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I. Basis of *Laker* Decision

The basis of the holding in *Laker*[1] was that there is not a conflict between the British courts and us. The conflict is a direct conflict between the political and economic policies of the two governments, between the elective branches of the two governments. The British have their Protection of Trading Interests Act, which reflects their long and sincerely held policy on regulation of competition. We have our antitrust laws going back to 1890, almost 100 years. These are policy decisions made by the elective branches of our government. The basis of our decision therefore is that we as judges do not have the authority to decide that the longstanding, definite, clear antitrust policy of the political branches of our government can be compromised because it comes into conflict with the desires and the policy of another government. That is not for the judges to do. That is for the political branches of both governments to work out a compromise.

It may be that it is very unwise for the United States to insist on jurisdiction in this case. But if so, that should be spelled out by negotiations which judges are not in a position to conduct. As the law stands now, the U.S. courts have an obligation to apply it. We cannot say that the antitrust laws only go so far where airlines are concerned, the laws go a different distance where the SEC and the stock exchanges are concerned, . . . and so on.

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*Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

1. Laker Airways Ltd. v. Sabena, Belgian World Airways and KLM, Royal Dutch Airlines, 731 F.2d 909(1984), was decided on March 6, 1984, two days before Judge Wilkey made the following remarks. Judge Wilkey wrote the majority opinion of that court which reviewed a motion granted plantiffs by the district court for a preliminary injunction restraining defendants from participating in a foreign action designed to prevent the district court from hearing antitrust claims contained in the case. (*See* 559 F. Supp. 1124 (D.C.1983) for district court's decision.) Judge Wilkey, joined in his opinion by Circuit Judge MacKinnon, affirmed the district court's preliminary injunction. Circuit Judge Starr dissented, but disagreed only with the court's opinion on the question of comity. -ED.

II. English Courts and British Position

Therefore, we didn't try to compromise, and we recognize that the English courts are in the same position. They have their own obligation to the policy set forth by their executive; we understand fully why the English court ruled as it did. And I think when the English courts read our opinion carefully they will understand why we ruled as we did.

A description of the British position made earlier, which I assume is accurate, emphasized, first, the British argument that these alleged predatory acts against Laker were approved by the authorized body for regulating fares across the North Atlantic. Secondly, that Laker never objected to this approval of fares on the ground that the fares were predatory and anticompetitive.

This sounds like a perfectly valid defense on the merits for these defendants to make. And if the British make it as described, it might very well be successful. But this is on the merits, and this *Laker* litigation hasn't reached the merits stage in our courts or in the British courts either. And then, I thought: If the airlines have a valid defense on the merits, why not let it be adjudicated in the U.S. District Court for the District of Columbia here? Surely, the district court is accustomed to handling defenses like that, that the fares are not predatory, that they were approved, and that the complaining party waived any objection it might have at the appropriate stage. Surely Judge Greene[2] can handle defenses like that on the merits.

III. U.S. Courts

Remember, no party has challenged Judge Greene's jurisdiction to adjudicate, nor the U.S. Congress jurisdiction to prescribe in regard to companies doing business in the United States. Remember also, there is no international tribunal to try this case. This case must be tried by U.S. courts, if it is tried at all. The British Court of Appeal has so stated, recognizing that their laws are different from ours and that the action in England is not a parallel or similar action to the action in the U.S. District Court. The English action is purely a blocking one. There is no antitrust or antimonopoly or common law tort suit going on in England which our court here could be called upon to respect on the ground of comity. The action in England is purely one to frustrate the jurisdiction of the American courts. So, if the plaintiff Laker has a complaint under U.S. antitrust laws, as the English Court of Appeal said, "The place to hear it must be the U.S. courts."

Now I don't know what the reluctance of the British parties is to have their

2. Judge Harold H. Greene was the judge at the district court level. *See* 559 F. Supp. 1124 (D.C.,1983) -ED.

defense on the merits—that these fares were not predatory, that they were approved, and that Laker waived any objection—adjudicated by an American court. I don't know what the objection of the British is to having U.S. law adjudicated by U.S. courts. One, do they distrust completely the U.S. courts' fairness in judging these defenses on the merits? Or secondly, is the case for the British not so strong on the merits? They do not seem to be willing to put it to the test.

IV. Criticism of *Laker*: Some Responses

Turning to Mr. Beckett's few mild criticisms of our *Laker* appellate decision, he pointed out very cleverly, in the best Oxford or Cambridge debating style, that these three names on the cover were a foreign corporation versus two other foreign corporations.[3] I guess, superficially, that is right. But it's very superficial because all three of these corporations are doing business in the United States and are subject to U.S. laws and no one has argued to the contrary. This is not an extraterritorial case in the U.S. District Court; it is a domestic antitrust case on the merits because the impact is here and the effect is here. The effects doctrine is a domestic jurisdiction doctrine, it is not extraterritorial at all. It's because of the impact on American consumers and the impact on American creditors that this case is brought. Judge Greene did go into extra-territorial actions when he issued injunctions, but that's something else.

Not only are these parties, these three foreign corporations, subject to American laws in American courts because they're doing business here, but if you look at the opinion,[4] you'll see that they specifically subjected themselves to jurisdiction of the United States over predatory pricing and abuse of monopoly power. Article 12 of the United States-Belgium treaty says that and there is similar language in the Dutch treaty and in the German treaty.

Remember also that the parties before us as defendants are a Belgian and a Dutch corporation, not British, and while the plaintiff Laker is a British corporation, it is a shell and a bankrupt entity. The interests to be protected by this lawsuit are the interests of American consumers and American creditors; they're the ones who will benefit by the Laker action, if anyone ultimately benefits. So superficially, yes, they're three foreign corporations,

3. Mr. Beckett was asked after his presentation to respond to the following question: Would "the British response in the *Laker* case have been so strong if it had not been a U.S. antitrust action," or was "the basis of the British action the intolerability of a U.S. court passing judgment on the legitimacy of the regulatory regime of English authorities as to matters that are primarily English?" Mr. Beckett's response was: "[A]ll I will say . . . is to read the title of the cases before Judge Wilkey. Leaving out actual names it is a Foreign Corporation v. a Foreign Corporation and a Foreign Corporation . . . ." -ED. (from transcript)

4. *See* 731 F.2d 909, 922–925 -ED.

but the interests are American and all corporations involved have subjected themselves to U.S. laws and U.S. courts in order to do business here.

Mr. Beckett also referred to the use of the word "arrogant" in the opinion, but you have to look at the opinion to see how the word "arrogant" was used.[5] It was used totally conditionally: "The Protection of Trading Interests Act and the order govern 'any person in the United Kingdom who carries on business there.'" That includes every airline in the world which lands in England. The order forbids "any person in the United Kingdom from furnishing 'any commercial document in the United Kingdom,' or 'any commercial information [apparently *regardless of location*] which relates to the said Department of Justice investigation or the Grand Jury or the District Court proceedings.' Even United States airlines would be swept within these broad directives, but for the directions' specific exclusion of United States carriers." Continuing, "The English Executive has thus issued an order to every airline in the world doing business in England to refuse to submit to the jurisdiction of the American court and not to submit any documents from England pursuant to an order of the American court. If the exercise of 'extraterritorial' jurisdiction under United States antitrust laws can ever be described as *arrogant*, the order and directions issued by the British government certainly bear the *same* characteristic."

Does this sound a little different from the word "arrogant" taken out of context? United States antitrust laws are enforced where there is an impact in the United States, but only after an adjudication in the U.S. courts that there is a violation. Here the English executive has presumed to bar foreigners—remember SABENA and KLM are foreigners—from complying with an order of an American court before there is adjudication by any court on the merits of the dispute.

Going on in the opinion, it states:

> Moreover, since oral argument before this court, the English Secretary of State has interpreted the order and directions to bar the furnishing of any 'commercial information,' even that located exclusively within United States territory. On the basis of this interpretation the British Government has refused to permit Laker's use of commercial information contained in documents situated in the United States to respond to interrogatories propounded by Trans World Airlines [which is another defendant in this action but not on the cover yet]. The orders thus interfere with any attempt by Laker, to use any commercial information, *whether located in the United Kingdom or the United States,* to proceed against any of the defendants, *whether British or American.*[6]

Now, I go back to my conditional statement in our opinion: "If the exercise of 'extraterritorial' jurisdiction under United States antitrust laws can ever be described as arrogant, the order and directions issued by the

5. 731 F.2d 909, 940 -ED.
6. *Id.* (emphasis added) -ED.

British government certainly bear the same characteristic."[7] I'll stand on that.

We followed up by pointing out that Kant said that the ethical imperative is for every man to act as if his actions were universalized.[8] Now, take what the British executive has done and universalize it. Assume that every country does exactly the same thing in regard to jurisdiction over airlines, and see what chaos would be brought about in the commercial world. That's how we got Kant into the opinion.

Another question following Mr. Beckett's address concerned the statement in the opinion: "If Laker had sued the American defendants for fraud, or on a contract claim for failure of performance, the British would not have been at all interested in intervening . . . "[9] That is our assumption based on the British policy in the past. Yet there is no basic difference between the exercise of U.S. antitrust jurisdiction affecting foreigners and other jurisdiction which arouses little controversy. Take, for example, American law in regard to stock exchanges. Assume a fraud on the New York Stock Exchange perpetrated by foreigners abroad, but the impact is felt here and Americans are defrauded. If the American courts do not have jurisdiction to seek out documents and to bring persons who are doing business inside the United States under a treaty before the court—if the courts don't have that type of jurisdiction—then we really are in a bad way. The same would be true of mail fraud. Assume a mail fraud scheme directed inside the United States from abroad with the victims entirely American, if the American courts can't bring in the accused in a case like that, we are more powerless than anyone imagined. If only Americans can be subject to charges of antitrust law violations but not foreigners engaged in precisely the same activities with the same internal U.S. impact, then it's a rather unfair statute.

Finally, I want to stress that this conflict is not between the courts of the two countries. Each of the courts is, I say, carrying out the respective obligations of their statutes, of their economic policy as enunciated by the responsible political branches of the government. It is not for the courts to say: "Well, we can't apply that here because a foreign government has a different idea." Mr. Beckett pointed out very clearly the different idea that the British have in regard to antitrust litigation. I'm so glad that he did point out that their antimonopoly statutes are totally devoid of any right of private action. Of course, that has been in our law since 1890, and we have relied on the right to bring private actions and obtain treble damages to help enforce our antitrust law. The British have chosen not to do so. Certainly it's their

7. *See supra* note 5, at 940 - ED.
8. 731 F.2d 909, 941 - ED.
9. 731 F.2d 909, 946 - ED.

right to make that choice. But these are great differences in regulatory philosophy reflected in the statutory schemes of the two countries.

An American court must enforce American statutory rights. How did Judge Greene do it? He did it by an antisuit injunction, which we discussed at length in the Opinion.[10] In the judgment of our appellate court the justification for the antisuit injunction rests on several factors. First, the action in our District Court was six months ahead of any action in the English court. Second, the weight of U.S. interest is here. The American consumers: 50 percent of the passengers on these airlines are American citizens. The creditors: the creditors are American banks because the airplanes Laker bought were financed here. So the weight of American interest is substantial and predominant. Third, the clarity of the U.S. statutory policy in subjecting both foreigners and Americans—foreigners doing business in the United States and where there is an impact within the United States—to U.S. antitrust jurisdiction is longstanding and a court can't avoid it. And fourth, the nature of the English court actions, which were not parallel actions attempting to achieve similar goals or to afford similar relief to the litigants. They were purely actions to frustrate the acknowledged jurisdiction of the American courts. And so for that reason we held that the antitrust injunction was justified, deploring as always any conflict with the English judiciary.

10. *See* 731 F.2d 909, 926–934. - ED.