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Policy Conflicts in Foreign Trade and Investments: The Anti-Boycott Regulations: Remarks

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some of the more fundamental aspects of the question. We had avoided the fact that what governments were willing to do for international policy reasons were not necessarily acceptable for private commercial institutions whose motivations were profit. Nor would we expect private institutions to be worried about public purposes in the sense that governments worry about them. Today's discussion, in other words, could be no more than a prelude for a much more in-depth discussion of how we were to improve international trade so that countries could earn enough to be able to repay the debts which had accrued over the years. Aid measures were and had always been stopgap measures. Private investment had its pro and con side. Professor West, whose views he shared, has given a picture of what he thought is the future of raw materials investments and of manufacturing investments. Today the discussion has been only a small bit of a complex, related problem, and in a sense the discussion today really brought us to the beginning of the discussion, not to the end of it.

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Reporter

POLICY CONFLICTS IN FOREIGN TRADE AND INVESTMENTS: THE ANTIBOYCOTT REGULATIONS

The roundtable convened at 2:30 p.m., April 27, 1978, Thomas S. James** presiding. The MODERATOR introduced the topic.

At the Practising Law Institute boycott seminar in New York in March, Stanley Marcuss opened with the remark that he had been asked to avoid all philosophies and to get down to the "nuts and bolts." Our objective is the contrary: to forego a "how to do it" clinic and focus on the policy and broader legal issues raised by the boycott legislation. Before our panelists get into a policy discussion, I will briefly sketch the Arab boycott and the U.S. legal response to provide some background.

The Arab economic boycott of Israel springs from the creation of Israel and the suppression, in the eyes of the Arab nations, of the legitimate rights of the Palestinian people. The Arab League in 1954 adopted a "Unified Law on the Boycott of Israel," which, with minor variations, has been enacted by all the Arab League member states. The boycott under the legislation has three basic forms:

> The *primary boycott* is the refusal of the Arab states to trade with Israel and its nationals;
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> The *secondary boycott* involves prohibition of trade by Arabs with non-Israeli third parties which contribute to Israel's economic or military strength; basically, such persons are blacklisted if they engage in a continuing business activity in Israel (as opposed to occasional sales from offshore) or have licensed or supplied technology to Israel;

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The *tertiary boycott* prohibits Arab utilization directly or indirectly of goods or services of blacklisted firms; it seeks to induce non-Israeli third parties, for example U.S. companies, not to deal with blacklisted companies.

The Arab boycott is administered by a boycott office in each country, loosely coordinated by a central boycott office in Damascus.

For years the U.S. Government all but ignored the Arab boycott. In 1965, under pressure from Jewish groups in the United States, the administration proposed, and Congress adopted, a Congressional statement of policy, with no sanction, as an amendment to the Export Control Act. However, the primary U.S. response has occurred during the past 2½ years as the boycott's effectiveness has increased markedly due to the Arab states' new oil riches. The cornerstones of U.S. antiboycott policy today are the Ribicoff Amendment in the Tax Reform Act of 1976 and the 1977 amendment to the Export Administration Act, (EAA) and its implementing regulations of 1978.

The Tax Reform Act does not prohibit boycott participation. It denies tax benefits to U.S. taxpayers who agree to participate in or cooperate with a boycott. The existence of an agreement is the key to denial of tax benefits. An agreement to participate in a boycott is defined as an agreement, undertaken as a condition of doing business in a country:

(a) to refrain from doing business with a boycotted country (*e.g.* Israel);
(b) to refrain from doing business with any U.S. person trading with a boycotted country (*e.g.* Israel);
(c) to refrain from doing business with any company because it is owned or managed by persons of a particular nationality, race or religion;
(d) to refrain from employing individuals of a particular nationality, race or religion.

Agreements to engage in a primary boycott are exempted.

The tax law requires reporting of operations in Arab countries of the taxpayer and his tax control group as well as of any agreements by them to participate in a boycott. Such an agreement to cooperate results in the loss of the right to credit taxes, defer income, and realize DISC benefits, in respect of income arising out of operations in the Arab country involved. If a taxpayer has agreed to cooperate with a boycott in one Arab country, there is a rebuttable presumption under the statute that he has so agreed in respect of his operations in all Arab countries.

The Export Administration Act boycott amendments and their implementing regulations prohibit categories of boycott–related conduct including refusals to deal, discrimination against U.S. persons, and furnishing information or implementing letters of credit in compliance with a boycott. The legislation excepts various conduct from its strictures including compliance with a primary boycott and the giving of certain shipping certifications respecting origin of goods, name of the carrier, route of shipment and the name of the supplier of the goods and related service. It also allows compliance with the selection of specific goods or services by a resident of a boycotting country, even where

selection is made for boycott reasons, provided certain conditions are met. It allows as well compliance with local laws by U.S. persons resident in Arab countries respecting their activities within that country and the import of certain goods. The law requires intent to comply with a boycott and that the transaction in question involve U.S. commerce. The Export Administration Act provides both criminal and civil penalties, including suspension of export privileges. The Act and its regulations are administered by the Commerce Department.

A third arm of the executive branch of the Government actively involved in the U.S. response to the Arab boycott is the Justice Department. Justice filed a case against Bechtel Corporation, alleging that its activities in compliance with the Arab boycott violated the Sherman Act. A proposed consent decree agreed by the parties, awaits court action. This case was discussed in extenso at last year's meeting and will not be reviewed here. It is of interest to note Justice's very recent assertion of the application of the antitrust laws to the boycott area, as it raises an important issue of possible conflicts of U.S. laws.

The U.S. response to the Arab boycott is an effort to resolve conflicting national policies and competing interests. The panel is well qualified to address this issue.

Remarks by David Small*

I would like to sketch some of the general international law and policy aspects of our new antiboycott activities and to begin by a quick review of the problem of the Arab boycott.

For many years there had been a conflict between the policy statement of the 1965 Export Act opposing boycotts of friendly nations and the policies of the Arab League states. Until the oil embargo and the petrodollar explosion, this was largely abstract; the United States had little law or regulation on the subject. The United States was relatively complacent about boycotts and other forms of economic coercion, viewing itself generally as potential boycotter and embargoer rather than victim. Our own boycotts had not been very effective in recent years. Similarly, the Arab boycott had not been particularly successful in inflicting injury on Israel or coercing changes in its policies.

Because of some features of the Arab boycott, the petrodollar explosion raised new concerns in the United States. The boycott was not only a primary boycott of Israel, involving Arab states' refusal to buy from or sell to Israel, directly or through intermediaries, but it had also developed an elaborate secondary structure, aimed at pressuring or inducing third state nationals to refrain from a wide range of "special" relations with Israel deemed to strengthen its war potential. The new petrodollar wealth, it was feared, might bring about vastly greater compliance with this

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secondary boycott. This raised not only prospects of real harm to a friendly state, but also the specter that U.S. nationals and U.S. commerce might be increasingly turned into the instrument of a policy of other states in conflict with the established policies of the United States. Such a distortion of U.S. domestic and international commerce was and remains repugnant to a broad spectrum of U.S. opinion.

While international lawyers generally weigh and analyze economic coercion in terms of its impact on the target state, the primary concern reflected in the debate on the legislation was, instead, with this perceived intrusion into U.S. affairs and commerce. In considering Title II of the Export Administration Act, both houses of Congress were in essential agreement on exempting compliance with primary boycott requirements and focusing on the secondary and so-called tertiary aspects, as they had, earlier, in adopting the Ribicoff Amendment to the 1976 Tax Reform Act. This is also the basic thrust of the international boycott application of the Sherman Act, as expressed in the proposed Bechtel consent decree. However, the end result, the actual rules and limitations now facing our foreign trading community, may, in a variety of situations, prohibit or frustrate activities in which the intrusion into U.S. affairs would have been fairly theoretical and attenuated.

Throughout the legislative process, the international legal and policy aspect of the Arab boycott and the U.S. response received scant attention, perhaps deservedly so in light of the murkiness of the international law on economic coercion. The desirability of modifying or limiting the U.S. boycott potential in, for example, the Export Administration Act itself, was not seriously considered. That Act states it to be our policy to use export controls to the extent necessary to further significantly our foreign policy, not just national security. Nor was attention paid to framing a more neutral policy principle of opposition to secondary boycotts generally, not just by others against our friends and ourselves, but by us against other nations. Clearly, most of us would hold that economic coercion is undesirable in an increasingly interdependent world and secondary boycotts are additionally objectionable as a device broadening rather than containing conflict. Those were not, in my view, operative concerns in our legislation, although they should be in formulating policy in this area.

To the extent that international legal considerations figured in the legislative response, it was in an awareness that, to a degree, the sovereign prerogatives of boycotting and other foreign states ought to be taken into account in shaping a response. The House International Relations Committee Report on Title II noted expressly that the bill contained exemptions designed "to interfere as little as possible with the right of any sovereign nation to conduct a direct, primary boycott of other nations." The Senate Banking Committee report, while somewhat more nuanced, also described the exceptions as "accommodations to the laws and rights of other nations, including boycotting nations." It is not clear whether secondary and tertiary boycotts by others were considered unlawful—a doubtful assumption for a U.S. legislator to make in light of the sec-

ondary aspects of some of our past economic measures, for example, against Cuba and Vietnam—or whether the Congress was merely asserting, correctly I believe, that while foreign secondary boycotts may not be per se unlawful, it is also our sovereign prerogative to limit their intrusions into our own commerce, a prerogative the Administration and Congress decided to exercise despite the potential for conflict.

In any event, I do not believe the Congress could have safely asserted the present unlawfulness of the Arab boycott. Many nations, including our own, had defended boycotts as a sovereign's prerogative to control its trade for economic, security and other reasons, except as regulated through existing trade agreements such as the GATT and bilateral FCN treaties. Although expressing an interest in depoliticizing trade, the United States has also recognized boycotts as a means of conducting inevitable international conflicts at an acceptably low level of violence, unlike armed force, which we view as the sole subject of the general prohibition on the threat or use of force in Article 2(4) of the UN Charter. While international law has evolved beyond "laissez faire" economic notions, the extent of its evolution is unsettled and the newly accepted statements of legal norms in the area provide little guidance in distinguishing between those economic measures which remain permissible in international relations and those which rise to the level of prohibited coercion. The United States, the United Kingdom, and other like-minded states, while maintaining the purity of their traditional position on the scope of Article 2(4) of the Charter, have come to agree that high levels of economic coercion, exercised for improper purposes, are unlawful. The breakthrough in their attitude toward the law came with the adoption of two statements on economic coercion in the context of "nonintervention" in the 1970 Friendly Relations Declaration. Those statements proscribed economic coercion "aimed against the political independence or territorial integrity of a state" as well as "economic measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights *and* to secure advantages of any kind." However, it takes little imagination to adduce arguments to defend a wide variety of hostile economic measures using these ambiguous formulations.

More meaningful regulation of economic coercion may well call for restrictions of a different sort, perhaps evolving from Charter norms a more general presumption against use of deliberately harmful economic measures against other states for political purposes. Even that would not preclude boycotts justified by their authors on security grounds. Perhaps the answer lies in broadening international commitment to a stable and fair international economic and trading system, for example, by a GATT code limiting to some degree the potential scope of the Article 21 national security exception, although, given the sensitivity of Article 21 to the GATT parties, some other GATT arrangement might be needed.

A final point about our boycott regulations. We have created some areas of conflict with the law and policy of boycotting states, the scope of which is unclear due to the incomplete process of adjustment going on in

Mideast trade and to the overlapping and inconsistent rules in the Bechtel decree, the Tax Reform Act, and the Export Administration Act. We have also extended our law extraterritorially not only to activities in boycotting states but also in nonboycotting states, despite prospects of direct clash of laws or policies operating on the affected businessmen. The Export Regulations cover the conduct of foreign corporations owned or controlled by U.S. firms, and transactions which are deemed to be "in United States commerce" based on any of a variety of factors such as minor componentry of U.S. origin. It is quite evident that these regulations may frustrate a transaction by a company which a country like Canada or France may view as more substantially theirs than ours and acting in what they view as essentially their own commerce. The Commerce Department has sought to define the reach of the law to give it sufficiently broad scope to accomplish the Congressional purpose without unduly interfering in the interest of foreign countries in regulating the conduct of persons subject to their jurisdiction. However, it is no criticism of that Department to note that our friends and allies have public policies on treatment of boycott requirements and export promotion different from our own. The importation of our regulatory scheme into their economies through U.S. investment may be considered by a number of them as, to put it kindly, at least anomalies in a law largely justified in terms of concerns about the intrusions of foreign regulations and policies into U.S. commerce.

The extraterritorial reach of the Tax Reform Act is quite different. Tax consequences attach to boycott agreements by any person, not just a U.S. person, and in practice will reach the conduct of any U.S. taxpayer or member of a controlled group which includes a U.S. taxpayer. The boycott agreements, for tax law purposes, are not restricted by any U.S. commerce test.

The extraterritorial reach of the Bechtel decree seems to be within the modern reach of U.S. antitrust law. With the possible exception of some applications of the tax law, I do not think that international legal bases of jurisdiction are being tested. However, the real question to me is not whether our laws have a legally adequate jurisdictional minimum, but whether the jurisdictional basis warrants the particular conflict raised by the rule of regulation in question as a matter of policy and comity.

Remarks by John Hoffman*

I would like to review how some of these competing and conflicting policy considerations that have been identified by the previous speakers were dealt with in the process that led to the adoption of the boycott legislation and regulations and to identify a number that remain and pose severe problems for us. It is clear from the earlier remarks that the policies that come to bear on these matters almost necessarily lead to conflict. In a very real and practical sense, the evolution of the boycott legislation and

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the regulations represents a good case study in the resolution of competing policy considerations. Those considerations came to bear in a number of different contexts. They derived from the objectives and responsibilities of the various groups that were involved and interested in this subject.

The fundamental conflict presents itself as a conflict between states. Boycott problems arise not only between Israel and the Arab countries, but between India and Pakistan, Nigeria and South Africa, Taiwan and China, and the United States and Cuba, to mention just a few. Such conflicts are not likely to be resolved by boycott legislation or regulations. In the case of the Export Administration Act amendments of 1977, everybody well recognized that what was being done was an attempt to deal with symptoms and not causes of the principal problem. As the implementation of the primary boycott reached beyond the shores of the particular countries involved, the problems became more complex. The freedom to conduct business and trade where and with whom we wished without unnecessary interference or restrictions by foreign countries came into conflict with the legal and pragmatic need to give some recognition to restrictions that were in fact being imposed by some of those countries with whom we wished to deal. As the significance of the Arab boycott increased, the debate on this subject tended to lead to a polarization of views between the supporters of Israel and those desiring to preserve or expand our trade with many Arab countries.

In a small and always noncontroversial way, there was a conflict that appeared from time to time between our ethical and legal civil rights principles and certain restrictions that were imposed by certain countries. I do not think that those conflicts ever represented a serious problem, and they were dealt with promptly and effectively.

Another area of conflict, which still exists to some extent, is between the views of various governmental representatives or bodies that are concerned with this subject—views representing largely their own perspectives and legislative responsibilities but leading to conflicts and confusion that make it very difficult for people to order their affairs effectively. A number of departments in the Executive branch have responsibilities relating to the regulation of trade: the State Department, which has responsibilities for maintaining relationships with friendly countries; the Treasury Department, which never did belong in this process and does not belong in it now, although it does have a statutory mandate that it has to live with; and the Department of Justice, which obviously has a role to play because any boycott is by definition a restrictive trade practice of some sort. The attitudes and policies that have been adopted by these departments have not always been in harmony and there are some very serious conflicts that remain.

Finally, there are conflicts posed by a general policy, stated to be a valid one by the Executive and certainly considered to be proper by businessmen trying to live with these requirements, which is the policy of not smothering business and trade through an excess of regulation and reporting. The legal regulatory scheme that evolves from this process is

very complicated. Those who have followed it very closely have trouble understanding it themselves, and businessmen face a significant problem in orienting their employees and departments to comply with these new restrictions. The scope of the problems of new reporting requirements has yet to achieve final form, although as long as there are separate reporting requirements by two departments of the Executive, there are unavoidably going to be unnecessary conflicts.

The fundamental underlying conflict, the conflict between two countries, certainly is not apt to be resolved by any kind of U.S. legislation. However, this fundamental conflict was dealt with in U.S. legislation. Provisions in the Ribicoff Amendment and in the Export Administration Act recognize the existence of primary boycott restrictions and thereby without necessarily condoning them try to steer a course minimizing the conflict between the sovereign interests of boycotting countries and our own domestic policies. I think a very good formulation was worked out in the export legislation dealing with that aspect of conflict.

As one goes beyond the primary boycott restrictions and into the areas that have been popularly called secondary and tertiary boycott, the problem becomes much more complex. The terms "secondary boycott" and "tertiary boycott" are confusing and unnecessary labels that in the heat of the debate on this subject often tended to obscure the real policies that needed to be dealt with. They are, however, a convenient handle, and I will adopt the general rubric identified by earlier speakers of secondary boycott to refer to anything outside the primary boycott area. Despite some of the rhetoric on the subject of secondary boycotts, it is clear that they have not always been regarded as inherently evil and are not attacked as such in the Commerce legislation. For two examples, I cite an article from *The New York Times*:

> The United States has cautioned Greece that all military and economic aid may be cut off this year if Greek ships continue to trade with Cuba. At the request of the United States, Greece has already banned all such trading by decree, but at least one ship owner has continued to trade with Cuba in defiance of the prohibition. State Department officials confirming that the United States had cautioned Greece added that Cyprus has also been cautioned.

That appeared 12 years ago, but it bears on the U.S. view of certain so-called secondary boycotts. Another example involves the well-known *Fruehauf* case. Fruehauf had a majority-owned subsidiary in France which contracted with another French company to sell it some vans that were eventually destined for China. The United States Treasury Department refused to approve the deal, and Fruehauf France tried to get the other French company to back off from the agreement which it refused to do. To avoid what threatened to be a very extensive and probably losing lawsuit in France, the French minority directors of Fruehauf France petitioned a French court for an order appointing a receiver of the French subsidiary to take over the company and implement the contract, which

was done. This is a rather dramatic example of the reaction in some foreign countries to U.S. policies regarding secondary boycotts.

The groups that were focusing the principal attention on the boycott issue in the earlier portions of the 2 to 2½ year debate, as I mentioned earlier, tended to adopt somewhat polarized views. The conflict between the two identified interest groups, business and the Jewish organizations, was worked out in the finest traditions of a free society. They stopped yelling at one another and started talking to one another; while some of the compromises that were worked out in that process were not to anybody's particular liking, there was an effort to deal with them on a basis of reason and compromise.

On the governmental level, there have been some efforts at coordinating policies among some concerned government departments, but those efforts at harmonization have not gone far enough and have not been particularly effective. One of the major conflicts that remain perhaps cannot be solved at that level of governmental activity; that is the conflict between the Ribicoff Tax Amendment and the Commerce legislation. Those efforts at harmonizing the tax guidelines with the Commerce regulations, while well intentioned, were doomed to failure, and the only proper solution is repeal of the Ribicoff Amendment. Another area of existing conflict in governmental policies grows out of the recently published Justice Department response to the comments on the proposed Bechtel consent decree. In that response, the Department of Justice takes the position that the Sherman Act is the overriding legislative imperative in this area, and that while some things may have been worked out in the Commerce legislation as a matter of compromise and may be permissible under that legislation, they are prohibited by the Sherman Act. That policy as followed and implemented represents a very dangerous, dramatic and unnecessary conflict. We have not seen the Commerce reporting regulations yet, and I will not comment further on that. Mr. Small has already touched on the last point I was going to mention, interference with third-country relations and the serious reactions that may be engendered in third nonboycotting countries by our effort to export our own policies into their economies.

Remarks by Paul Berger*

There are many aspects that specifically relate to the boycott and the efforts of the United States to legislate or otherwise regulate boycott acitivity. Without getting into any details as to the arguments on the legalities or illegalities of economic coercion and the use of oil power and the boycott, I'd like to refer you to three articles[1] if you wish to read about

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[1] Paust & Blaustein, *The Arab Oil Weapon–A Threat to International Peace*, 68 AJIL 410 (1974); Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, *id.* 591; Paust & Blaustein, *The Arab Oil Weapon: A Reply and Reaffirmation of Illegality*, 15 Col. J. Trans. L. 57 (1976).

the subject in more detail; there are arguments on both sides. Some of the considerations I will address relate to the fact that the United States is coming into an era, or is in an era, where its policies, practices and principles and very existence can be jeopardized by external threats of economic coercion. Furthermore, international law and the bodies that deal with international law thus far seem unable to contribute meaningfully to handling the consequences and concerns of economic coercion. The world is, and is becoming, more economically interdependent. There should be increasing concern of the extent to which international law can deal with questions of economic coercion in this world of great economic interdependence. While international law has recognized economic sanctions by one party to a combat against another during war, the oil embargo and the Arab boycott are at least important expansions against noncombatant nations and their persons, not specifically to improve a military position, but to improve a political posture. There is also a danger that if international law does not restrict or deal with economic sanctions in some lawful manner, one or more nations may seek to resolve problems resulting from economic sanctions through the use of international force, which could be very damaging to world order.

Another aspect relevant to this problem is that we are often faced with double standards, triple standards or even a greater number of standards, depending upon whose ox is being gored or who is doing the goring at the particular point. This is true in the context of economic coercion by the oil nations. Although the oil producing states have subscribed to certain declarations, and were among those pressing hardest for certain principles with respect to the duty of states to refrain in their international relations from military, political, economic or any other form of coercion against the political independence or territorial integrity of any state and that such economic measures were to be in violation of international law, as Professor Gardner has written, not a single voice has been raised in the United Nations to cite the relevance of the declarations to the Arab oil embargo or the boycott. Professor Gardner says this is typical of the double standard that currently prevails in the world organization and accounts for much of the skepticism about the integrity of its decisionmaking process. The United States has not raised this point. Its failure to do so has been criticized by the Joint Economic Committee of the Congress, which has recommended that to discourage further economic warfare the United States should ask the Secretary General of the United Nations to serve notice on the Arab oil producers that their actions violated the UN resolutions limiting the use of economic and political pressure. This is with respect specifically to the oil embargo and not the boycott. This point relates to concerns that we should have as lawyers, as Americans, for the future of economic coercion in the world as it affects us and affects the rest of the world, and what, if anything (I strongly underscore "anything") legal principles can or will do about it.

Assuming for a moment that economic coercion such as boycott activity is not going to be prohibited by international law, we nevertheless have U.S. interests which require us to consider what laws we should

pass as it affects those within our own jurisdiction. The easiest thing to understand is that if we are dealing with a foreign practice which involves religious discrimination or racial discrimination, we can easily take steps, and should take those steps, to make sure these foreign practices are not imported into the United States. Something not so obvious, however, is the covert and insidious impact of economic measures which appear not to involve religious discrimination, but might very well have that effect. In 1975 efforts to exclude the banking firm of Lazard Freres from a financing in the Middle East received wide attention in the United States and in the Congress and was not a small factor in getting Congress to do something about the boycott as it affected those in the United States. It was not altogether clear why Lazard Freres was excluded. There is also a fear among some, a justified fear, that companies wishing to do business in the Middle East may seek to be clean in the eyes of those they do business with, without entering into any agreements or other types of arrangements on any formal basis, and that these types of arrangements might exclude those who are considered likely candidates for the title of Israeli or Zionist sympathizer.

We also should be concerned about efforts from the outside to intervene in our domestic order, where foreign schemes might work to affect internal trade in a pattern conforming to the political objectives of those outside the country. We should be concerned about actions which violate our own principles of free trade and would otherwise distort our internal trade relationships. This is a factor not necessarily determinative, but when outside influences affect us, we have reason to be concerned about it.

We should also be concerned about the extent to which outside forces would influence our own internal business decisionmaking. There is a slippery slope linking or potentially linking Israel, Zionists, Jews today and, maybe tomorrow someone else. What price does our own society pay to satisfy external demands that relate to our right to do business with other parties?

The final point is our need to be able to establish policy, whatever that policy might be. The United States must have the ability to express itself and to determine what is in its own best interests, not simply in short range terms, but in terms of its nature as a nation. In this connection, the International Law Section of the American Bar Association is currently considering a report on the posture the ABA might take in connection with secondary and tertiary boycotts.

Changing the subject, the Ribicoff Amendment was enacted before the recent amendments to the Export Administration Act, and as you have heard John Hoffman and many others say, to maintain harmony with the EAA the Ribicoff Amendment should be repealed. Narrowly focusing on the conflict between the Export Administration Act and the Ribicoff Amendment, let me point out a few factors that Congress may wish to consider. Should there be a complete repeal? If not a complete repeal, should there be total conformity? If there were total confirmity, might there still be loss of tax benefits if there were a violation of the Export Administration Act? If not, why not? The Export Administration Act has

several exceptions which will allow U.S. companies to do business, although complying with various aspects of the foreign boycott. Should there nevertheless be a toll charge for that opportunity? Some of the exceptions were made in recognition that it was necessary to allow U.S. companies resident and doing business in those foreign countries to comply with foreign laws, and not to subject them to criminal or civil offenses for complying with those laws. It is still possible to comply with those laws and yet to pay a tax for such compliance. Such a result is not necessarily inequitable in that the companies that are fortunate enough to be able to do business in these countries by being resident there and being able to rely upon the exceptions available in the Export Administration Act, will have a degree of monopoly power with respect to those U.S. companies that are not so fortunate or not able to be residents in those foreign countries. To the extent that you have this competitive edge, the tax charge can have a balancing effect. These are at least some of the considerations that Congress might take into account in determining what to do about the Ribicoff Amendment.

REMARKS BY M. CHERIF BASSIOUNI*

There are three threshold questions that come to mind: Is economic coercion a valid instrument of state policy in time of peace or in time of war, and should we not draw a distinction between the two? Can a state engage in countereconomic coercion in the name of opposition to economic coercion? Can a state purport to have its economic regulation apply extraterritorially in the name of free trade? I am not going to attempt to resolve those questions simply because I do not think they are resolvable; I also do not think any of these three, as lofty as they may appear in their idealistic basis, is really at the heart of the legislation that we are dealing with. Consider first that the United States does, in one form or another, engage in some form of boycott. Second, economic boycotts are a form of international sanction recognized by the UN Charter and used by the United Nations.

There is something that ought to be said also to dispel any question that may be lingering in anybody's mind about the Arab boycott of Israel. It is not predicated on racial, religious or ethnic factors. At one time the legislation was advanced as being a way of insuring that those basic constitutional provisions in the United States Constitution about equality of rights and nondiscrimination would not be abused by a foreign country in the pursuit of its policy. That is not the case. The Arabs' economic boycott of Israel is a continuation of its coercive policy in a coercive relationship with the state with which Arab states are technically at war. Consequently it must be viewed in this context. Proceeding from these observations, let me raise a very simple question: Let us assume that the efforts of President Sadat would come to fruition and a certain peace process would develop in which we would see some peace agreement

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develop, maybe first between Egypt and Israel, and followed by other Arab states. Would the economic boycott still survive? The answer is clearly no. So we know very well that it is related to, that it is intimately linked with, the relations between the Arab states and Israel in terms of the present coercive process that exists. We do know that Israel and the Arab states, including the Palestinians, are for all practical purposes in a state of war, one which sporadically flares up in military operations, but which in the interim continues both at the economic and at the political level.

Let me consider for a minute the timing of the U.S. legislation, possibly raising an interesting hypothesis about its purpose and its scope. Although it is true that the exclusion of the Lazard Freres Bank from a given transaction had something to do in terms of galvanizing Congress—we must consider, also parenthetically, that Lazard Freres Bank is one of the companies that finances many operations in Israel, not the least of which are oil pipelines, and that is indeed a very valid basis for which a country which is at war with Israel can exclude the introduction of that firm into its own internal affairs—the legislation came about at a time which followed the 1973 oil embargo. It was not really the oil embargo per se that gave rise to the U.S. concern with respect to Arab policies, but it was what suddenly jolted most of the western industrialized world into the realization that the economic power that was wielded by the Arab oil producing countries was having and could have devastating effects on these economies. In addition there was the clear implication that suddenly came to mind that a substantial amount of dollar surpluses could be held in reserve and could be used in one way or another to have a great impact on the economy and the financial stability of the world.

Let us examine the relationship between the United States and the Arab oil producing countries. The United States imports approximately $25 billion of oil from the Arab producing countries out of a total import of approximately $45 billion a year, with a clear indication that this reliance is going to continue to be the same or increase unless alternative sources of supply can be found. We know from the IMF that there is an estimated $55 billion in monetary surpluses held by these Arab oil producing countries. A substantial portion of these are in short term investments in the United States; the rest of it is held elsewhere most in U.S. dollars. We also note that during 1977 there was $11 billions of trade between the United States and Arab countries during a period of time the U.S. balance-of-payment deficit was approximately $30 billion. Now if you look at these figures together, it seems clear that a new special relationship could indeed emerge from this situation. The United States is dependent upon oil imports from the Arab world; it does rely heavily on its exports in order to offset its balance-of-payment deficit; it has a stake in preserving its presence economically, politically and strategically in that part of the world; and it is interested in insuring a continuous flow of oil at a fairly stable price. All of these factors combined

together would clearly indicate that the new economic power of the Arab oil producing countries could well be put to use in the United States. If that should develop as would be very natural in this type of an economic relationship between two trading partners, a new relationship could develop between those countries and the United States, one which could ripen into what was referred to as "a very special relationship;" thus, for all practical purposes, threatening the "special relationship" that exists between Israel and the United States.

One of the hypotheses that can be raised with respect to this legislation, notwithstanding all of its noble projections, is that the timing and the manner in which the legislation came into being could well have been designed to send a very clear message to the Arab states, and the oil producing countries in particular, that special interest groups would use all their ability and power at the policy level to prevent anything that could threaten the U.S.-Israel special relationship. Furthermore, that indeed this special relationship between the United States and Israel is paramount and supersedes any other type of relationship even though it may be in the best interest of the United States. If one looks at the legislation, its timing and its implementation in the total context of relations in the Middle East—that is, between the Arab states and Israel, and between the Arab states and the United States—one cannot escape the conclusion that the manner in which the legislation was passed, and is implemented, convey that message and have a tendency to discourage greater U.S. trade and investment in the Arab world and decrease trade between the Arab world and the United States. The consequences could well be to raise the possibility of shifting dollar surpluses from being invested in the United States to other parts of the world and the possibility of shifting the holdings and monetary surpluses from dollars to another currency. If that is the case, it seems to me that this legislation, notwithstanding all the lofty ideals that are invariably presented as its justification is a very simple, forthright political message. It is one which is intended to convey the irrevocable position of the United States in support of Israel not only militarily, but economically as well. The special interest groups made the United States willing to use its power to preserve this "special relationship" through the application of extraterritorial legislation which would have effect in other countries. If that is the case, we can examine this type of legislation in light of the political relations that exist between those three participants—on the one hand, the Arab states, on the other Israel, and finally the United States. Whether or not this legislation will ultimately have the effect of reducing U.S.-Arab trade, shifting dollar reserves, or shifting the monetary basis of these reserves will largely be dependent on political developments that will take place on the peace front. This indicates very clearly that the economic boycott is only an instrument of state policy in the context of a warring situation that exists between Israel and the Arab world and is only secondary to that entire coercive process that exists between them. The interjection of the United States at

this point and in this manner can only be to the detriment of the United States by limiting its ability to be an evenhanded negotiator or promoter of peace relations between the two protagonists.

REMARKS BY STANLEY J. MARCUSS*

I have good news for John Hoffman and bad news for Paul Berger. The President has recommended the substantial repeal of the Ribicoff Amendment. The tax reform package calls for the elimination of DISC and deferral, and without DISC and deferral there is very little left of the Ribicoff Amendment. But you may be saved because the Congress may refuse to go along, and thus make John Hoffman's good news bad news and Paul Berger's bad news good news. There is a certain irony in all that.

The new antiboycott law in the Export Administration Act is not an attempt to prevent any country from conducting a boycott against any other country. In a very fundamental way it recognizes the right of any country to decide with whom it wishes to do business and to refuse to do business with whomever it wishes to refuse to do business. It is not an attempt to force any country to buy from a boycotted country, nor is it an attempt in any way to force any boycotting country to sell to a country which it boycotts. What it is intended to do instead is to prohibit U.S. citizens from assuming the responsibility for enforcing another country's boycott and to give all American citizens an equal opportunity to do business in any part of the world where a boycott is in effect. That in large part accounts for the detailed exceptions in the statute. Admittedly very fine lines have been drawn between recognizing the right of any state to conduct a boycott and prohibiting American citizens from assuming the responsibility for carrying out the boycott. This can be seen in the exceptions that exist under the statute to permit compliance with the import laws of the boycotting country which restrict imports from a boycotted country; American citizens subject to this law agree not to export from boycotting countries to a boycotted country; and persons subject to this law comply with the business choices, under most circumstances, of a boycotting country. So long as the boycotting state assumes the responsibility for enforcement itself and does not shift that responsibility for enforcement to a U.S. citizen, boycott compliance is permitted.

In that vein, the new antiboycott statute is reflective of deeply held American principles—principles against nondiscrimination and principles against anticompetitive business behavior. It is clearly consistent with the long-established American tradition prohibiting compliance with restraints of trade and general anticompetitive behavior. The best example of this was the Justice Department's suit against the Bechtel Corporation, which has been the subject of a great deal of attention. That

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suit was brought long before enactment of any antiboycott statute, and it was based upon alleged compliance with the boycott, compliance which under the theory of the suit is violative of the Sherman Act itself. In many ways what the new boycott legislation illustrates is a particular application of basic antitrust principles to the unique and admittedly complex situation of international trade in the context of a foreign boycott. In many ways one can argue that it is surprising that the statute is regarded as sui generis, because concepts of refusal to deal and prohibitions against discrimination on the basis of race or religion, sex and national origin are concepts which are well recognized and understood in American law.

No one can say with any certainty what the effect of the statute will be on American business. Much depends upon a variety of unknowns at this point—the attitude of the Arab states, the ability of U.S. business concerns to negotiate offending boycott conditions out of contracts and business transactions. We do know that there are vast differences in the attitudes of the boycotting states in the Middle East. There are liberal states which could generally be identified as including Saudi Arabia, Egypt, Iran, Jordan, and some tougher states, Iraq, Libya and Syria, and then there are some middle-of-the-road states. The response and reactions have been different in each of those clusters of countries. But we do know of a number of circumstances where American businessmen have successfully negotiated boycott provisions in violation of U.S. law out of contracts. In the April 19, 1978 *American Banker* Mr. Burhan Dejani, Secretary General of the General Union of Arab Chambers of Commerce, is reported to say that it has been possible to continue the flow of trade and that the Arab trade with the United States has been little affected. That same article quotes a New York banker, who said earlier that he feared the Arabs were not going to budge, but now says that we have seen a lot of modifications on the part of the Arab states.

There are at least two respects in which a very forceful argument can be made that this attempt to deal with the problem, admittedly a very complex and sensitive problem, will help business, not hurt it. For one thing, it opens the door to trade for all who otherwise might be systematically excluded from business transactions in boycotting parts of the world. But secondly and more pragmatically, at the time this statute was signed into law, 18 states in the United States had various types of antiboycott statutes, many of which were conflicting, based upon different principles, and vastly different in scope and extraterritorial application. Enactment of a uniform federal law has the effect of removing the enormous cloud of uncertainty facing American businessmen who have had to attempt to comply with a variety of laws in a number of different jurisdictions. Only time will tell what the long term impact will be, but it is clear that we have embarked in this country on an attempt to deal realistically, forcefully and evenhandedly with an issue which is made extraordinarily complex because of its inevitable involvement in a sensitive part of the world where there are sensitive political issues and where there are substantial interests both of the United States and other countries at stake. I think that if this law is understood as part of a piece