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Taking Sides: An Overview of the U.S. Legislative Response to the Arab Boycott of Israel

Keywords

Israel, Boycotts, Regulation

Taking Sides: An Overview of the U.S. Legislative Response to the Arab Boycott of Israel*

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Despite the repeated assertions of U.S. businessmen that the Arab boycott of Israel has had little effect on their relations with either Israel or the Arab countries,¹ and despite the assertions of the State Department that diplomacy is adequate to deal with the boycott,² the disposition of Congress to oppose the boycott has crescendoed from the *piano* of disclosure to the *sforzando* of prohibitive legislation. This article will attempt to set forth the current legislative scheme, emphasizing the Tax Reform Act of 1976,³ and to comment upon the legislation as policy.

The Arab boycott of Israel itself is a loosely administered intergovernmental organization under the auspices of the Arab League which maintains a permanent administrative body, the Central Boycott Office, in Damascus.⁴ The boycott has three aspects. In its primary, or direct form, it simply involves the refusal of the participating countries to maintain any economic relations with Israel. This primary boycott is not an uncommon act of belligerency under a declared state of war.⁵ As such, it is

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1. A general discussion of the "gaps, shortcomings, and failures" of the boycott is found in D. CHILL, *THE ARAB BOYCOTT OF ISRAEL* 29-39 (1976).

2. See, e.g., remarks of Sidney Sober, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs, Department of State News Release, May 14, 1976.

3. Tax Reform Act of 1976, Pub. L. No. 94-455, § 504, 90 Stat. 1563, *codified at* INT. REV. CODE OF 1954, § 44A.

4. D. CHILL, *supra* note 1, at 3.

5. See generally Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187 (1974); Bouve, *The National Boycott as an International Delinquency*, 28 AM. J. INT'L L. 19 (1934); Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125 (1933).

a clear exercise of sovereignty outside the legislative jurisdiction of the United States. Although the thrust of the legislation is at times excessive, the legislative scheme is therefore generally directed against the secondary and tertiary, indirect forms of the Arab boycott. These respectively involve the refusal of the boycotting countries to deal with foreign firms which engage in certain economic relations with Israel, and the refusal to deal with foreign firms which transact certain business with boycotted, or "blacklisted" firms. For example, a non-boycotted firm may be denied an import license by Arab countries for a product which contains components manufactured by a blacklisted company or is manufactured under a license from a blacklisted company. The erratic application of the indirect forms of the Arab boycott is well known,⁶ but in general the rationale behind it is the same as that of the direct boycott—to damage, or at least not to assist, the economy of Israel.

Opposition to the boycott has taken several forms: requirement of public disclosures by U.S. business of certain manifestations of boycott; the denial of tax benefits in the event of "cooperation with or participation in an international boycott";⁷ and legislation which would prohibit most boycott-related activity.⁸ Additionally, the antitrust laws have been used to challenge compliance with certain aspects of the Arab boycott of Israel.⁹ There has also been a flurry of state activity related to the Arab boycott.¹⁰ Although all the U.S. legislation applies to all foreign boycotts, it is clear that it has been promulgated as a response to the Arab boycott.

6. U.S. NEWS & WORLD REPORT, April 19, 1976, at 56.

7. Tax Reform Act of 1976, § 1061, codified at INT. REV. CODE OF 1954, § 908.

8. Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (June 22, 1977) (codified in 50 U.S.C. app.).

9. *Antitrust as an Antidote to the Arab Boycott: United States v. Bechtel Corp.*, 8 LAW & POL. INT'L BUS. 799 (1976); Note, *The Antitrust Implications of the Arab Boycott*, 74 MICH. L. REV. 795 (1976).

10. See, e.g., ch. 1247, 1976 Cal. Legis. Serv., 5426 (1976) (to be codified as CAL. BUS. & PROF. CODE §§ 16721, 16721.5, effective Jan. 1, 1977); ch. 613, 1976 Md. Laws, 1702 (1976) (to be codified as MD. COMMERCIAL LAW CODE ANN. §§ 11-2A01 - 11-2A15); New York, Bill 56411, N.Y. EXECUTIVE LAW, § 296.13 (McKinney 1976); OHIO REV. CODE ANN. § 1129.11 (Page).

The proposed federal anti-boycott legislation will likely preempt these hastily drafted measures.

I. DISCLOSURE REQUIREMENTS

The Export Administration Act of 1969¹¹ states that the policy of the United States is "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States."¹² The Act further directs the Department of Commerce to issue regulations which require the reporting of "requests for the furnishing of information or the signing of agreements"¹³ dealing with restrictive trade practices or boycotts.

Prior to the stir created by the 1976 Presidential debates, the regulations promulgated pursuant to the Act¹⁴ required the reporting to the Office of Export Administration either individually or in a quarterly accumulation any "request for an action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice or boycott"¹⁵ The regulations distinguish between types of requests. They expressly prohibit compliance with any request which "discriminates . . . against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin."¹⁶ Thus a firm may not, for example, certify that it has no Jewish members on its board of directors. Firms receiving requests which do not involve discrimination against U.S. citizens are "encouraged and requested to refuse to take any action"¹⁷ which may support or further a boycott, but are not prohibited from doing so.

The vast majority of boycott-related requests are either requests for a certification that goods shipped under a given bill of lading or letter of credit contain no components manufactured in Israel or requests for a certification that such goods will not be delivered on a vessel which calls on an Israeli port. Such certifications are reportable, and in the past constituted "compliance" with the boycott. The reporting form used the word "comply" for such actions, and firms furnishing such cer-

11. 50 U.S.C. app. §§ 2401-2413.

12. *Id.* § 2402(5)(A).

13. *Id.* § 2403(b)(1).

14. 15 C.F.R. § 369 (1976).

15. *Id.* § 369.4.

16. *Id.* § 369.2.

17. *Id.* § 369.3.

tifications received highly unfavorable publicity, even though such certifications usually involved the mere stating of a fact totally unrelated to the boycott. The Department of Commerce corrected this problem to a certain extent by a proposed revision to the regulations which would remove the word "comply" from the reporting form, and which would eliminate the reporting requirement altogether for "positive U.S. certificate of origin."¹⁸ Thus, a manufacturer would only be required to report a request if it certified that goods were not of Israeli origin.

Prior to President Ford's announcement on October 6, 1976, that the names of U.S. companies which had complied with the Arab boycott would be made public, reports received by the Office of Export Administration were held in confidence. After the announcement, however, the regulations were amended to permit public inspection of the reports received after October 7, 1976, and eliminated the quarterly multiple transaction report.¹⁹ Currently, a request must be reported within 15 calendar days after the end of the month in which the request was received. Some confusion has developed as to when a request is "received." It should be noted that in the common situation in which one of the aforementioned certifications of origin is placed on shipping documents as a result of direction in a published export manual, the request is deemed to have been "received" when the certificate is placed on the document, not when the goods covered by the document are shipped. The public disclosure is, of course, an effort to discourage any action by U.S. exporters from taking boycott-related action.

II. FEDERAL TAX LEGISLATION

A. *The Tax Law*

The Tax Reform Act of 1976 (TRA) contains several provisions which are intended to discourage U.S. taxpayers from cooperating with international boycotts not sanctioned by the United States.²⁰ The TRA does not make cooperation with an international boycott illegal per se.

18. 41 Fed. Reg. 51,424 (1976).

19. 41 Fed. Reg. 44,861 (1976); 41 Fed. Reg. 46,443 (1976).

20. Tax Reform Act of 1976, §§ 1061-64, *codified at* INT. REV. CODE OF 1954, §§ 908, 952(a), *as amended* 995(b)(1), *as amended* § 999 (1976).

The Act requires all taxpayers to report to the Treasury all boycotts known to the taxpayer if the taxpayer has operations in the country enforcing a boycott.²¹ The report must also contain a list of all boycotts in which the taxpayer was requested to participate and the extent to which the taxpayer complied with the request.²² Finally, the Treasury is to publish and maintain a list of known boycott countries.²³ The taxpayer must report all operations in the listed countries.²⁴ The report will be on Form 5713²⁵ and must be filed annually with the taxpayer's U.S. income tax return.²⁶

If a taxpayer has agreed to comply with certain defined boycott activities, the taxpayer will lose tax benefits otherwise available to it. The benefits lost include the deferral of DISC income,²⁷ the deferral of earned income of controlled foreign corporations,²⁸ and the loss of foreign tax credits.²⁹ The reduction of tax benefits will be reflected on Form 1120-DISC, Form 3646, and Form 1118 respectively.³⁰

It should be noted that while the taxpayer will suffer the loss of the foreign tax credit with respect to boycott activities, the foreign tax may be taken as a deduction on the U.S. tax return.³¹ It will, however, be a foreign source deduction which will reduce foreign source income.³²

In computing the lost tax benefits, the taxpayer must segregate boycott-tainted income and foreign taxes from all other foreign income and foreign taxes. The taxpayer may use the actual amounts involved if it can demonstrate that the boycott-tainted operation is clearly separate and apart from all other operations and the amounts are clearly attributable to the boycott operation.³³ If a clear separation is not possible, the

21. INT. REV. CODE OF 1954, § 999(a)(1)(B) [hereinafter cited as I.R.C.].

22. *Id.* § 999(a)(2).

23. *Id.* § 999(a)(3).

24. *Id.* § 999(a)(1).

25. 41 Fed. Reg. 49,923, Question A-5 (1976).

26. *Id.* Question A-7.

27. I.R.C. § 995(b)(1)(F); *see also id.* § 999(c)(2).

28. *Id.* § 952(a)(3).

29. *Id.* § 908(a).

30. *Supra* note 25, Question A-5.

31. I.R.C. § 908(b).

32. *Id.* § 862(b).

33. *Id.* § 999(c)(2).

taxpayer must compute its lost tax benefits by means of a ratio, the International Boycott Factor.³⁴ This fraction consists of a numerator which includes all of the boycott-related operations of the taxpayer. The denominator of the fraction is the worldwide operations of the taxpayer. Worldwide operations is defined to exclude operations in the United States.³⁵

If a taxpayer participates in or cooperates with a boycott during a tax year, the law establishes a presumption that all operations related to that boycott are in fact boycott tainted.³⁶ To the extent the taxpayer can demonstrate that it has clearly separate and identifiable operations which are not boycott tainted within the presumed boycott activities, no tax benefits will be lost as to the separate operation.³⁷ The burden of proof, however, is clearly on the taxpayer.

The Tax Reform Act distinguishes between primary and secondary boycotts.³⁸ A taxpayer must report all known boycotts unless they are sanctioned by the United States. However, a taxpayer will only lose tax benefits if it agrees to engage in a secondary boycott which is not sanctioned by the United States.

The TRA recognizes that a boycott may be enforced both by the government of a country and by businesses or nationals of that country.³⁹

The term "taxpayer" used throughout the foregoing is technically either a U.S. person⁴⁰ or a U.S. shareholder of a foreign corporation. A U.S. person must report known boycotts and compute lost tax benefits for itself and its 50 percent or greater ownership controlled group.⁴¹ A U.S. person who owns 10 percent or more of the total combined voting power of all classes of stock entitled to vote of a foreign corporation is a U.S.

34. *Id.* § 999(c)(1).

35. *Id.* § 999(c)(3).

36. *Id.* § 999(b)(1).

37. *Id.* § 999(b)(2).

38. Primary Boycotts are defined at I.R.C. § 999(b)(4)(B), (C). Secondary Boycotts are defined at I.R.C. § 999(b)(3).

39. I.R.C. § 999(b)(3). Throughout this article, the term "boycott country" includes the country, government, businesses, and nationals of the boycott country.

40. I.R.C. § 7701(a)(30).

41. *Id.* §§ 999(a)(1), (b)(1), (b)(2), (c)(1), which refer to the 50 percent control group test in I.R.C. § 993(a)(3). See I.R.C. § 999(e) for attribution rules between a person and a corporation vis-a-vis boycotts.

shareholder of a foreign corporation.⁴² Finally, if any person other than a U.S. person claims the benefit of the foreign tax credit or owns stock in a DISC, it will be subject to the boycott provisions of the Tax Reform Act.⁴³

B. *Necessity of Further Clarification*

The international boycott provisions of the Tax Reform Act of 1976 had no predecessor in prior tax law. This has made the need for clarification and interpretation by the U.S. Treasury even more critical than for most of the new legislation. To the Treasury's credit, it published a guideline in question-and-answer format in an attempt to answer the most obvious questions which would occur to taxpayers.⁴⁴ Its reward for this effort was severe criticism from a member of Congress for telling taxpayers how to "avoid" the Act's sanctions against international boycotts.⁴⁵ The Senator has chosen to overlook the fact that some of the "avoidance" techniques which appeared in the Treasury Guidelines were suggested in the boycott provisions of the Conference Report for the Tax Reform Act.⁴⁶ The Senator's assumption that taxpayers should have no guidance from the Treasury on the complexities of the new Act is hardly conducive to sound tax administration.⁴⁷

Despite the criticism, it is hoped that additional clarification concerning the boycott provisions of the TRA will be forthcoming from the Treasury. Below are two areas which are in need for further clarification.

1. International Boycott Factor

If a U.S. taxpayer is unable to segregate boycott-tainted operations from all others, the taxpayer must use the International Boycott Factor to compute its lost tax benefits. The Treasury has already indicated that if a taxpayer can segregate some but not all boycott-tainted activities, it may compute its lost tax benefits for such separate activities but must forfeit all deferral, DISC, and foreign tax benefits for other foreign activi-

42. *Id.* § 999(a)(1) which refers to the 10 percent test in I.R.C. § 951(b).

43. *Supra* note 25, Question A-1.

44. *Supra* note 25.

45. Letter to the Secretary of Treasury from Senator Ribicoff, BNA DAILY TAX REPORT, No. 237, at J-2 (Dec. 8, 1976).

46. H.R. CONF. REP. No. 94-1515, 94th Cong., 2d Sess. 399 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4118.

47. *Id.* at 467, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4173.

ties.⁴⁸ In the alternative it would be required to use the International Boycott Factor. Therefore, it must be presumed that most taxpayers will in fact be required to compute the Factor.

The Treasury has indicated that the International Boycott Factor is to be determined with reference to three items: purchases, sales and payroll.⁴⁹ Precisely how the Factor is to be computed was set out in proposed regulations issued on March 1, 1977.⁵⁰

The regulations for computing the International Boycott Factor suffer from numerous defects. Perhaps the most obvious fault is that the regulations require purchases, sales, and payroll to be added to each other in both the numerator and denominator in order to form the fraction.⁵¹ Elementary algebra will convince anyone that the resulting number is not the average percentage of the individual items, but a number which in fact has no relevance to anything.

Only a little less obvious a defect in the regulations is the potential for double counting, particularly within one controlled group. Thus a sale for one group member is a purchase by another. The proposed regulations attempt to deal with this problem in the numerator of the Factor but fail to consider the problem in constructing the denominator.⁵²

Because of the numerous problems with the International Boycott Factor regulations as now proposed, it would not be surprising if they are changed before being issued in final form.

2. Clarification of Scope of Official List

The boycott provisions of the Tax Reform Act require the Secretary to maintain and publish not less frequently than quarterly a current list of countries which require or may require participation in a secondary international boycott as defined in the TRA. While the Act states that the Secretary "shall" maintain a "current" list, it does not specifically state the list must contain all boycotts known to the Secretary.⁵³ To

48. 42 Fed. Reg. 1092, § F-8 (1977).

49. *Supra* note 25, § F-1.

50. Proposed Treas. Reg. § 1.999-1, 42 Fed. Reg. 11,845 (1977).

51. *Id.* § 1.999-1(c).

52. *Id.* § 1.999-1(b)(7).

53. That the list in fact would not be complete was contemplated by Congress, *supra* note 46, at 469, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 4175.

date, the Treasury has not stated whether in fact the official list will be complete. It is conceivable that one or more boycotts will be omitted from the list for political or national policy reasons.

In any audit of a taxpayer's return for tax years after 1975, it is quite probable that the Internal Revenue agent will have a complete list of boycott countries including listed, unlisted and boycott countries discovered subsequent to the tax year involved.⁵⁴ Should the agent assert a deficiency against the taxpayer for failure to segregate all boycott operations, it is quite probable that the taxpayer will claim that it has been misled by the Treasury's failure to list all boycotts. This type of argument will be most likely to arise if the taxpayer has listed a suspected boycott in one year but has not seen the boycott listed officially by the Treasury thereafter. The taxpayer may then feel justified in not listing the boycott in subsequent years in the belief that the Treasury has determined that the suspected boycott in fact is not of the kind described in the tax code.

Two parts of the boycott provisions of the TRA suggest that such arguments by the taxpayer would be looked upon with disfavor. First, the Act imposes a positive duty upon the taxpayer to report known or suspected boycotts if the taxpayer has operations in the boycott country. This requirement is wholly apart from the requirement that the taxpayer list all operations in countries which appear on the official list. Second, the TRA provides a means by which the taxpayer may request that the Secretary determine if a particular activity constitutes a boycott.⁵⁵ Based upon these two provisions of the Act, it would seem that the Treasury's official list of boycott countries must be viewed as an aid in complying with the boycott provisions of the Tax Reform Act but should not be assumed to be complete.

It would be most useful if the Treasury were to state either that all known boycotts will in fact be listed or that for various reasons certain boycotts may not be listed. It is doubtful if either pronouncement will ever be made. To list all countries

54. *Id.*

55. I.R.C. § 999(d).

without exception would severely limit the Treasury's options should political or national policy considerations suggest that it would be more prudent not to list a particular country. To state that the Treasury was, as a matter of policy, not listing certain boycott countries would undoubtedly open the door to further charges that it is subverting the will of Congress. The most that can be expected from the Treasury is a rather oblique reference to the fact that taxpayers cannot rely on the official list in all circumstances. Such a pronouncement will surely mean that the list is not complete and the Treasury reserves the right to not list countries in appropriate cases.

C. *Legislation of Morality*

The Internal Revenue laws of the United States have, since the passage of the 16th amendment to the Constitution, been championed as a vehicle for public policy. Initially, the income tax was intended to redistribute the nation's wealth from the have's to the have not's. Over the years, numerous provisions have been added to the Internal Revenue Code to achieve more limited national policy objectives. One need look no further than the Tax Reform Act of 1976 for such provisions. Several sections of the Act were enacted to encourage capital formation and, indirectly, new jobs.⁵⁶ Child and dependent care provisions were liberalized to permit more individuals to enter the labor force.⁵⁷

Although many provisions of the tax code were enacted to promote public policy, only a few were enacted to discourage activities which were perceived as morally repugnant. In general, ill-gotten gains have been taxed the same as all other income.⁵⁸ Expenses of a business were permitted as a deduction on the basis of ordinary and necessary, not on the basis of the moral acceptability of the activity.⁵⁹

Congress has on occasion passed tax legislation which is intended to discourage morally repugnant acts. In computing taxable income, wagering losses are only allowed to the extent

56. S. REP. NO. 94-938, 94th Cong. 1st Sess. 176 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3607.

57. *Id.* at 132, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 3565.

58. *James v. United States*, 366 U.S. 213 (1961). *See* *Rutkin v. United States*, 343 U.S. 130 (1952).

59. I.R.C. § 162(a). *See* *Commissioner v. Sullivan*, 356 U.S. 27 (1958); *Rev. Rul.* 323, 1974-2 CUM. BULL. 40.

of wagering gains.⁶⁰ U.S. citizens who move abroad and renounce their U.S. citizenship in order to avoid the U.S. income tax may be taxed by the United States in a less favorable manner than other nonresident alien individuals.⁶¹ Illegal bribes or kickbacks to government officials or employees whether made in the United States or overseas cannot be deducted in computing a business's taxable income.⁶² The same is true of illegal payments if the law of the United States or any state would subject the payor to criminal penalties or loss of license or privilege to engage in a trade or business.⁶³ Kickbacks, rebates or bribes paid by providers of service under Medicare and Medicaid to secure business may not be deducted from income to arrive at taxable income.⁶⁴ Restrictions have been placed on the amount which can be claimed as a business expense which has been incurred as damages in a criminal antitrust action.⁶⁵

The anti-boycott provisions of the Tax Reform Act of 1976 are the most ambitious attempt by Congress to date to provide tax disincentives for a particular activity. The avowed purpose of the anti-boycott provisions is to discourage U.S. taxpayers from participating in or cooperating with any international boycott not sanctioned by the United States. The tax code is a particularly clumsy vehicle for carrying out such Congressional intent. Boycott activities do not always relate neatly to accounting for income and expenses and are thus not susceptible to computing loss of tax benefits. Further, the legislation as written is a rather crude tool for punishing those who might engage in a boycott.

In the case of wagering losses, bribes, or illegal payments, the tax code provisions which restrict deductions bear a direct relationship to the underlying undesirable activity. Generally, the event is certain as to time and amount and thus susceptible to being accounted for in arriving at taxable income. This will not always be the case when one is attempting to segregate

60. I.R.C. § 165(d).

61. *Id.* § 877.

62. *Id.* § 162(c)(1). As to loss of other tax benefits as a result of foreign bribes see I.R.C. §§ 952(a)(4), 995(b)(1).

63. *Id.* § 162(c)(2).

64. *Id.* § 162(c)(3).

65. *Id.* § 162(g).

boycott-tainted income and expense. If the taxpayer has one isolated project or business operation which is boycott tainted, little problem will be encountered in determining boycott-tainted income. In the more common situation of continuous business dealings with both boycott and non-boycott countries, segregation of boycott-tainted income and expenses is far more difficult. If a U.S. manufacturer delivers goods to a port in the United States for shipment overseas, some part of the goods may be bound for boycott countries and some to non-boycott countries. How is the expense of delivering the goods to the port to be segregated between boycott and non-boycott taxable income?

Congress has provided a partial answer to the question by providing for the International Boycott Factor. In essence it has fallen back on cost accounting techniques to segregate boycott-tainted net income. This is the case unless the U.S. taxpayer can clearly identify all boycott activities and they are all in fact separate and apart from all non-boycott activities. The computation of the International Boycott Factor will require additional record keeping and computations on the part of the U.S. taxpayer. The extent of the additional effort will not be clear until the Treasury publishes regulations on the precise method which must be used in computing this factor. Nonetheless, the additional computation will be required even though the taxpayer will gain no tax advantage and, for the most part, the boycott activities are not illegal per se.

The anti-boycott provisions of the Tax Reform Act are a particularly crude device for punishing what is perceived as morally wrong behavior because it cannot distinguish between degrees of culpability or between "good" and "bad" boycotts. If two identically situated taxpayers both agree to participate in a boycott, both lose identical tax benefits. It makes no difference that the extent of one taxpayer's agreement was to permit boycott language to appear on a letter of credit while the other taxpayer's agreement was a refusal to do business with boycotted businesses, a refusal to hire individuals because of race, religion, or nationality, or a refusal to ship goods with certain carriers.

The Tax Reform Act perceives all boycotts as either U.S. sanctioned and "good" or non-U.S. sanctioned and "bad." The result of such narrow thinking is that the United States could

indirectly encourage immoral behavior far more serious than the perceived evil of participation in international boycotts.

In 1939, the United Kingdom and Nazi Germany were at war. The United States was officially neutral and presumably would not have officially sanctioned a United Kingdom boycott of Germany. Under the present anti-boycott provisions of the TRA, U.S. taxpayers would have lost U.S. tax benefits for all business which was related to the United Kingdom. Indirectly, the United States would have been aiding Nazi Germany. A critic might charge that if such events occur in the future it would be easy enough to amend the Act to include an exception for a "good" boycott. However, it is difficult to conceive of a situation where the United States might remain neutral in an international conflict but at the same time pass partisan tax legislation.

In short, any attempt to use the tax laws to discourage morally repugnant activities should be approached with extreme caution. This is particularly true when the activities which are to be discouraged are broadly defined and not readily susceptible to precise accounting treatment. If Congress truly wishes to discourage participation in international boycotts it should make the activities illegal per se and punish those who engage in the acts. Properly enforced, such a criminal law would result in no U.S. tax benefits for boycott-tainted income because no U.S. taxpayer would have such income.

D. But Who Will Sign the Report?

The anti-boycott provisions of the Tax Reform Act require U.S. taxpayers to report on their worldwide international boycott activities. The report will be submitted to the U.S. Treasury as a part of the taxpayer's annual income tax return. Its accuracy and truthfulness will be attested to under penalties of perjury.⁶⁶ A willful failure to file the report can result in criminal prosecution.⁶⁷ Needless to say, the U.S. taxpayer will be under a strong compulsion to submit a complete and accurate boycott report.

The U.S. taxpayer may find that it is faced with a dilemma. Many of the boycott activities reported may be illegal

66. *Id.* § 6065.

67. *Id.* § 999(f).

under state, federal, or foreign law. Refusing to hire or to have business dealings with individuals because of race, religion, or nationality could very well violate civil rights laws. Refusing to do business with a person or company because it does business in a boycotted country might violate antitrust law. Failure to support fully a foreign country's boycott law may subject the U.S. taxpayer to criminal prosecution in the boycott country. Yet, each of the potentially criminal acts must be fully reported to the U.S. Government in a sworn statement. The question must be asked whether the taxpayer might raise a fifth amendment defense to submitting the report based on self-incrimination.⁶⁸

In a recent case, the U.S. Supreme Court has ruled that, in general, a taxpayer may not assert the fifth amendment right in a nontax criminal prosecution to suppress the introduction into evidence of the taxpayer's return.⁶⁹ The Court clearly indicated that if a taxpayer intended to claim the fifth amendment privilege it had to be done by refusing to complete the relevant portions of the tax return. Thus, it would seem that if a taxpayer suspected his boycott report might be used in a subsequent nontax criminal prosecution, it should either not file a boycott report or should file a return but include a statement to the effect that the privilege has been claimed. In a subsequent criminal prosecution for willful failure to file a return, the Court seems to indicate that a valid assertion of the privilege is an absolute defense to the crime charged. A good faith assertion of the privilege, even if mistaken, will presumably rebut a charge of willfulness.⁷⁰ However, this later proposition can not be stated with certainty at this time and will have to await further litigation.⁷¹

This recent case even gives hope that a U.S. taxpayer might be able to suppress the boycott report in a nontax criminal prosecution even when the privilege was not asserted at the time of filing the tax return. The Court asserted that the legal requirement to file a tax return was not sufficient compulsion

68. U.S. CONST. amend. V.

69. *Garner v. United States*, 424 U.S. 648 (1976).

70. *See United States v. Pomponio*, 429 U.S. 10 (1976), for the proposition that willfulness does not imply evil intent in a tax prosecution but only "a voluntary intentional violation of a known legal duty."

71. 424 U.S. at 666 (Marshall, J. concurring).

in and of itself to say that a taxpayer was compelled to testify against himself. It pointed out that the requirement applies to all persons who earn income and the mere completing of a tax return is not an admission of criminal activity. When, however, the only persons required to file a particular report or pay a particular tax are those guilty of nontax criminal activities, the Court recognized the compulsive nature of the requirement to file a return.⁷² Here even a stated refusal to file indicated possible criminal activity. If most or all compliance with international boycotts is in fact illegal under federal or state law and, therefore, all U.S. taxpayers who report such activities are in fact admitting to criminal acts, is not the boycott report compelled testimony and thus subject to being suppressed?

Claiming the privilege will depend on whether the taxpayer has a reasonable belief that criminal prosecution is possible. Numerous threshold questions could arise such as the following.

Who has committed the criminal act?

If the U.S. taxpayer is an individual it would seem clear who the potential criminal would be. If the U.S. taxpayer is a trust or corporation, the criminal acts might be those of the taxpayer and its officers, directors, or trustees. If an officer signs a report which details the corporation's misdeeds, does the officer become a participant in the criminal activity even if wholly innocent before?

Where is the criminal act committed?

If the criminal act is in the jurisdiction of the government which has made the act a crime, little problem arises. However, in many instances, most of the activity will in fact occur in a foreign jurisdiction. Can U.S. persons be prosecuted for acts which take place outside a state or the United States? Is the case stronger if the foreign actor is 100 percent controlled by the U.S. person?

Can a fifth amendment privilege be asserted when the

72. 424 U.S. at 658, discussing the applicability of *Mackey v. United States*, 401 U.S. 667 (1971); *Marchetti v. United States*, 390 U.S. 39 (1968); and *Grosso v. United States*, 390 U.S. 62 (1968) to the plaintiff's claim that he was compelled to file a tax return and incriminate himself. The three cases cited pertain to the federal excise and information return on wagering and the fact that only gamblers were required to file this return.

criminal prosecution could only occur in a jurisdiction outside the United States?

The stated purpose of the privilege is to assure that the U.S. judicial system remains adversary in nature.⁷³ If this is the case, the privilege should not be available when the criminal prosecution can only occur outside the United States.

There are no doubt other preliminary questions which each U.S. taxpayer will have to face before it would assert the privilege and refuse to submit a boycott report. Each question could no doubt be the subject of an independent treatise on criminal or constitutional law. Suffice it to say that in the proper circumstances the privilege can and should be asserted when the tax return is filed.

III. THE PROHIBITORY LEGISLATION

The anti-boycott sections of the Export Administration Act of 1977⁷⁴ represent the strongest opposition to the Arab boycott to date. This statute was the result of a considerable effort by U.S. exporters and the "Israel lobby" to arrive at a compromise piece of legislation which would have the effect of prohibiting compliance with the Arab boycott of Israel without destroying U.S. trade with the Arab countries.⁷⁵ It is, therefore, a good deal more moderate than previous bills, but nonetheless shares some of the objectionable features of the tax legislation.

These anti-boycott sections prohibit the taking of or agreeing to take certain actions "with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly with the United States"⁷⁶ Stated simply, these are:

1. Refusing to do business with the boycotted country or its nationals or with any other person pursuant to an agreement with, requirement of, or a request from, or on behalf of any boycotting country.⁷⁷

2. Refusing to employ or otherwise discriminate against

73. 424 U.S. at 655, *citing* *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966).

74. Export Administration Amendments of 1977, 50 U.S.C. app. §§ 2401-13.

75. *THE NEW REPUBLIC*, June 4, 1977, at 17.

76. Export Administration Amendments of 1977, § 4A(a)(1).

77. *Id.* § 4A(a)(1)(A).

persons of a particular race, religion, nationality, or national origin.⁷⁸

3. Furnishing information regarding a person's race, religion, nationality, or national origin.⁷⁹

4. Furnishing information about whether a person does, has done, or proposes to do business with the boycotted country or its nationals or with any person known or believed to be boycotted.⁸⁰

5. Furnishing information about whether any person is a member, has made contributions to, or is otherwise associated with organizations which support a boycotted country.⁸¹

6. Paying, honoring, or confirming any letter of credit which contains a condition which is prohibited by the anti-boycott rules of the United States.⁸²

The drafters of the statute appear to have been careful to insure that the law would serve as an antidote to the Arab boycott, not simply to proscribe certain conduct. The six prohibited acts are only unlawful if done with the intent of complying with a foreign boycott. The broad prohibition against refusing to do business with a boycotted country is only applicable if a refusal is made pursuant to a request from a boycotting country, and with the stipulation that

[t]he mere absence of a business relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of rules and regulations issued to carry out this subparagraph.⁸³

Furthermore, the Act seems to be a conscious attempt to restrict only the secondary and tertiary aspects of the Arab boycott without infringing upon the sovereignty of the countries involved. To this end, a group of exceptions to the broad strictures listed above has been included in the Act. Regulations to be written will contain exceptions for:

78. *Id.* § 4A(a)(1)(B).

79. *Id.* § 4A(a)(1)(C).

80. *Id.* § 4A(a)(1)(D).

81. *Id.* § 4A(a)(1)(E).

82. *Id.* § 4A(a)(1)(F).

83. *Id.* § 4A(a)(1)(A).

1. Complying with the import restrictions of boycotting countries on goods produced in the boycotted country.⁸⁴

2. Complying with the shipping requirements of the boycotting countries as to carrier and route.⁸⁵

3. Furnishing information as to the country of origin of goods and the names and routes of shippers. Until June of 1978, this information may be in the form of negative or blacklisting terms, for example, "This shipment contains no goods manufactured in Israel." After June of 1978, only positive information will be permitted.⁸⁶ At this writing, most Arab countries accept positive certifications.

4. Complying with the unilateral positive selection, by a purchaser in a boycotting country, of an importing carrier, an insurer, suppliers of services to be performed in a boycotting country, or suppliers.⁸⁷ The prohibition against the furnishing of information regarding a person's race, religion, national origin, or nationality remains in force, however.⁸⁸

5. Complying with the transshipment⁸⁹ and immigration⁹⁰ requirements of boycotting countries.

6. "[C]ompliance by a United States person resident in a foreign country . . . with the laws of that country with respect to his activities exclusively therein . . ." ⁹¹ Again, the strictures regarding the furnishing of information as to a person's nationality, race, or religion are still in force. Since a "person" is defined as a foreign subsidiary of a U.S. corporation, the last exception is of particular significance. Its intent is to avoid, to some extent, the extraterritorial application of U.S. law.

The anti-boycott provisions of the Export Administration Act seem to be a rather reasonable reaction to a perceived, if not a real, problem. Despite the exception for compliance with local law, it is submitted that the potential of prohibiting for-

84. *Id.* § 4A(a)(2)(A).

85. *Id.*

86. *Id.* § 4A(a)(2)(B).

87. *Id.* § 4A(a)(2)(C).

88. *Id.* § 4A(a)(3).

89. *Id.* § 4A(a)(2)(D).

90. *Id.* § 4A(a)(2)(E).

91. *Id.* § 4A(a)(2)(F).

eign subsidiaries from engaging in conduct required by the country in which they are incorporated is substantial. Further, the Act could have the undesired effect of dampening trade with Israel; firms could understandably be reluctant to enter preliminary negotiations with an Israeli purchaser for fear that if a potential bargain should fail they may be accused of not completing the transaction because of their "wish" to comply with the Arab boycott.

The past practice of many Arab countries has been to ignore the boycott for products for which there is no viable alternative supplier. The statute may thus have the effect of causing small U.S. exporters in highly competitive industries to be boycotted while large manufacturers which occupy a dominant position in an industry continue to sell to the Arab markets.

Perhaps the most relevant question is whether such legislation is needed at all. U.S. exporters have in the past shown a remarkable ability to deal effectively with both Israel and the Arab countries in spite of the boycott. Given the fact that discrimination against U.S. citizens due to the boycott is already prohibited, one might question the need to attack the Arab boycott itself.

IV. CONCLUSION

The disclosure, the tax, and the prohibitory boycott legislation suffer from similar disabilities which make them needlessly burdensome and in some respects unwise as policy.

First, there is a general failure to adequately distinguish between conduct which has the effect of discriminating against U.S. persons and firms and the mere furnishing of information which has no effect on U.S. trade. The disclosure regulations have to some extent rectified this problem by changing the reporting form to remove the word "comply" with respect to the reporting of certain information, but the Tax Reform Act and the Export Administration Act both apply to the furnishing of information. As mentioned previously, the Arab boycott apparatus touches the majority of U.S. exporters only with respect to certification that exports to boycotting countries do not contain Israeli components and are not shipped on a black-listed vessel. Much less frequently, exporters or investors are required to furnish information as to their involvement with

Israel.⁹² The exceptions in the Export Administration Act would assumedly permit the former, but would unequivocally prohibit the latter, even for information which is a mere statement of fact, not requiring or indicating action on the part of the furnisher. Thus far, U.S. businesses have successfully dealt with both Israel and the Arab countries. It is submitted that lumping such conduct which does not discriminate against U.S. persons, together with clearly discriminatory conduct, has the effect of needlessly discrediting action not affecting U.S. persons and dampening U.S. trade with the Arab countries.

Similarly, all three pieces of legislation do not adequately distinguish between the primary boycott of Israel by the Arab League countries and the secondary boycott of firms doing business with Israel. Opposition to the former is clearly beyond the reach of U.S. legislation. It is submitted that the legislation, particularly the Export Administration Act, has the effect, if not the intent, of interfering with the Arab League's primary boycott of Israel. For example, section 4A(a)(2)(A) of the statute excepts from the broad prohibitions compliance with the import requirements of boycotting countries that imports not be manufactured in Israel. Part of the boycott, however, is to prohibit the importation of goods manufactured elsewhere but containing *components* manufactured in Israel. Since the statute does not except compliance with such a requirement, its effect is to force the boycotting countries either to alter their boycott requirements or not to import U.S. goods.

Furthermore, since the prohibitory legislation⁹³ and the tax legislation⁹⁴ apply to actions taken by all foreign subsidiaries of U.S. companies, they thus represent yet another extraterritorial application of U.S. business regulation.⁹⁵ It is ironic that at a time when many countries are objecting to the imposition of U.S. sponsored boycotts on the foreign subsidiaries of U.S. companies, legislation has been enacted which discourages or

92. See, e.g., regulations issued under article 291(4) of the Commercial Code of Iraq regarding the formation of branches of foreign companies.

93. Export Administration Act of 1977, Pub. L. No. 95-52, § 204, 91 Stat. 247, amending 50 U.S.C. app. § 2410 (1969).

94. I.R.C. §§ 999(a)(1), (b)(1), (b)(2), (c)(1).

95. See generally Bradfield, *United States Extraterritorial Commerce Regulations*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* 19 (V. Cameron ed. 1976).

prohibits those same subsidiaries from taking action with respect to boycotts not sanctioned by the United States. National treatment for foreign investors is a theme upon which the United States has consistently played. The inclusion of the foreign subsidiaries in a growing number of U.S. regulatory laws is inconsistent with the goal of national treatment of the foreign subsidiaries of U.S. companies. This is especially true when the U.S. regulatory policy is contrary to that of the host country, as is often the case with boycott regulations.

Finally, the legislation in general seems to arise from a confused set of motives. The underlying policy of the Export Administration Act is that foreign boycotts are inimical to a U.S. economic policy favoring classical notions of free trade. However, the United States itself has been a participant in, and indeed the instigator of, a number of boycotts and embargoes directed against foreign countries.⁹⁶ Both that fact and the likelihood of dampened U.S. trade with the Arab world cast doubt upon the proposition that the anti-boycott legislation is solely designed to promote free trade. In this respect, an even more hypocritical motive is the notion that boycotts per se, and in particular the Arab boycott, are somehow immoral.⁹⁷

A more likely motivation is simply the foreign policy objective of aiding Israel, a proposition which is supported by the congratulatory statement of Israel's Foreign Minister to the American Jewish Congress "on the successful outcome of efforts to secure legislation against practices of boycott and discrimination."⁹⁸ If this is the case, however, there is no reason to cause burdensome reporting and compliance requirements by including all foreign boycotts under the umbrella of the U.S. legislation. The number of boycotts likely to be discovered

96. Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970); Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 190 (1974); Comment, *The Trading with the Enemy Act of 1917 and Foreign-Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining*, 11 SAN DIEGO L. REV. 206 (1973).

97. President Carter stated in a debate with former President Ford, "It's not a matter of diplomacy or trade with me. It's a matter of morality." quoted in THE NEW REPUBLIC, June 4, 1977, at 17. See also Noonan, *Bribes and the Boycott*, 62 A.B.A.J. 1606 (1976).

98. 1 BOYCOTT REPORT 3 (1977).

around the world may be substantial, and not all of them will be directed against as clear cut an ally as Israel. At a time when there is a genuine opportunity for an overall Middle East peace, a strong pro-Israeli measure such as the anti-boycott legislation may ultimately have an unintended deleterious effect on that opportunity.