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The Anti-Boycott Provisions of the Export Administration Amendments of 1977

by David Modi*

The oil money available to many Arab states has made them one of the fastest growing export markets in the world.¹ As trade with the industrialized West has increased dramatically since 1974,² so has competition among Western companies for shares of the Arab market. As a result, the Arab nations have been able to exact compliance by foreign firms with their boycott to a hitherto unprecedented degree.³ Initial efforts by the United States to combat the boycott were sporadic and ineffective.⁴ In June, 1977, however, President Carter signed into law amendments to the Export Administration Act of 1969.⁵ Title II of the amendments makes it illegal for Americans to comply with most aspects of the Arab boycott.

Following a discussion of the history and content of the boycott, and of the United States government's earlier responses to it, this note will examine Title II and its potential effects on American trade with the boycotting Arab nations.

The Arab Boycott

In 1946, two years before the state of Israel was officially created, the Arab League began a boycott of Jewish products.⁶ In 1951, the League moved to expand and consolidate the boycott, establishing a Central Boycott Office in Damascus to coordinate the activities among its various members. The Central Boycott Office is comprised of a managing committee consisting of representatives from each member state. This committee adopts resolutions at regularly scheduled meetings

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¹123 CONG. REC. H3276 (daily ed. April 20, 1977) (remarks of Rep. Wirth); Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355 (1976).

²Steiner, *supra* note 1. See generally, *Hearings on Discriminatory Arab Pressure on U.S. Business Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Bingham Hearings*]; 123 CONG. REC. H3272 (daily ed. April 20, 1977) (remarks of Rep. Pascell).

³Guzzardi, *That Curious Barrier on the Arab Frontier*, FORTUNE, July 1975, at 82. The Commerce Department reported that Arab oil income in 1975 was three to four times what it was in 1973 and that the Arabs are using this money for massive economic development.

⁴See text accompanying notes 20-36 *infra*.

⁵Pub. L. No. 95-52, 91 Stat. 235 (1977) (to be codified in 50 U.S.C. §§ 2401-2413).

⁶Arab League Council, resolution No. 16, Dec. 16, 1945, cited in LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 99 (1975). L. PRESTON, *TRADE PATTERNS IN THE MIDDLE EAST* 51 (1970).

and maintains a central blacklist. The blacklist is a list of names of all foreign firms which are forbidden by the boycott practices from having commercial intercourse with Arab nations.⁷

Despite the central and apparently highly coordinated organization, actual administration of the boycott is not centralized. The Central Boycott Office's resolutions are not binding on member states, and each country is free to add to, or subtract from, the central blacklist to meet its own peculiar needs. For this reason, enforcement of the boycott varies from country to country.⁸

Because the Arab states are in the position of trying to encourage foreign trade and investment while at the same time trying to enforce a boycott which restricts such trade and investment, foreign companies are often arbitrarily and even capriciously blacklisted and then delisted. Blacklist inclusions range from concerns such as Hartz Mountain Pet Food Co., to Xerox, Coca-Cola and Ford Motor Co.⁹ Some are not blacklisted at all even though they may trade quite extensively with Israel. General Electric, for example, sells military engines to both Israel and the Arabs.¹⁰ Having top-notch military equipment is apparently more important than boycotts to the Arabs, and they therefore are willing to wink at boycott violations, however flagrant, if it is in their interest to do so.¹¹

Anatomy of the Boycott

There are three distinct aspects of the Arab boycott against Israel: primary, secondary and tertiary.

The primary boycott is the Arabs' refusal to trade directly with Israel. It includes a refusal to import goods that contain Israeli components.¹²

⁷Guzzardi, *supra* note 3, at 84.

⁸*Id.* Stern, *On and Off the Arabs' List*, NEW REPUBLIC, March 27, 1976. See also *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, (94th Cong., 1st Sess., pt. 11 (1975)) [hereinafter cited as *Church Hearings*]; See also generally, *Bingham Hearings*, *supra* note 2.

⁹Stern, *supra* note 8, at 9.

¹⁰*Id.*

¹¹See generally *Bingham Hearings*, *supra* note 2, at 24-38. "This is an area where you can blink, where you can wink and where you can cheat. . ."

Getting off the blacklist is difficult for a firm. Xerox, which was blacklisted for making a documentary film about Israel, was apparently told that an investment in an Arab nation — the sum comparable to that which it spent on the film — would suffice to get its name off the list. Another company was approached by a Syrian lawyer who told the company how it could get off. The company was willing, but it later learned that the lawyer was publicly hanged in Damascus. Stern, *supra* note 8.

¹²One commentator divided the primary boycott as defined here into two parts — a core primary boycott and an extended primary boycott. The extended primary boycott according to his definition is the Arab refusal to import goods containing Israeli components. Steiner, *supra* note 1, at 1367-68.

The secondary boycott is the Arabs' refusal to deal with third-country individuals or companies that maintain commercial relations with Israel. It is designed to intensify the pressure on Israel by isolating it from trading partners, and by forcing foreign firms to choose between trade with the Arabs or trade with Israel.¹³ The secondary boycott is also an attempt to engender hostile feelings toward Israel in the foreign firm's home country.

The tertiary boycott¹⁴ is the Arabs' refusal to buy goods from a foreign firm whose products contain components of blacklisted companies or whose services include those of blacklisted sub-contractors. Thus, if firm A is blacklisted, and firm B manufactures a product which contains components manufactured by A, the Arabs will refuse to buy that product from firm B. Firm B itself, though, will not be blacklisted. B therefore, will choose non-blacklisted components when filling orders from Arab nations. Thus, the tertiary boycott is far more disruptive of American commerce than is the secondary boycott. It becomes involved directly in molding commercial relations among American companies operating in the United States. For this reason, a company which now complies with the tertiary boycott runs the risk of violating not only Title II, but also the Sherman Antitrust Act.¹⁵

Another aspect of the boycott, subtle but present nonetheless, is that of religious discrimination. Though the Arabs strive mightily to allay fears that the boycott is based on a person's religion,¹⁶ religious discrimination is a part of the boycott.¹⁷

Enforcement of the Boycott

The Arab countries attempt to compel and verify compliance with the boycott by requiring an affidavit, a questionnaire, a certificate of origin or a letter-of-credit certification, depending on the business of

¹³A company will not always be placed on the blacklist for violating boycott rules. See text accompanying notes 9-11 *supra*.

¹⁴Steiner called this the extended secondary boycott. Steiner, *supra* note 1, at 1369.

¹⁵The Sherman Act, 15 U.S.C. § 1 (1970) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal."

¹⁶Letter from Abdul Aziz H. al Sazar to the United States Department of Commerce (undated), General Union of Chambers of Commerce, Industry & Agriculture for Arab Countries, *The Arab Boycott of Israel: Its Grounds and Regulations*, reprinted in *Hearings on Contempt Proceedings against Secretary of Commerce, Rogers C. B. Morton, Before the Subcomm. on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. at 146. (1975) [hereinafter cited as *Moss Hearings*].

¹⁷See Stern, *supra* note 8, at 8; *Hearings on S. 425, Amendment No. 24 Thereto*; S. 953, S. 995, & S. 1303 *Before the Subcomm. on International Finance of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess., at 18 (1975) [hereinafter cited as *Stevenson Hearings*].

Mohammed Mahgoub, the Central Office's Commissioner General, once said that "[t]he blacklist includes companies when it is proven by definite evidence that

the foreign firm.¹⁸ Failure to fill out and return the form within a certain time is ground for blacklisting.¹⁹ These forms inquire into the foreign firm's trade relationships with Israel and with blacklisted firms.

Initial American Responses

The first official United States governmental response to the boycott was in 1965. Amendments to the Export Control Act of 1949²⁰ were introduced making it unlawful for Americans to comply with the Arab boycott. The Johnson Administration opposed these amendments.²¹ A compromise was struck, and the language was eventually

they, their proprietors or controllers have Zionist tendencies." Guzzardi, *supra* note 3, at 168. What constitutes such "definite evidence" is unilaterally decided by the Boycott Office, since a firm under consideration for blacklisting receives no notification thereof and therefore has no opportunity to be heard. The phrase "Zionist inclination" is a catch-all which is used to discriminate against Jewish people.

In one instance, the Saudi Arabian government exacted compliance by the United States Corps of Engineers with religious discrimination. Congress, not unexpectedly, was inflamed by this report. *Church Hearings*, *supra* note 8, at 201-04.

There are conflicting reports as to how many specific cases of religious discrimination based on the boycott have occurred. Compare, *Subcommittee on Oversight and Investigations of the Comm. on Interstate Commerce*, 94th Cong., 2d Sess., *Report on the Arab Boycott and American Business* 33 (1976) [hereinafter cited as *Arab Boycott and American Business*]; *Stevenson Hearings*, *supra* note 14, at 178; *Bingham Hearings*, *supra* note 2, at 84; and Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics and United States v. Bechtel Corporation*, 54 TEX. L. REV. 1411, 1430, n.100 (1976).

¹⁸Letter from Abdul Aziz H. al Sazar to the United States Department of Commerce, *Moss Hearings*, *supra* note 6, at 146. See also *Bingham Hearings*, *supra* note 2, at 15.

The Arabs claim that the boycott does not apply to "normal dealings" with Israel but only to those trading relationships which enhance the military or economic power of Israel. Specifically, activities proscribed by boycott rules include:

For manufacturing and trading companies: having main or branch offices in Israel, having assembly plants in Israel, assembling goods in Israel for shipment to Arab countries, maintaining general or main offices in Israel, granting manufacturing licenses to Israeli companies, rendering consultative or technical services to Israeli factories, holding shares in Israeli companies, allowing their directors to become members of joint foreign-Israeli Chambers of Commerce, acting either as agents for Israeli companies or as principal importers of Israeli products outside of Israel, and prospecting for natural resources in Israel;

For banks: granting loans or subsidies to Israeli firms which carry out "major" military, industrial or agricultural projects, distributing or promoting Israeli loan bonds, establishing companies in Israel, and helping Israeli companies raise capital.

The rules also contain forbidden activity for navigation companies, motion picture companies, insurance companies and shipbuilding companies. *Moss Hearings*, *supra* note 6, at 146-49.

¹⁹*Moss Hearings*, *supra* note 6, at 146.

²⁰Export Control Act of 1949, ch. 11, 63 Stat. 7.

²¹*Hearings to Amend Section 2 of the Export Control Act of 1949 Before a Subcomm. of the Senate Committee on Banking and Currency*, 89th Cong., 1st Sess. 6-18 (1965) (testimony of George W. Ball, Under Secretary of State). Ball feared that anti-boycott legislation "would interfere seriously with the effective operation of programs of economic denial that we are now conducting against several Communist countries . . ." Much of the information the United States called upon foreign firms to furnish in order to facilitate American enforcement of its boycotts was the same information United States firms were prohibited by the proposed amendments from furnishing.

incorporated into the Export Administration Act of 1969. The American response was limited to a policy statement that it is contrary to United States public policy to comply with boycotts instituted against countries friendly to the United States.²² The 1969 Act also required American companies receiving boycott requests to report to the Secretary of Commerce that they received such requests, but they were not required to report whether they complied or intended to comply with the request.²³ The Act gave the Secretary of Commerce the power "to exercise such controls . . . as . . . are necessary to facilitate and effectuate . . . the policy set forth in this Act."²⁴

Neither the Nixon nor the Ford administration favored extensive controls over American business' compliance with the boycott,²⁵ and the policy statement of the Export Administration Act was seriously undermined.²⁶

²²Pub. L. No. 91-184, 83 Stat. 841, Section 3(5) (codified at 50 U.S.C. § 2402(5) (1975)).

²³*Id.*

²⁴50 U.S.C. § 2403(a)(1) (1975). See note 147 *infra*.

²⁵See generally *Bingham Hearings*, *supra* note 2; *Stevenson Hearings*, *supra* note 14; *Hearings on the Extension of the Export Administration Act of 1969 Before the House Committee on International Relations*, 94th Cong., 2d Sess., (1976) [hereinafter cited as *Morgan Hearings*].

²⁶No sanctions were imposed by the United States government against any firms for non-compliance with the Export Administration Act of 1969 until 1975. Since 1975 the activities of 105 firms have been investigated, but only five have actually been reprimanded, receiving only \$1000 fines. The other one hundred were given warnings.

In 1975, Congressional interest in the effects of the boycott increased. A House Subcommittee subpoenaed from the Secretary of Commerce, Rogers Morton, information as to American companies and their compliance with the reporting requirements of the 1969 Act. Secretary Morton refused, claiming confidential disclosure under the Act, and the House Subcommittee instituted contempt proceedings against him. *Moss Hearings*, *supra* note 6.

There is evidence that the Commerce Department indirectly aided the Arabs in their boycott. The Department had adopted a policy of circulating business offers from Arab boycotting nations to American companies when such offers contained boycott requests. Included in the offer package was a statement by the Commerce Department that American firms were encouraged and requested, but not legally required, to resist compliance with the boycott requests. Several Congressmen saw the phrase "but not legally required" as an attempt to deliberately evade the stated public policy of section 3(5) of the Export Administration Act of 1969. See *Moss Hearings*, *supra* note 6, at 38-40.

During the dispute decided in *Antco Shipping Co. v. Sidemar*, 417 F. Supp. 207 (S.D.N.Y. 1976), Antco employed an ingenious, though unsuccessful, ploy to put some teeth into section 3(5)'s policy statement. The shipping contract it had with the defendant contained a provision preventing the ship from docking at Israeli ports. Later, Antco wished to be relieved of its contractual obligations and argued that the provision on Israeli ports was a boycott related request, tainting the entire contract. It concluded therefore that the contract was void and unenforceable as against American public policy delineated in 3(5) of the Export Administration Act of 1969.

The court held against Antco. It refused to take judicial notice that the provision excluding Israeli ports as docking ports was a boycott provision, declaring instead that it could as easily have been a "safe ports" provision, in view of the risk of hostilities in

Prelude to Title II

In 1975, the United States position changed. By then, the boycott's influence on American commerce had become very real and far-reaching.²⁷ Companies were receiving boycott requests in record numbers²⁸ and, more often than not,²⁹ were complying with them. Congressional interest in the boycott was aroused. Hearings were held and bills were introduced.³⁰

President Ford then began taking executive action.³¹ In November 1975, President Ford issued a directive to all executive agencies³² in which he attacked the boycott's religious discrimination and ordered all federal agencies to ignore any exclusionary policies of the host country when making overseas assignments.³³

In December, the Commerce Department revised its Export Administration Act regulations prohibiting religious or racial discrimination by exporters.³⁴

In January 1976, the Justice Department, over the objections of Henry Kissinger, instituted anti-trust proceedings against Bechtel Corp., for

the region. The court conveniently neglected to mention, though, why the safe ports provision did not also exclude Egyptian or Lebanese ports.

²⁷Prior to 1974, most trade between the United States and the Arab nations was a one-way street — oil going to the United States. This changed in 1974 with the increase in Arab oil revenue. It is estimated that 1974 OPEC revenue surpluses were \$105 billion, \$55 billion of which was available for foreign investment and \$50 billion for the purchase of goods and services. 121 CONG. REC. H6579-81 (daily ed. July 10, 1975) (remarks of Rep. Holtzmann). See also notes 2-3 *supra*.

²⁸In 1973, 1,152 United States export transactions that were reported involved an Arab boycott demand. Seven hundred and eighty-five such transactions were reported in 1974. *Bingham Hearings*, *supra* note 2, at 12. For the six months ending September 30, 1976, 72,781 such transactions, involving \$5.5 billion, were reported. SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 95th Cong., 1st Sess., REPORT ON EXPORT ADMINISTRATION AMENDMENTS OF 1977 TO ACCOMPANY S. 69 (Senate print 1977) [hereinafter cited as S. REP. NO. 95-104].

²⁹From January 1, 1974 to December 5, 1975, 45% of those companies reporting boycott requests indicated compliance therewith, 53% did not indicate whether they complied, and only .119% stated they refused to comply. *Morgan Hearings*, *supra* note 25, at 24.

³⁰From 1974-1977, over thirty bills were introduced in both Houses of Congress which were aimed at restricting the boycott's influence on American business.

³¹The first came in February 1975, when President Ford ordered all federal agencies whose activities concerned the boycott to reconsider their boycott practices. President's News Conference of February 26, 1975, 11 WEEKLY COMP. OF PRES. DOC. 218 (March 3, 1975).

³²President's Statement on Foreign Boycott Practices, November 20, 1975, 11 WEEKLY COMP. OF PRES. DOC. 1305 (November 24, 1975).

³³*Id.*

³⁴15 C.F.R. 369.1 (1975), as amended by 15 C.F.R. 369.1 (1976). The Export Administration Act of 1969 had by its own terms expired on September 30, 1976. President Ford, acting under authority granted him by the Trading With the Enemy Act of 1917, issued an executive order ordering the Secretary of Commerce to continue administering the Export Administration Act programs. See 2 N.C.J. INT'L LAW & COM. REG. 77 (1977).

alleged discrimination against certain American sub-contractors in compliance with the tertiary boycott.³⁵

The Congressional drive for anti-boycott legislation continued. A provision of the Tax Reform Act of 1976 known as the Ribicoff Amendment denied international tax benefits to those companies which cooperated with the boycott.³⁶ More comprehensive bills were introduced and passed both the House and the Senate. A conference committee, blocked by Senate maneuvering in 1975, was convened and a bill satisfactory to both bodies emerged in June 1977. The bill was passed in the Senate on the 7th, and in the House on the 10th. President Carter signed it into law on June 22, 1977.

Title II

The bill is entitled the Export Administration Amendments of 1977.³⁷ Title II³⁸ contains the anti-boycott provisions.³⁹ It is a com-

³⁵In the complaint the government alleged that Bechtel engaged in a combination or conspiracy which resulted in an unreasonable restraint on trade, in violation of the Sherman Act, 15 U.S.C. § 1 (1970). Bechtel answered that (1) the Arab League boycott of Israel is political in nature and hence beyond the scope of the Sherman Act; (2) other government agencies sanctioned the very participation in the boycott with which the defendant is charged and the government is therefore estopped from this prosecution; and (3) the defendants are not liable because of the sovereign compulsion and act-of-state doctrines.

The case thus raised some interesting questions about international and domestic law. They were, however, never adjudicated because Bechtel and the government agreed to an out-of-court settlement, including an injunction which forbade Bechtel from engaging in the alleged illegal conduct. The injunction will remain in force for twenty years. Title II will probably not have an appreciable effect on it since, ostensibly, the activity in which Bechtel engaged is also forbidden by Title II.

The Bechtel case was significant for several reasons. The Bechtel group of contractors was the largest American group in the Middle East. By tackling the biggest, especially over then Secretary of State Henry Kissinger's misgivings, the Justice Department was manifesting a tougher attitude toward anti-boycott provisions. One commentator believed, however, that the settlement indicated a lack of conviction on the part of the government. Lowenfeld, *supra* note 6, at 124.

For a discussion of the Bechtel case, see Note, *The Arab Boycott and the Bechtel Case*, 11 J. WORLD TRADE L. 383 (1977).

For a discussion of the antitrust aspects of the Arab boycott and American business, see Areeda, *Remarks on the Arab Boycott*, 54 TEX. L. REV. 1432 (1976); Kestenbaum, *supra* note 14; Comment, *The Antitrust Implications of the Arab Boycott*, 74 MICH. L. REV. 795 (1976); Note, *Export Policy, Antitrust and the Arab Boycott*, 51 N.Y.U.L. REV. 94 (1976).

³⁶Pub. L. No. 94-455, §§ 1061-1064 (1976), (to be codified in I.R.C. §§ 908, 952(a), 995(b)(1), 999).

³⁷Pub. L. No. 95-52, 91 Stat. 235 (1977) (to be codified in 50 U.S.C. §§ 2401-2413).

³⁸Pub. L. No. 95-52, 91 Stat. 235 (1977), Title II, §§ 201-205 (to be codified in 50 U.S.C. §§ 2403a-2410). Title II was largely the product of a compromise negotiated between the Business Roundtable, which generally opposed restrictive legislation, and the Anti-Defamation League of B'nai Brith, which generally favored restrictive legislation. There was fear that a strong law would antagonize business interests, and a weak one Jewish interests. In many respects Congress, except for a few members, took a back seat in formulating the language of Title II. The Roundtable and the ADL desired above all to present to Congress a bill suitable to all and thus to avoid an emotional debate. The result was a law which sought to strike a balance between morality and economics, a compromise which satisfied no one. N. Y. Times, Aug. 21, 1977, § 3, at 5, col. 3.

³⁹The law is not limited specifically to curbing compliance with the Arab boycott

promise between those factions which wanted stricter legislation and those which wanted no legislation at all.⁴⁰ Recognizing that every nation has the sovereign right to trade with whom it wishes, Congress sought to avoid language which might interfere with the Arabs' primary boycott of Israel. Title II, therefore, is technical and has many exceptions. It does, however, attempt to outlaw all compliance with the secondary and tertiary boycotts.

Section 201(a) orders the President to issue "rules and regulations" making it unlawful for any United States person engaging in "interstate or foreign commerce" to take any of the prohibited actions "with intent to comply with . . . any boycott . . . imposed by a foreign country against a country which is friendly to the United States."⁴¹ Intent is an essential element of a violation. If a person does not have the intent to comply with a boycott request, then his activities will not be punishable, even though furthering the boycott's goals.⁴²

According to the proposed Commerce Department regulations issued pursuant to section 201(a), a United States person will be presumed to have the requisite intent if the existence of the boycott is a motivating factor in that person's decision to take a particular action.⁴³ Thus, if an American company explores business opportunities in the boycotted country and decides for boycott related reasons not to pursue them, it has violated Title II. If it decides for legitimate business reasons not to pursue these opportunities, however, no violation will be found.⁴⁴

but applies to boycotts in general. On the other hand, its provisions are aimed at preventing compliance with whatever forms the Arab boycott takes.

⁴⁰See, e.g., 123 CONG. REC. H3277 (daily ed. April 20, 1977) (remarks of Rep. Waxman).

⁴¹Pub. L. No. 95-52, Title II, § 201(a) (to be codified in 50 U.S.C. § 2403-1a). One possible loophole is found in the use of the word "friendly" to describe nations against which compliance with a boycott is forbidden. The term "friendly nation" is not defined in Title II. A company under prosecution for violation of Title II could argue that Israel, in light of the recent disagreements, is not friendly to the United States. Though this is perhaps not an effective or even probable argument, Title II nevertheless offers no clarification of this issue.

⁴²S. REP. NO. 95-104, *supra* note 28, at 37.

⁴³42 Fed. Reg. 48,561 (1977), (to be codified in 15 C.F.R. 369.1(e)(2)). Making the boycott "a" motivating factor apparently encompasses more activity than if the boycott were "the" motivating factor. An example of this definition of intent is provided in the regulations. A bank which regularly implements letters-of-credit containing boycott requests violates Title II even if it did not know of the requests since it "could have learned of the prohibited condition in any such letter-of-credit." *Id.* at 48,562, example (iv). Intent is implied through inactivity or lack of affirmative action.

⁴⁴*Id.* (to be codified in 15 C.F.R. 369.1(e), Examples of Intent (vii), (viii)). Such a provision is likely to result in firms being hesitant to explore business opportunities in a boycotted country, lest their refusal to follow through be viewed as a violation of Title II. It seems naive to think that a company contemplating a major investment in a boycotted nation will not take into account, at least to an extent, the possible repercussions stemming from the boycott, including blacklisting. In such a case, the existence of the boycott would be a motivating factor in the firm's decision and a denial to follow up its initial explorations will be a violation. Whether this will be the effect will depend upon how strictly the section is enforced.

Even if a legitimate business reason may exist for a refusal to do business, if the refusal is also even partially motivated by a boycott request, Title II has been violated.⁴⁵ If an American company has been blacklisted because it has a plant in a boycotted country, then it will violate Title II if it closes that plant in an effort to get off the blacklist.⁴⁶

Section 4A(a)(1)(A) and the rules and regulations promulgated thereunder prohibit refusing to do business for boycott reasons.⁴⁷ Refusals to do business include the exclusion of any person or country from a transaction for boycott reasons,⁴⁸ refusals implied by a course or pattern of conduct,⁴⁹ refusing to accept a business opportunity for boycott related reasons,⁵⁰ maintaining either a blacklist or a whitelist,⁵¹ or advising another party not to do business.⁵² This section attempts to cover both the secondary and tertiary boycotts.

To avoid possible misinterpretation, the second part of the section adds that the absence of a business relationship in the boycotted country or with a blacklisted company does not establish a Title II violation.⁵³ That is, a company is under no obligation to affirmatively seek the business of boycotted countries or companies. A specific agreement to refuse to do business is not necessary to find a violation; an action pursuant to a request or other requirement is sufficient.⁵⁴

If an American firm negotiates a contract with a boycotting country (without a boycott request) and then submits to the country a list of potential sub-contractors on a non-discriminatory basis, the firm may comply with the boycotting country's selection of a sub-contractor, although it may know that the selection was boycott based.⁵⁵ How-

⁴⁵Pub. L. No. 95-52, Title II, § 201(a)4A(a)(1)(A) (to be codified in 50 U.S.C. § 2403-1(A)).

⁴⁶42 Fed. Reg. 48,563 (1977) (to be codified in 15 C.F.R. § 369.2(a), Examples of Refusals to do Business; Refusals to Do Business (v)). This section could directly interfere with business planning. If a company decides that doing business with the boycotting countries is more profitable than doing business in the boycotted country, this section prevents that company from carrying out its decision. There are qualifications: the company must be blacklisted and it must want to relocate its business activities "in an effort to have itself removed from boycotting country('s)... blacklist." Yet this section creates a presumption of a violation anytime a blacklisted firm wishes to sever its ties with a boycotted nation. More effective enforcement of the Act could result, but it would interfere with long range business planning.

⁴⁷42 Fed. Reg. 48,562 (1977) (to be codified in 15 C.F.R. § 369.2(a)(2)).

⁴⁸*Id.*

⁴⁹*Id.* (to be codified in 15 C.F.R. § 369.2(a)(6)).

⁵⁰*Id.*

⁵¹*Id.* (to be codified in 15 C.F.R. § 369.2(a)(7)).

⁵²*Id.* (to be codified in 15 C.F.R. § 369.2(a)(8)).

⁵³Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(A) (to be codified in 50 U.S.C. § 2403-1a).

⁵⁴S. REP. NO. 95-104, *supra* note 28, at 38. 42 Fed. Reg. 48,562 (1977) (to be codified in 15 C.F.R. § 369.2(a)(10)).

⁵⁵42 Fed. Reg. 48,563 (1977) (to be codified in 15 C.F.R. 369.2(a), Examples of Refusal to do Business; Refusals to Do Business (xi)).

ever, in the same situation "except that the [boycotting country] selects the [sub-contractor] and requests the [general contractor] to advise the [sub-contractor], arrange for the shipment, and inspect the goods upon arrival,"⁵⁶ the American general contractor has violated Title II because its "post-award actions carry out his client's boycott based decision."⁵⁷

Subsections (B) and (C) prohibit discrimination based on race, religion, sex or national origin, either through direct employment of an individual or by furnishing such information about a United States person.⁵⁸ Section 4A(a)(4) of Title II, states that nothing in this law shall effect in any way the operation of civil rights laws of the United States.⁵⁹

If an American company receives from a boycotting country an offer containing the requirement that "no persons of country X are to work on this project," then entering into this contract will violate Title II.⁶⁰ However, if the request asks that "no persons who are citizens of country X are to work on this project," then entering into the contract will not violate Title II.⁶¹

If a boycotting country tenders an invitation to bid on a construction project in its country, and such invitation specifies that "women will not be allowed to work on this project," an American firm agreeing to this tender will not violate Title II.⁶²

An American company may not comply with a request that a six-pointed star (presumably the Star of David) not be used on the packaging of the products to be imported into the boycotting country, on the ground that, inasmuch as the six-pointed star is a religious symbol, compliance with this request by the American company is certification that it will not ship products made by persons of that religion.⁶³ But the American company may comply with a request not

⁵⁶*Id.* (to be codified at 15 C.F.R. § 369.2(a), example (xii)).

⁵⁷*Id.* (to be codified at 15 C.F.R. § 369.2(a)). The distinction the examples make is based on what the American general contractor does *after* receiving the boycott selected sub-contractors.

⁵⁸Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(B), (C) (to be codified in 50 U.S.C. § 2403-1a).

⁵⁹*Id.*, § 201 4A(a)(4) (to be codified in 50 U.S.C. § 2403-1a). It is arguable that other civil rights laws outlaw discrimination that is associated with the Arab boycott. See Comment, *The Arab Boycott and Title VII*, 12 HARV. C.R.-C.L. L. REV. 181 (1977).

⁶⁰42 Fed. Reg. 48,564 (1977) (to be codified in 15 C.F.R. § 369.2(b), Examples of Discriminatory Actions, example (ii)).

⁶¹*Id.* (to be codified at 15 C.F.R. § 369.2(b), example (iii)). The distinction, according to the regulations, is that in the first the discrimination is on the basis of "national origin," whereas in the second, it is on the basis of "nationality."

⁶²*Id.* (to be codified at 15 C.F.R. § 369.2(b), example (vi)). The rationale given is that the restriction against employment of women is not boycott-based. This rationale completely contradicts Title II, which explicitly forbids sex discrimination. *Supra* note 58. It is interesting to note that this is one of the few instances in which Title II is interpreted narrowly, rather than broadly.

⁶³*Id.* (to be codified at 15 C.F.R. § 369.2(b), example (viii)).

to use a symbol of a boycotted country on its packaging, such symbol conveying no statement about persons of any particular religion.⁶⁴

Subsection (D), like subsection (A), attempts to eliminate compliance with the secondary and tertiary boycotts by prohibiting United States persons from furnishing information on whether that person has, has had, or intends to have business relations in the boycotted country or with any blacklisted country when such information is sought as a boycott request.⁶⁵ Enforcement of this section will have a greater impact than enforcement of (A) since a firm usually fills out a questionnaire or other form indicating that it will refrain from proscribed activities before it actually refrains from carrying out those activities.⁶⁶ Title II makes it illegal to fill out the questionnaire.

Subsection (D) allows the furnishing of "normal business information in a commercial context . . ."⁶⁷ Normal business information may include factors such as financial fitness, technical competence or professional experience, and may be found in documents normally available to the public. These documents would include annual reports, disclosure statements, promotional brochures and business and trade handbooks.⁶⁸ For instance, an architect or engineering firm would be allowed to send information about its professional competence to a prospective client, even though such information might incidentally reveal business relations that are forbidden by the boycotting country's rules.⁶⁹ But if the information is sought pursuant to a boycott related request, compliance with the request is not allowed, irrespective of whether the information is available to the public and is considered normal business information.⁷⁰ A presumption of illegality arises if it is "reasonably clear" that the information is sought for boycott purposes. The "clearest case" is where the questionnaire seeks only information on the firm's business relations with the boycotted country or with blacklisted firms. This presumption is subject to rebuttal.⁷¹

Subsection (E) forbids furnishing information about one's membership in, contribution to, or association with, any fraternal or charitable organization that supports the boycotted country.⁷² The prohibi-

⁶⁴*Id.* (to be codified at 15 C.F.R. § 369.2(b), example (ix)). What will happen if a religious symbol and a nation's symbol are the same is left open.

⁶⁵Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(D) (to be codified in 50 U.S.C. § 2403-1a).

⁶⁶In that sense, this subsection most of all affects American commerce.

⁶⁷Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(D) (to be codified in 50 U.S.C. § 2403-1a).

⁶⁸42 Fed. Reg. 48,565 (1977) (to be codified in 15 C.F.R. § 369.2(d)(4)).

⁶⁹S. REP. NO. 95-104, *supra* note 28, at 40.

⁷⁰42 Fed. Reg. 48,564 (1977) (to be codified in 15 C.F.R. § 369.2(d)(5)).

⁷¹S. REP. NO. 95-104, *supra* note 28, at 40.

⁷²Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(E) (to be codified in 50 U.S.C. § 2403-1a).

tion does not apply if the information is incidental to a boycott request, such as the organizations one might list on a resume.⁷³

Subsection (F), applicable to banks, prohibits them from honoring or implementing letters-of-credit⁷⁴ which contain conditions compliance with which is unlawful under any section of Title II.⁷⁵ Again intent is required, and a bank which "accidentally" implements a letter-of-credit with a boycott request will not run afoul of subsection (F), so long as it takes steps to guard against future accidents.⁷⁶ For this section to apply, the transaction in question must be within the interstate or foreign commerce of the United States and the intended beneficiary of the letter must be a United States person.⁷⁷

Title II's applicability is limited only to transactions "in the interstate or foreign commerce of the United States."⁷⁸ All exports from, and imports to the United States are considered as activities in the United States commerce. Also included is action by a foreign subsidiary or affiliate of a United States company when so directed by the American parent.⁷⁹ United States commerce further includes activities between foreign firms and firms which are controlled in fact⁸⁰ by American firms.⁸¹

A foreign firm's purchase of goods from its American parent is considered within United States commerce in the following situations: (1) if the goods were purchased to fill a specific order from a person in the boycotting country;⁸² (2) if the goods were acquired for incorporation into a product pursuant to a specific order from a boycotting country;⁸³ (3) if the goods are ultimately used to fulfill an order from a boycotting country, regardless of whether they are to fill a specific order or whether they were originally intended for that purpose.⁸⁴ But

⁷³S. REP. NO. 95-104, *supra* note 28, at 40.

⁷⁴For a description of what letters-of-credit are and how they operate to finance exports, see Note, *Financing Exports: Private Methods and Public Assistance*, 2 N.C.J. INT'L L. & COM. REG. 59 (1977).

⁷⁵Pub. L. No. 95-52, Title II, § 201 4A(a)(1)(F) (to be codified in 50 U.S.C. § 2403-1a).

⁷⁶S. REP. NO. 95-104, *supra* note 28, at 42.

⁷⁷*Id.* at 41. The report contains some perplexing language: "(I)f a bank cannot determine whether a German company, which may be a subsidiary of a U.S. company, is a 'U.S. person' for purposes of the bill, or, having resolved that question, is unable to determine whether the transaction to which the credit relates involved U.S. commerce, it will have no choice but to reduce the business. Such would be both unfair and inconsistent with the intended scope and reach of the bill." It is unclear from this passage what result is unfair and inconsistent.

⁷⁸Pub. L. No. 95-52, Title II, § 201 4A(a)(1) (to be codified in 50 U.S.C. § 2403-1a).

⁷⁹42 Fed. Reg. 48,560 (1977) (to be codified in 15 C.F.R. § 369.1(d)(2)).

⁸⁰For a definition of "controlled in fact," see text accompanying notes 90-94 *infra*.

⁸¹*Id.* (to be codified in 15 C.F.R. § 369.1(d)(3), (4) and (5)).

⁸²*Id.* (to be codified in 15 C.F.R. § 369.1(d)(5)(ii)).

⁸³*Id.* (to be codified in 15 C.F.R. § 369.1(d)(5)(iii)).

⁸⁴*Id.* (to be codified in 15 C.F.R. § 369.1(d)(5)(v)). This provision is more comprehensive than the others and includes many of them. Perhaps it is here for emphasis.

if the purchased material is used in the subsequent manufacture of another product, not pursuant to a specific order, the transaction is not within United States commerce.⁸⁵

If a foreign owned company operating outside the United States has a contract to construct a building in a boycotting country, an American engineering firm's supplying of consulting services to the foreign company is an activity within United States commerce, despite the foreign firm's freedom from the restraints of Title II.⁸⁶

Title II's applicability is further limited to transactions involving United States persons.⁸⁷ A United States person is partially defined as "any permanent foreign establishment,"⁸⁸ described as a foreign concern which is licensed or registered, or is doing business, in any state in the United States.⁸⁹

A United States person is also partially defined as a foreign subsidiary or affiliate of a domestic concern which is "controlled in fact" by that domestic concern.⁹⁰ A foreign affiliate or subsidiary will be deemed controlled in fact when any of the following conditions is met: (1) if more than fifty percent of the outstanding voting securities of the foreign affiliate are owned by the American domestic company; (2) if the United States firm controls the foreign firm through an exclusive management contract; (3) if a majority of the board of directors of a foreign firm are also members of the comparable governing body of the American company.⁹¹ A presumption of controlled in fact arises when more than twenty-five percent of the foreign firm's outstanding voting securities are owned or controlled by the American parent, or when the American parent has the authority to appoint the majority of the board of directors of the foreign firm.⁹² This presumption is rebuttable by competent evidence.⁹³

⁸⁵*Id.* (to be codified in 15 C.F.R. § 369.1(d)(7)). Presumably, therefore, a foreign subsidiary can import goods from a U.S. person and use them with impunity to manufacture another. As long as there is no specific order all is legal in the above transaction. The distinction is between resale of the product whole, and resale of the product as incorporated into another. It appears to serve no real purpose and will result in foreign subsidiaries buying foreign. Transactions between foreign subsidiaries and non-U. S. persons never come within U. S. commerce.

⁸⁶42 Fed. Reg. 48,560 (1977) (to be codified in 15 C.F.R. § 369.1(d), Examples of Activities in the Interstate or Foreign Commerce of the United States, United States Person in the United States, example (iv)). This could cause problems. Suppose, for example, the foreign firm's construction contract is under a boycott request. Whether the American company automatically violates Title II by supplying consulting services — regardless of whether its contract with the foreign firm is boycott free and whether it knew of the boycott provisions of the master contract — is not answered.

⁸⁷Pub. L. No. 95-52, Title II, § 204 11(1) and (2) (to be codified in 50 U.S.C. § 2410).

⁸⁸*Id.*

⁸⁹42 Fed. Reg. 48,559 (1977) (to be codified in 15 C.F.R. § 369.1(b)(iv)).

⁹⁰Pub. L. No. 95-52, Title II, § 204 11(2) (to be codified in 50 U.S.C. § 2410).

⁹¹42 Fed. Reg. 48,559 (1977) (to be codified in 15 C.F.R. § 369.1(c)(2)).

⁹²*Id.* (to be codified in 15 C.F.R. § 369.1(c)(4)).

⁹³*Id.*

A foreign incorporated company is deemed controlled in fact by an American company if it is fifty-one percent or more controlled by another foreign corporation which itself is fifty-one percent or more controlled by the American company.⁹⁴ This is a broad extension of the controlled in fact definition.

Title II has many exceptions listing activities that are not punishable. These are perhaps the most controversial aspects of the law.

For example, section 4A(a)(2)(A) permits compliance with the boycotting country's requirements concerning imports from the boycotted country.⁹⁵ It also permits compliance with exporting requirements of the boycotting country regarding exports to the boycotted country.⁹⁶

Subsection (B) permits compliance with import and shipping document requirements with respect to the origin of the goods in question.⁹⁷ A year after enactment of these amendments, any information given under this section may not be stated in negative terms.⁹⁸ For the Arabs, this means that after June 22, 1978, they must be satisfied with certifications that state "Made in the United States" instead of ones that state "Not Made in Israel."⁹⁹

A distinction is made between requirements pursuant to a law of the boycotting country, and requirements pursuant to a contract between the American company and the boycotting country. In the former, if the law requires that all shipments into the country must be accompanied by a certificate showing that the goods did not originate in the boycotted country, an American company may not comply after June 22, 1978.¹⁰⁰ But if the request is a part of a contract, the American company may comply indefinitely because this "contractual requirement . . . constitutes an import document requirement."¹⁰¹

Subsection (C) is one of the most controversial exceptions.¹⁰² It allows Americans to comply with the unilateral selection of the boycot-

⁹⁴*Id.* (to be codified in 15 C.F.R. § 369.1(c)(5), Examples of "Controlled in Fact," example (viii)).

⁹⁵Pub. L. No. 95-52, Title II, § 201 4A(a)(2)(A) (to be codified in 50 U.S.C. app. § 2403-1a).

⁹⁶*Id.*

⁹⁷Pub. L. No. 95-52, Title II, § 201 4A(a)(2)(B) (to be codified in 50 U.S.C. app. § 2403-1a).

⁹⁸*Id.*

⁹⁹S. REP. NO. 95-104, *supra* note 28, at 43.

¹⁰⁰42 Fed. Reg. 48,568 (1977) (to be codified in 15 C.F.R. § 369.3(c)(4), Examples of Compliance with Import and Shipping Document Requirements, example (iii)).

¹⁰¹*Id.* (to be codified in 15 C.F.R. § 369.3(c)(4), Examples of Compliance with Import and Shipping Document Requirements, example (iv)). Even if there is a law, the boycotting country may still compel compliance by inserting the request into the contract.

¹⁰²*See e.g.*, 123 CONG. REC. S7149-50 (daily ed. May 5, 1977) (remarks of Sen. Brooke); *id.* at S7153 (remarks of Sen. Heinz); *id.* at S7155 (remarks of Sen. Javits); 123 CONG. REC. H3269 (daily ed. April 20, 1977) (remarks of Rep. Whalen); *id.* at H3272 (remarks of Rep. Lagomarsino); *id.* at 3277 (remarks of Rep. Wirth).

ting country, in the "normal course of business," of the goods and services for import into the boycotting country when such goods or services are in the "normal course of business... identifiable by source."¹⁰³

The exception is available only if the selection is truly unilateral, i.e., made by a resident or national of a boycotting country.¹⁰⁴ A United States person may qualify as a bona fide resident of a boycotting country.¹⁰⁵

Goods identifiable by source in the normal course of business are those labeled by a trademark, trade name, symbol or other identification normally on the product, or those which may be identified by their unique packaging or design.¹⁰⁶

All discretion for the selection must rest with the boycotting country resident. Compliance is not permitted with selections stated in negative terms.¹⁰⁷ Thus, a firm may not comply if the boycotter states that it will take a component part from any company except those from a certain list. However, an American firm can submit a list of potential sub-contractors, including its recommendations, so long as its list and recommendations are not boycott based.¹⁰⁸

If all the requirements are met, an American can comply with the unilateral selection even if he knows it is boycott based.¹⁰⁹ However, a later section of Title II, 4A(a)(3), states that compliance is not permitted if made in contravention of the prohibitions against religious discrimination.¹¹⁰ An American company would violate Title II if the Arab importer with which it is dealing unilaterally selects firm A, a non-Jewish firm, to supply the component parts, and the American company complies with the request when firm B, a Jewish firm, normally supplies its component parts.¹¹¹

¹⁰³Pub. L. No. 95-52, Title II, § 201 4A(a)(2)(C) (to be codified in 50 U.S.C. app. § 2403-1a).

¹⁰⁴42 Fed. Reg. 48,569 (1977) (to be codified in 15 C.F.R. § 369.3(d)(5)).

¹⁰⁵For a definition of "resident," see text accompanying notes 117-19 *infra*.

¹⁰⁶42 Fed. Reg. 48,569 (1977) (to be codified in 15 C.F.R. § 369.3(d)(10)).

¹⁰⁷S. REP. NO. 95-104, *supra* note 28, at 43-44.

¹⁰⁸If an American company did not include on a list any blacklisted firms, theoretically a presumption of boycott based selections could arise. Much, of course, depends on the facts of the particular case, such as whether qualified blacklisted firms were excluded, whether unqualified non-blacklisted firms were included, and whether qualified non-blacklisted firms were excluded. These are all factors which could be considered in resolving this situation.

¹⁰⁹42 Fed. Reg. 48,565 (1977) (to be codified in 15 C.F.R. § 369.3(d)(11)).

¹¹⁰Pub. L. No. 95-52, Title II, § 201 4A(a)(3) (to be codified in 50 U.S.C. app. § 2403-1a).

¹¹¹S. REP. NO. 95-104, *supra* note 28, at 47. The exact language of the report is as follows: "For example, assume a U.S. seller, who would normally use components made by X, receives an order from a boycotting country designating that the components are to be supplied by Y instead because X is Jewish and dealings with Jews are prohibited under that country's boycott policy. In that circumstance, the U.S. seller could not comply." If the Arab nation states specifically that it wants Y's products

With respect to services, the exception is available only when the services are to be performed in the boycotting country. Thus if an American tractor company receives an otherwise valid unilateral selection requesting that the tractors' engines be designed by a non-blacklisted firm, the American company will not be permitted to comply because "in the normal course of business, the services will not be performed" in the boycotting country.¹¹²

The Senate Committee report accompanying the Senate version of Title II called this exception a "necessary, but limited, bow to reality."¹¹³

Subsection (E) permits compliance with passport and immigration requirements of the boycotting country.¹¹⁴ It thus allows Arab nations to force American companies not to send Jewish people to work in Arab lands.¹¹⁵ The section is aimed at permitting an individual to comply and does not allow American employers in the boycotting country to submit lists of prospective employees when the lists are to be used to screen individuals for boycott reasons.¹¹⁶

because X is Jewish, then the American seller is and should be forbidden from complying.

However, an Arab country may have legitimate business reasons for wanting Y's product unrelated to Y's or X's religious affiliation. One can infer from the Senate language that anytime a company chooses a non-Jewish firm pursuant to an Arab request when the company usually deals with a Jewish firm, a presumption of discrimination arises. Whether this was Congress' intent is unclear.

The original House bill, H5840, contained as part of the entire 4A(a)(2)(C) exception the following: "except that this exception shall not apply in any case in which the United States has actual knowledge that the sole purpose of the designation is to implement the boycott." H5840, 95th Cong., 1st Sess., 1977. The enacted law does not contain this language, and one could draw a negative inference that scienter of religious discrimination is not necessary. However, as mentioned earlier, this could hardly have been Congress' intent since the intent to further the boycott is missing in the absence of scienter.

¹¹²42 Fed. Reg. 48,569 (1977) (to be codified in 15 C.F.R. § 369.3(d)(8). 15 C.F.R. § 369.3(d), Examples of Permissible Compliance With a Unilateral Selection, Suppliers of Services, example (v)).

¹¹³S. REP. NO. 95-104, *supra* note 28, at 44. The Arab nations could still expect compliance with their boycott, albeit in an indirect way, by making all their unilateral selections boycott based. American companies will therefore, notwithstanding Title II, feel the effects of the boycott.

¹¹⁴Pub. L. No. 95-52, Title II, § 201 4A(a)(2)(E) (to be codified in 50 U.S.C. app. § 2403-1a).

¹¹⁵Although not expressly stated, this inference seems to be a fair and logical one. Limitations as to this effect are, however, set out. See note 116 *infra*, and accompanying text.

¹¹⁶S. REP. NO. 95-104, *supra* note 28, at 45. "[T]his amendment is intended to permit a U.S. firm to proceed with a project in a boycotting country even if certain of its employees are denied entry for boycott reasons. However, this provision does not mean that employees may be selected in advance in a manner designed to comply with a boycott." But the amendment really does mean that "employees may be selected in advance in a manner designed to comply with a boycott." An employer, in choosing employees for work abroad, will not choose people who are *persona non grata* to the host country. If he knows that Jews will be denied visas by Saudi Arabia, for example, it would be against business interests to include Jews on the list of prospec-

Subsection (F) allows compliance by American residents of the boycotting country with the local laws of that country.¹¹⁷ It is applicable only to bona fide residents of the country. To be classified as a bona fide resident, the United States person must have legitimate business reasons for being in the foreign country and must intend to maintain the continuity of the residency.¹¹⁸ A United States person attempting for legitimate business reasons to establish residency in a boycotting country may furnish boycott related information pursuant to its quest for residency.¹¹⁹ At no time, however, may a United States resident in the boycotting country discriminate against another United States person on the basis of race, religion, sex or national origin.¹²⁰

As the exception applies only to the United States person's activities exclusively within his resident country,¹²¹ it therefore does not apply to imports of any kind, regardless of whether the United States person is a bona fide resident.¹²² But if the activity is exclusively within the boycotting country, the exception is available to both individuals buying for personal reasons and companies or banks buying for business reasons.¹²³

There is an interesting and unusual aspect to this compliance with local law exception. According to the Commerce Department regulations, it will be "continually reviewed and carefully scrutinized" in order to ensure compliance with the law while trying at the same time to "avoid serious adverse economic . . . [as well as] political consequences for the United States . . ."¹²⁴

tive employees. But this section prevents him from excluding them. To feign compliance with the Act, then, the employer will add Jews to the list with the knowledge that they will be rejected and that he will have to select others. This is one example of where myopia to practical reality is manifested in Title II.

¹¹⁷Pub. L. No. 95-52, Title II, § 201 4A(a)(2)(F) (to be codified in 50 U.S.C. app. § 2403-1a).

¹¹⁸42 Fed. Reg. 48,572 (1977) (to be codified in 15 C.F.R. § 369.3(g)(4)). This could raise problems any time an American company opens a branch office in a boycotting country, especially if it is not accompanied by some evidence of long-range intent.

¹¹⁹*Id.* (to be codified in 15 C.F.R. § 369.3(g), Examples of Permissible Compliance With Local Law With Respect to Activities Exclusively Within a Foreign Country, United States Person Resident in a Foreign Country, example (iv)).

¹²⁰*Id.* (to be codified in 15 C.F.R. § 369.3(g)(6)).

¹²¹*Id.* (to be codified in 15 C.F.R. § 369.3(g)(2)).

¹²²*Id.* (to be codified in 15 C.F.R. § 369.3(g), Examples of Permissible Compliance With Local Law With Respect to Activities Exclusively Within a Foreign Country, United States Person Resident in a Foreign Country, example (ii)). Therefore if the choice of sellers is boycott based, the American company violates Title II.

¹²³S. REP. NO. 95-104, *supra* note 28, at 45.

¹²⁴42 Fed. Reg. 48,573-74 (1977) (to be codified in 15 C.F.R. § 369.3(g)(8)). Perhaps by negative implication this means that the other exceptions will not be so continually reviewed or carefully scrutinized.

Congressional attitude toward this exception was belabored and cautious. See 123 CONG. REC. S7149-50 (daily ed. May 5, 1977) (remarks of Sen. Brooke); *id.* at S7150 (remarks of Sen. Proxmire); *id.* at S7153 (remarks of Sen. Heinz).

In an attempt to control noncompliance with the Act, Congress included an evasion clause to Title II which stated that any person who engages in an activity "with intent to evade the provisions of this Act" shall be guilty of violation of Title II.¹²⁵ Thus, if a corporation normally does not include in its annual report a list of the countries in which it does business, but puts in this information and gives the report to the boycotting country, this action, absent some legitimate business reason¹²⁶ is an evasion and hence a violation of Title II.¹²⁷ Likewise, if a company normally does not put an identification on its products but does so pursuant to a unilateral selection by a boycotting country resident, it violates Title II.¹²⁸

For contracts and other agreements entered into prior to May 16, 1977,¹²⁹ a grace period is provided before Title II becomes effective.¹³⁰ The grace period expires December 31, 1978, but it may, at the discretion of the Secretary of Commerce, be extended.¹³¹

Firms receiving boycott requests are required to report these to the Secretary of Commerce and to indicate whether they intend to comply with the request.¹³²

A company which violates Title II is subject to a fine, to have its export license suspended or revoked, or it may have administrative sanctions imposed against it.¹³³

¹²⁵Pub. L. No. 95-52, Title II, § 201 4A(a)(6) (to be codified in 50 U.S.C. § 2403-1a).

¹²⁶The language of this passage creates a conflict between what could be a bona fide business purpose and activity proscribed by the Act. For example, a corporation could argue here that a legitimate business purpose for this action was the corporation's desire to get off the blacklist and increase trade with the boycotting country. Logical as it may be, this argument contravenes both the spirit and letter of the law.

¹²⁷42 Fed. Reg. 48,575 (1977) (to be codified in 15 C.F.R. § 369.4, example (i)).

¹²⁸*Id.* (to be codified in 15 C.F.R. § 369.4, example (ii)). It is unclear whether both companies are in violation; clearly the one asking for the change is, but presumably the receiver would be also if it had the requisite intent.

¹²⁹This provision may work a hardship on those entering into contracts between May 16 and June 22. The grace period does not apply to these contracts, and when they were executed, it was not illegal to include boycott provisions. If such parties cannot re-negotiate their now tainted contracts, they are confronted with a Hobson's choice: (1) continue under the old contract but in violation of Title II, or (2) unilaterally renounce their obligations under the old contract.

If the party renounces the contract, ordinary contract principles would not afford the aggrieved party with a right to damages for the breach. Congress was either not aware of, or chose to ignore, this problem. *See* 123 CONG. REC. H3295 (daily ed. April 20, 1977) (remarks of Rep. Findley).

¹³⁰Pub. L. No. 95-52, Title II, § 201 4A(b)(2) (to be codified in 50 U.S.C. § 2403-1a).

¹³¹*Id.* The Secretary of Commerce is given wide discretion in extending the grace period.

¹³²Pub. L. No. 95-52, Title II, § 201 4A(b)(2) (to be codified in 50 U.S.C. § 2403-1a).

According to an undated Anti-Defamation League *Memorandum Concerning Constitutional Implications of Anti-Boycott Proposals* (reprinted in *Morgan Hearings*, *supra* note 25, at 718), an individual who complies with the request will be protected by the 5th Amendment against self-incrimination from reporting compliance, but a corporation has no such protection.

¹³³Pub. L. No. 95-52, Title II, § 203(a) (to be codified in 50 U.S.C. § 2407).

Finally, Title II pre-empts any state statute which "pertains to . . . compliance with . . . restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries."¹³⁴

Effects of Title II

Title II's effect on American trade with the Middle East and on American foreign relations will turn largely on the response of the Arab nations. It is safe to postulate that the Act is not likely to cause the Arabs to abandon their boycott.¹³⁵ Despite the ambiguity which attends any premonition in this field, certain aspects of the law can be highlighted.

An American company receiving a boycott request will be forbidden by Title II from complying.¹³⁶ The Arab boycott rules state that any company which refuses to comply with a request is subject to blacklisting.¹³⁷ Therefore *all* Americans receiving boycott-tainted business offers from Arab countries will be subject to blacklisting. The Arabs may compromise their own principles by not including boycott requests in offers to American companies, or by overlooking non-compliance. On the other hand, they may, as a means of punishing American companies, deal only with those whose products they could not buy in comparable quality or price from another competitor and reject all others.¹³⁸ Should this happen, American trade with Arab nations will

¹³⁴*Id.* § 205 (to be codified in 50 U.S.C. § 2403-1a). Thus far, at least seven states — New York, Illinois, Massachusetts, California, Ohio, Maryland and North Carolina — have passed anti-boycott statutes. The Act pre-empts only those statutes aimed at preventing compliance with foreign boycotts; presumable statutes which deal solely with discrimination are not pre-empted.

For a discussion of the constitutional factors involved in the New York statute outside the Title II pre-emption, see Comment, *The Arab Boycott and State Law: The New York Anti-Boycott Statute*, 18 HARV. INT'L L.J. 343 (1977). The author concluded that the New York law would be declared unconstitutional.

¹³⁵The Arab boycott of Israel is grounded in the deep-rooted conflict in the Middle East, and is not likely to end until there is an overall settlement. In Title II, according to one Congressman who considered the House bill "peculiar," "[w]e are trying to reduce or to harness a religious prejudice which has existed for almost 2000 years between the Arab world and the Jewish world." 123 CONG. REC. H3281 (daily ed. April 20, 1977) (remarks of Rep. Ryan).

¹³⁶See text accompanying notes 45-77, *supra*.

¹³⁷See text accompanying note 16, *supra*.

¹³⁸Perhaps the single most crucial debate on the effects of the legislation centered around the question of how much do the Arabs want American goods. There is no doubt that American business has a lot to lose in Arab trade. United States trade with Arab nations jumped from \$1.1 billion in 1975, to \$6.0 billion in 1976 and is expected to reach \$10 billion by 1980. N.Y. Times, June 23, 1977, Sec. D at 1, col. 4.

Jack Carlson, chief economist of the U. S. Department of Commerce predicted that large multinational companies will suffer little from Title II, but that small exporters, without the resources and expertise to comply with the law, will be hardest hit. *Id.* at 7, col. 5.

Mohammed Magoub (see note 14), chief of the Arab League's boycott commission, said that American firms complying with the law will be denied trade with and access to raw materials of the Arab boycotting nations. *Id.* at 7, col. 6.

be virtually dictated unilaterally by the Arabs. Companies which offer only an "average" product, but who have built up a business rapport enabling them to capture a good portion of the Arab market, may suffer business setbacks as a result of Title II.

Title II will also penalize the firm which states in the boycott questionnaire that it does not do business with Israel not because of boycott pressure, but for legitimate business reasons. If the United States loses business because of Title II, a negative impact on domestic employment is imminent.¹³⁹

Congress in enacting Title II was not unaware of these possible effects.¹⁴⁰ American compliance with the boycott presented overriding moral issues,¹⁴¹ and Congress took the position that "maintaining our principles and the integrity of our conduct is worth the cost that will ensue."¹⁴²

Title II's effects on American foreign relations with Middle Eastern states presents issues beyond the scope of this note.¹⁴³ The Arabs may take umbrage with it, and become more resistant to American peace feelers. The Act may be perceived as a gratuitous affront to Arab sympathies, making the United States less trustworthy.¹⁴⁴ Given the Carter administration's expressed desire to follow an even-handed policy in the Middle East, exemplified by a proposal that the Palestinians be included in a peace conference, it is not absolutely clear that Title II will anger the Arabs to any great extent.¹⁴⁵

The question remains: do the benefits to be gained from Title II outweigh the potential problems it raises? It is true, as the Ford administration argued, that action had been taken within preexisting law to curb compliance with the most invidious aspects of the boycott.¹⁴⁶ Yet principles of American democracy are concerned with

¹³⁹How many jobs would be lost depends, of course, on the volume of business that is lost. It is interesting that George Meany, President of the AFL-CIO, and a man who would naturally be concerned about any legislation that might entail loss of jobs, supported the passage of Title II. 123 CONG. REC. H32681 (daily ed. April 20, 1977) (remarks of Rep. Bingham).

¹⁴⁰See *Id.* at H3268 (remarks of Rep. Bingham); *id.* at H3274-5 (remarks of Rep. Michel).

¹⁴¹In his foreign policy debate with President Ford in October 1976, Mr. Carter said that the boycott "is not a matter of diplomacy in trade with me. It's a matter of morality." *Id.* at H3277.

¹⁴²*Id.* at S7151 (daily ed. May 5, 1977) (remarks of Sen. Heinz).

¹⁴³Representative Hamilton pointed out that Secretary of State Vance had said that "carefully directed legislation and diplomatic action can protect our political and economic interests in the Middle East." *Id.* at H3274 (daily ed. April 20, 1977).

¹⁴⁴According to one Ford administration official, some Arab nations have become "concerned at what they have seen as a deliberate attack or campaign against them." *Morgan Hearings*, *supra* note 25, at 24 (remarks of Sidney Sober, Deputy Assistant Secretary for Near East and South Asian Affairs, Department of State).

¹⁴⁵The Ford administration's predictions about the negative effect of anti-boycott law on American foreign policy may have been intended to thwart legislation. If the Arabs react to Title II, it is more likely to be an economic response than a political one.

¹⁴⁶Testimony of William Simon, *Morgan Hearings*, *supra* note 25 at 42-3.

something less than the most invidious. As a declaration of morality in the international community, Title II was necessary.¹⁴⁷

Conclusion

Title II was devised to resolve a conflict between pursuit of morals and of economic gain. It declares morals the victor. The true measure of victory resides in the extent to which Title II is enforced. In an attempt to compromise competing interests, the Act has left substantial ambiguities.

¹⁴⁷See text accompanying note 24 *supra*. It can be argued that under this section the Secretary of Commerce was empowered to do everything to effectuate the same purpose of Title II, but without the added possibility of antagonizing the Arab nations with legislation. In § 3(5) of the EEA of 1969, 50 U.S.C. § 2402(5) (1977), Congress declared that "it is the policy of the United States . . . (B) to encourage and request domestic concerns engaged in the export of articles . . . to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the . . . boycotts . . . imposed by any foreign country against another country friendly to the United States . . ." "Encourage and request" does not mean the same thing as "prohibit," yet the policy reasons are the same. Had a Secretary of Commerce by the authority vested in him by 50 U.S.C. § 2403(a)(1) — allowing him to "exercise such controls . . . as he determines are necessary to facilitate and effectuate implementation of the policy set forth in this Act" — promulgated regulations with the same effect as Title II has now, would that have been a usurpation of power? Technically it would not, though the question is now moot. This, however, would support the argument that Title II is unnecessary and serves only to put the United States in an embarrassing position.

Addendum

The Commerce Department has issued final regulations concerning the scope and implementation of Title II.¹ In several areas the final regulations differ significantly from the proposed version. The proposed regulations stated that a foreign subsidiary of an American company would be conclusively presumed controlled in fact if one of a number of conditions were true.² The final regulations declare that no presumptions are conclusive, that all are rebuttable by competent evidence.³ The final regulations also state that the presumption arises if the American parent has the authority to appoint the chief operating officer of the foreign subsidiary.⁴

The proposed regulations stated that if any particular facet of a transaction was within United States commerce, the entire transaction was within United States commerce.⁵ The final ones make an allowance for a transaction of a foreign subsidiary when the American parent furnishes only "ancillary services" to the subsidiary. For example, if U.S. company A's corporate counsel provides legal advice to company B, a controlled foreign subsidiary of A, concerning the applicability of Title II to B's transactions, B's activities do not as a result of this advice automatically come within the scope of U.S. commerce, even though A's providing the advice is an action within U.S. commerce.⁶ Similarly, if A provided B with legal services in connection with B's contract in a boycotting country, B's contract

¹The Commerce Department in September 1977 issued proposed regulations and invited comment on them. These final regulations take into account the comments and criticisms of the proposed regulations.

²See notes 90-91 of main Note and accompanying text.

³43 Fed. Reg. 3513 (1977) (to be codified in 15 C.F.R. § 369.1(c)(2)). The Commerce Department made the changes in response to criticisms that "[c]onclusive presumptions leave no scope for the wide variety of factors which bear on the question of control."

"Control in fact consists of the authority or ability to establish a subsidiary's or affiliate's general policies or control its day-to-day operations [and] [i]f it is possible . . . to own well over 50% of a foreign subsidiary's voting securities and not possess effective control [since] [c]ontrol in practice does not necessarily require ownership of a particular proportion of a subsidiary's voting securities." *Id.* at 3508 (to be codified in 15 C.F.R. § 369 Discussion of Comments; "Controlled in fact").

⁴*Id.* at 3513 (to be codified in 15 C.F.R. § 369.1(c)(2)(vi)). "[This] power presumes the authority or ability to control the subsidiary's . . . day-to-day operations." *Id.* at 3508 (to be codified in 15 C.F.R. § 369 Discussion of Comments; "Controlled in fact")

⁵This issue was never discussed specifically in the main Note, but see note 86 and accompanying text.

⁶43 Fed. Reg. 3516 (1977) (to be codified in 15 C.F.R. § 369.1 Examples of Activities in the Interstate or Foreign Commerce of the United States; Foreign Subsidiaries, Affiliates and other Permanent Foreign Establishments of Domestic Concerns, example (xi)).

would not come within U.S. commerce as a result of this advice, even though A's provision of the advice is within U.S. commerce.⁷

However, to come within this limited exception, the ancillary services must be provided directly to the foreign subsidiary and may not be part of the services ultimately provided to the subsidiary's client. Thus, if company A in the above example guaranteed B's performance of the contract B had with the boycotting country, B's contract would be in U.S. commerce.⁸ Likewise if A provided B with engineering services in connection with B's contract.⁹

The proposed regulations stated that action by a controlled foreign subsidiary was in U.S. commerce if ordered or directed by the American parent.¹⁰ The final regulations state that even though the order itself is in U.S. commerce, in and of itself it does not bring the underlying activities of the foreign subsidiary within the ambit of U.S. commerce.¹¹

⁷*Id.* (to be codified in *Id.*, example (xiii)).

⁸*Id.* (to be codified in *Id.*, example (xiv)).

⁹*Id.* (to be codified in *Id.*, example (xii)). The difference between these last two examples and the first two is that in the latter, A's services are not considered ancillary because they are part of the services ultimately provided to the boycotting country.

The Commerce Department's rationale for this exception was that "[a] rule which discourages the use of U.S.-source ancillary services would have little if any positive anti-boycott effect. Indeed it could have adverse anti-boycott consequences by driving U.S.-controlled foreign subsidiaries into the hands of foreign companies which have little if any compunction about complying with foreign boycotts opposed by the United States." *Id.* at 3409 (to be codified in 15 C.F.R. § 369 Discussions of Comments; Activities in the interstate and foreign commerce of the United States, ancillary services).

In a sense this exception defeats the spirit of Title II since it permits a controlled foreign subsidiary of a U.S. company to engage in transactions which if considered within U.S. commerce would be violations of Title II. The contrary rule, however, might be an impermissible extension of the concept of U.S. commerce. See note 11 of this addendum, *infra*.

¹⁰See note 79 of main Note and accompanying text.

¹¹43 Fed. Reg. 3514 (1977) (to be codified in 15 C.F.R. §369.1(d)(2)). "From the point of view of U.S. anti-boycott policy, this distinction is immaterial [since] jurisdiction over the person making the specific direction is sufficient to accomplish the anti-boycott objectives of the statute. From the point of view of conformity with permissible notions of U.S. commerce, this distinction is essential." *Id.* at 3509 (to be codified in 15 C.F.R. § 369 Discussion of Comments; Activities in the interstate and foreign commerce of the United States, Directions to a foreign subsidiary).

The final regulations do not specifically say that the underlying activities of a foreign subsidiary are outside U.S. commerce when those activities are directed by the American parent. See generally *id.* at 3514 (to be codified in 15 C.F.R. § 369.1(c)(1) to (15)) Only the Commerce Department's discussions of comments make that distinction. *Id.* at 3509 (to be codified in 15 C.F.R. § 369 Discussions of Comments; Activities in the interstate and foreign commerce of the United States, Direction to a foreign subsidiary) ("In and of themselves . . . [t]he activities of a U.S. parent corporation in specifically directing prohibited boycott compliance by its controlled foreign subsidiary . . . do not bring into U.S. commerce activities which are otherwise wholly outside U.S. commerce.")

With respect to the exception for unilateral selection,¹² the final regulations state that any pre-selection services a United States person might provide a boycotting country, such as submission of a list of prospective sub-contractors, must be "of the type customarily provided in similar transactions by the firm (or industry of which the firm is a part) as measured by practices in non-boycotting as well as boycotting countries."¹³

The final regulations impose an identical limitation on the provision of services that are to be performed in the boycotting country.¹⁴ Services to be performed within the boycotting country are those "customarily . . . performed by suppliers of those services within the country of the recipient of those services" An additional requirement is that a portion of the services to be performed in the boycotting country must be a "necessary and not insignificant part of the total services performed."¹⁵

The final regulations limit the availability of the exception for compliance with local law. The proposed regulations interpreted the phrase "for his own use, including the performance of contractual services" to include goods imported for turnkey and general retailing operations.¹⁶ The final ones restrict the definition of the phrase to include only goods that are to be further manufactured or incorporated or reprocessed into another product.¹⁷ That is, if the goods are to be

¹²See notes 102-13 of main Note and accompanying text.

¹³43 Fed. Reg. 3527 (1977) (to be codified in 15 C.F.R. §369.3(b)(6)). "If such services are not customarily provided in similar transactions, [they] may not be provided without destroying the unilateral character of any subsequent selection." *Id.* (to be codified in *Id.*) The proposed regulations contained no such limitation. See note 108 of main Note and accompanying text.

According to the Commerce Department, "[t]hese additional constraints are imposed in the final regulations in order to ensure that pre-selection services are not used as a device to facilitate boycott-based decisions by boycotting buyers." 43 Fed. Reg. 3510 (1977) (to be codified in 15 C.F.R. §369 Discussions of Comments; Unilateral selection, Pre-selection services).

A strict reading of the final regulations leads to the conclusion that an American company would violate Title II even if it provides a non-boycott related pre-selection service to a boycotting country if that service is not "customarily provided in similar transactions." However, the American company in this situation may not have the requisite intent to a finding of a Title II violation. Nevertheless, the additional limitation could have the effect of stifling innovations and initiative in the expansion of services to customers.

¹⁴See note 112 of main Note and accompanying text.

¹⁵43 Fed. Reg. 3527 (1977) (to be codified in 15 C.F.R. §369.3(b)(14)). "These constraints will permit use of the exception for the selection of suppliers of services which in good faith must be performed within the boycotting country while ensuring that it is not used as a mechanism for unrestrained compliance with foreign boycotts in the selection of suppliers of services." *Id.* at 3510 (to be codified in 15 C.F.R. §369 Discussions of Comments; Unilateral selection, Services to be performed within the boycotting country).

¹⁶See notes 117-24 of main wnote and accompanying text.

¹⁷43 Fed. Reg. 3533 (1977) (to be codified in 15 C.F.R. § 369.3(f-2)(6)(iv)).

resold as are, or are for the purpose of filling an order from someone else, they are excluded.¹⁸ Also, the goods must be of a nature that are customarily further manufactured, incorporated or reprocessed into another product.¹⁹

This exception is available only with respect to the importing of goods. Specifically excluded is the importing of services.²⁰

The final regulations state, as did the proposed, that the exception for compliance with local law will be "monitored and continually reviewed to determine whether its continued availability is consistent with the national interest."²¹

The proposed regulations stated that a risk-of-loss provision in a contract was not per se a prohibited refusal to do business.²² The final regulations state that if the risk-of-loss provision is an "artifice, device or scheme . . . intended to place a person at a commercial disadvantage . . . because he is blacklisted or otherwise restricted for boycott reasons from having a business relationship with or in a boycotting country," the company demanding such a provision violates Title II.²³ Institution of risk-of-loss provisions after the effective date of the final

¹⁸*Id.* (to be codified in *Id.*, (f-2)(7)). If, for example, an American company which qualifies as a bona fide resident of a boycotting country has a contract to build an office building in that country, it may import light fixtures, wallboard and office partitions from non-blacklisted firms without violating Title II. *Id.* at 3534 (to be codified in 15 C.F.R. §369.3 (f-2) Examples of Permissible Compliance with Local Import Law, Imports for U.S. Person's Own Use, example (vi)). It may not, however, import desks, chairs or typewriters from non-blacklisted firms without violating Title II. *Id.* (to be codified in *Id.*) The difference is that the former are to be further incorporated into another product.

¹⁹*Id.*, at 3533 (to be codified in *Id.*, (f-2)(7)). "These limitations are intended to ensure that this exception is not utilized for import transactions which are akin to import for resale operations." *Id.* at 3511 (to be codified in 15 C.F.R. §369 Discussions of Comments; Compliance with Local Law, "For his own use, including the performance of contractual services").

²⁰*Id.* at 3533 (to be codified in 15 C.F.R. §369.3(f-2)(8)). "[T]he language of the statute is simply not susceptible of such a construction . . . to bring services within this exception. Congress . . . could have . . . made express reference to services . . . under this provision . . . but did not [as it did] with the exceptions for unilateral selection and compliance with import requirements." *Id.* at 3511 (to be codified in 15 C.F.R. §369 Discussions of Comments; Compliance with Local Law, Importation of Services).

²¹*Id.* at 3533 (to be codified in 15 C.F.R. §369.3(f-2)(9)). For discussion of this language, see note 124 of the principal discussion and its accompanying text. The final regulations say that the availability of this exception "may be limited or withdrawn as appropriate." *Id.* (to be codified in *Id.*). The Commerce Department is concerned with the effect this exception might have on "economic and other relations of the United States with boycotting countries." *Id.* (to be codified in *Id.*).

"Congress intended this exception not as an avenue for general boycott compliance but rather as a means to permit limited boycott compliance by U.S. persons resident in a boycotting country." *Id.* at 3511 (to be codified in 15 C.F.R. §369 Discussions of Comments; Compliance with Local Law, Scope of the Exception).

²²See generally notes 47-57 *supra* and accompanying text.

²³43 Fed. Reg. 3534 (1977) (to be codified in 15 C.F.R. §369.4(c)). This action is considered an evasion of Title II.

regulations is presumed to be an evasion and therefore a violation of Title II.²⁴ The presumption is rebuttable by a showing that the provision is in "customary usage without distinction between boycotting and non-boycotting countries" and that there is a "legitimate non-boycott reason" for using it.²⁵

The old sections 369.1, 369.2 and 369.3 of Title 15 of the Code of Federal Regulations are revoked and replaced by the new 369.1,369.2,369.3,369.4 and 369.5.

²⁴*Id.* (to be codified in *Id.*, (d)).

²⁵*Id.* (to be codified in *Id.*)