

THE ANTIBOYCOTT LAW: THE REGULATION OF INTERNATIONAL BUSINESS BEHAVIOR*

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I. INTRODUCTION

The long, drawn-out battle over the adoption of the new antiboycott law is over. The legislation, which was three years in the making, was signed into law on June 22, 1977.¹ Its implementing regulations were promulgated in accordance with the statutory mandate on January 18, 1978 after an extraordinary and exhaustive public comment period.²

Both the statute and the regulations are the product of intense and often bitter debate. That debate is likely to continue as the law is applied and enforced. But for the moment at least, the contending interests have expressed general satisfaction with the new regulations,³ although not surprisingly, differences on details persist.

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¹ Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977) [hereinafter cited as EAA] amending the Export Administration Act of 1969, 50 U.S.C. app. § 2401, *et seq.* (1970) (amended 1974).

² On September 20, 1977, the Department of Commerce invited interested persons to submit comments on its proposed regulations to implement Title II of the Export Administration Amendments of 1977. Comments were to be delivered by November 21, 1977. In response, the Department received 178 submissions containing comments and suggestions totalling over 1,000 pages. Earlier, in response to its July 13, 1977, advance notice of proposed rulemaking in this matter, the Department received 152 submissions containing comments totalling over 1,750 pages. Included in these totals are written summaries of meetings between officials of the Department and numerous persons who requested such meetings in order to make comments and suggestions on the regulations to implement the Act. All these comments are on the public record. (These submissions are on file in the Freedom of Information Record Inspection Facility of the Industry and Trade Administration, Room 3012, United States Department of Commerce, Washington, D.C. 20230).

³ In a January 31, 1978 letter to the Secretary of Commerce, Irving Shapiro, the Chairman of the Business Roundtable, which actively participated in the development of the legislation, said that despite disagreement on some of the issues, "we believe that the Commerce Department's representatives charged with the responsibility of formulating these Regulations have performed their difficult assignment in a diligent, conscientious and professional manner." Letter from Irving Shapiro to Juanita Kreps, Secretary of Commerce (January 31, 1978). And in a joint press release issued shortly after the final regulations were promulgated, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League of B'nai Brith, all of which actively participated in the development of the legislation, declared their "satisfaction with the thrust" of the regulations despite some residual concerns. Joint

Whether that satisfaction continues depends on how the law is applied and enforced, the ability and willingness of American businessmen and their foreign customers to accommodate to conflicts in their respective laws, and the willingness of boycotting states to accommodate their own boycott enforcement objectives to United States legal requirements.

This Article describes the philosophy of the new law, outlines its structure and principal elements, and examines a number of the more important practical and jurisprudential issues which it raises.

II. PHILOSOPHY OF THE NEW LAW

The new antiboycott law is the product of growing public and congressional concern over the intrusion of the Arab boycott against Israel into internal American affairs through its impact on private economic decisions. While the boycott has been in effect since 1946, it was only with the vast accumulation of wealth in many parts of the Arab world, following the dramatic increase in OPEC oil prices in 1973 and thereafter, that its significance for American interests began to be realized. Burgeoning business opportunities in the Arab world provided the boycotting states with the muscle to enforce their long-standing boycott and businessmen, seeking a share of that lucrative market, with a strong incentive to comply. Reports filed with the Department of Commerce under an earlier law revealed that in well over 90% of American business transactions involving boycott requirements of one kind or another, American companies complied with the boycott requirement.⁴ During the year ending March 31, 1977, American exporters reported their compliance or intent to comply with boycott requirements in transactions involving more than \$4.4 billion in American trade.⁵

Contemplated legislative remedies ranged from mild admonishments along the lines of existing law to absolute prohibitions against compliance with foreign boycotts in any and all aspects. An informal Senate-House conference committee convened in the fall of 1976 to resolve the differences between significantly different Senate and House versions of antiboycott legislation passed earlier that year and produced agreement on the approach which was eventually

Statement of American Jewish Committee, American Jewish Congress and Anti-Defamation League of B'nai Brith (January 26, 1978).

⁴ BUREAU OF EAST-WEST TRADE, U.S. DEP'T COMMERCE, EXPORT ADMINISTRATION REP. NO. 114, at 11 (1977) [hereinafter cited as EXPORT ADMINISTRATION REP.].

⁵ *Id.* at 14; EXPORT ADMINISTRATION REP. No. 115, *supra* note 4 at 15.

to emerge as law.⁶ While modified in detail before enactment the following year, the agreed-upon approach was to prohibit, generally, compliance with most of the secondary and so-called tertiary dimensions of foreign boycotts while generally leaving untouched compliance with their primary dimensions. It was this basic philosophical approach which was eventually embodied in the law and is reflected in its implementing regulations.

As such, the law is not an attempt to interfere with the right of a foreign country to conduct a boycott directly against another. It recognizes that such primary boycotts are an inherent prerogative of sovereignty and that legislated non-compliance would be tantamount to a counter boycott.

What the law seeks to do instead is prohibit United States citizens from assuming the responsibility for enforcing foreign boycotts against others and to give all United States citizens an equal opportunity to participate in boycotting country markets. In that vein it reflects deeply held American principles opposing discrimination and anti-competitive behavior. At the same time, the law is intended to preserve United States sovereignty itself by preventing the enlistment of its own citizens in economic warfare against a friendly country.

Thus, the new foreign boycott law is both the product of laudable objectives and a reflection of basic American precepts. Few would support the proposition that American business should be permitted to discriminate against United States citizens on the basis of race, religion, sex, or national origin under any circumstances, let alone in order to comply with the foreign policy or other objectives of a foreign government. Few would support the proposition that American businessmen should be permitted to engage in systematic exclusion of other American businessmen from economic opportunities in order to advance the foreign policy or other objectives of another country. And many thoughtful Americans recognize the threat to United States interest which occurs when American citizens cooperate in advancing a foreign power's political objectives. These are issues which transcend the immediate Arab-Israeli con-

⁶ A formal Senate-House conference could not be convened because of opposing parliamentary tactics. Nonetheless, conferees met informally and agreed on compromise legislation (S. 69) which was introduced in the Senate by Senator Stevenson during the 95th Congress. See generally REPORT OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS ON S. 69, S. REP. NO. 104, 95TH CONG., 1ST SESS. (1977) [hereinafter cited as SENATE REPORT].

flict in the Middle East.

But laudable objectives and the attainment of those objectives are two different things. Conflicts, dilemmas, inconsistencies, and misperceptions are inevitable. This is especially true in a highly charged political setting.

One of the ironies of the new antiboycott law is that a statute which attempts to prevent infringements of United States sovereignty inevitably infringes on the sovereign rights of other countries when it attempts to regulate the activities of United States citizens abroad and foreign subsidiaries of United States corporations. The conflict is most acute where United States law attempts to govern the activities of persons physically present in a country with directly contrary laws or policies. There United States law and policy and the law and policy of the host country are in direct confrontation. It was in part the recognition of this conflict that gave rise to the exception in the new law to permit United States persons resident in a foreign country, including a boycotting country, to comply with the boycott laws of that country with respect to activities exclusively within the country and with respect to certain importing activities.⁷ Still the exception is far from absolute since it does not permit compliance with boycott laws requiring information pertaining to or discrimination on the basis of race, religion, sex, or national origin,⁸ and it places significant qualifications on the ability to comply with host country laws pertaining to import activities.⁹

The conflict between United States law and policy and that of a foreign country is less acute where the host country is not a boycotting country. It is nonetheless potentially significant. Where the non-boycotting host country has no policy one way or the other with respect to the boycott which is the target of United States law, the conflict may be more theoretical than real but nonetheless could give rise to general concern about the extraterritorial application of United States law as a matter of general principle.¹⁰

⁷ EAA sec. 201, § 4A(a)(2)(F).

⁸ *Id.* § 4A(a)(3).

⁹ An exception is provided for compliance by a United States person in a foreign country or agreement by such a person to comply with the laws or regulations of that country governing imports into the country of trademarked, trade-named, or similarly specifically identifiable products or components of products for his own use, including the performance of contractual services within that country. *Id.* § 4A(a)(2)(F).

¹⁰ Such concerns have been expressed, for example, by the Government of Canada and other countries with respect to the application of the United States' embargo of Cuba to the foreign subsidiaries of United States companies. For a discussion of this concern, see Note,

The conflict may be more than theoretical in such a country, however, where adverse economic consequences might result from constraints imposed by United States law on the ability of the foreign country's resident companies to do business with boycotting countries. A foreign country heavily dependent on trade with a boycotting country where a significant proportion of that trade is accounted for by United States subsidiaries subject to United States antiboycott law would understandably have a substantial economic interest in the extraterritorial reach of that law. The economic interest may be buttressed by the foreign country's political interests where its own foreign policy posture toward the boycotting country is supportive rather than neutral or where it fears retaliation by a boycotting country for other than a neutral stance.

While a law which seeks to protect United States sovereignty itself intrudes upon the sovereignty of others, the failure to reach the activities of either United States citizens abroad or foreign subsidiaries of United States companies where they are in fact controlled by their United States parent would seriously undermine the efficacy of the law in a world of multinational enterprises. It would also provide substantial incentives to shift United States operations abroad to escape the law altogether with attendant adverse consequences for United States economic activity. This is a recurring issue in modern attempts to regulate the activities of the multinational enterprise. The new antiboycott law is but one example of the difficult issues presented by modern economic regulation.

As the new antiboycott law is analyzed, it is apparent that it presents a number of these issues in acute form. While its philosophical contours are relatively clear, its practical implementation requires numerous steps across otherwise rigid boundaries in order to accomplish the statute's fundamental objectives.

III. STRUCTURE OF THE LAW

The statute is structured with a series of prohibitions and a series of exceptions. Together they generally permit compliance with primary boycott requirements with certain notable exceptions while generally prohibiting compliance with secondary boycott requirements, again with certain notable exceptions. In addition, there is a separate statutory provision which makes the law applicable to

any transaction or activity undertaken with intent to evade the law.

The three key common elements of the law are as follows: First, it applies to "United States persons," a term defined to include the controlled foreign subsidiaries of United States companies.¹¹ Second, it applies only to actions in United States commerce,¹² a term amplified at length in the regulations.¹³ Third, the Act applies only to actions taken with intent to comply with, further, or support a foreign boycott against a friendly country where the United States does not itself boycott that country.¹⁴ Contrary to some impressions, this requirement does not mean that one has to agree with or support the objectives of a foreign boycott before a violation may occur. In fact one may disagree with its goals entirely and do so explicitly. Nonetheless, if a prohibited boycott condition is complied with, a violation may occur.

The first two of these three common elements of the statute present threshold jurisdictional questions. The last, "intent," is an ultimate question pertaining to the legal character of a particular act.

IV. PROHIBITIONS

The basic prohibitions of the statute are as follows:

First, there is a broad based general prohibition against refusing to do business with anyone, including the boycotted country, pursuant to an agreement with, requirement of, or request from or on behalf of a boycotting country.¹⁵ This prohibition encompasses such things as excluding certain firms or persons from participating in a business transaction because they are blacklisted or selecting as participants in a business transaction only those who are not blacklisted. This is the first and perhaps most fundamental provision of the new law.

The second is a corollary of the first. It is a general prohibition against discrimination against United States persons on the basis of race, religion, sex, or national origin.¹⁶ This includes discrimination in employment. Like the prohibition on refusals to do busi-

¹¹ EAA sec. 201, § 4A(a)(1) and EAA sec. 204 amending § 11(2) of the Export Administration Act of 1969, 50 U.S.C. app. § 2410 (1970).

¹² EAA sec. 201, § 4A(a)(1).

¹³ Export Administration Regulations on Restrictive Trade Practices or Boycotts [hereinafter cited as EAR] § 369.1(d), 43 Fed. Reg. 3508, 3514-16 (1978) (to be codified in 15 C.F.R. pt. 369).

¹⁴ EAA sec. 201, § 4A(a)(1).

¹⁵ *Id.* § 4A(a)(1)(A).

¹⁶ *Id.* § 4A(a)(1)(B).

ness, as well as all other prohibitions, this applies only to actions taken with intent to comply with, further, or support an unsanctioned foreign boycott.

The third prohibition is a general prohibition against furnishing information with respect to the race, religion, sex, or national origin of any United States person where that information is furnished with intent to comply with, further, or support a foreign boycott.¹⁷ This is an adjunct of the prohibition against discrimination and is intended to terminate the supply of information thought necessary for boycott enforcement purposes where the boycott involved discrimination on the basis of race, religion, sex, or national origin.

The fourth prohibition is a general prohibition against furnishing information about business relationships with a boycotted country, with business concerns organized under the laws of a boycotted country, with nationals or residents of a boycotted country, or with any person known or believed to be restricted from doing business with or in a boycotted country.¹⁸ The statute admonishes that nothing in this prohibition shall prohibit the furnishing of normal business information in a commercial context.¹⁹ The target is information about business relations sought for boycott enforcement purposes, such as, "Do you do business with blacklisted firms; Do you do business with Israel?"

This prohibition, like the prohibition against supplying information about race, religion, sex, or national origin, is an adjunct of another prohibition, namely, the prohibition against refusing to do business. It is intended to terminate the flow of information commonly sought for boycott enforcement purposes. If firms were permitted to respond to boycott questions by indicating the absence of an offending business relationship with a boycotted country, they would most likely find themselves at an advantage over those who could not so respond. However, because of its categorical nature, this prohibition does raise the possibility that firms which do have business relationships with boycotted countries and intend to continue such relationships may find themselves blacklisted because of their inability to respond to boycott questions rather than because of the offending business relationship itself.

A fifth major prohibition reflects the application of the basic pro-

¹⁷ *Id.* § 4A(a)(1)(C).

¹⁸ *Id.* § 4A(a)(1)(D).

¹⁹ *Id.*

hibitions of the statute to the special case of letters of credit. That prohibition makes it illegal to implement a letter of credit which contains conditions or requirements which may not legally be complied with under the antiboycott law.²⁰ Therefore, the central issue for an implementing bank is whether the beneficiary may comply with the boycott requirements which appear in a letter of credit. Special jurisdictional rules apply to the letter of credit prohibition in order to minimize the uncertainty which could exist due to the difficulty of determining whether the statutory jurisdictional tests had been met.

Basically, those special rules provide that the letter of credit prohibition applies only when the beneficiary is a United States person and the transaction to which the letter of credit relates is in United States commerce.²¹ For United States banks implementing letters of credit in the United States, the regulations establish a presumption that the beneficiary is a United States person and that the transaction is in United States commerce where the letter of credit specifies a United States address for the beneficiary.²² For United States banks implementing letters of credit abroad, there is a presumption that both conditions are met; namely, the beneficiary is a United States person and the transaction is in United States commerce, where the letter of credit specifies a United States address for the beneficiary and the documents indicate that the goods are to be shipped from the United States.²³ In both cases these presumptions are rebuttable by a showing that either the beneficiary is not a United States person or that the goods are to be shipped from other than the United States.²⁴

V. EXCEPTIONS

The exceptions, which apply to all the prohibitions, are intended to permit compliance with essentially primary boycott requirements. They do, however, permit significant levels of compliance with secondary boycott requirements but only under circumstances of duress, such as where the United States person is subject to conflicting foreign laws, or in circumstances where the responsibility

²⁰ *Id.* § 4A(a)(1)(F).

²¹ EAR § 369.2(f)(6), 43 Fed. Reg. 3523 (1978).

²² EAR § 369.2(f)(7), 43 Fed. Reg. 3523 (1978).

²³ EAR § 369.2(f)(9), 43 Fed. Reg. 3523 (1978).

²⁴ EAR § 369.2(f)(7) and (9), 43 Fed. Reg. 3523 (1978).

for boycott based choices is assumed by a resident of a boycotting country.

The first exception generally permits compliance with boycotting country prohibitions on the importation into a boycotting country of goods or services from the boycotted country or goods or services produced by boycotted country companies, residents, or nationals.²⁵ This exception also generally permits compliance with boycotting country prohibitions on the shipment of goods to the boycotting country on a carrier of the boycotted country or by a route other than as prescribed by the boycotting country.²⁶

Both of these provisions directly relate to primary boycott requirements. They recognize that any boycotting country has a right to insist that goods or services which it imports not be from a boycotted country and that any goods which it purchases not be shipped on a carrier of a boycotted country. In addition, they recognize that any boycotting country has a legitimate interest in seeing to it that its goods are not shipped via the territorial waters or ports of a boycotted country. All of these are essential protections for any country engaged in a direct boycott against another, and to prevent United States companies from complying with these requirements would be tantamount to depriving them of the opportunity to do business with a boycotting country—in short, a legislatively mandated counter boycott.

The second exception is a corollary of the first and deals with boycotting country import and shipping document requirements. Under that exception, a person subject to United States boycott law may comply with a boycotting country's import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment, and the name of the provider of other services.²⁷ A major qualification on this exception is that after June 21, 1978, no information supplied in response to such requirements may be stated in negative or blacklisting terms.²⁸ For example, while it will be permissible after June 21, 1978, to certify that the goods in a particular shipment are "Made in U.S.A.," it will not be permissible to certify that they are *not* made in a particular country.²⁹ By the same token,

²⁵ EAA sec. 201, § 4A(a)(2)(A).

²⁶ *Id.*

²⁷ *Id.* § 4A(a)(2)(B).

²⁸ *Id.*

²⁹ EAR § 369.3(b), Examples (i) and (ii), 43 Fed. Reg. 3526 (1978).

while it will be permissible to certify that the goods are made by a particular company, it will not be permissible to certify that they are *not* made by, say, blacklisted firms or that they are not made by a particular company.³⁰

A positive statement that goods are made in a given country necessarily conveys the information that they were not made in another country, including, obviously, a boycotted country. Similarly, a statement that goods are made by ABC company necessarily conveys the information that they are not made by XYZ company, and where ABC company is not blacklisted, the certification necessarily conveys the information that the goods are not made by a blacklisted firm. To that extent, a positive certification is as effective as a negative certification in primary boycott enforcement.

Nonetheless, Congress recognized that import and shipping document requirements of the type specified are a normal requirement of international commerce and that despite their utility for boycott enforcement purposes, they cannot be outlawed without bringing trade with boycotting countries to a halt. Moreover, Congress also recognized that it would be inconsistent to permit compliance with primary boycott requirements generally but prohibit compliance with corresponding certification requirements. However, negative certifications to the effect that goods are not made in a boycotted country or that they are not made by a boycotted country company adds nothing to the effectiveness of primary boycott enforcement, and their general use can have the effect of discouraging the exploration of business opportunities with the boycotted country. By generally prohibiting negative certifications, the Congress retained consistency with the primary boycott exception while reducing the potential chilling effect on trade with boycotted countries and blacklisted firms which can arise from the practice of issuing blanket statements that a particular country or a category of persons is excluded from a transaction.

An important qualification on the general prohibition against negative certifications is that it does not generally apply to carriers and their routes of shipment.³¹ The statute recognizes that negative certifications in this area are a reasonable and not entirely unusual requirement imposed by boycotting countries to protect the buyer of goods against war risks or confiscation. Therefore, under the regu-

³⁰ EAR § 369.3(b), Example (iv), 43 Fed. Reg. 3526 (1978).

³¹ EAA sec. 201, § 4A(a)(2)(B).

lations, it is permissible for a United States exporter to certify that the goods will not be shipped on a carrier which flies the flag of, is owned, chartered, leased, or operated by the boycotted country or by nationals or residents of a boycotted country.³² It is also permissible under the regulations to certify that the vessel will not stop at the port of a boycotted country en route to a boycotting country.³³

Permission to make either type of certification is consistent with the statute's general recognition of the right of any state to conduct a primary boycott against another and to take reasonable steps to insure that that boycott is observed. A certification that goods will not be shipped on a boycotted country's carrier or through a boycotted country's waters or airspace is a reasonable means of protecting a boycotting country's property against confiscation by the boycotted country.³⁴

Despite the relationship between the exception for primary boycott compliance and the exception for import and shipping document compliance, the two cannot be combined in determining the scope of the statute's exception from the information furnishing prohibition. For example, while it is permissible under the primary boycott exception to agree not to import into a boycotting country goods produced by a business concern organized under the laws of a boycotted country, it, nonetheless, generally violates the information furnishing prohibition for a company to certify or otherwise supply information to the effect that the companies with which it may be doing business are not organized under the laws of a boycotted country. It also generally violates the information prohibition to supply that same information through another formulation, for example, by a statement that the companies with which one is doing business are incorporated in a particular country where that information is furnished with intent to comply with boycott requirements. The only exception is with respect to carriers where there is a broad based statutory exception permitting negative certifications to protect against war risk or confiscation.

The reason for this seeming anomaly is that the information prohibition expressly prohibits furnishing information about whether one has a business relationship with any business concern organized under the laws of a boycotted country. To interpret the primary

³² EAR § 369.3(b), Example (vii), 43 Fed. Reg. 3526 (1978).

³³ EAR § 369.3(b), Example (ix), 43 Fed. Reg. 3526 (1978).

³⁴ EAA sec. 201, § 4A(a)(2)(B).

boycott exception as allowing the furnishing of that information (except to the extent to which it is indirectly conveyed through an agreement) would permit the exception to swallow the rule. It would do violence not only to the delicately balanced statutory scheme but also to the express statutory admonition to construe the exceptions narrowly,³⁵ to permit the general primary boycott exception to overrule the information prohibition itself or modify the explicit and deliberately narrow import and shipping document exception.

The third exception represents a significant departure from the law's basic goal of preventing secondary boycott compliance. Under this exception, persons subject to the law may comply with so-called "unilateral selections" of carriers, insurers, suppliers of services to be performed within the boycotting country, and specific goods which in the normal course of business are identifiable by source upon importation into the boycotting country. These so-called unilateral selections must be made by a person who resides in the boycotting country, but among those who qualify as residents are United States persons.³⁶

This exception was one of the most intensely debated provisions of the new law, with most of the debate centered on the question of whether compliance with unilateral selections made by United States persons should be permitted. It reflects a recognition of the fact that the inability to comply with customer choices of specified products or participants in a transaction would essentially terminate trade with boycotting countries since such choices when made by a boycotting country or by persons residing in a boycotting country are presumably in conformity with boycott requirements. Compliance with such choices under those circumstances could be regarded as a refusal to do business for boycott reasons with those not chosen. At the very least, the basis for the choice in those circumstances is ambiguous. When a boycotting country customer instructs his United States supplier to supply items made only by company A, the choice of A would in all probability be in conformity with boycott requirements even if non-boycott reasons for the selection are present as well. Whether or not boycott conformity is a factor in the selection, the United States supplier would run the risk of an alleged refusal to do business if he complied with the selection since it would be arguable that he knew or should have known that

³⁵ *Id.* § 4A(a)(6).

³⁶ EAR § 369.3(c)(7), 43 Fed. Reg. 3527 (1978).

any such choice would in all probability have excluded blacklisted persons.

Thus, the unilateral selection exception is a mechanism for removing the threat of illegality which would hang over United States persons who carried out their boycotting country customers' choices. The exception is also a recognition of the relative ease with which a boycotting country can exclude carriers, individuals, goods, and, to a degree, providers of services where physical presence within the country may be necessary in order to supply the service effectively.

The key limitation on the use of this exception for secondary boycott compliance arises from the terms "unilateral" and "specific" as used in the exception. To come within the exception, the customer's choice must be unilateral and specific. Under the regulations, a "unilateral" selection is one in which the discretion in making the selection is exercised by the boycotting country buyer.³⁷ In other words, the United States supplier may not himself make the decision for his customer. A "specific" selection under the regulations is one which is stated in the affirmative and specifies a particular supplier of goods or services for inclusion in the transaction.³⁸ The distinction is between a customer's instruction to exclude all blacklisted subcontractors, for example, from a transaction and an instruction to subcontract only with company A with respect to goods whose manufacturer can be identified by an inspection of the goods at the time of importation. The latter is an affirmative and specific selection; the former is not.

Taken together, these two limitations are intended to place full responsibility for boycott-based choices on the boycotting country buyer and prevent United States persons from taking upon themselves the responsibility for enforcing the foreign country's boycott. Where the boycotting country buyer is willing and able to identify precisely the persons with whom he wishes to do business, the unilateral selection exception generally permits United States persons to fulfill his wishes. But the exception does not permit United States persons to carry out generalized instructions to see to it that boycott conditions are met and blacklisted persons as a class systematically excluded from business transactions with boycotting countries, nor does it permit United States persons to carry out discrimination on the basis of race, religion, sex, or national origin, even where a

³⁷ EAR § 369.3(c)(5), 43 Fed. Reg. 3527 (1978).

³⁸ EAR § 369.3(c)(4), 43 Fed. Reg. 3527 (1978).

unilateral selection is involved. Compliance with such discriminatory selections is expressly prohibited.³⁹

Whether the relatively fine distinction between "unilateral" and other selections can be drawn in practice presents one of the more significant challenges to effective enforcement of the law. But the failure to make the distinction would produce artificial bifurcation of otherwise integrated transactions and significantly limit United States participation in certain kinds of business functions, such as general contracting, where the essential service performed is the integration of widely diverse activities to produce a single result. Rather than employing a general contractor to marshal the forces needed to complete a project, the customer would either assume the general contracting role himself—an unlikely possibility—or employ a non-United States person to perform it for him. In either case, while no antiboycott purpose would be served, there would almost certainly be a redirection of business opportunities away from United States firms.

The fourth exception represents the other half of the primary boycott exception. Under this exception, a person subject to the law may comply with a boycotting country's prohibition on exporting goods from the boycotting country to the boycotted country, to nationals or residents of the boycotted country, or to business concerns of or organized under the laws of a boycotted country.⁴⁰ The exception recognizes the legitimate interest a country has in controlling the destination of its exports, an interest which the United States freely exercises through its extensive system of export controls for national security and foreign policy reasons.

The fifth exception permits compliance with a boycotting country's immigration, visa, or employment information requirements.⁴¹ It reflects the fact that information regarding race, religion, sex, and national origin is required in many parts of the world in order to secure a visa or work papers. Constraints on the ability to supply that information would impair if not terminate travel to boycotting countries by United States citizens. However, because of the danger that this exception could be used by United States companies for purposes of facilitating boycotting country discrimination, the exception permits only an individual on his own behalf or on behalf

³⁹ EAA sec. 201, § 4A(a)(3).

⁴⁰ *Id.* § 4A(a)(2)(D).

⁴¹ *Id.* § 4A(a)(2)(E).

of his family to supply necessary visa, immigration, or employment information pertaining to race, religion, sex, or national origin. This is to prevent United States employers from furnishing lists of employees seeking permission to enter a boycotting country with their race, religion, sex, or national origin identified, thereby facilitating systematic exclusion on one of those grounds by the boycotting country.

An important operational consequence of this exception is that it permits employers whose employees are denied entry into a boycotting country to proceed nonetheless with their business activities within that country. This aspect of the exception is not self evident from the statutory provision itself but is explicitly spelled out in the Senate Report.⁴² Without such latitude to pursue business activities in a boycotting country, the ability of United States companies to do business in boycotting countries would be dependent on that country's immigration policies.

The last exception recognizes that fundamental dilemma faced by United States persons who reside in a boycotting country when they are confronted with host country laws which conflict with applicable United States laws. The dilemma is created in large part because of the antiboycott law's extraterritorial reach which extends its umbrella to foreign corporations which are controlled subsidiaries of United States companies.

Under this exception, United States persons resident in a foreign country may comply with the laws of that country with respect to their activities exclusively within that country and with respect to their importation of specifically identifiable products imported for their own use.⁴³ However, the exception in no event permits discrimination on the basis of race, religion, sex, or national origin.⁴⁴

Like the unilateral selection exception, this provision was the subject of intense debate. Proponents saw it as essential to the ability of United States companies located in boycotting countries to continue doing business within those countries. Faced with the choice of violating United States law or host country law, many United States companies would undoubtedly choose to cease operations in the boycotting country.

Opponents, however, saw the exception as an opportunity for the

⁴² SENATE REPORT, *supra* note 6, at 45.

⁴³ EAA sec. 201, § 4A(a)(2)(F).

⁴⁴ *Id.* § 4A(a)(3).

creation of a glaring loophole. If United States companies which happen to have a physical presence within a boycotting country could freely comply with that country's boycott requirements, there would be little left to United States antiboycott law so far as United States multinationals are concerned.

As a consequence of these competing concerns, the limitations created by the insertion of various qualifications on the scope of the exception took on added importance. The term "specifically identifiable products," which has its counterpart in the term "specific goods" as used in the unilateral selection exception, was intended to narrow the category of decisions which host country American subsidiaries could make on a boycott basis.⁴⁵ More important was the concept that the category of import decisions which could be made in conformity with foreign boycott law should be limited to decisions about products which a person resident in a boycotting country imports "for his own use." This concept was intended to prevent wholesale use of the exception for compliance with foreign boycott laws over the full range of business decisions made by multinational corporations. Without it, there would be essentially two bodies of law—one for multinationals which would have optimum flexibility in complying with a foreign boycott by conducting a part of their operations as residents of a boycotting country—and one for purely domestic United States concerns whose flexibility would be much more constrained.

As it is, the local law exception inevitably creates a distinction between multinational and purely domestic business enterprises. But its constraints are intended to minimize the potential for dissimilar treatment arising from differences in corporate structure. However, the distinction between goods imported "for one's own use" and goods imported for another is admittedly heroic, both conceptually as well as legally, and has and will continue to present some of the most difficult problems of interpretation and application.

VI. ANALYZING THE APPLICABILITY OF THE LAW

Because of the detailed exceptions and generalized prohibitions in this statute, there is a tendency to analyze its applicability to given situations by first asking whether the situation comes within

⁴⁵ EAR § 369.3 (f-2)(4), 43 Fed. Reg. 3533 (1978); § 369.3(c)(16) and (17), 43 Fed. Reg. 3528 (1978).

one of the exceptions without asking two essential prior questions. One is whether the transaction is subject to the law in the first place. The answer to that depends on whether a "United States person" is involved and whether the transaction is in United States commerce.

The second is whether the transaction is subject to one of the prohibitions. That depends among other things on whether the action is taken with the requisite intent. It is often the case that tortuous efforts to fit a transaction within one of the exceptions are superfluous because the transaction offends no prohibition in the first place.

It is only when the first two questions have been answered in the affirmative, namely, that the transaction is subject to the law and offends one of the prohibitions—that it becomes necessary to determine whether it comes within one of the exceptions.

VII. EVASION

There is one final step. Even if a transaction neither offends a prohibition nor is encompassed by one of the exceptions, it is necessary to determine whether it violates the express provision on evasion. As indicated, the evasion provision expressly provides that the law shall apply to any transaction or activity undertaken with intent to evade the law.⁴⁶ It further provides that the rules and regulations which implement the statute shall not permit activities or agreements, express or implied, which are not within the intent of the exception.⁴⁷

This provision, more suitable perhaps as an expression of law enforcement attitudes or healthy adjudicatory skepticism, reflects the nervousness with which some viewed the exceptions as possible loopholes. Its contours are not easily defined, but it will provide law enforcement authorities with a vehicle for piercing the form and structure of a transaction to prevent the creation of devices for compliance with boycott requirements through mechanisms which superficially conform to activities described in the exceptions.

The regulations grapple with the concept of evasion by stating that the use of any artifice, device, or scheme which is intended to place a person at a commercial disadvantage or impose on him special burdens because he is blacklisted or otherwise restricted for

⁴⁶ EAA sec. 201, § 4A(a)(6).

⁴⁷ *Id.*

boycott reasons from having a business relationship with or in a boycotting country will be regarded as evasion.⁴⁸

Then, because of the particular attention focused on so-called risk of loss provisions during the comment period on the regulations, the final regulations specifically provide that unless permitted under one of the exceptions, the use of risk of loss provisions that expressly impose a financial risk on another because of the import laws of a boycotting country may constitute evasion.⁴⁹ The use of such a risk of loss clause will be presumed to constitute evasion by the person insisting on it if he introduces such a condition on doing business with him after the effective date of the regulations, January 18, 1978.⁵⁰ This presumption may be rebutted by a showing that such a provision is in customary usage without distinction between boycotting and non-boycotting countries and that there is a non-boycott reason for its use.⁵¹

This situation is to be contrasted with the case where a United States person had customarily used a risk of loss provision before the new regulations went into effect. There, continued use of such a provision after the effective date of the regulations is presumed not to constitute evasion.

The rationale for distinguishing between the two situations is that it is difficult, conceptually, to treat as evasion of a new law a practice which existed before the new law went into effect. The circumstances of its application may change or its purpose as a device to engage in prohibited activity might at some point emerge. But until either occurs, the continuation of pre-existing risk of loss practices will enjoy a presumption of legality.

On other aspects of evasion, the regulations provide that the use of dummy corporations or other devices to mask prohibited activity will also be regarded as evasion.⁵² The facts and circumstances of an arrangement or transaction are to be carefully scrutinized to determine whether appearances conform to reality.⁵³ The regulations provide, in addition, that it is evasion to divert specific boycotting country orders from a United States parent corporation to a foreign subsidiary for purposes of complying with prohibited boycott

⁴⁸ EAR § 369.4(c), 43 Fed. Reg. 3534 (1978).

⁴⁹ EAR § 369.4(d), 43 Fed. Reg. 3534 (1978).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² EAR § 369.4(e), 43 Fed. Reg. 3535 (1978).

⁵³ *Id.*

requirements.⁵⁴ However, they also provide that the alteration of a company's structure or method of doing business will not constitute evasion so long as the alteration is based on legitimate business considerations and is not undertaken solely to avoid the antiboycott law.⁵⁵

As is evident, the evasion provision of the new law presents some of the most difficult problems of interpretation and application. The difficulties associated with risk of loss provisions have their counterpart in the business diversion and alteration of business methods issues.

No regulatory solution in an area which so intimately depends on the facts of a particular case can be completely satisfactory. An attempt to deal with a portion of the limitless situations which can arise runs the risk of conveying misleading signals and forces the regulation-writer to adjudicate hypothetical fact situations whose character intimately depends on purpose, motivation, and intent. On the other hand, failure to give flesh to a catch-all provision as generally worded as the evasion provision of this statute would cast an *in terrorem* pall over international business transactions, and in this particular case, would violate the express congressional mandate to provide maximum practical guidance and certainty to the exporting community.⁵⁶

One of the important policy issues raised but not fully answered by the evasion provision is its applicability to locus of doing business decisions. While a distinction between avoidance and evasion can be articulated in the context of the tax laws, the distinction blurs in the context of laws, like the boycott law, which have the protection of a class of persons as one of its principal objectives. If the antiboycott law merely results in the transfer of business abroad to more favorable legal climates or produces new structures and forms for doing business which have the same operational consequences for the class of persons the law seeks to protect, little, if anything, will have been accomplished. Indeed, to the extent such behavior diminishes the level of economic activity in the United States, the law could harm the very interests it seeks to protect by reducing overall opportunities for participation in international trade. A law which leaves persons in legal jeopardy despite conform-

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ SENATE REPORT, *supra* note 6, at 37.

ity of their activities to the letter of the law raises serious constitutional problems. So, too, does a law which freezes business activities in an existing mold and places serious constraints on traditional freedom of movement. The new evasion provision of the statute will undoubtedly provide opportunities to test the contours of the concept as the antiboycott law is implemented and enforced.

VIII. UNITED STATES COMMERCE

The new boycott law may also have significance for the development of United States law on extraterritoriality. The scope of the law's extraterritorial impact depends in large part on the definition of United States commerce since the law reaches controlled foreign subsidiaries of United States companies only with respect to their activities in United States commerce.

Under the regulations, a controlled foreign subsidiary's transaction with a boycotting country or other third party is in United States commerce when the foreign subsidiary acquires goods or services from the United States for purposes of completing the transaction with that third party.⁵⁷ There are two basic exceptions. One is where the subsidiary disposes of goods acquired from the United States without substantial alteration or modification. Those transactions are in United States commerce under the regulations despite the fact that the goods are not acquired for the specific purpose of disposition to an identified third party.⁵⁸ The rationale is that otherwise the regulations would create an inevitable incentive for United States companies to source from their foreign subsidiaries sales which would otherwise be made directly from the United States.⁵⁹

The other exception is for so-called "ancillary services." Under this exception, a foreign subsidiary's receipt of ancillary services from the United States does not bring that subsidiary's otherwise foreign transaction into United States commerce.⁶⁰ Ancillary services are defined as services provided primarily for the subsidiary's own use rather than that of a third person. They include financial, accounting, and legal services whether provided by the subsidiary's parent or an unrelated entity.⁶¹

The rationale for this exception is that such ancillary services are

⁵⁷ EAR § 369.1(d)(8), 43 Fed. Reg. 3514 (1978).

⁵⁸ EAR § 369.1(d)(8)(iv), 43 Fed. Reg. 3514 (1978).

⁵⁹ See EAR Preamble, 43 Fed. Reg. 3509 (1978).

⁶⁰ EAR § 369.1(d)(5), 43 Fed. Reg. 3514 (1978).

⁶¹ EAR § 369.1(d)(14), 43 Fed. Reg. 3515 (1978).

typically interchangeable with those furnished by non-United States persons and could be obtained from non-United States sources with relative ease.⁶² A rule which discouraged the use of United States source ancillary services would have little if any positive antiboycott effect. As pointed out in the preamble to the regulations, it could, in fact, have adverse antiboycott consequences by driving United States 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.⁶³

Therefore, under the regulations, the provision of project financing by a United States bank or legal services by a United States law firm to a United States controlled foreign subsidiary is an ancillary service which will not cause the subsidiary's otherwise foreign transaction with third parties to be in United States commerce.⁶⁴ By contrast, the regulations provide that where a domestic concern gives a guarantee of performance to a third party on behalf of its controlled foreign subsidiary, that is a service provided primarily to the customer and, as such, brings the subsidiary's transaction with the customer into United States commerce.⁶⁵ Similarly, as pointed out in the regulations, architectural or engineering services provided by a United States company in connection with a controlled foreign subsidiary's construction project in a third country are typically passed through to the subsidiary's customers and, as such, bring the subsidiary's transaction with the third party into United States commerce.⁶⁶

These exceptions as well as the general rule on United States commerce require the drawing of fine distinctions. The distinctions are made necessary by the effort to avoid placing the universe of transactions in United States origin goods under the umbrella of United States commerce and to apply United States law instead to those circumstances where there is a relatively direct link between a foreign subsidiary's acquisition of goods and services from the United States and their subsequent disposition to third parties. These distinctions are also necessary to avoid so limiting the concept of United States commerce as to exclude United States subsidiaries from the law altogether.

⁶² EAR Preamble, 43 Fed. Reg. 3509 (1978).

⁶³ *Id.*

⁶⁴ EAR § 369.1(d)(15), 43 Fed. Reg. 3515 (1978).

⁶⁵ *Id.*

⁶⁶ *Id.*

Some of those who commented on the regulations before they became final argued that the United States commerce concept should extend to any foreign subsidiary dispositions of United States origin goods or services no matter how remote the connection between the disposition and the original acquisition. Under that view, a foreign subsidiary which stocks part of its inventory with components from the United States would be subject to American law with respect to all dispositions of the end-product no matter how remote from the original acquisition from the United States and no matter how small a proportion of the total content of the end-product was represented by the United States components.

An alternative view urged on the Department of Commerce would have United States commerce cease at the point where the foreign subsidiary acquires the goods from the United States. Any subsequent dispositions would be beyond the reach of the law. Under that approach, the law would have virtually no application to transactions between American foreign subsidiaries and third parties.⁶⁷

The adoption of a general nexus test avoids either extreme and applies the law to those circumstances where the United States interest can reasonably be regarded as more compelling than that of the country within which the subsidiary operates. However, like the concept of evasion, this too will require further development as the law is implemented and enforced and could ultimately require the courts to make difficult conflict of law choices.

IX. CONCLUSION

It will be some time before the full dimensions and effect of the law are fully understood. The law is the product of intense controversy; it is the product of cooperation and compromise. After months of disagreement and weeks of negotiation, the American Jewish community and the American business community joined forces in the spring of 1977 to pave the way for its enactment.

While the law applies to all unsanctioned foreign boycotts, it has its foundation in a long and bitter struggle in a turbulent part of the world. American political commitments and American dedication to human rights and equal opportunity are woven between its lines.

The issues which the legislation raises and the issues which it addresses are issues on which reasonable men can and do differ. They are issues which transcend the antiboycott law itself. How they are resolved here will have significance for other efforts to regulate business activity in an increasingly integrated world where political and economic issues are deeply intertwined.

⁶⁷ EAR Preamble, 43 Fed. Reg. 3508-09 (1978).