The original documents are located in Box 9, folder "Discrimination - Arab Boycott (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

U.S. DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

Discrimination

March 4, 1975

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

Pursuant to our telephone conversation this morning, attached please find the February 14 letter to Secretary Dent from Senators Javits and Williams concerning the issue of alleged Arab discriminatory practices. Attached also are copies of our preliminary responses from our Office of Congressional Affairs.

Sincerely,

Robert S. Milligan

Robert S. Milligan
Director
Office of Policy Development

Attachments

February 18, 1975

Honorable Harrison A. Williams, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Williams:

Secretary Dent has asked me to acknowledge the February 14 letter in which you and Senator Javits express concern with reports of religious discrimination in international financial transactions.

You may be assured that we will look into this matter and that Secretary Dent will write you further in this regard at an early date.

Sincerely,

James M. Sparling, Jr.
Assistant to the Secretary
for Congressional Affairs

145039
Dobbin
Secretary's signature

United States Senate

WASHINGTON, D.C. 20510

February 14, 1975

Dear Mr. Secretary:

We have noted with grave concern reports of efforts to discriminate against banking firms with Jewish members from participation in international financial transactions. This effort now seems to be spreading to the United States as evidenced by the reported withdrawal of the Kuwait Investment Company from two transactions in which it would have been an underwriter together with Lazard Freres and Company. We believe that the spread of this unconscionable practice so opposed to American principles and law should be stopped in the United States. Quite properly, Merrill Lynch, Pierce, Fenner, and Smith, Inc., as the leading underwriter, and Donald Regan, its chief executive has announced its intention to proceed with the transactions not to be intimidated by the Kuwait withdrawal.

It is clearly intolerable to permit Arab---or any---investors to attempt to extend such religious discrimination to the United States. Indeed, the policy of the United States has been expressed in the Export Administration Act in an amendment we introduced in 1965---now law---which states:

"It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries friendly to the United States and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States..."

This latest action by Arab interests is an attempt to extend the boycott against Israel to firms with any Jewish members everywhere, including the United States, and therefore contrary to stated U.S. policy.

These events have raised the distinct possibility also of pressure by Arab interests that could result in a positive discriminatory action or financial harm to a U.S. company or citizen. Furthermore, the Kuwait Investment Company may be engaged in other U.S. transactions of a comparable discriminatory nature. While U.S. law cannot compel the inclusion of underwriters who do not wish to participate in an underwriting, we cannot allow any investor to dictate the membership of an underwriting group on the basis of religious exclusion.

Prompt action is required to prevent the spread of such discrimination. We therefore request your department to act promptly to:

(1) determine whether any cases of religious discrimination against Jewish or any other Americans by the Arab interests have already occurred;

(2) examine closely U.S. law and regulations to determine whether violations of law are involved;

(3) promulgate, where possible, under existing law such regulations as may be necessary to prevent the occurrence of any such religious discrimination; and

(4) propose such new legislation as may be needed to prevent such discrimination.

We are aware that studies may be under way in your department with regard to foreign investment in the U.S., and we welcome them. However, the issue of religious discrimination in business is so vital and so fundamental that it should be addressed immediately.

We feel the U.S. stands ready to welcome foreign investment, including Arab investment, that conforms to the standards of our society and the national security and interest, but Arab oil money should not be permitted to enter our country on a basis contrary to our morality and constitution. This matter should be given the highest priority and we await your prompt response.

Sincerely,

Jacob K. Javits

Harrison A. Williams, Jr.

The Honorable Frederick B. Dent
Secretary
Department of Commerce
Washington, D.C.

10:20 Robert Milligan would like a call. 967-4885
(Dir., Office of Policy Development, Office of Secy. of Commerce
His secretary said you had talked with him either
yesterday or today.

Discrimination

Wednesday 3/5/75

10:45 Dennis Fahrney of the Wall Street Journal 783-0164
would appreciate a call.

Needs to talk about the investigation into the Arab boycott of Jewish businesses ??

He had been referred to Ed Savage in the Press Office but he didn't know very much about it.

WASHINGTON, D. C. OFFICE
ANTI-DEFAMATION LEAGUE
Of B'nai B'rith
1640 Rhode Island Avenue, N.W. • Washington, D. C. 20036 • [202] 393-5284

DAVID A. BRODY
Director

March 20, 1975

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

I just want to take this opportunity to express to you our thanks for taking time out of your busy schedule to meet with us to discuss the implications of the boycott by the Arabs of domestic concerns doing business with Israel and their effort to export anti-Semitism to this country along with their petrodollars. We appreciate the deep seated concern over these developments which you expressed to us as well as your helpful suggestions.

Incidentally, I saw Dick Vander Veen earlier this week and told him of the fine meeting we had with you.

With every good wish,

Sincerely,

DAB:mbh

David A. Brody

Discrimination

Thursday 3/13/75

Meeting
3/13/75
12:30 p.m.

6:15 David Brody, Lawrence Pierez and Justin Finger will meet with you at 12:30 p.m. tomorrow (Friday 3/14).

(Mr. Brody had originally said Arnold Foster would be coming with him but Justin Finger is coming instead.)

David

Tuesday 3/11/75 Meeting 3/14/75

3:20 David Brody, Washington representative of the Anti-defamation League of B'Nai Brith, is the Chairman of the National Executive Committee. Ex. 3-528

Lawrence Pierez and Arnold Foster (General Counsel) will be here in Washington on Friday and David Brody would like to bring them in to meet with you to discuss the Arab boycott and offer some suggestions.

They have a 10:30 meeting and then a 2 p.m. meeting at the Pentagon ------ but would be free between 11:30 and 1:30 for a short meeting.

Mr. Brody knows the President and Congressman Vander Veen, he says.

Do you want us to schedule a meeting for Friday?

Cable Address: ANTIDEFAMIC

Document 1

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

315 LEXINGTON AVENUE, NEW YORK, N.Y. 10016, TEL. 689-7400

March 26, 1975

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Buchen:

I want to thank you for our most satisfactory and productive meeting on the Arab boycott issue. Mr. Peirez, Mr. Brody and I were most encouraged by the Administration's attitude toward this problem and we are anxious to be of any further help if we can.

Since our meeting, the ADL has come into possession of the attached document, which directly bears on the matter of our mutual concern. By its own terms, it is only one of a number of invitations issued to American firms to bid on a contract to furnish architectural-engineering services in Cairo, Egypt. We understand from our source that the addressee company plans to submit a bid for this very lucrative contract. Acceptance of the conditions set forth in the letter would constitute compliance with the Arab boycott by these companies, a matter which should be of great interest to the Justice Department as a possible violation of the Sherman Act.

We believe that American firms would be better able to withstand pressure for compliance if they had a definitive interpretation of the law from the Justice Department.

We have deleted the name of the addressee on the document as we must protect our source from disclosure.

Again, we at the ADL are most appreciative of the Administration's efforts to protect the rights of all our citizens.

Sincerely,

Justin J. Finger

JJF:am

cc: David Brody

Enclosures

Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

MAR 24 1975

MEMORANDUM TO THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Principal Federal Laws Relating to Arab Boycott and Discrimination

This is in response to your recent request for a description of the principal Federal laws bearing upon the Arab League boycott of businesses having certain contacts with Israel; the alleged application of racial or religious tests by Arab states and businesses, in connection with the boycott or otherwise; and the conduct of U.S. Government agencies, private companies and individuals in complying with or cooperating in the boycott or the racial or religious discrimination.

The nature of the boycott, and the steps now being taken by the Departments of State, Treasury, Commerce, and Justice to meet it, were discussed in recent testimony by representatives of those agencies before the Subcommittee on International Trade and Commerce of the House Committee on Foreign Affairs; copies are attached for your information. There is an almost unlimited number of laws which have conceivable application to discriminatory or boycott-related activities, depending upon the precise nature of the activity and the particular field of commerce involved. For example, a regulation of the Federal Communications Commission, 47 C.F.R. § 21.307, prohibits racial or religious discrimination by communications common carriers. We have not attempted to assemble all such particularized restrictions, but will address only those statutes that are of general application, and those more narrow statutes which bear upon specific abuses that have been alleged.

I. FEDERAL CIVIL RIGHTS LAWS

The boycott rules established by the Central Boycott Office of the Arab League Council do not impose sanctions on the basis of race or religious affiliation--nor even, for that matter, on the basis of ordinary commercial dealings with Israel. Allegations have been made, however, that racial or religious criteria have been applied. Moreover, quite unconnected with the boycott itself, some Arab nations have restrictive practices with respect to the entry or employment of Jews in their territories. Thus, application of the United States civil rights laws is relevant.

For purposes of this discussion, it will be useful to divide the problem into three categories: discrmination in employment; discrimination in the selection of suppliers or contractors; and discrimination by private firms in the treatment of customers.

Discrimination in Employment

Federal employment

The Federal government is of course prohibited from discriminating in employment on the basis of race or religion by the Constitution itself. The courts have held that the due process clause of the Fifth Amendment embodies equal protection concepts like those expressly set forth in the Fourteenth Amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Johnson v. Robison, 415 U.S. 361, 364, footnote 4 (1974). In furtherance of this constitutional principle, Executive Order 11478 explicitly prohibits discrimination in the employment practices of Federal agencies and charges the Civil Service Commission with responsibility for overseeing enforcement of the prohibition. It should be noted that the Executive Order recites (Section 6) that it "does not apply to aliens employed outside the limits of the United States." The implication of this is that it does apply to United States citizens employed throughout the world. Cf. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

In 1972, discrimination in employment practices of Federal agencies was made unlawful by statute, through the addition of Section 717 to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. This requires each agency to establish an administrative procedure for the handling of discrimination complaints. When administrative procedures are exhausted, the aggrieved individual is given a right to judicial relief. Enforcement of Section 717 rests with each agency, with respect to its own employees, with oversight responsibility in the Civil Service Commission. This statutory provision, like the pre-existing Executive Order, is not applicable "to aliens employed outside the limits of the United States"--an exclusion which implies that it is applicable to citizens employed by the Federal government throughout the world.

Private employment

With respect to discrimination in employment by private companies and individuals, the governing provision is Title VII of the 1964 Civil Rights Act, as amended. This prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." § 701(b), 42 U.S.C. 2000e(b). The prohibited practices include refusal to hire an individual, or any discrimination regarding the terms or conditions of his employment, based on race, color, religion, sex or national origin. § 703(a), 42 U.S.C. 2000e-2(a). Once again, the statute contains an exemption "with respect to the employment of aliens outside any State," § 702, 42 U.S.C. 2000e-1, which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.

Prior to March 24, 1974, the Department of Justice had civil enforcement responsibility with respect to this legislation; but as of that date the 1972 amendments transferred such authority to the Equal Employment Opportunity Commission (EEOC). § 707(c)-(e), 42 U.S.C. 2000e-6(c)-(e). Of course, civil lawsuits by the aggrieved individuals are also an available means of enforcement.

Title VII provides for certain exceptions to its broad prohibitions, one of which deserves special mention within the present context. Section 703(e), 42 U.S.C. 2000e-2(e), provides in part that hiring or

employment "on the basis of . . . religion, sex, or national origin" (note that "race" and "color" are significantly omitted) is not unlawful in circumstances in which such factor "is a bona fide occupational qualification reasonably necessary to the normal operation of . . . [the] particular business or enterprise." There is no Federal case law on the point whether this provision would, for example, justify the refusal to hire a Jewish applicant for a job to be performed in a country which does not issue visas to Jews. A New York State trial court found that a comparable exemption under that State's antidiscrimination legislation would not justify such refusal. American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S. 2d 218 (Sup. Ct. 1959), modified, 10 App. Div. 2d 833, 199 N.Y.S. 2d 157 (1960), aff'd, 9 N.Y. 2d 223, 213 N.Y.S. 2d 60, 173 N.E. 2d 788 (1961). Moreover, EEOC guidelines concerning sex discrimination, 29 C.F.R. § 1604.2(a), and national origin discrimination, 29 C.F.R. § 1606.1(a), state that the bona fide occupational qualification exception is to be construed "narrowly" or "strictly." The guidelines regarding religious discrimination, 29 C.F.R. Part 1605, do not address this matter. In the present context, it is not clear whether discrimination against Jews should be regarded as "religious" or "racial" discrimination or even discrimination based on "national origin."

In addition to Title VII, there are special restrictions upon discrimination in the employment practices of persons who hold contracts (or subcontracts) with the Federal government or who perform federally assisted construction. Executive Order 11246, as amended, forbids such employers, regardless of the number of employees whom they hire, to discriminate on the basis of race, color, religion, sex, or national origin. Responsibility for securing compliance with the Executive Order belongs to the various contracting agencies, subject to the overall authority of the Secretary of Labor. The sanctions provided by the Order include the bringing of lawsuits by the Department of Justice, upon referral by the agency, to enforce the nondiscrimination requirements.

It should be noted that Section 204 of the Order gives the Secretary of Labor the power (which he has exercised in 41 C.F.R. § 60-1.5(a)(3)) to exempt classes of contracts "whenever work is to be . . . performed outside the United States and no recruitment of workers

within the limits of the United States is involved." The clear implication is that contracts to be performed abroad cannot, as a class, be exempted so long as recruitment takes place within the United States. Section 204 of the Order also permits the Secretary to exempt a particular contract when "special circumstances in the national interest so require." On March 10, 1975, former Secretary of Labor Brennan sent to all Federal agencies a memorandum which stated that the Order is violated by refusal in this country to employ any person on the prohibited discriminatory grounds, "regardless of exclusionary policies in the country where the work is to be performed or for whom the work will be performed."

While Title VII and Executive Order 11246 are the main sources of authority with regard to private employment, it should be noted that some agencies have issued regulations, based upon their particular statutes, concerning employment practices of federally regulated or assisted entities. See, e.g., the regulations of the Federal Communications Commission, alluded to above, pertaining to communications common carriers, 47 C.F.R. § 21.307.

Discrimination in Selection of Contractors

Title VII and the Executive Orders discussed above relate to "employment." That term does not cover the selection of suppliers or subcontractors. Nor is there any other generally applicable Federal statute or Executive Order prohibiting discrimination on the basis of race or religion in the selection of suppliers or contractors.

With respect to the procurement practices of Federal agencies, the due process clause would presumably prohibit any discrimination even as between contractors, on the basis of race or religion. With respect to the practices of private firms, however, in selecting suppliers of goods or services, it appears that the civil rights laws impose no such constraints.1/ In some circumstances,

1/ Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981, provides that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." This provision has been interpreted to prohibit private discrimination in contracting, but only on the basis of alienage or color. It is not inconceivable

(continued on next page)

when a private company is closely connected to the Federal government or a State government, it might be argued that the action of the company is "State action" and therefore subject to constitutional prohibitions against discrimination. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Recent decisions indicate, however, that the present Supreme Court has a narrow view of the scope of "State action." See, e.g., Jackson v. Metropolitan Edison Co., 43 U.S.L.W. 4110 (Dec. 23, 1974).

Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This has been interpreted by some agencies as prohibiting discrimination by grantees in their selection of independent contractors. See, e.g., 28 C.F.R. § 42.104(b)(vi). It is not entirely clear that this extension will be upheld in all cases, at least where the contractors can in no way be regarded as intended beneficiaries of the grant statute. Moreover, it should be noted that Title VI only applies to persons "in the United States," and does not prohibit discrimination on the basis of religion.

Discrimination in the Treatment of Customers

There are no generally applicable Federal laws or Executive Orders which prohibit the refusal to deal with a particular customer on the basis of race or religion.2/ Title VI, mentioned above, theoretically might apply, but it is hard to visualize the circumstances under which

1/ (Continued from the previous page)
that the Supreme Court might extend it to racial or religious discrimination in contracting; but unless we wish to seek a significant extension of present law, the provision must be considered inapplicable to the circumstances here discussed.

2/ See note 1, supra.

the Arab boycott would result in discrimination against a customer on racial grounds in the United States by one receiving a Federal grant.

Some civil rights statutes do impose restrictions, unconnected with the receipt of Federal money, upon particular areas of commerce--for example, Title II of the 1964 Civil Rights Act, 42 U.S.C. 2000a, relating to public accommodations, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. 3601, relating to housing. There are, however, numerous State laws which impose more general restrictions.

Conclusions

With regard to employment (including work assignments) and contracting, the Federal government may not discriminate against anyone on the basis of race, religion, color, sex, or national origin in the United States; it cannot so discriminate against American citizens anywhere in the world. Thus, it would be unlawful for a Federal agency intentionally to exclude Jewish employees from agency work in Arab countries (assuming the employees themselves did not wish to be excluded) merely because they might incur the disfavor of the host country.

In the present context, the most difficult questions with respect to Federal employment and contracting are presented by those cases in which the Arab state excludes Jews from the country altogether, as does Saudi Arabia.

> --Is it essential, in order to avoid a violation, to submit the names of Jewish employees for entry even though it is a certainty that they will be rejected? As a practical matter, certainty will rarely exist and submission of the visa applications will be necessary to establish it. This seems the best course as a matter of policy in any event. It would probably constitute technical compliance with the law to make the possession of a valid visa a qualification for the employment or work assignment.3/

3/ While the impact of such a racially neutral hiring or assignment qualification would be exclusively on Jews, there would exist the required correlation between the ability to meet the job or assignment qualification and the ability to do the job. Cf. Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971).

--If a visa is discriminatorily denied to a person attempting to enter a country to participate in activity of a Federal agency, must the activity itself be cancelled? The civil rights laws in no way require this, although it certainly is a policy matter to be considered.

--How can the Federal government select contractors for work in Arab countries which exclude Jews without violating the civil rights laws? Again it would probably constitute technical compliance with the law to condition the acceptance of a bid or the letting of a contract on the ability of the contractor to obtain entry into the country.

With respect to private businesses, discrimination in employment (including work assignment) is unlawful in this country--and abroad if it affects American citizens. The same visa problems discussed with respect to the Federal government arise here as well.

Generally speaking, unless a business is a regulated utility, a grantee of Federal funds, or a business engaging in "State action" in the constitutional sense, it has no Federal obligation in contracting or in selecting customers, to refrain from discrimination against Jews either in this country or abroad.

A caveat is necessary with respect to so much of the foregoing conclusions as applies to activity on foreign soil: Where, with respect to such activity, the extra-territorial application of United States law would result in a direct conflict with the mandate of the foreign sovereign, under established principles of international law the United States law may yield. Absent a vital national interest on the part of the State whose law has extraterritorial application, an individual normally will not be punished by the State for an act which he was compelled to perform under the law of the State which had physical jurisdiction over him at the time. See Restatement (Second), Foreign Relations Law § 40 (1965). We are unaware of any judicial application of this principle to the type of law at issue here, nor to acts of the Federal government itself as opposed to acts of private citizens.

II. FEDERAL ANTITRUST LAWS

The primary Federal antitrust statute which has significant potential application with respect to the Arab boycott is the Sherman Act,4/ which makes illegal "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. This legislation is enforced by the Antitrust Division of the Department of Justice through suit in the courts to impose both civil and criminal sanctions. 15 U.S.C. 2, 4. In addition, any person injured as a result of violation of the Act may bring a law suit seeking treble damages. 15 U.S.C. 15.

The Sherman Act represents what might accurately be called a "common law" of antitrust. That is to say, the generalized prohibition set forth in the language just quoted has been given content by judicial reference to common law antitrust principles which existed before the Act was passed, and by judicial elaboration and refinement of new principles under the rubric of the statutory language. "Restraint of trade" has been read to mean "unreasonable restraint of trade"--and unreasonableness has been determined by economic and legal principles enunciated by the courts.

4/ Violations of the Sherman Act also constitute violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. American Cyanamid Co. v. F.T.C., 363 F.2d 757 (6th Cir. 1966); Union Circulation Co. v. F.T.C., 241 F.2d 652 (2d Cir. 1957). While "unfair methods of competition" condemned by Section 5 are not limited to violations of the Sherman Act, F.T.C. v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953), they have not been interpreted to include activity based upon racial or religious discrimination. And with respect to boycotts the reach of Section 5 is apparently no greater than that of the Sherman Act. See, e.g., F.T.C. v. Paramount Famous-Lasky Corp., 57 F.2d 152 (2d Cir. 1932). There is some possibility that Section 5 could be interpreted to require American companies to disclose to their customers as a material fact that they are boycotting Israel. This extension, however, seems to us both doubtful and undesirable. In any event, enforcement of the Federal Trade Commission Act is the exclusive province of the F.T.C. (Continued on next page.)

The primary boycott in the present case--the boycott of Israel by the Arabs--does not directly affect United States commerce and is not cognizable under our antitrust laws. The secondary boycott, that is, the boycott of United States businesses providing certain economic advantages to Israel, is another matter. An agreement between commercial firms doing business in the United States to boycott another firm in this country would constitute a traditional form of restraint of trade, and ordinarily would fall within the category of acts illegal per se. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). For purposes of further analysis it will be useful to consider separately the possible Sherman Act liability of (1) the Arab states, (2) Arab businesses, and (3) United States businesses.

It is highly unlikely that the Sherman Act can be used against the Arab states. This is so primarily because a sovereign state cannot be made a defendant in the courts of another sovereign. Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938)(Stone, J.). While this doctrine only fully applies to "public or political" acts of a state, and perhaps not to its "private or commercial" acts, see, e.g., United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929), the boycott in question is probably more "political" than "commercial," inasmuch as it is an expression of the Arab states' economic warfare against Israel. Secondly, the "act of state" doctrine might insulate most of the Arab states' boycott activities (and perhaps all of them if they were properly structured) from our antitrust laws. That doctrine holds that the courts of a sovereign will not examine the validity of acts of another sovereign performed within its own territory. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Sherman Act liability of Arab entities other than the Arab states themselves is more likely, but in our view

4/ Continued from previous page
Two other trade statutes deal with restraints of trade in imports, the Wilson Tariff Act of 1894, 15 U.S.C. 8-11, and the Tariff Act of 1930, 19 U.S.C. 1337. It is unlikely that these provisions provide any coverage with respect to the activities here under discussion, not duplicative of the Sherman Act.

still doubtful. Foreign corporations are, of course, subject to the Sherman Act even when their unlawful activity is carried on in foreign territory, so long as the activity affects our commerce. United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). However, if the activity in question occurs within a foreign state, and under legal compulsion by that state, it would ordinarily be contrary to the principles of international comity to subject the actor to liability in another jurisdiction. See, e.g., Inter-american Refining Corp. v. Texaco Maricaibo, Inc., 307 F. Supp. 129 (D. Del. 1970). This principle might insulate actions by Arab companies taken within their own countries.5/ Moreover, even with respect to acts committed by such nongovernmental entities within this country, it is in our view likely that the international political situation and the compulsion exerted by the Arab states over their nationals would be taken into account in determining whether the restraint of trade was "reasonable" under the Sherman Act. The purpose and context of a particular restraint of trade are of course relevant in determining its reasonableness, see, e.g., Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974). Even "per se" violations of the Act can sometimes be legitimated by such factors--for example, an agreement not to compete can be valid if its purpose is to preserve the good will of a business that has been sold. Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay, 200 U.S. 179 (1906). With this flexibility available, it seems to us unlikely that the courts will find the Sherman Act to be a device which thrusts us into unavoid-able confrontation in international politics whenever a secondary boycott, motivated by political considerations, is imposed by foreign governments through their nationals.

5/ We have no firm information on whether the secondary boycott is mandatory for Arab companies under their domestic laws; mere permissibility would not suffice to bring the principle into play. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

(There would be no basis under the Act for distinguishing between boycotts with which we are sympathetic and those with which we are not.) At least with respect to what might be termed the "core" of the secondary boycott--that is, the agreements among Arab states and their own nationals--it seems to us doubtful that the restraint would be held "unreasonable." At a minimum, it is probable that the courts would require a material adverse effect upon foreign commerce greater than that which the Arab boycott in most cases produces.6/

American businesses and businessmen cannot rely upon any of the distinctive features discussed above to avoid Sherman Act liabilities. Nonetheless, the existence of a "contract, combination, or conspiracy" as opposed to merely individual action, would have to be established. United States v. Colgate & Co., 250 U.S. 300 (1919). This requirement would ordinarily not be satisfied by a company's mere unilateral abstention from doing business with Israel in order to obtain Arab business. It might be argued, however, that an economic decision to do business with one person rather than another in order to avoid the effect of the former's boycott is a tacit combination or contract, cf. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). It is uncertain whether this theory would be applied, but it could form the basis of good-faith prosecution.

If an American company has made an actual agreement not to deal with Israel (as opposed to mere unilateral determination not to do so in order to obtain Arab business),

6/ If Arab entities are held subject to the Sherman Act, there would of course often be substantial impediment to the assertion of personal jurisdiction or the enforcement of judgments. See, e.g., United States v. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y. 1952); British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1953] Ch. 19 (C.A. 1952).

the fact that the agreement was made under duress, in order to avoid becoming an object of the boycott, would be no defense. Interstate Circuit, Inc. v. United States, supra. There might, however, be some difficulty in establishing that the agreement resulted in the proscribed restraint upon American foreign commerce. That is, assuming that the Arab states may with impunity bar an American company from doing business with them if it trades with Israel; and assuming further (as presumably would always be the case) that the volume of business which the company will do with the Arabs exceeds that which it would anticipate from Israel; it could be argued that the only net restraint, if any, is upon Israeli foreign commerce, an interest not protected by the United States antitrust laws. See American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); United States v. Aluminum Company of America, supra. This argument would not be available, of course, when the American business agrees to refrain from dealing not only with Israel, but also with another American company. There, the effect upon American commerce would be immediate and demonstrable.

It may be noted that the Congress is apparently of the view that "foreign policy" boycotts of the sort here involved do not violate United States law. A provision of the Export Administration Act of 1969, which first appeared in 1965 as an amendment to the Export Control Act of 1949, reads as follows:

> (5) It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States. 50 U.S.C. App. 2402(5).

It would certainly be strange for the Congress to refer to merely a "policy" of opposing a practice which, at least as applied to United States commerce (which was the subject of the legislation), was positively unlawful under United States law. Likewise, it would be strange merely to "encourage and request" American companies to refrain from "furthering or supporting" activities plainly illegal. The language of this legislation clearly presumes that the "core boycott" is not illegal, and the legislative history supports that interpretation.7/

Conclusions

Absent some particularly significant effect upon United States exports, it seems to us unlikely that the "core boycott"--that is, boycott activities by Arab states and their nationals--would be held to be a violation of the Sherman Act. Liability is at least sufficiently doubtful that the Justice Department is justified in devoting its prosecutorial resources elsewhere. Insofar as participation in the boycott by American nationals is concerned: The mere decision by an individual firm not to trade with Israel, in order that it may receive Arab business, may not constitute a violation. If the Arab Government or corporation exacts, and the the American company provides, an agreement not to deal with Israel, a Sherman Act violation is more likely. It would almost certainly be a violation for an American company to agree to boycott another American company in order to obtain Arab business.

7/ An argument based on this provision of the Export Administration Act may prove too much: The quoted language indicates the presumption that not only the "core boycott" is lawful, but also "agreements" by United States companies in furtherance of that boycott--a point which we are not prepared to concede.

III. OTHER PROMINENT LEGISLATION

There are numerous laws besides the antitrust and civil rights laws which might apply to acts of discrimination by United States citizens arising out of the Arab boycott. The following are the most prominent.

1. The third section of the Export Administration Act of 1969, Pub. L. No. 91-184, § 3, 83 Stat. 841, as amended (50 U.S.C. App. 2402), sets forth five Congressional "declarations of policy," the last of which reads as follows:

> (5) It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States.

Section 4(a)(1) of the Act (50 U.S.C. App. 2043(a)(1)), directs the Secretary of Commerce to make such organizational and procedural changes in the Department of Commerce "as he determines are necessary to facilitate and effectuate the fullest implementation of the policy set forth in this Act." Section 4(b) provides as follows:

> To effectuate the policies set forth in section 3 of this Act, the President may prohibit or curtail the exportation from the United States . . . of any articles . . . except under such rules and regulations as he shall prescribe. To the extent necessary to achieve effective enforcement of this Act, these rules and regulations may apply to the financing, transporting, and other servicing of exports and the participation therein by any person. . . . The rules and regulations

shall implement the provisions of section 3(5) of this Act and shall require that all domestic concerns receiving requests for the furnishing of information or the signing of agreements as specified in that section must report this fact to the Secretary of Commerce for such action as he may deem appropriate to carry out the purposes of that section. 50 U.S.C. App. 2403(b).

The U.S. Exporter's Report prescribed by regulation pursuant to the last quoted sentence is attached to this memorandum. Failure to submit it is punishable by fine or imprisonment, 50 U.S.C. App. 2405(a), but we are advised that no such penalty has ever been imposed.

This legislation would permit the President to restrict exports and to regulate the financing of exports for the purpose of opposing the Arab boycott and encouraging domestic concerns to ignore it. It is in our view the most sweeping and flexible means clearly available to the President for dealing with the main aspects of the present problem.

2. Section 301 of the Trade Act of 1974, Pub. L. No. 93-618, Jan. 3, 1975, 88 Stat. 1978, entitled "Responses to Certain Trade Practices of Foreign Governments," provides in part as follows:

> (a) Whenever the President determines that a foreign country or instrumentality --
>
> . . .
>
> (2) engages in discriminatory or other acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce,
>
> . . .
>
> the President shall take all appropriate and feasible steps within his power to obtain the elimination of such restrictions . . . and he--
>
> (A) may suspend, withdraw, or prevent the application of, or may refrain from proclaiming, benefits of trade agreement

concessions to carry out a trade agreement with such country or instrumentality; and

(B) may impose duties or other import restrictions on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate.

For purposes of this subsection, the term "commerce" includes services associated with the international trade.

The language of this provision would clearly embrace the present boycott, assuming it were found to be "unjustifiable" or "unreasonable". There is no indication in the legislative history that the boycott was specifically intended to be reached--and indeed political boycotts are not expressly mentioned in the long list of illustrative restrictive practices which the Senate report contains. S. Rep. No. 93-1298, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 8246, 8362. Given, however, the clear language of the statute itself, it does not seem that this omission would suffice to render the statute inapplicable in the present situation. In our view, it can be applied, if the President determines that the boycott is "unjustifiable or unreasonable" and that it "burdens or restricts" United States commerce.

The terms "unjustifiable" and "unreasonable" are not defined in the Act, but the legislative history is explicit that "unjustifiable" means "restrictions which are illegal under international law or inconsistent with international obligations," and that "unreasonable" refers to "restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or otherwise discriminate against or unfairly restrict or burden U.S. commerce." H.R. Rep. No. 93-571, 93d Cong., 1st Sess., 65 (1973). Similar language is contained in the Senate report. S. Rep. No. 93-1298, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Adm. News 8246, 8361. In our view, the President has broad discretion in making this determination of unjustifiability or unreasonableness; it is highly unlikely that a court would reverse his judgment.

If the President wishes to take action against the boycott under this section, he must comply with certain procedural requirements, including the provision of public hearings if requested. § 301(e). In fact, even if the President does not wish to utilize Section 301, it appears that he must "provide an opportunity for the presentation of views" concerning the boycott (§ 301(d)(1)); and "any interested party" may compel the Special Representative for Trade Negotiations to review the boycott and hold public hearings on it by filing a complaint under Section 301(d)(2).

Of course, the principal sanctions available under this provision of law--import controls--are precisely not those that are likely to be effective against the Arab countries. Moreover, the Congress might well regard any tariff-type controls with respect to the principal Arab export (oil) to be a Presidential evasion of agreements reached with respect to the present oil import fees.

3. Section 14 of the Shipping Act of 1916, ch. 451, 39 Stat. 733 (46 U.S.C. 812) provides that common carriers by water shall not:

> Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.
>
> Fourth. . . . [U]nfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities. . . .

Section 16 of the same Act (46 U.S.C. 815) provides that a common carrier by water shall not

> make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or . . . subject any particular person,

> locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

These sections make violation of their provisions misdemeanors punishable by fine. We are advised that the Federal Maritime Commission, in practice, investigates possible violations and then refers them to the Justice Department.

One feature of the Arab League boycott prevents ships from calling at Arab ports on a trip which includes calls in Israel. It has been alleged that U.S. flag carriers have complied with the Arab boycott by not calling at Israeli ports or accepting cargo for Israel. It is by no means clear that such action constitutes violation of the provisions discussed above. The Arab countries unquestionably have the right to determine which ships shall be permitted to enter their ports, and if an American water carrier is merely complying with the conditions necessary to secure entry for the products of some shippers destined for those ports, his action may not have the "unfair," "unjust," "undue," or "unreasonable" character necessary to establish violation. We are advised that the matter is currently under investigation by the Federal Maritime Commission.

4. The Foreign Assistance Act of 1961, Pub. L. No. 87-195, pt. I, § 102, 75 Stat. 424, as amended (22 U.S.C. 2151), provides in the "Congressional statement of policy" that

> [I]t is the policy of the United States to support the principles of . . . freedom of . . . religion . . . and recognition of the right of all private persons to travel and pursue their lawful activities without discrimination as to race or religion. The Congress further declares that any distinction made by foreign nations between American citizens because of race, color, or religion in the granting of, or the exercise of, personal or other rights available to American citizens is repugnant to our principles.

This statement of policy is nowhere translated into a concrete prohibition by the Act; it presumably is meant

to be only one of the factors considered by the President in exercising his discretion with respect to foreign assistance.

5. The Securities Exchange Act of 1934, ch. 404, § 15A(b)(8), as added, June 25, 1938, ch. 677, § 1, 52 Stat. 1070, as amended (15 U.S.C. 78o-3(b)(8)), requires registered securities associations to have rules designed "to promote just and equitable principles of trade, . . . and to remove impediments to and perfect the mechanism of a free and open market; and . . . not designed to permit unfair discrimination between customers or issuers, or brokers or dealers. . . ." In compliance with this provision, the rules of the National Association of Securities Dealers (NASD) provide as follows:

> Members who participate or intend to participate in the preparation or in the distribution of . . . issues of securities, whether as an underwriter, a selling group member, or otherwise, have an obligation in respect to that distribution to act at all times in accordance with high standards of commercial honor and just and equitable principles of trade. Thus, members may not so participate when the underwriting or other arrangements in connection with or related to the distribution, or the terms or conditions relating thereto, are unfair or unreasonable.

A securities association which does not enforce compliance with its rules can have its registration suspended; and an officer or director of a registered securities association who willfully fails to enforce its rules can be removed from office by the Securities Exchange Commission (SEC). 15 U.S.C. 78o-3(l). These provisions would arguably enable the SEC to investigate, and to require the NASD to move against, the alleged attempts by certain Arab banks and investment companies to exclude "Zionist supporters" from bond offerings.

6. With respect to the banking agencies (Federal Reserve Board, Comptroller of the Currency, and Federal Home Loan Bank Board) we are unaware of any explicit statutory provision or regulation which would prohibit practices in support of the Arab boycott. The charters of all these agencies are extraordinarily unspecific, however, and as a practical matter it seems likely that they

can put an end to undesirable practices if they wish. Banking Bulletin 75-3 issued by the Comptroller of the Currency on February 24, 1975, advised the Presidents of All National Banks as follows:

> This Office has recently learned that some national banks may have been offered large deposits and loans by agents of foreign investors, one of the conditions for which is that no member of the Jewish faith sit on the bank's board of directors or control any significant amount of the bank's outstanding stock. . . .
>
> One of the major responsibilities of this Office is to insure that each national bank meets the needs of the community it was chartered to serve. While observing those credit and risk factors inherent to the banking business, all the activities of all national banks, indeed of all banks regardless of the origin of their charters, must be performed with this overriding principle of service to the public in mind. Discrimination based on religious affiliation or racial heritage is incompatible with the public service function of a banking institution in this country.
>
> By means of its regular examination function, this Office will assure the adherence of national banks to a nondiscriminatory policy in the circumstances mentioned, as well as in any other respect where racial or religious background might similarly be placed in issue. . . .

The Bulletin cites no specific statutory provision in support of its prescription.

Section 1818 of Title 12, U.S.C., permits Federal insurance to be terminated or "cease and desist" proceedings to be brought by the appropriate Federal banking agency, with respect to any bank which has engaged in "unsafe or unsound practices" or has violated a "law, rule, regulation" or "any condition imposed in writing . . . in connection with the granting of any application or other request by the bank, or any written agreement entered into with" the Federal agency. As indicated, we know of no such laws, rules, regulations, conditions or agreements at present, but in our view they could be imposed for the future.

7. There are many other provisions of law prohibiting commercial discrimination in particular areas of activity regulated by the Federal government. For example, several laws under the jurisdiction of the Secretary of Agriculture prohibit generally discrimination in stockyard services (7 U.S.C. 205, 208, 213) and in warehouse services (7 U.S.C. 254). Common carriers, water carriers, motor carriers and freight forwarders subject to the jurisdiction of the I.C.C. are prohibited from unreasonable and unfair discrimination. 49 U.S.C. 3(1), 316(d), 905(c), 1004(b). The Federal Aviation Act broadly prohibits discrimination against any "person" in air travel services by any air carrier, including foreign air carriers. 49 U.S.C. 1374(b). Discrimination in services by communications common carriers and telegraph carriers is prohibited by 47 U.S.C. 10, 202(a).

We have made no attempt to exhaust the list of such specific proscriptions. Since each of them individually has such limited application, they seem inappropriate as the basis for any Presidential action except a general instruction to all agencies to prevent unlawful discrimination in regulated commercial services. Beyond that, the application of each of these provisions must be considered within the context of a particular abuse in a specific area of commerce.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attachments

Testimony -- State

Statement by Sidney Sober, Acting Assistant Secretary for Near Eastern and South Asian Affairs, before the Subcomittee on International Trade and Commerce, House Foreign Affairs Committee

Thursday, March 13, 1975

MR. CHAIRMAN, I am sure the Subcommittee will understand that, while we are in the middle of delicate negotiations in the Middle East, this is a particularly difficult time to be discussing the subject before us today. I nevertheless wish to be responsive to the Subcommittee's interest in discussing the policy of the Department of State toward the Arab boycott of Israel and actions by the Department in connection with the boycott.

Let me begin by putting the boycott in its Middle East context.

The Arab boycott of Israel is one manifestation of the basic Arab-Israel conflict and thus arises from deep-seated political and emotional factors. The initial boycott organization, which was set up as a committee of the Arab League Council at the beginning of 1946, applied a primary boycott to prevent the entry of certain products into Arab countries from what is now the State of Israel. The secondary boycott, designed to inhibit third parties from assisting in Israel's development, was introduced in 1951, and it is this secondary boycott that affects American economic relations with a number

of Middle East countries.

The scope of the boycott has been broadened through the years, and it applies to a variety of activities which are seen by the Arab countries as constituting a special economic relationship with Israel. An extension of the boycott has involved the blacklisting of foreign actors, artists and other entertainment figures (and their films or recordings) judged to have aided Israel, such as through fund-raising. It is our understanding that, generally speaking, the act of trading with Israel -- as such -- does not violate any of the regulations of the boycott organization and does not of itself bring the boycott into effect. However, the Arab countries themselves reserve the power to interpret the boycott regulations and decisions, and our experience suggests that they are not uniformly applied. There are a number of firms which do business in Israel and Arab countries.

It is impossible to determine how much the boycott up to now has actually harmed Israel, whose economy has been growing at the rate of about 10 percent annually. We recognize, however, that the rapidly increasing economic strength of certain Arab countries has enhanced the Arab boycott as a potentially effective weapon against Israel. There is a likelihood that the growing attractiveness of commerce with Arab countries will place greater

pressure on some foreign firms not to deal with Israel because of the boycott.

Now I want to come to the position of the U.S. with regard to the boycott. As stated on numerous occasions our position is clear and it can be summarized as follows: the United States opposes the boycott. We do not support or condone it in any way. The Department has emphasized our opposition to the boycott to the Arab governments on many occasions as it adversely affects United States firms, vessels and individuals. Where the commercial interests of American firms or individuals have been injured or threatened with injury, we have made representations to appropriate Arab officials.

Consistent with our policy of opposition to the boycott, as reflected in the Export Administration Act of 1969, the Department of State has refused hundreds of requests from U.S. companies for authentication of documents relating to the boycott, as being contrary to public policy.

A number of American firms with boycott problems have consulted with Department officials. These firms have been (A) reminded of their reporting responsibilities under the Export Administration Act and (B) encouraged and requested to refuse to take any action in support of restrictive trade practices or boycotts.

A fundamental factor which has to be faced is

that Arab governments regard the boycott as an important element in their position toward Israel, and one of the basic issues of the Arab-Israeli conflict to be dealt with as progress is made toward resolving that conflict. Indeed, this is one of the issues which we have very much in mind as we continue our diplomatic efforts to help the parties achieve a just and lasting peace. The problem has been how to change effectively the underlying conditions which led to imposition of the boycott. We believe we can best serve this objective not through confrontation but by continuing to promote with the parties directly concerned a peaceful settlement of basic Middle East issues. We believe that our present diplomatic approach is the most effective way to proceed.

Though the boycott emerged from the political problems of the Arab-Israeli conflict, we are also concerned by reports that it could be used for discrimination on outright religious grounds. On this subject President Ford has recently said: "There have been reports in recent weeks of attempts in the international banking community to discriminate against certain institutions or individuals on religious or ethnic grounds.

"There should be no doubt about the position of this Administration and the United States. Such discrimination is totally contrary to the American tradition

and repugnant to American principles. It has no place in the free practice of commerce as it has flourished in this country.

"Foreign businessmen and investors are most welcome in the United States when they are willing to conform to the principles of our society. However, any allegations of discrimination will be fully investigated and appropriate action taken under the laws of the United States."

In summing up, I want to reemphasize

--that we oppose the boycott and will continue to make our opposition to it known, and

--that we will continue to oppose any efforts to discriminate against American firms or individuals on the basis of religion or ethnic background.

At the same time, we will continue to do our utmost to help the countries in the Middle East to find a basis for resolving the Arab-Israeli dispute and to arrive at a just and durable peace. It is our conviction that in the attainment of peace lies the fundamental basis for the resolution of the boycott issue, among others, which we are discussing today.

Statement of
The Honorable Gerald L. Parsky
Assistant Secretary of the Treasury
Before the
Subcommittee on International Trade
and Commerce
House Committee on Foreign Affairs
March 13, 1975

Mr. Chairman, I am pleased to be here this afternoon as the representative of the Treasury Department to speak on matters concerning the Arab economic boycott of Israel and the issue of discrimination on religious or ethnic grounds.

It is the policy of the United States to encourage trade and economic cooperation with all countries with which we have diplomatic relations. Pursuant to that policy, and in the belief that closer economic ties with nations in the Mid-East could further political as well as economic stability, the U.S. Government has established Joint Commissions for the purpose of furthering economic cooperation with Egypt, Israel, Iran, and Saudi Arabia, among others. The U.S.-Saudi Arabian Joint Commission on Economic Cooperation, established by Secretary Kissinger and the Second Deputy Prime Minister of Saudi Arabia, is headed on the U.S. side by the Secretary of the Treasury. Its stated purposes are to promote programs of industrialization, trade, manpower training, agriculture, and science and technology. The Secretary of the Treasury is also U.S. Chairman of the U.S.-Israel Joint Committee for Trade and Investment which has been dealing with ways to enhance collaboration in the areas of investment, trade, raw materials supply and scientific cooperation. Although the Treasury Department does not head the other Joint Commissions, we have participated in their activities.

Questions have arisen whether it is appropriate for the United States

Government to follow these policies in light of the Arab boycott and reported discriminatory activities against Jews. In answering these questions, I think it is important to begin with the clearest possible understanding of the nature of the Arab practices. In particular, I would like to distinguish between the Arab economic boycott of Israel, on the one hand, and discriminatory activities based on religion on the other.

The Arab boycott of Israel has been in operation since the late 1940's. As a secondary boycott, it operates to prevent certain businesses, those on the so-called blacklist, from doing business in Arab countries or entering into joint business undertakings with Arab firms. The Arabs maintain that firms are placed on the blacklist only if they have especially close economic ties with Israel, or if they contribute to the Israeli defense capability. Although there have been allegations to the contrary, the best information available to us indicates that the boycott has in fact been based primarily on these economic factors and not on the religion or ethnic background of owners or managers of firms. To our knowledge, questionnaires distributed by the boycott office focus on the economic relations of businesses to Israel; they generally do not request religious or racial information. Furthermore, there is every indication that firms without any clear Jewish ties are being boycotted while other firms with prominent Jewish owners, managers, or directors are doing business in the Arab world. The existence of the boycott machinery may have in the past permitted some instances of discrimination based on religion, but the evidence available to us indicates that this has not been among the criteria for being boycotted.

A separate issue apart from the boycott has been the policy of the Government of Saudi Arabia to deny visas to Jews. Saudi Arabia has always had a very restrictive visa policy, and in previous decades obtaining an entry permit was difficult for any non-Moslem. At present, the Government of Saudi Arabia maintains a general policy of not issuing visas to Jews.

While we must recognize the sovereign right of foreign nations to choose the criteria on which they permit and deny the entry of individuals into their country, nonetheless the U.S. Government opposes this Saudi visa policy, and we have so informed the Saudis. Furthermore, the Treasury Department has never acquiesced in or complied with this discriminatory practice. We have advised the Saudis that we will not screen individuals visiting Saudi Arabia under the aegis of the Joint Commission, and government employees have been permitted entry into that country without regard to religion. To make the point as clearly as possible: U.S. Government employees who are Jewish have gone to Saudi Arabia and have conducted business in that country in connection with Joint Commission activities. Thus, the Saudi Government policy of discrimination against Jews in issuing visas has not been a problem in the past in this connection and we do not anticipate it will be a problem in the future.

Let me return now to the issue of the Arab boycott against U.S. firms. The record clearly indicates that the U.S. Government has consistently opposed the boycott and we shall continue to oppose it. The Department of State has repeatedly made known our disapproval of

the boycott through diplomatic channels and has on numerous occasions offered assistance to affected U.S. firms. Treasury Department officials have made clear to Arab representatives to Joint Commissions that we oppose the boycott and consider it injurious to our bilateral relations and to their development efforts.

Furthermore, we believe we are, in a real sense, working to end the boycott of U.S. firms by promoting closer economic ties with all the nations in the Mid-East. These ties serve to demonstrate the potential contribution of U.S. firms to their economies. There is an economic cost to the Arab countries involved in boycotting U.S. firms -- the opportunity cost of foregoing U.S. technology, managerial talent, and capital -- and this cost will become clearer as economic cooperation increases. We believe this is an especially important consideration with regard to the non-oil producing countries in the Middle East which are more readily inclined to the removal of impediments to their economic growth. Thus we have seen cases where companies have been permitted to do business in these countries, although they continue their relationship with Israel.

More importantly, we are attempting to create an economic and political climate in which a lasting peace settlement in the Mid-East is possible. Such a peace settlement is the best way to bring a definitive end to the Arab boycott. Thus we view our broad effort at increased economic cooperation with Arab countries as the most effective way in the long run to oppose and bring an end to the boycott.

We must, however, recognize that the increased economic power of the Arab oil-exporting countries has substantially enhanced the potential effect of the boycott. Being boycotted by the Arab league is a much more serious situation for most American firms in 1975 than it was in 1955. And in recognition of this, I think it is altogether appropriate that we re-examine our legal and other means to effectively counter the effects of the boycott. As you are aware, President Ford has ordered an interdepartmental study which is presently being conducted to determine what U.S. laws may be brought to bear on this problem and also what additional steps, if any, should be taken by the Government in response.

Finally, let me say a few words concerning foreign investment in the U.S. This is a subject under active review by other Congressional committees, but questions concerning investments which are germane to this hearing have been raised.

In formulating our policies in this area I would urge that full account be taken of two factors: One is that we need to encourage foreign investment in the U.S., all the foreign investment we can appropriately attract to assist in promoting the growth of our economy. Second, we have a long-standing commitment to achieve an environment for international investment in which capital flows are responsive to market forces unencumbered by governmental influence. We have urged other countries to help create such an environment and we are a party to numerous treaties granting broad reciprocal access to markets. We feel strongly that this policy helps maximize long-term economic growth and productivity.

I think it has been made clear both by the President and by the Congress that we will not tolerate foreign investors who discriminate in the United States on the basis of religion or race. Several Arab countries have agreed to consult with us prior to undertaking significant investments in order to assure that their activities in the U.S. are consistent with our national policies and objectives. We are hopeful that all foreign investors will follow this policy. These consultations offer us the opportunity to stress to investors that it is imperative that they conduct their affairs here in conformity with the principles of our society. The Justice Department has been actively reviewing our present laws to determine whether they are adequate to assure this conformity for all.

As we explore the question of whether additional approaches to all of these issues are required, I believe we must keep carefully in mind the need to avoid unnecessary confrontation. This would obviously have an adverse effect on our overall relations in the Mid-East, particularly our ability to help further an Arab-Israeli settlement, and would stiffen resistance in the Arab world to relaxation and removal of the boycott.

Testimony -- Commerce

STATEMENT OF
CHARLES W. HOSTLER
DEPUTY ASSISTANT SECRETARY FOR INTERNATIONAL COMMERCE
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL TRADE AND COMMERCE
OF THE
HOUSE FOREIGN AFFAIRS COMMITTEE
MARCH 13, 1975

INTRODUCTION: Two Separate Issues (1) Discrimination
(2) Arab Boycott

Mr. Chairman: I welcome this opportunity to present Department of Commerce views concerning the issue of discrimination on religious or ethnic grounds and the Arab economic boycott of Israel.

The Department of Commerce subscribes totally to President Ford's statement of February 26 on this subject. We view the problem as involving two separate issues: (1) On the one hand, we are faced with allegations of Arab pressures on certain U.S. institutions to undertake actions which discriminate against American citizens or firms on the basis of race or religion. (2) On the other hand, there is a long-standing system of economic sanctions applied by Arab League countries against certain types of business relationships undertaken by U.S. firms with Israel. As different issues, they need different remedies and approaches.

Discrimination

There is no question that the Department of Commerce finds unacceptable any pressures on U.S. private institutions to discriminate against U.S. citizens or firms in their investment or employment policies. As Secretary Dent wrote to Senators Javits and Williams on March 7, "I fully share your indignation at attempts by any groups, foreign or domestic, to discriminate against American institutions on religious or ethnic grounds." As you know, the President has directed several Departments, including the Department of Commerce, to investigate allegations of ethnic discrimination in activities carried out pursuant to laws and programs under their jurisdiction. It would be inappropriate for me to comment further until these investigations of discrimination against U.S. citizens and firms have been completed.

At the same time, and also at the President's request, we are investigating whether there have been any instances of pressure or submission to pressure for such discrimination within the Commerce Department. Although this investigation is not yet complete, I am pleased to report that no instances of such discrimination within the Department have yet been found.

On the contrary, at least one Department of Commerce representative recently traveled to an Arab OPEC nation after openly acknowledging he was Jewish.

Arab Boycott

The Arab Boycott of Israel poses a different problem. This government's opposition to the Boycott, in accordance with Congressional policy, is a matter of record. I would endorse the comment of Deputy Assistant Secretary of State Harold H. Saunders in his February 26 appearance before Senator Church's Subcommittee, to the effect that the question is not whether we oppose the Boycott but how we can most effectively work to change the situation which gives rise to it. It in no way detracts from our policy of opposition to recognize that in trying to deal with this issue we are concerned with conditions imposed by independent nations on their own external economic relations, which impact on U.S. economic interests. Moreover, however negative our reaction to them, they reflect convictions deeply held by the Arab countries.

It is unfortunate that in the current dialogue, the terms "discrimination" and "boycott" are becoming virtually interchangeable. I say unfortunate because of the possibility that

proposed legislative remedies which may be appropriate to the discrimination problem may, in the confusion of the issues, be extended also to the existing U.S. anti-boycott legislation. The Department's view is that such action would adversely affect U.S. economic interests without in any way redressing the causes of the boycott problem, for reasons which I shall outline.

As you know, the Boycott has its origins in the long-standing Arab-Israeli dispute resulting from the creation of the State of Israel in 1948. Although the Arab states generally act in concert where actions against specific foreign firms are concerned, various countries throughout the history of the Boycott have made exceptions to it on a case-by-case basis when apparently it was deemed in their national interest to do so. The Boycott has worldwide application; it is not directed only at U.S. interests.

The Boycott operates both as a primary boycott (aimed at preventing direct economic relations between the Arab States and Israel) and as a secondary boycott (by seeking to influence companies in third countries not to establish certain types of relationships with Israel). It is directed essentially

at firms undertaking activities which the Arabs consider as contributing to the consolidation of Israel's economic and defense capabilities.

The Boycott generally does not apply to companies engaged in regular civilian trade with Israel. This is illustrated by the type of questions contained in Arab questionnaires sent to firms asking them to certify to their relations with Israel. The questions include the following:

1. Do you have main or branch factories, assembly plants, or joint ventures in Israel?
2. Do you hold shares in Israeli companies?
3. Do you provide technical assistance or consultative services to Israel?
4. Do you maintain general agencies or main offices in Israel for Middle East operations?
5. Do you license technology to Israel?
6. Are you prospecting for natural resources in Israel?
7. Are you acting as the principal importer or agency for Israeli goods?

Certain Arab states also have boycott related import regulations or otherwise require pro-forma boycott certifications on purchase orders, letters of credit, and other commercial documents issued for individual transactions.

In short, the Boycott appears intended to deny the State of Israel certain economic benefits, but not to constitute an attempt to prevent routine exports of products and services to Israel or to deny trade opportunities to exporters on religious or ethnic grounds. We would not contend that there have not been instances of attempted religious or ethnic discrimination under cover of the Boycott rules. It has been the Department's overall experience, however, that for the most part, the boycott has been applied solely as an economic weapon against Israel.

How effective has it been? The concensus appears to be "Not very effective." Until recently it has apparently been more of a nuisance than any real impairment of Israel's access to needed investment, technology, and trade goods. As to the affected U.S. firms, many--perhaps most--of those which have been boycotted have suffered an actual or potential loss of sales to Arab countries. On the other hand, it is difficult to assess how many of these firms have had any interest in, or potential for dealing with, Arab countries. The effect on total U.S. exports to the Arab countries cannot be estimated, since it would be virtually impossible to

determine the extent to which sales have been lost by boycotted firms and to what degree these sales may have been recouped by other U.S. firms or lost to foreign competitors. In view of the steadily increasing U.S. exports to the Arab countries and Israel over the years, and particularly the dramatic increases of the past two years, the Boycott would not appear to have significantly hampered the overall ability of U.S. firms to do business with either Israel or the Arab countries.

The Department is aware, however, of the increased concern being generated over the Boycott by the new economic realities in the Arab states, and of legislative proposals to prohibit U.S. firms from responding to boycott requests. The Department of Commerce believes that any such legislation would be ill-advised. In this connection, it might be useful to sketch briefly the history of the anti-boycott legislation.

When the Export Control Act of 1949 was extended by Congress on June 30, 1965, it was amended to include a statement that the policy of the United States is: (a) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States; and (b) to encourage and request U.S. domestic concerns

engaged in export to refuse to take any action or sign any agreement that would further such practices.

Prior to the adoption of the 1965 amendment there was consideration in the House of a bill that would have prohibited U.S. exporters from responding to questionnaires issued by the League of Arab States. The Department of Commerce opposed such an amendment to the Export Control Act at that time, essentially for the following reasons:

a) its effectiveness as a device to force boycotting countries to terminate the Boycott was negligible.
b) data required by the Arabs to administer the Boycott, if not obtained from exporters, via questionnaires, could be collected from other sources. To the extent that the information was unreliable, businessmen might be blacklisted erroneously;
c) many companies that, for reasons of their own, decided to trade with the Arab countries would be adversely affected because their legal inability to respond to the questionnaire would lead to their blacklisting;
d) firms are boycotted only when their relationships with Israel are within certain specifications; firms not so involved would be adversely affected by a law prohibiting responses to questionnaires.

e) a businessman should be free to make a choice between two countries when certain commercial relations with one may result in retaliation by the other. He is the best judge of the requirements of his business. Under a legal prohibition, he would lose this discretion.

The Congress found these arguments persuasive and in its final form, the amendment "encouraged" and "requested" firms to refuse to take any action, including the furnishing of information or the signing of agreements, that would have the effect of furthering or supporting restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States. It did not, however, prohibit taking such action or supplying such information.

This amendment was endorsed by the Congress in 1969 after some discussion by being incorporated without change in the Export Administration Act of 1969. It was endorsed again in 1972 and 1974 when the Act was extended.

The reasons for the position taken in 1965 and subsequently by the Department of Commerce were sound at that time and are sound today. The Department believes that American firms should not

be restricted in their freedom to make economic decisions based on their own business interests, where no element of ethnic or religious discrimination in violation of U.S. law is involved. This is particularly important in the current economic climate, when exports to the Near East may be significant to a company's financial position and employment, as well as to our overall national economy and balance of payments. International competition for the Arab markets is intense, and we know of no other country which has enacted or intends to enact anti-boycott legislation. There is a strong possibility that the Arab countries, interpreting more restrictive U.S. anti-boycott legislation as an anti-Arab action, might react with obvious counter-measures against U.S. interests and business concerns. Mandatory U.S. legislation could thus produce serious adverse effects in the U.S. and would remove flexibility on the part of the U.S. Administration to deal with the changing conditions in the Near East. Such legislation would have only a very limited effect on supplies available to the countries against which such legislation would be directed. There would thus be little pressure on the Arab states to abandon their Boycott.

The Department believes that the Boycott, as a manifestation of the deep-seated Arab-Israeli differences, can only be effectively dealt with as part of an overall settlement. We share with the Department of State the view that the most effective way to resolve this problem is to continue to seek a resolution of the matters which gave rise to it. We do not endorse a policy of confrontation which could work to the detriment of U.S. interests and efforts to resolve the underlying issues. We advocate an approach which provides an appropriate balance between our policy of opposing restrictive trade practices and supporting legitimate U.S. business operations.

I would like to comment on the Department's role in implementing the present law as it applies to boycotts of the type we are concerned with here. Our regulations set forth the U.S. Government's basic policy of opposing such boycotts and require exporters to report receipt of requests for information or action that would further the boycott efforts of the requesting country. The Department has twice conducted widespread publicity campaigns in an effort to make certain that exporters were aware of the law and their responsibility to report. The first campaign followed immediately upon enactment of the legislation and carried over into 1966. Another intensive campaign was launched in 1968 and carried over into 1969.

In 1968 and 1969, the Department also made a spot check of a number of New York firms known to be trading with the Arab countries but which had filed no reports. Many had received no boycott requests. Others, because of ignorance or misunderstanding, were not complying with the reporting requirement. However, those firms which should have reported, but had not, immediately complied.

Currently, the Department is preparing another campaign aimed at calling to the attention of the export community the policy of the government respecting boycotts and the reporting requirements of the laws and regulations.

Given the limited investigative resources of the Office of Export Administration, which has the responsibility within the Department for administering the law, constant surveillance of exporters trading with the Arab states would be difficult. Priority has had to be placed on investigating alleged violations of our national security export controls. Notwithstanding, any allegation that a firm is not complying with the reporting provisions of the export regulations is promptly investigated. Upon learning of the recent press release of the Anti-Defamation League of B'Nai B'rith naming shipping

companies and banks who were alleged to be in violation of our regulations, for example, the Department's investigators in New York were immediately instructed to obtain copies of the relevant documents, and to conduct a thorough investigation. This is currently underway, as is outlined in our Commerce press release of March 6, 1975.

MARITIME ADMINISTRATION

As a final point, the Maritime Administration, an agency within the Department of Commerce, has reviewed questions raised with respect to the Boycott. The Maritime Administration, however, does not have the statutory responsibility for regulating the commercial practices of United States-flag ocean carriers under the Shipping Act of 1916, especially those practices pertaining to unlawful discrimination against persons, localities or cargo. Rather, this responsibility is vested in the Federal Maritime Commission, an independent regulatory agency.

The Maritime Administration on the other hand does have primary responsibility for fostering and promoting the construction and operation of the privately-owned United States-flag merchant fleet. The basic methods utilized to

achieve this responsibility are the various assistance programs available to the Maritime industry, including direct construction and operating-differential subsidies, under the Merchant Marine Act of 1936.

The Maritime Administration, as part of its responsibility to promote the U.S. Maritime Industry, has an obligation to inform American-flag shipping companies of appropriate laws and regulations that may affect their business. This Agency is developing a Bulletin which will be directed to the entire United States-flag oceangoing fleet, both subsidized and unsubsidized, reapprising them of their obligation under the Export Administration regulations to report restrictive trade practices or boycotts to exporters.

SUMMARY

In summary, Mr. Chairman, the Department of Commerce, for the reasons set forth, urges that there be no change in the "anti-boycott" provisions of the Export Administration Act. We shall administer the law and our regulations effectively and thus keep before the affected elements of the U.S. business community, the Government's policy of opposing such boycotts.

This position is in the mutual self interest of this Nation, the Arabs and the Israelis. We must work constructively to build a stable and lasting peace in that area. We believe that avoiding confrontation in this sensitive part of the world at this time would be in the best interest, not only of those nations directly involved, but the world at large.

This, Mr. Chairman, concludes my prepared remarks.

Department of Justice

TESTIMONY

OF

ANTONIN SCALIA
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

ON

LEGAL ISSUES UNDER CIVIL RIGHTS AND ANTITRUST LAWS REGARDING THE ARAB BOYCOTT

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE AND COMMERCE
COMMITTEE ON FOREIGN AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 13, 1975

Mr. Chairman and Members of the Subcommittee:

My role in this joint presentation before you today is to describe the application to the Arab boycott of those categories of laws for which the Department of Justice has enforcement responsibilities. I may note at the outset that I will be unable, either in my testimony or in responding to your questions, to provide the Department of Justice's views as to whether a specific incident which has been reported in the press or which has otherwise come to your attention constitutes a violation of law. All such incidents within the jurisdiction of the Department are currently under active investigation, and it would be inappropriate for me to comment upon them. Moreover, as you will conclude from the later portions of my testimony, the lawfulness or the unlawfulness of a certain act will often depend so much upon particularized circumstances that it would be misleading to attempt a conclusion until a full investigation and assessment of the circumstances had been completed.

I. CIVIL RIGHTS LAWS

I would first like to discuss the application of what are generically termed the Civil Rights Laws. Most of

these laws are not the enforcement responsibility of the Department of Justice, but some of them are; some others of them used to be; and the Department in general has wide experience in the field. For purposes of this discussion it will be useful to divide the problem into three categories: discrimination in employment; discrimination in the selection of suppliers or contractors; and discrimination by private firms in the treatment of customers.

Discrimination in Employment - The Federal government is of course prohibited from discriminating in employment on the basis of race or religion by the Constitution itself. In furtherance of this Constitutional principle, Executive Order 11478 explicitly prohibits discrimination in the employment practices of Federal agencies and charges the Civil Service Commission with responsibility for enforcement of the prohibition. In 1972, discrimination in employment practices of Federal agencies was made unlawful by statute through the addition of § 717 to Title VII of the Civil Rights Act of 1964. Enforcement of § 717 rests with each agency, with respect to its own employees, with oversight responsibility in the Civil Service Commission. It should be noted that both Executive Order 11478 and § 717 of Title VII specify that they are not applicable to "aliens employed outside the

limits of the United States." The implication of this is that they do apply to United States citizens employed throughout the world.

With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of "unlawful employment practices" by any private employer "engaged in an industry affecting commerce who has fifteen or more employees." The prohibited practices include refusal to hire an individual, or any discrimination regarding the terms or conditions of his employment, based on race, color, religion, sex or national origin. Once again the statute contains an exemption "with respect to the employment of aliens outside any State", which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world. Prior to the 1972 amendments, the Department of Justice had civil enforcement responsibility with respect to this legislation but it is now lodged in the Equal Employment Opportunity Commission.

With respect to Title VII's restrictions on employment practices of private individuals, one provision deserves special mention within the present context: Section 703(e) provides, in part, that discrimination in hiring

or employment "on the basis of . . . religion, sex, or national origin" (note that "color" and "race" are significantly omitted) shall not be unlawful in circumstances where such factor "is a bona fide occupational qualification reasonably necessary to the normal operation of /the/ particular business or enterprise." There is no Federal case law on the point whether this provision would, for example, justify the refusal to hire a Jewish applicant for a job to be performed in a country which does not issue visas to Jews. A New York State trial court found that a comparable exemption under that State's anti-discrimination legislation would not justify such refusal. */

In addition to Title VII, there are special restrictions upon discrimination in the employment practices of persons who hold contracts with the Federal government and perform federally assisted construction. Executive Order 11246 forbids such employers, regardless of the number of employees whom they hire, to discriminate on the basis of race, color, religion, sex, or national origin. Responsibility for securing compliance with the Executive order belongs to the various contracting agencies,

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*/ See American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S. 2d 218 (Sup. Ct. 1959), modified, 10 App. Div. 2d 833, 199 N.Y.S. 2d 157 (1960), aff'd, 9 N.Y. 2d 223, 213 N.Y.S. 2d 60, 173 N.E. 2d 788 (1961).

subject to the overall authority of the Secretary of Labor. Sanctions include the bringing of law suits by the Department of Justice, upon referral by the agency, to enforce the nondiscrimination requirements. It should be noted that the order permits the Secretary of Labor to exempt classes of contracts which involve "work . . . to be . . . performed outside the United States and no recruitment of workers within the limits of the United States." The clear implication is that contracts to be performed abroad are covered.

While Title VII and Executive Order 11246 contain the principal Federal restrictions upon discrimination in private employment, some agencies have issued regulations, based upon their particular statutes, concerning employment practices of federally regulated or assisted entities. See, for example, the regulations of the Federal Communications Commission, 47 CFR § 21.307.

Discrimination in Selection of Contractors - Title VII and the Executive order discussed above relate to "employment." That term does not cover the selection of suppliers or subcontractors. Nor is there any other generally applicable Federal statute or Executive order prohibiting discrimination on such grounds as race or religion in the selection of suppliers or contractors.

With respect to the procurement practices of Federal agencies, the Constitution would presumably prohibit any discrimination, even as between contractors, on the basis of race or religion. With respect to the contracting practices of private firms, however, in selecting suppliers of goods or services, it appears that the Federal Civil Rights Laws impose no constraints.

Discrimination in the Treatment of Customers - There are no generally applicable Federal Civil Rights Laws which prohibit discriminatory refusal to deal with a particular customer. The closest approach to a broad Federal prohibition is Title VI of the 1964 Civil Rights Act, which prohibits the recipients of Federal grants from discriminating against the intended beneficiaries of Federal programs on the ground of race, color or national origin--for example, such discrimination by private hospitals which receive Federal money. Some civil rights statutes do impose restrictions, unconnected with the receipt of Federal money, upon particular areas of commerce--for example Title II of the 1964 Civil Rights Act, relating to public accommodations, and Title VIII of the 1968 Civil Rights Act, relating to housing. There are, however, numerous State laws which impose more general restrictions.

II. FEDERAL ANTITRUST LAWS

The only Federal antitrust statute which has significant application to the problem we are discussing is the Sherman Act, which makes illegal "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." This legislation is enforced by the Antitrust Division of the Department of Justice through suit in the courts to impose both civil and criminal sanctions. In addition, any person injured as a result of violation of the Act may bring a law suit seeking treble damages.

The Sherman Act represents what might accurately be called a "common law" of antitrust. That is to say, the generalized prohibition set forth in the language just quoted has been given content by judicial reference to common law antitrust principles which existed before the Act was passed, and by judicial elaboration and refinement of new principles under the rubric of the statutory language. "Restraint of trade" has been read to mean "unreasonable restraint of trade"--and unreasonableness has been determined by economic and legal principles enunciated by the courts.

The primary boycott in the present case--the boycott of Israel by the Arab countries--is not a matter which directly affects United States commerce or is cognizable under our antitrust laws. It is the secondary boycott we are here concerned with, that is, the boycott by the Arab countries of United States businesses which provide certain economic advantages to Israel. Let me discuss first what I might call the "core boycott"--that is, the agreement among the Arab nations and (let us assume) independent Arab businesses to boycott certain United States companies.

An agreement between commercial firms doing business in the United States to boycott another firm in this country would constitute a traditional form of restraint of trade, and ordinarily would fall within the category of acts illegal per se under the Sherman Act. There are, however, some special features about the present case. First, and perhaps most important, is the fact that the ultimate purpose of the boycott is not to injure any United States firm--nor is it even a commercial purpose in the usual sense. The boycott is ultimately a political rather than a commercial phenomenon. Second, there is a question whether a boycott of this sort, which in effect requires an American company to choose whether it wishes

to have certain types of business relations with Israel or to have dealings with the Arab countries, has a sufficient impact upon United States foreign commerce to come within the Sherman Act. The Act only proscribes activity which has a "material adverse effect" upon our foreign commerce.

There are some distinctive legal considerations raised by the governmental character and the nationality of the boycotting parties. In general, as a matter of international law, a sovereign state cannot be made a defendant in the courts of another sovereign. This doctrine only applies with respect to the "public or political" acts of a state and not with respect to its "private or commercial" acts; but there is at least some question as to which category the present boycott occupies. Another principle of international law is the so-called "act of state doctrine," which holds that our courts will not examine the validity of acts of a foreign sovereign performed <u>within its own territory</u>. This would pose considerable difficulty with respect to boycott agreements and activities undertaken by the Arab states within their own territory. Finally, another doctrine of international comity provides that a defendant (whether a sovereign or a private individual or

corporation) should not ordinarily be subject to sanction in one jurisdiction for acts performed in another jurisdiction under pain of sanction by the latter jurisdiction. Application of this principle could exclude from liability even non-governmental Arab entities which participate in the boycott outside this country by direction of their own governments.

None of the above-described distinguishing considerations makes it theoretically impossible to apply the Sherman Act to the "core boycott" in the present case. Cumulatively, however, they raise substantial doubts that the courts would interpret the flexible statute to require such application--at least absent evidence of major economic impact upon United States exports. It has at least never been held that a foreign, politically motivated boycott of this sort violates the Act.

Let me turn now from the "core boycott"--that is, the agreement among the Arab Governments and companies themselves--to other agreements in this country which may accompany or flow from the "core boycott." An agreement between an American company and an Arab company that the latter will give the former its business in exchange for a commitment by the former not to trade with Israel would be much more likely to constitute a Sherman Act violation. (This is to be distinguished from the situation in which

the American company unilaterally refrains from trading with Israel in order to obtain Arab business, but without agreeing not to trade.) Even more suspect--and almost a certain offense--would be an agreement by the American company not only to refrain from doing business with Israel but to refrain from doing business with certain American companies as well.

Such indirect consequences of the "core boycott" are currently under active investigation by the Antitrust Division. Of course, in order to find a violation of the Sherman Act, a "contract, combination, or conspiracy" as opposed to merely individual action, must be established. Where there is an agreement, however, it will not necessarily suffice as a defense that the agreement was entered into by a company under duress in order to avoid becoming an object of the boycott. The answer to these issues which extend beyond the core boycott must be considered on a case-by-case basis.

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I would like to conclude, Mr. Chairman, by noting that the Justice Department has always been the vanguard of the struggle against both of the evils we are seeking to avoid

in connection with the present boycott: racial or religious discrimination, and anticompetitive behavior exerting a material adverse effect upon United States commerce. The President has asked us to redouble our efforts, in the present situation, and I assure you we are promptly and enthusiastically complying.

(FORMERLY IA-1014)

DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION
BUREAU OF EAST-WEST TRADE
OFFICE OF EXPORT CONTROL
WASHINGTON, D.C. 20230

Form Approved
Budget Bureau No. 41-R[illegible]

U.S. EXPORTER'S REPORT
OF REQUEST RECEIVED FOR INFORMATION, CERTIFICATION, OR OTHER ACTION INDICATING A RESTRICTIVE TRADE PRACTICE OR BOYCOTT AGAINST A FOREIGN COUNTRY

A. IMPORTANT. It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take, but are not legally prohibited from taking, any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.

Accordingly, I encourage and request individuals and firms receiving such requests to refuse to comply with them.

Frederick B. Dent
Secretary of Commerce

B. INSTRUCTIONS: This form must be completed by a U.S. exporter whenever he is requested to take any action, including the furnishing of information or the signing of an agreement, which is designed to support a restrictive trade practice or boycott fostered or imposed by a foreign country against any other country not included in Country Group S, W, Y, or Z. (Country Groups are listed in Supplement No. 1 to Part 370 of the U.S. Department of Commerce Export Control Regulations.) Submission of this form is mandatory (50 USC App. 2403(b). Failure to comply subjects the U.S. exporter to the penalties prescribed in Section (6) of the Export Administration Act of 1969, as amended. It must be submitted to the U.S. Department of Commerce, Domestic and International Business Administration, Bureau of East-West Trade, Office of Export Control, Washington, D.C. 20230, within fifteen business days from the date of receipt of such a request. Whenever a person receives more than one request for action with reference to the same transaction, only the first request need be reported to the Office of Export Control (See Part 369 of the Export Control Regulations).

C. CONFIDENTIAL. Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in Section 7(c) of the Export Administration Act of 1969 (50 USC App. 2406(c)).

1. Name and Address of U.S. Exporter submitting this report:

Name:

Address:

City, State, and Zip Code:

2. Exporter's Reference No. *(If any)*:

3. Name of Country/ies against which the request is directed:

4. Date request was received by me/us:

5. I/We received this request from:

Name:

Address:

City and Country:

6. Specify type of request received. *(If any item in 6b is checked, complete item 7)*

a. ☐ Questionnaire *(Attach copy)*

b. ☐ Other type of request for information or action contained in:

☐ Trade Opportunity ☐ Certificate of Origin ☐ Consular Invoice
☐ Bid Specification ☐ Certificate of Manufacture ☐ Other *(Specify)* _____
☐ Purchase Order ☐ Letter of Credit

7. If item 6b above is checked, give the specific information or action requested. (Use direct quotations from the request.)

8. If the request relates to a specific transaction, describe the commodities or technical data involved. (The description of the commodity or technical data may conform to the description on the order or to usual commercial terminology, and may but need not be in terms of the Commodity Control List or Schedule B.)

Quantity	Description	Value

9. Additional Remarks:

10. Action: (Completion of the information in this item would be helpful to the U.S. Government but is not mandatory.)

a. ☐ I/We have not complied and will not comply with the request for information or action described above.

b. ☐ I/We have complied with, or will comply with, the request for information or action described above.

c. ☐ I/We have not decided whether I/we shall comply with the request for information or action described above and I/we will inform the Office of Export Control of my/our decision.

11. I certify that all statements and information contained in this report are true and correct to the best of my knowledge and belief.

Sign here in ink _____ Type or print _____ Date _____

(Signature of Person Completing Report) (Name and Title of Person whose Signature Appears on the Line to the Left)

USCOMM-DC [illegible]