

THE BUSINESS EFFECTS OF THE ANTIBOYCOTT PROVISIONS OF THE EXPORT ADMINISTRATION AMENDMENTS OF 1977—MORALITY PLUS PRAGMATISM EQUALS COMPLEXITY

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I. INTRODUCTION

In enacting the antiboycott provisions of the Export Administration Amendments of 1977 (EAA)¹ in June of 1977, Congress and the President, impelled by strong moral and political forces, began an experiment, the results of which are in large measure still unknown. The experiment may determine whether it is possible to proscribe compliance by United States firms and their controlled foreign affiliates with certain aspects of the Arab boycott of Israel,² without seriously harming the United States economy or progress toward a peaceful settlement in the Middle East. The experiment is scheduled to continue, unless there is a comprehensive Middle East peace settlement, at least until the summer of 1979 when the Export Ad-

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

² The Arab boycott of Israel has both "primary" and "secondary" elements. The primary boycott seeks to prevent the importation of Israeli goods or services into Arab countries or the export of goods or services from Arab countries to Israel. The secondary boycott extends to third country business firms, seeking to deter them from contributing to Israel's economic development. Under the secondary boycott, Arab governments or businesses are prohibited from doing business directly or indirectly with companies which have certain kinds of economic or business relations with Israel, such as: manufacturing or assembly plants in Israel or licensing arrangements with Israeli companies; prospecting for natural resources in Israel; or substantial investment in Israeli companies or joint venture partnerships with Israeli companies. The secondary boycott also has been applied to foreign banks which lend money for Israeli industrial, military or agricultural projects; insurance companies which participate in commercial or industrial companies in Israel; and vessels which have routinely called at Israeli ports.

The secondary boycott is enforced through the maintenance by boycott authorities of a "blacklist" of business concerns, persons, or vessels believed to have engaged in business relations with Israel violative of boycott principles. To maintain and enforce this blacklist, Arab countries routinely require the furnishing of information by firms seeking to qualify to do business in Arab countries. Further, they require the submission either as a condition of payment of a letter of credit or as an import documentation requirement, certifications regarding origin of goods and the blacklist status of supplier, vessel and insurer. Also, Arab sources not infrequently require foreign business concerns to undertake not to subcontract with blacklisted firms for products or services needed to carry out contractual obligations. These latter requirements, sometimes called "tertiary" boycott requests, are a principal (but by no means exclusive) target of the EAA.

The EAA is not directed at the "primary" boycott requirements of Arab countries but rather at the "secondary" and "tertiary" requirements. However, subject to a limited grace period until June 21, 1978, the EAA prohibits the furnishing of negatively phrased statements regarding the origin of goods (*e.g.*, "goods not of Israeli origin"). EAA sec. 201, § 4A(a)(2)(B). Thus, even though a United States firm may comply with an Arab country's law prohibiting the import of Israeli goods, EAA sec. 201, § 4A(a)(2)(A), it may not give a negative certificate of origin. The provisions of the EAA are summarized in the text accompanying notes 20 to 27 *infra*.

ministration Act of 1969 will again be subject to amendment and extension.³

The success of the experiment initiated by enactment of the EAA depends upon numerous variables. These variables include, most importantly: the results of extensive rulemaking responsibilities vested in the Secretary of Commerce (Secretary);⁴ the willingness of the Secretary to administer the EAA antiboycott prohibitions in a fair and coherent fashion; the willingness of Arab nations enforcing the boycott of Israel to accommodate their boycott practices to the new strictures of United States law; and finally, the changing complexion of Middle East politics.

Of these four variables, only the first can presently be isolated and analyzed with any thoroughness. Some highly speculative comment can be proffered on the second and third. Discussion of the fourth, a highly volatile one, is beyond the scope of this modest effort.⁵

The principal focus of this Article is, therefore, on the regulations promulgated by the Commerce Department to implement the EAA's prohibitions and exceptions thereto. In developing these regulations, the Commerce Department has performed in a conscien-

³ The EAA extended the Export Administration Act's authorities until September 30, 1979, at which time they will lapse unless extended once again. EAA sec. 101.

⁴ The EAA is not self-executing. It requires that its antiboycott prohibitions and exceptions be implemented by regulations adopted by the Secretary of Commerce [hereinafter referred to as the Secretary] in accordance with specific deadlines. EAA sec. 201, §§ 4A(a)(1) and (5). Final implementing Export Administration Regulations [hereinafter cited as EAR] were promulgated as required by the EAA, on January 18, 1978. 43 Fed. Reg. 3508 (1978) (to be codified in 15 C.F.R. Part 369). Since these regulations have not yet been codified, and interested persons are accustomed to citing them as EAR § 369.1-.5, this Article will cite just to the EAR and appropriate section number, followed by a parallel citation to the Federal Register.

⁵ Also beyond the scope of this Article is any significant discussion of the antiboycott provisions of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 §§ 1061-1064, I.R.C. §§ 908, 952(a), 995(b)(1) and 999 [hereinafter cited as TRA]. In general terms, the TRA may deprive a United States taxpayer of portions of its otherwise available foreign tax credits, foreign affiliate income deferral, and DISC income deferral if it or any member of its controlled group or any 50%-or-more owned affiliated corporation or under certain conditions, any corporation in which it has a 10% or greater ownership interest, has participated or cooperated in an international boycott, other than a boycott sanctioned by the United States in the relevant tax year. Boycott participation or cooperation for this purpose includes agreeing to refrain from doing business with a boycotted country or with blacklisted persons but excludes agreeing to observe a primary boycott, *i.e.*, agreeing not to ship Israeli-origin products to Arab countries and vice-versa. The TRA provisions add very substantial complexity to the regulatory environment faced by the United States firms with Middle East business. They resulted, it can be speculated, from the frustration caused the Congress by the Ford Administration's unyielding opposition to antiboycott measures in Export Administration legislation.

tious fashion while under substantial political pressures.⁶ The resulting Export Administration Regulations (EAR) do much to fulfill a congressional mandate that, insofar as feasible, the regulations supply clear guidelines to those regulated.⁷ Nevertheless, as a result of the intrinsic complexity of the legislation and the need of the Commerce Department to make hard choices in a highly politicized context, the EAR contain certain significant gaps and imperfections. This Article will highlight these gaps and imperfections in the course of attempting to assess the overall impact of the EAA and the EAR on continued conduct of business by those subject to the EAA, with and in boycotting countries.

This Article is divided into four additional sections. Section II reviews very briefly the historical background of the EAA. Section III summarizes its provisions and discusses its major jurisdictional criteria as elaborated in the EAR. Section IV discusses in practical terms the application of the EAA's prohibitions and exceptions to business relations of firms within the jurisdictional ambit of the EAA, with and in Arab countries. It also identifies and suggests remedies for gaps and imperfections in the EAR as they affect these business operations. Section V offers some highly speculative assessments regarding the likely reaction of Arab nations to the new strictures of United States law and states certain general conclusions about the overall impact of the EAA on United States business in the Middle East, in light of these assumptions and in light of the

⁶ After issuing proposed regulations, 42 Fed. Reg. 48,556 (1977), the Commerce Department received letters from Senators Proxmire (Oct. 24, 1977), Heinz (Nov. 1, 1977) and others urging amendment to the final regulations to conform them to alleged legislative intent. These letters are on file in the Freedom of Information Records Inspection Facility of the Industry and Trade Administration, United States Department of Commerce, *see* note 18 *infra*. In addition, hearings were held by the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Government Operations Committee, chaired by Benjamin Rosenthal for the ostensible purpose of exercising "oversight" of the actual rulemaking process. *Department of Commerce's Proposed Antiboycott Enforcement and Regulation Plans: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 95th Cong., 1st Sess. (1977). Since the principal compromises imbedded in the legislation were reached in extra-legislative negotiations (*see* note 18 *infra* and accompanying text), the claims of various members of Congress to speak authoritatively, after the fact, regarding legislative intent are questionable at best. The legislative intent in accepting the extra-legislative compromise was to delegate to the President and the Secretary of Commerce the task of giving specific operational content to agreed and legislated principles. In that context the "activism" of certain members of Congress during the rulemaking process was unusual, and arguably, inappropriate.

⁷ *See* REPORT OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS ON S. 69, S. REP. NO. 104, 95th Cong., 1st Sess. 37 (1977) [hereinafter cited as SENATE REPORT].

character of the administration of the EAA by the Department of Commerce.

II. BACKGROUND

Enactment of the EAA by the 95th Congress marked the end of two years of legislative and political controversy on the subject of antiboycott legislation. The Ford Administration opposed antiboycott legislation on the grounds that adequate legal authority already existed in the Export Administration Act of 1969⁸ and other federal statutes to deal with the boycott's most controversial manifestations, that is, discrimination against United States firms with Jewish management,⁹ and refusals by United States firms to do business with other firms "blacklisted" by boycott authorities,¹⁰ and on the

⁸ Since 1965 it has been the declared policy of the United States to "oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States." Further, it has been United States policy, "to encourage and request domestic concerns [engaged in export transactions] to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting [such restrictive trade practices or boycotts]," 50 U.S.C. app. § 2402(5) (1970) (amended 1977). This policy statement and an accompanying requirement that domestic concerns be required by rules and regulations to report to the Commerce Department receipt of requests, answers to which would violate the policy, were included in the 1965 Amendments to the Export Control Act of 1949, Pub. L. No. 89-63, 79 Stat. 209 (1965) (replaced by the Export Administration Act of 1969). At the same time these antiboycott provisions were added, the Export Control Act was also amended to allow control of the export of "information" and it was contemplated by Congress that this authority might be used, at the discretion of the executive branch taking into account the foreign policy interests of the United States, to prohibit responses to boycott inquiries. See REPORT OF THE SENATE COMMITTEE ON BANKING AND CURRENCY TO ACCOMPANY H.R. 7105, S. REP. No. 363, 89th Cong. 1st Sess. 8, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1826. Thus, it can be argued that authority has existed since 1965 for the prohibition of the most common forms of boycott "compliance" and that the EAA's prohibitions were not necessary, except as a means to compel action by the executive branch.

The reporting requirements of the Export Control Act of 1965 and of the Export Administration Act of 1969 have been enforced by the Commerce Department's Export Administration Regulations found at 15 C.F.R. §§ 369.1-.5 (1977). The EAA continues the requirement of reporting of requests to further or support restrictive trade practices or boycotts aimed at friendly countries. EAA sec. 201, § 4A(b)(2).

⁹ In November 1975, the Commerce Department's Export Administration Regulations were amended effective December 1, 1975 to prohibit responding to any boycott request which "discriminates, or has the effect of discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex or national origin." 15 C.F.R. § 369.2 (1976).

¹⁰ In January 1976 the Department of Justice initiated an antitrust suit against Bechtel Corporation under Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), alleging that Bechtel had, in compliance with the Arab boycott, engaged with other United States firms (its corporate affiliates) in a concerted refusal to deal with United States firms whose names appeared on the blacklist maintained by Arab boycott authorities. *United States v. Bechtel Corp.*, No. C76-99 (GBH) (N.D. Cal., filed Jan. 16, 1976). A consent decree to settle this suit was proposed in January 1977, 42 Fed. Reg. 3716 (1977).

On March 28, 1978, in a pleading filed with respect to the proposed decree, the Department of Justice took the position that certain conduct permitted by the EAA may, nonetheless, violate the Sherman Act. 43 Fed. Reg. 12,954 (1978). Most significantly, it is the Justice Department's position that United States firms may not initiate boycott-based selections of suppliers of goods for import into a boycotting country, even though such selections are permitted by the local law compliance exception of the EAA and EAR. See notes 261 to 291 *infra* and accompanying text for an elaboration of this exception.

If final, revised Commerce Department reporting regulations require reporting of either the initiation or receipt of such selections, the task of would-be federal or private antitrust litigants will be substantially facilitated.

grounds that any new legislation could have a serious deleterious impact on United States economic and diplomatic goals in the Middle East.¹¹ Administration witnesses argued that the legislation could be viewed by Arab nations as an affront to their sovereignty and that it could substantially handicap United States firms seeking expanded business opportunities in oil-rich Arab markets. Infringing Arab sovereignty and handicapping United States firms seeking to build business relationships, it was felt, would undercut the United States' ability to be an effective mediator, enjoying the confidence of Arabs as well as Israelis, in the efforts to obtain permanent peace in the Middle East.¹²

While the debate between the executive and legislative branches on the subject of antiboycott legislation ran its course during 1975-1976, the business community did not vigorously participate though it remained a very interested spectator. Since the executive branch was opposing new antiboycott legislation, the business community probably thought it had little to gain by taking a strong public position on an issue of such political sensitivity.

Legislative efforts in the 94th Congress foundered when parliamentary maneuvers in the closing days of the Congress blocked appointment of Senate Conferees to a House-Senate Conference on Export Administration Act extension legislation containing antiboycott provisions.¹³ An "informal" House-Senate Conference did convene, however, and produced a text of boycott provisions which subsequently became the focal point for legislative action in the 95th Congress.¹⁴

Inevitably the antiboycott policy of the United States became an issue in the 1976 presidential campaign. Candidate Carter endorsed stringent antiboycott legislation, apparently based upon the common misapprehension that the Arab boycott was essentially a dis-

¹¹ See *Effectiveness of Federal Agencies Enforcement of Laws and Policies Against Compliance, by Banks and Other U.S. Firms, with the Arab Boycott (Part 2—Department of Commerce Boycott Disclosure Program) Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 94th Cong., 2d Sess. 2, 4 (1976) (statement of Secretary of Commerce, Elliot L. Richardson) [hereinafter cited as the Rosenthal Hearings]*.

¹² The positions of the executive and legislative participants in the extended debate have been lucidly summarized by Professor Steiner. See Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1380-90 (1976).

¹³ The bills sent to Conference were S. 3084, 94th Cong., 2d Sess. (1976), and H.R. 15377, 94th Cong., 2d Sess. (1976).

¹⁴ 122 CONG. REC. H12313-15 (daily ed. Oct. 1, 1976).

criminytory boycott directed against Jewish Americans and United States firms with Jewish management.¹⁵ President Ford ordered prospective public disclosure of reports of boycott requests filed by United States companies with the Department of Commerce¹⁶ but did not publicly espouse new legislation.¹⁷

The election of President Carter made enactment of new antiboycott legislation a virtual certainty and impressed upon the business community the need to become more actively involved in the legislative process on this issue. There resulted an unusual, extra-legislative negotiation between representatives of the Business Roundtable (an association of 190 executives of major American corporations) and of the three major Jewish service organizations, the Anti-Defamation League of B'nai B'rith, the American Jewish Committee, and the American Jewish Congress. Lawyers for both sides conducted extensive negotiations in the winter and spring of 1977 and forged a compromise legislative text which each side was willing to support. Their compromise provisions were introduced as amendments to Export Administration extension legislation on the floor of the Senate¹⁸ and later became law.

¹⁵ Much of the legislative impetus in the 94th Congress was the result of widespread belief by citizens and legislators that the Arab boycott was essentially discriminatory in nature, imbued with discriminatory animus against firms with Jewish officers or directors. Boycotting governments and their officials have steadfastly denied this charge. Reports of boycott requests filed at the Department of Commerce, and since October 7, 1976, routinely made public, disclose that boycott requests manifesting racial or religious discrimination are extremely rare, and that the Arab boycott of Israel has become in large part what it purports to be—an economic boycott. Nevertheless, it is undeniable that misconceptions about the boycott have the potential to cause "chilling" effects on business opportunities for Jewish owned or managed firms and that in some cases this potential has in all probability been realized.

¹⁶ The President's directive was accomplished by amendment to the Commerce Department's Export Administration Regulations effective October 7, 1976, 41 Fed. Reg. 44,861 (1976).

¹⁷ In the final week of the 94th Congress, the White House circulated to certain members of the "informal" House-Senate Conference, and to representatives of major Jewish organizations, a proposed compromise text. See *Rosenthal Hearings*, *supra* note 11, at 4, 45-46. It was too little and too late. It was similar to the Senate version of legislation, S. 3084, 94th Cong., 2d Sess. (1976) (the so-called Stevenson bill), but would have required proof of an actual agreement to sustain a charge that a United States person had engaged in a "refusal to deal." As such it was narrower in scope than either the House or Senate bills and therefore, as a parliamentary matter, subject to point-of-order challenge if it had been approved by conference committee. It is this proposal to which President Ford referred during the second Carter-Ford debate when he stated that his administration had sought legislation which would take strong and effective action against those who participate in or cooperate with the Arab boycott. N.Y. Times, Oct. 8, 1976, § A, at 19, col. 1.

¹⁸ 123 CONG. REC. S7152-54 (daily ed. May 5, 1977) (remarks of Senator Heinz). The fragility of the compromise was demonstrated by the widely divergent points of view ex-

The fact that a major business association played a central role in framing the legislative compromise does not mean, however, that the resulting legislation does not present substantial obstacles to business relations with countries engaged in the boycott of Israel.¹⁹

III. SUMMARY OF THE ANTIBOYCOTT PROVISIONS OF THE EAA

The EAA imposes substantial criminal and civil penalties²⁰ on certain conduct of "United States persons" in United States interstate or foreign commerce, undertaken with intent to comply with, further or support any boycott, unsanctioned by United States law or regulation, and directed against "a country which is friendly to the United States."²¹

A. *Prohibitions and Exceptions*

The EAA's prohibitions are directed to the perceived, principal manifestations of the boycott: its emphasis on the furnishing of certifications and answers to questionnaires to Arab authorities,

pressed in comments submitted by the Business Roundtable on the one hand and the major Jewish organizations on the other, to the Commerce Department in response to the Department's requests for comments on proposed regulations to implement the EAA's prohibitions. Compare Submission of the Business Roundtable dated November 18, 1977 with that of the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League of B'nai B'rith, dated November 18, 1977. (Both Submissions are on file in the Freedom of Information Records Inspection Facility of the Industry and Trade Administration, Room 3012, United States Department of Commerce, Washington, D.C. 20230.)

¹⁹ The boycott is known to be enforced by Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, the United Arab Emirates and the Yemens. The TRA requires that a public listing of boycotting countries be made quarterly by the Department of Treasury; this listing is made up of the aforementioned countries. I.R.C. § 999 (a)(3). See 42 Fed. Reg. 17,560 (1977).

²⁰ Knowing violations of the EAA are subject to a criminal fine of \$25,000 and one year's imprisonment. Second and subsequent knowing violations are subject to a \$50,000 fine, or a fine of three times the value of any exports involved, and five years imprisonment. EAA sec. 112 (amending § 6(a) of the Export Administration Act of 1969, 50 U.S.C. app. § 2405(a)). Violations are also subject to civil and administrative penalties. Each violation may occasion a fine of \$10,000, and a person's export privileges may be suspended or revoked. EAA sec. 203(a) (amending § 6(c) of the Export Administration Act of 1969, 50 U.S.C. app. § 2405(c)). Although administration of the Export Administration Act is normally exempt from the Administrative Procedure Act, civil and administrative sanctions imposed pursuant to the EAA must follow notice and opportunity for an on-the-record hearing in accordance with 5 U.S.C. §§ 554-557 (1970). *Id.*

²¹ EAA sec. 201, § 4A(a)(1). While by its terms the EAA applies to all foreign boycotts against countries friendly to the United States, in fact, the legislation has been crafted to deal with the Arab boycott of Israel. In the foreseeable future it is likely that the Commerce Department will devote almost the totality of its available boycott-enforcement resources to deal with problems arising from the Arab boycott of Israel. Nevertheless, United States persons remain liable for violations of the EAA vis-a-vis other international boycotts.

either directly or as a condition of payment of a letter of credit; its attempt to condition Arab business on a requirement that United States companies not do business with Israel or other United States companies doing business with Israel; and its overemphasized discriminatory animus against Jewish Americans.

Consequently, subject to certain carefully limited exceptions, the EAA prohibits doing or agreeing to do the following: (1) refusing or requiring anyone else to refuse to do business with or in a boycotted country, with any national, resident or business concern of the boycotted country or with any other person, pursuant to an agreement with, requirement of, request from or on behalf of a boycotting country; (2) discriminating against United States persons on the basis of race, religion, sex, or national origin; (3) furnishing information regarding the race, religion, sex, or national origin of any United States person; (4) furnishing information about anyone's past, present, or future business relationships with a boycotted country, its nationals or residents, including any business concern organized under its laws, or with any other person known or believed to be blacklisted; (5) furnishing information about charitable or fraternal involvements; and (6) implementing any letter of credit which conditions payment upon the performance of any prohibited boycott action.²² In addition, the EAA contains a broadly-phrased prohibition against any action undertaken directly or through another person, with the intent to evade the application of its provisions.²³

These prohibitions are subject to certain exceptions designed to permit compliance with "primary" boycott practices and to accommodate legitimate exercise of sovereign rights by Arab states within their own territories. Accordingly, the EAA's exceptions allow compliance or agreement to comply with: (1) requirements of a boycotting country barring the importation of goods or services of a boycotted country, its residents, nationals or business concerns; (2) requirements barring the use of carriers of a boycotted country or carriers which do not follow prescribed routings so as to avoid stopping in ports of a boycotted country prior to disembarkation at an Arab port; (3) import and shipping document requirements with respect to the country of origin, name of the carrier, route of shipment, and identity of the supplier, so long as this information is

²² *Id.* § 4A(a)(1)(A)-(F).

²³ *Id.* § 4A(a)(6).

provided in affirmative, non-blacklisting, non-exclusionary terms; (4) unilateral and specific selections by a boycotting country or a national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods identifiable by source when imported into the boycotting country; (5) export requirements of a boycotting country regarding shipment or transshipment of goods to a boycotted country; (6) immigration, passport or employment information requirements, provided the information is furnished by an individual for himself or for his immediate family; and (7) laws of the boycotting country as they apply to a United States person resident therein with regard to activities of that person exclusively in the boycotting country or to importation of identifiable products for that person's own use in the boycotting country.²⁴

To allow an orderly and fair adjustment to the new prohibitions by United States companies and, presumably by Arab clients and customers as well, the EAA provides a "grace period" through December 31, 1978 for actions taken pursuant to a written contract or other agreement entered into before May 16, 1977.²⁵ This period may be extended for an additional year on a case-by-case basis if the Secretary finds that good faith efforts are being made to renegotiate the contract to eliminate the offending provisions.²⁶ A "mini" grace period was provided, in addition, to allow continued furnishing of negative certificates of origin and blacklist status of supplier, vessel, and insurer through June 21, 1978.²⁷

The EAA's prohibitions and exceptions, as amplified in the EAR promulgated by the Secretary, will be discussed further in evaluating the business effects of the EAA. Special emphasis will be placed on the four most significant prohibitions: those dealing with refusals to do business, furnishing of information about business relationships, implementing letters of credit containing prohibited conditions, and evasion. Similarly, prominence in any discussion of business effects of antiboycott legislation must be given to three of the six exceptions: those relating to compliance with import and shipping document requirements, compliance with boycott-based unilateral and specific selections of suppliers of goods or services, and compliance with local laws of boycotting countries.

²⁴ *Id.* § 4A(a)(2)(A)-(F).

²⁵ *Id.* § 4A(a)(5).

²⁶ *Id.*

²⁷ *Id.* §§ 4A(a)(2)(B) and 4A(a)(5).

Before analyzing the potential business effects of the EAA's prohibitions, however, it is appropriate to review in some considerable depth its jurisdictional foundations, namely the definitions of "United States person," United States commerce, and "intent."

B. "*United States Person*" and *United States Commerce*

The EAA and EAR define "United States person" to include all individuals who are residents or nationals of the United States; any government of a United States jurisdiction or its departments and agencies; and all corporations, partnerships or other form of association organized under the law of any United States jurisdiction. Further, it includes United States branch offices and subsidiaries of "foreign concerns." Finally, and significantly, it embraces all "controlled in fact" foreign branches and subsidiaries of "domestic concerns."²⁸

The EAA leaves to the executive branch the task of defining by regulation the criteria for the existence of control in fact.²⁹ According to the EAR, such control exists when a domestic concern³⁰ has the authority or ability "to establish the general policies or to control the day-to-day operations" of its foreign subsidiary or branch.³¹ However, a foreign branch office of a domestic concern is deemed to be controlled in fact by the domestic concern under all circumstances.³² A rebuttable presumption of control in fact arises when the domestic concern: (1) owns or controls more than 50% of the voting securities of the foreign affiliate; (2) owns or controls 25% or more of the voting securities, and this interest is not matched or exceeded by that of any other person; (3) operates the foreign affiliate pursuant to an exclusive management contract; (4) has members of its board of directors filling a majority of the positions on the

²⁸ EAA sec. 204 (amending § 11 of the Export Administration Act of 1969, 50 U.S.C. app. § 2410); EAR § 369.1(b), 43 Fed. Reg. 3512-13 (1978).

²⁹ EAA sec. 204 (amending § 11 of the Export Administration Act of 1969, 50 U.S.C. app. § 2410).

³⁰ "Domestic concern" is a term that has appeared in United States law pertaining to the Arab boycott of Israel, since 1965. See discussion at note 8 *supra*. Nevertheless, it has never been statutorily defined. The EAR define it to mean any business entity organized under the laws of any United States jurisdiction or any "permanent domestic establishment of a foreign concern." EAR § 369.1(b)(2), 43 Fed. Reg. 3513 (1978). This definition excludes individuals and therefore, it is clear that stock ownership by individuals in foreign corporations will not under any circumstances constitute control in fact, making such foreign corporations "United States persons" for purposes of the EAA.

³¹ EAR § 369.1(c)(1), 43 Fed. Reg. 3513 (1978).

³² EAR § 369.1(c)(5), 43 Fed. Reg. 3513 (1978).

foreign affiliate's board; (5) can appoint a majority of the members of the foreign affiliate's board; or (6) can appoint the chief operating officer of the foreign affiliate.³³

The EAR nowhere state that these six presumptive tests are exclusive. Thus, the Commerce Department may find the presence of control in fact in instances where power to establish the general policies of the foreign affiliate or to control its day-to-day operations exists, despite the fact that none of the presumptive tests apply.³⁴

The fact that a foreign concern has a United States affiliate or branch does not make it a United States person.³⁵ However, a United States branch or affiliate of a foreign concern is deemed to be a domestic concern, and any foreign affiliate or branch controlled by it will be deemed to be a "United States person."

The treatment by the EAA and EAR of a United States branch of a foreign concern as a separate juridical entity extends also to the treatment of foreign branches of domestic concerns. While, as already noted, a domestic concern's foreign branch will always be considered to be controlled in fact, and therefore a United States person subject to the EAA's prohibitions, it is treated as a separate entity for purposes of the EAA and EAR.³⁶

The prohibitions of the EAA apply to the foregoing classes of

³³ EAR § 369.1(c)(2), 43 Fed. Reg. 3513 (1978). The percentage ownership tests may exempt from the EAR's purview 50-50 joint ventures between United States firms and foreign entities unless the United States venture partner can appoint the venture's chief operating officer or a board majority, or otherwise can establish the venture's general policies or control its day-to-day operations.

³⁴ The Preamble to the EAR states that power to appoint a board majority is equivalent to the power to establish general policies for a foreign affiliate, and that power to appoint the chief operating officer equates to the power to control day-to-day operations. However, it also states that no presumptions exist regarding the absence of control. 43 Fed. Reg. 3508 (1978).

³⁵ EAR § 369.1(b), Example (iii), 43 Fed. Reg. 3513 (1978). The EAR imply, however, that if the board of directors of a United States corporate affiliate of a foreign concern also makes up a majority of the board of the foreign concern, then the foreign concern will be presumed to be controlled in fact by the domestic concern. EAR § 369.1(c)(2)(iv), 43 Fed. Reg. 3513 (1978). It seems doubtful that the EAR intend this result and a more sensible reading of this subsection is that it only applies when there is a domestic concern parent and a foreign subsidiary.

³⁶ A branch may become a bona fide resident of a boycotting country and direct boycott-based unilateral and specific selections of suppliers of goods to the United States offices of the same company. EAR § 369.3(c), Boycotting Country Buyer, Example (iii), 43 Fed. Reg. 3529 (1978). Also, foreign branches of United States banks are subject to separate and distinct presumptive tests regarding the presence of United States commerce for purposes of the EAA's prohibition against implementing certain letters of credit. See EAR § 369.2(f) *passim*, 43 Fed. Reg. 3523-24 (1978).

United States persons only with respect to their activities in the "interstate or foreign commerce of the United States." The Department of Commerce has also had relatively broad latitude in defining "interstate or foreign commerce of the United States."³⁷ Under the EAR, any transactions involving the direct export or sale of goods or services, including information, from the United States to any foreign purchaser will be in United States commerce.³⁸ The action of a domestic concern in specifically directing the activities of its foreign affiliate or branch is an activity in United States commerce, but will not bring a transaction of the foreign affiliate, not otherwise in United States commerce into United States commerce.³⁹

More interesting and significant is the EAR's application of the United States commerce standard to the activities of foreign branches and affiliates of domestic concerns. Any transaction involving United States origin goods or services, including information, will be in United States commerce, if the goods or services are acquired from a person in the United States for the purpose of engaging in any specific transaction, including filling the anticipated needs of specified customers.⁴⁰ Goods acquired from a person in the United States remain in United States commerce, whether or not they "come to rest" in inventory outside the United States, until they are "further manufactured, incorporated into, refined into or reprocessed into another product."⁴¹ However, goods ordered from the United States with reference to a specific transaction with a boycotting country, or in anticipation of specific orders from a boycotting country, remain in United States commerce irrespective of alteration or modification by manufacture or processing outside the United States.⁴²

Services acquired from a person in the United States, by a foreign branch or affiliate of a domestic concern, will not cause a transaction involving their subsequent disposition by the branch or affiliate to be in United States commerce, if the services were acquired without reference to a specific transaction.⁴³ For instance, manufacture abroad by a controlled in fact subsidiary of goods for Middle East-

³⁷ The Congress clearly intended the executive branch to elaborate the United States commerce standard in regulations. See the SENATE REPORT, *supra* note 7, at 37.

³⁸ EAR § 369.1(d)(2), 43 Fed. Reg. 3514 (1978).

³⁹ *Id.* and EAR Preamble, 43 Fed. Reg. 3509 (1978).

⁴⁰ EAR § 369.1(d)(8)-(9), 43 Fed. Reg. 3514-15 (1978).

⁴¹ EAR § 369.1(d)(12), 43 Fed. Reg. 3515 (1978).

⁴² EAR § 369.1(d)(8)(ii), 43 Fed. Reg. 3514 (1978).

⁴³ EAR § 369.1(d)(13)(i), 43 Fed. Reg. 3515 (1978).

ern markets pursuant to a license agreement with the United States parent does not cause sale of those goods to be in United States commerce.⁴⁴ Thus, in contrast to their treatment of goods of United States origin, the EAR consider services which have "come to rest" outside the United States to be outside United States commerce.

The EAR, however, contain an unfortunate ambiguity at this point. Whereas they generally treat "information" as part of services by placing a parenthetical "including information" after the term "services," the EAR omit this parenthetical when discussing the circumstances under which United States-origin services are not in United States commerce.⁴⁵ If information is to be treated differently from services in this regard, the consequences are substantial. Boycott information questionnaires or other inquiries from boycotting countries are often directed to United States persons' overseas branches or affiliates, incident to aspects of doing business with boycotting countries not otherwise involving United States-origin goods or services and therefore not in United States commerce. Foreign branches or affiliates of domestic concerns should be able to respond to such inquiries, without specific recourse to the domestic concern's parent, without the risk that the transaction will be deemed to be in United States commerce because some of the information provided originally came from the United States. Also, domestic concerns' foreign branches or subsidiaries should be able to respond to boycott information requests received incident to the registration of patents or trademarks in boycotting countries without their action being in United States commerce simply because some of the information involved originally came from the United States.

Services which the EAR deem to be "ancillary," provided by a person in the United States to a foreign affiliate or branch of a domestic concern will not, by themselves, cause a transaction to be in United States commerce. Ancillary services include legal, accounting, financial and transportation services which are rendered to the foreign affiliate or branch primarily for its own use rather than the use of a third party customer or client. In contrast, services such as those provided by architects or engineers in the United States, are deemed to "pass through" to the foreign client, bringing a transaction into United States commerce.⁴⁶

⁴⁴ EAR § 369.1(d) Example (xx), 43 Fed. Reg. 3516 (1978).

⁴⁵ Compare EAR § 369.1(d)(11) with EAR § 369.1(d)(13), 43 Fed. Reg. 3515 (1978).

⁴⁶ EAR § 369.1(d)(14)-(15), 43 Fed. Reg. 3515 (1978).

If any "non-ancillary" part of a transaction between a domestic concern's foreign affiliate or branch and a person outside the United States is in United States commerce, then the entire transaction will be considered to be in commerce.⁴⁷ Thus, if a domestic concern on behalf of its foreign affiliate gives a guarantee of performance to a foreign customer, the entire transaction will be in United States commerce.⁴⁸ Since a branch generally is without legal capacity to contract on its own account, it is possible that United States commerce may be deemed to exist in all transactions engaged in by a foreign branch of a domestic concern. The Commerce Department may view all such transactions to be guaranteed by the domestic concern parent.

If this, indeed, is the intended effect of the regulations, it moots the separate legal status given foreign branches by the EAR's definition of United States person.⁴⁹ Not only will branches always be deemed to be controlled in fact and therefore United States persons,⁵⁰ but also their contractual commitments may be deemed to be in United States commerce and subject to the EAA's prohibitions.⁵¹ The Commerce Department, although aware of this issue, has not yet offered any clarification.

On the whole, with the important exceptions of the ambiguities that attend branch transactions and the furnishing of information by controlled in fact foreign affiliates, the jurisdictional compass given the EAA's prohibitions by the EAR appears sensible and workable. Contrary to general belief, it does not differ radically from the jurisdictional scope given by the Commerce Department to its Arab boycott request reporting requirements in effect since 1965.⁵²

⁴⁷ EAR § 369.1(d)(10), 43 Fed. Reg. 3515 (1978).

⁴⁸ EAR § 369.1(d)(15), 43 Fed. Reg. 3515 (1978). The EAR make clear that the provision of a performance guarantee by a domestic concern parent of a foreign subsidiary to a third country purchaser, in contrast to the provision of general financial assistance to the foreign subsidiary, is not an ancillary service and therefore creates a United States commerce nexus.

⁴⁹ See discussion at note 36 *supra* and accompanying text.

⁵⁰ See text at note 32 *supra*.

⁵¹ The same analysis does not apply, however, to foreign branches of United States banks implementing letters of credit. See notes 199 to 200 *infra* and accompanying text.

⁵² 15 C.F.R. §§ 369.1-.5 (1977). See discussion at note 4 *supra*. Prior to amendment by the EAA, the Export Administration Act stated that it was the policy of the United States "to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action" which would further or support a boycott contravening United States policy. 50 U.S.C. app. § 2402(5)(B) (1970). The reporting requirements implementing this policy of discouragement were to apply to all "domestic concerns," 50 U.S.C. app. § 2403(b) (1970).

The EAA amends the policy statement to substitute the term "United States person" for

The Commerce Department has stated that these requirements applied to all transactions involving exports from the United States, whether pursuant to an order received by a domestic concern or its foreign subsidiary.⁵³ On the other hand, the previous reporting requirements, in contrast to the new prohibitions, did not apply to transactions of foreign subsidiaries involving United States goods that had come to rest in inventory abroad.⁵⁴ Nor was their application to operations of American concerns in boycotting countries or to the provision of services and "export" of information clearly spelled out in Commerce Department regulations or other sources of guidance.

Whatever the reach of prior law, the EAA and EAR greatly clarify the jurisdictional scope of boycott-related provisions of the Export Administration Act. They apply them unequivocally, when United States commerce is present, to foreign affiliates that are controlled in fact by domestic concerns and to operations of United States firms within boycotting countries. They are explicit with respect to the conditions under which provision of services from the United States will cause a transaction abroad to be in United States commerce. Most significantly, they decline to break the chain of United States commerce for goods which have come to rest in inventory abroad.⁵⁵

C. *Intent*

Before conduct will violate the prohibitions of the EAA it must be undertaken with intent to comply with, further or support an unsanctioned boycott.⁵⁶ The EAR provide that the requisite intent

domestic concern but retains its language indicating the need for an export transaction nexus. Thus, it states in pertinent part that it is the policy of the United States, "to encourage and, in specified cases, to require United States persons *engaged in the export of articles, materials, supplies or information* to refuse to take [any] actions [which would constitute prohibited boycott compliance]." EAA sec. 202(b) (amending § 3(5)(B) of the Export Administration Act of 1969, 50 U.S.C. app. § 2402(5)(B) (1970) (emphasis added)). This policy statement is the predicate for both the prohibitions and reporting regulations under the EAA. EAA sec. 201(a), § 4A(a)(1), §§ 4A(b)(1) and (2). The Secretary of Commerce does not, however, appear to have felt constrained by the export-related language of this policy statement in posing tests for United States commerce. See EAR § 369.1(d), 43 Fed. Reg. 3514-15 (1978).

⁵³ Letter from Secretary of Commerce Elliot L. Richardson to Congressman John Moss (July 26, 1976), a copy of which is on file at the office of the GA. J. INT'L & COMP. L.

⁵⁴ *Id.*

⁵⁵ See discussion at notes 29-33 and notes 37-42 *supra* and accompanying text. In contrast to the EAA, the TRA's boycott-related provisions apply regardless of whether there exists a nexus with United States commerce.

⁵⁶ EAA sec. 201(a), § 4A(a)(1); EAR § 369.1(e)(1), 43 Fed. Reg. 3516 (1978).

will be present whenever boycott information is knowingly furnished in response to a request. Boycott compliance need not be the sole or even the principal reason for an action for there to exist culpable intent, so long as boycott compliance is at least one of the reasons for a person's action.⁵⁷

The EAR's general definition of intent does not appear to pertain to violation of the statutory evasion standard which proscribes actions taken with "intent to evade" the provisions of the EAA and EAR.⁵⁸ An action, such as an alteration of one's business structure undertaken for legitimate business reasons, in addition to a desire to avoid the application of the EAA's prohibitions, will not constitute evasion.⁵⁹

The Commerce Department has resisted repeated suggestions that it list the Arab boycott of Israel (and the participants therein) as the *sole* boycott against a "country friendly to the United States," intentional compliance with which will violate the EAA's prohibitions.⁶⁰ The reason for the Department's reluctance to take this sensible step is not known. It may be that it fears political criticism if such a step were taken. At any rate it is believed that the Arab boycott of Israel is the only "secondary" international boycott currently being enforced and it is clear that the EAA aims at prohibiting secondary and not primary boycott compliance.⁶¹ The only exception to the focus on secondary boycott practices is the prohibition in the EAR against negative certificates of product origin.⁶² Unless or until the Commerce Department announces that the Arab boycott is the sole boycott subject to the EAR, it will remain a difficult question whether, for instance, furnishing a negative certificate of origin to an African country stating that goods do not originate in South Africa, will constitute intentional, prohibited boycott compliance. Unfortunately, the Department remains opposed to issuing such a notice. In fact, an official of the Department, on February 27, 1978 has specifically, publicly, beseeched the business community to bear in mind that there are numerous boycotts throughout the world against nations friendly to the United States,

⁵⁷ EAR § 369.1(e)(2), 43 Fed. Reg. 3516 (1978).

⁵⁸ EAA sec. 201(a), § 4A(a)(6).

⁵⁹ EAR § 369.4(e) and § 369.4, Example (vii), 43 Fed. Reg. 3535 (1978).

⁶⁰ The TRA, I.R.C. § 999(a)(3), requires such a listing. The Treasury has published it as part of its Guidelines on the Tax Reform Act's boycott provisions. See note 19 *supra*.

⁶¹ See REPORT OF THE HOUSE COMMITTEE ON INTERNATIONAL RELATIONS ON H.R. 5840, H. REP. No. 190, 95th Cong., 1st Sess. 5, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1138.

⁶² EAR § 369.3(b)(2), 43 Fed. Reg. 3526 (1978).

which may require action that would violate the EAA.⁶³ This Article will, caveats of the Commerce Department notwithstanding, maintain its focus on the principal objective of the EAA's experiment—the Arab boycott of Israel.

IV. IMPACT OF THE EAA AND EAR ON BUSINESS WITH AND IN THE ARAB WORLD

This section will analyze the impact of the EAA and EAR on business with and in boycotting countries. There are two major subsections. The first deals with export transactions of United States companies and their controlled foreign branches or subsidiaries outside boycotting countries. The second examines the special benefits provided to and problems encountered by United States persons with operations in boycotting countries. These subsections reflect the major categories of business relationships between United States concerns and Arab nations and nationals.

The analysis in each subsection includes a background discussion of manifestations of the boycott encountered by firms doing business with or in Arab nations, prior to the effective date of the EAA and EAR, January 18, 1978.⁶⁴ This discussion is followed by a description of what the EAA and EAR will permit United States concerns to do in response to boycott requirements imposed upon them, delineating those gaps and imperfections in the EAR which compound the difficulty faced by United States concerns seeking to maintain or develop business relations with Arab countries while complying with the EAA.

It is a thesis of this Article that imprecisions in the EAR adversely affect business relations with boycotting countries. Such imprecisions can be interpreted to the detriment of United States concerns by government officials or can simply discourage certain business practices otherwise permitted by the EAA. More importantly, ambiguities in the EAR make it difficult to have the United States antiboycott law treated seriously by Arab governments and boycott offices. United States government officials and businessmen seeking to convince Arab nations to relax their boycott laws will be handicapped if certain anomalies and imperfections in the EAA and EAR are left uncorrected. Accordingly, this Article seeks to emphasize

⁶³ Interview with Stanley J. Marcuss, Deputy Assistant Secretary of Commerce for Trade Regulation, *Questions and Answers on a Subject of Prime Business Interest*, INT'L TRADE EXP. WEEKLY (BNA) No. 196, M-1 (Feb. 28, 1978).

⁶⁴ See note 4 *supra*.

such anomalies and imperfections suggesting clarifications and amendments to the EAR where appropriate.

This section does not attempt a comprehensive assessment of the extent to which United States business prospects in the Middle East may be damaged by the EAA. Any such assessment must include predictions of the Arab response to the EAA and EAR. This section outlines the effects of the EAA and EAR on the ability of United States concerns to comply with typical Arab boycott requirements. Section V of this Article contains some highly speculative predictions regarding the Arab response to the EAA and EAR and taking these predictions into account, makes certain "summary assessments" of the likely effects of the EAA and EAR on United States business prospects in the Middle East.

A. *Export Transactions*

1. *Effects of Arab Boycott*

Prior to January 18, 1978, United States business exported billions of dollars of goods and services to the Arab world.⁶⁵ Almost without exception these transactions involved some boycott-related activities on the part of United States concerns.⁶⁶ The most common boycott-related activities included (a) furnishing information in response to requests contained in purchase orders or letters of credit or in anticipation of the demands of customs officials in Arab nations, (b) entering into boycott-related agreements regarding business relations with Israel or blacklisted firms pursuant to conditions contained in export sales contracts or bid and tender documents, (c) selecting suppliers, freight forwarders, carriers or insurers as a result of boycott-based agreements or fear of confiscation of nonconforming goods by Arab customs officials, (d) responding to general questionnaires regarding business relations, and (e) implementing letters of credit containing boycott-related conditions and requirements.⁶⁷ In addition, a number of these transactions may have involved a diversion of Arab business to foreign entities to avoid direct compliance by United States concerns with the boycott.

The information commonly requested by Arab nations varied

⁶⁵ SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., REPORT ON THE ARAB BOYCOTT AND AMERICAN BUSINESS 29 (Subcomm. Print 1976) [hereinafter cited as AMERICAN BUSINESS].

⁶⁶ *Id.* at ix, 7-8, 31-32.

⁶⁷ See note 2 *supra*.

somewhat depending upon the country requesting the information.⁶⁸ Hard-line Arab countries such as Kuwait demanded certifications by the exporter that (a) the exporter and its affiliates were not on the Arab blacklist, (b) the exporter would not use blacklisted insurers, (c) the goods or services to be imported would not be transported via Israel or on blacklisted carriers, (d) the goods to be imported would not be of Israeli origin (the so-called negative certificate of origin), and (e) the goods to be imported were not supplied by blacklisted companies.⁶⁹ More moderate countries such as Saudi Arabia typically requested a certification from the exporter covering items (b) through (e) above.⁷⁰ Finally, some Arab states such as Egypt often requested only a certification that the import was not of Israeli origin and that the carrier was not blacklisted.

The boycott-related agreements frequently requested by Arab customers as part of large export transactions, sought contractual assurances from the exporter regarding origin of goods and blacklist status of carriers or suppliers, similar to boycott certification requirements typically fulfilled by import and shipping document certifications or letter of credit conditions in less extensive export transactions.⁷¹ Hard-line Arab states often required agreements that

⁶⁸ Statistics collected by the Commerce Department as a result of the reporting requirements of the Export Administration Regulations, 15 C.F.R. 369.1-.5 (1977), in effect prior to January 18, 1978, show a substantial variation in boycott requests depending upon the Arab country initiating the request. BUREAU OF EAST-WEST TRADE, U.S. DEP'T OF COMMERCE, EXPORT ADMINISTRATION REP. No. 114 10-19 (1976) [hereinafter cited as EXPORT ADMINISTRATION REP.].

⁶⁹ Reliable information as to what boycott-related demands are made by Arab countries is difficult to find. The statistical analysis of the EXPORT ADMINISTRATION REP., *supra* note 68, is perhaps the best available published summary of boycott requests but is deficient in a number of respects. First, it is dated. Second, the categories into which it divides requests are overbroad. Third, the analysis does not show the changes in patterns of requests over time. Accordingly, to a significant extent, in describing the effects of the boycott on business in various Arab countries, the authors have had to rely on their own experience in the practice of law and government service. *But see also* example of Iraqi tender offer reprinted in *Foreign Investment and Arab Boycott Legislation: Hearings on S.425, S.953, S.995, and S.1303 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 209-11 (1975) [hereinafter cited as *Foreign Investment*].

⁷⁰ The New York Chamber of Commerce and Industry regularly publishes and makes available to its members a listing of documents required for export to foreign countries. With respect to Arab countries this listing includes boycott-related documentary requirements. Regarding Saudi Arabian boycott requirements, *see* Documents Required for Shipments from the United States to: Saudi Arabia, New York Chamber of Commerce and Industry, February 1976.

⁷¹ Frequently, in large export sales transactions, exporters were asked not only to enter into boycott-related agreements but also to issue certifications that paralleled these agreements. *See*, example of agreement reprinted in *Foreign Investment*, *supra* note 69, at 213-16.

exporters forswear business with Israel or blacklisted persons and that no services incident to the export transaction be provided by blacklisted concerns. More moderate countries commonly required such agreements and representations merely with regard to the particular exports in question. And, the most moderate states if they required any boycott-related agreements at all, typically required them only in relation to the origin of exports, the nationality of the carrier and the route of the carrier in transporting the particular export in question to the importing country.

The extent to which United States concerns tacitly complied with boycott regulations in the selection of suppliers, carriers, insurers and other United States persons prior to the effective date of the EAA is hard to determine.⁷² In some cases, United States concerns have completely disregarded boycott-related agreements with Arab customers not to use blacklisted suppliers. In other instances, the *in terrorem* effect of the boycott has probably caused United States concerns to select suppliers on a boycott basis even in the absence of a specific agreement to do so. It is likely that the substantial increase in the scope and attractiveness of the Arab "market" and a coincident increase in the vigor of boycott enforcement during the period between 1973 and January 18, 1978, caused an increase in the influence of the boycott on business choices of United States firms.

One indication of the increased vigor of the boycott apparatus during this period was a constant increase in the boycott-related screening of United States concerns by Arab countries. Hard-line countries, especially, initiated investigations of United States concerns doing business in Arab countries. Such investigations inevitably involved a request that the corporation being investigated answer a variant of the so-called general seven-point questionnaire.⁷³

⁷² There has been some speculation that compliance by United States businesses with Arab boycott requirements prior to the effective dates of the EAA and EAR was extensive. Steiner, *supra* note 12, at 1366. This opinion appears to be confirmed by Commerce Department statistics which show overwhelming compliance by United States concerns with boycott requests and requirements. EXPORT ADMINISTRATION REP., *supra* note 68, at 19. See AMERICAN BUSINESS, *supra* note 65, at ix, and SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, EXPORT ADMINISTRATION AMENDMENTS, FOREIGN BOYCOTTS, AND DOMESTIC AND FOREIGN INVESTMENT IMPROVED DISCLOSURE ACTS OF 1976, S. REP. NO. 917, 94TH CONG., 2D SESS. 16 (1976). However, for the most part, such "compliance" took the form of certifying and/or agreeing that goods were not of Israeli origin and that goods would not be shipped on Israeli vessels or via Israel.

⁷³ The following is the partial text of a so-called seven-point Arab boycott questionnaire sent by the General Office for the Boycott of Israel, the Central Boycott Office, to an American company:

In most cases, failure to answer the questionnaire meant eventual blacklisting or, in the cases of persons already blacklisted, a denial of requests to be removed from the blacklist.⁷⁴

Prior to the effective date of the EAA and EAR, letters of credit were the principal means of effecting payment in export transactions with Arab countries.⁷⁵ They provided United States exporters with a safe, inexpensive payments mechanism and United States banks found them attractive because of their ease of administration. Unfortunately, they also provided Arab countries with a simple means of eliciting boycott-related information from exporters, freight forwarders and shippers.

A letter of credit opened in an Arab country made to the order of a United States beneficiary typically contained boycott-related conditions and requirements including a requirement that the beneficiary of the credit supply one or more of the following certifications: (a) that neither the beneficiary nor its affiliates were on the Arab blacklist, (b) that the goods covered by the credit were not made in or did not include component parts made in Israel, (c) that the goods covered by the credit were not made by or did not include component parts made by blacklisted suppliers, and (d) that the goods covered by the credit would not be insured by a blacklisted

I. A declaration containing your answers to the following questions:

Do you or any of your subsidiaries . . . :

1. Have now or ever had a branch or main factory or assembly plant in Israel?
2. Have now or ever had general offices in Israel for regional or international operations?
3. Grant or ever granted the rights of using your names, trademarks, manufacturing licenses, patents rights etc. . . to Israeli persons or firms?
4. Participate or own shares, now or in the past, in Israeli firms or businesses inside or outside Israel?
5. Represent or ever represented any Israeli firm or business in Israel or abroad?
6. Render or ever rendered any technological assistance to any Israeli firm or business?
7. What are the names and nationalities of all companies in which you hold shares and what is the percentage of your shareholding in each of them? Moreover, what are the names and nationalities of the companies holding shares in your company or its subsidiaries, and what is the percentage of the shareholding of each of them as to the total share capital of the company participated?

Not infrequently, the seven-point questionnaire appeared in the form of an eight-point questionnaire in which question 7 above was merely divided into two questions.

⁷⁴ See Bahti, *The Arab Economic Boycott of Israel*, Brookings Inst. 7-32 (1967).

⁷⁵ Steiner, *supra* note 12, at 1372.

insurer, be shipped on an Israeli or blacklisted ship or be shipped via Israel.⁷⁶ Such letters of credit were commonly confirmed or advised by United States financial institutions which, in accordance with customary international banking practice, honored the credit only so long as the beneficiary of the credit presented all the documents required thereby including the boycott-related certificates.

Additionally, prior to January 18, 1978, some United States concerns probably diverted Arab world business either to independent foreign distributors or foreign subsidiaries. Such diversion of business avoided the Commerce Department's then existing report requirements.⁷⁷ The foreign entities could with regard to a non-United States export transaction answer boycott questionnaires, enter into boycott-based agreements and unilaterally make boycott certifications without filing a report with the Commerce Department.⁷⁸ The volume of this business diversion activity probably depended upon (a) the availability of such foreign entities to a particular United States concern, (b) the willingness of the United States concern to be involved indirectly in boycott compliance behavior by foreign distributors or affiliates, and (c) the extent to which the United States concern feared public censure for engaging directly and publicly⁷⁹ in boycott compliance activity itself. However, because the previous Export Administration Regulations were only seriously enforced in the two or three years immediately preceding the enactment of the EAA⁸⁰ and because public interest in concerns reporting nondiscriminatory boycott compliance activity diminished after an initial flurry of excitement following the institution by the Commerce Department of public disclosure of boycott reports in the Fall of 1975,⁸¹ such diversionary activity prior to January 18, 1978, was probably not widespread.

⁷⁶ EXPORT ADMINISTRATION REP., *supra* note 68, at 15.

⁷⁷ 15 C.F.R. § 369 (1977). See notes 53 to 54 *supra*.

⁷⁸ The reporting provisions required reports by United States exporters that had received or were informed of a boycott request. 15 C.F.R. 369.4 (1977). The regulations defined United States exporter as the person who controlled the export from the United States. 15 C.F.R. 370.2(28) (1977). Consequently, a persuasive argument can be made that if a transaction did not involve an export from the United States, no exporter was required to file a boycott request report with the Commerce Department.

⁷⁹ As noted earlier in this article, boycott reports filed with the Commerce Department were made public beginning in the fall of 1976. See note 16 *supra* and accompanying text.

⁸⁰ Steiner, *supra* note 12, at 1370.

⁸¹ See note 16 *supra* and accompanying text.

2. *Specific Applications of the EAR to Export Transactions*

This section is designed not only to demonstrate the impact of the EAR on transactions with the Arab world and note gaps and imperfections in the EAR which may heighten this impact but also to provide practical guidance for exporters doing business with the Arab world. The analysis in this section assumes throughout, unless the contrary is stated, that the threshold tests for application of the EAA—United States commerce,⁸² United States person,⁸³ and intent⁸⁴—are met.

a. *Furnishing Information*⁸⁵

The EAA prohibits furnishing information regarding business relations with a boycotted country or with persons known or believed to be blacklisted.⁸⁶ However, certain of its exceptions allow furnishing of information provided the criteria of the exceptions are met.⁸⁷ The most significant exception allows furnishing information in response to import and shipping document requirements of a boycotting country.

The conclusions expressed in this subsection apply, unless otherwise specified, whether the information is provided, directly or through others,⁸⁸ to customs officials,⁸⁹ to customers⁹⁰ pursuant to

⁸² See notes 37-55 *supra* and accompanying text.

⁸³ See notes 28-36 *supra* and accompanying text.

⁸⁴ See notes 56-63 *supra* and accompanying text.

⁸⁵ The TRA in contrast to the EAA contains no general prohibition on furnishing information. Thus, the TRA Guidelines provide that a mere certification that a carrier, insurer or supplier is not blacklisted does not constitute participation or cooperation. Treasury Department Boycott Guidelines, 43 Fed. Reg. 3454 (1978) [hereinafter cited as TRA Guidelines]. However, an agreement to certify that no supplier, carrier or insurer is blacklisted does constitute participation or cooperation. TRA Guidelines H-32 and H-34, 43 Fed. Reg. 3465 (1978). And, when a particular supplier has been specified by the importer, an agreement to supply a certificate that states the supplier is not blacklisted constitutes participation or cooperation so long as the supplier is (i) a United States person (within the meaning of TRA Guidelines), (ii) a boycotted country or national of a boycotted country, or (iii) a person that the exporter knows or has reason to know is unable to certify as required because the supplier's ownership or management is made up in whole or in part of individuals of a particular religion, race or nationality. TRA Guideline H-13, 43 Fed. Reg. 3463 (1978).

⁸⁶ EAA sec. 201, § 4A(a)(1)(D).

⁸⁷ EAA sec. 201, § 4A(a)(2)(B).

⁸⁸ The EAR clearly and simply prohibit the "furnishing" of certain information by a United States person. EAR § 369.2(d)(1), 43 Fed. Reg. 3521 (1978). Nowhere do the EAR suggest that the manner in which the information is furnished limits the prohibition. On the contrary, examples, particularly in the anti-evasion section of the EAR, make clear that prohibited information may not be furnished with intent to support a boycott even if the information is supplied in normal commercial documents, EAR § 369.4, Example (i), 43 Fed. Reg. 3534 (1978), or through the means of a third party, EAR § 369.4, Example (v), 43 Fed. Reg. 3534 (1978).

⁸⁹ EAR § 369.2(d)(1), 43 Fed. Reg. 3521 (1978).

⁹⁰ EAR § 369.2(d), Example (x), 43 Fed. Reg. 3522 (1978).

purchase order conditions, to banks pursuant to letter of credit conditions⁹¹ or to others.⁹² They apply to information furnished at the exporter's initiative⁹³ as well as to information specifically requested in tender documents,⁹⁴ questionnaires,⁹⁵ power of attorney forms,⁹⁶ by letters of credit clauses⁹⁷ or otherwise.⁹⁸ The conclusions pertain to the information supplied in a particular instance whether or not this is the same information which has been requested, for example, the rules governing positive certifications apply to positive certificates given in response to requests for negative certificates.⁹⁹ However, the EAA's shipping document exception applies only if the information provided is furnished in compliance with the boycotting country's shipping documentation requirements.¹⁰⁰ It should also be noted that information regarding a person's relationships with blacklisted persons, boycotted countries, and nationals of boycotted countries, though supplied in a normal commercial format such as an annual report, may not be supplied in response to a boycott request.¹⁰¹

(1) *Conclusions*

After June 21, 1978,¹⁰² a United States person exporting goods to

⁹¹ EAR § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (i), 43 Fed. Reg. 3524 (1978).

⁹² EAR § 369.2(d), 43 Fed. Reg. 3521 (1978).

⁹³ EAR § 369.2(d)(2)(ii), 43 Fed. Reg. 3521 (1978).

⁹⁴ EAR § 369.2(d), Example (i), 43 Fed. Reg. 3521 (1978).

⁹⁵ EAR § 369.2(d), Example (iv), 43 Fed. Reg. 3521 (1978).

⁹⁶ EAR § 369.2(d), Example (xvii), 43 Fed. Reg. 3522 (1978).

⁹⁷ EAR § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (i), 43 Fed. Reg. 3524 (1978).

⁹⁸ See note 92 *supra*.

⁹⁹ EAR § 369.3(b), Example (i), 43 Fed. Reg. 3526 (1978).

¹⁰⁰ EAR § 369.3(b)(1), 43 Fed. Reg. 3526 (1978).

¹⁰¹ EAR § 369.2(d)(4), 43 Fed. Reg. 3521 (1978). See notes 188-191 *infra* and accompanying text for one anomaly that results from the EAR's treatment of the furnishing of otherwise permitted information in response to a boycott request.

¹⁰² The "grace period" permitting the furnishing of information in negative, blacklisting and exclusionary terms provided in EAA sec. 201, §§ 4A(a)(5)(B) and 4A(a)(2)(B); in EAR § 369.3(b)(2), 43 Fed. Reg. 3526 (1978); and EAR § 369.5, 43 Fed. Reg. 3536 (1978) lasted until June 22, 1978. From the effective date of the EAA through June 21, 1978, a United States exporter could provide the following information: (1) that the good or service exported is not of Israeli origin or that it is of United States or other specific country origin, EAR § 369.3(b), Examples (i) and (ii), 43 Fed. Reg. 3526 (1978); (2) that the export carrier is not blacklisted,

the Arab world is only able to provide the following information in response to or in anticipation of a boycott-related requirement or request: (i) the specific country of origin of the export,¹⁰³ (ii) the specific name of the carrier,¹⁰⁴ (iii) that the carrier is not owned by Israel, does not fly the Israeli flag and will not arrive at the importing country after having passed through Israel,¹⁰⁵ (iv) the name of the insurer or supplier,¹⁰⁶ and (v) the blacklist status of the exporter itself.¹⁰⁷

EAR § 369.3(b), Example (vi), 43 Fed. Reg. 3526 (1978), is not owned by Israelis, does not fly the Israeli flag, EAR § 369.3(b)(2), § 369.3(b), Example (vii), 43 Fed. Reg. 3526 (1978), will not stop at an Israeli port immediately prior to arriving at the importing country, EAR § 369.3(b), Examples (ix) and (xi), 43 Fed. Reg. 3526 (1978); (3) the name of the carrier, EAR § 369.3(b), Example (viii), 43 Fed. Reg. 3526 (1978); (4) that the insurer or supplier is not blacklisted, EAR § 369.3(b), Example (v), 43 Fed. Reg. 3526 (1978); (5) the name of the specific insurer or supplier, EAR § 369.3(b), Example (x), 43 Fed. Reg. 3526 (1978); and (6) the blacklist status of the exporter itself, EAR § 369.3(b), Example (x), 43 Fed. Reg. 3526 (1978).

Particular care should have been taken not to enter into export or other transactions payment for which would be made after June 21, 1978, under a letter of credit which included a requirement or condition that negative certifications (other than certifying the nonuse of Israeli vessels or prescribed routes) be furnished. The United States supplier not able to fulfill such negative certification requirements or conditions after June 21, 1978, has no recourse against the issuing or confirming bank if the requirements or conditions were not met before that date, unless the letter of credit can be amended to delete or modify the objectionable certification. EAR § 369.2(f) *passim*. The bank may have no legal obligation to secure such an amendment, however. *Id.*

¹⁰³ EAR § 369.3(b), Example (i), 43 Fed. Reg. 3526 (1978).

¹⁰⁴ EAR § 369.3(b), Example (vi), 43 Fed. Reg. 3526 (1978).

¹⁰⁵ EAR §§ 369.3(b)(2), 369.3(b), Examples (vi), (vii) and (xi), 43 Fed. Reg. 3526 (1978).

¹⁰⁶ EAR § 369.3(b), Examples (iv) and (v), 43 Fed. Reg. 3526 (1978).

¹⁰⁷ The EAR nowhere explicitly permit a United States person to supply information about its blacklist status. That furnishing such information is not prohibited can be inferred from EAR § 369.2(f), Example (xiv), 43 Fed. Reg. 3524 (1978). Example (xiv) states that a United States bank may implement a letter of credit requiring a beneficiary to certify that he is not on the blacklist. The bank may not, however, insist that the certification be furnished because by so insisting "it would be refusing to do business with a blacklisted person in compliance with a boycott." *Id.* Since banks are prohibited from implementing a letter of credit containing a requirement, compliance with which is prohibited, the implication of this example is that simple certification of nonblacklist status is not a prohibited act.

The permission to furnish such information can also be inferred from the absence of example (ix) of section 369.2(d) of the proposed regulations. 42 Fed. Reg. 48565 (1977). Example (ix) of the proposed regulations stated that a United States company could not give a boycotting country a certification that the company was not on the blacklist. This example reasoned that furnishing such information necessarily conveyed information about the company's past dealings with boycotted countries or blacklisted persons. This example has been omitted from the final regulations. Instead, a new example is included in EAR which points out that a United States company cannot certify that its supplier is not on the blacklist.

The correctness of these inferences has been confirmed in an "interpretation" issued by the Commerce Department's Industry and Trade Administration. EAR § 369, Appendix, 43 Fed. Reg. 16969 (1978). Responding to certain requests for certifications (which it is believed have

(2) *Gaps and Imperfections*

(i) *Furnishing Blacklist Status Information.* The EAR permit the furnishing of information regarding a United States person's own blacklist status, but not information as to the blacklist status of one's affiliates.¹⁰⁸ Such a prohibition against furnishing information as to the blacklist status of one's affiliates creates significant practical difficulties for exporters. First, information as to the blacklist status of a company's affiliates has traditionally been requested by a number of Arab countries.¹⁰⁹ Second, the prohibition diminishes the value to exporters of being permitted to certify as to their own blacklist status since it is not uncommon for an exporter doing business with Arab countries to be asked in a single question to certify as to its own blacklist status as well as to that of its parent corporation and its affiliates. Failure to respond by the exporter to the entire question can mean loss of the export sale.

The EAR do not provide a clear rationale for distinguishing be-

been proposed by Saudi Arabia) the Department finds that each of the declarations (a) that a vessel is "otherwise eligible to enter into the ports of the boycotting country in conformity with its laws and regulations," *id.*, and (b) that a freight insurer "has a duly qualified and appointed agent or representative in the boycotting country," *id.* at 16970, is equivalent to a certification that the vessel or the freight forwarder, respectively, is not blacklisted. The Department further determines that a vessel's owner, charter or master and the insurance company, respectively, may furnish such certifications even after June 21, 1978, the end of the mini grace period for negative certifications. However, the Department also points out that "[W]here a person other than the vessel's owner, charter or master furnishes such a statement, that is tantamount to furnishing a statement that he is not doing business with a blacklisted person or is doing business only with blacklisted persons [and is prohibited from furnishing such a statement unless it is clear] that the certification is not required for a boycott reason." *Id.* at 16969, 16970.

It should be noted that although the EAR permit a United States person to advise a boycotted country that it is not blacklisted, such a self-certification may give rise to a number of problems for the certifier including: (a) adverse tax consequences, if the self-certification is provided to satisfy a condition in a letter of credit, TRA Guideline H-29A, note 85, 43 Fed. Reg. 3464 (1978), (b) reporting obligations under the yet-to-be finalized EAR reporting requirements, § 319.6, Example (14), 42 Fed. Reg. 65,595 (1977), and (c) violations of the EAR through evasion or aiding and abetting in an EAR violation of the certifier knows or has reason to know that the party requesting the self-certification is contravening the EAR. EAR § 369.4, Example (xviii), 43 Fed. Reg. 3524 (1978); 15 C.F.R. § 387.2, 387.3, 387.7 (1977).

¹⁰⁸ The version of the EAR published in the Federal Register on January 25, 1978, was far from clear on this point. One example clearly stated that a United States person, "may furnish the information about the nationality of its owners, because it is not information about . . . [the company's] business relationships." EAR § 369.2(d), Example (xvi), 43 Fed. Reg. 3522 (1978). However, in amendments and clarifications to the EAR published in the Federal Register on March 20, 1978, it was made clear that a United States person cannot certify as to the blacklist status of its affiliate. 43 Fed. Reg. 11576 (1978).

¹⁰⁹ See note 73 *supra*.

tween furnishing blacklist status information about oneself on the one hand and the furnishing of such information about one's affiliates on the other. Nor can such a rationale easily be discerned from either the EAA or its legislative history.¹¹⁰

One explanation why the Commerce Department has distinguished between furnishing blacklist status information about oneself and one's affiliates is that the Department feels that if it permits a person to furnish blacklist status information about an affiliate there is absolutely no logical way to prohibit furnishing such information about any third party. However, while it indeed may be true that there is no purely logical way, reasoning from the EAR and EAA to this distinction, a purposive argument of why the Department should permit the furnishing of some but not all blacklist status information recommends itself.

It can be argued that one of the reasons Congress agreed upon the need for a furnishing information prohibition is to discourage United States persons from inquiring as to other persons' relationships with the boycotted country so as not to cause a chilling effect on business relationships between persons not directly involved in the boycott, that is, foster the so-called tertiary boycott.¹¹¹ Accordingly, if a concern in seeking information for an Arab customer about the blacklist status of a supplier learns that the supplier is on the blacklist, the concern may be less willing to do business with the supplier in the future regardless of the reason for the blacklisting. On the other hand, supplying information about one's own blacklist status to an Arab customer will obviously not give rise to new information nor have a chilling effect on business relationships within the United States. Similarly, providing information about one's own affiliates to an Arab customer is not apt to result in providing new information which would have a chilling effect on one's business relationship.

Thus, there is at least one reasonable place along the slippery slope for the Commerce Department to stop. In the absence of a cogent argument on the part of the Department in support of any other reasonable stopping point and in the interest of fostering

¹¹⁰ While the legislative history gives no rationale for the distinction, it does provide clear support for the proposition that a concern should not supply information about its dealings with blacklisted persons. SENATE REPORT, *supra* note 7, at 39. However, the legislative history does not state whether or not this proposition applies to all persons, including the concern furnishing the information itself, or merely nonaffiliated third parties.

¹¹¹ SENATE REPORT, *supra* note 7, at 22.

where possible¹¹² business relationships with the Arab world, the Commerce Department should amend the EAR to permit companies to give blacklist status information about their affiliates.

(ii) *Furnishing Third-Party Self-Certifications.* A second question related to the right of self-certification is whether it permits a person to furnish a boycott office, Arab customer, bank or import authorities with a self-certification regarding blacklist status provided by a third party. The EAA could be read to the effect that by passing on the certificate of a third party, a company would be furnishing prohibited information about one's relationship with that other person. However, the EAR clearly permit a bank to do just that¹¹³ in implementing a letter of credit conditioned upon the beneficiary certifying to his own blacklist status. If a bank is permitted to pass on the blacklist status certificate of a beneficiary, there appears to be no logical reason why an exporter may not also pass on such a certificate, from say an insurer or shipper. Whether this interpretation will be accepted by the Commerce Department remains to be seen. However, if the Department does not accept such an interpretation, it will probably have to disavow the aforementioned letter of credit example.

There are several practical limitations on the use of the right of self-certification which are apt to detract from its utility as a device to permit certain export transactions with the Arab world to continue. First, self-certifications by third parties to the transactions may be unacceptable to the Arab customer, to import authorities or to banks issuing or confirming letters of credit. The customary practice has been to require the exporter himself to make the certification for third parties. Where a letter of credit calls for the exporter to certify as to the blacklist status of an insurer, the issuing or confirming bank will be exposed¹¹⁴ and may be unable to collect if it accepts the certificate of the insurer itself as to its own blacklist status. Customers and import authorities may be unwilling to take third party certificates. It is possible, however, that greater flexibility will come with time if the practice of self-certification gains general recognition.

Second, requests for self-certifications are likely to be publicly

¹¹² Fostering business relations when possible without violation of the EAA has been favored by Congress. See, e.g., SENATE REPORT, *supra* note 7, at 21.

¹¹³ EAR § 369.2(f), Example (xiv), 43 Fed. Reg. 3524 (1978).

¹¹⁴ See notes 224-230 *infra* and accompanying text.

reportable¹¹⁵ and the reporting person (exporter and/or supplier) receiving such a request must state in his report whether or not he has complied or will comply with the request. A great many companies have concluded as a matter of corporate policy that they will not comply with any reportable boycott request. Unless these policies change, perhaps either to conform to the limitations of the antiboycott law or otherwise, self-certifications will not be a solution for these companies.¹¹⁶

Third, in present form the EAR make it clear that one cannot compel another to furnish a self-certification, even if a contract provision so specifies. The EAR reason that to do so would be tantamount to a refusal to do business contravening yet another statutory prohibition.¹¹⁷ Thus, any arrangement with a customer which is dependent upon others to furnish self-certifications involves a significant degree of risk. As noted below in subsection IV A.2.e. (2) of this Article such an arrangement is untenable for banks.¹¹⁸ It could also cause immense financial problems for exporters. For instance, if an exporter is asked by an Arab customer to supply the self-certification of a component supplier in a large export transaction and after initially agreeing to so certify the component supplier decides not to do so, the EAR prohibit the exporter from requiring the certificate and the Arab customer may refuse to accept the exporter's shipment without it.

The Commerce Department should clarify the scope of permitted self-certification. In the EAR's present form an Arab customer can force difficult decisions on the exporter. If the customer decides to require third party self-certification, the exporter cannot be sure whether this is permitted or not. Some exporters, if the stakes are

¹¹⁵ The Commerce Department's proposed reporting regulations define a reportable request as one which the recipient knows or has reason to know has as its purpose "to enforce, implement or otherwise further or support a foreign boycott or restrictive trade practice," § 369.6(a)(2)(ii), 42 Fed. Reg. 65,543 (1977), and which is not excepted under § 369.6(a)(5), 42 Fed. Reg. 65,543 (1977). Further, the proposed regulations emphasize that requests will be reportable regardless of whether the action requested is prohibited or permissible under the Act and implementing regulations. § 369.6(a)(1), 42 Fed. Reg. 65,593 (1977). As blacklist self-certifications are not explicitly excepted by Prop. Regs. § 369.6(a)(5), it would almost certainly be reportable under the proposed reporting regulations.

¹¹⁶ Self-certifications may also give rise to income tax problems. If the self-certification is required by the terms of an agreement or as a condition or requirement of a letter of credit, the Department of Treasury takes the position that an agreement constituting boycott participation for income tax purposes has been made. TRA Guideline, *supra* note 85, at H-29A, 43 Fed. Reg. 3465 (1978).

¹¹⁷ EAR § 369.2(f), Example (xiv), 43 Fed. Reg. 3524 (1978).

¹¹⁸ See notes 224-230 *infra* and accompanying text.

high enough, are apt to decide that it is permitted. This interpretation then presents a dilemma to the rest of the United States export community. To refuse to accept the interpretation may mean loss of export sales; to accept it may mean violation of the EAA and criminal and civil penalties.

On the other hand, if the EAR are merely clarified to permit self-certification but to prohibit United States persons from requiring such certification of others, exporters will be faced with perhaps an even greater problem. To enter into an export transaction that involves third party self-certification will give rise to the financial problems specified above; not to do so may mean loss to other exporters of export sales.

Finally, regardless of whether third party self-certification is permitted, so long as any self-certification is permitted by the EAR, Arab customers may still obtain both the information and the goods they desire by simply ordering and demanding the certification directly from the supplier. Accordingly, it would appear advisable for the Commerce Department either to eliminate self-certification altogether or to clarify its treatment of third party self-certifications.

b. Boycott-related Agreements

(1) Conclusions

The EAA prohibits not only engaging in specified boycott activities but also knowingly agreeing to engage in such activities.¹¹⁹ A United States person need not take or intend to take actions as the result of such an agreement for the boycott-related agreement by the United States person to constitute a violation of the EAA.¹²⁰ Further, neither the EAA nor the EAR differentiates on the basis of what form the agreement takes nor in what document if any the agreement appears.¹²¹ Accordingly, the following conclusions apply

¹¹⁹ EAA sec. 201, § 4A(a)(1).

¹²⁰ EAR § 369.2(a), Agreements to Refuse to Do Business, Example (ii), 43 Fed. Reg. 3519 (1978).

¹²¹ Both the EAA sec. 201, § 4A(a)(1) and the EAR § 369.2(a)-(f), 43 Fed. Reg. 3517-25 (1978), prohibit a United States person from taking an action and knowingly agreeing to take such action. Nowhere in the EAA, the EAR or the legislative history, is there a qualification as to the type of agreement or form of the agreement. On the contrary, in the few instances when the form of prohibited agreements are discussed it is to broaden the concept of an agreement. EAR § 369.2(a)(9), 43 Fed. Reg. 3518 (1978); EAR § 369.2(a), Agreements to Refuse to Do Business, Example (ix), 43 Fed. Reg. 3520 (1978). Accordingly, it would seem in determining whether or not an agreement is covered by the prohibition one should determine whether or not it actually constitutes an agreement in accordance with applicable contract law principles.

to provisions in invitations to bid,¹²² purchase orders, letters of credit and other contracts, associated agreements and commitments whether written or oral,¹²³ express or implied by a course of conduct.¹²⁴

It should be emphasized that while the EAR prohibit an exporter from entering into certain boycott-related agreements after the effective date of the EAA and EAR, the EAR do not prohibit an exporter or any other United States person from being a party to a contract that contains a prohibited boycott agreement entered into prior to the effective date of the EAR so long as the United States person does not further effectuate the prohibited agreement itself.¹²⁵ An exporter may at any time renegotiate a prohibited boycott agreement to make it accord with the rules of the EAR.¹²⁶

Exporters and other United States persons are prohibited by the EAR from entering into agreements which: (i) require furnishing of information which is forbidden (one may agree not to ship goods of Israeli origin, but may not agree to give a negative certificate of origin at time of import);¹²⁷ (ii) preclude the use of blacklisted carriers, insurers and suppliers;¹²⁸ (iii) impose "risk of loss" on the supplier whereby the supplier agrees to indemnify the exporter if the supplier's goods are denied entry to the country of destination (the EAR contain an exception, however, when such clauses were used by the exporter prior to January 18, 1978, or are required for legitimate non-boycott reasons and are customary in the exporter's dealing with non-boycotting countries);¹²⁹ or (iv) state that the exporter

¹²² EAR § 369.2(a), Agreement to Refuse to Do Business, Example (ii), 43 Fed. Reg. 3519 (1978).

¹²³ See note 121 *supra*.

¹²⁴ EAR § 369.2(a)(9), 43 Fed. Reg. 3518 (1978). Similarly, the TRA Guidelines provide that an agreement can be implied by a course of conduct. TRA Guidelines, *supra* note 85, at H-9, 43 Fed. Reg. 3463 (1978).

¹²⁵ EAR § 369.5(f), 43 Fed. Reg. 3536 (1978). It should be noted that the TRA treats prior agreements quite differently. A boycott agreement included in a contract entered into prior to the effective date of the TRA constitutes participation in the boycott, if the contract remains in effect even if there is no compliance with the boycott agreement. TRA Guideline E-6, 43 Fed. Reg. 3460-61 (1978). To avoid participation in the boycott, the United States person must renounce the agreement and communicate its renunciation to the other party to the contract. *Id.*

¹²⁶ EAR § 369.2(a), Agreements to Refuse to Do Business, Example (i), 43 Fed. Reg. 3519 (1978).

¹²⁷ EAR § 369.2(d) *passim*, 43 Fed. Reg. 3521 (1978).

¹²⁸ EAR § 369.2(a) *passim*, 43 Fed. Reg. 3517-18 (1978). See also EAR § 369.2(a), Agreements to Refuse to Do Business, Example (ii), 43 Fed. Reg. 3519 (1978).

¹²⁹ EAR §§ 369.2(a)(5), 43 Fed. Reg. 3517 (1978); 369.4(d), 43 Fed. Reg. 3534 (1978); 369.4(d), Examples (x)-(xii), 43 Fed. Reg. 3535 (1978).

will comply with the boycott law of the boycotting country.¹³⁰

Exporters and other United States persons are permitted by the EAR to enter into agreements, even though boycott-related, which: (i) preclude the importation of Israeli-origin goods or goods containing Israeli-origin materials or components,¹³¹ or require that the goods be of a particular country of origin;¹³² (ii) prohibit the shipment of goods to a boycotting country aboard an Israeli carrier;¹³³ (iii) prohibit transiting of Israel or require particular routes so long as they are in conjunction with the transportation of an export to a boycotting country;¹³⁴ (iv) require the use of particular carriers, insurers or suppliers *if* (A) there is no reason to believe that the selection was boycott based, or (B) the selection is made by the boycotting country or a resident thereof and meets all the requirements of the unilateral selection and local law compliance exceptions,¹³⁵ (v) require the supplier to effect delivery and pass title in the boycotting country as a condition of payment;¹³⁶ (vi) provide that the law of the boycotting country will apply to or govern interpretation of an export contract;¹³⁷ or (vii) state that the exporter will comply with the laws of the boycotting country.¹³⁸

(2) *Gaps and Imperfections*

(i) *Bid and Tender.* A significant amount of export sales to Arab countries have in the past resulted from successful competitive bidding by United States exporters. Tenders by Arab nationals or governments have not infrequently contained boycott requirements which United States bidders have either agreed to or ignored. At

¹³⁰ EAR § 369.2(a)(5), Fed. Reg. 3518 (1978); EAR § 369.2(a), Agreements to Refuse to Do Business, Example (v), 43 Fed. Reg. 3519 (1978).

¹³¹ EAR §§ 369.3(a-1)(1), 43 Fed. Reg. 3525 (1978); 369.3(a-1), Examples (i) and (ii), 43 Fed. Reg. 3525 (1978).

¹³² When the EAR do not prohibit the taking of an action nor explicitly prohibit an agreement to take such an action, it follows that such an agreement is not, in fact, prohibited.

¹³³ EAR § 369.3(a-2), Example (ii), 43 Fed. Reg. 3525 (1978).

¹³⁴ EAR § 369.3(a-2), Example (i), 43 Fed. Reg. 3525 (1978).

¹³⁵ See EAR § 369.3(c), 43 Fed. Reg. 3526-28 (1978); EAR § 369.3(f), 43 Fed. Reg. 3531-34 (1978); notes 261-307 *infra* and accompanying text.

¹³⁶ EAR § 369.4, Examples (xiii) and (xiv), 43 Fed. Reg. 3535 (1978).

¹³⁷ EAR § 369.2(a), Agreement to Refuse to Do Business, Example (iii), 43 Fed. Reg. 3519 (1978).

¹³⁸ EAR §§ 369.2(a)(5), 43 Fed. Reg. 3518 (1978); 369.2(a), Agreement to Refuse to Do Business, Example (iv), 43 Fed. Reg. 3519 (1978). However, it should be noted that the Treasury Department has interpreted such generalized law compliance clauses to be boycott participation for federal income tax purposes. TRA Guideline, *supra* note 85, at H-4, 43 Fed. Reg. 3463 (1978).

times, United States exporters have been successful in eliminating such requirements from the final export contract.

The EAR endangers this export business by making it impossible for a United States exporter to respond to a tender which contains a prohibited boycott requirement unless the exporter explicitly excepts the requirement from its bid.¹³⁹ United States exporters are in effect no longer permitted to respond in their bids to boycott requirements with silence and to amend or eliminate the requirement when and if they are awarded the export contract.¹⁴⁰ This appears to be the case even when the tender does not call for an agreement on prohibited boycott certifications by the exporter at the time the bid is made but rather when the final contract is signed.¹⁴¹

This EAR interpretation is not compelled by either the EAA or applicable legislative history. It runs counter to a general theme of the EAR favoring reformation of documents containing prohibited boycott terms.¹⁴² Further, if a United States exporter responds to a tender that contains a prohibited boycott condition, with no intention whatever of complying or agreeing to comply with that condition, it is difficult to see how the exporter's action includes the element of intent requisite to a violation of EAA's antiboycott prohibitions. Thus, the EAR should be amended to permit a United States exporter to bid on a contract that contains boycott requirements provided that in doing so the exporter does not furnish prohibited information and provided that if awarded the contract, the exporter eliminates the prohibited requirement either before executing the contract or before beginning work under the contract.

(ii) *Risk of Loss*. In at least one respect¹⁴³ the EAR attempt to insure that one United States concern is not favored over another merely as a result of its past business structure, practices or policies

¹³⁹ EAR § 369.2(a), Agreement to Refuse to Do Business, Example (ii), 43 Fed. Reg. 3519 (1978).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² EAR § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (iv), 43 Fed. Reg. 3524 (1978).

¹⁴³ The EAR permit a United States concern not previously a resident in a boycotting country to establish residency, and thus be in a position to take advantage of the EAR's local law compliance exception, by furnishing boycott-related information which, if furnished in other context by a non-boycotting country resident, would be prohibited. EAR § 369.2(d), Example (xii), 43 Fed. Reg. 3522 (1978); EAR § 369.4, Example (vi), 43 Fed. Reg. 3535 (1978). This exception is not clearly provided for in either the EAA or its legislative history and thus appears to be a recognition of the concept that the antiboycott law should not favor one United States person over another merely because of past history.

in relation to the Arab world prior to the effective date of the EAA and EAR. While bias based on historical happenstance may be to some extent inevitable with the institution of any new set of regulations, it is a result more to be tolerated than encouraged.

Unfortunately, without justification the EAR do in at least two instances significantly favor certain business concerns over others based on prior history. Both of these cases will be discussed in this article. The first dealing with the use of the "risk-of-loss" clause will be discussed immediately below. The second dealing with removal from the blacklist will be discussed in subsection IV A.2d.(2).

A risk-of-loss provision is not uncommon in international export transactions. It appropriately shifts the contractual allocation of responsibilities and risks to the party most able to assess them. The provision was completely sanctioned by the proposed EAR¹⁴⁴ and continues to be so sanctioned by the Treasury Department's anti-boycott guidelines.¹⁴⁵

The EAR do not prohibit the use of the clause. The EAR specifically provide that the use of the clause is not in and of itself a prohibited refusal to do business,¹⁴⁶ and that use of the clause after the EAR's effective date by firms that used it before that date will be presumed not to constitute evasion.¹⁴⁷ In contrast, however, the EAR provide that introduction of a risk-of-loss clause by a business concern for the first time after the effective date of the EAR, will be presumed to constitute evasion.¹⁴⁸ Such a presumption can only be rebutted by an affirmative showing: (i) that the clause is a "customary usage" without distinction between boycotted and boycotting country and (ii) that there is a legitimate nonboycott reason for its use.¹⁴⁹

The EAR give no explanation why business concerns using the clause prior to the effective date of the EAR should be benefitted more than concerns adopting the clause after the effective date. Neither the EAA nor its legislative history provide any clear support

¹⁴⁴ Prop. EAR §§ 369.2(a)(7) & 369.2(a), Agreements to Refuse to Do Business, Example (viii), 42 Fed. Reg. 48,564 (1977).

¹⁴⁵ TRA Guidelines *supra* note 85, at Part J, 43 Fed. Reg. 3466-67 (1978). However, in accordance with the introductory definition (g) in the TRA Guidelines, an overall course of conduct that includes the use of risk of loss clauses in addition to other factors could support the inference of a boycott agreement.

¹⁴⁶ EAR § 369.2(a)(5), 43 Fed. Reg. 3518 (1978).

¹⁴⁷ EAR § 369.4(d), 43 Fed. Reg. 3534-35 (1978).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

for such a distinction. Nor do the EAR treat other, similar risk-shifting devices on this basis. The EAR permit an exporter to require its suppliers to deliver goods on an in-country basis,¹⁵⁰ or to require that title remain with its suppliers until a delivery is effected in a boycotting country,¹⁵¹ regardless of whether or not the exporter customarily imposed such requirements before the effective date of the EAA and EAR.

In the absence of any justification for treating United States business concerns differently on the basis of whether or not they utilized risk-of-loss clauses in their dealings with the Arab world before or after the effective date of the EAA and EAR, the Department should amend the EAR at the very least to provide uniform treatment for all United States concerns. In light of the position taken by the Tax Reform Act of 1976 (TRA) vis-a-vis risk-of-loss clauses as well as the EAR's treatment of other previously mentioned risk-shifting devices which provide exporters with similar means of doing business in boycotting countries,¹⁵² it seems logical that such an amendment should take the form of a general loosening of the restriction on the use of risk-of-loss clauses.

c. Boycott-based Selections

(1) Conclusions

The EAR severely limit but do not eliminate boycott-based selections of suppliers of goods or services. The regulations recognize the rights of a boycotting country as well as nationals and residents of that country to select imports for use within the country. This recognition is primarily reflected in the EAR's unilateral selection exception¹⁵³ which permits exporters to implement the boycott-based selections by boycotting countries and nationals and residents of those countries, including United States persons who are "bona fide

¹⁵⁰ EAR § 369.4, Example (xiii), 43 Fed. Reg. 3535 (1978).

¹⁵¹ EAR § 369.4, Example (xiv), 43 Fed. Reg. 3535 (1978).

¹⁵² The EAR attempt to distinguish the use of risk-of-loss clauses and other risk-shifting devices on the basis that a risk-of-loss clause is "an extraordinary arrangement designed to require that the risk of loss remain with the supplier even after title [has] passed." EAR § 369.4, Example (xiv), 43 Fed. Reg. 3535 (1978). However, it is not at all clear that the use of a risk-of-loss clause in export transactions with the Arab world is any more extraordinary than forcing the supplier to retain title to goods until they are delivered in a boycotting country.

¹⁵³ EAA sec. 201, § 4A(a)(2)(C); EAR § 369.3(c), 43 Fed. Reg. 3526-28 (1978).

The conduct of United States person in initiating such selections is governed, however, by another significant exception that deals with compliance with local law. See notes 261-298 *infra* and accompanying text.

residents" of boycotting countries.¹⁵⁴ Second, the EAR permit exporters on their own initiative to make a certain limited number of boycott-based selections.¹⁵⁵ The conclusions regarding boycott-based selections expressed below are divided to reflect these two categories of selections permitted by the EAR.

(i) *The Unilateral Selection Exception.* The unilateral selection exception permits exporters to implement boycott-based selections of suppliers of goods or services including carriers and insurers if certain conditions are met.¹⁵⁶ The exception itself does not relate to the conduct of an exporter-supplier in complying with a boycott-based selection of his own goods or services. However, nothing in the EAA or EAR forbid a United States person from responding to a boycott-based selection of his own products or services, and this fact is noted in the EAR's discussion of the unilateral selection exception.¹⁵⁷

The conditions which must be met in order for an exporter to implement a boycott-based selection of goods or services to be supplied by a third party include:

(a) The selection must originate with a boycotting country or a national or resident thereof¹⁵⁸ or with a United States person that is a bona fide resident of the boycotting country¹⁵⁹ including a resident branch or office of the exporter.¹⁶⁰ The EAR note, however, that intracompany transactions will be given very close scrutiny by the Commerce Department to determine whether the selection really originated in the boycotting country, as required for the exception to

¹⁵⁴ There is no unilateral selection exception in the TRA boycott provisions. However, the TRA Guidelines state that for tax purposes an agreement to refrain from doing business with others, e.g., with Israel or blacklisted persons, will not be inferred "solely" from obedience to a specific selection. TRA Guidelines *supra*, note 85, at H-14, H-15, 43 Fed. Reg. 3463-64 (1978).

¹⁵⁵ See notes 176-179 *infra* and accompanying text.

¹⁵⁶ EAR § 369.3(c)(1), 43 Fed. Reg. 3526 (1978).

¹⁵⁷ EAR § 369.3(c)(2), 43 Fed. Reg. 3527 (1978).

¹⁵⁸ EAR § 369.3(c)(1), 43 Fed. Reg. 3526 (1978).

¹⁵⁹ *Id.*

¹⁶⁰ The EAR permit an exporter to implement the unilateral selection of any bona fide resident of a boycotting country regardless of whether the resident is a juridical person and regardless of what class of juridical person the resident might be. EAR §§ 369.3(c)(1), 43 Fed. Reg. 3526 (1978); 369.3(c) *passim*, 43 Fed. Reg. 3526-28 (1978); 369.3(c), Specific and Unilateral Selection, Example (ii), Boycotting Country Buyer, Examples (ii), (iii), (iv), and (v), 43 Fed. Reg. 3528-29 (1978).

apply.¹⁶¹ A selection made outside a boycotting country by an agent of the boycotting country or government or a resident of the boycotting country will not qualify for the exception.¹⁶² An exporter receiving a selection which it has reason to know is boycott-based, transmitted by a United States person outside the boycotting country, has a duty to inquire whether the selection originated in the boycotting country.¹⁶³ An exporter may accept assurances from an agent of the boycotting country regarding boycotting country origin of the selection without further investigation.¹⁶⁴

(b) The selection must be unilateral and specific, specifying one particular carrier, insurer or other supplier of services, in affirmative terms.¹⁶⁵ It must be made by a party in the boycotting country at its own discretion.¹⁶⁶ It is permissible for the exporter or someone else to provide a list of choices and to make a recommendation to the selecting party in the boycotting country, provided such pre-award activity is consistent with customary practices of the exporter or the exporter's industry and provided there is no screening out or identification of blacklisted persons by the exporter.¹⁶⁷ Even though a customer may utilize such nonboycott-related pre-award services in making a boycott-based selection, the exporter or any other person providing the pre-award services may still comply with the selection and provide post-award services to the customer.¹⁶⁸

(c) Any specifically selected goods must in the normal course of business be identifiable by source when imported into the boycotting country.¹⁶⁹ This condition will be met by goods identifiable in the normal course of business by trademark, trade name, symbol or other identification on the

¹⁶¹ EAR § 369.3(c), *Boycotting Country Buyer, Examples (ii) and (iii)*, 43 Fed. Reg. 3529 (1978).

¹⁶² EAR § 369.3(c), *Boycotting Country Buyer, Examples (iv) and (v)*, 43 Fed. Reg. 3529 (1978).

¹⁶³ EAR § 369.3(c)(11), 43 Fed. Reg. 3527 (1978).

¹⁶⁴ EAR § 369.3(c), *Specific and Unilateral Selection, Example (viii)*, 43 Fed. Reg. 3528 (1978).

¹⁶⁵ EAR §§ 369.3(c)(3) and (4), 43 Fed. Reg. 3527 (1978).

¹⁶⁶ EAR § 369.3(c)(5), 43 Fed. Reg. 3527 (1978).

¹⁶⁷ EAR § 369.3(c)(6), 43 Fed. Reg. 3527 (1978).

¹⁶⁸ EAR § 369.3(c), *Specific and Unilateral Selection, Example (xi)*, 43 Fed. Reg. 3528 (1978).

¹⁶⁹ EAR § 369.3(c)(16), 43 Fed. Reg. 3528 (1978).

product or its packaging.¹⁷⁰ Also, it may be met by goods identifiable through uniqueness of design or appearance.¹⁷¹ Goods identifiable as to source solely by means of import documentation will not qualify for the exception.¹⁷²

(d) Specifically selected services must necessarily be performed in significant part within the boycotting country from which the selection was made.¹⁷³ Such services are only considered performed within the boycotting country if they are of a type that would customarily be performed¹⁷⁴ by the supplier of services in any foreign country from which such a selection would come.¹⁷⁵

(ii) *Boycott-based Selections by Exporters.* The EAR permit exporters themselves to make the following boycott-based selections with respect to shipments to a boycotting country so long as such selections are made in accordance with the import and shipping requirements of the importing country: (i) the exporter may select out goods and materials of Israeli origin;¹⁷⁶ (ii) the exporter may select from among carriers that call at ports of the importing country;¹⁷⁷ and (iii) the exporter may also direct the carrier to follow a prescribed route or not transit Israel.¹⁷⁸ However, the EAR do not permit exporters to select out blacklisted suppliers and insurers.¹⁷⁹

(2) *Gaps and Imperfections*

There are some serious discontinuities between the EAR's unilateral selection exception¹⁸⁰ and local law compliance section¹⁸¹ with regard to the selection of services. These discontinuities are discussed below in section IV.B.¹⁸²

¹⁷⁰ EAR § 369.3(c)(17), 43 Fed. Reg. 3528 (1978).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ EAR § 369.3(c)(13), 43 Fed. Reg. 3527 (1978).

¹⁷⁴ EAR § 369.3(c)(14), 43 Fed. Reg. 3527-28 (1978).

¹⁷⁵ EAR § 369.3(c)(15), 43 Fed. Reg. 3527 (1978).

¹⁷⁶ EAR § 369.3(a-1)(1), 43 Fed. Reg. 3525 (1978).

¹⁷⁷ EAR § 369.3(a-2)(1)(i), 43 Fed. Reg. 3525 (1978).

¹⁷⁸ EAR § 369.3(a-2)(1)(ii), 43 Fed. Reg. 3525 (1978).

¹⁷⁹ EAR § 369.2(a), Refusals to Do Business, Examples (i), (ii), (iii), 43 Fed. Reg. 3518 (1978); EAR § 369.2(a)(6), 43 Fed. Reg. 3518 (1978).

¹⁸⁰ EAR § 369.3(c), 43 Fed. Reg. 3526-28 (1978).

¹⁸¹ EAR § 369.3(f), 43 Fed. Reg. 3531 (1978).

¹⁸² See notes 261-309 *infra* and accompanying text.

d. *Responding to General Boycott-based Questionnaires*

(1) *Conclusions*

The EAR deals unequivocally and severely with responses to general questionnaires from the central or regional boycott offices or other boycotting country residents or officials. General questionnaires or other inquiries seeking information about the blacklist or non-blacklist status of the exporter's affiliates or the exporter's activities in or business relationships with Israel or Israeli parties or blacklisted persons may not be answered, either negatively or by the providing of affirmative information which enables the questioner to reach a conclusion with respect to the question put.¹⁸³

Probably the only safe response to a boycott questionnaire for a United States person who is not a bona fide resident of the boycotting country is that United States law prohibits United States persons from answering such questionnaires. However, as will be discussed in more detail below,¹⁸⁴ where the exporter is seeking to establish or has established a bona fide residence¹⁸⁵ in a boycotting country for legitimate business reasons,¹⁸⁶ it may be possible for that resident or prospective resident to respond to boycott status questions if it does so from within the country and without consulting the parent or other sources outside the country and does not provide information about any United States person's race, religion, sex or national origin.¹⁸⁷

(2) *Gaps and Imperfections*

(i) *Information about a "Non-discrimination" Policy.* While the EAR severely limit the furnishing of information about a United States person's business relations with a boycotted country in response to a boycott questionnaire, the EAR do not prohibit the unilateral furnishing of all such information. Example (ix) of section 369.1(e) of the EAR¹⁸⁸ makes it clear that a United States person can unilaterally notify a boycotting country that it has adopted an even-

¹⁸³ EAR §§ 369.2(d)(4), 43 Fed. Reg. 3521 (1978); 369.2(d), Examples (iii), (iv), (viii) and (ix), 43 Fed. Reg. 3521-22 (1978).

¹⁸⁴ See notes 310-314 *infra* and accompanying text.

¹⁸⁵ EAR § 369.4, Example (vi), 43 Fed. Reg. 3535 (1978). See EAR § 369.2(d), Example (xii), 43 Fed. Reg. 3522 (1978).

¹⁸⁶ EAR § 369.4, Example (vi), 43 Fed. Reg. 3535 (1978); EAR § 369.3(f-1), Examples (iii) and (iv), 43 Fed. Reg. 3532 (1978).

¹⁸⁷ EAR § 369.3(f-1), Discrimination Against United States persons, Examples *passim*, 43 Fed. Reg. 3532-33 (1978).

¹⁸⁸ 43 Fed. Reg. 3517 (1978).

handed business policy vis-a-vis boycotting and the boycotted country and in addition, supply the boycotting country with business information to support its contention provided that the "intent" of the person supplying the information is not to further or support the boycott.

The recognition by the EAR of this limitation on the scope of the EAA's furnishing information prohibition has considerable potential significance. Over the last several years certain domestic concerns have been approached by boycotting countries and boycott offices not with requests to cease doing business with Israel but rather with requests to establish in Arab countries facilities of equivalent magnitude to the facilities maintained by the firms in Israel. These requests suggest the possibility that United States concerns could avoid blacklisting merely by following a policy of nondiscrimination between the Arab world and Israel and certifying to this fact.

However, the usefulness of this limitation on the information furnishing prohibition may be significantly reduced if the EAR continue to prohibit the furnishing of such information in response to general boycott questionnaires.¹⁸⁹ Even if United States concerns adopt a public non-discrimination policy vis-a-vis Israel and the Arab world, these concerns are not apt to initiate contact with a boycotting country or boycott office to apprise them of this policy in the hopes of quelling future boycott questionnaires. Such contacts might give rise to an investigation of the company by a boycott office or a questionnaire from the government of a boycotting country or from a boycott office requesting additional information about the policy. Response to such information requests are expressly prohibited by the EAA and EAR.

The distinction, then, in the EAR between unilaterally supplying information of an even-handed policy to a boycott office and supplying such information in response to a questionnaire raises serious practical problems for United States concerns that wish to do business in the Arab world. In addition, the distinction is not compelled by logic, the EAA or its applicable legislative history.

The explanation given by the EAR for the distinction is set forth in example (x) of section 369.1(e).¹⁹⁰ This example creates a conclusive presumption that information, even with respect to nondiscrimi-

¹⁸⁹ EAR § 369.1(e), Example (x), 43 Fed. Reg. 3517 (1978).

¹⁹⁰ *Id.*

mination in business relationships with Israel and the Arab world, if supplied in response to a boycott questionnaire, must be supplied with an "intent" to further or support the boycott. On the other hand, such information supplied unilaterally may or may not be supplied with the requisite intent.

This conclusive presumption is not supported by the EAA or its legislative history.¹⁹¹ Nor does the EAR make any assertion, let alone factual showing, that United States concerns which respond to a boycott questionnaire always have boycott supportive intent while those that unilaterally contact boycott offices do not.

Regardless of the form in which information about an evenhanded boycott policy is delivered, such information about the company's business policy should not be treated as the type of information, the furnishing of which, the EAR seeks to prohibit. The boycott, which Congress sought to interdict in the EAA, was a boycott injurious to a friendly country and which has the effect of forcing United States persons to cease operations in a friendly country in order to do business elsewhere. Efforts by countries to achieve equal status with others by attracting business to themselves rather than penalizing firms for doing business elsewhere do not fall within the conduct Congress sought to prohibit. Accordingly, example (x) should be amended to eliminate the conclusive presumption. If this is not done, one of the potentially most fruitful ways in which United States concerns may develop a relationship with Arab countries and still avoid participating in the boycott may be eliminated.

(ii) *United States Persons Included in the Blacklist.* As noted in subsection IV.A.2.b.(2) of this article,¹⁹² the EAR in at least two instances unjustifiably favor some United States concerns over others on the basis of past business practices and arrangements. One of these cases involves favoring United States business concerns that have not been blacklisted.¹⁹³ While such bias in the EAR may be unintended, absent a compelling argument in support of such a result, the EAR should be amended to eliminate this result.

¹⁹¹ On the contrary, the SENATE REPORT indicates that the "intent" requisite for a violation of the EAA is not meant to be a mere formality but a requirement which must be met by some factual proof. SENATE REPORT, *supra* note 7, at 37.

¹⁹² See notes 139-52 *supra* and accompanying text.

¹⁹³ The arguments in favor of giving a firm that is on the blacklist some right to correspond with the boycott office, in order to obtain removal from the blacklist, support with equal force permitting a United States concern that is under investigation by the boycott office rights to correspond with the boycott office in order to prevent blacklisting, if possible.

In the past a business concern seeking removal from the Arab boycott blacklist has had to answer a number of questions posed by the Central Boycott Office in Damascus, Syria as well as other local boycott offices. These questions have typically been about the boycotted concern's business relations with Israel. As noted above, a responsive answer to these questions is certainly prohibited by the EAR and any answer is in all probability prohibited.¹⁹⁴ Thus, it is practically impossible for a domestic concern now on the blacklist to be removed from it.

A business concern not now on the blacklist, including one that was able to have itself removed prior to the effective date of the EAR, may never be asked by a boycott office about its business relationship with Israel. Further, the more the concern has favored or currently favors Arab customers in its business dealings and the more the concern has in the past complied with boycott requirements, the less likely it is to be asked questions in the future about its business relationship with Israel.

Of course, the EAR cannot right this inequity by permitting a domestic concern to supply information about its business relationship with Israel. However, the EAR need not presume, as it now does, that contact with a boycott office must be for boycott-supportive purposes. Further, as discussed above, the EAR should not prohibit a response to a boycott questionnaire which sets forth a company's nondiscriminatory policy regarding its business relationships with the Arab world and Israel.

e. *Letters of Credit*

(1) *Conclusions*

(i) *United States Commerce.* Any discussion of letter of credit transactions under the EAA and EAR must begin with a discussion of United States commerce. The EAR posit, with respect to the letter of credit prohibition, what might be called a "commerce plus" test. While the EAR's provision discussing United States commerce generally contains a commerce test for letters of credit,¹⁹⁵ an additional commerce-related criterion is set forth in the letter of credit prohibition section itself.¹⁹⁶

In order to fulfill the first United States commerce requisite, a

¹⁹⁴ See note 95 *supra* and accompanying text.

¹⁹⁵ EAR § 369.1(d)(18) and (19), 43 Fed. Reg. 3515 (1978).

¹⁹⁶ EAR § 369.2(f)(6), 43 Fed. Reg. 3523 (1978).

letter of credit must either be implemented by a United States person located within the United States¹⁹⁷ or be implemented by a United States person outside the United States and either (a) specify a United States address for the letter of credit beneficiary, (b) call for documents indicating shipment from the United States, or (c) call for documents indicating that the goods are of United States origin.¹⁹⁸

The requisite contained in the letter of credit prohibition itself is significantly more demanding. In accordance with these requirements, for a letter of credit to be in United States commerce, the underlying transaction to which the letter of credit applies must be in United States commerce and the letter of credit beneficiary must be a United States person.¹⁹⁹ This second United States commerce test, peculiar only to letters of credit is clearly called for by the EAR's legislative history.²⁰⁰

In order to simplify a bank's determination as to whether the business transaction underlying a letter of credit is in United States commerce and whether the letter of credit beneficiary is a United States person, the EAR set forth certain presumptions.²⁰¹ These presumptions may be relied on by a United States bank implementing a letter of credit unless the bank is aware of facts that could reasonably lead it to conclude otherwise.²⁰²

Where the bank implementing the letter of credit is located in the United States, the letter of credit transaction will be presumed to be in United States commerce where the beneficiary has a United States address.²⁰³ The letter of credit transaction will be presumed to be outside United States commerce so long as the credit does not specify a United States address for the beneficiary.²⁰⁴

Where the bank implementing the letter of credit is located outside the United States, the letter of credit transaction will be presumed to be in United States commerce only (1) when the letter of credit specifies a United States address for the beneficiary *and* (2) when the letter of credit calls for documents indicating that the goods to which the credit relates are of United States origin or will

¹⁹⁷ EAR § 369.1(d)(18), 43 Fed. Reg. 3515 (1978).

¹⁹⁸ EAR § 369.1(d)(19), 43 Fed. Reg. 3515 (1978).

¹⁹⁹ EAR § 369.2(f)(6), 43 Fed. Reg. 3523 (1978).

²⁰⁰ SENATE REPORT, *supra* note 7, at 41.

²⁰¹ EAR §§ 369.2(f)(7), (8), (9), and (10), 43 Fed. Reg. 3523 (1978).

²⁰² EAR § 369.2(f)(7), 43 Fed. Reg. 3523 (1978).

²⁰³ *Id.*

²⁰⁴ EAR § 369.2(f)(8), 43 Fed. Reg. 3523 (1978).

be shipped from the United States.²⁰⁵ Conversely, where the implementing bank is located outside the United States, the letter of credit will be presumed not to be in United States commerce (1) when the credit does not specify a United States address for the beneficiary and (2) when the credit does not call for documents indicating that the goods are of United States origin or will be shipped from the United States.²⁰⁶

(ii) *Conclusions Generally.* The conclusions below demonstrate the relevance of the letter of credit prohibition chiefly for United States financial institutions which implement letters of credit. The letter of credit prohibition is directed at such institutions and adds no additional prohibitions affecting the behavior of United States business concerns involved in letter of credit transactions. United States business concerns involved in letter of credit transactions, in order to avoid violating the EAA, must simply comply with the EAA's other prohibitions relating to the furnishing of information and refusing to do business. Further, the conclusions below assume the existence of United States commerce as defined in the letter of credit prohibition.

The letter of credit prohibition forbids a financial institution from implementing a letter of credit that contains a requirement or condition, compliance with which is prohibited elsewhere in the EAA.²⁰⁷ Accordingly, in order to determine which letters of credit are prohibited, a bank must determine what actions by letter of credit beneficiaries would violate one of the other prohibitions of the EAA.

The EAR presume that any bank which routinely engages in letter of credit transactions involving the shipment of goods to a boycotting country knows that such letters of credit frequently contain prohibited requirements.²⁰⁸ Accordingly, a bank is unlikely to be excused from accidentally implementing a prohibited letter of credit, unless it has taken reasonable steps to prevent the implementation of such credits.²⁰⁹ Such reasonable steps are in part determined by standard banking practice.²¹⁰

While an inadvertant implementation of a prohibited letter of credit may not constitute a violation of the EAA, once the error is

²⁰⁵ EAR § 369.2(f)(9), 43 Fed. Reg. 3523 (1978).

²⁰⁶ EAR § 369.2(f)(10), 43 Fed. Reg. 3523 (1978).

²⁰⁷ EAA sec. 201, § 4A(a)(1)(F).

²⁰⁸ EAR § 369.1(e), Examples (iv) and (v), 43 Fed. Reg. 3517 (1978).

²⁰⁹ EAR § 369.1(e), Example (iv), 43 Fed. Reg. 3517 (1978).

²¹⁰ EAR § 369.1(e), Example (v), 43 Fed. Reg. 3517 (1978).

discovered the prohibited letter of credit may not be further implemented.²¹¹ However, the EAA and the EAR provide an "absolute defense" to banks in any action brought to compel payment of or for damages resulting from the failure to pay under a prohibited letter of credit.²¹²

The letter of credit prohibition proscribes the "implementation" of letters of credit that contain prohibited requirements and conditions.²¹³ For purposes of the prohibition, the term implementation includes: issuing, confirming, honoring, paying or negotiating payment under a letter of credit.²¹⁴ It does not include advising the beneficiary of a prohibited letter of credit or taking the ministerial actions necessary to dispose of such a credit.²¹⁵

Banks may advise a beneficiary of all the terms and conditions of a prohibited letter of credit. Both banks and beneficiaries may work individually or in concert to nullify or renegotiate the prohibited boycott terms of a letter of credit.²¹⁶ If such terms are nullified or adequately amended, the letter of credit may thereafter be fully implemented.²¹⁷

(2) *Gaps and Imperfections*

(i) *Identification of Prohibited Letters of Credit.* The letter of credit prohibition has presented banks with new and significant burdens. A United States bank implementing a letter of credit opened in an Arab country is now required to decide if the credit contains any condition compliance with which is prohibited elsewhere in the EAA. If the letter of credit contains one or more such condition, the bank must either refuse to implement the credit or renegotiate the credit eliminating or amending the offending condition. Alone, this new requirement that each letter of credit be analyzed for prohibited boycott conditions is unlikely to stop banks from implementing letters of credit with Arab countries and nationals and residents of Arab countries. Most large United States banks have the capacity to provide trained personnel to screen letters of credit for prohibited boycott terms. Nevertheless, the EAR could still cause United States banks to severely curtail their letter of

²¹¹ EAR § 369.2(f), Example (x), 43 Fed. Reg. 3524 (1978).

²¹² EAR § 369.2(f)(5), 43 Fed. Reg. 3523 (1978).

²¹³ EAR § 369.2(f)(1), 43 Fed. Reg. 3523 (1978).

²¹⁴ EAR § 369.2(f)(2), 43 Fed. Reg. 3523 (1978).

²¹⁵ EAR § 369.2(f)(4), 43 Fed. Reg. 3523 (1978).

²¹⁶ EAR § 369.2(f), Example (iv), 43 Fed. Reg. 3524 (1978).

²¹⁷ *Id.*

credit business with the Middle East if, due to ambiguities in the EAR, letter of credit screening personnel are unable to screen quickly and accurately all possibly tainted credits.

Even though a workmanlike set of regulations, the EAR do not and cannot provide a clear and simple resolution of every boycott-related problem. For United States banks to be able to rapidly and precisely screen all letters of credit that might contain prohibited boycott conditions and requirements, the Commerce Department must provide a responsive mechanism through which United States banks can expeditiously obtain an opinion as to whether or not a particular letter of credit condition is prohibited. As will be discussed in section V, the mechanism for providing interpretive rulings already proposed by the Commerce Department is inadequate for this purpose.²¹⁸

(ii) *Duty to Inquire.* The so-called United States "commerce plus" test contained in the letter of credit prohibition of the EAR,²¹⁹ whereby a letter of credit to be subject to the EAR must not only be in United States commerce itself but must also be issued in favor of a beneficiary who is a United States person and involve an underlying transaction that is in United States commerce, contains a number of presumptions which are designed to aid banks to rapidly determine whether or not letters of credit are subject to the EAA.²²⁰ As noted above, this convenience is important. If letters of credit from Arab countries are to remain a useful payments mechanism, they must be reasonably inexpensive and thereby easily administered. A United States bank must quickly and accurately be able to determine which letters of credit contain prohibited boycott clauses and which do not.

Unfortunately, the EAR is not entirely clear regarding the extent to which banks can actually rely on the United States commerce presumptions mentioned above. The EAR emphasize that the presumptions may be rebutted by facts which could reasonably lead a bank to conclude otherwise.²²¹ However, the EAR do not suggest what these facts are, to what degree banks should be aware of these facts, or whether banks have any affirmative duty to find these facts.

²¹⁸ See notes 349-50 *infra* and accompanying text.

²¹⁹ EAR §§ 369.2(f)(7), (8), (9), and (10), 43 Fed. Reg. 3523 (1978).

²²⁰ See notes 195-200 *supra* and accompanying text.

²²¹ EAR §§ 369.2(f)(7), (8), (9), and (10), 43 Fed. Reg. 3523 (1978).

A duty to look beyond the particular documents directly presented to a bank in each isolated letter of credit transaction conflicts with the EAA's legislative history.²²² That history makes it clear that Congress wanted the EAR to provide sufficient clarity for banks to determine quickly and accurately whether or not the United States commerce plus test did or did not subject a particular letter of credit to the strictures of the EAA in order that EAR imprecisions not reduce otherwise permissible letter of credit business.²²³ Accordingly, the EAR should be amended to make clear that a bank has no affirmative duty in determining what letters are subject to the letter of credit prohibition or to look beyond the letter of credit documentation customarily presented in each transaction.

(iii) *Acceptance of Non-complying Certifications.* The EAR suggest that United States banks could be forced by letter of credit beneficiaries to accept certificates to fulfill a boycott-related requirement other than those specified by the credit. Example (xiv) of the letter of credit section permits a United States bank to implement a letter of credit wherein the beneficiary must certify he is not blacklisted.²²⁴ However, the example prohibits the United States bank from demanding such a certificate to fulfill the letter of credit requirement, reasoning that to permit a bank to demand such a self-certification of non-blacklist status would be tantamount to permitting banks to deal only with non-blacklisted persons, something clearly prohibited by the EAR.²²⁵ The example, thus, implies that the beneficiary could require the bank to honor the credit regardless of the certificate he delivers. A United States bank might thereby be required to pay under a letter of credit on the basis of irregular documentation which is insufficient to secure repayment of said United States bank from the Arab bank that issued the credit. Failure of the Arab bank to reimburse the United States bank due to the inability of the United States bank to present those documents called for in the credit would be fully in accordance with the normal rules applicable to the administration of international letter of credit transactions.

The mischief which may be done to United States banks by example (xiv) may be compounded in at least two ways. First, if the

²²² SENATE REPORT, *supra* note 7, at 42.

²²³ *Id.*

²²⁴ EAR § 369.2(f), Example (xiv), 43 Fed. Reg. 3524 (1978).

²²⁵ EAR § 369.2(a)(4), 43 Fed. Reg. 3518 (1978).

Commerce Department were to decide that the rationale which permits exporters to issue certificates as to their own blacklist status extends to the issuance of certificates regarding the blacklist status of the exporters' affiliates,²²⁶ the Commerce Department could also decide that the rationale that prohibits banks from demanding exporter self-certifications extends to blacklist status certifications regarding exporter affiliates. United States banks could then further be forced to accept additional noncomplying certificates which certificates they might find impossible to negotiate for repayment.

Second, example (vi) of the letter of credit section of the EAR²²⁷ suggests that United States banks may possibly be required to accept non-complying certificates other than those simply relating to blacklist status. In that example, a United States bank confirms a letter of credit containing a requirement for a negative certificate of origin which, due to the effectiveness of the EAA, it can no longer implement unless the exporter presents a nonconforming positive certificate of origin in response to this requirement. While example (vi) does suggest that in this case the United States bank has the discretion to accept or reject the non-confirming tender, the example is not entirely clear on this point.

Putting banks in jeopardy of substantial financial losses for engaging in non-prohibited letter of credit transactions with the Arab world runs counter to the spirit of the EAA²²⁸ and the EAA's legislative history²²⁹ which seek to hold banks harmless for compliance with the EAA. It also appears to run counter to both the spirit and the letter of a provision in the EAR which also generally attempts to hold banks harmless from implementing prohibited boycott-related credits.²³⁰

²²⁶ For a discussion arguing that the extension of the rationale permitting an exporter to certify to his own blacklist status to certifications regarding the blacklist status of affiliates is plausible if not compelling, see notes 108-12 *supra* and accompanying text.

²²⁷ EAR § 369.2(f), Example (vi), 43 Fed. Reg. 3524. While the EAA's hold harmless clause specifically relates to the letter of credit provision, only the history of the clause suggests that Congress intended the broadest possible interpretation of the clause.

²²⁸ EAA sec. 201, § 4A(a)(1)(F).

²²⁹ SENATE REPORT, *supra* note 7, at 42.

²³⁰ "Compliance with this section shall provide an absolute defense in any action brought to compel payment of, honoring of, or other implementation of a letter of credit, or for damages resulting from failure to pay or otherwise honor or implement the letter of credit." EAR § 369.2(f)(5), 43 Fed. Reg. 3523 (1978).

f. *Evasion*

(1) *Conclusions*

In consonance with the EAA,²³¹ the EAR²³² contain a broadly worded prohibition on actions taken either independently or through any other person with intent to evade the provisions of the EAA. Evasion may occur through the diversion to foreign affiliates of the business of a United States exporter, where that diversion is effected to place one or more transactions outside United States commerce and thereby enable some boycott-related action or actions to be taken by the affiliate which the resident exporter itself is prohibited from taking.²³³ Diversionary evasion may occur when particular orders are diverted by a United States firm to its foreign affiliates in the face of actual or anticipated boycott demands.²³⁴ On the other hand, one example in the EAR indicates that resourcing the manufacturing of products for a region from the United States to foreign affiliates because the United States firm could not engage in trade consistent with the EAA prohibitions would not be considered evasion, presumably because this involves significant business changes which demonstrate that boycott considerations could not be the sole motivating factor.²³⁵ Thus, diversions of specific orders are inherently suspect. Resourcing business generally is probably legal where the boycott is not the sole motivating factor.²³⁶

Evasion may also occur where foreign unrelated third parties are interposed between the exporter and an Arab customer so that the third party, not a United States person, will be in a position to take whatever boycott-associated actions may be necessary, action which the exporter itself may not lawfully take.²³⁷ In these circumstances not only the diversion of particular sales from direct to indirect third-party transactions, but the interposition of dealers or distributors for a product line or lines with respect to a region, may be considered evasion where the objective is to permit the taking of

²³¹ EAA sec. 201, § 4A(a)(6).

²³² EAR § 369.4, 43 Fed. Reg. 3524-35 (1978).

²³³ EAR § 369.4, Example (viii), 43 Fed. Reg. 3535 (1978).

²³⁴ *Id.*

²³⁵ EAR § 369.4, Example (vii), 43 Fed. Reg. 3535 (1978).

²³⁶ See discussion at notes 58 to 59 *supra* and accompanying text regarding meaning of "intent" in the evasion standard.

²³⁷ EAR § 369.4, Examples (iii) and (iv), 43 Fed. Reg. 3535 (1978).

actions by third parties which the exporter is prohibited from taking.²³⁸

In certain cases, restructuring transactions or business arrangements so that they fall within the scope of one or more of the exceptions of the EAA's boycott prohibitions should not be considered evasion so long as the new arrangements are bona fide.²³⁹ Thus, for example, it should be possible for old or new Arab customers or old or new distributors or dealers in Arab countries to make use of the unilateral selection exception to designate particular suppliers of goods, carriers, insurers or suppliers of other services. On the other hand, an exporter would not be free of risk of evasion in establishing a new local office or branch to function as an importer in an Arab country and make use of the local law and unilateral selection exceptions.²⁴⁰ The risk that this would be deemed to be evasion (or would not constitute bona fide residence for purposes of satisfying the unilateral selection and local law compliance exceptions) would appear to be significant, unless it could be established that there was a need for the local facility apart from its usefulness in making such selections.

It should also be noted that neither the EAR nor the EAA or its legislative history give any indication that a restructuring of a business arrangement so that there is no prohibited boycott actions or agreement by any party to the transaction constitutes evasion. For example, it should also be permissible to establish a multi-country distributor in an Arab country which could import consistent with the unilateral selection exception and re-export to other Arab countries, provided the distributor does not give negative certifications or otherwise take actions within the scope of the EAA prohibitions in connection with its re-exportation.

(2) *Gaps and Imperfections*

(i) *Theory of Evasion.* The EAR have failed to adopt a sufficiently clear test for evasion. Evasion essentially involves the use of contrivances or artifices to accomplish what would otherwise be an unlawful act.²⁴¹ In the context of the antiboycott prohibitions, evasion quite properly may encompass, for example, a United States

²³⁸ *Id.*

²³⁹ EAR § 369.4(b), 43 Fed. Reg. 3534 (1978).

²⁴⁰ EAR § 369.4, Example (vi), 43 Fed. Reg. 3535 (1978).

²⁴¹ *Distinctive Theatres of Columbus, Inc. v. Looker*, 165 F. Supp. 410, 411 (S.D. Ohio 1958); see *Keegan v. United States*, 325 U.S. 478, 487 (1945).

person's use of a dummy foreign company, nominally owned by others but under the dominion of the United States person, to provide negative certifications which the United States person himself could not lawfully provide.²⁴² It might also involve the routing of a particular shipment through an intermediary solely for the purpose of avoiding the prohibitions.²⁴³

On the other hand, the term evasion should not encompass bona fide changes in business relationships which obviate situations where prohibited boycott activities might otherwise arise. It is incorrect, for example, to characterize as evasion a change from direct selling to selling through bona fide independent distributors, irrespective of what those distributors may determine to do, of their own volition, vis-a-vis the boycott. Likewise, it is not evasion if a United States person establishes manufacturing, assembly, or warehousing facilities outside the United States, transactions from which are outside the scope of United States commerce. The fact that such actions may be motivated in some degree or even primarily by boycott considerations does not convert what is otherwise lawful conduct into something prohibited.

The EAR, in limited measure, recognize that avoiding the impact of a law by altering the business reality of a transaction is not evasion. In so doing, they affirm an intent by the Commerce Department not to "freeze" business structures for dealing with Arab customers in the form they appeared on January 18, 1978.²⁴⁴ Thus, the EAR provide that repeated use of exceptions will not be deemed to be evasion.²⁴⁵ Also, as noted above, the EAR recognize that United States persons may establish residency in boycotting countries and thus, avail themselves of the compliance with local law exception, so long as the establishment of residency is motivated by legitimate business considerations and does not have as its sole purpose the avoidance of the EAA's prohibitions.²⁴⁶

In example (vii) of section 369.4,²⁴⁷ the Commerce Department goes so far as to acknowledge that if a United States concern can no longer do business with a boycotting country because of the effects of the EAA, the United States concern may shift all its

²⁴² See EAR § 369.4(e), 43 Fed. Reg. 3535 (1978).

²⁴³ See EAR § 369.4, Example (iii), 43 Fed. Reg. 3535 (1978).

²⁴⁴ See notes 310-314 *supra*.

²⁴⁵ EAR § 369.4(b), 43 Fed. Reg. 3534 (1978).

²⁴⁶ EAR § 369.4, Example (vi), 43 Fed. Reg. 3535 (1978).

²⁴⁷ 43 Fed. Reg. 3535 (1978).

business to its controlled foreign subsidiary which can legally avoid compliance with the EAA by manufacturing abroad all the goods to be sold to the boycotting country. That is, in example (vii) the Department does recognize, if only tacitly, that avoidance of the EAA by altering the economic reality of the way business is conducted with a boycotting country is not evasion and that the desire to continue business relations with a boycotting country is a sufficient "legitimate" business reason to justify the avoidance procedure.

However, the EAR do not maintain this approach throughout the evasion section. In example (iv),²⁴⁸ a company which had an established business relationship selling calculators directly to a boycotting country cannot continue to do so without violating the EAA. Consequently, the company decides to sell its products to a distributor in a third country that in turn will almost certainly sell the calculators to the boycotting country; the company's warranty will continue to run with the product to the purchaser. Thus, in example (iv), as in example (vii), to avoid the effects of the EAA and continue to sell its product a company changes the economic reality of its business relationships with the boycotting country, but for an undisclosed reason the Commerce Department has decided the behavior described in example (iv) constitutes evasion.

It is difficult to explain away example (iv) as simply an example of a change in the structure of a business relationship devoid of economic reality. Example (iv) in no way suggests that the foreign distributor is not a bona fide business entity which makes a profit on the transaction. Further, example (iii) of section 369.4²⁴⁹ presents a case of evasion where instead of selling the goods to a legitimate foreign business entity which in turn resells them to customers in the boycotting country, the United States company "merely arranges to have all future shipments *run through* a foreign corporation in a third country."²⁵⁰

It is also difficult to find a practical justification for the distinction between example (iv) and example (vii). In finding that sales by a United States-based company to a foreign distributor, which in turn sells the goods to a boycotting country, constitute evasion but manufacturing goods abroad by the foreign subsidiary of a

²⁴⁸ EAR § 369.4, Example (iv), 43 Fed. Reg. 3535 (1978).

²⁴⁹ 43 Fed. Reg. 3535 (1978).

²⁵⁰ *Id.* (Emphasis added.)

United States' concern does not, the EAR have in effect determined that the only sanctioned way to avoid the effects of the EAA and continue to sell goods to boycotting countries is to diminish manufacturing, and thus employment opportunities, in this country and encourage manufacturing abroad, a result clearly not intended by Congress. Accordingly, example (iv) destroys the most logical framework within which the EAA's anti-evasion provision could operate. What is more, example (iv) does so without establishing a reasonable alternative.

This lack of clarity is regrettable. It is incumbent upon the Commerce Department to articulate better boundaries for the evasion concept. Such a delineation is necessary on the basis of fundamental concepts of fairness in the enforcement of a statute containing substantial civil and criminal penalties. It is necessary also to prevent the evasion provision from having an unintended and inappropriate *in terrorem* effect on a broad range of international business dealings. In the absence of an effective articulation of the scope of the evasion provision in the regulations, it is not entirely clear whether or not the courts will enforce the provision which is itself vaguely worded.

B. *Doing Business within Boycotting Countries*

1. *Effect of Arab Boycott on Doing Business with the Arab World*

Prior to the effective date of the EAR, a significant number of American companies were doing business in Arab countries.²⁵¹ Their conduct was not subject to the reporting requirements of the Export Administration Act, except in relation to transactions involving export of goods or services from the United States and the American company's parent or home office acted as the exporter.²⁵² Like their Arab counterparts, these companies and employees of these companies were subject to local laws and regulations including boycott laws. The principal ways in which Arab customs, immigration and boycott laws affected the business of United States companies doing business or attempting to do business within a boycotting country included: (a) registering to do business within the boycotting country, (b) obtaining work permits and visas for company employees,

²⁵¹ AMERICAN BUSINESS, *supra* note 65, at 29. See EXPORT ADMINISTRATION REP., note 68 *supra*, at 14; Samuelson, *As the Oil Flows, So Flows the Trade*, 9 NAT'L J. 161 (1977).

²⁵² See notes 52 to 55 *supra* and accompanying text.

and (c) importing goods and services for a company's own use or for resale.

The EAA prohibitions and exceptions are specifically designed to apply to these activities of United States persons in boycotting countries whenever there exists a nexus with United States commerce. This nexus will often exist since goods or services (such as those of architects or engineers) of United States origin are typically ordered with regard to specific projects in the boycotting country or because the home office or parent corporation provides non-ancillary services for specific projects including bid or performance bonding. Because contracts of a branch office may be deemed always to be guaranteed by the home office,²⁵³ all branch operations in boycotting countries may be in United States commerce regardless of the origin of goods or other services provided to customers. The discussion in this section assumes, therefore, the existence of United States commerce and the analysis will not pertain where United States commerce is not present.

In registering to do business within an Arab country, companies are typically asked to certify that they are not blacklisted and that they do not have certain kinds of business relationships with Israel (licensing agreements, manufacturing plants, oil exploration contracts, and the like).²⁵⁴ In some countries companies have had to agree not to deal with Israeli companies or have Israeli employees.²⁵⁵

It is typical for United States companies doing business in an Arab country to seek admission for employees who are United States nationals. For a United States national to be employed in an Arab country he must obtain a visa and a work permit. The issuance of such visas and work permits is often conditioned upon the applicant being neither a "Zionist" nor blacklisted.²⁵⁶ The term Zionist does not appear to be uniformly defined in every Arab state. Being a Zionist appears not to be synonymous with being Jewish, although it seems that in the actions of most Arab immigration authorities the correlation between the two is quite high.²⁵⁷

²⁵³ See notes 47 to 51 *supra* and accompanying text.

²⁵⁴ See note 2 *supra*.

²⁵⁵ *Id.*

²⁵⁶ See League of Arab Countries, General Secretariat, Head Office for the Boycott of Israel, General Principles for Boycott of Israel, June 1972.

²⁵⁷ See, *Discriminatory Arab Pressure on U.S. Business: Hearings Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 1st Sess. 3 (1977) (statement of Henry Waxman); *Hearings on S. 69 and S. 92 Before*

The importation of United States origin goods and services into an Arab country by a United States concern resident within an Arab country involves many of the same requirements and potentially many of the same EAA prohibitions regarding the furnishing of information and selection of suppliers, carriers and insurers that are faced by United States firms exporting to an Arab country. Because as many United States concerns resident within Arab countries have in the past relied on United States origin imports, to in effect prohibit these exports by prohibiting the concerns from complying with local Arab law would have serious if not catastrophic effects on the concerns' business. However, if certain specific criteria are met, the United States concern resident in a boycotting country may take advantage of the EAA's exception for compliance with local law²⁵⁸ as well as that dealing with unilateral and specific selections.²⁵⁹ These exceptions, then, become of great importance to United States persons attempting to do business within the Arab world.

Due to the importance and intricacies of the local law compliance exception and unilateral selection exception, the remainder of this section will be organized in slightly different fashions than the preceding discussions of export transactions. First, before proceeding to a discussion of the practical effects of the EAA and EAR on operations within boycotting countries, it is helpful to explore in some detail the local law compliance exception and its interrelation with the exception for unilateral and specific selections.²⁶⁰ Second, the discussion of gaps and imperfections in the EAR will be integrated with the conclusions regarding the compliance with local law and unilateral selection exceptions and the application of the EAR to doing business within boycotting countries generally and will not be set out in separate subsections.

2. *Elaboration of Compliance with Local Law and Unilateral Selection Exceptions*

a. *Compliance With Local Law*

The local law compliance exception²⁶¹ is available only if a resi-

the Subcomm. on International Finance of the Senate Comm. on Banking, Housing, and Urban Affairs, 95th Cong., 1st Sess. 174, 177-81 (1977) (statement of George Helland).

²⁵⁸ EAA sec. 201, § 4A(a)(2)(C).

²⁵⁹ EAA sec. 201, § 4A(a)(2)(F).

²⁶⁰ This exception is introduced and discussed at notes 156 to 175 *supra* and accompanying text.

²⁶¹ Compare EAA sec. 201, § 4A(a)(2)(F) with TRA Guidelines, H-3, H-4, 43 Fed. Reg.

dency test is met and it is available for compliance with respect to particular laws and activities. It does not permit, under any circumstances, discrimination against United States persons on the basis of race, religion, or national origin, or the furnishing of information about the race, religion or national origin of any United States person or of any owner, director, officer or employee of a United States person.²⁶²

Technically the exception also does not extend to discrimination on the basis of sex or to the furnishing of such information.²⁶³ However, the EAR acknowledge that sex discrimination is not an aspect of the Arab boycott.²⁶⁴ It is important to note that the EAR do not preclude discrimination on the basis of nationality or the providing of information about a person's nationality, as distinct from national origin.²⁶⁵

b. *Bona Fide Local Residence*

In order to avail himself of the local law compliance exception, a United States person must qualify as a bona fide resident of the boycotting country.²⁶⁶ The EAR adopt quite a flexible posture toward this residency test. A number of factors, no one of which is dispositive, will be applied to evaluate the bona fides of a person's residence including: (i) physical presence in the boycotting country; (ii) whether residence is needed for legitimate business reasons; (iii) continuity of the residency; (iv) intent to maintain the residence; (v) prior residence in the boycotting country; (vi) the size and nature of the person's presence in the country; (vii) whether the person is registered to do business or incorporated in the country; (viii) whether the person (individual) has a valid work visa; and (ix) whether the person has a similar presence in both boycotting and non-boycotting countries in connection with similar business activities.²⁶⁷

Residency need not be permanent in order to qualify. In the case

3462-63 (1978). The TRA contains no equivalent exception and the Treasury Department has interpreted agreements to comply generally with laws of boycotting countries to constitute boycott participation for federal income tax purposes.

²⁶² EAA sec. 201, § 4A(a)(3), EAR § 369.3(f-2)(10), 43 Fed. Reg. 3533 (1978).

²⁶³ *Id.*

²⁶⁴ EAR § 369.2(c), Example (vi), 43 Fed. Reg. 3521 (1978).

²⁶⁵ EAR § 369.2(b), Example (iii), 43 Fed. Reg. 3520 (1978); EAR § 369.2(c), 43 Fed. Reg. 3520 (1978).

²⁶⁶ EAA sec. 201, § 4A(a)(2)(F).

²⁶⁷ EAR § 369.3(f)(3)(i)-(ix), 43 Fed. Reg. 3531 (1978).

of a business firm, residency is established by a branch office, project office or other facility in the boycotting country which will operate there on a continuing basis or for the life of a local project, such as the construction of a power plant or dam.²⁶⁸

c. *Particular Laws and Activities*

The local law compliance exception pertains only to compliance with host country laws, whether derived from statutes, regulations, decrees, or other official sources having the effect of law in the host country.²⁶⁹ It does not allow compliance with presumed policies of the host country not reflected in official sources having the force of law. It is in this respect more narrow than the other exceptions of the EAA which address themselves to boycotting country "requirements" rather than laws.²⁷⁰ There are two distinct parts to the local law compliance exception, one dealing with activities "exclusively within" the host country and the other dealing with activities involving imports into the boycotting country.

(i) *Activities "Exclusively Within" the Host Country.* A United States person that is a bona fide resident of a boycotting country will not violate the EAA if he complies or agrees to comply with the laws of that country regarding his activities "exclusively within" that country.²⁷¹ This portion of the local law compliance exception is mandatory under the EAA whereas the local import law compliance portion is entirely discretionary with the Secretary.²⁷² The exception for activities exclusively within the boycotting country is, however, of highly limited practical effect.

²⁶⁸ See EAR § 369.3(f), Examples of Bona Fide Residency, *passim*, 43 Fed. Reg. 3531-32 (1978).

²⁶⁹ EAR § 369.3(f)(1), 43 Fed. Reg. 3531 (1978).

²⁷⁰ See, e.g., EAR § 369.3(b), 43 Fed. Reg. 3526 (1978), allowing certain compliance with import and shipping document "requirements" of a boycotting country and EAR § 369.3(e), 43 Fed. Reg. 3530 (1978), allowing certain compliance by individuals with immigration, visa and passport "requirements" of boycotting countries.

²⁷¹ EAA sec. 201, § 4A(a)(2)(F). This provision is elaborated in the EAR at § 369.3(f-1) and accompanying examples, 43 Fed. Reg. 3532-33 (1978).

²⁷² EAA sec. 201, § 4A(a)(2)(F). According to the EAR the local import law portion "will be monitored and continually reviewed to determine whether its continued availability is consistent with the national interest. Its availability may be limited or withdrawn as appropriate. In reviewing the continued availability of this exception, the effect that the inability to comply with local import laws would have on the economic or other relations of the United States with boycotting countries will be considered." EAR § 369.3(f-2)(9), 43 Fed. Reg. 3533 (1978).

While it permits agreements to comply with a boycotting country's law with regard to activities exclusively within that country, more general agreement to comply with host country laws is not, in and of itself, a prohibited action.²⁷³ Thus, arguably, the exception is less permissive than the corresponding rule. The single, significant practical effect of the "actions exclusively within" portion of the local law compliance exception is that it allows furnishing of otherwise prohibited information about business relations with Israel or blacklisted firms, so long as the information is furnished within the Arab country, by a United States person on the basis of his own knowledge without recourse to outside sources of information.²⁷⁴ It would not appear, however, to allow furnishing of boycott-related information such as negative certifications, in the context of an import transaction, since the information furnishing will probably be viewed as a portion of the import activity and not as an activity exclusively within.²⁷⁵ While, as a theoretical matter, it will allow United States persons who are bona fide residents in boycotting countries to exclude from selection blacklisted in-country suppliers of goods and services, it is doubtful whether any blacklisted firms offer goods or services within boycotting countries.

(ii) *Local Import Law.* The import law portion of the local law compliance exception while discretionary and therefore subject to withdrawal by the Secretary, is of considerably greater practical significance than the portion dealing with activities exclusively within boycotting countries. However, its practical effects have been significantly, and unnecessarily, reduced by a determination by the Commerce Department that it applies only to the import of goods and not services.²⁷⁶

This portion of the exception allows a United States person that is a bona fide resident of a boycotting country to comply or agree to comply with local import laws with regard to importation of goods into that country provided (A) the goods are for such person's own use within the host country, and (B) in the normal course of business the goods are identifiable as to source or origin at the time of

²⁷³ According to the EAR § 369.2(a)(5), 43 Fed. Reg. 3518 (1978), such general local law compliance agreements do not constitute a prohibited agreement to refuse to do business with a boycotted country or blacklisted persons.

²⁷⁴ See discussion at notes 338 to 341 *infra* and accompanying text.

²⁷⁵ *Id.*

²⁷⁶ EAR § 369.3(f-2)(8), 43 Fed. Reg. 3533 (1978). See discussion at notes 284 to 296 *infra* and accompanying text. Its practical value may be further reduced by the fact that initiation of such selections may give rise to antitrust prosecution. See discussion at note 10 *supra*.

entry into the host country.²⁷⁷

Goods are for the United States person's own use if: (A) they are to be consumed by the United States person; (B) they are to remain in such person's possession and to be used by such person; (C) they are to be used by such person in performing contractual services for another; (D) they are to be further manufactured, incorporated into, refined into, reprocessed into another product to be manufactured for another; or (E) they are to be incorporated into or permanently affixed as a functional part of a project to be constructed for another.²⁷⁸ Neither goods that are acquired to fill an order for another person nor goods acquired for retail sale from inventory qualify.²⁷⁹

To be identifiable as to source in the normal course of business when imported into a boycotting country, goods must be identifiable by (A) trademark, trade name, symbol or other identification normally on the product itself or its packaging, or (B) by uniqueness of design or appearance.²⁸⁰ Goods identifiable as to source solely by means of import documentation will not qualify for the exception.²⁸¹

The most obvious application of the import law portion of the local law compliance exception is to permit a United States person resident in a boycotting country to select suppliers of identifiable goods to be imported for that person's own use. It would appear that such selections may be made in either positive or negative or exclusionary terms, for example, by refusing to deal with blacklisted firms or by the use of "blacklists" or "whitelists" (lists of acceptable firms) in seeking bids for the supply of specifically identifiable goods. On the other hand, the practical benefits of this portion of the exception are circumscribed because it does not appear to extend to the furnishing of import-related information, such as negative certifications, with regard to goods selected for import in compliance with local import law.²⁸² Likewise it may not permit the issuance, confirmation or acceptance of import-financing letters of

²⁷⁷ EAR § 369.3(f-2)(1), 43 Fed. Reg. 3533 (1978).

²⁷⁸ EAR § 369.3(f-2)(6), 43 Fed. Reg. 3533 (1978).

²⁷⁹ EAR § 369.3(f-2)(7), 43 Fed. Reg. 3533 (1978). The EAR provide an exception to this requirement that goods not be imported for resale with regard to goods to be sold in a company employee canteen or commissary. They will be considered to be for the consumption of the importing person and not for resale and thus they qualify for the exceptions. EAR § 369.3(f-2) Imports For a U.S. Person's Own Use, Example (ii), 43 Fed. Reg. 3534 (1978).

²⁸⁰ EAR § 369.3(f-2)(1)(ii), 43 Fed. Reg. 3533 (1978).

²⁸¹ EAR § 369.3(f-2)(4), 43 Fed. Reg. 3533 and EAR § 369.3(c)(17), 43 Fed. Reg. 3527 (1978).

²⁸² See notes 338 to 341 *infra* and accompanying text.

credit requiring or conditioned upon such certifications.²⁸³

Further, and perhaps of greatest potential significance, it does not permit boycott-based selection of providers of services for import.²⁸⁴ A boycott-based selection of carrier or freight insurer would similarly fall outside the scope of the local import law compliance exception.²⁸⁵ Thus, a United States person resident in an Arab country is chargeable with violating the EAA's prohibition against refusing to do business, if in compliance with the Arab country's law he chooses a non-blacklisted United States architect, engineer, freight insurer or other provider of services.

This anomaly in the treatment by the EAR of goods and services is not only confusing and an impediment to business operations in the Arab countries, it also contradicts the legislative scheme of the EAA and explicit legislative history. The EAA states unequivocally that a United States person may *comply* with a selection of a supplier of services (even if the selection is boycott-based) made by a United States person resident in a boycotting country.²⁸⁶ While the local law compliance exception of the EAA is not entirely unambiguous on the question of whether the import law compliance exception extends to services,²⁸⁷ it may and should have been thus construed, in the light of the clear scope of the complementary unilateral selection exception, in order to give the statutory scheme integrity.

Although the EAA can and should be interpreted, consistent with its wording, to allow selection of suppliers of services by United States persons resident in boycotting countries, any basis for hesitation in this regard by the Commerce Department should have been eliminated by a review of the legislative history of the unilateral selection and local law compliance exceptions.

The Senate version of the Export Administration Amendments of 1977, S. 69, as reported by the Senate Committee on Banking, Housing and Urban Affairs,²⁸⁸ contained a serious discontinuity be-

²⁸³ *Id.*

²⁸⁴ See notes 286 to 294 *infra* and accompanying text.

²⁸⁵ See notes 329 to 332 *infra* and accompanying text.

²⁸⁶ EAA sec. 201, § 4A(a)(2)(C). This exception as implemented by the EAR is discussed at notes 156 to 175 *supra* and accompanying text.

²⁸⁷ EAA sec. 201, § 4A(a)(2)(F) provides, in pertinent part: "[S]uch rules and regulations may contain exceptions for such resident complying with the laws or regulations of [the boycotting country] governing imports into such country . . . specifically identifiable products . . . for his own use, including the performance of contractual services within that country. . . ."

²⁸⁸ See SENATE REPORT, *supra* note 7.

tween the two exceptions. The unilateral selection exception stated that United States persons resident in boycotting countries were *excluded* from the category of persons with whose unilateral selections of suppliers of goods and services, United States persons could comply.²⁸⁹ The compliance with local law exception was designed to *permit* United States persons resident in boycotting countries to comply with local law in the import of goods *and services*.²⁹⁰ Thus, while the latter would allow implementing regulations to permit unilateral and specific selections of suppliers of goods and services by United States residents of boycotting countries, the former would have proscribed compliance by United States persons with such selections.

A principal purpose of the Business Roundtable participants in the extra-legislative negotiations with representatives of the major Jewish organizations, at this stage of the legislative process, was to remedy this discontinuity by eliminating the exclusion of the United States persons from the class of persons with whose selections compliance was to be permitted. The outcome of these negotiations was reflected in floor amendments proposed in the Senate by Senator Heinz,²⁹¹ whereby the unilateral selection provision was amended by eliminating the exclusion of United States persons resident in boycotting countries from the category of persons with whose selections United States persons could lawfully comply.²⁹² In describing the amendment, Senator Heinz indicated that he believed that the amended version of the unilateral selection exception governed the conduct of those making selections as well as that of the recipients of such selections. He explained that the new provision differed from that of S. 69 as reported, "in that it permits a unilateral selection by a U.S. person resident in a foreign country" and that both "S. 69 and [the] amendment permit unilateral selections from the same range of products and services."²⁹³ Senator Heinz's remarks would seem to demonstrate an unequivocal legislative intent to permit selection of suppliers of services by United States persons resident in boycotting countries.

At the same time, an amendment was made to the compliance with local law exception in order to accommodate debate between

²⁸⁹ *Id.* at 62.

²⁹⁰ *Id.* at 46.

²⁹¹ 123 CONG. REC. S7152-54 (daily ed. May 5, 1977) (remarks of Sen. Heinz).

²⁹² *Id.*

²⁹³ 123 CONG. REC. S7153 (daily ed. May 5, 1977).

the Jewish organizations and the Business Roundtable pertaining to the proper scope of the exception with regard to the import of goods. The Jewish organizations apparently had feared that this exception, as previously stated in S. 69 whereby boycotting country residents could import United States goods and services on a boycott basis for resale, could be so broadly construed as to swallow the rule against boycott-based refusals to deal.²⁹⁴ The Roundtable apparently wanted to make certain that goods needed for construction projects would qualify for the exception. The result was addition of language stating that to qualify for the exception, imported goods must be for the United States person's "own use, including the performance of contractual services in that country."²⁹⁵

Nothing in the legislative record indicates an intent by the Senate to constrict the previous scope of the exception so as to eliminate services from the ambit of the compliance with local import law exception. In fact, the record clearly shows the opposite. Senator Heinz explained that the amendment to the local law compliance selection represented a "narrowing," because of the language with regard to "one's own use."²⁹⁶ He did not state that the amendment was designed to limit selections made in compliance with local import law to goods and not services. It seems fair to conclude that if this change were intended, Senator Heinz would have specifically addressed such a significant further "narrowing" of S. 69. From the foregoing analysis, it seems clear that either the Senate intended the unilateral selection exception to enable unilateral selections of providers of services by United States persons (this was apparently Senator Heinz's impression) or the Senate intended the amendment to the local law compliance section to deny United States persons resident in boycotting countries the right to make selections of suppliers of services.

The impact of the Commerce Department's erroneous construction of the local law compliance exception's application to the import of services may be mitigated by use of certain contract provisions so long as these provisions are not deemed to constitute evasion. As noted earlier in this Article, the EAR, while generally proscribing the use of "risk of loss" provisions with respect to importation of goods,²⁹⁷ allow use of contract conditions requiring suppliers

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See notes 143 to 149 *supra* and accompanying text.

to make delivery and pass title to goods on an "in country" basis.²⁹⁸ It is not unreasonable to conclude on the basis of the EAR's treatment of delivery of goods that a United States firm resident in a boycotting country could require prospective contractors to provide evidence of their qualifications to perform services in the boycotting country. Acceptance of a bid could be conditioned upon the successful bidder obtaining entry to the boycotting country for its personnel. However, the EAR offer no specific guidance on the legality of such a contractual scheme. Unless or until the Commerce Department provides such guidance by way of interpretation of or additions to the EAR, a firm doing business in boycotting countries will probably be well advised to use such a scheme, only if such arrangements are a normal, worldwide commercial practice by the firm or the industry of which it is part.

d. *Unilateral Selection Exception*

The unilateral selection exception has a dual significance for United States firms conducting operations in boycotting countries. First, a United States firm itself, either through its local office or through its offices and facilities outside the country, may comply with qualifying unilateral selections made by any bona fide resident of the boycotting country.²⁹⁹ Second, other United States persons may comply with qualifying unilateral selections emanating from a local resident office of the United States firm.³⁰⁰

The unilateral selection exception covers what a United States person may do to carry out a selection made by another and does not apply to the legality of the origination of the selection itself.³⁰¹ If the person originating the selection is a United States person, the selection must meet the criteria of the local law compliance exception.³⁰² The unilateral selection and local law compliance exceptions are similar but, as suggested by the foregoing analysis of the treatment of selection of services under the local law compliance exception, they are not identical in scope.

Under both exceptions, to be lawful the selection must originate

²⁹⁸ EAR § 369.4, Example (xiv), 43 Fed. Reg. 3535 (1978). See notes 150 to 151 *supra* and accompanying text.

²⁹⁹ EAR § 369.3(c) *passim*.

³⁰⁰ EAR § 369.3(c), Boycotting Country Buyer, Example (ii), 43 Fed. Reg. 3529 (1978).

³⁰¹ EAR § 369.3(c)(2), 43 Fed. Reg. 3527 (1978).

³⁰² *Id.*

with a bona fide resident of the importing boycotting country.³⁰³ Under both exceptions any goods which are selected must in the normal course of business be identifiable by source when imported.³⁰⁴ Neither exception applies if the person initiating or receiving the selection knows that the purpose of the selection is to discriminate against any United States person on the basis of race, religion, or national origin.³⁰⁵ But only the unilateral selection exception extends to the selection of services to be performed in whole or in part within the boycotting country³⁰⁶ and to the selection of goods not intended for the use of the importer.³⁰⁷

The EAR are flawed in that they do not adequately spell out the interrelations of these two exceptions and the varying legal obligations their dissimilarity may impose on persons subject to the EAA. The following can be concluded from a prudent reading of the EAR. Where the selection originates with a United States person's resident office in a boycotting country and the selection also is carried out by a United States person, both exceptions must be available; that is, the implementing person should not carry out a unilateral and specific selection of goods if the selection does not meet the "own use" requirement of the local import law compliance exception, and he should not carry out a selection of supplier of services to be performed in whole or in part in the boycotting country. In other words, the scope of the selection will be limited to activities common to both exceptions. Even where the originating and implementing parties are independent United States persons, each must take care not to encourage or assist the other to act beyond the scope of the exception available to the other, as such encouragement could constitute unlawful aiding and abetting or evasion.³⁰⁸ A United

³⁰³ EAR § 369.3(c)(7), 43 Fed. Reg. 3527 (1978) and EAR § 369.3(f)(2), 43 Fed. Reg. 3531 (1978).

³⁰⁴ EAR § 369.3(c)(16), 43 Fed. Reg. 3528 (1978).

³⁰⁵ EAR § 369.3(c)(18), 43 Fed. Reg. 3528 (1978) and EAR § 369.3 (f-2)(10), 43 Fed. Reg. 3533 (1978).

³⁰⁶ See notes 284 to 296 *supra* and accompanying text.

³⁰⁷ Goods selected in compliance with local import law must be for the use of the United States resident importing the goods, EAR § 369.3(f-2)(1)(i), 43 Fed. Reg. 3533 (1978). This test is amplified in notes 278 to 279 *supra* and accompanying text.

³⁰⁸ The evasion section of the EAR states:

No United States person may engage in any transaction or take any other action, either independently or through any other person, with intent to evade the provisions of this Part. *Nor may any United States person assist another United States person to violate or evade the provisions of this Part.*

EAR § 369.4(a), 43 Fed. Reg. 3534 (1978) (emphasis added).

States person receiving an apparently boycott-based unilateral and specific selection of a supplier of services is probably under no duty to inquire as to whether its originator is a United States person.³⁰⁹

3. *Application of the EAA and EAR to Operations of United States Persons within Boycotting Countries*

The following analysis applies the prohibitions and exceptions of the EAA as elaborated in the EAR to the establishment and conduct of business operations in Arab countries participating in the boycott of Israel. The analysis assumes throughout that the activities described are in United States commerce.

a. *Establishing a Bona Fide Residence*

A United States person without a bona fide residence in a boycotting country may establish such a residence (and thereby become eligible for the local law compliance exception and to initiate unilateral selections with which United States persons may comply) so long as he has a legitimate business need to do so. Residence established solely for purposes of avoiding application of the EAA's prohibitions will not be deemed to be bona fide.³¹⁰

A person seeking to establish bona fide residence may furnish otherwise prohibited, nondiscriminatory information regarding business relations with a boycotted country or with blacklisted persons, if such information is required by law of the boycotting country in order to establish a branch or subsidiary therein.³¹¹ The information may only be furnished, however, by employees of the United States person based upon their own knowledge while they are within the boycotting country.³¹² The EAR's examples point out that a United States person's employees visiting a boycotting country to prepare a bid on a construction project are not bona fide residents

Also applicable is the general aiding and abetting provision of the Commerce Department's Export Administration Regulations, 15 C.F.R. § 387.2 (1977).

³⁰⁹ As a general matter, the EAR do not explicitly impose any duty of inquiry on recipients of unilateral selections of suppliers of goods or services, except where the recipient is advised of the selection by a person outside the boycotting country. In this instance the recipient must inquire whether the selection originated in the boycotting country. He may accept the assurances of the conveyor of the selection without further inquiry. EAR § 369.3(c)(11), 43 Fed. Reg. 3527 (1978).

³¹⁰ EAR § 369.3(c)(8) and § 369.3(f)(3), 43 Fed. Reg. 3527, 3531 (1978).

³¹¹ EAR § 369.3(f) Bona Fide Residency, Examples (iv) and (vi), 43 Fed. Reg. 3531 (1978). The "flexibility" of the EAR on the point is intended to prevent freezing the status quo at the date of effectiveness of the EAR (January 18, 1978). *Id.*

³¹² *Id.*

and may not furnish prohibited information required to be submitted with the bid.³¹³ However, personnel of a United States company, not previously resident in a boycotting country, sent to the boycotting country to set up operations after their employer has been awarded a construction contract, are construed to be bona fide residents and, as such, may furnish nondiscriminatory boycott information necessary to the establishment of operations.³¹⁴

b. *Compliance with Immigration, Passport, Visa or Employment Requirements of a Boycotting Country*

An individual employee of a firm establishing or conducting operations in a boycotting country may comply or agree to comply with the immigration, passport, visa or employment requirements of a boycotting country to the extent of furnishing information about the race, religion, sex, nationality or national origin of himself and members of his immediate family.³¹⁵ A firm may not furnish racial, religious, or national origin information about its executives or employees. It may, however, furnish information about the nationalities and sex of its employees. It may also perform certain administrative actions, on a nondiscriminatory basis, to facilitate completion of applications by individuals, even though those applications may contain information (supplied by the employee) about race, religion or national origin. Employers may inform employees of host country visa requirements and provide typing, translation, messenger and other similar services. Employers may transmit visa applications to the host country's consulate and may urge their expeditious processing.³¹⁶

The fact that certain employees may be denied entry to the host country for boycott reasons need not prevent an employer from proceeding with the establishment of a branch or subsidiary or the carrying out of a project using others in the place of those denied entry. However, an employer may not agree to exclude persons based on race, religion or national origin, nor may he select out employees in advance to eliminate those who are expected to be denied entry, on the basis of race, religion or national origin.³¹⁷ The

³¹³ *Id.* Example (v).

³¹⁴ *Id.* Example (xii).

³¹⁵ EAR § 369.3(e)(1), 43 Fed. Reg. 3530 (1978).

³¹⁶ EAR § 369.3(e)(3), 43 Fed. Reg. 3530 (1978).

³¹⁷ To do so would violate the EAA's prohibitions against taking discriminatory actions, EAA sec. 201, § 4A(a)(1)(B).

EAR do not state whether an employer may condition an offer of employment upon the applicant's ability to obtain an entry visa or work permit. Such a condition should be permitted. By way of analogy, the EAR permit a condition in a purchase contract that title to goods not pass until they have been delivered into a boycotting country.³¹⁸

c. *Importing Goods into a Boycotting Country*

(i) *Selection of Suppliers of Goods.* Personnel of a bona fide resident branch, subsidiary or other office of a United States person in a boycotting country may make boycott-based, direct choices of suppliers of goods for import into the boycotting country so long as they meet the identifiability³¹⁹ and "one's own use"³²⁰ tests of the local import law compliance exception.³²¹ Though the EAR do not specify the permissible means for making such selections, it seems fair to conclude that they may be made by placing orders or seeking bids only from firms which are not blacklisted or by refusing bids of blacklisted firms.³²²

Similarly, employees of a United States person resident in a boycotting country may initiate boycott-based, but nondiscriminatory, choices to be carried out by third parties of suppliers of goods so long as the criteria of the local import law compliance exception are met. If the person requested to implement the selection is a United States person, including the home office or parent of the person initiating the selection, it must meet the criteria of the unilateral selection exception.³²³ In such circumstances, the United States home office or parent probably can provide so-called "pre-award" assistance in the form of lists of potential suppliers and their qualifications without identification of blacklist status and without excluding blacklisted firms, but the selection of a specific supplier must be made by the resident of the boycotting country.³²⁴ However, in order to

³¹⁸ The Treasury Department guidelines implementing the TRA antiboycott provisions explicitly sanction such an entry visa employment condition. See TRA Guidelines, note 85 *supra*, H-10 and H-11, 43 Fed. Reg. 3463 (1978).

³¹⁹ See notes 280 to 281 *supra* and accompanying text.

³²⁰ See notes 278 to 279 *supra* and accompanying text.

³²¹ EAR § 369.3(f-2), 43 Fed. Reg. 3533 (1978).

³²² Suppliers may not be excluded, however, on the basis of the race, religious affiliation or national origin of the supplier or its owners, management or other personnel. See note 262 *supra* and accompanying text.

³²³ EAR § 369.3(c), 43 Fed. Reg. 3526-28 (1978). For a discussion of these criteria see notes 156 to 175 *supra* and accompanying text.

³²⁴ The EAR state as a general proposition that, unless a selection meets the criteria of the

qualify, such provision of “pre-award” or “pre-selection” services must be customary for the United States parent or home office (or the industry of which it is part) in non-boycotting as well as boycotting countries.³²⁵

Also, a United States person resident in a boycotting country may carry out a boycott-based unilateral and specific selection of a supplier of identifiable goods, originated by a boycotting country customer, including another United States person that is a resident of that country. Here again the provision of qualifying pre-award assistance by the United States person to the boycotting country customer will not taint the selection.³²⁶ If the selection is initiated by another United States person resident in the boycotting country, it is necessary that the goods of the designated supplier be for the use³²⁷ of the person initiating the selection. If the recipient of the selection knows or has reason to know that the goods are not for the use of the United States person originating the selection, the recipient may be charged with evasion or aiding and abetting if he implements the selection.³²⁸

(ii) *Selection of Carriers and Insurers.* While the EAR’s local law compliance and unilateral selection exceptions provide considerable scope for boycott-based selection of suppliers of goods for import into boycotting countries, they circumscribe conduct of United States persons resident in boycotting countries, in the selection of providers of certain services necessary in the conveyance of the selected goods to the boycotting country. This anomaly results from the Commerce Department’s insistence on excluding selections of suppliers of services from the ambit of the local law compliance exception.³²⁹ Under the EAR a United States person resident in a boycotting country can make a selection of a carrier from among

unilateral and specific selection exception, a United States person will be guilty of an unlawful refusal to do business if it provides “post award” services (such as negotiating a contract with a supplier of goods selected by the client) when it knows or has reason to know that the client selection was boycott-based. This general proposition is true whether or not the United States person provided “pre-award assistance.” EAR § 369.2(a)(7), 43 Fed. Reg. 3518 (1978).

³²⁵ EAR § 369.2(a)(6), 43 Fed. Reg. 3518 (1978).

³²⁶ See notes 324 to 325 *supra* and accompanying text.

³²⁷ See notes 307 to 308 *supra* and accompanying text.

³²⁸ *Id.*

³²⁹ See notes 284 to 296 *supra* and accompanying text. Selection of carriers and insurers with regard to import transactions does not appear to be an activity “exclusively within” a boycotting country and as a selection of services it does not qualify under the local import law portion of the local law compliance exception. EAR § 369.3(f), 43 Fed. Reg. 3531 (1978).

those permitted to call at ports in the boycotting country.³³⁰ A United States person may make such boycott-based selection of eligible carriers directly. Alternatively, he probably can request a third party to implement the selection.³³¹ He may not, however, initiate a boycott-based selection of a non-blacklisted freight insurer or other provider of services necessary to complete the transaction, since such selections are clearly proscribed selections of services not

³³⁰ EAR § 369.2(a) Refusals to Do Business, Example (iv), 43 Fed. Reg. 3518 (1978). This altogether salutary example conveys a recognition by the Department of Commerce that only non-blacklisted vessels may carry goods to Arab ports and that United States firms should not be placed in jeopardy of a prosecution for refusal to do business simply by virtue of compliance with the practical imperatives of shipment of goods to boycotting countries. While this treatment of choices of carriers is perhaps not compelled by the logic of the EAA ("discriminating" against blacklisted carriers is no different than "discriminating" against blacklisted suppliers), it is both exigent and practical.

To avoid confusion, the determination of the EAR, evidenced by Refusals to Do Business, Example (iv), generally to permit boycott-based selection of carriers should be better integrated into the regulations as a whole. First, carrier selection should not be included in the exclusion of services qualifications to the local import law compliance exception. If this is not the case, the exception can be said to be more restrictive than the rule.

Second, the following example in the unilateral and specific selection exception section should be altered:

A, a U.S. exporter, is asked by B, a U.S. person who is a bona fide resident of a boycotting country Y, to ship goods on U.S. carrier C. C is not blacklisted by Y, and A knows that B has chosen on a boycott basis in order to comply with Y's boycott laws.

A may comply or agree to comply with B's request because B is a bona fide resident of Y. EAR § 369.3(c) Boycotting Country Buyer, Example (i), 43 Fed. Reg. 3529 (1978).

This example seems unnecessary and potentially misleading. It is unnecessary since Refusal to Do Business, Example (iv), states it is not a refusal to deal to make a boycott-based selection of a carrier. Therefore, the local law compliance and unilateral selection exceptions need not pertain. It is misleading because it implies that United States persons may comply with boycott-based selections of providers of services initiated by other United States persons resident in boycotting countries despite the EAR's clear proscription of such selections, although such compliance is culpable as evasion or aiding and abetting. See notes 308 to 309 *supra* and accompanying text.

But see note 105 *supra* and accompanying text: A United States person cannot certify that a carrier is eligible to enter a boycotting country's ports or waters. A United States person may only comply or agree to comply with host country requirements (i) prohibiting shipment of goods in a carrier flying the flag of the boycotted country or which is owned, chartered, based or operated by a boycotted country, its nationals or residents, and (ii) specifying that the carrier not visit a port of a boycotted country en route or that it follow a prescribed route. EAR § 369.3(a-2), 43 Fed. Reg. 3525 (1978). It may also certify compliance with such a "precautionary" or "war risk" requirement, EAR § 369.3(b)(2), 43 Fed. Reg. 3526 (1978).

³³¹ Since the EAR's treatment of such carrier selections is extraordinary, see note 330 *supra*, it may be argued that only direct selection of carriers will be permitted. This interpretation is, however, difficult or impossible to square with EAR § 369.3(c) Boycotting Country Buyer, Example (i), *reprinted in* note 330 *supra*.

covered by the local law compliance exception.³³²

A United States person resident in a boycotting country may carry out a boycott-based, unilateral and specific selection of carrier, freight insurer or other provider of services originated by a customer in the boycotting country.³³³ He may *not*, however, comply with boycott-based selections of export facilities other than carriers initiated by United States persons, since to do so would risk a charge of evasion or aiding and abetting.³³⁴

Nothing in the EAA or its legislative history requires the result contained in the EAR regarding selections of providers of services necessary for conveyance of goods to boycotting countries. This is probably so because the Congress did not realize that the Secretary would construe the local law compliance exception not to cover selections of providers of services, and especially those services necessary to carry out an export-import transaction.³³⁵ Even if the Commerce Department were to continue to resist the compelling logic favoring amendment to the EAR to permit boycott-based selections of providers of services, generally in compliance with local law, it should, at a minimum, amend the EAR to permit such selections with regard to freight insurers and other providers of services necessary in the conveyance of goods from the United States to Arab countries. If it does not amend the EAR, the likely result will be the establishment of freight insurance facilities by the Arab countries themselves, and a resulting loss of business for American insurers.

d. *Import and Shipping Documentation*

The consequence of the EAR's treatment of services under the local law compliance exception is to diminish somewhat the practical benefit of this exception. These benefits are further reduced by the EAR's apparent refusal to allow special treatment for import and shipping documentation furnished in the context of an import transaction carried out in compliance with local import law.³³⁶ Thus, firms with operations in boycotting countries are probably subject to the same stringent limits in this respect as are United States

³³² See notes 284 to 296 *supra* and accompanying text.

³³³ See notes 299 to 302 *supra* and accompanying text.

³³⁴ See notes 308 to 309 *supra* and accompanying text.

³³⁵ Senator Stevenson, the leading Senate sponsor of antiboycott legislation, clearly intended the local law compliance exception to cover such services. The exception, he said, "presumably would include the services of carriers making deliveries to the boycotting country." 123 CONG. REC. S7154 (daily ed. May 5, 1977).

³³⁶ See notes 338 to 341 *infra* and accompanying text.

exporters.³³⁷ This conclusion seems compelled by the following analyses.

The EAR's exception for activities "exclusively within" a boycotting country is probably too narrowly drafted to permit the furnishing of prohibited boycott information by a United States person resident in a boycotting country in connection with an import transaction.³³⁸ Though it explicitly allows a boycotting country resident to furnish otherwise prohibited boycott information to a person within the boycotting country so long as the information is compiled within the boycotting country and is based on the resident's own knowledge,³³⁹ it does not specify precisely what is meant by the requisite that information be compiled within the boycotting country. It is common in import transactions for data from which an importer might compile information to be furnished to officials within the boycotting country, that is, data about the supplier of the imported goods, the carrier and the insurer, to originate from outside the boycotting country. Further, the examples in the subsection suggest a narrow interpretation of what should be considered as information compiled within the country.³⁴⁰ The examples include no case involving an import transaction.³⁴¹

The local import law compliance exception makes no reference to the furnishing of information incident to the importation of goods.³⁴² Rather, the regulations and examples of the subsection emphasize the limitations on the selection of goods by a boycotting country resident.³⁴³ While the issue is not free from doubt, it seems that the exception is not meant to permit the furnishing of negative certifications or other boycott-related information, not specifically excepted by the EAR, incident to the importation of goods.

If the EAR do not permit a boycotting country resident to supply boycott information in compliance with local import law with regard to the importation of goods into the boycotting country, a rather anomalous situation is created whereby a United States person is permitted to agree to and, in fact, select an import on a prohibited boycott basis but is prohibited from actually certifying

³³⁷ See notes 86 to 107 *supra* and accompanying text which outline the prohibitions and exceptions that apply to such documentation with regard to export transactions.

³³⁸ See EAR § 369.3(f-1), 43 Fed. Reg. 3532-33 (1978).

³³⁹ *Id.* Activities Exclusively Within a Foreign Country, Examples (iii) and (iv).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² EAR § 369.3(f-2), 43 Fed. Reg. 3533 (1978).

³⁴³ *Id.*

to the boycotting country it has done so. Such an anomaly may be more than a mere annoyance. Certifications including prohibited boycott information will no doubt continue to be required in at least some boycotting countries. An inability to supply such certifications in some instances may mean that a boycotting country resident, in fact, will not be able to import goods for his own use as contemplated in the EAA.

Unless or until the Commerce Department clarifies the EAR, a prudent construction of them may foreclose a number of transactions otherwise permitted. Accordingly, in the spirit of the local law compliance exception as a whole and particularly the local import law subsection, the Department should clarify the EAR to permit importers to supply such information (other than discriminatory information) required for the import of goods into the boycotting country.

e. *Letter of Credit Transactions within a Boycotting Country*

Branches and subsidiaries of United States banks in boycotting countries have in the past carried on a not insignificant number of letter of credit transactions in these countries. Typically, a national or resident of a boycotting country will ask such bank branches or subsidiaries to open a letter of credit in favor of a nonboycotting country exporter in order to provide payment for the import of goods or services. Such letters of credit frequently contain boycott-related conditions and requirements which would be likely to prevent a United States bank branch or subsidiary outside the boycotting country from implementing them with respect to transactions in United States commerce.³⁴⁴ The possibility that a United States bank branch or subsidiary could issue these letters of credit depends almost entirely on the applicability of the local law compliance exception.

As noted earlier in this Article, the local law compliance exception permits boycotting residents including bank branches and subsidiaries to comply with the nondiscriminatory local boycott laws and requirements with respect to activities of the residents exclusively within the boycotting country.³⁴⁵ Unfortunately, while the EAR's

³⁴⁴ The EAA's prohibition against implementation of letters of credit containing prohibited boycott conditions, EAA sec. 201, § 4A(a)(1)(F), is only applicable when the beneficiary is a United States person and the underlying transaction is in United States commerce. See notes 196 to 199 *supra* and accompanying text.

³⁴⁵ See notes 269 to 275 *supra* and accompanying text.

analysis of the local law compliance exception does deal rather extensively with the interpretation of the requirement that activities to be covered thereby must be exclusively within the boycotting country, it does not deal specifically with letters of credit.

An analysis of the activities of an issuing bank in a letter of credit transaction suggests that such activities could certainly be considered as activities "exclusively within" the boycotting country so long as a local bank customer opens the credit at a bank branch within the boycotting country. In that case the bank agrees with the local customer to issue the letter of credit with the terms and conditions specified by the customer and by the laws and regulations of the boycotting country. The cost for opening the letter of credit is almost always borne by the local customer. Although such a letter of credit is issued in favor of a letter of credit beneficiary residing outside the boycotting country, the issuing bank reviews within the boycotting country the documents supplied in compliance with the terms of the credit and makes its decision within the boycotting country whether or not the credit is to be paid. Payment by the local customer for the credit is almost invariably made locally.

On the other hand, letters of credit issued to beneficiaries outside the country of the issuer require not insignificant services from banks located in the country of the beneficiary. Further, payment to the beneficiary is generally effected from funds of the issuing bank on deposit in the country of the beneficiary.

Accordingly, the EAR should be amended to make clear whether or not letters of credit issued by a bank branch or subsidiary in a boycotting country to a beneficiary outside the boycotting country come within the local law compliance exception. That the Congress imposed upon the Commerce Department a burden to clarify the effects of the EAA on letter of credit transactions, there can be no doubt.³⁴⁶

V. ASSESSMENTS AND CONCLUSIONS

As noted in the Introduction, three of the most important variables in determining the results of the experiment begun by the enactment of the EAA are: the regulations adopted by the Commerce Department to implement the EAA's prohibitions and exceptions; the response of Arab, boycotting nations to the new United States legal strictures; and the character of the administration and en-

³⁴⁶ SENATE REPORT, *supra* note 7, at 41.

forcement of the new laws and regulations by the Commerce Department.

Sections III and IV of this Article set forth the EAA's prohibitions and exceptions, analyzed its jurisdictional tests as amplified in the EAR, and then assessed the application of the EAA and EAR to a range of business relations with Arab countries. The foregoing sections made certain tacit assumptions about the likely reaction by Arab boycotting countries to the new law. Before proceeding to a summary assessment of the likely impact of the EAA and EAR on United States business prospects in the Middle East and an assessment of the character of the Commerce Department's administration of these new laws, it is worthwhile to venture some observation and speculation regarding this Arab response to the EAA.

A. *The Arab Response—A Speculative Assessment*

Some United States firms have already encountered signs that Arab customers are willing, in limited measure, to accommodate their boycott practices to the requirements of United States law. Many of the more moderate Arab nations, even prior to the January 18, 1978, effective date of the EAA's prohibitions, relaxed requirements for negative certificates of origin of goods and began accepting in their place affirmative statements of the origin of goods. Also, a number of United States concerns were sent boycott questionnaires immediately prior to the EAR's effective date, possibly indicating an awareness by boycott authorities that such firms would not, as a general matter, be able to answer such questionnaires after January 18, 1978. Some firms with operations in both the United States and Europe have found that in exporting goods from Europe they encounter more stringent boycott demands than when exporting from the United States. This may be a sign of willingness on the part of some Arab states to take United States legal requirements into account. On the other hand, the harder line Arab countries, and especially Iraq, have shown few, if any, signs of flexibility.

The flexibility that has been shown by Arab countries has related principally to form and not substance. An affirmative certificate of origin can, of course, serve the same end as one negatively phrased. Nevertheless, the willingness of many Arab countries to adjust form to accommodate United States law augurs well for the possible success of the experiment initiated by the EAA. At the same time, however, there exists no evidence that Arab boycotting countries will, as a general rule, abandon the substance of their boycott of Israel in the case of most business transactions. As has been true in

the past, depending upon the nature of United States business's product or service, it will remain possible on a transaction-by-transaction basis to negotiate the deletion or amendment of boycott requirements.

B. Summary of Likely Business Impacts

Based upon these speculative assessments of Arab conduct, the following summary conclusions can be stated regarding the likely overall impact of the EAA's provisions, as implemented by the EAR, on American business relations in and with Arab countries:

1. United States exporters, including their controlled in fact foreign subsidiaries and branches when a United States commerce nexus exists, will be seriously circumscribed in the types of boycott information they can provide³⁴⁷ and in the types of boycott agreements they can enter. The impact of these limitations on action may be, in considerable measure, mitigated by the willingness of Arab moderates to accept qualifying affirmative certifications and contractual undertakings. Business will be lost, however, especially in hardline countries.
2. Arab countries, at least the more moderate ones, will probably bend to the EAR's prohibition on furnishing information as to the blacklist status of carriers and insurers. As noted above, the EAR permit exporters to furnish positive certificates as to the names of insurers and carriers and such permitted certifications should still enable Arab countries to effectively administer the boycott. However, for convenience sake, in an effort to foster local industry and perhaps in a pique at the EAA and EAR requirements, Arab nations are apt to increase selections of national or other Arab carriers and insurers with attendant loss of business for United States carriers and insurers.
3. While hardline Arab nations will not stop purchasing United States goods altogether, particularly those goods needed for national development, they may well as a matter of national policy favor European and Japanese goods of similar type and quality.
4. The EAA's sweeping prohibition on furnishing information, as broadly interpreted by the Commerce Department,

³⁴⁷ The full effect of the documentation limitations is not yet known because of the "mini" grace period until June 21, 1978. See note 27 *supra* and accompanying text.

may pose a substantial obstacle to United States firms seeking to avert blacklisting or removal from the blacklist. It may, itself, lead to increased blacklisting of United States firms unable to provide information to correct frequent Arab misconceptions. This provision itself, however, may not have too serious an impact on the development of new business opportunities in Arab countries because of the availability of the local law compliance exception and the EAR's interpretation of it allowing the furnishing of boycott information for the purpose of establishing residence.

5. The EAA's prohibition on refusals to do business, as counterbalanced by its exceptions and especially those allowing compliance with unilateral and specific selection and compliance with local import law, will hamper but not prevent business in the Middle East. When the exceptions are not available or applicable, firms may require goods to be delivered and for title to pass "in country." This same concept possibly may also be applied in the selection of providers of services although the EAR are not clear on this point.

6. The EAA's evasion provision will constrain conduct which might otherwise circumvent the EAA's prohibitions. In addition, because of its broad terms, it may continue to cause uncertainty and delay, and consequent competitive detriment to United States firms, in business decision making with regard to opportunities arising in Middle Eastern markets.

7. The overall effect of the EAA on letter of credit operations is difficult to assess with any precision for it depends to a large degree on the willingness of Arab countries to accept qualifying, affirmative import and shipping documentation. It does seem fair to conclude that the EAA and EAR have injected new and unwanted complexity into the letter of credit business with almost certain increased costs to banks and exporters alike. Depending on the resolution of these complexities, letter of credit transactions may diminish.

8. United States firms with operations in boycotting countries may take advantage of the EAA and EAR's deference to the exercise of sovereignty by Arab States. However, here again, great regulatory complexity has been imposed, and this will handicap such operations, especially in relation to those of foreign competitors.

9. If the EAR cannot be clearly and precisely described, more moderate Arab states in attempting to alter rules or regulations and form agreements that will accommodate the EAR, will, not infrequently, unintentionally make changes that continue to place United States persons in jeopardy.

10. The Commerce Department's construction of the EAA's anti-evasion provision prohibiting United States exporters to sell to Arab countries through bona fide foreign distributors able to make boycott certifications and agreements will cause United States concerns to establish or enlarge wholly foreign manufacturing subsidiaries with an attendant loss or "export" of American jobs.

C. The Penalty of Imprecision—The Need for Interpretive Procedures

Possibly more consequential than the direct effects of the EAA's prohibitions and exceptions as implemented by the EAR are their indirect effects resulting from the great complexity they impose on business decision making. Stated another way, the new law and regulations may seriously handicap American firms and their foreign branches and affiliates not simply because of their direct proscriptions but rather because it is so difficult to apply these standards confidently to the facts of individual transactions to determine whether or not a business decision will result in jeopardy of civil or criminal penalties. In largest measure, this burden of complexity is not the fault of the Commerce Department. It is the direct result of the legislative scheme itself, posing as it does three jurisdictional threshold tests, six prohibitions, six exceptions and a broad injunction against evasion, all of which must be applied in the analysis of the facts of any given business transaction.

It is true, as has been extensively discussed in section IV, that the EAR contain significant gaps and imperfections. Nevertheless, the Commerce Department's regulations represent a conscientious effort to give specific content to a very complex statutory scheme. Even if the majority of the EAR's imperfections were to be remedied, the American businessman would still face great regulatory complexity in his business dealings in the Middle East.³⁴⁸

This burden of complexity could be significantly lessened if the

³⁴⁸ This complexity is seriously compounded by the antiboycott provisions of the TRA. See note 5 *supra*.

Commerce Department were to adopt a flexible and responsive system for providing interpretive advice in the context of specific transactions. The Department, to date, has failed to establish such a system. It has proposed a system for providing interpretive rulings pursuant to requests raising important issues of general interest.³⁴⁹ Responses to requests for interpretations under this system are entirely discretionary with the Department.³⁵⁰ The system offers no genuine prospects that affected parties may secure timely, transaction-specific advice. Such a system for interpretive or non-action advice is a virtual prerequisite to a regulatory program of the complexity that marks the EAA and EAR. Unless or until the Department of Commerce establishes such a system, the EAA and EAR may handicap American businessmen by the uncertainties they create more than by the prohibitions they contain.

D. Conclusion

The experiment begun by enactment of the EAA may some day be analyzed by historians as an apogee of the regulatory optimism of 20th century America. The Congress and the President have acted upon moral impulse to regulate, in sweeping fashion, commercial dealings of United States firms and numerous foreign entities controlled by these firms. Their action was tempered by a pragmatism which itself was as American as the moral impulse behind the legislation. This pragmatism manifests itself in the EAA's exceptions. The distillate of this mix of morality and pragmatism is complexity and uncertainty.

The EAA was enacted after long-drawn and spirited controversy regarding the appropriate scope of the United States response to the

³⁴⁹ 42 Fed. Reg. 65,592, 65,595 (1977). Also, under the proposed procedures for issuance of interpretive letters, the requesting party must identify "all relevant parties" including himself. *Id.* The Commerce Department is without adequate, statutory authority to withhold the names of individuals requesting such letters from disclosure under the Freedom of Information Act, 5 U.S.C. § 556(b)(3) (1976). *American Jewish Congress v. Kreps*, No. 76-1559 (D.C. Cir. 1978). Given the intensity of public interest in the conduct of United States businesses in response to the Arab boycott of Israel and the potential business consequences which could attend disclosure of the name of a party initiating a request, companies will be reluctant to initiate requests for interpretive letters unless some means is designed to guarantee the requestor anonymity. The only apparent means to guarantee such anonymity would be to permit requests for interpretive letters to be submitted in hypothetical terms and forwarded to the Department by counsel or other third party on behalf of the requesting party. The Department's interpretive opinion would bind the Department only with regard to the precise facts set forth in the request.

³⁵⁰ 42 Fed. Reg. 65,592, 65,595 (1977).

Arab boycott of Israel. The compromises which underly the EAA were reached in a spirit of moderation. It can only be hoped at this time that the spirit of moderation will continue to prevail in the Commerce Department, in the Congress, in Arab countries, and in the business community. With continued great patience by all parties, and with the establishment of better means for securing specific interpretive advice regarding the application of the EAA and EAR to particular circumstances, the experiment may achieve a measure of success.