THROUGH THE ANTIBOYCOTT MORASS TO AN EXPORT PRIORITY*

I. INTRODUCTION

United States policy regarding unsanctioned international boycotts was formed during a two year period of intense congressional debate, culminating with the passage of the Export Administration Act Amendment of 1977 (EAA)\(^1\) and the Tax Reform Act of 1976 (TRA).\(^2\) Concern over this area of law has not ended with the diminution of political controversy, however, because full implementation of the antiboycott laws has created what appear to be some significant long term problems for U.S. exports; the focus has shifted from formulating a policy to living with its enforcement.

This Note examines export problems arising from the enforcement of U.S. antiboycott policy, but does not challenge the fundamental premise that U.S. businesses should not comply with unsanctioned international boycotts. Rather the focus is on the cumulative effect upon business of the overlapping and inconsistent regulatory schemes purporting to implement the policy. Sections II and III examine the objectives and provisions of the antiboycott laws: the EAA, the TRA, and antitrust law,\(^3\) noting

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lack of clarity and inconsistencies within each law. Section IV reviews the inconsistencies among the laws, and Section V follows with an examination of the impact these inconsistencies have upon businesses. In light of the need for a coordinated export policy, some adjustment in the regulatory schemes of United States antiboycott law is in order and, indeed, can be accomplished in a fashion accordant with the underlying objectives of United States policy in the antiboycott area. Thus, in Section VI, administrative and legislative measures to reduce these effects are proposed.

II. THE POLICIES OF ANTIBOYCOTT LAWS

The objective of an antiboycott law should be to prevent U.S. persons from complying with certain aspects of unsanctioned foreign boycotts. To do this, the law should reflect three factors: the nature of the boycott, the nature of international trade and the aspects of boycott participation which are to be proscribed. To the extent that other factors in the political process influence legislation, the objective of the law may be obscured. The importance of a concise and consistent statement of the objectives of a governmental policy is three-fold: first, it guides the implementing agency in promulgating regulations and identifying violations; second, it enables businesses to predict administrative enforcement; and third, it requires government to develop consistent regulatory schemes. This section will review the particular objectives of each antiboycott law, and assess the prospects of their compatibility within a comprehensive U.S. antiboycott policy.

A. Export Administration Act Amendment of 1977

The EAA, with its broad prohibitions and detailed implementation, is the focal point in the antiboycott area. However, its objectives are open to different interpretations. The stated legislative policy is U.S. opposition to foreign boycotts imposed against friendly countries and U.S. persons. The EAA prohibits U.S. persons from taking certain actions with intent to comply with, further or support such boycotts. While the EAA effectively forbids compliance with the secondary and tertiary aspects of a boycott, it permits activity in compliance with the primary boycott. Congress drew


4 EAA Sec. 3(5).

5 The primary boycott seeks to prevent the importation of boycotted country goods or
this distinction because it recognized the sovereign right of a country to conduct a boycott within its own territory, but deemed certain methods of enforcing the boycott intolerable.

The Commerce Department interpretation of the EAA, as evidenced by the Export Administration Regulations (EAR)\(^6\) and by the statements of several Commerce officials, follows for the most part the stated congressional policy, but does differ in some respects. In response to intense and conflicting lobbying pressure, the Commerce Department developed what it considered to be a moderate interpretation of statutory policy.\(^7\) The officials often repeat the theme that "what the law seeks to do . . . is: (1) prohibit United States citizens from assuming the responsibility of enforcing foreign boycotts against others, and (2) give all United States citizens an equal opportunity to participate in boycotting country markets."\(^8\) On the whole, Commerce's position is a moderate balance of opposing views, and its regulations are fairly consistent with the EAA, although justification for certain interpretations is needed.\(^9\) An indication of the Department's middle of the road stance is the fact that it has been criticized by some for being too lenient\(^10\) and by others for being unjustifiably restrictive.\(^11\)

In contrast to the Commerce Department's moderate statement of goals are the positions of the two principal lobbies in the antiboycott area: the Jewish groups\(^12\) and the Business Roundtable.\(^13\) The Jewish groups have the political goal of diminishing the negative impact of the Arab boycott upon Israel.\(^14\) To achieve

services into the boycotting country, or the export of goods or services from the boycotting country into the boycotted country. The secondary boycott applies to third country firms, and seeks to deter them from doing business with the boycotted country. The tertiary boycott seeks to deter third country firms from doing business with other firms which do business with the boycotted country. See Marcuss, The Antiboycott Law: The Regulation of International Business Behavior, 8 GA. J. INT'L & COMP. L. 559, 561 (1978).

\(^1\) 15 C.F.R. § 369 et seq. (1978).


\(^6\) Marcuss, supra note 5, at 561.

\(^8\) See Section II, Subsection A of this Note infra.

\(^9\) See Kestenbaum, note 3 supra at 803-806. See generally BOYCOTT REPORT Volume 2 (1978) (issued periodically by The American Jewish Congress, Maslow ed.).

\(^10\) See generally Ludwig and Smith, note 1 supra.

\(^11\) The American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League of B'nai B'rith are the primary Jewish lobbying groups. Steiner, supra note 7, at 550.

\(^12\) The Business Roundtable consists of the Chief Executives of approximately 180 companies among the 500 largest U.S. companies. Id.

\(^13\) President Carter said that the purpose of the EAA was to "end the divisive effects on American life of foreign boycotts aimed at Jewish members of our society." Wall St. J., Jun. 23, 1977 at 3, col. 2.
this purpose, they have insisted upon the need to prohibit discrimination against U.S. enterprises which do business with Israel, and to prohibit discrimination against U.S. persons on the basis of their race, religion, or national origin.\textsuperscript{15} The Roundtable, on the other hand, has pursued an economic goal: while concerned with protecting U.S. businesses from other businesses which comply with the boycott, it has focused much of its lobbying pressure on minimizing the impact of the law.\textsuperscript{16} Both lobbies have expressed some dissatisfaction with the EAA and the EAR but have agreed to support renewal of the EAA without revision.\textsuperscript{17}

B. Tax Reform Act of 1976

Whereas the EAA is designed to prohibit boycott compliance, the intent of the TRA is to penalize "participation in or cooperation with international boycotts" (PCIB) by disallowing some tax benefits normally available to U.S. taxpayers conducting business abroad.\textsuperscript{18} It is often the availability of these tax benefits and incentives to U.S. taxpayers operating abroad that enables firms to compete with foreign businesses and increase exports. Congress believed that it was unfair to those taxpayers who refused to participate in a boycott, to allow tax benefits to those who do, and further that many taxpayers would not participate in an international boycott if they and foreign countries were aware that tax benefits were not available to participants.\textsuperscript{19} The legislative history of the TRA exhibits a dual concern for equity and the discouragement of boycott participation, but contrary to that of the EAA, expresses little concern for the negative impact of the antiboycott law on U.S. businesses.

This sparse expression of legislative purpose presents problems in determining whether the Treasury Department's Guidelines\textsuperscript{20}
are faithful to congressional intent. Most explications of this intent have come from Senator Abraham Ribicoff, the sponsor of the bill which added the antiboycott provisions to the TRA, in his criticisms of the Department's Guidelines. Businesses have not challenged Ribicoff's interpretations of legislative intent, but rather the propriety of using the tax laws to carry out foreign policy. The Guidelines are insulated from any evaluation regarding their fidelity to congressional intent.

C. Antitrust Law: The Bechtel Case

Whereas the EAA and the TRA are laws which are specifically designed to prevent U.S. persons from complying with unsanctioned international boycotts, antitrust laws have the broader purpose of promoting competition by inhibiting monopolies and other restraints on trade. This difference of purpose suggests that antitrust litigation will in the long run prove to be an inadequate means of enforcing a politically oriented antiboycott policy. U.S. v. Bechtel Corp. provides the only indication of the Justice Department's position regarding foreign boycotts, and this stance remains unclear.

The charge against Bechtel demonstrates the necessity of a connection between boycott compliance and impact on trade, as measured by antitrust standards: first, Bechtel was charged with entry into a combination and conspiracy in violation of § 1 of the Sherman Act; second, the terms of the combination and conspiracy were alleged to be refusing to deal with blacklisted persons and requiring others to do likewise; and third, unreasonable effects of the combination and conspiracy upon U.S. blacklisted per-

[hereinafter cited as Guidelines]. The Guidelines do not have the status of regulations, but serve as the Department's interpretation of the TRA.


2 See Miller, note 17 supra.


sons were alleged. These charges were not litigated, as the case was resolved pursuant to a consent decree under the Administrative Penalties and Procedures Act.

Although *Bechtel* is the only antitrust case involving the Arab boycott, it is useful to consider what tools are at the Justice Department's disposal for implementing an antiboycott policy. Two pertinent concepts to be considered are a per se rule of illegality for boycotts, and the principle of comity. Such concepts are likely to underlie, respectively, the arguments of the Justice Department and a defendant. Justice also might rely on one of several theories of horizontal and vertical combinations/conspiracies to support a charge. It could also seek to prove *participation* in a combination, a charge especially important for a general contractor providing pre-award services for a boycotting country client. However, since none of these theories was adjudicated in *Bechtel*, they are of little help as guidelines for businesses.

If the Justice Department intends to regulate boycott compliance in the future, some guidelines are needed. Bechtel sought the Department's agreement that the decree represents Departmental policy but an official later claimed that the decree was *sui generis* and that the Department was still formulating its policy.

Some indication of that policy is found in the Justice Department's Response to Comments (RTC). Against the charge raised

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28 For a general discussion of domestic boycotts as per se illegal, see L. SULLIVAN, note 24 supra, at 229-232. For an argument that the per se rule extends to international boycotts, such as the Arab boycott, see Kestenbaum, *Antitrust Implications of the Arab Boycott*, in *LEGAL ASPECTS OF THE ARAB BOYCOTT* (N. Vander Clute ed. 1977), at 147. For a definition of comity see *Restatement (Second) of Foreign Relations Law* § 40 (1965).
29 Kestenbaum, supra note 28, at 150-152.
30 Id. at 152.
33 See 218 ITEX N-4 (Aug. 8, 1978) (interview with John Shenefield, Assistant Attorney General in Charge of the Antitrust Division, Justice Department). Mr. Shenefield also stated that antitrust law should fill loopholes in the EAA and EAR.
by the Jewish groups that the decree provided inadequate relief, the Justice Department responded with three principles: (1) a person subject to U.S. personal jurisdiction may not participate in making a boycott decision the effect of which is to injure a U.S. resident in the flow of U.S. commerce; (2) considerations of comity limit the exercise of subject matter jurisdiction over persons and conduct beyond U.S. frontiers, especially where there is compulsion by a foreign authority acting within its own territory; and (3) as a corollary to these principles, no person subject to U.S. personal and subject matter jurisdiction should act as a gatekeeper to exclude U.S. residents from export business opportunities in boycotting countries. Thus under principle (1) Bechtel could not make a boycott decision which affected U.S. persons, but principle (2) would allow Bechtel to comply with the boycott decisions made by its clients. Principle (3) is intended to support the proposition that "it is irrelevant that foreign customers making choices in foreign lands may accomplish the same ultimate result, so long as U.S. persons do not themselves participate in the selection process. Such conduct would violate the Sherman Act and be offensive to United States public policy." The crucial question posed by Bechtel is whether the Justice Department will adhere to an antiboycott policy which is derived solely from these antitrust principles or whether it will harmonize its policy with the EAA.

D. Conclusion

The U.S. response to the Arab boycott is marked by three distinct sets of objectives: two developed by the legislative branch through the political process, though in different contexts; and one developed by the Justice Department through its application of statutes and antitrust principles in one case. Each distinct set of objectives is implemented by a different agency, resulting in different regulatory schemes with which businesses must contend.

III. REVIEW OF LAWS AND REGULATIONS

Before an adequate comparison of the antiboycott laws can be made, the provisions of each must be examined. This section

* Id. at M-1.
* Id.

* The EAA was enacted in 1977 after it failed to be passed in 1976. It was widely debated and has an extensive legislative history. See generally Steiner, note 7 supra. The
reviews the substantive provisions of the three laws and their implementations, noting the inconsistencies and lack of clarity found within each law. The problems discussed here are common to many situations in which a company confronts the difficult task of interpreting and obeying a particular set of regulations. In this type of situation, the firm deals with only one agency. The problems pertaining to multiple agency regulation are discussed in Sections IV-VI.

A. The Export Administration Act and Export Administration Regulations.

The EAA provisions dealing with boycotts are divided into six major sections: jurisdictional requirements, prohibitions, exceptions to the prohibitions, evasion, reporting requirements, and penalties. The final version of the Export Administration Regulations, promulgated by the Department of Commerce in January 1978, adheres to and elaborates on the EAA provisions.

1. Jurisdictional and Threshold Requirements

There are two jurisdictional requirements and one culpability standard which must be met before a particular business transaction will fall within the purview of the Act. First, the transaction must involve a U.S. person; second, the transaction must be in the interstate or foreign commerce of the United States; and third, the action must be taken "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." The EAR elaborate on these jurisdictional requirements in the Definitions section.

a. U.S. person. A United States person includes all United States residents, and all foreign subsidiaries, affiliates, or perma-

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*EAA sec. 4A(a)(1).
* EAA sec. 4A(a)(1A)-(F).
* EAA sec. 4A(a)(2A)-(F).
* EAA sec. 4A(a)(6).
* EAA sec. 4A(b)(2).
* EAA sec. 6.
* EAA sec. 4A(a)(1).
* 15 C.F.R. § 369.1.
nent foreign establishments of domestic concerns which are "controlled in fact" by the domestic concern. "Controlled in fact" will be presumed under certain circumstances, and means that the domestic controlling concern has the authority to establish general policy for, or to control the day-to-day operations of, the foreign entity.

b. Interstate or foreign commerce. Transactions which involve interstate or foreign commerce of the United States include all activities of a controlled in fact foreign entity specifically directed by the domestic concern, or activities between a domestic concern and its controlled in fact foreign entity. Also included are transactions between a controlled in fact foreign entity and a person outside the United States, if the transaction involves goods acquired from a United States person for the purpose of filling an order with the person outside the country.

c. Intent. Intent to comply with, further, or support an unsanctioned foreign boycott is a necessary element of any violation. Intent means "the reason or purpose for one's behavior." Intent to comply need not be the sole reason for taking a specific action; if it is at least one of the reasons for the decision to take a specific ac-

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47 15 C.F.R. § 369.1(b).

48 15 C.F.R. § 369.1(c)(2). The presumption arises when (i) the domestic concern beneficially owns or controls more than 50% of the outstanding voting securities; (ii) the domestic concern beneficially owns or controls 25% or more of the voting securities, if no other person owns or controls an equal or larger percentage; (iii) the foreign subsidiary or affiliate is operated by the domestic concern pursuant to the provisions of an exclusive management contract; (iv) a majority of the members of the board of directors of the foreign subsidiary or affiliate are also members of the comparable governing body of the domestic concern; (v) the domestic concern has authority to appoint the majority of the members of the board of directors; or (vi) the chief operating officer of the foreign subsidiary may be appointed by the domestic concern. The presumption may be rebutted by competent evidence.

49 15 C.F.R. § 369.1(c)(1).

50 15 C.F.R. § 369.1(d)(2).

51 15 C.F.R. § 369.1(d)(6).

52 15 C.F.R. § 369.1(d)(8)(i). In addition, the transaction will be in U.S. commerce if the goods were purchased for "incorporation into, refining into, reprocessing into or manufacture of another product for the purpose of filling an order from a person outside the United States," § 369.1(d)(8)(ii); or "if the goods or services were acquired for the purpose of fulfilling or engaging in any other transaction with a person outside the United States," § 369.1(d)(8)(iii); or "if the goods were acquired and are ultimately used, without substantial alteration or modification in filling an order from, or filling or engaging in any other transaction with, a person outside the United States" § 369.1(d)(8)(iv). Transactions between a foreign subsidiary or affiliate and a person outside the U.S. will be in U.S. commerce if the U.S. company provides services to the foreign entity such as technical advice on the transaction in question. § 369.1(d) Foreign Subsidiaries, Affiliates, And Other Permanent Foreign Establishments of Domestic Concerns, Example (xvi).

53 15 C.F.R. § 369.1(e).

54 15 C.F.R. § 369.1(e)(4).
tion, the requisite intent will be found. Actions which happen to further the boycott but which are not taken with the necessary intent are not prohibited.

2. Prohibitions

The Act prohibits six distinct activities: (1) refusing, or requiring any other person to refuse to do business with any person in compliance with the boycott; (2) discriminating against any business or person on the basis of race, religion, sex, or national origin; (3) furnishing information about any person's race, religion, sex, or national origin; (4) furnishing information about one's business relations with boycotted country firms, or blacklisted firms; (5) furnishing information about one's affiliation with, or contributions to a charitable organization which supports the boycotted country; (6) implementing any letter of credit which violates the rules and regulations promulgated by the Commerce Department. The discussion of the EAR below focuses on the prohibitions that tend to create problems for U.S. businesses.

a. Refusals to do business. The prohibition concerning refusals to do business protects businesses in both the boycotted country and in the United States from the effects of the secondary and tertiary aspects of the boycott. The prohibition extends to the U.S. person's selection of suppliers, parts manufacturers, subcontractors, and insurers. In addition, it prohibits a U.S. company from considering the boycott in its decision whether to open a branch

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56 15 C.F.R. § 369.1(e)(2). In contrast, a violation of the evasion clause requires that the action be taken solely for the purposes of avoiding the application of this part. § 369.4(e).
57 15 C.F.R. § 369.1(e)(3). Example (ix) permits a U.S. company to supply information to a boycotting country about its activities in a boycotted country if the information is supplied at the U.S. company's initiative, and the U.S. company has no intention of terminating or otherwise changing its relationship with the boycotted country. This example contradicts the prohibition on providing information to a boycotting country which applies whether the information is requested by the boycotting country or furnished on the initiative of the U.S. person. § 369.2(d)(2)(ii). Possibly the drafters of the regulations had in mind the content of the information in permitting the U.S. company to provide information which confirms the existence of business relations in the boycotted country, but prohibits the furnishing of information which denies the existence of business relations with the boycotted country.
58 EAA sec. 4A(a)(1)(A).
59 EAA sec. 4A(a)(1)(B).
60 EAA sec. 4A(a)(1)(C).
61 EAA sec. 4A(a)(1)(D).
62 EAA sec. 4A(a)(1)(E).
63 EAA sec. 4A(a)(1)(F).
64 15 C.F.R. § 369.2(a).
office in a boycotted country. The prohibition applies to agreements to refuse to do business as well as actual refusals to do business.

b. Furnishing information concerning business relations.

The EAR prohibits furnishing information about business relationships with the boycotted country or with any other person who is known or believed to be blacklisted. Providing "normal business information in a commercial context" which is sought "for a legitimate business purpose" is not proscribed even if the information could be used for boycott purposes. The distinction between permissible, or "normal business information," and prohibited information is usually made in the parlance of positive and negative certifications, respectively. A positive certification would be a listing of all firms with which a company does business, whereas a negative certification would be a listing of firms, such as Israeli firms, with which the company does not do business. The distinction is largely one of form: its utility as an enforcement tool for the Commerce Department rests on the fact that it is a relatively simple rule for businesses to comply with, and that positive certifications may impede the Arab League's effectuation of its boycott.

In addition to the "normal business information" qualification of the furnishing information prohibition, there are several explicit exceptions. Providing information in response to import and shipping document requirements is excluded from coverage, as is providing information about one's own blacklist status (self-certification). Furthermore, furnishing information which would otherwise be prohibited is allowed if the information is supplied by a bona fide resident in an Arab country who supplies the information from his own knowledge, or from sources within the coun-

15 C.F.R. § 369.2(a), Refusals To Do Business, Example (v).

If an invitation to bid from a boycotting country contains a clause which states that the bidder must not deal with companies on the blacklist, acceptance of a U.S. company's bid constitutes an agreement to refuse to do business. § 369.2(a), Agreements to Refuse To Do Business, Example (ii). This example has been criticized as being inconsistent with the policy of the EAR to encourage reformation of documents. Ludwig & Smith, supra note 1, at n. 142.

15 C.F.R. § 369.2(d). The prohibition also applies to information concerning business relationships with any business concern organized under the laws of a boycotted country, and with any national or resident of a boycotted country. § 369.2(d)(1).

15 C.F.R. § 369.2(d)(4).

15 C.F.R. § 369.3(b).

15 C.F.R. § 369 Appendix Interpretation. See also Ludwig & Smith, supra note 1, at nn.107-08.
A significant problem with the furnishing information rules is determining what kinds of information, other than the straightforward positive certification, fall within the "normal business" qualification. On this issue the EAR examples obfuscate rather than illustrate what information may be supplied. For instance, a U.S. company may supply a copy of its annual report to a boycotting country despite the fact that it may contain all the information needed to determine whether it has business relations with blacklisted firms or in the boycotted country. Yet the regulations explicitly prohibit the furnishing of the same information in response to an explicit boycott request. Liability appears to turn on the label which the boycotting country customer affixes to his request, and on his intent. A U.S. company will have difficulty discerning the intent of a boycotting country customer who will couch the request in non-boycott terms in light of these regulations. Furthermore, the Regulations do not indicate whether the request must be motivated solely by boycott purposes for the prohibition to apply, or whether a request which is in part motivated by boycott purposes is sufficient to trigger the prohibition.

d. Letters of credit. The EAR prohibit a U.S. bank from implementing letters of credit (LOCs) which contain a condition or requirement which, if complied with, would violate one of the prohibitions. This prohibition has an additional jurisdictional requirement—the "commerce-plus test:" the transaction to which the letter of credit applies must be in U.S. interstate or foreign commerce, and the beneficiary must be a U.S. person. The beneficiary is presumed not to be a U.S. person if his address is not in the United States, but the presumption can be rebutted if the bank knew or should have known that the beneficiary is a U.S. person. In addition, the transaction will be presumed not be in U.S. commerce if the letter of credit calls for documents indicating shipment of foreign-origin goods from foreign ports.

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75 15 C.F.R. § 369.3(f) Examples (iii), (iv), (v).
76 15 C.F.R. § 369.2(d), Example (ii).
77 15 C.F.R. § 369.2(d)(4).
78 15 C.F.R. § 369.2(f).
79 15 C.F.R. § 369.2(f)(6)-(10).
80 15 C.F.R. § 369.2(f)(6).
81 15 C.F.R. § 369.3(f)(7)-(10). The fact that these presumptions are rebuttable requires the banks to look beyond the face of the document. The examples provide no help in determining what facts will be sufficient to rebut the presumption absent actual knowledge that the beneficiary is a U.S. person despite his foreign address, or that the transaction is in U.S. commerce despite documentation of foreign origin goods.
Fairly clear rules are provided to banks by the EAR, and except for some confusion immediately following the promulgation of final regulations, banks have been able to comply without much difficulty. A minor problem has arisen concerning the Commerce Department's interpretation of the self-certification rule. The Department has stated that self-certifications can be voluntarily furnished by the beneficiary, but a bank may not require a self-certification, as this amounts to a refusal to do business. Banks are placed in an awkward position by this interpretation: a beneficiary could require the bank to honor the LOC regardless of the certificate he furnishes (unless it was a negative certificate regarding a third party), since honoring the LOC would be legal under U.S. law. However, if the beneficiary chose to give a certificate which did not conform to the conditions of the LOC, the Arab bank paying under the Letter could refuse to do so because of the U.S. bank's failure to present the required documents. The Arab bank's refusal to pay under an improperly documented LOC would be in accordance with international LOC rules.77

3. Exceptions to the Prohibitions

The exceptions in the EAA recognize the validity of an international primary boycott78 by permitting the following activities: (1) complying with the boycotting country's requirements prohibiting the importation of goods made in the boycotted country, and with the boycotting country's shipping route requirements;79 (2) complying with the boycotting country's import and shipping document requirements;80 (3) complying with the unilateral and specific selection by a boycotting country resident of insurers, suppliers, and shippers;81 (4) complying with the boycotting country's export requirements;82 (5) complying with the boycotting country's immigration requirements;83 (6) complying with the local laws of the boycotting country.84

a. Import Requirements of a Boycotting Country. The import

77 See 15 C.F.R. § 369.2(f), Letters of Credit, Example (xiv), for The Commerce Dep't.'s interpretation. For an excellent discussion of the problems with this interpretation, see Ludwig & Smith, note 1 supra, at 251-252.
78 See note 5 supra.
79 EAA sec. 4A(a)2(A).
80 EAA sec. 4A(a)2(B).
81 EAA sec. 4A(a)2(C).
82 EAA sec. 4A(a)2(D).
83 EAA sec. 4A(a)2(E).
84 EAA sec. 4A(a)2(F).
requirement exception\textsuperscript{85} permits a U.S. person to comply with the boycotting country's requirements which restrict imports from the boycotted country. However, the prohibitions against issuing negative certificates of origin\textsuperscript{86} and furnishing information about business relationships with boycotted countries or blacklisted persons\textsuperscript{87} still apply.

b. Import and shipping documentation. The prohibition on furnishing information does not apply to the boycotting country's import and shipping documentation requirements.\textsuperscript{88} Information may be provided with respect to the country of origin, the name of the carrier, the route of shipment, the name of the supplier of the shipment and the name of the provider of other services. However, the information must be furnished in positive terms,\textsuperscript{89} except for the name for the carrier and the route of shipment, which can be stated in negative terms in order to comply with precautionary requirements for war risks or confiscation.\textsuperscript{90}

c. Unilateral and specific selection. The unilateral and specific selection exception\textsuperscript{91} and the local law exception\textsuperscript{92} apply to both the refusal to do business and the furnishing of information prohibitions. A U.S. person may comply with the selection made by a resident of the boycotting country of carriers, insurers, and suppliers of services or goods. In order to comply with the selection of services, the U.S. person must establish that the service is customarily performed in the boycotting country. With respect to the selection of component parts, the goods must be identifiable as to their source of origin.\textsuperscript{93} The EAR explicitly allow to U.S. person

\textsuperscript{85} 15 C.F.R. § 369.3(a-1).
\textsuperscript{86} 15 C.F.R. § 369.3(b)(2).
\textsuperscript{87} 15 C.F.R. § 369.2(d).
\textsuperscript{88} 15 C.F.R. § 369.3(a-1)(3).
\textsuperscript{89} 15 C.F.R. § 369.3(b).
\textsuperscript{90} 15 C.F.R. § 369.3(b)(2).
\textsuperscript{91} Id. The regulations do not permit a U.S. company to certify "goods will not be shipped on a carrier that is ineligible to enter the boycotting country's waters." This negative certification is not a reasonable requirement to protect against war risks or confiscation. § 369.3(b), Examples of Compliance with Import and Shipping Document Requirements, Example (vii).
Since a U.S. person is permitted to select a shipper from among those who are eligible to enter boycotting country's waters, 15 C.F.R. § 369.2(a), Refusals to Do Business, Example (iv), the result is that the U.S. person may make a selection in compliance with the boycott, but may not directly tell the boycotting country that it has done so. The same anomaly exists with respect to furnishing information in compliance with local law. See Ludwig & Smith, note 1 supra, at 263.
\textsuperscript{92} 15 C.F.R. § 369.3(c).
\textsuperscript{93} 15 C.F.R. § 369.3(f).
}\textsuperscript{94} 15 C.F.R. § 369.3(c)(16). The goods must be identifiable by "(a) uniqueness of design or
to make the selection on a boycott basis if he is a bona fide resident of the boycotting country.⁹⁶ Factors which will be considered in determining the bona fides of residency emphasize the nature and purpose of the presence of the U.S. person in the boycotting country.⁹⁶ Businesses may be unable to invoke this exception in light of Bechtel, as discussed in Section IV.

d. Local law exception. There are two parts to this exception, both of which relate to the activities of a bona fide resident of a boycotting country.⁹⁷ The first part covers activities performed exclusively within the boycotting country.⁹⁸ The second part covers the importation of goods by a bona fide resident of the boycotting country.⁹⁹ In compliance with local law, the resident may perform any act which would otherwise be prohibited under the EAR except for discrimination on the basis of race, religion, sex, or national origin.¹⁰⁰ The local law exception does not apply to the importation of services,¹⁰¹ and with respect to the importation of goods, the goods must not only be identifiable¹⁰² but must also be for the resident's "own use or for his use in performing contractual services" within the boycotting country.¹⁰³ Many transactions will be covered by both the unilateral and specific selection exception and the local law exception. It has been argued that the local law exception limits the unilateral and specific selection exception where the two exceptions overlap, because of the local law exception's "own use" requirement, and the exclusion of services from the scope of that exception.¹⁰⁴

⁹⁶ 15 C.F.R. § 369.3(c)(7).
⁹⁷ 15 C.F.R. § 369.3(c)(8). The factors are (i) physical presence in the country; (ii) whether residence is needed for legitimate business reasons; (iii) continuity of the residence; (iv) intent to maintain the residence; (v) prior residence in the country; (vi) size and nature of presence in the country; (vii) whether the person is registered to do business or incorporated in the country; (viii) whether the person has a valid work visa; and (ix) whether the person has a similar presence in both boycotting and non-boycotting foreign countries in connection with similar business activities.
⁹⁸ The factors used to determine the bona fides of residence are the same as those applied for the unilateral and specific selection exception, supra note 96.
⁹⁹ 15 C.F.R. § 369.3(f-1).
¹⁰⁰ 15 C.F.R. § 369.3(f-2)(10).
¹⁰¹ 15 C.F.R. § 369.3(f-2)(6). This has been criticized as contrary to congressional intent. Ludwig & Smith, supra note 1, at 257-258.
¹⁰² The test of identifiability is the same as that used for the unilateral and specific selection, supra note 94.
¹⁰³ 15 C.F.R. § 369.3(f-2)(1)(i). "For one's own use" is elaborated in § 369.3(f-2)(6).
¹⁰⁴ The interplay between these exceptions is thoroughly examined in Ludwig & Smith,
4. **Evasion**

The broadly worded evasion clause of the EAA\(^{103}\) proscribes any act or transaction undertaken with the intent to evade the provisions of the EAA or the implementing regulations. The Regulations\(^{106}\) provide three examples of evasion: (1) the use of an artifice or scheme which places a person at a commercial disadvantage because he is blacklisted,\(^{107}\) (this includes the use of a risk-of-loss provision that imposes a financial risk on another because of the import laws of a boycotting country);\(^{108}\) (2) the use of a dummy corporation to "mask prohibited activity;"\(^{109}\) and (3) the diversion of "specific boycotting country orders from a United States parent to a foreign subsidiary for purposes of complying with prohibited boycott requirement."\(^{110}\) The extensive use of exceptions is not evasion per se, but if a U.S. company establishes a local branch in a boycotting country solely for the purpose of invoking the unilateral and specific selection exception or local law exception, it will be evasion.\(^{111}\) Individual transactions which have the effect of avoiding the prohibitions will not constitute evasion "so long as the [transaction] is based on legitimate business considerations and is not undertaken solely to avoid the application of the prohibitions."\(^{112}\)

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\(^{103}\) EAA sec. 4A(a)(6).

\(^{104}\) 15 C.F.R. § 396.4.

\(^{105}\) 15 C.F.R. § 396.4(c).

\(^{106}\) 15 C.F.R. § 396.4(d). This is a presumption which can be rebutted by showing that the provision is customary for both boycotting and non-boycotting countries and that there is a legitimate non-boycott reason for its use.

\(^{107}\) 15 C.F.R. § 369.4(e).

\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) 15 C.F.R. § 369.4 Example (vi). This example involves a company which does have other legitimate business reasons for establishing a bona fide residence, but implies that absent such reasons the activity would constitute evasion. Arguably, this will relate to the bona fides of residence, supra note 96, rather than evasion.

\(^{111}\) § 369.4(e) (emphasis supplied). Several of the examples illustrate this point, e.g., example (i) (changing annual report which is sent to potential Arab customer as a means of furnishing information); (ii) (requesting a supplier of goods to label his goods in order to satisfy the identifiably requirement of the local law exception).
Interestingly, the evasion examples distinguish between the diversion of purchase orders to a foreign subsidiary in order to remove a transaction from U.S. commerce and the decision by a foreign subsidiary to expand its market to the boycotting country after the U.S. parent determined it could no longer do business there because of the EAR. While the former action constitutes evasion, the latter does not. Thus, the diversion of an entire market to a foreign subsidiary is permitted, while the diversion of a single transaction is proscribed. The Department's explanation for the market diversion example is that there is a legitimate business reason for the actions of the parent and subsidiary. For the reasons to be legitimate, it must be assumed that the parent, when it terminated business in the boycotting country, did not intend for the subsidiary to pick up its lost business. It is the absence of independent decision making in the purchase order example which renders that action evasive.

5. Reporting Requirements

The Act requires U.S. persons to report to the Department of Commerce any request for the furnishing of boycott information, or for taking action in support of the boycott. The report must indicate whether the U.S. person intends to comply with the request. The Regulations make it clear that reports of requests must be filed regardless of whether the action requested is prohibited or permissible under the EAR. Thus, if a boycotting country makes a unilateral and specific selection on a boycott basis, the implementing U.S. company must report this action if it has reason to know that the selection was made on the basis of a blacklist. Since a boycotting country customer would rarely choose a blacklisted supplier, the reporting requirement applies to virtually all unilateral and specific selections.

113 15 C.F.R. § 369.4 Example (viii).
114 15 C.F.R. § 369.4 Example (vii).
115 Of course, if the goods are manufactured in the U.S. and diverted to a foreign subsidiary for subsequent sale to a boycotting country, this would constitute evasion, since the intent is to avoid the U.S. commerce test. 15 C.F.R. § 369.4 Example (iv).
116 EAA sec. 4A(b)(2).
117 15 C.F.R. § 369.6(a)(1). A subsequent section exempts seven types of requests from the reporting requirement. § 369.6(a)(5).
118 C.F.R. § 369.6 Example (ii). Other Examples which require a request to be reported despite the legality of taking the requested action are (i) request to self-certify and (v) unilateral and specific selection.
The Export Administration Act of 1969 also had a reporting requirement.\textsuperscript{119} Congress found that the implementing regulations\textsuperscript{120} were too vague and did not require a U.S. company to indicate whether it would comply with the request.\textsuperscript{121} In response, the EAR require all U.S. companies to report whether they have taken or intend to take the requested action.\textsuperscript{122}

6. Conclusion

The EAR are comprehensive and reasonably clear. Many fine distinctions are drawn which reflect opposing lobbying pressures on the Commerce Department. Concessions to business such as allowing self-certifications,\textsuperscript{123} allowing the furnishing of information which is not in response to an express boycott request,\textsuperscript{124} and the commerce-plus test for letters of credit\textsuperscript{125} are balanced by concessions to the Jewish groups such as limiting the local law exception to goods,\textsuperscript{126} prohibiting an invitation to bid on a contract which has a boycott clause,\textsuperscript{127} and requiring banks to look beyond the face of a letter of credit document to determine jurisdiction.\textsuperscript{128}

The extent to which the evasion clause has an \textit{in terrorem} effect on business will depend on how rigorously the Commerce Department analyzes other legitimate business reasons for taking an action which avoids the prohibitions. Clarification of the activities constituting evasion is necessary.

The EAA could effectively deter compliance with the more intolerable aspects of an international boycott. Unfortunately for business, it is only one of the laws with which businesses must contend.

B. Tax Reform Act of 1976 and Treasury Guidelines

The antiboycott provisions of the TRA provides two methods

\textsuperscript{120} 15 C.F.R. § 369.4 (1977).
\textsuperscript{122} 15 C.F.R. § 369.6(d)(6).
\textsuperscript{123} See text at note 69 \textit{supra}. This concession, as well as those in notes 124-128 \textit{infra}, are not statutorily required.
\textsuperscript{124} See text at note 71 \textit{supra}.
\textsuperscript{125} See text at note 74 \textit{supra}.
\textsuperscript{126} See text at note 101 \textit{supra}.
\textsuperscript{127} See text at note 65 \textit{supra}.
\textsuperscript{128} See text at note 77 \textit{supra}.
for deterring boycott compliance: first, a broad reporting requirement gathers data on all U.S. persons conducting business in Arab countries, whether they receive tax benefits or not;\textsuperscript{129} and second, the statute penalizes boycott compliance by the withdrawal of three types of tax benefits.\textsuperscript{130}

1. Reporting Requirement

U.S. taxpayers are required to report (a) all operations in or related to any country included in the Treasury Secretary's boycotting country list; (b) operations in or related to a country, not on the list, but which the U.S. taxpayer knows or has reason to know requires PCIB as a condition of doing business; and (c) any requests received for PCIB, and if received, the nature of the operation involved and whether or not there was PCIB.\textsuperscript{131} Reporting requirements apply to all U.S. persons who have operations described by (a) and (b) whether or not they receive tax benefits.\textsuperscript{132} Willful failure to report can result in stiff penalties.\textsuperscript{133}

2. Denial of Tax Benefits

A taxpayer who agrees to engage in PCIB is denied the following tax benefits with respect to boycott related income: (1) credits for foreign taxes paid;\textsuperscript{134} (2) deferral of U.S. taxation on earnings of controlled foreign corporations;\textsuperscript{135} and (3) deferral of U.S. taxation of the earnings of a Domestic International Sales Corporation (DISC).\textsuperscript{136} Loss of tax benefits can be mitigated in two ways. The taxpayer can choose to apply the International Boycott Factor (IBF),\textsuperscript{137} or the specific attribution of taxes and income method.\textsuperscript{138} If the IBF is chosen, the taxpayer can demonstrate that some operations are clearly separable from the boycotting operation, and specifically attribute taxes paid and income earned in connection with those separate operations, thereby excluding them from the

\textsuperscript{129} I.R.C. § 999(a)(1).
\textsuperscript{130} I.R.C. § 999(c).
\textsuperscript{131} I.R.C. § 999(a)(1).
\textsuperscript{132} I.R.C. § 999(a)(1). Operations in or related to a boycotting country provide a sufficient ground for the reporting requirement. See note 226 infra.
\textsuperscript{133} I.R.C. § 999(f).
\textsuperscript{134} I.R.C. § 908(a).
\textsuperscript{135} I.R.C. § 952(a)(3).
\textsuperscript{136} I.R.C. § 995(b)(1)(F). For a discussion of the merits of Domestic International Sales Corporations, see Note, Tax Incentives to Exportation: Alternatives to DISC, at 413 infra.
\textsuperscript{137} I.R.C. § 999(c)(1).
\textsuperscript{138} I.R.C. § 999(c)(2).
The statute penalizes “participation in or cooperation with international boycotts” (PCIB), which is defined as an agreement made as a condition of doing business directly or indirectly with or within a boycotting country. A PCIB agreement is one to refrain from doing business with or in the boycotted country or with its government, nationals or companies; to refrain from doing business with any U.S. person who is engaged in trade with the boycotted country; to refrain from doing business with any company whose ownership is comprised of individuals of a particular nationality, race or religion; to remove or refrain from selecting directors or to refrain from employing individuals, for reason of race, religion, or nationality; or to refrain from shipping or insuring goods on a blacklisted carrier as a condition of the sale of a product to a boycotting person. The only exceptions to the prohibition against PCIB concern compliance with boycotts which are sanctioned by the United States and compliance with a boycotting country’s prohibitions on the import or export of goods produced in or sent to a boycotted country.

The class of taxpayers who could lose their tax benefits is broadly defined to include all members of a controlled group, or

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139 I.R.C. § 999(c)(1). Temporary Treasury Regulation § 7.999-1 specifies that the numerator and denominator of the IBF are determined on the basis of three factors: purchases, sales, and payroll.


141 I.R.C. § 999(a)(3). “U.S. person” includes U.S. citizens, residents, corporations, partnerships, trusts, and estates (see I.R.C. § 7701(a)(30)).


146 I.R.C. § 999(b)(4)(A).

147 I.R.C. § 999(b)(4)(B), (C).

148 I.R.C. § 999(a). “Controlled group” is defined in I.R.C. § 1563(a), as modified by § 999(a)(3). There are two kinds of controlled groups: parent-subsidiary and brother-sister groups. A parent-subsidiary controlled group consists of a chain of corporations where more than 50% of the voting power or of the total value of the stock of each corporation is owned, directly or through an option, by one or more of the other corporations. Parent-subsidiary groups also include groups where a common parent owns, directly or through an option, more than 50% of the voting power or of the total value of the stock of one or more members of the group.

A brother-sister controlled group exists where five or fewer individuals, trusts, or estates own, directly or constructively under I.R.C. § 1563(e), more than 50% of the voting power or of the total value of the stock of each corporation in the group, where only the lowest percentages of stock ownership of each person in any of the corporations is considered. See I.R.C. § 1563(a)(2) and (d)(2). One writer has pointed out the lack of clarity
all related persons. There is a presumption that all members of a controlled group and all related persons are involved in PCIB if other members or related persons are involved, but the presumption can be rebutted by a clear demonstration that the operations sought to be exonerated are clearly separate and identifiable and did not engage in PCIB.

Treasury Department enforcement of the TRA focuses on agreements to engage in PCIB. The Department’s Guidelines cover express agreements, written or oral, and implied agreements, which may be inferred from an overall course of conduct. Express agreements to engage in PCIB trigger tax penalties even though execution of the agreement deviates from its terms, or the agreement was not made with intent to engage in PCIB. The only real limit, therefore, to Treasury enforcement is that all charges of PCIB must relate to an agreement.

3. Problem Areas

There are four troublesome areas in the Guidelines: (a) the course of conduct inference; (b) the relation back concept in letter of credit transactions; (c) the furnishing of information provisions; which results from the TRA’s application of the attribution tests of § 1563, which heretofore applied only to domestic groups, to foreign corporations. BNA Portfolio, supra note 2, at A-17.

I.R.C. § 999(e). I.R.C. § 304(c) defines a related person as one who owns, directly or by means of § 318 attribution, at least 50% of the total combined voting power or total value of all the stock of a corporation, or has such a percentage of ownership of a corporation which in turn has that percentage of ownership of another corporation. This definition of “related person” can extend the presumption of PCIB to corporations which are related to other corporations or persons to an extent less than a controlled group. It has been pointed out that the method of application of § 318 attribution rules to foreign corporations is far from clear. BNA Portfolio, supra note 2, at A-17.

I.R.C. §§ 999(b)(1); 999(b)(2)(A), (B); 999(e)(1), (2).

Id. The presumption applies only to operations in or with the boycotting country, not to operations related to the country.


I.R.C. § 999(b)(3).

Guidelines H-1A.

See ¶ (g) of the Preamble to the Guidelines: where the action described in the question by itself does not, according to the answer, provide sufficient evidence to support an inference that an agreement under section 999(b)(3) exists, an overall course of conduct which includes such action in addition to other factors could support such an inference; whether an agreement can be inferred from a given course of conduct is an evidentiary question which turns on the probative value of particular facts and circumstances.

Guidelines H-18.

Guidelines I-4.
and (d) the provisions regarding selection of subcontractors.

a. **Course of conduct inference.** Even when an agreement falls within a given exception, PCIB can be inferred from the parties' course of conduct. There are three situations where permissible conduct comes under scrutiny:159 (1) where a taxpayer enters an express agreement which is allowed but which contains a questionable clause160 which may, in effect, advance the boycott; (2) where an express agreement is allowed but there is conduct which is at the same time consistent with the boycott161 (such as termination of business with Israel soon after making an agreement in an Arab country); and (3) where there is no agreement but a person indicates that he would have entered into one which contained a questionable clause162 (e.g., a contractor in its tender indicates that it *would sign* a contract which would amount to PCIB). The course of conduct inference is similar to the evasion clause of the EAA since both can trigger penalties for activity not expressly prohibited. However, while the evasion clause is contained in a statute, the course of conduct inference is purely a creation of the Treasury Department.163

b. **Relation back.** The relation back concept applies to letter of credit (LOC) transactions. If a taxpayer enters into a legal contract but a subsequent LOC contains a boycott requirement, the requirement relates back to the original contract and becomes part of it, with the result that fulfillment of the requirement constitutes an express PCIB agreement.164 This concept allows Treasury to regulate LOCs.

The relation back concept has been obscured by a recent IRS Letter Ruling165 which allowed a beneficiary of a LOC to comply with the LOC boycott requirement because the beneficiary had made a good faith effort during negotiation of the contract to in-

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163 See note 156 *supra*.
164 Guidelines H-8. It is not clear to which operations the penalties will apply: operations which are the subject of the original contract or the separate and identifiable operations relating to the LOC or the actual contract negotiations. Cf. Guideline D-3(f), which enables banks to set up their LOC services as operations which are separate and identifiable from their other international banking and financing services. It appears that other businesses too may be able to minimize tax penalties by separating their operations with respect to LOCs.
sure that the requirement would not appear in the LOC. The beneficiary who sought the ruling had included a clause in the original contract which required that the LOC be in conformity with the contract, but believed that despite its efforts the LOC would contain a boycott requirement. The IRS stated that the non-conforming LOC constituted a breach of the original contract and therefore was not a condition of doing business. Compliance with the requirement was allowed, on the condition that the beneficiary's good faith efforts continued through the time when final arrangements were made for carriage of goods to the destination. There was no explanation why an inference of a PCIB agreement should not be drawn from this conduct; the IRS merely warned that consistent failure to obtain conforming LOCs would violate § 999. The Letter Ruling is a judicious analysis of the given set of facts, but confuses the rules concerning LOCs and course of conduct inferences.

c. Furnishing information. The Guidelines generally allow a U.S. taxpayer to furnish information to a boycotting country. Furnishing information about one's business relations with blacklisted persons is permitted because it is not a PCIB agreement, although it could lead to the inference of an implied agreement to engage in PCIB. The Guidelines permit negative certification concerning goods, sellers, and suppliers, but for no clear reason prohibit certification that no boycotted country capital was used to produce goods. This last prohibition could, depending on the wording of the request, prevent the giving of the other permitted type of negative certification.

The Treasury Department apparently has adopted an informal rule that self-certification, or agreement to do so, is PCIB, on the theory that it is an agreement not to become blacklisted. This

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106 See note 156 and accompanying text supra. An inference of an implied PCIB agreement can be made where there is an allowable express agreement but where there is conduct which is consistent with the boycott.

107 See Guidelines H-3 (repeated inclusion of provision that local law will apply does not give rise to inference); and H-32 (repeated supplying of import certificates that goods were not manufactured by person engaged in trade in boycotted country does not by itself constitute PCIB agreement).

108 Guidelines H-17.

109 Id. See also Guidelines H-32 (agreement to provide negative certification is prohibited, whereas repetitive provision of such certification is permitted).

110 Guidelines I-4.

111 E.g., if the request combined two questions: “Were these goods made in Israel or with Israeli capital?”

112 Bricker, supra note 2, at 291. The Treasury Department has written new, more restrictive LOC Guidelines which may involve the furnishing of information. The Guidelines await the Secretary's approval. See 249 ITEX A-1, March 20, 1978.
rule is consistent with some of the Guidelines;\textsuperscript{173} but inconsistent with the Guidelines concerning the furnishing of information. There is no reason why self-certification, but not negative certification, should constitute PCIB.

d. \textit{Selection of subcontractors}. A contractor’s ability to select subcontractors is sketched out in the Guidelines, but the vagueness of the rules masks the risk of tax penalties. The Guidelines permit contracts containing clauses which: (1) give the boycotting country right of prior approval of all subcontractors;\textsuperscript{174} and (2) give the contractor the right to disapprove any subcontractor proposed by the boycotting country.\textsuperscript{175} Regarding the latter clause, the Guidelines state that the contractor has the right of disapproval even though the boycotting country makes proposals based on a blacklist. This situation may give rise to antitrust problems, as discussed in subsection C. below.

Two problems arising under the tax rules on subcontractor approval are apparent here. First, an inference of an implied PCIB agreement may still be made with regard to either type of contract.\textsuperscript{176} For example, one Guideline states that the inference could be made if the contract specifies a number of subcontractors, none of which are blacklisted, where the contractor knows that both the listed and omitted companies are capable.\textsuperscript{177} Second, it is not clear whether the contractor is under a duty to inquire about the boycotting country’s blacklist. One Guideline, referring to all companies, presumably including contractors, would allow parties to sign a contract requiring them to refrain from using certain subcontractors which the boycotting country alleges to be blacklisted for non-boycott reasons, but is silent on the contractor’s duty of

\textsuperscript{173} E.g., H-29A (bank confirming LOC which contains blacklist self-certification is a PCIB agreement); H-34 (self-certification by component supplier is a PCIB agreement); K-5 (certification in LOC that beneficiary’s board of directors has no boycotted country nationals is a PCIB agreement).
\textsuperscript{174} Guidelines H-13.
\textsuperscript{175} Guidelines H-15.
\textsuperscript{176} Guidelines H-13, H-15. \textit{Compare} Guidelines H-14 (contract which on its face indicates a pattern of exclusion of certain companies).
\textsuperscript{177} Guidelines H-14. \textit{But cf.} Guidelines J-10 (permits a contract in which the component supplier is named and where the boycotting country’s import laws prohibit the importation of goods manufactured by blacklisted companies). In J-10 no inference of a PCIB agreement will be made “solely from a provision . . . that goods or components must be produced by a specific company that does not in fact appear on the blacklist.”
inquiry into the basis for the country’s assertion.\textsuperscript{178} Silence creates some difficulty, such as when a contract contains clause (2) mentioned above, giving the contractor a right to disapprove of subcontractors submitted by the boycotting country. Can an inference of PCIB be made in cases where the contractor has right of disapproval, and where the country submits a list of firms with the explanation that omitted firms were blacklisted on a non-boycott basis? Does the contractor’s right of disapproval entail a duty to inquire into whether omitted companies are competent, or into the basis for the country’s claim that it used a non-boycott blacklist? There is tension between the rule holding the contractor liable for agreeing to a contract which specifies certain subcontractors and excludes others known to be capable, and the rule allowing the contractor to sign a contract requiring it to refrain from selecting certain subcontractors, in reliance on the country’s assurances. What must the contractor know, and what can it do?

4. Summary

Underlying all four areas discussed above is the problem that charges of PCIB must be related to an agreement. A flawed set of rules has resulted. There exist an omnipresent threat of an inferred agreement; an obscure relation back concept for LOCs; an inconsistent set of furnishing information provisions; and unclear rules regarding the selection of subcontractors. The objective of deterring boycott compliance by means of tax penalties has been undermined by the vague and confused Guidelines.

C. Antitrust Law

1. The Bechtel Decree

The Justice Department brought antitrust law to bear upon boycotts with its suit against Bechtel, filed prior to the enactment of the TRA and EAA.\textsuperscript{179} The suit charged that Bechtel unreasonably restrained foreign and interstate commerce in violation of the Sherman Act by its enforcement of the Arab boycott against its subcontractors.\textsuperscript{180} A consent decree was negotiated pursuant to the Antitrust Penalties and Procedures Act (APPA)\textsuperscript{181} and, after review by the district court, was filed as a final judg-

\textsuperscript{178} Guidelines J-1.
\textsuperscript{179} See note 23 supra.
\textsuperscript{180} See Complaint, supra note 23, at § VII.
ment, almost three years after the initiation of negotiations.\footnote{182}{See note 23 supra.} Bechtel, disagreeing with the court's interpretation of the decree, has since appealed the judgment filed by the court.\footnote{183}{See 248 ITEX A-1 (Mar. 13, 1979).}

The decree applies to Bechtel with respect to its role as a prime contractor on any major construction project and regulates the business relations between Bechtel, its clients, and subcontractors by means of a system of injunctions and exceptions. Three specific actions are covered: Bechtel's alleged refusal to deal, specific and unilateral selection by Bechtel's client, and solicitation by Bechtel of bids from subcontractors.

a. \textit{Refusals to deal}. Bechtel is enjoined from performing any provision of a contract which requires that it boycott or refuse to deal with any U.S. blacklisted subcontractor; from requiring any other person to boycott or refuse to deal with such subcontractor; and from performing any provision of a contract which requires that any other person boycott or refuse to deal with such subcontractor.\footnote{184}{U.S. v. Bechtel, Civ. No. C-76-99 (N.D. Cal., Jan. 16, 1976) at IV(A), (B), (C).} There are two exceptions to these injunctions. First, Bechtel may enter into a contract outside the U.S. which requires that it abide by the laws of the country in which the project is located.\footnote{185}{Id. at V(A).} This exception allows Bechtel to comply with Arab law regarding any contract provision other than one requiring it to boycott a U.S. blacklisted person. Second, Bechtel may boycott non-U.S. blacklisted persons.\footnote{186}{Id. at V(B).} The exceptions allow Bechtel to comply with local law in boycotting subcontractors, but not U.S. blacklisted subcontractors.\footnote{187}{See Justice Department RTC, supra note 34, at M-2.}

b. \textit{Specific and unilateral selection}. The decree also enjoins Bechtel from serving as an agent for a client in order to perform in the U.S. a provision of a contract which provides that the client boycott or refuse to deal with any U.S. blacklisted subcontractor.\footnote{188}{Id. at V(C).} However, Bechtel may purchase for its client goods or services produced in the U.S. by a subcontractor who has been specifically and unilaterally selected by the client, whether or not the selection was boycott based.\footnote{189}{See U.S. v. Bechtel, Civ. No. C-76-99 (N.D. Cal., Jan. 16, 1976) at IV(E).} Similarly, where the client has independently purchased the goods and ser-
vices from subcontractors, whether or not on a boycott basis, Bechtel may work on the project. On the other hand, its work may not include inspecting a subcontractor with the U.S. to determine its blacklist status.\textsuperscript{190} Thus Bechtel is prohibited from serving as an agent of its client when the client boycotts U.S. blacklisted subcontractors, but is permitted to comply with any specific and unilateral selection of subcontractors by the client, even if the selection is boycott based.

c. \textit{Solicitation of bids from subcontractors}. The narrow specific and unilateral selection exception requires a precise definition of the permissible roles of Bechtel and its client in soliciting bids from subcontractors. Bechtel is enjoined from failing to recommend any person because it is a U.S. blacklisted person, from excluding any person from a list of possible subcontractors because it is a U.S. blacklisted person, and from excluding any person from the list of those from whom bids are solicited because it is a U.S. blacklisted person.\textsuperscript{191} There is also an injunction against selecting, recommending, or soliciting bids from subcontractors from a list provided by the client if Bechtel knows or has reason to believe that any person was excluded from the list because it was a U.S. blacklisted person.\textsuperscript{192} Finally, there are injunctions against maintaining a blacklist in the U.S. and against using a blacklist outside the U.S. for any specifically prohibited purpose.\textsuperscript{193}

There is an exception which allows Bechtel to use competitive bidding by issuing invitations to subcontractors, including, but not limited to, those proposed by the client. Bechtel may also recommend subcontractors to the client, provided the client makes an independent selection. However, Bechtel's recommendation may not be based on the blacklist status of subcontractors.\textsuperscript{194}

The effect of the decree is to prevent Bechtel from directly boycotting U.S. blacklisted subcontractors. Bechtel may only boycott non-U.S. subcontractors. It may not serve as its client's agent in selecting subcontractors where the client is using a blacklist, but it may comply with any boycott based selection of the client which is specific and unilateral. Bechtel may also provide the clients with normal pre-award services: selecting subcontractors, recommending subcontractors, and soliciting bids from

\textsuperscript{190} Id. at V(D).
\textsuperscript{191} Id. at IV(F).
\textsuperscript{192} Id. at IV(G).
\textsuperscript{193} Id. at IV(H).
\textsuperscript{194} Id. at V(E).
subcontractors, as long as it does not use a blacklist of U.S. subcontractors.

2. **Bechtel's Appeal**

During the decree review and comment period, allowed under the APPA, a disagreement between Bechtel and the Justice Department arose over the decree's meaning. This lead Bechtel to oppose its entry as final judgment.\(^{195}\) The disagreement involved three issues: (1) whether the consent decree represented the Department's policy on foreign boycotts; (2) whether the Department would restrict its enforcement to exclude actions taken within foreign countries; and (3) what kind of modification of the decree Bechtel could obtain.\(^{196}\) Bechtel charged that the Justice Department changed its position on these issues between the signing and entry of the decree.\(^{197}\) It claimed with respect to issue (1) that it had bargained for and obtained the Department's agreement that the decree would serve as the Departmental policy,\(^{198}\) only to have an official later say that the case was *sui generis* and that the Department was still formulating its policy.\(^{199}\) With respect to issue (2) Bechtel pointed out that Justice had stated in its Competitive Impact Statement (CIS) that Bechtel was prevented from boycott enforcement in the U.S. but not in an Arab country,\(^{200}\) then later, in its Response to Comments (RTC), stated that such territorial limitation was premised on three factors related to foreign sovereign compulsion.\(^{201}\) Regarding issue (3), Bechtel charged that Section VI of the decree gave it the right to seek modification of the decree in order to conform it to the unilateral and specific selection exception of the EAA.\(^{202}\) This would allow Bechtel, if a bona fide resident of an Arab country, to make a boycott based selection of U.S. subcontractors.\(^{203}\) Bechtel said that the Justice Department originally assented to that interpretation, but subsequently interpreted the section to mean that any modification must nevertheless be consistent with antitrust law.\(^{204}\)


\(^{197}\) *Id.*

\(^{198}\) *Id.*

\(^{199}\) See note 33 *supra*.


\(^{201}\) Justice Department, RTC, *supra* note 34, at M-2.

\(^{202}\) See Memorandum of Decision, note 27 *supra*, at “Objections to Entry of Proposed Consent Judgment.”

\(^{203}\) 15 C.F.R. § 389.3(c).

\(^{204}\) See Justice Dept., RTC, note 34, *supra* at M-3.
The District Court, in its Memorandum of Decision entering the decree, upheld the Department's interpretation of the decree as issue (3) and implicitly rejected Bechtel's claims regarding issues (1) and (2).  

Bechtel's claim concerning issue (2), that the Department changed its position regarding the territorial limitations of antitrust law is probably unwarranted since the qualifying factors which the Justice Department subsequently referred to were noted in its Competitive Impact Statement. This formal expression should prevail over any informal statements made by Department officials during negotiations.  

Bechtel's claims with respect to issue (1), whether the decree represents the Department’s policy, and issue (3), what kind of modification Bechtel may obtain, can be considered together. Identification of the Department’s policy may shed light on the extent to which it is willing to conform the decree to the EAA.

3. *The Justice Department, Antitrust Law and the Export Administration Amendments*

The parallel development of the policies of the EAA and the Justice Department indicates that they should be consistent, particularly on the issue of unilateral and specific selection. Although the Bechtel case was filed prior to passage of the EAA, the Department refrained from moving for entry of final judgment until after enactment of the EAA and its implementation by Commerce. The reason given was that the Justice Department wanted to review the decree and obtain public comments "from the widest possible perspective." This indicates that the Justice Department may have been influenced by the debate over the EAA in determining its own antitrust policy regarding international boycotts. The Bechtel suit influenced the EAA as well: it has been asserted that the Bechtel decree was the source of the EAA's unilateral and specific selection concept. Furthermore, the decree was often discussed in the legislative history of the EAA. It was repeatedly stated that antitrust law should complement the EAA

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205 See Memorandum of Decision, note 27 supra, at "Effect of Enactment of EAA of 1977."

206 Bechtel's claim relates to Justice's alleged change of position regarding territoriality. There remains the important question of what Justice's position should be.

207 Justice Department, RTC supra note 34, at M-1.

but was of itself an inadequate means of regulating boycott compliance.\textsuperscript{209}

Despite this legislative intent to have complementary laws in the antiboycott area, the Justice Department, in the Response to Comments, emphasized its independence.\textsuperscript{210} It pointed out that the EAA expressly refrained from superseding or limiting the operation of the antitrust laws,\textsuperscript{211} and said that the EAA and the Sherman Act were "independent statutes which may apply to the same conduct."\textsuperscript{212} The Department went on to state that "in several significant respects the [EAA] and the regulations issued thereunder appear to permit conduct which may, notwithstanding such promulgation, raise antitrust problems."\textsuperscript{213} The RTC appears to reject any idea that the two regulatory schemes are consistent. In fact, the RTC, taken as a whole, seems to reject the idea that the two schemes ought to be consistent.

But this asserted independence is obscured by other Department statements in the RTC which suggest that the EAA serves as a standard for antitrust policy. The Department cited the EAA as an expression of congressional policy which, along with antitrust law, would be inconsistent with a decree which failed to apply the principle of comity.\textsuperscript{214} In response to the charge that the decree allowed Bechtel to implement the boycott, the Department said that allowing Bechtel to provide pre-award services was permitted by the decree as well as by the EAA and EAR.\textsuperscript{215} But the Department cannot have it both ways: if the statutes are independent, then congressional policy pertaining to one does not justify agency action taken pursuant to the other. The Justice Department should either provide independent justification for its enforcement policy and furnish Guidelines for compliance with that policy, or conform its enforcement to the pertinent objectives of the EAA.

IV. INCONSISTENCIES AMONG THE LAWS

This section notes the major inconsistencies among the three antiboycott laws. It addresses a different sort of problem for businesses than that discussed in Section III. The concern here is

\textsuperscript{209} See note 25 supra.
\textsuperscript{210} For a more extensive discussion of agency reflex behavior in attempting to defend and extend its bureaucratic turf, see Note, Interagency Conflict: A Model for Analysis, at 241 supra.
\textsuperscript{211} Justice Department, RTC, supra note 34, at M-3, n. 11.
\textsuperscript{212} Id. at M-1.
\textsuperscript{213} Id. at M-3, n. 11.
\textsuperscript{214} Id. at M-1.
\textsuperscript{215} Id. at M-2, n. 5.
compliance, not merely with a single set of rules, but with three distinct and often contradictory sets of rules, each enforced by a different agency. For the sake of simplicity, it will be assumed that the penalties imposed by each law have equal weight and hence equal deterrent effect. The direct result of the convergence of these inconsistent laws is that, in any given situation, a company's activity is limited to what is permitted by the most restrictive law.

A. Jurisdiction

1. EAR

The EAR have a clear definition of jurisdiction. In order to come within the EAR the potential defendant must be a "U.S. person," and the particular transaction in question must be "in U.S. commerce." The "U.S. person" category includes all U.S. residents and all controlled in fact foreign subsidiaries or affiliates. "U.S. commerce" covers all activities of controlled in fact foreign entities which are directed by a domestic concern, or involve acquisitions from the domestic concern by the controlled in fact foreign affiliate to fill an order for the boycotting country.

2. Antitrust

U.S. antitrust laws apply to all persons within U.S. personal and subject matter jurisdiction. There is no U.S. person test as such, but antitrust law can probably reach most controlled in fact foreign entities through personal jurisdiction. The Bechtel decree, for example, applies to all of Bechtel's subsidiaries without regard to residence or control in fact. Antitrust subject matter jurisdiction is also broadly defined by a U.S. foreign and interstate commerce test, but it is unclear to what extent this test parallels the EAR "U.S. commerce" test. The latter looks more to the import and export of goods and services, as directed by a domestic concern, while the former looks to the impact of a restraint of trade upon U.S. foreign and interstate commerce. It appears that antitrust law can reach farther than the EAR, but considerations of comity may restrain enforcement of the law.

See notes 47-49 and accompanying text supra.

See notes 50-52 and text supra.


L. SULLIVAN, supra note 24, at 715.

See notes 49-51 and accompanying text supra.

See Justice Department, Antitrust Guide, supra note 31, at 6-7. See also Kestenbaum, supra note 3, at 806.
3. **TRA**

The TRA and the Guidelines have a broader and more complex definition of jurisdiction than the other two laws. Tax penalties apply wherever there are tax benefits to be lost. Foreign tax credit allowable under sections 901, 902, and 960 can be reduced;\(^{222}\) there can be an additional category of Subpart F income, as determined under section 952(a)(3);\(^{223}\) and there can be an addition of the amount of deemed distribution to shareholders under I.R.C. section 995(b)(1)(F)(ii).\(^{224}\) Persons who can claim these tax benefits include domestic individual shareholders, domestic corporations, foreign individual shareholders, and foreign corporations. Under the TRA, shareholders, both domestic and foreign, in corporations which are U.S. taxpayers, can lose their tax benefits if their corporation engages in PCIB. This differs from the EAR, which do not impose penalties upon domestic or foreign individual shareholders.\(^{225}\) In addition, U.S. taxpayers who do not fall within the U.S. person test of the EAR may still lose their U.S. tax benefits. One writer developed the following example of the TRA's broad jurisdiction:

[A] presumption (of PCIB) will arise from participation in or cooperation with a boycott by a foreign corporation which is owned to the extent of 50% by a foreign trust, the beneficiary of which is a non-resident alien individual who derives foreign source income effectively connected with his conduct of a trade or business in the United States, in connection with which income the individual claims a "direct" § 901 foreign tax credit.\(^{226}\)

The writer inserts the caveat that in such a situation the taxpayer could probably rebut the presumption of PCIB by showing that the U.S. operation was separate and identifiable from that which practiced PCIB. Nevertheless, the example demonstrates a way in which the tax law can reach beyond the EAR and antitrust law.

The tax law is also broader in scope due to: (1) the definitions of "controlled groups"\(^{227}\) and "related persons;"\(^{228}\) and (2) the TRA's presumption that PCIB by any member of a controlled group or by a related person constitutes PCIB by all other members or

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\(^{222}\) I.R.C. §§ 999(c)(12), 908(a).


\(^{224}\) I.R.C. § 995(b)(3).

\(^{225}\) See 15 C.F.R. § 369.1(b), Examples of "United States Persons" (iv) (U.S. individuals who are shareholders are not "domestic concerns"); and (vi) (foreign national resident in foreign country is not a U.S. person because not a U.S. resident or national).

\(^{226}\) See BNA Portfolio, supra note 2, at A-17. See note 290 infra.

\(^{227}\) See note 149 supra.

\(^{228}\) See note 150 supra.
related persons. Since the controlled group is defined in terms of 50% or more ownership (whereas the EAR defines controlled in fact corporations in terms of 50% or more ownership in certain circumstances and 25% or more in other circumstances) it will often happen that a corporation subject to EAR prohibitions will also be subject to tax penalties. However, tax penalties will apply to more corporations as a result of one instance of PCIB than will EAR sanctions, due to the presumptions of PCIB for members of controlled groups and related persons.

B. Prohibitions

The laws take quite different approaches to prohibitions. Whereas the EAR prohibit activities which are taken with intent to comply with or further the boycott, regardless of the existence of an agreement, the Guidelines penalize a U.S. taxpayer who agrees to PCIB. The authority of the Treasury Department to infer an implied agreement from the over-all course of conduct increases the scope of the prohibition but the activity still must be related to an agreement. The Bechtel decree applies to agreements, as well as contracts, arrangements, and understandings, but prohibits only those which are anti-competitive. Consequently, one law looks mainly to activities, another to agreements, and the third to contracts, agreements, arrangements, and understandings made in the course of a combination or conspiracy.

1. Refusal to do Business

Some activities which are explicitly prohibited by the EAR will not trigger tax penalties (unless the activities are part of a course of conduct from which an implied agreement can be inferred). For example, if a U.S. company chooses suppliers or insurers only from among those who do not do business in or with the boycotted country, but the contract with the country does not specify this selection method, no tax penalties will be imposed since there is no PCIB agreement. The EAR prohibit this method of selection.

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229 I.R.C. §§ 999(b)(1), 999(e).
230 The loss of tax benefits can of course be mitigated. See notes 137-139 and accompanying text supra.
231 See notes 53-56 and accompanying text supra.
232 See notes 153-158 and accompanying text supra.
233 See notes 159-163 and accompanying text supra.
234 U.S. v. Bechtel (Civ. No. C-76-99 (N.D. Cal., Jan. 16, 1976) at Section IV(A), (C), (D), (E).
235 Guidelines H-14, H-15. The Treasury Department will consider this transaction in the context of the overall course of conduct, but as an isolated act it is insufficient to trigger tax sanctions.
since it is a refusal to do business. The Bechtel decree provides a narrower prohibition than the EAR: the selection method noted above would not be a violation of antitrust law unless the U.S. company refuses to deal with suppliers because they are blacklisted U.S. persons.

Another example concerns tenders. If a U.S. company tenders a bid on a contract which requires boycott compliance, acceptance of the bid by the boycotting country results in an agreement to refuse to do business under the EAR. The Guidelines will only find a PCIB agreement upon the signing of the contract: tendering a bid which is accepted does not itself constitute an agreement. As in the case of selection of suppliers, tendering bids can run afoul of the EAR without incurring tax liability.

In other situations the Guidelines are stricter than the EAR. The Guidelines impose tax penalties on U.S. taxpayers who sign a contract requiring them to comply with the boycotting country's laws. On the other hand, the Guidelines permit signing a contract which provides that the laws of the boycotting country will apply. The rationale is that the "comply clause" is an express PCIB agreement while the "will apply clause" is not, since it normally relates to issues of contract interpretation and dispute resolution. The EAR do not make such a distinction between "comply" and "will apply." Instead they distinguish between contracts which require compliance with boycotting country laws generally, and contracts which require compliance "with the laws of the boycotting country, including boycott laws." The former are permissible but the latter are not since the latter constitute agreements to refuse to do business.

2. Furnishing Information.

The EAR furnishing information rules are based on the assumption that compliance by firms with information requirements of boycotting countries is an essential component of the boycott. The EAR seek to carefully regulate what information may be supplied to boycotting countries. The Guidelines, on the other hand, generally permit the furnishing of information, on the grounds that this is not a PCIB agreement. The Bechtel decree, in further

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236 15 C.F.R. § 369.2(a)(3).
237 See notes 184-187 and accompanying text supra.
241 Guidelines H-3.
242 15 C.F.R. § 369.2(a), Agreements to Refuse to Do Business, Examples (iv) and (v).
contrast, does not prohibit Bechtel from furnishing information about itself or about the blacklist status of past suppliers and subcontractors. However, the decree does enjoin Bechtel from making recommendations of subcontractors which are based on their blacklist status, soliciting bids on a blacklist basis, and selecting subcontractors by means of a blacklist. These injunctions probably serve effectively as prohibitions against furnishing information concerning the blacklist status of subcontractors to boycotting country parties.

Given the fact that the EAR and Guidelines present different views on furnishing information, inconsistencies between the sets of rules are likely to arise. An obvious inconsistency is that the EAR prohibit the furnishing of negative certifications but the Guidelines permit them. Another inconsistency is that the EAR permit self-certifications while the Guidelines prohibit them. The reason for the latter inconsistency may be that the two sets of rules are developing in opposite directions: the EAR self-certification rule was adopted as a concession to business practicality, whereas the informal Guideline was adopted to "tighten up" the Treasury rules on letters of credit.

C. Letters of Credit

Letters of credit are explicitly regulated by the EAR and Guidelines but not antitrust law (though regulation by the latter cannot be entirely ruled out). The EAR and Guidelines both apply to the same range of LOC activities: opening, honoring, paying, confirming, negotiating, and otherwise implementing LOCs. Both sets of rules permit a bank to advise its beneficiary of receipt of a prohibited LOC and of its terms. The duties of banks are extended by each set of rules to matters beyond the face of a LOC, but these duties may vary.

The EAR employ rebuttable presumptions to determine the
residence of beneficiaries and to determine whether the transaction which underlies the LOC is within U.S. commerce. For example, a bank may rebut the presumption that a certain LOC involves a U.S. beneficiary and that a transaction is within U.S. commerce by a showing of facts, including those not apparent on the face of the LOC, which could reasonably lead a bank to conclude that the beneficiary is not a U.S. person or that the transaction is not within U.S. commerce. The EAR presumptions are intended to aid a bank in determining which LOCs are covered by the law, but this requires the bank to look beyond the face of the LOC.

The Guidelines have no commerce test for determining jurisdiction over LOCs, but do have a U.S. person test, albeit a somewhat different one than that of the EAR. Guidelines H-29A prohibits implementation of LOCs which require self-certification of blacklist status, except in certain situations. If the beneficiary is neither a boycotted country person nor a U.S. person, and if the bank has no reason to know that it could not obtain the certification because of the nationality, race, or religion of the beneficiary's ownership, management, or directors, then the bank may implement the LOC. H-29A distinguishes between U.S. and non-U.S. persons as beneficiaries, and contains a reasonableness standard for knowledge that certifications can not be obtained. It thus explains in a crude fashion the duty of a bank to look beyond the face of the LOC to determine some facts concerning the beneficiary.

The two sets of regulations also differ in their treatment of a bank's knowledge of the beneficiary's intent. The EAR prohibit the implementation of a LOC which is legal on its face but where a bank knows that the beneficiary has agreed to supply prohibited information. A bank is also prohibited by the EAR from requiring a negative certification where the LOC is legal on its face but the bank acts on what it knows the boycotting country purchaser customarily requires. The Guidelines, in contrast, merely state that when a bank has reason to know that a person was inserted as the beneficiary in order to funnel payment to another, the LOC will be viewed as having the other person as beneficiary.

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253 15 C.F.R. § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (xvi).
254 15 C.F.R. § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (xv).
255 Guidelines H-29A.
general duty is imposed upon banks by the EAR with respect to implicit agreements made by their beneficiaries, while the Guidelines impose a duty only with respect to one type of implicit agreement.256

In addition to a broader knowledge standard for banks regarding the intent of their beneficiaries, the EAR also prohibit more types of LOCs than do the Guidelines. The EAR contain a general prohibition against the implementation of any LOC whose underlying transaction is also prohibited.257 The Guidelines only proscribe implementation of a LOC where it would result in refraining from doing business with a U.S. person.258 It is an open question whether under the Guidelines the inference of an implied agreement by the bank to engage in PCIB could be made whenever the transaction underlying the LOC constitutes PCIB.259 Specific rules are provided by the EAR on this point, but not by the Guidelines.

Another difference between the sets of rules concerns furnishing of information. The EAR prohibit the use of negative certification in LOCs.260 However, a bank may implement a LOC which contains a self-certification, if it has not insisted upon such certification.261 Although the Guidelines generally prohibit use of a negative certification in a LOC, the IRS Letter Ruling permitted one where the U.S. beneficiary had made a good faith effort to exclude it.262 The Guidelines also prohibit the use of self-certification in LOCs,263 contradicting the EAR.

4. Evasion

The evasion clause of the EAR has no specific counterpart in the Guidelines or in antitrust law. The Guidelines' inferred agreement and the antitrust concept of conspiracy serve much the same purpose, however. For the EAR and the Guidelines, the evasion clause and the inferred agreement expand the scope of express

256 Forthcoming Guidelines may contain rules in this area.
258 Guidelines H-29A, H-29B. H-29A involves self-certification and H-29B concerns negative certification. Although negative certifications are generally allowed, their use in LOCs is declared to be refraining from doing business.
259 See notes 164-167 and accompanying text supra. A recent IRS Letter Ruling dealt with a LOC, but did not address the issue of the implementing bank's PCIB, because the Ruling was directed solely toward the beneficiary.
260 15 C.F.R. § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (vi).
261 15 C.F.R. § 369.2(f), Prohibition Against Implementing Letters of Credit, Example (xiv).
262 Supra note 165. The IRS warned however that repeated failure to secure a permissible LOC would result in an inference of a PCIB agreement.
263 Guidelines H-29A. See also note 172 supra.
prohibitions without delineating in advance those activities which are specifically prohibited. Similarly, the vague concept of conspiracy enables the Justice Department to punish business conduct in a wide range of cases. As the Commerce, Treasury, and Justice Departments encounter novel situations, such as new boycotting country requirements and new business activities, they can respond with their flexible but unpredictable enforcement tools. The extent to which the Departments respond in concert will determine the extent of future legal inconsistencies.

One current inconsistency concerns risk-of-loss clauses. The EAR prohibit the use of these clauses if they are imposed on a supplier because of its blacklist status. If the clause was introduced after the effective date of the EAR it is presumed to be an evasion of the refusal to do business prohibition. The Guidelines, however, allow the use of a risk-of-loss clause without limitation, the rationale being that the inability of a blacklisted supplier to meet the conditions of a “delivered-in-country” clause is due to the boycotting country’s laws, not to any real agreement between the company which imposed the burden and the boycotting country. Nevertheless, an implicit agreement might be inferred by the Treasury Department.

Several activities which constitute evasion under the EAR are allowed under the Guidelines, the latter being more permissive regarding furnishing information. The EAR contain three examples of evasion involving the prohibited furnishing of information to a boycotting country through an agent in another country; these same actions are permitted under the Guidelines. Other EAR examples involve evasion by means of diversion of sales to a foreign subsidiary. This type of arrangement usually remains within the jurisdiction of the TRA, since the Guidelines do not employ a “U.S. commerce” test, and thus the prohibition of diversion turns on the existence of a PCIB agreement.

C. Exceptions to the Prohibitions

1. Import Requirements of the Boycotting Country

Both the EAR and the Guidelines recognize the legitimacy of a primary boycott, and permit a U.S. company to comply with the

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264 15 C.F.R. § 369.4(d).
265 Id.
266 Guidelines J-7.
267 15 C.F.R. § 369.4, Examples (iii), (v), (viii).
268 E.g., 15 C.F.R. § 369.4, Example (iv).
laws of a boycotting country with respect to the importation of goods from the boycotted country.\textsuperscript{269} The antitrust law also recognizes the legitimacy of primary boycotts by means of the principle of comity.\textsuperscript{270}

While the EAR provide exceptions for compliance with a boycotting country's laws regarding importation of both goods and services, the TRA excepts only the importation of goods.\textsuperscript{271} The EAR limit their exceptions by prohibiting the use of negative certificates of origin, but such certificates are permitted by the Guidelines. Nevertheless, EAR exceptions are broader than those provided by the Guidelines or the \textit{Bechtel} decree, since the EAR permit a U.S. company to comply with the import laws of the boycotting country respecting goods produced by nationals of the boycotted country, without regard for the residency of those nationals.\textsuperscript{272} Neither the TRA\textsuperscript{273} nor \textit{Bechtel}\textsuperscript{274} permit compliance with import laws with respect to goods produced by nationals of the boycotted country who are resident in the U.S.

2. Unilateral and Specific Selection

The EAR unilateral and specific selection exception permits a resident of a boycotting country, whether a U.S. person or a boycotting country national, to select suppliers of goods and services on a blacklist basis.\textsuperscript{275} The Guidelines also permit this activity,\textsuperscript{276} although an inference of an implied agreement can be made if other factors are present.\textsuperscript{277} \textit{Bechtel} indicates that antitrust law does not permit a U.S. contractor, even a bona fide resident of a boycotting country, to make a unilateral and specific selection which involves the use of a blacklist of U.S. subcontractors. This inconsistency is the source of much of the controversy surrounding the \textit{Bechtel} decree, as the defendant sought to have the EAA version of the unilateral and specific selection exception applied.

\textsuperscript{269} EAR § 15 C.F.R. § 369.3(a-1); IRC § 999(b)(4)(B).
\textsuperscript{270} See Justice Department Antitrust Guide, note 31 supra, at 6-7; Kestenbaum, note 3 supra, at 806.
\textsuperscript{271} Cf. EAR § 15 C.F.R. § 369.3(a-1); IRC § 999(b)(4)(B).
\textsuperscript{272} 15 C.F.R. § 369.3(a-1)(iii).
\textsuperscript{273} Cf. IRC §§ 999(b)(3)(A)(i); 999(b)(4)(B). The general prohibition against refusals to do business with boycotted country nationals is limited by the narrow exception pertaining to importation of goods made in the boycotted country, presumably even though such goods are produced by boycotted country nationals.
\textsuperscript{274} See Kestenbaum, note 3 supra, at 784.
\textsuperscript{275} 15 C.F.R. § 369.3(c).
\textsuperscript{276} Guidelines J-10.
\textsuperscript{277} Id. The statement that an inference will not be made "solely from the provision in a contract that goods or components must be produced by a specific company..." implies that the presence of additional factors could lead to an inference of PCIB. See, e.g., Guidelines H-3, H-17.
The decree is consistent with the EAR, however, in allowing a U.S. person to comply with unilateral and specific selections which are made by boycotting country nationals. A further consistency is that both the EAR and the *Bechtel* decree limit the exception by prohibiting U.S. companies from providing any services to boycotting country clients which involve the companies' use of a blacklist. Here the similarity ends. The EAR impose an additional limitation upon unilateral and specific selections: the selected goods must be identifiable as to their source of origin at the time of entry into the boycotting country, and the selected services must necessarily and customarily be performed in significant part within the boycotting country. *Bechtel* imposes no such limitation on selections by the defendant's clients.

The Bechtel decree binds only Bechtel, and the Justice Department has stated that it is *sui generis*. But the decree stands as the foremost indication of Justice Department policy on the antitrust implications of foreign boycotts, and thus effectively eliminates the use of the unilateral and specific selection exceptions provided by the EAR and the Guidelines. The decree strongly suggests that firms using this exception are exposed to antitrust liability which includes both Justice Department prosecution and private antitrust damages suits. This exposure is made more threatening by the fact that compliance by a U.S. person with a unilateral and specific selection made by another must be reported to the Commerce Department. Such reports are on file in the Freedom of Information Room of the Commerce Department. Thus the private antitrust plaintiff need only peruse the unilateral and specific selection compliance reports to discover possible antitrust violators.

### 3. Local Law Exception

The local law exception of the EAR is without parallel in either the Guidelines or the antitrust decree. However, the decree is probably consistent with the first part of the EAR exception allowing compliance with local law for activities exclusively within the boycotting country, since in those situations where the EAR test of

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15 C.F.R. § 369.3(c). For a discussion of *Bechtel* prohibitions, see notes 184-194 and accompanying text supra.

15 C.F.R. § 369.3(c)(1).

See Weadon, note 3 supra, at 4.

15 C.F.R. § 369.6, Example (v).

15 C.F.R. § 369.6(c).

15 C.F.R. § 369.3(f-1).
"exclusively within the country" is satisfied, the Justice Department would probably not have subject matter jurisdiction, due to the principle of comity and the fact that there would be little or no unreasonable impact on U.S. commerce.

The Guidelines, in contrast, impose tax penalties if there exists a contract which provides that the taxpayer will comply with the boycotting country's law. Even with respect to activities exclusively within the boycotting country, where the EAR would allow a U.S. company to discriminate against nationals of the boycotted country, the TRA penalizes any agreement to do so.274

The second part of the EAR local law exception permits a U.S. person who is a bona fide resident of the boycotting country to comply with local laws regarding importation of goods. To fall within this exception the bona fide resident's imports must meet the identifiability requirement of the unilateral and specific selection exception, and the goods must be for the U.S. person's own use.275 Any use of this second part of the local law exception would be prohibited by the antitrust decree if it involved selecting among U.S. subcontractors by means of a blacklist. The Guidelines would also penalize use of this part of the exception if there were an express or implied PCIB agreement.

D. Reporting Requirement

The EAR require any U.S. person to report any request to further or support the boycott,276 provided that the transaction is in U.S. commerce. Reports must be submitted to the Commerce Department quarterly, and must include copies of the request, plus a statement by the U.S. person indicating whether it intends to comply or has already complied with the request.277 A U.S. person may designate another individual to report requests on his behalf.278

Reporting is also required by the TRA; U.S. taxpayers must annually report all requests involving PCIB to the Internal Revenue Service.279 In addition to requests made to taxpayers, all U.S. persons must report all operations in or related to countries on the Treasury Secretary's boycotting country list, whether or not

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274 IRC § 999(b)(3)(A)(1).

275 See notes 102-03 and accompanying text supra.

276 See notes 116-122 and accompanying text supra.

277 Up to 75 requests can be reported on one Multiple Transaction Form.

278 15 C.F.R. § 369.6(b)(2).

279 IRC § 999(a)(2).
those persons have the tax benefits in question. Both reporting requirements apply to all members of a controlled group and to all related persons, even though only one member engages in the operations in question. However, arrangements may be made for one person to report on behalf of all members of its controlled group or for one related person to report on behalf of the others. Both types of reports may be made on IRS Form 5713, which requires information about operations and about the type of PCIB request which has been received or agreed to. Aside from the inconsistent prohibitions and the different jurisdictions of the two sets of rules, the EAR and IRS reports require submission of similar information. Although not an inconsistency, this results in duplication of work for businesses.

V. IMPACT ON BUSINESS

A. Measuring the Impact

Recent Commerce Department statistics show that U.S. exports to Arab countries have increased since the passage of the anti-boycott laws. Commerce officials cite these statistics as evidence that, although some business has been lost in particular instances, in general the Commerce Department has been "successful in fulfilling the antiboycott goals of Congress while minimizing the impact on U.S. exports." This conclusion is unwarranted: the statistics show only that the negative impact of the laws has not been so great as to cause a diminution in overall exports; they do not prove that there has been a minimum impact. A more accurate analysis would examine the particular areas of trade which are most likely to be affected by the laws. Such an analysis requires several distinctions to be drawn.

The statistics, for example, do not distinguish between different

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290 See note 132 and accompanying text supra.

291 Guidelines A-3. But see Guidelines A-4: each U.S. shareholder of a foreign corporation must report the corporation's operations unless a consolidated return is filed which includes all U.S. shareholders.


293 Id. For a similar conclusion, see American Jewish Committee, The Impact of Anti-Boycott Laws on U.S. Mideast Trade (May 1979) (unpublished study on file in offices of GA. J. INT'L & COMP. L.) The study cites increasing U.S. exports to the Mideast, as well as increasing U.S. market share. Numerous factors contributing to U.S. export problems are discussed, but the study never directly addresses the impact of the U.S. antiboycott laws; it only mentions some modifications made in Arab country laws.
types of businesses. Specific data are needed to determine whether those exporters which are subject to more rigorous Arab boycott demands are more adversely affected than firms for which the Arabs are likely to waive boycott compliance. Arab buyers are more willing to waive boycott requirements when purchasing essential or high technology items such as computers, satellite communication systems and medicines. They are less willing to waive boycott requirements when purchasing less essential goods such as small electric motors, brake shoes and zippers, since they can obtain these from foreign competitors who are willing and able to comply with the boycott. The Commerce Department statistics also fail to distinguish between military and non-military goods: it is difficult to believe that Saudi Arabia rigorously enforced boycott requirements in its purchase of F-15s, although the requirements may be more aggressively enforced regarding less sophisticated military related items. The foregoing distinctions should be considered in any analysis of the impact of the antiboycott laws. Despite the fact that there has been an overall increase in exports, the distinctions reveal the domestic barriers to exports sought to be eliminated by a national export policy.

This section analyzes the impact of antiboycott laws in light of these distinctions. The information contained herein was derived from telephone conversations and personal interviews with businessmen, private attorneys, government officials, and lobbyists. Various types of businesses were examined: manufacturers, exporters, freight forwarders, and banks. Also, firms of different sizes were studied, ranging from Fortune 500 firms to companies employing less than fifty people. The section is organized into two broad categories: compliance costs and impacts which are disproportionately felt by some firms.

B. Compliance Costs

The overlapping prohibitions and exceptions of the three laws

294 See Friedman, note 1 supra, at 448-49, listing other industries accorded preferential treatment under the Arab League's General Principles for the Boycott of Israel.

295 An attorney who represents U.S. exporters reported that foreign competitors have used the EAA and TRA as a bargaining tool in contract negotiations with Mideast buyers, reminding their prospective purchasers that they are ready and willing to comply with all boycott laws.


297 The people contacted were for the most part very cooperative, and the authors wish to express their gratitude. These individuals insisted on the utmost confidentiality in order to avoid any publicity or blacklisting.
impose a high compliance cost on firms which do business in the Mideast. Compliance costs can be divided into four types: personnel cost, reporting cost, the cost of restructuring corporate decision making, and the cost of documenting compliance with the laws.

1. Personnel Cost

The most noticeable personnel cost is the need to retain specialized attorneys for each of the three laws. Few firms will employ the same counsel for the EAR, the Guidelines and antitrust. This presents significant management problems: in-house counsel well versed in the EAR may give certain advice to ensure compliance with that law, while contradictory advice may be offered by outside tax counsel.

Additional personnel costs involve the hiring and training of extra clerks to fill out forms to satisfy the reporting requirements. Training is often needed for contracts and shipping personnel. Firms have had to circulate information about the laws, organize training sessions, conduct seminars, and bring in legal specialists in order to inform their personnel. These are continuing costs: the boycotting countries occasionally modify their requests, thus necessitating further legal advice and additional training costs. Many firms have had to resort to quality control measures such as the use of penalties, auditing, and in some cases double-auditing, to ensure that clerical personnel are properly identifying boycott requests and filling out reports to the IRS and the Commerce Department.

2. Reporting Requirements

Despite the legislative mandate to minimize the cost of reporting, the Commerce Department uses the reporting requirement in part to deter certain permissible activities. Apparently this method works: many firms, as a matter of corporate policy, do not engage in any activity which is reportable, even if the activity is permitted by the EAR. The Treasury Guidelines also re-
quire the reporting of activities which are permitted, apparently in order to monitor PCIB and to survey business conducted in the Mideast. These broad reporting requirements are used by the Departments in their pursuit of various enforcement objectives, some of which are not clearly related to the statutory mandate, with little regard for the cost of reporting imposed on businesses.

Considerable duplication results from the reporting requirements. Under the EAR, for example, if an exporter is the beneficiary of a LOC which requires a negative certificate of origin, not only must the beneficiary report, but a freight forwarder who has assumed the responsibility of assuring that all necessary documentation accompany the shipment must report, and the bank which is asked to implement the LOC must report. Reporting under the Guidelines can also be complicated and duplicative. Complications arise from the technical rules pertaining to the reporting by members of controlled groups and by related persons, and from the rules applicable to the use of a single report for all shareholders of a corporation. Of course, if the detailed requirements for consolidating reports are not met, there can be considerable duplication.

The reporting requirements are designed in large measure as a policing mechanism which costs the agencies little but which is quite expensive for businesses. The broad range of reportable activities, together with the duplication of reports, imposes a high compliance cost upon firms without a clear justification in terms of the expected benefits, political and otherwise, of regulation. Indeed, the total cost of reporting for businesses over a period of time may exceed the value of deals lost due to inability to comply with the boycott.

3. Restructuring Corporate Decision Making

The antiboycott laws loom as a significant factor in the environment in which a firm dealing in the Mideast operates. The broad threat of legal liability forces management to devote substantial

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803 See Bricker, supra note 2, at 281.
804 15 C.F.R. § 369.6 Examples (xv) and (xx).
806 Guidelines A-4.
807 See generally J. Bennett and M. Johnson, The Political Economy of Federal Government Paperwork, 7 POLY REV. 27 (1979). The authors provide statistics concerning number of forms, responses, and manhours devoted to government reporting, and conclude that bureaucrats have strong incentives to shift the cost of paperwork on the private sector.
time to planning how to ensure compliance with the laws. This allocation of time usually involves consultation with attorneys and supervision of clerks and sales personnel. In addition, the laws require attorneys to intrude into situations where they are not usually required: a company may need an attorney to supervise the filing of Commerce and Treasury Department reports, to participate in letter of credit negotiations, or to supervise the production of internal memoranda to ensure that there is evidence of proper business reasons for engaging in certain activities and that there was no intent to further or support the boycott. As the activity in question approaches prohibited conduct, the need for attorneys increases sharply in these over-regulated situations.

A decision to reorganize marketing structure may also require legal counsel to ensure that the business will not be charged with evasion. Such a decision is complicated by the need for examining the planned structure from the standpoint of the TRA, since the firm should seek to ensure that it can rebut an IRS inference of an implied PCIB agreement. A firm might also seek to isolate as "separate and identifiable" those operations having a chance of violating tax law, in order to minimize possible tax losses. The corporate alteration is further complicated if the firm's activities involve substantial contracting with suppliers or subcontractors, as this increases the chance of violating antitrust law.

Furnishing information to a Middle East buyer is no longer a task which can be easily performed by low-level personnel. A decision will have to be made whether the information sought will further or support the boycott. Discerning the motives the buyer has for requesting the information requires insight into the method by which the boycott has been enforced by the Arab countries; fully one-third of the evasion examples relate to the furnishing information prohibition.808 Personnel who are unfamiliar with what information is normally sought from a company in its transactions with other countries cannot readily determine whether there is a proper business justification for furnishing the information.

4. Documentation of Compliance

The antiboycott laws implicitly encourage firms which are engaged in trade in the Middle East to document justification for certain decisions in order to be able to prove, in an informal or formal administrative proceeding or in a trial, that there was no "implied agreement," that there was no intent to further or support

808 15 C.F.R. § 369.4, Evasion, Examples (i), (iii), (v), (viii), (xvii), (xviii).
the boycott, and that there was no combination or conspiracy to boycott blacklisted U.S. firms. To invoke the unilateral and specific selection exception of the EAR, a company will have to document the bona fides of its agent's residency, and that the selection was made by that resident. The EAR warn that this type of transaction will be carefully scrutinized, which has led one writer to conclude that "refusal to impute the employees' action to their employer is likely to lead to the creation of formal records to document an artificial dichotomy between the corporation and its employees." If an Arab customer makes the unilateral and specific selection, the company must be able to prove to Commerce and Justice Department authorities that pre- and post-award services provided to the client in recommending, evaluating, or soliciting subcontractors did not include the use of a blacklist of U.S. persons. In addition, firms involved in unilateral and specific selections must prepare and retain documents for possible use as evidence in defending against private antitrust damage actions.

To avoid a charge of evasion, a company will have to document that any reorganization of marketing structure was justified by reasons unrelated to the boycott. Following the evasion provision is an illustrative example which permits a foreign subsidiary to begin dealing in the Mideast after the domestic parent ceases operations because of the EAR. This would require documentation that the subsidiary's decision was taken independently of, and subsequent to, the domestic concern's decision. The firm's documents should also be able to meet the arguably higher burden of proof required to rebut an inference by the IRS of an implied PCIB agreement.

C. Disproportionate Impact

Not all firms trading in the Mideast are affected in the same way by the antiboycott laws. The cost of compliance, the difficulties in altering operations, and the restrictions on business activities which are imposed by the substantive provisions of the laws are all effects which are felt by firms in different degrees.

1. Impact on Large and Small Firms

The disproportionate impact on small companies results from both the compliance costs and the substantive provisions. Small

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809 15 C.F.R. § 369.3(f-2), Compliance By A Bona Fide Resident, Example (ii).
810 Friedman, supra note 1, at 521.
811 15 C.F.R. § 369.4 Example (vii).
exporters do not have in-house counsel who can advise them how to comply with the various laws. As a result, they must seek outside counsel who are competent in this area. A single boycott compliance request to a large multinational corporation may need no more legal analysis than a request to a small exporter, but the legal fee will bear more heavily on the smaller company. The cost of training personnel, documenting legitimate activities, and negotiating repugnant language out of a contract will all be proportionately more burdensome to the small exporter.

There is a failure in the laws to compensate for problems caused smaller firms by selective boycott enforcement by Arab customers. As noted earlier, the enforcement policies of the Arab customers discriminate against exporters who do not offer high technology or essential goods, and often small firms cannot offer such desired items. In addition, a small exporter who refuses to comply with the demands of the boycotting country will be at a competitive disadvantage to foreign companies, a critical fact since there may be more foreign competition for lower technology sales. Furthermore, Arab countries are occasionally willing to remove a company from the blacklist if it is willing to establish facilities in the boycotting country equal to its facilities in Israel: a small exporter who has even a small outlay in Israel may not be able to invest an equivalent amount of capital in the boycotting country.112

The exceptions to the EAR are tailored to meet the needs of large multinational corporations, but ill-suited to the operations of smaller companies. Requirements that the company have a bona fide resident in the boycotting country to invoke the local law exception, or the unilateral and specific selection exception, will preclude many companies from utilizing the exception to diminish the prohibitions' impact. Not only will the cost be prohibitive, but if there is no legitimate business reason for establishing bona fide residence other than to utilize the exception, the exporter may be guilty of evasion.113 Whereas a large business will have legitimate business reasons for establishing a local office in the Mideast, a small exporter could have difficulty justifying the creation and use of a branch for the purpose of making relatively few transactions.

112 The efforts of Coca-Cola to take advantage of this Arab boycott provision involved developing 15,000 acres of citrus groves in Saudi Arabia and Egypt. Wall Street Journal, Nov. 4, 1977, at 14, col. 1.

113 15 C.F.R. § 369.4(e), Example (vi).
An additional and greater threat to the small firm could be posed by the evasion clause. A large exporter can divert manufacturing functions to a foreign subsidiary if there is some business justification other than avoiding the prohibitions of the EAR. A small exporter will not have a subsidiary to which it may divert its product, and even if there were a foreign entity to perform this function, there might be no legitimate reason which the exporter could establish to justify the transaction.

In analyzing the tax sanctions, many large firms may decide that the loss of certain tax benefits does not outweigh the potential profit of a particular transaction. This will be especially true if the penalty is triggered by an action which establishes the firm on the boycotting country's whitelist. The loss of the tax benefits on a single transaction will be minimal in light of the opportunities gained. A small firm, on the other hand, will not have such extensive opportunities to offset the loss of tax benefits on a particular operation.

2. Banks

Due to the special treatment of LOCs under the EAR and the Guidelines, banks have been affected in a unique way. The legislative history of the EAA strongly indicates that Congress intended for LOC rules to have a minimal negative effect upon banks. The Guidelines also address the particular operations of banks; a special rule is provided which allows banks to minimize tax losses by separating LOC operations from other banking operations.

Banks have compliance costs as their principal problem. These costs are borne primarily by the largest U.S. banks because they have the largest volume of LOC business. Small and medium size banks not only receive fewer LOCs than the larger banks, but also

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... it should be observed that the loss of benefits mandated by the tax antiboycott provisions may not be determinative (sic) for a contractor . . . . Contractors do not ordinarily utilize DISC; most Arab countries do not tax profits of contractors; and the benefits of deferral can be obtained, at least in part, by reporting income for tax purposes on the completed contract method. Accordingly, when a contractor is able to comply with EAA, but [not] the tax anti-boycott provisions, it may make the business decision to accept the loss of tax benefits.


83 Guidelines D-3(f). *See also* Guidelines D-4.
receive disproportionately fewer illegal LOCs since the prohibited language has been negotiated out by the large banks before the LOCs are transferred to the smaller ones. Unfortunately, smaller banks must still employ counsel to interpret antiboycott laws, and this cost may not be in proportion to the revenue from Mideast LOC business or to the risk of legal liability.

Some major banks report that a substantial part of their compliance cost is attributable to the necessity of controlling foreign branch operations. This can involve training personnel and presenting lectures and seminars to divisions which are involved in international business and which provide services for multinational corporations. In addition, large banks experience the same management problems as do manufacturers and exporters, with regard to reporting and checking that reportable requests are not overlooked. Banks on occasion must have attorneys participate in business transactions where they are not usually required. One bank found it necessary to have its in-house counsel sit in on letter of credit negotiations where the beneficiary was a valued customer and there was some reason to believe that the Arab customer would require a negative certification.

Although the EAR and Guidelines are inconsistent with respect to a bank's duty to look beyond the face of the LOC and its accompanying documents, this usually does not cause significant practical problems, for the rules do not correspond with the business reality of LOC operations anyway. The EAR require banks to refuse to implement LOCs where there is reason to believe that the beneficiary has implicitly agreed to provide prohibited information, and the Guidelines require banks to insert the proper person as beneficiary in order to prevent evasion of the prohibitions. These situations rarely arise: one counsel for a major bank described them as naive, since banks typically look only to the LOC and accompanying documents, and consequently have no reason to know of any underlying circumstances.

Banks appear to be coping well with the antiboycott laws due to the fact that LOC operations are in general narrowly defined. The EAR and the Guidelines are relatively easy to comply with, but this situation could change with the advent of new LOC Guidelines. The impact of the antiboycott laws upon banks should nevertheless be carefully monitored because LOCs occupy a strategic place in the international business transaction. Exporters report that some banks are seeking to reduce compliance costs by adopting a new procedure of advising the receipt of LOCs but refusing to negotiate out any prohibited language, thereby
pushing the cost of negotiation onto the beneficiary. To the extent that major banks introduce such a practice, this will result in increased costs to the beneficiaries, as well as to the smaller banks to which LOCs will be transferred.

3. **Unique Situations**

U.S. companies which were doing business in the Mideast at the time the regulations were promulgated are favored by the antiboycott laws. The most obvious example is the inability of a currently blacklisted firm to have its name removed from the blacklist regardless of its present situation. The only way to be removed from the blacklist is to provide information to the boycotting country which, of course, is prohibited. In addition, numerous American firms were sent questionnaires by the Arab boycott office just prior to the effective date of the EAR, enabling them to curry favor by supplying soon to be prohibited information. It is ironic that those firms which supplied information and complied with other boycott requests in the past may not be significantly affected by the EAR, whereas those companies which refused to furnish information in the past or which were known to have conducted business with Israel may be precluded from exporting to a boycotting country. This disadvantage may well apply to firms which are not currently blacklisted but which have had no prior dealings in the Mideast. An Arab customer, rather than dealing with an unknown firm, may select only from among those firms whose blacklist status is known from prior dealings, or from records compiled in the Central Boycott Office.

VI. **Conclusions and Proposals**

This paper has traced the antiboycott laws from a clear theoretical objective to a confused array of rules. It was suggested at the outset: first, that the objective of an antiboycott law is to prohibit U.S. persons from complying with certain aspects of unsanctioned foreign boycotts, and second, that such a law should

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81 See Ludwig and Smith, note 1 supra, at 264.
82 Id. at 243. These firms complied with Section 3(5) of the Export Administration Act of 1969, which stated that the United States policy is to "encourage and request domestic concerns . . . to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any sovereign country against another country friendly to the United States."
be the product of three factors: the nature of the boycott; the nature of international trade; and the aspects of boycott compliance which are to be limited. Instead of developing a single law designed to achieve this objective, the government in less than two years developed three distinct laws, each having a different objective. In addition to inconsistencies and lack of clarity within each law, there are a number of major inconsistencies among the laws, which in a particular case may limit the scope of a firm’s activity to what is permitted by the most restrictive law, without regard for whether overall objectives are served. The laws also have a cumulative impact upon business which raises the cost of compliance and which affects different industries in different ways.

Four general conclusions can be drawn from the government’s responses to the Arab boycott. First, at the legislative level, no fundamental objective for an antiboycott law has been established, and consequently the regulatory schemes of the implementing agencies have not been harmonized with regard to a single objective. Second, at the administrative level, the agencies have paid insufficient attention to the regulations and enforcement activities of the other agencies. This agency tunnel vision, whether conscious or not, hinders efforts made within the executive branch to resolve legal inconsistencies. Third, the agencies have not properly attended to the differences among industries and among sizes of firms, and to the disproportionate impact upon industries and firms which results therefrom. Thus, many rules are not tailored to their intended task. Fourth, the agencies have failed to take advantage of the cooperation of various interest groups: compromises embodied in the EAA were the product of negotiations between Jewish groups and the Business Roundtable. Subsequently none of the agencies has actively sought to tap this same potential for reaching a consensus regarding enforcement. The lobbies have been left to residual methods of influence, such as trying to open and close loopholes, contributing to the development of inconsistencies among the rules.\footnote{The Business Roundtable and the Jewish lobbies were active \textit{amicus curae} throughout the \textit{Bechtel} case. The Jewish lobbies succeeded in getting the TRA enacted when the EAA failed in 1976. Then the Roundtable and the Jewish groups virtually wrote the EAA in 1977. The practical concessions to businesses made in the EAR led the Jewish groups to seek successively stricter Treasury Guidelines. Finally, the Jewish groups dropped their opposition to entry of the \textit{Bechtel} Final Judgment, thereby supporting the Justice Department’s overriding of the EAA’s unilateral and specific selection exception.} These conclusions regarding the government’s responses to the Arab boycott point to problems which should be addressed
in an attempt to improve the antiboycott laws.

Proposals for revamping the antiboycott laws under the rubric of a National Export Policy can be arranged along a continuum running from a minimum to a maximum of political effort.

A. Minimum Reform

The minimum effort would involve primarily the Executive Branch, and would require each department to modify its regulatory scheme to bring it in line with the others, as far as can be done consistent with its legislative mandate. This could be accomplished by means of a presidential order or by informal agreements among department heads. President Carter’s statement on a National Export Policy exemplifies this political effort.\(^{220}\) Consistent with President Carter’s general proposals, the Commerce Department, with its thorough implementation of a compromise statute, should be assigned primary jurisdiction for enforcing antiboycott law. The Commerce Department should then clarify certain rules, and eliminate the internal inconsistencies noted in Section III, above. An important change would be improvement in communicating Departmental interpretation of rules to businesses.\(^{221}\) The Treasury Department should be directed to harmonize its Guidelines with the EAR, particularly on such issues as its distinction between “apply” and “comply”, and its rule against self-certifications. A single reporting form for both Departments could also be developed. Finally, the Justice Department should be directed to promulgate, in the Antitrust Guide to International Operations, boycott rules which conform its position regarding unilateral and specific selections with that of the EAR. Success at this minimum level of political effort depends on the President’s effectiveness as the leader of the Executive Branch: a single coherent policy must be devised, and the agencies must cooperate.

\(^{220}\) See President Carter, Statement on National Export Policy, reprinted in 225 ITEX AA-1 (Sept. 26, 1978). President Carter identified four goals of the policy: (1) to provide increased assistance through Small Business Administration loans to small exporters and through export development programs; (2) to reduce domestic barriers to exports; (3) to reduce foreign barriers to U.S. exports; and (4) to secure a fairer international trading system for all exporters. To reduce domestic barriers he directed department heads to take into account the adverse effects their regulatory activities have on U.S. balance of trade, and placed the Secretary of Commerce Juanita Kreps in charge of coordinating interdepartment efforts to increase exports. Id. at AA-8.

\(^{221}\) See 43 Fed. Reg. 29,078 (1978). See also Ludwig and Smith, note 1 supra, at 266.
B. Medium Reform

The medium level of political effort requires some congressional action: as a first step, the TRA provisions regarding international boycotts could be repealed. The extent of the compromise necessary to achieve this depends to a large extent on congressional perception of the Commerce Department’s enforcement of the EAA. Both legislative and executive compromises could be made. Examples of the former are the expansion of Commerce Department jurisdiction under the EAA, in order to offset the loss of the broader TRA, or the elimination of the unilateral and specific selection exception of the EAA. Examples of the latter are the promulgation of stricter rules in the EAR, such as eliminating self-certifications or expanding the definition of “U.S. commerce.” The medium level of political effort depends to a large extent on the willingness of the business community to accept certain changes in the EAA and the EAR—something it is apparently unwilling to do.\textsuperscript{322}

C. Maximum Reform

Creation of a cabinet level International Trade Department would represent the maximum expenditure of political effort.\textsuperscript{323} The Department would, \textit{inter alia}, have exclusive jurisdiction over the antiboycott area. This alternative has appeal because it would force interest groups to address a single forum, rather than have them seek influence in different departments and congressional committees, with various degrees of success. The International Trade Department should develop methods of rule making which balance in a fair manner the pressure exerted by the lobbies. Such a Department could much more readily develop a comprehensive regulatory scheme. It could provide special rules for each industry and for different sizes of firms, and would be assigned the task of coordinating these rules in order to achieve a single stated antiboycott objective. The gains from this level of effort are high, but

\textsuperscript{322} See Miller, \textit{Antiboycott Law Gains Support}, N.Y. Times, Mar. 13, 1979 § D at 1, col. 1. The Roundtable and the Jewish groups have agreed to support an extension of the EAA without modification. The Roundtable rejected the possibility of making the EAA more restrictive in exchange for repeal of the TRA.

the extent of legislative political balancing required makes this avenue of reform unlikely for the near future.

Regardless of the amount of political effort to be exerted, adjusting the antiboycott laws to reflect the importance of export trade requires the development of a measure of consensus among the actors—congress, the agencies, and the Jewish and business lobbies—as to what should be both the means and the end of an antiboycott law.

Mark D. Menefee
Don Samuel