NOTES

EXTRATERRITORIAL APPLICATION OF THE EXPORT ADMINISTRATION AMENDMENTS OF 1977

I. INTRODUCTION

On June 22, 1977, President Carter signed the Export Administration Amendments of 1977 (EAA), setting out new antiboycott rules affecting trade with the Middle East. The legislation was in response to the growing furor over the impact of the Arab boycott in the United States. Backed by the wealth of the oil-rich Arab states, the boycott has exerted increasing pressure on American business to comply with their boycott regulations. The EAA was designed to reduce the boycott's effect on United States commerce by forbidding compliance with certain boycott demands.

The broad scope of the new antiboycott statute should be of special concern to the American multinational corporation, particularly those with subsidiaries in the Arab League states because United States subsidiaries are subject to the concurrent jurisdiction of the United States and the host countries. The nature of the boycott and the general provisions of the EAA are beyond the scope of this note and are fully discussed elsewhere in this Symposium.

This Note will discuss the application of the antiboycott regulations to the United States subsidiary within the boycotting states. The boycott issue illustrates the dilemma facing the United States subsidiary when the national policies and laws of the domestic and host countries are in opposition, making conflicting demands on the subsidiary. The businessmen would then run the risk of violating either the domestic or host country's laws. After examining some of the difficulties the United States has en-

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4 The Arab League now comprises: Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Jordan, Algeria, Bahrain, Kuwait, Libya, Mauritania, Morocco, Oman, Qatar, Somalia, Sudan, Tunisia, United Arab Emirates, and the two Republics of Yemen. Although following the primary boycott, six states do not practice the secondary or tertiary boycotts, or engage in blacklisting. These are Algeria, Mauritania, Morocco, Somalia, Sudan, and Tunisia. Turck, The Arab Boycott of Israel, 55 Foreign Aff. 472, 476 (1977).
countered with the extraterritorial extension of its laws, this Note will focus on the justification for the extraterritorial application of the antiboycott legislation.

II. APPLICATION OF THE EAA TO THE UNITED STATES SUBSIDIARY

Title II of the EAA forbids compliance by United States companies with certain foreign boycott-related requests. A United States person in the interstate or foreign commerce of the United States is prohibited from taking or knowingly agreeing to take actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States. In order to be considered a violation of the Act, the transaction must involve a (1) "United States person," (2) take place in "United States commerce," and (3) involve "taking or agreeing to take" certain prohibited actions in compliance with a foreign boycott. When these three tests are met, the Congress intends the antiboycott regulations to be applicable even to those American businesses which reside in the boycotting countries.

The Congress has provided for exceptions allowing limited compliance with that country’s boycott laws with respect to activities exclusively within that country, and with import requirements concerning goods "for his own use, including the performance of contractual services within that country." The Export Administration Regulations (EAR) set careful limits on the scope of the exceptions in order to prevent them from becoming an avenue for general avoidance.

The threshold issue concerns the residency status of the company involved. In determining whether a firm is a “bona fide resident” and therefore included within the scope of the exceptions, all relevant factors are considered: the physical presence in the country, whether the residence is necessary for legitimate business reasons, the continuity of the residency, the intent to maintain a long-term base of operations, size and nature of its presence, whether the firm is registered to do business or incorporated in the country, and whether the company has a similar presence in both the boycotting and non-boycotting foreign countries in connection with similar business activities. An example of the application of the EAA is the situation in which a United States firm has been awarded a construction contract, the personnel who are sent to set up the operation are

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7 Although the EAA is nominally applicable to all foreign boycotts, it was formulated to deal with the Arab boycott of Israel. See 13 WEEKLY COMP. OF PRES. DOC. 898 (June 27, 1977).
8 EAA sec. 201, § 4A(a)(1).
9 Id.
deemed to be bona fide residents. However, where a company merely sends its employees to the country seeking to establish an office or to visit a prospective construction site in preparation of a contract bid, it fails to meet the residency test because its employees do not yet have a permanent business there. Some latitude is allowed in permitting the personnel to furnish non-discriminatory boycott information required to establish its residency, but they may only give such information as a United States person who is already a bona fide resident in that country could furnish.

Permanency is not necessary to meet the requirements of the EAA; a general contracting company with an office on the site of the project in the boycotting country is a bona fide resident even though the project may be completed within six months. If a company has a permanent office in the country that is necessary for legitimate business reasons, and the company intends to continue business there in the future, it may satisfy the residency test despite the fact its office is not fully staffed year-round. For example, if a computer company has a sales office in the country which is necessary in servicing products sold to its clients the company is a resident, even though the sales representative spends only two months out of the year in that country.

Once a firm satisfies the residency requirement the statute permits conformance with the country's boycott laws covering his activities exclusively within that country. The company may enter into contracts which require adherence to the boycott laws in transactions involving the purchase or sale of goods or the use of local contractors within that country. The resident company may supply required information about its dealings with the boycotted country as long as it compiles and furnishes the information solely from its own knowledge. It may even give information about its parent corporations dealings with the boycott target if it prepares it from its own resources, without inquiry to the parent. It may not, however, furnish information with respect to race, religion, sex, or national origin of any United States person. Similarly, while the resident subsidiary may agree not to hire a national of the boycotted country, it may not refuse employment to a United States citizen on the basis of race, religion, sex, or national origin regardless of whether or not the activity is exclusively within the boycotting country. Since the statute applies only to transac-
tions in United States commerce and discrimination against United States persons, the boycott-related discriminatory hiring practices of a United States company regarding non-Americans either in the boycotting country or, for instance, in Europe would not be a violation under the EAA, although other civil rights laws might apply.

The subsidiary may obey the host country's boycott laws covering imports of goods for its own use and in the performance of its contractual obligations, as long as the goods are specifically identifiable as to their source of origin. Goods are for the company's own use if they are to be consumed by the company. For example, a company may import from non-blacklisted firms specifically identifiable items such as candy or cosmetics for its employees, or may order trademarked office machinery for its own use.

The exceptions, however, are not available for goods imported for resale without further manufacture or refinement into another product, or incorporation into a functional part of a project constructed for another. Goods imported for resale are not covered by the exception even if the firm is acting in a procurement capacity or is in the retail business. The subsidiary may comply when importing such items as lighting fixtures, plate glass, or air-conditioning units when they are to be incorporated into the project. Yet it may not comply in the same project regarding items not normally incorporated into the project like office supplies, furniture, and typewriters. The exceptions are allowable whether the project is on a "turnkey" or a "cost-plus" basis with installment payments.

Services are not included in the exceptions to the regulations, even if the resident firm is importing the services for its own use. For example, in a construction project, the resident subsidiary may not refuse to deal with blacklisted architects and engineers because they render services even though the drawings and plans might at some point be "imported" into the boycotting country. The subsidiary may observe the host country's laws even if it realized that they are boycott-based. Nevertheless, under no circumstances may an American subsidiary "comply or agree to comply with any host country law which would require him to discriminate against . . . or to supply information about any United States person" on the basis of race, religion, sex, or national origin.

22 EAA sec. 201, § 4A(a)(2)(F).
III. BASES OF JURISDICTION

The antiboycott regulations have renewed the controversy over the propriety of the extraterritorial application of United States laws. The principle of territoriality provides that a state has absolute dominion and control over all individuals and property within its borders. A strong statement of the classic territorial view is seen in *Schooner Exchange v. McFadden*, where Chief Justice Marshall stated:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it . . . from an external source, would imply a diminution of its sovereignty. . . .

Each nation is deemed to have the power to prescribe rules of conduct covering activities occurring within its borders.

The United States subsidiary is subject to the jurisdiction and regulation of both the domestic and host countries. The United States asserts jurisdiction over its American subsidiaries under four theories: (1) conduct within its territory, (2) nationality, (3) control by American nationals, and (4) effects within United States territory. Under the first theory, a state may attack jurisdiction concerning activities of its subsidiary when there is conduct within the United States that is part of or taken pursuant to the prohibited action carried out abroad.

Secondly, the United States may assert jurisdiction under the principle of nationality. While the United States holds that a corporation is a citizen of the state of its creation, the subsidiary is considered an exception. The subsidiary is held to be an American citizen if it is wholly owned and operated by Americans, and therefore would be under the United States' continuing personal jurisdiction.

Under the control theory, even though a subsidiary is considered a citizen of the foreign country, if it is controlled by a United States company, then the parent corporation can be held liable for the conduct of its subsid-

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31 11 U.S. (7 Cranch) 116, 136 (1812). Justice Story in *The Apollon* stated the principle to be that "the laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the . . . rights of any other nation, within its own jurisdiction." 22 U.S. (9 Wheat.) 362, 370, 6 L. Ed. 111, 113 (U.S. 1824).
32 The traditional exceptions to the territorial rule, nationality, protective, universality, and passive personality are discussed extensively in *Research under the Auspices of the Faculty of the Harvard Law School, Draft Convention on Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 443 (Supp. I 1935).
33 *Restatement (Second) Foreign Rel. L.* § 17 (1965) [hereinafter cited as *Restatement*].
34 *Id.* at § 27.
itary's activities abroad which violate domestic law. The Restatement (Second) of American Foreign Relations Laws says that "[a] corporation has the nationality of the state which creates it," yet in comment (d) it states "[w]hen the nationality of the corporation is different from the nationality of the persons . . . who own or control it [then] the state of the nationality of such persons has jurisdiction to prescribe and to enforce in its territory rules of law governing their conduct."

The fourth basis for jurisdiction over the subsidiary is the "effects doctrine," which permits a state to assert its laws over conduct occurring outside its territory which has an effect within its territory. This theory was used in United States v. Aluminum Co. of America to extend the Sherman Antitrust Act to cover restrictive trade agreements made abroad which were intended to affect imports into the United States, and actually did affect them.

Judge Learned Hand wrote:

We should not impute to Congress intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. . . . On the other hand it is settled law . . . that any state may impose liabilities . . . for conduct outside its borders that has consequences within its borders.

The Alcoa case serves as principal support for Restatement section 18, which requires: (1) a close connection between the prescribed conduct and its effect, (2) that the effect must be “substantial,” (3) that it must be “direct and foreseeable” and (4) that its application must be “consistent” with generally recognized principles of justice. This basis for jurisdiction has been utilized to cover activities performed abroad by American companies, either alone or in conjunction with other foreign companies, when their activities have a substantial impact on the United States.

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34 Vagts, The Global Corporation and International Law, 6 J. Int'l L. & Econ. 247, 251 (1971-1972); Petition of Heins, 33 F. Supp. 141 (E.D.N.Y. 1940) (subsidiary held to be American even though it was domiciled in Panama); K. Brewster, Antitrust and American Business Abroad 60 (1958).

37 Restatement § 27, comment d.

38 The S.S. Lotus, [1927] P.C.I.J. Ser. A, No. 9. The Permanent Court of International Justice discussed the practice of states in exercising jurisdiction over offenses committed outside their territory “if one of the constituent elements of the offence, and more especially its effects have taken place there.” Id. at 23.

39 148 F.2d 416 (2d Cir. 1945) [hereinafter cited as Alcoa].

40 Id. at 444.

41 Id. at 443. This principle is also seen in Strassheim v. Daily, 221 U.S. 280, 285 (1911). Mr. Justice Holmes wrote: “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the actor] had been present at the effect, if the State should succeed in getting him within its power.”

42 Restatement § 18.

43 See United States v. American Tobacco Co., 221 U.S. 106 (1911); United States v. Sisal
further been extended to apply to activities by foreign firms alone, where it was intended to and did result in a substantial effect on United States commerce.44

IV. EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS

The United States has used these broad bases of jurisdiction to apply its laws extraterritorially in numerous areas but most predominantly in export controls,45 antitrust regulation,46 securities and exchange regulations,47 and regulation of foreign shipping by the Federal Maritime Commission.48 This far reaching use of extraterritorial jurisdiction has drawn severe criticism overseas.49 A brief examination of the export controls and antitrust regulations areas, where extraterritoriality has been a problem, will point out the difficulties encountered with this expansive extension of United States legislation.

A. Export Controls

During the 1950's and 1960's the focal point for the debate over extraterritoriality was the United States' active use of trade controls.50 The controversy revolved around the Trading with the Enemy Act of 1917 (TWEA), as amended in 1971,51 and the Export Control Act of 1949,52 which was

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replaced by the Export Administration Act of 1969.\(^5\) The TWEA imposes a strict embargo on imports from and exports to certain countries.\(^4\) During a national emergency, this Act authorizes the President to prohibit (except under license) any economic activity such as exports, imports, investments, and travel with the target country.\(^5\) The Foreign Assets Control Regulations issued pursuant to the Act are intended to have broad extraterritorial application to all persons subject to the jurisdiction of the United States and to all transfers outside the United States of any property subject to the jurisdiction of the United States.\(^5\)

The Export Control and Administration Acts require licensing for all commercial exports of goods and technology of United States origin to prevent a drain on scarce resources and to "exercise vigilance over exports from the standpoint of their significance to national security."\(^5\) Licenses are granted on the basis of the character of the product and its destination. Products that are considered "strategic" require a special license giving express authority to export the particular product to a designated country.\(^5\) The enforcement procedures are somewhat similar to Arab boycott policing techniques, making use of certificates, questionnaires, and blacklists. The Department of Treasury sends out questionnaires, concerning the end-use and expected transshipment of the exported goods. If the firm does not reply it may be blacklisted, and as a result, be denied the right to deal with any transactions involving United States goods. In addition, persons dealing with blacklisted firms are subject to being blacklisted themselves.\(^5\)

United States trade controls have given rise to numerous conflicts with the laws and policies of the host countries of United States subsidiaries. For instance, in 1974 Argentina threatened to nationalize a United States subsidiary when its export license was blocked by the Treasury Department, halting a sale of autos to Cuba. After stringent diplomatic protests, the United States compromised by granting a special license in the interests of "good relations with Argentina."\(^6\) Trade controls have continually caused friction with Canada because of the pervasive presence of United States-controlled industry in that country.\(^6\) In 1958, the Foreign Assets

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\(^4\) Formally including China, but now consisting of North Korea, North and South Vietnam, Cambodia, and Cuba.
\(^5\) A. Lowenfeld, Trade Controls for Political Ends, 7 (1977).
\(^3\) 31 C.F.R. § 500. 201 (1971).
\(^7\) A. Lowenfeld, supra note 55, at 14.
\(^5\) Id. at 15.
\(^6\) N.Y. Times, Apr. 19, 1974, at 1, col. 6.
\(^1\) See Corcoran, The Trading With the Enemy Act and the Controlled Canadian
Control Regulations frustrated Canada’s plan to sell 1,000 vehicles to China, causing great resentment over the domineering policies of its neighbor. When the United States halted the sale of 30 locomotives to Cuba in 1974, Prime Minister Trudeau personally intervened to get permission to carry out the transaction.

The cause célèbre of extraterritorial use of trade controls involved the Fruehauf corporation. Fruehauf was organized in Detroit in 1918, and by 1965 had factories in 10 countries. Its subsidiary, S.A. Fruehauf-France was owned 70% by the parent company and 30% by French investors. The parent appointed five of the eight directors, with the others appointed by the French investors. In 1964 Fruehauf-France contracted to sell its semi-trailers to Berliet, a French truck manufacturer. The tractor-trailers were to be resold to China. On learning of the transaction, the Department of Treasury warned Fruehauf-Detroit that the sale violated the Foreign Assets Control Regulations, and they would be assessed heavy criminal penalties.

The home corporation ordered Fruehauf-France to cancel the contract but Berliet refused to release the company and threatened a million dollar damage suit for breach of contract. The three French directors sued the American directors in the Commercial Court of Corbeil seeking the appointment of an administrator to manage the company temporarily and execute the contested contract. The relief was granted, and the Court of Appeals affirmed observing that the consequences of the breach of contract would imperil the existence of the corporation and the jobs of its 600 employees. While the contract was carried out under the administrator, the Secretary of the Treasury ruled that Fruehauf-France was no longer
controlled by Fruehauf-Detroit and so was no longer subject to its jurisdiction. The issue of the license was thereby avoided and an informal understanding appears to have been reached that Fruehauf-France would not participate in transactions with China in the future. 8

The problem over extraterritorial application of trade controls has lessened in importance in the 1970's. In 1975, the Organization of American States lifted the collective embargo on trade with Cuba. The United States relaxed its trade policy regarding its subsidiaries and Cuba, granting general "licenses... when [the United States subsidiaries] are operating in countries where local law or policy favors trade with Cuba." 9 With the opening of trade to China, detente with the Soviet Union and tentative steps towards normalization of relations with Cuba, United States policy has shifted towards promotion of East-West trade and relaxation of trade controls over non-strategic goods. 10

B. Antitrust Regulation

In recent times the most prominent point of contention over extraterritorial jurisdiction has been in the field of antitrust regulation. 11 Initially, it was the United States policy to limit the application of the Sherman Act. This early view is expressed in Justice Holmes' opinion in American Banana Co. v. United Fruit Co. 12 The plaintiff alleged that the United Fruit Company, as part of its monopolistic scheme, instigated the Costa Rican government's seizure of American Banana plantations and railways. Holmes wrote:

[T]he acts causing this damage were done so far as appears outside the jurisdiction of the United States and within that of other States. It is surprising to hear it argued that they were governed by the Act of Congress . . . [The] general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. 13

Such a strict territorial view has become outmoded with the rise of multinational corporations and worldwide marketing, and would have rendered ineffective comprehensive American regulatory schemes. The scope

8 Id. at 91.
9 73 DEP'T STATE BULL. 404 (1975).
13 Id. at 355-56.
of the Sherman Act was construed more broadly in the *Alcoa* case. What Justice Holmes considered "surprising" in 1909 was to Judge Hand "settled law" when he asserted that the agreements involved "were unlawful even though they were made abroad, if they were intended to affect imports and did affect them." The Court further held that "[a] state may impose liabilities; even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." The broad reach of this doctrine was seen in *United States v. Watchmakers of Switzerland Information Center, Inc.* An action was brought against numerous Swiss and American organizations for violations of the Sherman Antitrust Act and of the Wilson Tariff Act. The suit involved an agreement known as the Collective Convention which regulated the production, sale, and exports of watches and component and repair parts. The courts held jurisdiction over the American subsidiaries by virtue of the control exercised by the parent corporations. The defendants argued that the Collective Convention was sanctioned by the Swiss government and was part of its governmental policy of protecting the Swiss watch industry.

The court ignored the objections made by the Swiss Confederation in its *amicus curiae* brief charging that the United States actions impugned Swiss sovereignty in violation of international law, or that they constituted a direct attack upon the legislation and policy of the Swiss Confederation. Rejecting their arguments, the court stated:

If, of course the defendant's activity had been *required by Swiss law* this court could do nothing . . . . [T]he defendant's activities were not required . . . . It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government . . . . In the absence of a direct foreign governmental action compelling the defendant's activity, a United States court may exercise its jurisdiction as to acts and contracts abroad, if . . . such acts . . . have a substantial and material effect upon foreign and domestic commerce.

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71 *Alcoa, supra* note 39, at 444.
72 *Id.* at 443.
74 133 F. Supp. 40 (S.D.N.Y. 1955). The court further stated: "Jurisdiction over the parent is not being sought through subsidiary, but jurisdiction of the subsidiary is being sought through the parent." *Id.* at 48.
76 Swiss Confederation *amicus curiae* brief, as quoted in *INTERNATIONAL LAW ASS'N REPORT supra* note 71, at 377.
77 1963 TRADE CASES (CCH) ¶ 70,600 at 77456-57 (emphasis added). A similar result was
In another celebrated case, United States v. Imperial Chemical Industries, United States District Court Judge Ryan held that the agreements between a British corporation, Imperial Chemical Industries (ICI), and an American corporation, E.I. duPont de Nemours & Company, Inc. (duPont) divided up world markets in violation of the Sherman Act. DuPont invented nylon in the 1930's and sold its British patents for it to ICI which in turn sublicensed them to British Nylon Spinners, Ltd. (BNS). The court held the exclusive licensing arrangement between duPont and ICI to be illegal and unreasonably restrictive of trade. To reestablish competitive conditions in the United States export and import markets, the court ordered duPont to transfer part of its American patent rights to ICI and ordered ICI to grant duPont immunity from suit for infringement of its patent rights in Great Britain.

BNS, bringing suit in Great Britain obtained an injunction restraining ICI from complying with the United States decree and an order for specific performance of their contractual rights to the patents. The English court held that since it was an English contract between English nationals to be performed in England, it seemed that BNS had, at least, established a prima facie case that the United States courts were not competent to interfere with British patent rights. In granting specific performance for BNS, Evershed, M.R., said of the United States court order:

If... the judge intended to say (as it seems to me he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign Power effective to remove (as he said) harmful effects on the trade reached in United States v. Holophane Co., 119 F. Supp. 114 (S.D. Ohio 1954), aff'd per curiam, by an equally divided court, 352 U.S. 903 (1956). The court held that an agreement dividing up the world market for patented and trademarked prismatic glassware and lighting fixtures violated the Sherman Act. The court's decree ordered the American corporation "to use reasonable efforts... to promote the sale and distribution" of its product overseas. The judgment was construed as requiring only those acts which did not affirmatively violate a foreign law or valid judgment of a competent foreign court. 1954 TRADE CASES (CCH) ¶ 67,679 (S.D. Ohio 1954). See also United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd, 332 U.S. 319 (1947); United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), aff'd and modified, 341 U.S. 593 (1951).


105 F. Supp. 215, 226-32 (S.D.N.Y. 1952). One critic noted that "jurisdiction is taken to the extreme length of issuing directives to a foreign corporation concerning the disposition by it of property owned by it in its own country under its own law." Jennings, supra note 71, at 167.


Id. at 26, [1952] 2 All E.R. at 783.
of the United States, I am bound to say... I find myself unable to agree with it."

The export control and antitrust cases illustrate the potential for conflict when the United States extends its regulatory scheme beyond its borders. The subsidiary may find itself caught between the undesirable alternatives of obeying the domestic country's laws and facing sanctions within the host country, or adhering to the host country's laws in violation of the domestic regulation. The businessman trading in the Middle East market encounters a similar problem. If he does not follow the boycott regulations he may be blacklisted and denied access to Arab business. Yet, if he complies with certain prohibited boycott requests, he may face severe criminal or civil penalties."

V. EAA IN THE FRAMEWORK OF INTERNATIONAL LAW

International law is recognized as part of our national law and "must be ascertained and administered by the courts... as often as questions of right depending upon it are duly presented..." United States courts will always try to construe a statute within the framework of international law. Chief Justice Marshall in The Charming Betsy declared:

An act of congress (sic) ought never to be construed to violate the laws of nations if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

However, international law provides no bright line limitation on the extent of the effective reach of national legislation. When interpreting federal law, the courts look to the congressional intent in passing the legislation, since Congress does not lack the power to prescribe a law that

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"Id. at 25, [1952] 2 All E.R. at 782. Denning, L.J., stated further, "It would be a serious matter if there were a conflict between the orders of the courts of the United States and the orders of these courts. The writ of the United States does not run in this country and, if due regard is had to the comity of nations, it will not seek to run here." Id. at 28, [1952] 2 All E.R. at 784.


International law is constitutionally recognized in art. I § 8 which provides that "Congress shall have Power... to define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations..." (emphasis added).

The Pacquete Habana, 175 U.S. 677, 700 (1899).


"[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so..." Alcoa, supra note 39, at 443.
might be beyond the permissible limits of international law. As long as the statute does not exceed the power authorized by the Constitution the courts will uphold it. In Benz v. Compania Naviera Hidalgo S.A., for example, the Court was willing to apply the United States statute, even if it would be in derogation of international law. In that case, however, the Court expressed the belief that “[i]n the delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision.”

The intent of Congress in the EAA to disallow compliance with certain boycott requirements is clearly expressed in the statute as well as in its legislative history. The Export Administration Regulations (EAR) are intended to have broad application to all United States persons including the overseas subsidiary chartered under the laws of the foreign country if it is “controlled in fact” by an American company or individuals. Even though the EAR allow limited compliance with the host country’s laws by a bona fide resident of the boycotting country, the restrictions prohibiting compliance in transactions involving import of non-specifically identifiable goods, services, and goods for retail operations might be considered an infringement on the sovereignty of the host country. Clearly, the host country has the right to prescribe laws regarding conduct within its borders, and it has an immediate interest in the economic regulation of its businesses.

However, the application of the EAA to American-controlled subsidiaries is consonant with its traditionally recognized bases of jurisdiction. In many instances, jurisdiction may be upheld under the conduct theory. In fulfilling boycott requirements certain activities may occur within the territory of the United States, giving it jurisdiction over the defendant even if only part of the proscribed activity is done in this country. Activities such as the transfer of letters of credit containing boycott-based stipulations by banks, the processing of certificates of origin by exporters or Arab Chambers of Commerce, and the preparation of boycott questionnaires by American companies are commonly carried out in the United States when complying with the boycott. Counsel for Morgan Guaranty Trust Company testified in congressional hearings that between December 1975 and April 1976, his bank received 824 letters of credit in transactions with boycott-

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83 “[I]f Congress has expressly prescribed a rule with respect to conduct outside the United States, even one going beyond the scope as recognized by foreign relations law, a United States court would be bound to follow the congressional direction unless this would violate the due process clause of the Fifth Amendment.” Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).
86 Restatement § 17.
related clauses involving $41,237,815. In each case, the company complied with the boycott certifications as a condition of payments under the letters of credit.97

The EAA applies only to corporations which are "controlled in fact" by Americans. Although the EAR establish broad presumptions of control of the subsidiary by its parent corporation,98 these presumptions can be rebutted by competent evidence showing that control, in fact, does not exist.99 Such a controlled corporation may be regarded as a national of the United States and thereby remain under its continuing personal jurisdiction.100 In Skiriotes v. Florida, Chief Justice Hughes wrote:

. . . the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas, or even in foreign countries when the rights of other nations or their nationals are not infringed . . . [T]here is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.101

In any event, the same factors used in determining the subsidiary's nationality would be significant in asserting jurisdiction on the grounds of control of the subsidiary by the parent company.102 Likewise penalties can be imposed on the parent for its subsidiary's unlawful activities.103

The EAA clearly meets the qualifications set out in Restatement section 18 under the "effects" principle of jurisdiction. The conduct prohibited, that is, compliance with certain boycott requirements and their resulting discriminatory effect, are constituent and necessary elements of the activity proscribed by the regulations. Moreover, the impact of the Arab boycott is a "direct and foreseeable" consequence of the concerted effort of the Arab League to use its economic power in its war against Israel. The "effects" of the boycott is substantial due to the volume of trade between the United States and the Arab countries. The Moss Report on the Arab Boycott and American Business stated that between 1974 and 1975 "at least $4.5 billion worth of U.S. sales and proposed sales to Arab countries

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98 There is a rebuttable presumption of control where the parent owns or controls 50% of its voting stocks or if it controls directly or indirectly 25% or more of the voting securities where no other person has an equal or higher percentage. EAR § 369.1 (c)(2)(i),(ii), 43 Fed. Reg. 3513 (1978). There are further presumptions where the parent has the authority to appoint either a majority of the board of directors, giving it the ability to control the general policies of the subsidiary, or the power to appoint the chief officer of the subsidiary, giving it effective control of its daily operations. EAR § 369.1 (c)(2)(iii)(vi), 43 Fed. Reg. 3513 (1978).
100 Blackmer v. United States, 284 U.S. 421 (1932).
102 See text accompanying note 77 supra.
103 RESTATEMENT § 27, comment d.
VI. JUSTIFICATIONS FOR THE EXTRATERRITORIAL APPLICATIONS OF THE EAA

While the United States bases its exercise of extraterritorial jurisdiction in the EAA on recognized principles of international law, it must be remembered that the Arab states have equally valid claims for control over the subsidiary within their countries, deriving their claims from the same principles of jurisdiction. The problem arises that both the domestic and host countries have supportable grounds for jurisdiction over the subsidiary, while their national laws and policies are in opposition, thus subjecting the subsidiary to conflicting pressures. Since the United States and the Arab League have concurrent jurisdiction, the question becomes not one of the lack of prescriptive jurisdiction, but of the desirability of its enforcement.

In situations where the United States shares concurrent prescriptive jurisdiction with another country, the Restatement section 40 asserts that international law calls for each state to examine its claims in good faith and to temper its exercise of jurisdiction with the recognition of the primacy of the interests involved. Consideration is to be given to the vital national interests of each of the states; the extent and nature of hardship that inconsistent enforcement actions would impose upon the person; the extent to which the required conduct is to take place in the territory of the other state; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

In determining the justifications for the extraterritorial application of the EAA it is important to note the unusual nature of the problem with which the statute attempts to deal. The EAA was passed in response to a pervasive and organized interference in the United States market. The United States has a legitimate interest in "the integrity of its domestic

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105 The three most common boycott requests were that the seller submit certificates of origin for the goods, that the ship transferring the goods not be blacklisted, and that the carrier not stop at Israeli ports. Only 15 of the reported boycott requests with the Commerce Department between 1974 and 1975 contained clauses of a religious or ethnic nature. Examples of these requests were clauses requesting certification that there were no persons employed in senior management positions who were of Jewish faith, were Zionists, had purchased Israeli bonds, contributed to the United Jewish Appeal, or were members of organizations supporting Israel. Id. at ix.

106 Restatement § 40.

order and the regulation of its export trade.108 The boycott itself is an extraterritorial extension of Arab foreign policy on American business which seeks to affect the trade relationship between the United States and one of its allies. To the extent the boycott intervenes in United States economic affairs, it results in an impairment of United States sovereignty.109 The two major factors which combine to give leverage to the Arab boycott within the United States are the increasing commerce between the two nations and American dependence on Arab oil. The first resulted from the quintupling of the oil prices which created an enormous flow of wealth to the Arab countries.110 With their increased buying power, vast new markets for United States goods and services were opened. Since 1973, the Middle East market for United States exports has doubled from approximately 5% to nearly 10% of the total United States exports. The volume of sales to Arab states has grown significantly from $1 billion in 1971 to a present level of $7 billion per year.111 In addition the Arabs are putting nearly $10 billion annually into investments in the United States.112 The second major factor is United States dependence on Arab oil. The United States imports more than one-third of all its oil from Arab League states, representing more than 15% of the total oil consumption in the United States.113

This powerful economic force has brought great pressure to bear on American companies to adhere to boycott policies in order to get Arab business. This coercion of the exporting industry tends to divert the free movement of trade based on market conditions to one based on the foreign policy objectives of the Arab League. While the Arab states have the sovereign right to refuse to deal with any country they choose, they have no concomitant right to dictate the business policies of American companies.

The boycott provisions were drawn with regard to the recognition of the host country's right to regulate its businesses. The application of EAA to the American-controlled company is narrowed to only those transactions which take place in United States commerce. It does not purport to cover

109 Senate Hearings, supra note 3, at 429 (statement of Secretary of State Cyrus Vance).
110 Turck, supra note 4, at 485.
111 Senate Hearings, supra note 3, at 429. In terms of jobs, each billion dollars of trade roughly translates into 50,000 jobs so that nearly half a million jobs depend on the export trade to Arab countries. Id. at 462 (statement of Secretary of Commerce Juanita Krebs).
112 Id. at 429. As a result of this heavy investment, concern has been raised over the use of these investments and deposits as a lever to achieve Arab political goals. See *Hearings on S. 425, Amendment No. 24 Thereto; 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. 1 (1975); see generally Niehuss, *Foreign Investment in the United States: A Review of Government Policy*, 16 Va. J. Int'l L. 65 (1975).
113 Senate Hearings, supra note 3, at 429.
transactions of United States firms "which involve the commerce of a foreign country and not U.S. exports." The statute permits the subsidiary resident in the boycotting country to follow the host country's laws with respect to its activities exclusively within the host country, and in importation of specifically identifiable goods for its own use and in the performance of its contractual duties. The EAR forbid compliance with local law regarding discrimination against United States citizens and imports of nonspecifically identifiable goods, services, and goods for retail operations.

Although an American subsidiary is generally required to conduct itself within the ambit of United States laws, the antiboycott rules are flexible in allowing a resident to conform to the host country's laws, except where compliance would result in evasion of the statute or where fulfillment of the boycott requirement would violate United States public policy. To employ an extreme example, suppose company X determines that it might be very lucrative to engage in slave trade in country Y. Although slavery may be officially sanctioned and recognized by the laws of that country, such activity by a United States company would not be allowed. Likewise, the United States requires its companies within the boycotting countries to abstain from certain boycott activities which are deemed incompatible with American government policy.

The EAA does not deviate from the United States policy of not compelling a breach of law in another sovereign state. Even though the United States maintains that it is not precluded from exercising its jurisdiction because it might subject the subsidiary to liability under another state's laws, the United States will generally not enforce an order which in effect necessitates a breach of law in another country. The trade control and antitrust cases discussed earlier illustrate this point. In the Fruehauf case, the Treasury Department used the fact that "control" by the temporary administration removed it from United States jurisdiction to avoid the clash of conflicting requirements on the subsidiary. In the Canadian and Argentinian affairs, agreements were worked out through diplomatic chan-

114 Id. at 2 (statement of Senator Stevenson).
115 See text accompanying notes 17-29 supra.
116 See Comment, supra note 5, at 1001.
117 An analogous situation occurred in the Swiss Watch Case. The subsidiary was held in violation of United States antitrust regulations, even though the activity was sanctioned by the Swiss government. See discussion accompanying note 76 supra.
118 Andreas F. Lowenfeld, Acting Deputy Legal Advisor to the State Department wrote: "the United States has been the most ambitious of the major democratic states in trying to regulate international commerce; it has at least a claim to jurisdiction over vast commercial enterprises abroad owned and controlled by American parent companies . . . [a]s to conflict with the domestic law of other countries, both courts and federal agencies in the United States have been careful not to put persons, particularly aliens, in the position of having to violate one law or the other." Lowenfeld, Book Review, 78 Harv. L. Rev. 1699, 1705 (1965).
nels to avert the confrontation.\textsuperscript{119}

The antitrust cases generally follow this trend. The court's decree in the ICI case included a "savings clause" which allowed the English courts to get around inconsistent court decrees.\textsuperscript{120} The court in the Swiss Watch case drew the distinction that the defendants' activity was permitted, but not required, by the laws of the Swiss Confederation. The defendants, therefore, could obey the court order without violating Swiss law.

The EAA prohibits compliance with boycott requests, but does not require affirmative action in contravention of the host country's laws. The United States subsidiary, resident in the boycotting country, is not forced to violate the host country's laws and can operate within the framework of the statute without subjecting itself to liability in either the domestic or host state. It does not have to engage in the areas of prohibited conduct. Since the statute only applies to transactions in United States commerce, the firm can avoid the EAA's scope and comply with the boycott restrictions when importing goods and services from non-United States sources.

Perhaps the strongest justification for the broad application of the anti-boycott rules is the precarious risk of religious discrimination that pervades the boycott. The Arab League has repeatedly stated that the boycott involves no religious discrimination.\textsuperscript{121} Mohammed Mahmoud Mahgoub, Commissioner General of the Central Office for the Boycott of Israel wrote:

\begin{quote}
[t]he Boycott Principles are also very far from racial religious influences; [they are] practiced with all persons . . . notwithstanding their nationality or religion as long as they support the economy of Israel, and its war effort. [The Boycott does] not discriminate among persons on the basis of religion or nationality, they rather to do on the basis of their partiality or impartiality to Israel and Zionism.\textsuperscript{122}
\end{quote}

Former Secretary of Commerce Elliott L. Richardson has said "...[t]he evidence thus far supports the view that the boycott is symptomatic of the Mideast conflict and that, in its current manifestations, it is not based on religious or ethnic criteria."\textsuperscript{123} Yet despite these denials that the boycott

\begin{footnotes}
\textsuperscript{119} Restatement § 39.

\textsuperscript{120} See text accompanying notes 60-61 supra.

\textsuperscript{121} See Mann, note 49 supra, at 152. The practice has developed of including "savings clauses" in court decrees where there may be conflict with host's laws. In United States v. General Electric Co., 115 F. Supp. 835, 878 (D.N.J. 1953), the court said "...Phillips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, in which Phillips or any other subsidiaries may be incorporated . . .;" accord, United States v. Gulf Oil Corp. [1963] TRADE CASES (CCH) ¶ 77344, 77349 (S.D.N.Y.); United States v. American Type Founders Co., [1958] TRADE CASES (CCH) ¶ 74203, 74206-07 (D.N.J.).

\textsuperscript{122} Turck, supra note 4, at 480.

\textsuperscript{123} Excerpt from "Nature of the Boycott of Israel" enclosed with an August 31, 1975, letter from Commissioner General Mahgoub to the National Association of Securities Dealers, Inc.
\end{footnotes}
is not directed at Jews but rather at Zionists and supporters of Israel, these murky distinctions between Zionist and Jew have in practice seemed more rhetorical than real. Numerous incidents have been reported where the boycott policy has been translated into blatant discrimination against Jewish Americans.¹²¹

Even though the boycott may not be overtly discriminatory, its undertones raise the threat of injecting antisemitism into American business practices.¹²² There exists a great potential for a "shadow boycott."¹²³ Misguided businessmen may unilaterally avoid trading with Israeli firms or employing Jews in the hopes of currying favor with potential Arab clients. The problem is compounded by the unique nature of the boycott target. "Israel is not only a sovereign state, but one established for the purpose of providing a homeland for Jews. . . . [It is] the symbol of a worldwide religious ethnic community."¹²⁷

The provision allowing conformance with a host country's laws explicitly excludes the exception for religious discrimination against United States persons, and forbids the subsidiary from giving discriminatory information about a United States person's race, religion, sex, or national origin.¹²⁸ American companies should not be allowed to discriminate against other Americans. The United States Constitution,¹²⁹ Title VII of the 1964 Civil Rights Act,¹³⁰ and various executive orders¹³¹ have condemned discrimination on the basis of race, color, religion, or national origin.¹³² The United States adheres to a policy of non-discrimination as an absolute, fundamental principle that will not be compromised by its companies at home or abroad.

¹²² N. JOYNER, ARAB BOYCOTT ANTI-BOYCOTT: THE EFFECT ON U.S. BUSINESS 34 (1977); Schwartz, supra note 107, at 1267; Steiner, supra note 108, at 1366.
¹²⁴ N. JOYNER, supra note 125, at 1.
¹²⁵ MOSS REPORT, supra note 104, at 1.
¹²⁷ U.S. CONST. amend. 1.
VII. Conclusion

The extraterritorial scope of the EAA is justified despite the potential conflict with host country regulations, due to the peculiar nature of the boycott, its unique risk of discrimination, and the possibility of evasion of the legislation through the foreign subsidiary. The antiboycott regulations were drawn carefully to avoid confrontation, balancing the right of the Arab states to govern the businesses in their territory with the interest of the United States in having its subsidiaries act in accordance with its laws. The extension of the boycott rules to the subsidiary is supported by recognized principles of jurisdiction in conformity with international law, and within the framework of prior United States practices. The American corporation is able to do business in the Arab countries obeying the boycott laws and still remain within the parameters of the EAA. The firm may either refrain from engaging in the prohibited conduct or remove itself from the coverage of the legislation by operating outside of United States interstate or foreign commerce.

The only real solution to the boycott problem lies in the cessation of Middle East hostilities and suspension of the economic warfare. Until these differences are settled, the antiboycott regulations of the EAA are necessary in order to preserve the integrity of United States commerce and to prevent the Arab-Israeli conflict from invading and manipulating the American marketplace.

Robert S. Wayne

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123 The EAA applies only to actions within United States commerce. Discriminatory hiring practices in the employment of non-United States persons by the subsidiary either within the boycotting country or in Europe, while possibly violating United States civil rights laws, would be a violation of the antiboycott regulations. See Comment, The Arab Boycott and Title VII, 12 Harv. C.R.-C.L. L. Rev. 181 (1977).