approach to the dilemma. In his view, the status of Laker Airways as a British subject gave the United Kindom at least some authority over where Laker brought suit.\textsuperscript{110} Given that, Judge Starr asserted that the principles of international comity could be advanced by a more limited injunction than that approved by the majority. The district court had effectively forbidden the foreign airline defendants from proceeding in any court anywhere to contest Laker's right to sue in the United States. Judge Starr argued that an injunction which precluded only countersuit injunctive relief during the pen-

\textsuperscript{106} \textit{Laker}, 731 F.2d at 948-52.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.} at 955.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.} at 957. \textit{See also} Dames & Moore v. Regan, 453 U.S. 654 (1981).
dency of the U.S. antitrust action, thus allowing a declaratory judgment action in the British court such as that earlier pursued by Swissair and Lufthansa, would be preferable. Courts of both countries would be afforded the opportunity to adjudicate "the status of the parties before it under that nation’s laws and regulatory provisions . . . ." If judgments were rendered in both actions, choice of law questions would arise when the judgments were executed. In addition, allowance of concurrent proceedings would "preserve the possibility" that diplomatic negotiations or a defeat by Laker or the foreign defendants in their respective suits would "moot" the conflict.

The majority vigorously disagreed with the dissent's "skewed view of comity," which would "require mandatory deferral to a foreign action primarily intended to cut off . . . domestic interests." The fact that KLM and Sabena, the appealing parties, were not British enterprises and were not attempting to seek refuge in their own courts further diminished Britain’s claim to comity.

Britain’s interests arising from Laker’s British citizenship were adequately protected, according to the majority, by British government actions which did not interfere with "the autonomy of the foreign [U.S.] judiciary or course of

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111 Laker, 731 F.2d at 958. Swissair and Lufthansa were two of the four foreign airline defendants in Laker’s first U.S. antitrust suit, along with British Airways and British Caledonian Airways. They had joined the two British airline defendants in seeking relief in the United Kingdom enjoining Laker from proceeding with its United States antitrust action. Laker, 731 F.2d at 917-18.

112 Id. at 958.

113 Id. at 942-43. The majority distinguished Dames & Moore v. Regan, 453 U.S. 654 (1981), "[t]he spirit of" which was relied upon by the dissent to support the argument that a sovereign government can prohibit one of its nationals from suing in another forum. Id. at 957. Dames & Moore involved the validity of the termination of United States legal proceedings against Iran arising out of the agreement with the Iranian government to secure the release of the Americans held hostage in Tehran. The Laker majority pointed out that United States claims were preserved and remedies provided for in Dames & Moore, unlike with regard to the British government before it, which would cancel the claim without remedy. Laker, 731 F.2d at 943.

114 Laker, 731 F.2d at 954, n.175.
the foreign [U.S.] proceeding."\textsuperscript{116} The majority pointed out that the British Protection of Trading Interests Act provided for a number of remedies, such as the clawback provision, which protects English interests without interfering with a pending foreign judicial proceeding.\textsuperscript{117}

As to the breadth of the injunction, the majority noted that the district court had sought to further comity by preserving the right of the parties to move to narrow its scope. That the parties had not sought to do so evinced not a waiver of that right but rather an indication that no more limited relief was possible which would "protect the admittedly legitimate United States jurisdiction while permitting participation in a British proceeding intended to terminate the American action."\textsuperscript{118}

The allowance of a declaratory relief action in the United Kingdom would offer no protection for U.S. jurisdiction, the court believed, unless the relief sought was confined to a judgment that British law prohibits Laker from suing in United States courts.\textsuperscript{119} The prior action by Swissair and Lufthansa was not so limited; it sought an injunction banning all actions in U.S. courts based on U.S. antitrust laws.\textsuperscript{120} The \textit{Laker} majority pointed out that U.S. acquiescence to that type of interference with a pending U.S. suit would "shut down" the U.S. proceeding rather than enable the U.S. district court to protect its jurisdiction.\textsuperscript{121}

The dissent's conflict resolution approach does amount to an abdication of U.S. jurisdiction to a foreign authority during the pendency of the U.S. suit, unless the U.S. injunction can effectively limit the relief sought in the Brit-

\textsuperscript{110} \textit{Id.} at 943.
\textsuperscript{117} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 944.
\textsuperscript{119} \textit{Id.} at 945. The majority believed that a claim that foreign law forbids a foreign national from prosecuting a U.S. antitrust suit should initially be brought in the U.S. trial court "free from the coercive threat of a possible antitrust injunction." \textit{Id.} at 939, n.110.
\textsuperscript{120} \textit{Id.} at 945.
\textsuperscript{121} \textit{Id.} at 945, 954 n.175.
ish forum. The principal British interest due recognition is the status of Laker as a British corporation. While British airlines were original defendants in Laker's U.S. antitrust suit, the injunction issued by the United States district court involved only non-British defendants. These defendants do serve the United Kingdom, just as they serve the United States. However, they are charged with violating U.S., not British law. British interests through non-British defendants for actions not involving substantive British law are tenuous at best.\footnote{If an American plaintiff were to seek relief in a British court for violation of British law against the same defendants, it is hard to imagine a United States court attempting to block the action or assert exclusive jurisdiction.}

Since Britain may have the right, cognizable under international law, to control the judicial forums of its nationals, it is difficult to see why such an injunction limiting defendants to a concurrent British action on the sole question of whether British law forbids Laker, as a British subject, from suing in the United States could not issue. If we presuppose the good faith of the British court in applying British law, which the U.S. Court of Appeals does, deference to the British courts for determination of British law pursuant to the acknowledged legitimate British interest seems appropriate and in furtherance of comity.\footnote{The majority's position that a U.S. court decide the foreign (British) law question, supra note 119, appears inappropriate given the recognized foreign law interest. The majority does recognize that where an unsettled question of foreign law presents itself, a U.S. district court would have the discretion to stay its action pending a special proceeding in the foreign court limited to the resolution of the foreign law question. \textit{Laker}, 731 F.2d at 939, n.110. Of course, that presupposes the ability of a U.S. court to determine the settled and unsettled law of a foreign jurisdiction. That kind of approach necessarily involves a substantive analysis of foreign law. A limited injunction such as proposed herein would require that the U.S. court "certify" to the foreign jurisdiction (the United Kingdom) the proceeding for a decision limited to the foreign law question without a determination by the U.S. court as to the settled state of foreign law.}

The limited injunction is not without difficulty. Initially, it may be questioned whether foreign defendants in a U.S. antitrust suit are the appropriate parties to question the right of the plaintiff to sue in the U.S. pursuant to
the plaintiff's national laws. But to give any content to Britain's interest in Laker as a British subject, the foreign defendants must be allowed to bring such a proceeding.

Further, the real objection of the United Kingdom to Laker's antitrust suit, it must be recognized, is not Laker's initiation of the suit, but the jurisdiction of United States antitrust laws. Specifically, under the British Protection of Trading Interests Act the United Kingdom attempted to squelch U.S. antitrust laws by authorizing the British Secretary of State to (1) require that businesses operating in the United Kingdom cease compliance with designated "foreign" judicial or regulatory orders, (2) prevent British courts from complying with foreign document requests or discovery orders and (3) forbid enforcement of foreign antitrust judgments or treble damage awards.124 The Act does not, however, bar British companies from initiating U.S. antitrust actions.125

To recapitulate, the British Secretary of State's earlier order at the behest of British Airways and British Caledonian Airways prevented persons carrying on business in the United Kingdom, with the exception of United States airlines, from complying with "United States antitrust measures" arising from the U.S. district court.126 The English Court of Appeal ruled that the Secretary of State's order was well within its authority and permanently enjoined Laker from proceeding with its U.S. antitrust claims against British Airways and British Caledonian.127

The injunction against Laker, however, did not issue because of a British law forbidding Laker's bringing of U.S. antitrust suit; rather, it was required because the Secretary of State's order (1) prevented Laker from comply-

124 Protection of Trading Interests Act, 1980, ch. 11. See discussion Laker, 731 F.2d at 920.
125 See Columbia Note, supra note 8, at 1104-08 for a detailed discussion of the Act's provisions. Foreign defendants are specifically permitted to seek redress in U.S. courts for antitrust injuries by way of private treble damage actions. Pfizer Inc. v. India, 434 U.S. 308 (1978).
126 Laker, 731 F.2d at 920.
ing with any directions of the U.S. court and (2) prohibited the British defendants from relying on their own documents located in the United Kingdom to defend themselves against Laker in the United States. As such, the Court of Appeal concluded that an injunction against Laker was necessary because the U.S. lawsuit was "wholly untriable" and could result only in a "total denial of justice to" the British carriers.\footnote{128}

British law as incorporated in the Protection of Trading Interests Act does not directly bar Laker from instituting a United States antitrust suit. The British High Court of Justice, ruling on the injunctive relief sought by British Caledonian and British Airways prior to the English Secretary of State's invoking of the act,\footnote{129} and the House of Lords ruling after resort to the act, both denied relief on the ground that British sovereignty was not infringed by Laker's suit against British defendants doing business in the United States.\footnote{130} It would thus appear that British law does not limit the foreign forums in which its nationals can seek redress.

However, Section 1 of the Protection of Trading Interests Act empowers the British Secretary of State to order any person carrying on business in the United Kingdom to refuse to comply with foreign "measures" regulating international trade where United Kingdom "trading interests" may be threatened or damaged.\footnote{131} The intended broad discretion given under that section to the British executive may allow it to prohibit a British national from bringing a U.S. antitrust suit.\footnote{132} But that is an interpreta-

\footnote{128} Id. at 376.

\footnote{129} Id.


\footnote{132} The British Court of Appeal's injunction was based primarily on the difficulty of discovery of documents located in the United Kingdom due to the blocking provisions of § 2 of the Protection of Trading Interests Act. According to the Court of Appeal, the blocking provisions would harm Laker's ability to prosecute its U.S. suit and would even more seriously affect defendant's ability to defend
tion of British policy which is for the British courts, not the United States judiciary. It should not counsel against a U.S. court limiting its injunction so as to permit British courts to decide if British law can prevent Laker from using the United States judiciary to press antitrust claims. The British interest over the forum rights of its citizens is legitimate under international law and should alone permit the United Kingdom to interfere with pending United States litigation.

A United States injunction limited along the lines described would limit the British courts to consideration of the sole cognizable reason for interference with the United States litigation. Other British interests, codified by the Protection of Trading Interests Act, would not be at issue at that time but would presumably still be used to block production of documents, restrict enforceability of judgments and the like. Concurrent jurisdiction and conflict would be preserved, but the United Kingdom would not be permitted to usurp United States jurisdiction save for the one legitimate reason.

V. Application of the Judicial Interest Test

The unwillingness of the U.S. Court of Appeals to apply the interest balancing test underscores its increasingly recognized limitations. Laker, as the court acknowledged, involved a case of concurrent jurisdiction. United States jurisdiction was based on the concept of territoriality.

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1 The court described territorial jurisdiction as arising from the "prerogative of a nation to control and regulate activities within its boundaries...an essential element of sovereignty." Laker, 731 F.2d at 921. As a result, conduct outside the territorial boundary which has a substantial effect within the territory can be regulated by the state, just as conduct within the state which may have effects outside
while British jurisdiction arose from the nationality of some of the parties involved in the litigation. The jurisdiction of the two forums was thus not in issue; rather, the question presented was the right of one forum affirmatively to interfere with an ongoing suit in a forum with concurrent jurisdiction.

But, as the Laker court asserted, the judicial interest balancing approach does not seem suited for conflicts arising from concurrent jurisdiction. The balancing approach necessarily involves consideration of a range of factors, yet, the weight or relevance of each factor remains uncertain. For instance, Great Britain was the domestic forum of Laker and a number of the defendants, lending credence to the characterization of Great Britain as the proper forum for resolution of the dispute. The actions of the price-fixing cartel, however, had substantial detrimental effects on United States commerce, with the potential of significant damage to Laker's American creditors. Furthermore, United States antitrust law provided Laker and its creditors with the widest and most

the state is also within a state's regulatory power. Id. at 921-22. The court rejected the idea that jurisdiction based on territorial effects is an extraterritorial assertion of jurisdiction, since "jurisdiction exists only when significant effects were intended within the prescribing territory." Id. at 923. According to the court "the only extraterritoriality about the transactions reached under the territorial effects doctrine is that not all of the causative factors producing the prescribed result may have occurred within the territory." Id.

The Laker court's articulation of its jurisdiction base appears to be a reaffirmation of the Alcoa effects test which has caused so much foreign dissension, see supra notes 19-28 and accompanying text, particularly in view of the rejection by the court of the judicial interest analysis. See supra notes 102-111 and accompanying text. The jurisdictional base is noncontroversial on the Laker facts since all of the defendants operated on American soil, but it renewes the prospect of more contentious assertions of jurisdiction, as in cases where defendants do not have territorial contacts with the United States.

134 Laker, 731 F.2d at 926.
135 Id. at 948-53.
137 Laker, 731 F.2d at 924.
attractive range of remedies. Considering the available remedies, the United States arguably presented the only available forum where Laker and its creditors might seek effective redress for the injuries caused by the cartel. These and other factors also merited close consideration in any attempt to resolve the jurisdictional dispute.

Any determination by the Laker court, whether using a balancing approach involving consideration of conflicting factors or a pure effects approach, gives rise to criticism that the court was partisan to the interests of its jurisdiction. It further requires a court to go beyond its expertise and its governmental role.

The Laker court pointed out that interest analysis may be useful when determining whether a particular assertion of jurisdiction is "reasonable" or not. That is, it may be a valid approach to a determination as to whether the assertion of United States antitrust jurisdiction pursuant to the Alcoa "effects" test is appropriate or not in a particular case, given the balancing of factors such as those spelled out in Timberlane. But it is not helpful in cases of concurrent jurisdiction where the jurisdictional basis of both forums are "unimpeached," as was the case in Laker. The court believed that a balancing of interests to determine which forum was "more reasonable" and which "less reasonable" was unworkable. The balancing of vaguely defined factors in order to choose between competing forums certainly further complicates an already complex standard.

\[\text{138 Since it also subjects the defendants to their greatest possible liability, it might be argued, from the defendants' perspective, that jurisdiction is unreasonable.}\]

\[\text{139 It is, of course, possible that another jurisdiction could be persuaded to apply U.S. antitrust law as a mandatory foreign law. See supra note 76.}\]

\[\text{140 See Maier, supra note 40, at 593-95; Grossfeld and Rogers supra note 3, at 936. See also In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir. 1976), cert. denied, 429 U.S. 940 (1976).}\]

\[\text{141 Laker, 731 F.2d at 950. See also In re Uranium Antitrust Litigation, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979).}\]

\[\text{142 Laker, 731 F.2d at 952.}\]

\[\text{143 Id. at 952-53, n.169.}\]

\[\text{144 According to the court, the judicial interest analysis would only serve to}\]
Also, the intent of the British action, to halt the United States proceeding, cuts against the use of an interest analysis. Its use in Laker would, depending on the outcome of the balancing of various factors, permit one forum, with jurisdiction, to block the adjudication of a claim in another forum which also has jurisdiction. Such a result is inherently distinguishable from application of the test to ascertain if the assertion of jurisdiction by a forum in a given case is reasonable in the context of, in part, principles of international comity. Comity cannot be advanced by an interest analysis that could permit one forum to dictate the ability of another forum, with recognized jurisdiction, to adjudicate a claim legitimately before it.

The Laker court could, of course, have applied the interest analysis and found the British assertion of jurisdiction "unreasonable" since a valid claim based on United States law where United States jurisdiction was established was being attacked by a British forum without a remedy for the alleged wrong. The decisional result would have been the same but the effect may have been to give interest analysis a legitimacy it does not deserve. Certainly, a United States court declaring a foreign forum's assertion of jurisdiction "unreasonable," as opposed to reviewing a U.S. court's jurisdictional assertion, is inherently suspect and can do little for the cause of international comity.145

VI. A JUDICIAL VACUUM

While the Circuit Court of Appeals accurately points out the pitfalls of judicial interest balancing, at least where conflicting assertions of jurisdiction are present, its own analysis is troublesome. The court, in sum, in affirming the issuance of the injunction barring Sabena and KLM

choose "between potential forums to the extent the less reasonable assertion is characterized as unreasonable." Id. at 952 n.169. See infra text accompanying note 145.

145 It would seem clear that the fewer pronouncements made by one forum about the jurisdictional base or substantive legal claims of a foreign forum the less likely direct conflicts between the two will arise and the more likely principles of comity can be preserved.
from seeking British relief from Laker’s U.S. antitrust suit, simply applied domestic law, on the assumption that it had no other real choice and that ultimate conflict resolution was for the political arms of government through diplomatic channels. In so ruling, the court could find no real aid from principles of international law.

The Laker court’s “no rule” approach is perhaps justified based on the facts of that case. Another jurisdiction, the United Kingdom, with little thought to notions of comity and balancing of competing interests, had acted to interfere with United States jurisdiction legitimately asserted. Further, the interfering jurisdiction, Britain, could offer no alternate forum of redress for the alleged wrongs. But the confrontational circumstances of Laker should not yield a precedent which is applied to all cases involving concurrent assertions of jurisdiction; further, the Laker court’s abdication of itself as the proper forum for resolution of the competing jurisdictional claims may be overbroad.

It is difficult to imagine a different result by the Circuit Court of Appeals given the position of the United Kingdom. But the adoption of a method or approach to resolve such conflicts and a recognition that, like it or not, the courts are frequently called upon to decide disputes involving antagonistic government policies is needed.

For example, a “shared values” approach, the adoption of which has been urged elsewhere, attempts to avoid some of the difficulties of the judicial interest analysis method. It would take into account British interests and would, if employed, support affirmance of the United

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146 Laker, 731 F.2d at 955-56.
147 See, e.g., id. at 950 ("no evidence that interest balancing represents a rule of international law"); see also id. at 952 ("no principle of international law which abolishes concurrent jurisdiction.").
148 See Meessen, Antitrust Jurisdiction Under Customary International Law, 78 Am. J. INT'L L. 783, 789 (1984). In effect, the Laker court did nothing more than apply the Alcoa "effects" test.
149 See Grossfeld & Rogers, supra note 3.
States district court’s anti-suit injunction. Further, its use would advance an alternative methodology for resolution of jurisdictional conflicts to that espoused in Timberlane.

No approach to international jurisdiction conflict resolution is beyond reproach, given the complexity and political sensitivity of the issues. A reasoned approach, however, confirms the judiciary’s role, even though forced, as an arbiter of international disputes and gives credibility to the process by which the decision is made.

The D.C. Court of Appeals opinion is subject to criticism not because of its result, but because of its lack of methodology in reaching its decision. The court criticizes and refuses to apply judicial interest balancing, yet urges nothing in its place. The vacuum thus created may be interpreted, particularly by those abroad, as a mandate to assert and protect the jurisdiction of the forum where a conflict exists and as an abdication by the court of the role of dispute arbiter to diplomatic circles.

Courts are, of course, in the business of resolving disputes. They typically confront and decide procedural, jurisdictional, and substantive legal and factual controversies, often in the same case. For example, in Laker the conflict involved competing jurisdictional claims

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150 Under a shared values approach, the forum court would initially consider the values underlying the foreign law. If similar values were found the foreign law, if mandatory, see supra note 76, would be applied unless the foreign interest in the matter is insubstantial compared to the interest of the forum state. While a balancing of interests is not avoided, it comes in the context of greater deference to foreign mandatory law. See Grossfeld & Rogers, supra note 3, at 942-44. In Laker, a shared values analysis would have supported the U.S. district court’s anti-suit injunction, since it is unlikely that a U.S. court would conclude that the British action objecting to U.S. antitrust principles espouses values shared by the United States. The balancing of the interests of the states would thus be unnecessary under the Laker facts.

151 For other approaches see Meesen, supra note 148 (urging that only the interests of the states, not the private litigants, should be balanced); Gerber, The Extraterritorial Application of the German Antitrust Laws, 77 Am. J. Int’l L. 756 (1983) (urging that German approach of “conflict avoidance” be adopted). See also Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982) (jurisdiction under “effects” test appropriate only if no principles of comity, conflicts of law or international law are violated).
but what really was at issue was a dispute over substantive law, the United States antitrust provisions. The involvement of divergent government policies towards jurisdiction and economic laws certainly taxes the judiciary's dispute resolution capabilities and suggests the need for other, concurrent, dispute resolution forums.\textsuperscript{152} It does not, however, absolve the courts of their responsibilities to the private litigants seeking redress through their auspices.\textsuperscript{153}

The United States Court of Appeals in \textit{Laker}, in affirming its jurisdiction, does protect the right of access of the private parties before it. But in failing to articulate any guidelines for conflict resolution, it falls short in its role of dispute arbiter. The courts' principal responsibility is to adjudicate the claims and define the rights of the parties before it. It should develop strategies and principles for doing so, taking account as far as possible of the international interests and tensions involved. A recognition that the judiciary cannot resolve public international disputes does not absolve it from its obligation to mediate private grievances under its jurisdiction. To the extent that \textit{Laker} replaces the judicial interest balancing test with an analytical void, it represents a step backward in the resolution of disputes arising from the conflict of nations' laws and policies.

\textbf{VII. CONCLUSION}

The \textit{Laker} litigation illustrates a notable case of foreign resistance to assertions of United States antitrust jurisdiction. Indeed, the United States jurisdictional basis for the suit brought by Laker in the District of Columbia is not in the least questionable. Where, however, legitimate

\textsuperscript{152} For example, the consideration by the forum court of foreign interests, a much criticized aspect of judicial interest balancing, may be unavoidable, given the judiciary's role as dispute arbiter.

\textsuperscript{153} In government enforcement actions, where the Justice Department is a party, the court's obligation to resolve the conflict is arguably not as imperative. The government does have other dispute resolution mechanisms at its disposal, not available to private litigants.
assertions of U.S. antitrust jurisdiction involve foreign party defendants, foreign reaction, which is centrally directed to the substance of U.S. antitrust law, is certain to follow. Foreign state mechanisms to block American antitrust suits are unprecedented and present a formidable task for United States courts which must, in a suit involving foreign interests, somehow take those interests into account in resolving the often private disputes before them.

The United States Court of Appeals decision was a necessary and predictable affirmation of the right of a U.S. court to adjudicate, free from foreign interference, an antitrust suit where valid "territorial" jurisdiction over the parties to the dispute incontrovertibly exists. The later House of Lords decision, ruling that the Laker antitrust action against British and other airlines did not trample upon British sovereignty, exhibits the extremity of the earlier British position.

But, while the result reached by the U.S. Court of Appeals is not controversial, the route taken is. The issuance of a more limited injunction might have provided greater room for resolution of the conflict brought about by the U.S. antitrust laws through compromise rather than judicial fiat. On a broader level, the difficulties of the judicial interest analysis appear to make its use as a mechanism for dispute resolution impractical, at least where valid assertions of concurrent jurisdiction are involved. The Laker court's failure to supply an alternative methodology, however, tends to undermine the result, particularly from the perspective of foreign observers who may view the Laker decision as another example of United States antitrust provincialism and zealotry.