THE ARAB BOYCOTT OF ISRAEL: THE ROLE OF UNITED STATES ANTITRUST LAWS IN THE WAKE OF THE EXPORT ADMINISTRATION AMENDMENTS OF 1977

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I. INTRODUCTION

While the Export Administration Amendments of 1977 (EAA) prescribe a detailed set of rules, enforced by heavy sanctions, for United States companies doing business in the Arab world, Congress specifically provided that that legislation was not "to supersede or limit the operation of the antitrust . . . laws . . . ."[1] Companies wishing to do business with Arab customers, therefore, not only run the risk of civil penalties, the loss of their export privi-

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[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). For the specific non-preemption language cited in the text, see EAA sec. 201, § 4A(a)(4). The reporting requirement also created by the EAA, EAA sec. 201, § 4A(b)(2), and now the subject of proposed implementing regulations, 42 Fed. Reg. 65,592 (1977), would appear to provide an ideal monitoring device for those wishing to spot conduct which might be the subject of an antitrust complaint. Under the proposed regulations, United States persons are required to report to the Department of Commerce requests for action contrary to the broad statement of antiboycott policy contained in EAA sec. 202(b), apparently including requests for action running afoul of the EAA's prohibitions as well as those falling within its exceptions. This requirement raises possible questions of self-incrimination with respect to individual persons required to report acts, subjecting them to criminal prosecution under the EAA or antitrust laws, since it does not appear to be subject to the explanations relied on to defeat self-incrimination claims in recent Supreme Court cases. *See* Andersen v. State of Maryland, 427 U.S. 463, 473 (1976) (rejecting a self-incrimination claim on the grounds that the individual's office records were lawfully seized and the individual "was not asked to say or to do anything"); United States v. Freed, 401 U.S. 601 (1971) (rejecting a self-incrimination claim with respect to a federal statute requiring registration of certain firearms on the grounds that use of registration data in criminal proceedings was restricted); California v. Byers, 402 U.S. 424 (1970) (upholding, against a fifth amendment claim, a state statute requiring those involved in auto accidents to report their names and addresses to police).

For a general discussion of United States regulation of conduct relating to foreign boycotts, see Saltoun, *Regulation of Foreign Boycotts*, 33 BUS. LAW. 559 (1978). For a discussion of the EAA and its implementing regulations, see Ludwig & Smith, *The Business Effects of the Antiboycott Provisions of the Export Administration Amendments of 1977—Morality Plus Pragmatism Equals Complexity*, 8 GA. J. INT'L & COMP. L. 581 (1978).

leges, or even criminal penalties under the EAA, but open themselves to potential damage exposure under the antitrust laws as well. Indeed, the application of both laws to the same facts poses the very real possibility that conduct permitted by the EAA may still be challenged by private parties using innovative antitrust theories and seeking to recover treble damages, as well as attorney's fees.

This Article will review the complex interrelationship between the EAA and the antitrust laws and consider the manner in which the enactment of the EAA might affect a court's application of the antitrust laws to boycott-related conduct. From this review the authors conclude that the EAA and its implementing regulations reflect a congressional resolution of many of the difficult issues arising from the international context of the boycott, which have been raised but not always definitively resolved in the slower judicial evolution of the antitrust laws. For this reason, the provisions of the EAA and its implementing regulations should be given great weight by any court faced with related questions under the antitrust laws, and liability under the antitrust laws generally should not result if there is no violation of the EAA.

The Article will first briefly sketch the legislative development of the EAA, its relationship to basic antitrust principles, and the manner in which it resolves the questions of extraterritorial application and foreign sovereign involvement and then consider the manner in which a court might make constructive use of the EAA and antitrust precedents in analyzing (1) issues of extraterritorial jurisdiction, (2) defenses relating to the question of foreign sovereign involvement, and (3) the ultimate question of liability. Several hypothetical fact situations will illustrate the points developed in this review.

II. BACKGROUND

When the Arab boycott of Israel became the subject of heated public debate in late 1975 and early 1976, the antitrust laws of the United States were cited by some as providing a legal standard by which the boycott and its impact on the United States and its citizens could be judged.[2] Section 1 of the Sherman Act has long

[2] Schwartz, *The Arab Boycott and American Responses: Antitrust Law or Executive Discretion*, 54 TEX. L. REV. 1260 (1976); Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, and* United States v. Bechtel Corp., 54 TEX. L. REV. 1411 (1976); Note, *The Antitrust Implications of the Arab Boycott*, 74 MICH. L. REV. 795 (1976); Axinn, *Some Antitrust Aspects of the Arab Boycott*, N. Y. L.J., Apr. 20, 1976, at

been held to bar concerted refusals to deal, and a United States manufacturer's refusal to deal with a blacklisted United States supplier in order to satisfy an Arab customer was said to be a straightforward example of such conduct.

Indeed, in earlier cases arising in domestic commerce, courts frequently ruled that the adverse effect of concerted refusals to deal was so obvious as to make them per se illegal, without inquiring into purpose or justification. And in the case of Arab boycott compliance, some commentators recommended a similar rule of per se illegality.[3]

The antitrust laws were, in fact, used as a weapon against the Arab boycott by the Department of Justice in a suit for civil injunctive relief under the Sherman Act against the Bechtel Corporation, a major international contractor, and four of its subsidiaries. The complaint alleged that the Bechtel companies and certain unnamed co-conspirators[4] had implemented the Arab boycott within the United States by refusing to deal with blacklisted subcontractors and by requiring eligible subcontractors to agree not to deal with blacklisted companies.[5] The Department of Justice subsequently negotiated a consent decree which was published for comment in January 1977.[6] As this Article goes to press no action has been taken by the Court on the proposed decree.

1, col. 1. Several months earlier, the antitrust laws were proposed as a possible remedy against the Arab states' oil embargo of the United States in a memorandum submitted to the Department of Justice by Gulf & Western Industries, 729 ANTITRUST & TRADE REG. REP. (BNA) ¶ A-24 to A-26 (1975).

[3] As will be discussed in greater detail later, the courts have not always considered such conduct per se illegal but have, in a variety of circumstances, concluded that further inquiry into the reasonableness of the defendant's action was required. *See, e.g.*, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969). In addition, the Sherman Act recognizes a person's freedom to decide, unilaterally, that he will not deal with another, *e.g.*, United States v. Colgate & Co., 250 U.S. 300 (1919), although the courts have always examined the surrounding circumstances carefully to be sure there was no implicit agreement on the defendant's part, *e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966).

[4] The failure to name the co-conspirators led to speculation that the Department of Justice regarded the Arab states as co-conspirators with the Bechtel group. Schwartz, *supra* note 2, at 1278; Kestenbaum, *supra* note 2, at 1419. This interpretation of the pleading would appear to be inconsistent with the position subsequently adopted by the Department of Justice in its competitive impact statement in the *Bechtel* case.

[5] United States v. Bechtel Corp., No. C 76-99 (GBH) (N.D. Cal., filed Jan. 16, 1976).

[6] *See* Competitive Impact Statement of Department of Justice, 42 Fed. Reg. 3,716 (1977); Defendant's Competitive Impact, *reprinted in* 142 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) ¶ N-1 (1977). The Department of Justice recently published written comments on the proposed decree filed with the court, as well as its responses to those comments. 43 Fed. Reg. 12,953 (1978).

Congress concluded that the applicability of the antitrust laws to international boycotts was too uncertain to permit reliance on them to achieve its antiboycott objectives.[7] However, in drafting the specific antiboycott provisions of the EAA, Congress was forced to confront the very issues causing uncertainty under the antitrust laws.

The most basic issue faced both by Congress, and by the Commerce Department in issuing implementing regulations, was the extraterritorial application to be given the new legislation. It was obvious that some of the conduct which the EAA sought to regulate might occur outside the United States and might involve foreign individuals or companies. These factors served both to attenuate United States claims to regulatory jurisdiction and to strengthen the jurisdictional claims of other states (such as the situs of the conduct or the domicile of the foreign parties).

Secondly, the conduct to be regulated might be encouraged, requested, or required by one or more entities which could, with varying degrees of legitimacy, claim to speak for a foreign sovereign. To the extent that the Congress sought to subject a private party to a standard of conduct inconsistent with that imposed by a foreign sovereign, serious questions of international law and diplomacy were presented.

Congress ultimately resolved these questions with an approach that combined a frank opposition to the boycott and a recognition of the legal and practical limitations on its own jurisdiction to proscribe boycott-related conduct. This approach attempted to tailor the prohibitions, which are the heart of the act, to reach only the so-called "secondary" and "tertiary" levels of the boycott while leaving the "primary" boycott untouched.[8] The Senate Finance Committee described the bill as follows:

> [T]he bill reported by the committee makes certain limited accommodations to the laws and rights of other nations, including boycotting nations, with the realization that where rights of na-

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[7] REPORT OF THE SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS ON S. 69, S. REP. No. 104, 95th Cong., 1st Sess., (1977) *reprinted in* 85 DAILY REP. FOR EXECUTIVES (BNA) ¶ B-8, B-19, 20 (1977) [hereinafter cited as SENATE REPORT].

[8] In its report on S. 69, which is substantially identical to the EAA as enacted, the Senate Finance Committee described the "primary boycott" as the Arab government's refusal to have, and prohibition of their nationals from having, economic relations with the State of Israel or Israeli nationals. The "secondary" aspect of the boycott was said to constitute an attempt "to interfere with economic relations among third parties and the State of Israel as a means of implementing the primary boycott" while the "tertiary" aspect was said to involve attempts to "interfere with economic relations among third parties themselves." *Id.* at 20.

> tions conflict, each must make adjustments, however reluctantly, to avoid confrontations on "principles" which are as strongly opposed by others as they are deeply held by the United States. The goal of the bill is to defend American principles without unnecessarily interfering with the rights of others and without creating conditions which undermine U.S. influence or a settlement in the Middle East.[9]

In order to accomplish this goal, Congress limited the extraterritorial effect of the legislation by making it applicable only to "United States persons" and requiring that their conduct occur "in" United States commerce before the statutory prohibitions became applicable.[10] The "United States persons" definition effectively confines the Act to United States citizens, corporations, and other legal entities created under United States law, as well as foreign subsidiaries and affiliates controlled by United States companies.[11] The legislative history suggests that the "in" commerce requirement was also an effort by Congress to narrow the reach of the statute.[12]

The adoption of specific exceptions to the Act's prohibitions addressed the question of the involvement of foreign sovereigns. These exceptions extend to certain aspects of a United States person's compliance with a foreign state's immigration, export, import, and import documentation requirements, as well as to certain types of compliance with foreign law by United States persons residing in foreign countries, and to their compliance with unilateral selections of specifically identifiable goods or services made by foreign persons.[13]

Subject to these limitations, however, Congress was concerned, not only with prohibiting boycott-related discrimination against United States persons, but also with preventing any United States person from joining in the concerted efforts to disrupt commerce with a friendly country or with those doing business with that country. Not merely a desire to prevent restraints of trade in United States commerce with Israel, this latter objective obviously re-

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[9] *Id.* at 21.

[10] EAA sec. 201, § 4A(a)(1); EAA sec. 204, amending §11 of the Export Administration Act of 1969, 50 U.S.C. app. §2410 (1976).

[11] Export Administration Regulations [hereinafter cited as EAR] § 369.1(b), 43 Fed. Reg. 3512-13 (1978)(to be codified in 15 C.F.R., pt. 369).

[12] 158 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) ¶¶ N-6, N-7 (1977). This report indicates that that committee rejected the broader "affecting commerce" standard contained in the House bill and instead adopted the Senate's "in commerce" language.

[13] EAA sec. 201, § 4A(a)(2).

flected a basic political and foreign relations judgment that foreign states should not be permitted to enlist the support of United States persons to make such boycotts effective.

In sum, the EAA and the implementing regulations reflect a deliberate judgment of the legislative and executive branches to balance United States and foreign sovereign interests in the Arab boycott context. While the antiboycott policy underlying the EAA is not synonymous with the economic objectives of the antitrust laws, the manner in which Congress and the Executive resolved the questions of the extraterritorial scope to be accorded the EAA and the recognition to be given the interests of foreign sovereigns is highly relevant to the resolution of similar issues under the antitrust laws.

III. APPLICATION

A. *The Antitrust Laws and International Boycotts*

The application of the antitrust laws to international boycotts raises the same questions that arise under the EAA concerning extraterritorial application and the recognition to be given the involvement of a foreign sovereign in the challenged conduct. In addition, there is the question of the appropriate method of analyzing Arab boycott-related conduct subject to the strictures of the antitrust laws. While the EAA defines in some detail refusals to deal and other prohibited conduct, the general language of the Sherman Act requires a judicial analysis of the facts of each antitrust case (although, as noted earlier, the result of that analysis is sometimes the application of the per se rule of illegality).

To focus on each of these aspects of the antitrust laws, the following three hypothetical factual situations are proposed, based on examples given in Export Administration Act Regulations (EAR):

1. A, a United States exporter planning to sell retail goods to customers in boycotting country Y, enters into a contract to purchase goods wholesale from B, a United States appliance manufacturer. A's contract with B includes a provision stipulating that B may not use components or services of blacklisted companies in the manufacture of its appliances.[14]

2. A, a subsidiary of United States company B, is a bona fide resident of boycotting country Y. A plans to import computer operated machine tools to be installed in its automobile plant in boycot-

[14] *See* EAR § 369.2(a), Refusals to Do Business, Example (viii), 43 Fed. Reg. 3518 (1978).

ting country Y. The computers are mounted on a separate bracket on the side of the equipment and are readily identifiable by brand name. A orders the tools from United States supplier C and specifies that C must incorporate computers manufactured by D, a non-blacklisted company. A would have chosen computers manufactured by E, except that E is blacklisted, and Y's import laws prohibit the importation of goods manufactured by blacklisted firms.[15]

3. United States construction company A has a contract to build a school in boycotting country Y. A's employees set up operations in Y for purposes of commencing construction. A's employees in Y advise A's headquarters in the United States that Y's import laws prohibit importation of goods manufactured by blacklisted firms. A's employees in Y make the decision to issue invitations to bid only to non-blacklisted firms for certain specifically identifiable goods.[16]

B. *Extraterritorial Effect*

As previously noted, Congress chose to restrict the extraterritorial application of the EAA by making its provisions applicable only to "United States persons" and only with respect to their activities "in" United States commerce. The traditional interpretations of the antitrust laws, however, have established a potential extraterritorial scope for those laws considerably broader than that of the EAA. It is now well established that the Sherman Act applies to restraining conduct outside the flow of United States commerce, so long as that conduct has a sufficient adverse "effect" upon United States domestic or foreign commerce.[17] Indeed, the *Alcoa* case also establishes that the Sherman Act is applicable to the conduct of aliens, as well as United States citizens, although the standard of liability may be more rigorous in the case of an alien defendant, requiring proof of some intent to produce the required adverse effect on United States commerce.[18]

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[15] EAR § 369.3(f-2), Imports for U.S. Person's Own Use, Example (i), 43 Fed. Reg. 3534 (1978).

[16] *Id.* Example (iv), 43 Fed. Reg. 3534 (1978).

[17] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[18] *Id.* at 443-444; Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y. 1975) (holding that necessary intent to affect U.S. commerce may be inferred from other evidence). For recent general discussions of the extraterritoriality question, see Kintner & Griffin, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B. C. INDUS. & COM. L. REV. 199 (1977); Ongman, *"Be No Longer A Chaos:" Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 NW. U.L. REV. 733 (1977).

Recent pronouncements of the Department of Justice suggest a heightened sensitivity to the difficult legal and diplomatic issues posed by the extraterritorial reach of the Sherman Act and a desire to reconcile the statutory objectives to potential conflicts with the laws of foreign sovereigns. Thus, in its recent *Antitrust Guide for International Operations (Guide),*[19] the Antitrust Division suggests that

> considerations of jurisdiction, enforcement policy, and comity often, but not always, lead to the same conclusion: the U.S. antitrust laws should be applied to an overseas transaction when there is a substantial and foreseeable effect on the United States commerce; and, consistent with these ends, it should avoid unnecessary interference with the sovereign interests of foreign nations.[20]

A specific illustration of this enforcement approach is provided by the Justice Department's proposed consent decree in the *Bechtel* case,[21] which purports to enjoin the defendant's implementation of the Arab boycott within the sovereign jurisdiction of the United States. In defending its position that the decree should not, and could not, reach conduct occurring in the boycotting states, the Justice Department initially reaffirmed that the Sherman Act would apply to a conspiracy entered into abroad, even if among foreigners, "if it is capable of effecting a restraint upon, and is intended to affect United States domestic or foreign commerce."[22] Application of United States law to the boycott "as it operates in Arab League Countries"[23] was said to be inappropriate as a matter of law, enforcement policy, and comity since:

> (1) the United States may not be reasonably expected to achieve compliance by the attempt to impose its own law in conflict with that of a sovereign jurisdiction;
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> (2) the illegal conduct is to take place in the territory of the foreign sovereign; and
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> (3) the application of United States antitrust law to foreign con-

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[19] *Department of Justice, Antitrust Guide for International Operations* 1 (1977) [hereinafter cited as GUIDE]; *see also* Remarks by Donald A. Farmer, Jr., Special Assistant to Assistant Attorney General, Antitrust Division, Before the Annual Meeting of the National Security Industrial Association (May 23, 1977). *See also* Griffin, *Book Review,* 8 GA. J. INT'L & COMP. L. 516 (1978).

[20] GUIDE, *supra* note 19, at 6-7.

[21] United States v. Bechtel Corp., No. C 76-99 (GBH) (N.D. Cal., filed Jan. 16, 1976).

[22] Competitive Impact Statement of the Department of Justice, 42 Fed. Reg. 3716-19 (1977).

[23] *Id.*

> duct directly conflicts with foreign law valid in a foreign sovereignty thereby imposing substantial hardship upon the one against whom it would be applied . . . .[24]

Of course, the position of the Department of Justice, while reflecting official enforcement policy, is not binding on private plaintiffs and does not preclude courts presented with private treble damage claims from ta' 'ng inconsistent positions. Nevertheless, the Department's positio1 is the best reflection of the executive branch's assessment of the applicability of the antitrust laws in international contexts and on that basis alone would appear to be entitled to considerable judicial deference, even in private antitrust cases.

In any event, at least one federal court has recently expressed similar views concerning the need to make the "substantial effects" jurisdictional test more sensitive to enforcement policy and comity considerations. In *Timberlane Lumber Co. v. Bank of America*,[25] after reversing the district court's dismissal of the case on the basis of the act of state doctrine, the court examined the question of subject matter jurisdiction and expressed its dissatisfaction with the *Alcoa* "substantial effects" test, because it failed to "consider the other nation's interests" or to "take into account the full nature of the relationship between the actors and this country."[26] The case

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[24] *Id. See also* Remarks by Michael J. Egan, Associate Attorney General, Before the International Bar Association, Business Law Section, Nov. 3, 1977; Remarks by Donald A. Farmer, Jr., Special Assistant to the Assistant Attorney General, Antitrust Division, Before the Seminar on Antitrust Problems and Restrictive Business Practices in Latin America (June 8, 1977) (Both citing principles of comity as a basis for reconciling conflicting claims of the United States and foreign sovereigns). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965). A somewhat different note is sounded in the Justice Department's recent response to comments on the proposed *Bechtel* Decree. In defending the proposed decree, the Justice Department emphasized that the decree is "consistent with a full reach of United States Foreign Commerce Jurisdiction under the Anti-Trust Laws" and suggests that the decree may reach conduct permitted by the Export Administration Amendments. 43 Fed. Reg. 12,953-57 (1978). Primary emphasis is placed on the EAA provisions relating to the permissible scope of conduct by United States persons resident in boycotting countries, *e.g.*, EAR § 369.3, Examples F-1 and F-2.

[25] 549 F.2d at 597 (9th Cir. 1977).

[26] The commentators, and to a lesser extent the courts, have also noted another and more basic limitation of the "effects" test based upon the underlying purpose of the Sherman Act. As the Attorney General's Committee to Study the Antitrust Laws observed: "defendants should be allowed to show that due to foreign economic or political barriers, their conduct at bar was prerequisite to trade or investment in a foreign country." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 83 (1955); P. AREEDA, ANTITRUST ANALYSIS 128 (2d ed. 1974).

This same perception was expressed in slighly different terms in United States v. Minnesota Mining and Manufacturing Co., 92 F. Supp. 947 (D. Mass. 1950) where the court con-

was ultimately remanded to the district court for reconsideration of the question of subject matter jurisdiction.

The *Timberlane* court suggested that the somewhat mechanical process of gauging the substantiality of the effect of the challenged practices be superseded by a "tripartite analysis" in which the following three questions would be examined:

> (1) Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States?
>
> (2) Is it [the restaint] of such a type and magnitude so as to be cognizable as a violation of the Sherman Act?
>
> (3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[27]

The court characterized the third inquiry as one modeled on conflicts of laws principles, specifically quoting the language of section 40 of the *Restatement (Second) of Foreign Relations Law,* dealing with limitations on the exercise of enforcement jurisdiction.[28] Under

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demned agreements among United States manufacturers to supply foreign markets from jointly-owned foreign plants as a restraint, *inter alia,* on potential exports by United States competitors of the agreeing manufacturers. The court regarded the feasibility of such exports as established in the case before it but suggested that no liability should result where it was established that there would be no additional commerce, absent the concerted activity:

> It is axiomatic that if over a sufficiently long period American enterprises, as a result of political or economic barriers, cannot export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act. For, the very hypothesis is that there is not and could not be any American foreign commerce in that area which could be restrained or monopolized.

Id. at 958.

[27] *Id.* at 615.

[28] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965) provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as
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> (a) vital national interests of each of the states,
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> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
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> (c) the extent to which the required conduct is to take place in the territory of the other state,
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> (d) the nationality of the person, and
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> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

this "jurisdictional rule of reason," a complex set of variables would have to be considered:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business or [incorporation], the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[29]

Once these factors were evaluated, the court would be in a position to identify the potential areas of conflict which might arise if United States jurisdiction were asserted and to decide whether the United States' contacts with, and interests in, the conduct were "sufficient to support the exercise of extraterritorial jurisdiction."[30] Such an approach was said to be "especially required" in private treble damage actions in which "there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed."[31]

The preceding review suggests that the Sherman Act, unlike the EAA, is potentially applicable to: (1) "non-United States persons" and (2) conduct with the requisite "substantial effect" on United States commerce, even if such conduct is not "in" United States commerce, as required by the EAA. At the same time, this potentially broad applicability would appear to be limited by an increasing emphasis, both in official enforcement policy and in at least one important judicial decision, on insuring that the statute as applied to extraterritorial situations serves statutory objectives, and on minimizing interference with the laws and policies of other states having a legitimate regulatory interest in the situation. The "jurisdictional rule of reason" expressed by the *Timberlane* court represents the most complete expression of this expanded version of the *Alcoa* "substantial effects" test and would appear to provide a judicial vehicle for reconciling the reach of the antitrust laws with that deemed appropriate by Congress in enacting the EAA.

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[29] 549 F.2d at 614.

[30] *Id.* at 614-15.

[31] *Id.* at 613.

C. *Defenses Based on the Role of Foreign Sovereigns in the Challenged Conduct*

Under both the EAA and the antitrust laws, the participation of foreign sovereigns in the challenged conduct may provide some insulation from liability under United States law. As noted, the EAA resolves such claims by excepting from its prohibitions conduct deemed part of a foreign sovereign's "primary boycott," as for example, its attempts to prohibit trade between its own territory and nationals, on the one hand, and the boycotted state and its nationals on the other. These exceptions are cast in terms of permissible compliance with foreign import and export requirements (insofar as they prohibit trade with the boycotted countries, their nationals or residents), permissible compliance with a foreign state's local law by bona fide residents of that state with respect to the residents' local activities, and permissible compliance with the unilateral selection of specifically identifiable goods and services by a boycotting country or a national or resident thereof.[32]

Judicial construction of the antitrust laws has responded to the same concerns by shaping certain defenses that are available to both the foreign sovereign and the involved private parties in situations where the foreign sovereign's involvement was thought to make application of United States antitrust rules inappropriate. Although these defenses have not received extensive judicial consideration to date, an examination of the precedents suggests that, properly construed, they should give no less protection to the activities of foreign sovereigns than the EAA's exceptions.

The most important defense developed by the courts is the act of state doctrine, which grew out of cases involving the expropriation of property by foreign states and prevents United States courts from passing on the governmental acts of foreign states within their own

[32] Foreign sovereigns also enjoy some protection from United States juurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1976). This protection is subject to certain exceptions, however, including an exception for the state's "commercial activities." 28 U.S.C. § 1605(a)(2) (1976) specifically includes any case based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . [that] causes a direct effect in the United States." The categorization of an activity as "commercial" for purposes of this exemption is said by the statute to turn on "the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). *See,* Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion,* 55 TEX. L. REV. 1 (1976) (discussing the applicability of the sovereign immunity, act of state and sovereign compulsion defenses to the boycott situation).

territories.[33] The basic explanation of the doctrine has always been the courts' concern that their inquiry into such acts of state would embarrass and frustrate the executive branch in its discharge of its foreign relations function. As so stated, the doctrine reflects a judicial recognition of the practical limits of United States enforcement jurisdiction as well as the constitutional principle of separation of powers.[34]

This rationale was appropriate in cases challenging foreign expropriations since the executive branch was routinely involved in attempting to effectuate a settlement with the foreign state with respect to the claims of United States citizens.[35] While the doctrine

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[33] Underhill v. Hernandez, 168 U.S. 250 (1897). In the *Underhill* case, a United States citizen formerly residing in Venezuela sued a Venezuelan citizen for damages alleged to arise from the Venezuelan's conduct while serving as military chief of the Venezuelan district in which the plaintiff then resided. In the course of its affirmance of the judgment for defendant, the Court offered the classic statement of the act of state doctrine:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means to be availed of by sovereign powers as between themselves.

Id. at 252.

[34] In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964), the Court stated:

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.

One aspect of the act of state doctrine not yet resolved by the courts is the extent to which it is subject to the commercial-governmental distinction embodied in the new foreign sovereign immunity statute. *See* Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (Justice White suggested that the defense is not available for the commercial acts of a foreign state). This aspect of the doctrine appears to be of only marginal significance in the Arab boycott context since the activities likely to be the subject of an antitrust challenge are generally premised on some requirement of Arab law, *e.g.*, the prohibition on goods manufactured in whole or in part in Israel.

[35] This point was noted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 431-32, where the Court stated:

> Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submissions to the United Nations, or by the employment of political or economic sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the

might seem to have little relevance in the ordinary antitrust case, where diplomacy is seldom utilized to effect a solution, the Arab boycott is more than an antitrust problem. Congress acknowledged that the paramount role of the United States and the executive branch in effectuating United States interests in the Middle East was a reason for carefully defining the scope of its legislative anti-boycott rules.[36] Accordingly, the traditional formulation of the act of state doctrine would appear to support the same circumspect approach to the application of the antitrust laws in the Arab boycott context as is reflected in the EAA's exceptions.

A second defense which has grown out of the act of state doctrine is the sovereign compulsion defense, intended to protect private parties from liability for acts which they were compelled to perform by a foreign sovereign. This defense has been allowed in only one antitrust case and summarily rejected in several others.[37] Conse-

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property in question being brought into this country . . . . Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. [Footnote omitted.]

[36] SENATE REPORT, *supra* note 7, at B-14.

[37] The defense was allowed in Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), where the operator of a United States refinery alleged a concerted refusal to deal by two crude oil suppliers operating in Venezuela and a reseller of the crude (all of whom were subsidiaries of American companies). The court upheld the defendants' claims that they were compelled to cease dealing with the plaintiff by an order of the Venezuelan government.

By contrast, in United States v. Watchmakers of Switzerland Information Center, Inc., [1963] TRADE CASES (CCH) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] TRADE CASES (CCH) ¶ 71,352 (S.D.N.Y. 1965), the district court rejected a claim that Swiss legislation compelled the anticompetitive agreement among the defendant Swiss watch producers, holding that recognition and approval of the agreement by the Swiss government would not "convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign government mandate." Similarly, the defendant in United States v. Sisal Sales Corp., 274 U.S. 268 (1927), claimed that Mexican legislation compelled the challenged concerted Sisal marketing activities in the United States but the Supreme Court noted that the defendant had solicited the legislation and ruled the Mexican laws were merely a peripheral part of a larger pattern of anticompetitive conduct by the defendant. *See* Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962) (private company could not claim defense with respect to its own acts as government agent).

A related "state action" defense is sometimes allowed in domestic antitrust cases. On the basis of Parker v. Brown, 317 U.S. 341 (1943), which held a state official immune from antitrust liability for actions taken pursuant to a state agricultural marketing program, the courts have in some cases extended the immunity to private parties acting pursuant to state legislative or administrative regimes. E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966). The Supreme Court's recent decision in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) has made the availability of this defense to private parties less certain. While conceding that such a defense might be allowed if the private party's

quently, the precise nature of the foreign "compulsion" which must be demonstrated has never been clearly established by the courts.

The EAA's exceptions for compliance with foreign law are, in effect, a recognition of the same rationale and provide a more specific articulation of the "compulsion" requirement in the Arab boycott context which should be considered by courts facing similar questions under the antitrust laws. Thus, while it might be argued that United States persons can avoid the "compulsion" of Arab laws by not doing business with Arab customers, the EAA effectively recognizes that trade with the Arab states is a legitimate activity of United States persons and that in connection with such trade, they should be protected from liability for actions which fall within the recognized jurisdiction of the Arab state and which are taken in order to comply with the Arab law.[38]

The EAA, however, carefully defines the permissible reach of these "foreign legal compulsion" exceptions. While it permits Arab import law to be used to explain a refusal to deal with an Israeli firm with respect to an export sale to a boycotting country, the refusal to deal with a blacklisted person (including a United States supplier) can be justified on the basis of Arab law only where the decision is made by a United States person residing in the Arab state with respect to its local activities or where it is a consequence of a unilateral selection of specifically identifiable goods and services by a resident of a boycotting country.[39]

The Justice Department's *Guide* suggests an analytical approach which appears quite similar to that on which the EAA exceptions are premised. Although criticizing the only case in which this defense was allowed (for permitting its invocation with respect to conduct within the United States), the *Guide* acknowleges that "when an unresolvable and direct conflict between the laws of two countries imposes substantial hardship upon the affected party, comity

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conduct was commanded by the state or if the area in question were subject to pervasive state regulation, the Court concluded that the state regulatory agency's involvement in the defendant utility's bulb exchange program was not "so dominant that it would be unfair" to hold the utility responsible for its implementing conduct and that the application of the federal antitrust laws to the conduct would not impair the effectiveness of the state regulatory scheme.

For a general discussion of the issues raised by these defenses, see Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages, and Squeezes: Wandering On The Road to Mecca*, 61 CORNELL L. REV. 911 (1976); Comment, *Foreign Sovereign Compulsion and the Arab Boycott: A State Action Analogy*, 65 GEO. L.J. 1001 (1977).

[38] SENATE REPORT, *supra* note 7, at B-14.

[39] EAA sec. 201, § 4A(a)(2)(C), (F); EAR § 369.3(c), (f), 43 Fed. Reg. 3526-31 (1978).

may indicate that the laws of the nation with the more important national interest at stake, based upon its own laws and policies, should prevail."[40]

This discussion of the case law suggests that the courts, in enforcing the antitrust laws, have had the same general concerns with the application of United States law to the conduct of foreign sovereigns as are reflected in the EAA, although the "exceptions" of the EAA are obviously more detailed and precise in their application to the boycott situation than are the antitrust precedents. In both situations, however, the laws are concerned with advancing the basic legislative purpose while minimizing conflicts with foreign sovereigns, minimizing hardship on private parties who are subject to unavoidable conflicts between the United States and a foreign state, and avoiding conflicts with the executive branch in its continuing discharge of its foreign relations function.

D. *Substantive Analysis of the Arab Boycott under the Antitrust Laws*

The EAA differs from the antitrust laws in one important respect — the specificity with which it and the EAR define the conduct which it prohibits. The EAA represents a conscientious effort on the part of Congress and the Commerce Department to describe the conduct which they regard as illegal. Consequently, once it is determined that a particular act is within this category, no further analysis is required.

By contrast, the Sherman Act, as well as the other antitrust laws, are phrased in extremely broad terms and their general prohibitions can be applied to the facts of a particular case only after a detailed analysis of those facts on the basis of the pertinent judicial constructions of the Act. Under section 1 of the Sherman Act—the provision most likely to be involved in any antitrust challenge to boycott-related activity—the first question which a court must address is whether the conduct reflects the element of "contract, combination . . . or conspiracy" required by the statute. Assuming that the necessary agreement is found, analysis defines the nature of that agreement and decides whether the agreement works a sufficiently serious anticompetitive result to warrant the conclusion of illegality.

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[40] GUIDE, *supra* note 19, at 52. In its recent defense of the *Bechtel* Decree, however, the Justice Department suggested that the conduct permitted by the EAA exceptions for United States persons resident in a boycotting country "may . . . raise antitrust problems." 43 Fed. Reg. 12,956 n.11 (1978).

As already noted, some types of conduct, including many concerted refusals to deal, have been characterized as per se illegal; analysis in those cases stops once it is determined that the agreement is subject to the per se rule. Other cases, including some involving collective refusals to deal, have applied the traditional "rule of reason" analysis to the challenged conduct by considering "the facts peculiar to the business to which the restraint is applied . . . the nature of the restraint and its effect, actual and probable."[41]

The first question to be addressed in any judicial analysis of boycott-related conduct, therefore, is whether there was the necessary element of agreement among the parties to work a restraint on trade. The Sherman Act clearly does not prohibit unilateral refusals to deal, although courts will review the surrounding circumstances carefully to determine whether any agreement should be implied.[42] The burden is thus on the plaintiff to establish this element. The circumstances surrounding the Arab boycott, as well as the provisions of the EAA, suggest two possible obstacles to establishing such an agreement.

First, in many cases the actions of the United States company in choosing suppliers may be based on a knowledge of the applicable foreign law, such as the prohibition on the importation of blacklisted goods, and may not have been accompanied by any explicit agreement with the Arab customer. In such cases, there may be serious difficulties in implying any agreement between the Arab customer and the United States company since the facts suggest, instead, a unilateral decision to comply with the applicable laws of the country of importation.

Second, in many other cases, especially after the enactment of the EAA, it may be the Arab customer who makes the choice of suppliers, excluding those on the blacklist, while the United States seller implements that decision. The EAA contains a carefully detailed exception from its prohibitions for such implementation by a

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[41] *Id.*

[42] The leading case on this point is United States v. Colgate & Co., 250 U.S. 300 (1919). Where the party refusing to deal goes beyond announcements of his unilateral policy, however, in an attempt to secure the adherence of third parties to that policy, he risks a finding of combination or conspiracy sufficient to bring his conduct within section 1 of the Sherman Act. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (where coercion used to secure compliance). In addition, even a unilateral refusal to deal may run afoul of section 2 of the Sherman Act when used in an attempt to obtain monopoly power or to maintain or extend such power. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

United States supplier of a foreign buyer's "unilateral selection" of specifically identifiable goods and services.[43] A comparable provision is contained in the proposed *Bechtel* consent decree. These exceptions are based, in part, on the absence of any agreement by the United States supplier in such situations and should be factors considered by any court applying the antitrust laws to a comparable factual situation.

Assuming that some element of agreement is found, the precise nature and terms of that agreement are a matter of the greatest importance to further analysis. The Supreme Court has broadly condemned group boycotts, that is, concerted refusals to deal, as per se illegal but the lower courts have recognized that there are some situations which warrant analysis under the rule of reason standard.[44] Accordingly, the characterization of any agreement on the basis of these precedents will determine whether the court considers possible justifications for the agreement or merely pronounces it illegal.

The factual situations in which courts have applied the rule of reason to alleged concerted refusals to deal are extremely diverse.[45] The only generalization which can be derived from them is that they all involve agreements which the courts concluded had "a primary purpose and direct effect of accomplishing a legitimate business objective [with only an] incidental and indirect adverse effect upon the business of some competitors."[46]

For example, in a number of these cases, suppliers agreed to designate a new exclusive distributor, and the courts rejected the Sherman Act claims of the terminated distributor on the grounds that the dealer's exclusion was "merely the incidental result of [the suppliers'] agreement to transfer their lines" to a new distributor.[47]

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[43] EAA sec. 201, § 4A(a)(2)(C); EAR § 369.3(c), 43 Fed. Reg. 3526 (1978). Competitive Impact Statement of Department of Justice, 42 Fed. Reg. 3716 (1977) (Paragaph V(c) of the Proposed Final Judgment and Justice Department explanation).

[44] *Compare* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (applying the *per se* rule) *with* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969) (using the rule of reason standard).

[45] *See,* Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977); Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976); Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970); Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966); College Athletic Placement Service v. National Collegiate Athletic Ass'n, [1975] TRADE CASES (CCH) ¶ 60,117 (D.N.J. 1974), *aff'd without published opinion,* 506 F.2d 1050 (3d Cir. 1974).

[46] United States v. Hilton Hotels Corp., 467 F.2d 1000, 1003 (9th Cir. 1972).

[47] *E.g.,* Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d at 80.

Other representative cases have involved refusals by a national bridge league to sanction local tournaments if the plaintiff's computer was used to keep scores and professional golfers' association's rules for tournament entry which had the effect of excluding the plaintiff from tournament play.[48] In all of these situations, the courts considered the primary objectives of the defendants' actions to be other than anticompetitive and evaluated the incidental refusals to deal which resulted under the rule of reason, ultimately finding for the defendants on the merits.

In another pertinent case, the appellate court upheld a verdict for defendants charged with a violation of section 1 by reason of their abandonment of a foreign banana plantation and their discontinuance of the use of plaintiff's adjacent railroad facilities.[49] While acknowledging the usual per se rule of illegality, the court concluded that the refusal to deal with the plaintiff was merely an incidental effect of their decision to abandon the plantation and, therefore, distinguishable from the cases using the per se rule, which had all involved "joint refusals to deal by viable business entities which deliberately and intentionally refused to deal with a trader although otherwise able."[50]

On the basis of these precedents, the applicability of the per se rule to Arab boycott-related conduct appears open to serious question. In the first place, it would appear that the primary reason for a United States exporter's refusal to deal with a blacklisted supplier is not the simple anticompetitive desire found in the per se cases but rather a recognition that Arab law precludes its customer from accepting such goods and that the sale of such a supplier's goods to such a customer is not possible. In these circumstances, and especially in view of the role played by foreign legal requirements, it would be inappropriate for the courts to strike down all Arab boycott-related refusals to deal without an examination of the surrounding circumstances.

The *Guide* recognizes this point on a more general level, stating that "[t]he rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications

[48] Bridge Corp. of America v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970); Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966).

[49] International Ry. of Central America v. United Brands, 532 F.2d 231 (2d Cir. 1976).

[50] *Id.* at 241.

not normally found in the domestic market."[51] In other words, even if a court should conclude that its subject matter jurisdiction should be exercised and that the substantive defenses discussed are inapplicable, the court should carefully consider the circumstances surrounding the alleged refusal to deal before holding it unreasonable.

The justification which might be advanced for a refusal to deal in this context would presumably rely heavily on the role of the Arab states in the boycott and would describe the resulting supplier selection as a precondition imposed by foreign law to doing business with customers in those states. In evaluating the feasibility of less restrictive conduct, the court would be forced to grapple with the same concerns which led Congress to formulate the EAA's specific set of prohibitions and exceptions — concerns which inevitably require delicate judgments as to the appropriate extraterritorial scope of United States law, the consideration of the basis for foreign states' jurisdiction over the conduct, and the like.

The EAA, in defining the circumstances in which boycott-related refusals to deal should be permitted, offers an analysis of all of these factors which should also be considered in assessing the reasonableness of such conduct under the antitrust laws. Thus, as already noted, the EAA excepts from its prohibitions the actions of a United States person implementing the boycott-based supplier selection of a buyer located in a boycotting country where that selection relates to specifically identifiable goods and services.

In explaining this result, Congress noted that making such conduct illegal would challenge the boycotting states "on a point of obvious sensitivity"[52] and would likely result in a diversion of business to foreign countries willing to comply with the boycott — a result which would benefit no one since

> [b]lacklisted firms would sell no more goods in the boycotted country than otherwise, and other U.S. firms would be denied a

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[51] GUIDE, *supra* note 19, at 2-3. In support of this proposition, the GUIDE cites K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, 79-84 (1958). In discussing possible limits on the application of the *per se* rule to foreign commerce cases, Brewster observes:

> [T]here are aspects of foreign commerce which may temper the rigor or at least limit the reach of this per se doctrine. The first is the possibility that the commerce alleged to be restrained can be proved to have been impossible, even if there had been no restraint . . . . [M]ost important . . . is the possibility of business justifications for loose arrangements abroad which may not exist at home, including foreign legal requirements.

Id. at 88.

[52] SENATE REPORT, *supra* note 7, at B-14.

> business opportunity which they would otherwise have . . . . Such adverse consequences for the United States could erode domestic support for Israel and undermine solicitude for persons presently denied business opportunity in the Arab states.[53]

Other provisions of the EAA exempt a refusal to deal by a United States person residing in a boycotting country where that refusal is based on the local laws of the boycotting country and relates only to the residents' activities within that country. Congress noted that this exception was based on "recognition of the fact that a U.S. company with operations in a boycotting country has no choice but to comply with those import laws if it wishes to continue doing business in that country."[54]

The foregoing congressional logic, arrived at after lengthy investigation and debate, should be given substantial weight by any court required to define the legality of Arab boycott-related refusals to deal under the antitrust laws. Indeed, if Congress concluded that there was adequate justification for excepting the foregoing situations from its specific antiboycott policy, it seems doubtful that any different result should obtain under the more general economic policies of the Sherman Act.

In sum, there appears to be a sound basis under the antitrust laws for application of the rule of reason to conduct allegedly related to the Arab boycott and subject to the provisions of the EAA. The policy considerations underlying both the EAA and the evolving application of the antitrust laws to international transactions support the appropriateness of such an analysis rather than application of the rule of per se illegality; and both suggest certain circumstances in which any resulting restraint should be considered reasonable.

E. *Discussion of Hypothetical Factual Situations*

On the basis of the foregoing comments, the manner in which the

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[53] *Id.*

[54] *Id.* at B-15. While purporting to recognize that the application of the antitrust laws to conduct in the Arab states in compliance with local law would "go far beyond the traditional scope of United States antitrust enforcement and would be inconsistent both with United States foreign policy and with the expression of United States congressional policy embodied in the 1977 amendments," the Justice Department's recent defense of the proposed *Bechtel* Decree also observed that "the 1977 amendments and the rules thereunder authorize United States persons under the guise of compliance with the laws of the boycotting country, to engage in a plethora of boycotting-implementing activities which would not be permitted under the decree." 43 Fed. Reg. 12,953-54, 12,957 n.14 (1978).

antitrust laws might be applied to the three hypothetical cases drawn from the EAA regulations will be considered. In the first case, it seems clear that, while A's objective is to export goods to Y, the real problem is posed by the restrictive provision in a contract between A and B, two United States companies, relating to the sale of goods within the United States. As so construed, there would appear to be no real problem with respect to the extraterritorial application of the antitrust laws. Both A and B are subject to United States law, the agreement was entered into in the United States, and it was aimed at preventing certain transactions in the United States.

The degree of sovereign involvement in the first case may well be deemed inadequate to support any defense to liability based upon the act of state or sovereign compulsion doctrines. Since the laws of Y prohibit importation of blacklisted goods, the *Interamerican*[55] case could be cited for the proposition that the sovereign compulsion defense is available even where the allegedly compelled acts are performed in the United States. However, the *Interamerican* application of the defense has been the subject of much critical comment, and the fact that the EAA does not except this conduct from its prohibitions strongly suggests that the defense is not likely to be allowed under the antitrust laws.

As to the merits of a claim under section 1 of the Sherman Act on these facts, it is clear that there is an agreement between the parties, and an arguable restraint of trade results from the elimination of a possible export opportunity for blacklisted suppliers. While it might be argued that the primary purpose of this agreement was to comply with the laws of country Y, this argument is undercut by the fact that Y's laws are not, under United States standards of enforcement jurisdiction reflected in the EAA, permitted to control A and B's conduct within the United States. Accordingly, the facts of the first case would appear to present a high level of risk for the parties under the antitrust laws.

In the second case, although United States supplier E has arguably lost an opportunity to sell its goods for export by virtue of A's conduct, A's decision was both made and implemented in Y and was, in fact, the only decision consistent with the laws of Y. Under the EAR, A's conduct is described as an example of permissible

[55] Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970).

compliance with local law by a bona fide local resident with respect to its local activities. The *Timberlane* jurisdictional "rule of reason" would appear to suggest that extraterritorial application of the antitrust laws was unwarranted as well.

The laws of Y clearly require A to make the supplier selection described, and Y has a legitimate interest in enforcing those laws with respect to the local activities of its residents. While the United States also has an interest in the transaction, it would appear to be less than that of Y. In any event, it does not appear possible for the United States to secure compliance with its own antitrust laws with respect to the activities in question.

These same factors suggest that the act of state/sovereign compulsion defenses should be available in this context, if antitrust jurisdiction is exercised by the United States courts. The laws of Y effectively compelled A to make this selection in the circumstances described, and to hold A liable would require the court to pass on, and reject, the validity of the governmental act of Y as a justification for A's action. In these circumstances, it should probably not be necessary for a court to reach the merits of an antitrust claim arising from case two. If it did, however, much the same logic already advanced should serve to justify A's conduct under the rule of reason.

The third case presents the most difficult analytical problem. The EAA regulations indicate that this conduct, too, reflects permissible compliance with local law by A's employees, who are residents of Y. At the same time, the regulations caution that selections "purportedly made by employees of U.S. companies who are residents in boycotting countries will be carefully scrutinized to ensure that the discretion was exercised entirely in the boycotting country."[56]

No less caution is required in describing the applicability of the antitrust laws to these facts. While the situation here is functionally similar to the second case, the antitrust law precedents, unlike the EAA, generally hold an employer responsible for the actions of its employees within the scope of their employment.[57] Accordingly, al-

[56] EAR § 369.3 (f-2), Example (iv), 43 Fed. Reg. 3533-34 (1978).

[57] For example in United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), the appellate court, in upholding the imposition of criminal liability on a corporate defendant for participating in an illegal boycott through its manager-purchasing agent (notwithstanding specific corporate instructions to the agent not to participate), stated that "as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the

though the results should be the same under both statutes, there may be risks for United States corporations in this situation, even under a rule of reason analysis, and it may be preferable from an antitrust viewpoint to do such business through a subsidiary resident in the boycotting country.

IV. CONCLUSION

As the preceding review suggests, the antiboycott rules of the EAA represent, to a significant extent, the legislative development of principles inherent in the antitrust laws as construed by the courts. Thus, while the EAA does not preclude the application of the antitrust laws to the conduct which it governs, the EAA clearly represents a more sophisticated tool for the analysis of such conduct. Furthermore, courts would be wise to give careful consideration to the rules of the EAA, as reflecting the deliberate judgment of the executive and legislative branches of the government concerning the difficult international legal and political questions posed by the Arab boycott.

This approach to antitrust liability would appear to be consistent with the evolving case law in this area, as well as with the evolving concept of United States interests in regulating restrictive business practices. The United States has, in recent years, become increasingly aware of its economic interdependence with other countries and of the necessity of working out common solutions to economic problems.

In the antitrust area, the United States has placed increasing emphasis on the development of an international consensus which can be the subject of intergovernmental cooperation and, ultimately, appropriate intergovernmental agreement.[58] In light of this emphasis on the need for an international consensus on the subject of restrictive business practices, it would be especially unfortunate if the courts of the United States were to adopt an approach to the problem of the Arab boycott that was more aggressive and more likely to offend foreign sovereigns than that arrived at by Congress in its enactment of the EAA.

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agent." *Id.* at 1007. *See* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970).

[58] *See* Joelson & Griffin, *International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis*, 11 INT'L LAW. 5 (1977); Remarks by Joe Sims, Deputy Assistant Attorney General, Antitrust Division, Before the Practising Law Institute's 17th Annual Advanced Antitrust Law Seminar on International Trade and the Antitrust Laws (Jan. 21, 1978).