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STATE LEGISLATIVE RESPONSES TO THE ARAB BOYCOTT OF ISRAEL

The Arab boycott of Israel confronts the American business community with difficult ethical and political decisions. Six states, led by New York,¹ have quietly enacted antiboycott laws designed to prevent economic trade opportunities with the Middle East from encouraging discrimination within their borders.² The laws seek to prohibit the discriminatory effects of the boycott, which indicates that the Arab-Israeli conflict is not limited to military weapons³ or confined to the nations of the Middle East.⁴ More importantly, the states' responses signal a growing awareness that the federal government is unwilling to handle the complex moral, political, economic, and legal issues relating to the Arab boycott of Israel.⁵

This note will examine the history and nature of the boycott, the present federal and state statutes designed to thwart its effects, and the state antiboycott statutes and their accompanying practical problems.

¹ N.Y. EXEC. LAW § 296(13) (McKinney Supp. 1976) makes it an "unlawful discriminatory practice . . . for any person to discriminate against, boycott or blacklist or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person's partners, members, stockholders . . . business associates, suppliers or customers." It has been referred to by its author's name, Assemblyman Joseph F. Lisa.

² See, e.g., 1976 Cal. Legis. Serv. ch. 366, at 1247 (West); ILL. ANN. STAT. ch. 16 ½, §§ 196, 200; ch. 29, §§ 91-96; ch. 38, § 60-3 (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. §§ 11-2A01 - 11-2A15 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. EXEC. LAW § 296(13) (McKinney Supp. 1976); OHIO REV. CODE ANN. §§ 1129.11, 1153.05, 1331.01-.03, 1331.08, 1331.10-1331.11, 1707.44, 2307.832 (Baldwin 1976). Florida (H.B. 2713, Reg. Sess. 1976), Michigan (H.B. 6039-6043, Reg. Sess. 1976, and S.B. Nos. 1297-1301, Reg. Sess. 1976), and Pennsylvania (H.B. 2348) (1976) are considering similar legislation. A resolution was introduced in the Pennsylvania legislature, H.R. 293(1976), calling upon the federal government to enact legislation prohibiting discriminatory effects of the Arab boycott.

³ See L. PRESTON, TRADE PATTERNS IN THE MIDDLE EAST 49-51 (1970). For a general discussion of the economic impact of boycott agreements, see Bouve, *The National Boycott as an International Delinquency*, 28 AM. J. INT'L L. 19 (1934); Lauterpacht, *Boycott in International Relations*, 14 BRIT. Y.B. INT'L L. 125 (1933). For recent articles on the American response to the Arab boycott, see Schwartz, *The Arab Boycott and American Responses: Antitrust Law or Executive Discretion*, 54 TEX. L. REV. 1260 (1976); Note, *The Antitrust Implications of the Arab Boycott*, 74 MICH. L. REV. 795 (1976) [hereinafter cited as *Antitrust Implications*]; Note, *Export Policy, Antitrust and the Arab Boycott*, 51 N.Y.U.L. REV. 94 (1976) [hereinafter cited as *Export Policy*].

⁴ The Canadians have recognized the discriminatory effects of the Arab boycott within their borders. See N.Y. Times, Jan. 14, 1976, at A-7, col. 1.

⁵ See HOUSE COMM. ON GOVT. OPERATIONS, EFFECTIVENESS OF FEDERAL AGENCY ENFORCEMENT OF LAWS AND POLICIES AGAINST COMPLIANCE BY BANKS AND OTHER U.S. FIRMS WITH THE ARAB BOYCOTT, 31ST REPORT, 94th Cong., 2d. Sess. (1976) [hereinafter cited as *BANKS AND THE BOYCOTT*].

I. THE ARAB BOYCOTT OF ISRAEL

A. A Historical View

The Arab boycott of Israel has had two phases: the first involves the direct and primary boycott of Israel, and the second has been fostered by the new Arab wealth due to the fourfold increase in the price of oil after the Yom Kippur War.⁶ The primary boycott began when the Arab-Jewish dispute over Palestine became increasingly polarized over the proposed formation of the Jewish state of Israel.⁷ In October 1945, shortly after the formation of the Arab League,⁸ the primary boycott was formalized. In 1955, the Arab League organized the Central Boycott Office in Damascus to coordinate economic pressures against Israel, as developed by the Arab League Council.⁹

Relatively unnoticed in the United States until 1973,¹⁰ the boycott catapulted to world prominence in the wake of the dramatic rise in Arab wealth following the 1973 oil embargo, which forced many companies to reconsider the nature of their trade relationships with both Israel and the Arab nations.¹¹ The petrodollar bonanza moved the boycott from its primary military and

⁶ Guzzardi, *That Curious Behavior in the Arab Frontiers*, FORTUNE, July 1975, at 82; *The Arab Blacklist*, THE NATION, Mar. 15, 1975, at 292.

⁷ L. Preston, *supra* note 3, at 51. See also HOUSE SUBCOMM. OF OVERSIGHT AND INVESTIGATION OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, THE ARAB BOYCOTT AND AMERICAN BUSINESS, 94th Cong., 2d Sess. 10 (1976) [hereinafter cited as ARAB BOYCOTT REPORT].

⁸ See generally R. MACDONALD, THE LEAGUE OF ARAB STATES (1965).

⁹ Since the founding of the Arab League Council, the initial boycott rules have been frequently amended. See *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Sen. Comm. on Foreign Relations*, 94th Cong., 1st Sess. 442 (1975) (*General Principles for the Boycott of Israel, June 1972*) [hereinafter cited as 1975 Senate Hearings], noting the dates of successive amendments as the Arabs grew stronger and bolder.

Council meetings have resulted in a degree of confusion as to what the rules are at any given time. Adding to the confusion is the heterogeneous character of the rules, which differ for various types of activity—industry, trade, tourism, shipping, insurance, etc. *Id.* at 372. Finally, there has been a pragmatic tendency to relax the rules when such action is beneficial to the Arab states. See note 30 and accompanying text *infra*.

¹⁰ One of the initial attempts to expand the boycott occurred in 1965 when some Arab nations attempted to force Chase Manhattan Bank to comply with the boycott by demanding that the bank close its Israeli branches. Chase defied the Arabs and continued its extensive involvement in the Middle East. *Hearings on S. 948 to Amend Section 2 of the Export Control Act of 1949 Before the Senate Comm. on Banking and Currency*, 89th Cong., 1st Sess. 28 (1965) [hereinafter cited as 1965 Hearings].

¹¹ The Arab-dominated Organization of Petroleum Exporting Countries (OPEC) has become a force that Western countries can no longer ignore. 1974 OPEC revenues were estimated at \$105 billion; \$55 billion was available for foreign investments and the remainder was available to purchase goods and services. See 121 CONG. REC. H6579-81 (daily ed. July 10, 1975) (testimony of Rep. Holtzman); see also Wall St. J., Feb. 18, 1977, at 8, col. 1-2.

There is some evidence that high oil prices and the recent recession in the West have reduced the demand for Arab oil, causing a drop in OPEC revenues during late 1975, that will continue for several years. See Samuelson, *Too Little Too Late*, NEW REPUBLIC, Jan. 3, 1976, at 12; THE ECONOMIST, Feb. 14, 1976, at 84. Nevertheless, it is predicted that over the

economic focus into a second stage. The boycott is still directed towards Israel, but its evolution has created a wide range of moral, economic, and political questions in the United States.

B. An Overview of the Boycott

The Arab boycott of Israel operates on three levels. In its primary aspects it forbids all direct trade between Arab states and Israel, but this effort has not been completely successful.¹² The practice of one state boycotting another is one traditional technique for exerting economic pressure to achieve desired goals.¹³ The Arab boycott of Israel, however, represents the first modern attempt to impose and enforce secondary and tertiary boycotts.¹⁴ The secondary boycott is intended to bar from the Arab world all businesses that the Arabs believe have contributed materially to the strength of Israel.¹⁵

Through the tertiary or extended secondary boycott,¹⁶ some

next several years the Arab countries will accumulate vast sums of investment capital. See N.Y. Times, Jan. 4, 1975, at 2, col. 1 (describing massive Saudi Arabian development and construction projects planned for the next five years). This capital is presently being used in ambitious peacetime construction programs, and for eager American construction firms involved, there are rich rewards to be earned, but there are also immense difficulties including the possibility of antitrust attacks in the United States growing out of the Arab boycott. For example, the Bechtel Corp., the fourth largest contracting firm in the United States, has signed a \$9 billion contract with the Saudi Arabian government to oversee the construction of an industrial city. McQuade, *The Arabian Building Boom is Making Construction History*, FORTUNE, Sept. 1976, at 113. The corporation was subsequently sued by the United States for alleged antitrust violations. See note 40 and accompanying text *infra*.

¹² Farm produce does cross the Israeli-Jordan frontier. The Israelis like to exaggerate the amount of forbidden commerce, and the Arabs prefer to claim that it is nonexistent. What appears evident is that the primary boycott is generally respected, largely effective, and not a source of dispute among Arab states. Guzzardi, *supra* note 6, at 84.

¹³ Other techniques include export and import embargoes, licensing systems, blacklisting, prohibitions on reexportation, preemptive buying, controls on shipping, foreign exchange controls, and the blocking and freezing of assets. See ARAB BOYCOTT REPORT, *supra* note 7, at 9. Techniques of economic warfare were used with increasing sophistication during the two world wars. M. McDUGAL & F. FELICIANA, LAW AND MINIMUM WORLD ORDER 30 (1961), and are generally considered to be "legitimate exercises of sovereignty, not contrary to international law." W. BISHOP, INTERNATIONAL LAW 1033-34 n. 232 (3d ed. 1971). See generally Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245 (1976); Muir, *The Boycott in International Law*, 9 J. INT'L LAW AND ECON. 187 (1974); Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974).

¹⁴ For example, the United States has not required other countries to boycott Cuba as a condition of being able to do business in this country. See ARAB BOYCOTT REPORT, *supra* note 7, at 10. For a history of recent international economic controls, see Lowenfield, *Sauce for the Gander*, a paper delivered at the Conference on Transnational Economic Boycotts and Coercion, Feb. 19-20, 1976 at the University of Texas School of Law, Houston, Texas, cited in ARAB BOYCOTT REPORT, *supra* note 7, at 10 n.27.

¹⁵ Guzzardi, *supra* note 5, at 84. See also notes 24-26 *infra* for a consideration of what is materially contributing to the Israeli strength.

¹⁶ Prior to 1973, only the primary and secondary boycotts existed. See ARAB BOYCOTT REPORT, *supra* note 7, at 10; Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1367-70 (1976).

Arab nations refuse to deal with companies with pro-Israeli interests.¹⁷ In order to implement and monitor this boycott, the Arab League's Boycott Office maintains a blacklist of pro-Israeli businesses.¹⁸ As a military weapon, the Arab boycott has not affected the United States. On the other hand, the secondary and tertiary boycotts are acts of "foreign economic blackmail"¹⁹ that encourage the participation of American businesses in the continuing Middle Eastern conflict.

C. *The Mechanics of the Boycott*

The governing body for the boycott, the Arab League Council, holds biannual conferences, adopts legislative resolutions for the Arab League, issues authoritative interpretations of the boycott rules, supervises central and regional offices, and operates an international espionage system that reports suspected violations of boycott rules.²⁰ Although the Council governs the boycott, the Central Boycott Office coordinates boycott activities.²¹ Through a study of trade journals, the collection of hearsay information, and the distribution of questionnaires to foreign businesses,²² the Of-

¹⁷ The tertiary boycott involves requesting a neutral person "A" not to do business with "B" because "B" does business with or otherwise supports Israel. ARAB BOYCOTT REPORT, *supra* note 7, at 1.

¹⁸ It has been reported that there are approximately 1500 entries on the master blacklist, but without knowing how many Arab nations have individual blacklists and the number of entries on such lists, it is difficult to determine the true extent of the blacklist. ARAB BOYCOTT REPORT, *supra* note 7, at 37. Entries include the Xerox Corporation, Allstate Insurance Company, and Ford Motor Company. See note 24 *infra*. Recent blacklisted additions include the Glen Alden Corporation (for acquiring the blacklisted International Latex Corp.), Monsanto Corp., United Artists Corp., and American Motors Corp. 1975 Senate Hearings, *supra* note 9, at 373. Foreign companies and institutions are considered pro-Israeli if their operations support the Israeli economy. See note 26 and accompanying text *infra*. Despite the easing of the boycott, the blacklist continues to grow, as the number of companies added exceeds the number removed from the blacklist. 1975 Senate Hearings, *supra* note 9, at 573. See also note 29 and accompanying text *infra*.

¹⁹ N.Y. Times, Sept. 14, 1976, at 38, col. 1. Cf. N.Y. Times, Sept. 27, 1976, at 14 (advertisement noting that the boycott pits Americans against Americans to achieve Arab goals).

²⁰ The surveillance is conducted by diplomatic and consular representatives of the various regional offices of the Arab League boycott organization. 1975 Senate Hearings, *supra* note 9, at 442-44. One indication that the reports are inadequate can be found in the boycott compliance requests received by pro-Israeli companies, an action contrary to the rationale of the boycott. N.Y. Times, Oct. 20, 1976, at 11, col. 1.

²¹ L. PRESTON, *supra* note 3, at 51.

²² The practice of demanding information through questionnaires was challenged in 1965 by a bill introduced in the Congress seeking to criminalize responses to the questionnaires. See 1965 Senate Hearings, *supra* note 10. The amendment finally approved by Congress encouraged, but did not mandate, refusal to comply with the boycotters' requests for information. See Export Administration Act, 50 U.S.C. App. §§ 2401-2413 (1970 & Supp. V 1975). Nevertheless, it did require that such requests be reported to the Department of Commerce. Export Administration Act § 46, 50 U.S.C. App. § 2403(b) (Supp. V 1975). Between 1970 and 1974, exporters reported 44,709 transactions involving Arab requests for discriminatory practices against Israel. 121 CONG. REC. H6580 (daily ed. July 10, 1975)

fice assembles a master list of businesses whose connections with Israel are considered detrimental to Arab interests. This master blacklist is disseminated to member states, many of which have boycott departments within their economic or commercial government bureaucracy.²³

A blacklisted business cannot trade with an Arab state²⁴ and the same business may discover that it is ostracized in its business dealings in the United States as well.²⁵ According to official boycott regulations and policy statements, activities that can result in blacklisting include the maintenance of factories, assembly plants, agencies, or offices in Israel; the sale of licenses, trademarks, or technical assistance to Israeli businesses; the use of parts or materials produced by the blacklisted firm; and the conduct of normal trade with Israel, especially through the importation of Israeli goods.²⁶ The boycott is carried out in a variety of

(testimony of Rep. Holtzman). Undoubtedly many more requests for information have gone unreported. On Jan. 19, 1977, the Department of Commerce reported that six American companies had been fined for failure to report boycott requests in violation of the Export Administration Act. Wall St. J., Jan. 19, 1977, at 4, col. 2. An anonymous Commerce Department source stated that, in most of the estimated 50,000 transactions with Arab countries since 1970, Americans have complied with Arab demands. See N.Y. Times, Dec. 10, 1975, at 7, col. 1.

²³ For example, in Lebanon the boycott office is part of the Ministry of National Economy. See GRASSMUCK & K. SALIBI, A MANUAL OF REFORMED ADMINISTRATION 82 (1957).

²⁴ The United States portion of the Saudi Arabian "Directory of Boycotted Foreign Countries and Establishments for 1970" contained over 1800 entries. The list included an extraordinary number and range of American enterprises from obscure gift and pet shops to giant firms like Ford Motor Company (but not General Motors or the Chrysler Corporation), Sears Roebuck & Company, Allstate Insurance Company, Burlington Industries, Xerox Corporation and Zenith Radio Corporation. Numerous noncommercial firms are included, for example, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith. Also included were the puzzling entries of Boston, Massachusetts, and Miami, Florida. No international oil companies were included. See 1975 Senate Hearings, *supra* note 9, at 224, 374-441. The effects of blacklisting are clear. Boycott rules, however, have been relaxed for companies willing to make substantial investments in Arab nations. 1975 Senate Hearings, *supra* note 9, at 372-73. Although Ford Motor Co. has not sold a car or truck in the Middle East since 1966, *id.* at 195, it has entered a joint venture with the Egyptian government to build trucks and trailers in Egypt. Wall St. J., Feb. 4, 1975, at 2, col. 3.

²⁵ The practical effect of Arab blacklisting is twofold. First, it informs the blacklisted company that it cannot do business with Arab League members, and secondly, it notifies persons who do business with Arab nations to comply with the boycott rules and refuse to do business with blacklisted companies. See notes 17 and 24 *supra*.

²⁶ L. PRESTON, *supra* note 3, at 51-52. The regulations can be catalogued into seven classes:

1. Origin of Goods clause requires a company to certify and affirm that the exported goods are not of Israeli origin or are wholly of U.S. origin;

2. The Israeli Clause requires a company to certify that it neither has any subsidiaries or branches located in Israel nor is it substantially contributing to the Israeli economy;

3. The Shipping Clause requires certification that a company is neither using a blacklisted transportation line, nor is it using a vessel that will stop at an Israeli port in transit;

4. The Insurance Clause requires certification that the insurance company underwriting the exports is not blacklisted;

5. The Blacklisted Companies Clause requires certification that a company does not or will not do business with a blacklisted company;

ways,²⁷ but it remains subject to the volition of each Arab state.²⁸ Whether the boycott will be enforced depends on the "best interests" of the individual states, so that some businesses appearing on the master blacklist are not necessarily included on individual states' blacklists.²⁹ Businesses critical to an Arab economy are unlikely to be blacklisted. Blacklisted firms may defy or comply with the boycott or buy their way off the blacklist.³⁰ None of the methods for getting off the blacklist, however, guarantees that the business will be accepted in trading with Arab countries.

II. AMERICAN RESPONSES

American responses to the Arab boycott are twofold. The federal government has moved cautiously to prevent discriminatory effects of the Arab boycott in a variety of ways. Additionally, some states have responded to discriminatory effects within their borders by antiboycott statutes.

6. The Religious-Ethnic Clause requests the company to give information regarding the religious affiliation of the personnel of any American company and reference to individual beliefs in Zionism, such as "Zionist tendencies;"

7. The General Clause, a catchall provision requires companies to certify that they will "observe the rules of the Arab boycott" or "otherwise comply with the boycott." See 1975 Senate Hearings, *supra* note 9, at 449-53; ARAB BOYCOTT REPORT, *supra* note 7, at 33-37.

Saudi Arabia and Kuwait recently announced that they were relaxing their boycott restrictions by eliminating the requirement that an exporter certify that the goods are of non-Israeli origin. [1977] 144 U.S. EXPORT WEEKLY (BNA) A-2.

²⁷ The boycott extends to the banning of Jews from certain Arab states. 1975 Senate Hearings, *supra* note 9, at 215-20 (Saudi exclusion of Jews). See also Hearings on S. 425, Amend. No. 24 Thereto; S. 953, S. 995, and S. 1303 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. 281-86 (1975) [hereinafter cited as *Hearings on S. 425*] (efforts of Dubai, now the United Arab Emirates, to recruit American teachers, excluding anyone who has a "Jewish surname or who is an American Jew or who has Jewish ancestors").

²⁸ Guzzardi, *supra* note 6, at 84. Principle 15 (First) of the Arab League boycott prohibits dealings with blacklisted companies only when regulations have been issued by the individual Arab states. 1975 Senate Hearings, *supra* note 9 at 449. See Hearings on Discriminatory Arab Pressure on U.S. Business Before the Subcom. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. 105 (1975) (discussing variations of enforcement among the Arab states) [hereinafter cited as 1975 House Hearings].

²⁹ The startling ad hoc exceptions to the boycott rules made by some Arab states, in order to serve their individual interests, are indicative of the uneven adherence to the boycott. Many American defense industries continue to sell weaponry to Israel even though they should be blacklisted for giving material aid to the enemy. They have all been omitted because of compelling Arab interests in purchasing the best weaponry possible, irrespective of the boycott. The convenient rationale is that the purchase contract is made with the Department of Defense. Guzzardi, *supra* note 6, at 168. Many businesses carry on operations with both sides in the Middle East, but their Israeli operations go unnoticed when the Arabs protect other, higher interests. For example, Hertz is blacklisted but it maintains outlets in Israel and Egypt. *Id.* See also ARAB BOYCOTT REPORT, *supra* note 7, at 38.

³⁰ Getting off the blacklist is difficult, awkward, and sometimes costly. See *Id.* at 38-40. One report indicates that \$25,000-40,000 bribes to Arab officials may be effective. N.Y. Times, Dec. 20, 1976, at D-1, col. 1.

A. Federal Approaches

In 1975, President Ford announced that the United States would "not countenance the translation of any foreign prejudice into domestic discrimination against American citizens."³¹ New regulations were issued pursuant to the Export Administration Act of 1969,³² forbidding exporters and related service organizations from complying with boycott requests when compliance would discriminate against Americans on the basis of race, religion, color, sex, or national origin.³³

Federal banking agencies have called upon member banks to pronounce ethnic and religious discrimination caused by the Arab boycott as incompatible with the "public service function of American financial institutions."³⁴ The Securities and Exchange Commission issued a warning "reiterating the United States' policy of opposition to discriminatory practices against United States citizens or businesses resulting from foreign boycotts."³⁵ Legisla-

³¹ White House Release of President Gerald Ford's statement, 11 WEEKLY COMP. OF PRES. DOC. 1305 (Nov. 20, 1975).

³² Export Administration Act, Pub. L. No. 91-184, §§ 1-13, 83 Stat. 841 (codified as amended at 50 U.S.C. App. §§ 2401-2413 (1970 & Supp. V 1975)).

³³ 15 C.F.R. § 369 (1976), amending 15 C.F.R. § 369 (1975). The Secretary of Commerce acted pursuant to authority delegated to him under 50 U.S.C. App. §§ 2403(b)(1), (d) (1970 & Supp. V 1975).

³⁴ See BANKS AND THE BOYCOTT, *supra* note 5, at 23-27. The Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation are the regulatory agencies involved. *See id.* The agencies' actions concerning the effect of the boycott has been limited to the circulation of letters warning banks under their jurisdiction not to participate in the boycott. Initially, Federal Reserve Board Chairman Arthur Burns warned the 5800 member banks not to participate "even passively," in boycotting countries friendly to the United States by the honoring of conditions in letters of credits requiring payees to certify compliance with the boycott. Wall St. J., Dec. 17, 1975, at 6, col. 2. This strong tone has mellowed; Federal Reserve Board banks were notified that Mr. Burns' strong statement only encouraged the members to refuse to participate and did not prohibit participation with the boycott. Letter from Theodore E. Allison, Secretary of the Federal Reserve System, to the Federal Reserve Institutions (Jan. 20, 1976) (on file with U. MICH. J.L. REF.)

The importance of the letters must not be underestimated in light of the vast regulatory authority of the federal banking agencies. While it is unclear whether any agency could discipline a participant of the boycott, each agency recognizes that American banks have "public service functions" which could create legal obligations beyond the explicit statutory language. *See BANKS AND THE BOYCOTT, supra* note 5, at 23-27.

³⁵ Securities Exchange Act Release No. 11860 (Nov. 20, 1975), *cited in* [1975] 329 SEC. REG. & L. REP. (BNA) A-17. Where a company participates in the boycott, disclosure in reports or registration statements filed with the Securities and Exchange Commission is only required where the information is "material" to investors. For example, if compliance with the conditions in a boycott request would have a material adverse effect upon the income, assets, or profits of the company, disclosure of the relevant facts is required. Similarly, if breach of the condition, or disclosure of the fact that the company had complied with the boycott, would result in a material adverse effect on the company's business, disclosure is also required. *See BANKS AND THE BOYCOTT, supra* note 5, at 27-30. For a general summary on S.E.C. activities concerning the Arab boycott, *see* letter from S.E.C. Chairman Roderick M. Hills to Rep. Benjamin S. Rosenthal (June 1, 1976) (on file with the U. MICH. J.L. REF.). The S.E.C. has also announced that it will no longer support companies trying to evade disclosure of their boycott activities when pressured by stockholder resolutions. N.Y.

tion was proposed in Congress to prohibit any business from using economic means in coercing any person or entity to discriminate against American persons or entities on the basis of race, color, religion, sex, or national origin.³⁶

The new federal policy does not reach beyond racial, religious, or similar types of discrimination. An exporter could still decline to buy from blacklisted businesses for reasons other than personal discrimination. The proposed legislation designed to outlaw "coercion" was similarly circumscribed and would be of limited utility since the discriminatory effects are achieved mainly by acquiescence in Arab decisions to blacklist businesses on the basis of "Zionist sympathies."

1. Antitrust Laws—The Commerce Department, in recent regulations, asserted that compliance with the secondary boycott may constitute a violation of federal antitrust laws.³⁷ Section One of the Sherman Act³⁸ has been selected by the federal government as the

Times, Feb. 19, 1977, at 29, col. 1. In reply to that announcement, Pfizer, Inc., has announced that it would comply and supply the data such a resolution would have required in a post-meeting report to its stockholders. For a discussion on stockholder resolutions, see note 71 *infra*.

³⁶ H.R. 11488, 94th Cong., 2d Sess. (1976). Other bills are designed to prohibit discrimination on racial, religious or sexual grounds. *E.g.*, S. 92, 95th Cong., 1st Sess. (1977) (Proxmire bill); S. 953, 94th Cong., 1st Sess. (1975) (Stevenson bill); S. 425, 94th Cong., 1st Sess. (1975) (Williams bill); H.R. 5840, 95th Cong., 1st Sess. (1977) (Zablocki bill); H.R. 5246, 94th Cong., 1st Sess. (1975) (Holtzman-Rodino bill); H.R. 4967, 94th Cong., 1st Sess. (1975) (Drinan bill). See Steiner, *supra* note 16, at 1380-84. The Congress is contemplating legislation, S. 92, 95th Cong., 1st Sess. (1977) (Proxmire bill), that would prohibit companies from participating in the Arab boycott, even if it resulted in the loss of jobs. N.Y. Times, Feb. 22, 1977, at 7, col. 4; [1977] 140 U.S. EXPORT WEEKLY (BNA) N-1, A-1. The Carter Administration is preparing to introduce stringent legislation to combat the effects of the boycott, N.Y. Times, Mar. 1, 1977, at 1, col. 6, indicating a reversal of the Ford Administration's emphasis on quiet diplomacy. N.Y. Times, Sept. 1, 1976, at 19, col. 2. Secretary of State Cyrus Vance will direct the White House's aggressive antiboycott policy, but his initial action has been to ask Congress to consider scrapping its various bills in order to combat the boycott uniformly. N.Y. Times, Mar. 2, 1977, at A-7, col. 1.

³⁷ The regulation states:

All exporters and related service organizations engaged or involved in the export or negotiations leading to the export from the United States of commodities, services, or information, . . . are encouraged and requested to refuse to take any action, including the furnishing of information or the signing of agreements that have the effect of furthering or supporting other restrictive trade practices or boycotts fostered or imposed by foreign countries It should be noted that the *boycotting of a U.S. firm by another U.S. firm in order to comply with a restrictive trade practice by foreign countries against other countries friendly to the United States may constitute a violation of United States antitrust laws.*

15 C.F.R. § 369.3(a) (1976), amending 15 C.F.R. § 369.1-4 (1975) (emphasis added). Before Dec. 1, 1975, the regulations gave no indication that compliance with the secondary boycott might entail a violation of the antitrust laws and declared only that compliance was contrary to American policy but was not expressly prohibited by the Export Administration Act. 15 C.F.R. § 369.1 (1975).

³⁸ 15 U.S.C. § 1 (Supp. V 1975) prohibits contracts, combinations or conspiracies "in restraint of trade or commerce among the several States or with foreign nations." For general discussions of the Arab boycott and the antitrust laws, see generally Areeida, *Remarks on the Arab Boycott*, 54 TEX. L. REV. 1432 (1976); Baker, *Antitrust Remedies Against Government-Inspired Boycotts, Shortages and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911 (1976); Kestenbaum, *The Antitrust Challenge to the*

vehicle to resolve the issues posed by the secondary boycott. The classic case arises when an Arab corporation finalizes a trade agreement with a business operating in the United States. The trade pact is contingent upon the American firm's agreement not to trade either with Israel or with businesses trading with Israel, whether or not they are on any official blacklist.³⁹ The American business, in implementing the trade pact, either severs or refuses to deal with the targeted entities.

The recently settled *Bechtel* suit,⁴⁰ the first federal effort to enforce the antiboycott policy, establishes the principle that compliance with the boycott may subject participating companies to antitrust liability. Given the large number of businesses complying with the boycott⁴¹ and the limited resources of the Antitrust Division of the Department of Justice,⁴² an aggressive enforcement effort directed against secondary boycotts seems unlikely. Nonetheless, a selective enforcement strategy may have a significant impact,⁴³ and private litigation seeking to enforce stated antitrust policy may prove a viable supplement to the Division's activities.⁴⁴

Arab Boycott: Per Se Theory, Middle East Politics, and United States v. Bechtel Corporation, 54 TEX. L. REV. 1411 (1976); Schwartz, *supra* note 3, at 1272-85; Export Policy, *supra* note 3, at 106-31; Antitrust Implications, *supra* note 3, at 798-817.

³⁹ See note 26 *supra*.

⁴⁰ *United States v. Bechtel Corporation*, Civ. No. C-76-99 (N.D. Cal., filed Jan. 16, 1976) reported in [1976] 747 ANTITRUST & TRADE REG. REP. (BNA) A-8. Both parties signed consent decrees after Bechtel agreed not to cooperate with the Arab boycott. Immediately afterwards, Bechtel claimed it had not engaged in any discriminatory practices and had not violated any other federal laws. N.Y. Times, Jan. 11, 1977, at 41, col. 2.

⁴¹ See note 22 *supra*.

⁴² The Antitrust Division employs a staff of about three hundred lawyers and operates on a budget of approximately six million dollars a year. A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 383 (2d ed. 1970). The Federal Trade Commission is also involved in antitrust enforcement and assigns approximately three hundred professionals to the task. *Id.* at 835. For a discussion of the Antitrust Division's enforcement record in light of its restricted budget from 1960-1974, see Hadler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 232-37 (1975).

⁴³ See A. NEALE, *supra* note 42, at 374. Selective enforcement may result in consent decrees or judicial opinions offering guidance to corporate lawyers. *Id.* at 373. The office of Assistant Attorney General in charge of the Antitrust Division has changed hands frequently in recent years thus amplifying the problems of policy continuity. *Id.*

The Carter Administration is apparently taking an aggressive antiboycott stance and this may signal stronger enforcement measures. N.Y. Times, Mar. 1, 1977, at 1, col. 2 (1977); [1977] 142 U.S. EXPORT WEEKLY (BNA) A-1, M-1 (the Justice Department's issuance of an "Antitrust Guide for International Operations"). This policy may be thwarted by the Supreme Court's "new antitrust" majority, see *United States v. Marine Bancorporation*, 418 U.S. 602, 642 (1974) (White, J., dissenting), who are restricting the proliferation of antitrust remedies by insisting on tougher factual standards of proof. See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁴⁴ Any person whose business or property is injured by reason of anything forbidden in the federal antitrust laws may sue and recover treble damages. 15 U.S.C. § 15 (1970). A claimant need only show that he is within the sector of the economy in which the antitrust violations threatened a breakdown of competitive conditions, and that he was proximately injured thereby. *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir., 1955).

It is also possible that a corporate stockholder could initiate a derivative action to enjoin alleged antitrust violations ensuing from his corporation's compliance with the boycott request.⁴⁵ A derivative cause of action may be grounded on the perceived need to prevent a corporation from risking liability that could result because a competitor or blacklisted business is damaged by a refusal to deal.⁴⁶ Aside from issues of standing and security-for-costs,⁴⁷ the problems of proof and jurisdiction that arise in such a derivative suit may obstruct the path of a stockholder-plaintiff.⁴⁸

The more likely private plaintiff is a business injured by an American business' compliance with the boycott. The corporation would need significant financial and legal resources to make the risk and financial burden of antitrust litigation worthwhile.⁴⁹ In contrast, determining the identity of the defendant is less troublesome than the finding of a suitable plaintiff. As the legal and practical problems of suing Arab defendants make suit against the boycott instigator futile, the probable defendant would be an American business complying with the boycott.⁵⁰

⁴⁵ See Clayton Act § 16, 15 U.S.C. § 26 (1970). See generally Harris, *Derivative Actions Based Upon Alleged Antitrust Violations: Trap for the Unwary*, 37 BROOKLYN L. REV. 337 (1971). Corporations participating in the Arab boycott may also face securities law disclosure problems if their activities would have a material adverse effect on the income, assets, or profits of the corporation, or on the investors. See note 35 *supra*.

⁴⁶ Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), authorizes a private suit for treble damages by any person injured by a violation of the antitrust laws. "Person" has been interpreted to include foreign governments. See, e.g., *In re Antitrust Actions*, 333 F. Supp. 315, 316-17 (S.D.N.Y. 1971) (permitting Kuwait to sue under the antitrust laws in order to strengthen private enforcement). The privilege accorded to foreign governments of suing in United States courts has been denied only to America's wartime enemies. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964). Indeed, governments whose relations with the United States have been characterized as unfriendly have been permitted access to American courts. *Id.* at 410. Theoretically the State of Israel could bring an action against American businesses violating the Sherman Act.

⁴⁷ Section 16 of the Clayton Act, 15 U.S.C. § 26 (1970), authorizes "[a]ny person, firm, corporation or association" to sue for injunctive relief against "threatened loss or damage" stemming from a violation of the antitrust laws. Accordingly, it has been said:

To have standing, the private litigant must demonstrate a significant threat of injury to himself. But where the anticompetitive effect potential of the defendant's behavior would warrant an injunction in the Government's suit, the court may well forbid it without close scrutiny of the harm claimed by the private plaintiff.

P. AREEDA, *ANTITRUST ANALYSIS* 57 (2d ed. 1974), citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).

Security-for-costs problems confront plaintiffs who bring antitrust-grounded derivative suits. The plaintiff must either hold five percent of the outstanding stock of the corporation or the plaintiff may be required to give security for reasonable expenses, including attorney's fees which it may incur. The amount of security will be determined by the court having jurisdiction. See, e.g., N.Y. BUS. CORP. LAW § 627 (McKinney Supp. 1976).

⁴⁸ An extensive trial may be required for the plaintiff in a derivative action to prove both that the antitrust laws were violated and that the defendant knew or should have known of the violations. Harris, *supra* note 45, at 342. In addition, the plaintiff must properly determine the forum in which to bring the action. *Id.* at 343-47.

⁴⁹ See note 47 *supra*; L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 770-74, 785-87 (1977).

⁵⁰ A foreign corporation which complies with the boycott may violate the Sherman Act, yet it may be difficult to subject a foreign defendant, without United States offices, to

In addition, the Federal Trade Commission (FTC) could file suit under Section Five of the Federal Trade Commission Act to proscribe as an "unfair method of competition"⁵¹ the same boycott activities which could be the subject of an antitrust complaint, even if the practice is not held to violate the Sherman Act. In *Federal Trade Commission v. Sperry & Hutchinson Co.*,⁵² the Court upheld determinations that under Section Five, the FTC could restrain unfair methods of competition and unfair or deceptive practices if they violated the letter or spirit of the antitrust laws.⁵³ The FTC's authority to promulgate rules defining unfair practices⁵⁴ further enhances the federal government's ability to prevent secondary and tertiary boycotts.

2. *Discrimination*—Employment discrimination on the basis of race, color, religion, or sex is prohibited by the Constitution,⁵⁵ executive orders,⁵⁶ and Title VII of the 1964 Civil Rights Act.⁵⁷ Arguably the discrimination involved in screening out Jews, who by foreign law would not have access to the situs of the job, involves a work qualification rather than racial or religious motives imposed on American businesses.⁵⁸ Acceptance of this interpretation would, however, undermine a cherished constitutional protec-

American process and discovery even if subject matter jurisdiction is obtained. The likelihood of a foreign business submitting voluntarily to suit in a United States court is slight. Moreover, government-owned Arab corporations may request State Department certification to exempt themselves from suit in American court under the sovereign immunity doctrine. While a thorough study of the doctrine is beyond the scope of this note, it should be emphasized that State Department certification of sovereign immunity is ordinarily refused for normal commercial transactions. A. CHAYES, T. EHRLICH & A. LOWENFIELD, *INTERNATIONAL LEGAL PROCESS* 114-16 (1967). If the State Department refuses certification, a court is unlikely to be sympathetic to a claim of sovereign immunity, *see Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945), although it may look to the State Department's criteria for guidance. *See, e.g., Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358-59 (2d Cir., 1967), *cert. denied*, 381 U.S. 934 (1965). *See also United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929); Kinter and Hallgarter, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909*, 15 B.C. INT. & COM. L. REV. 343, 344 (1973); Lowenfield, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901 (1969).

⁵¹ Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1970).

⁵² 405 U.S. 233 (1972).

⁵³ *Id.* at 244. The Supreme Court refused to sustain the F.T.C.'s cease-and-desist order against the defendant for unfairly attempting to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps because the Commission failed to prove that the defendant's conduct violated the spirit or letter of the antitrust laws.

⁵⁴ Federal Trade Commission Act § 5(a)(6), 15 U.S.C. § 45(a)(6) (1970).

⁵⁵ U.S. CONST. amend. XIV.

⁵⁶ *E.g.*, Exec. Order No. 11478, 3 C.F.R. 214 (1973), 42 U.S.C. § 2000e (1970); Exec. Order No. 11246, 3 C.F.R. 173 (1973), 42 U.S.C. § 2000e (1970).

⁵⁷ 42 U.S.C. §§ 2000e - 2000e-17 (1970). For a discussion of employment discrimination and Title VII, *see Note, The Arab Boycott and Title VII*, 12 HARV. C.R.—C.L. L. REV. 181 (1977).

⁵⁸ This position has been disavowed by the Department of Justice in a letter from Assistant Attorney General Antonin Scalia to David A. Brody, Director of the Anti-Defamation League of B'nai B'rith, *reprinted in Hearings on S. 425, supra* note 27, at 166.

tion to the benefit of a business complying with the boycott. On the other hand, no federal legislation, with the possible exception of the antitrust laws, prohibits private parties from discriminating among their suppliers and contractors on racial, religious, or sexual grounds.⁵⁹ A number of proposed bills seek to close this gap.⁶⁰

3. *Disclosure Responsibility*—The antiboycott provisions of the Export Administration Act⁶¹ (EAA) have three basic elements. First, a statement is made that it is the policy of the United States to oppose the Arab boycott as an economic weapon against Israel, and to encourage domestic concerns not to participate in any stage of the boycott.⁶² Second, American companies are required to report any boycott requests to the Secretary of Commerce for

⁵⁹ Assistant Attorney General Scalia declared:

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 prosecution is Title VI of the 1964 Civil Rights Act, which prohibits the recipients of federal grants from discriminating against the intended beneficiaries of federally assisted programs on the grounds 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.

Hearings on S. 425, supra note 27, at 165.

⁶⁰ See note 36 *supra*. The danger that the infusion of Arab petrodollars into the U.S. will lead to the expropriation of American businesses and implementation of discriminatory practices has evoked several congressional responses, notably S. 425, 94th Cong., 2d Sess. (1976), the Foreign Investment Act of 1975 (revised in Title II of S. 953, as reported by the Committee on Banking, Housing and Urban Affairs, see S. REP. No. 632, 94th Cong., 2d Sess. (1976). Under this bill and proposed amendment no. 24, any foreign acquisition of more than 5 percent of the equity securities of an American business would have to be disclosed to the Securities and Exchange Commission and might be forbidden or required to be divested in either a government suit or private action on the ground that the foreign investor "caused" specified discriminatory practices. See *Hearings on S. 425, supra* note 27, at 167-70.

⁶¹ 50 U.S.C. App. §§ 2401-2413 (1970 & Supp. V 1975). The Export Administration Act lapsed on Sept. 30, 1976, when the Senate failed to complete action on a bill to amend and extend the law. *Id.* President Ford issued Exec. Order No. 11940, 41 Fed. Reg. 43707 (1976), to continue the existing export control regulations under the authority of the Trading with the Enemy Act of 1917, 12 U.S.C. § 95(a) (1970), 50 U.S.C. App. §§ 1-39 (1970 & Supp. V 1975), a World War I emergency law that has been amended several times to give the President sweeping emergency powers over U.S. foreign trade and international banking transactions. The invocation of the Act may be invalid, however, because it was intended to continue a controlled program in an emergency situation, and no present emergency confronts the United States. Moreover, the freedom given to the Department of Commerce by the Export Administration Act to issue regulations without any need for public notice or public participation in the rulemaking process no longer exists and any new rules, such as the recent order requiring the public disclosure of the boycott requests, may be invalid under the due process clause of the Constitution. [1976] 128 U.S. EXPORT WEEKLY (BNA SPECIAL REPORT) B-1 to B-7.

⁶² 50 U.S.C. App. § 2402(5) (Supp. V 1975). The provisions derive from a 1965 amendment to the Export Control Act of 1949. See Act of June 30, 1965, Pub. L. No. 89-63, § 3(a)(4), 79 Stat. 209, amending Export Control Act of 1949, ch. 11, § 12, 63 Stat. 9 (codified at 50 U.S.C. App. §§ 2021-2032 (1970)). See also United States Department of Commerce Form DIB-621 (rev. Feb. 1976).

appropriate action.⁶³ Finally, certain powers and duties to prohibit or curtail exports have been given to the President under the Act in order to fulfill its objectives.⁶⁴

The reporting requirement is the key provision of the EAA. Unfortunately, it has failed to have a significant impact on the secondary boycott because the antiboycott section of the Act has been interpreted by the Secretary of Commerce as merely discouraging, but not absolutely prohibiting, compliance with the boycott.⁶⁵ The Commerce Department, which administers the Act, has thwarted full implementation of the antiboycott provisions and has encouraged boycott practices by condoning activities declared to be contrary to national policy or simply by ignoring discriminatory practices. For example, the Department circulated trade proposals containing boycott clauses to American businesses and, until recently, failed to require companies in reporting a boycott request to answer questions concerning action the company took as a response to a boycott request.⁶⁶ The Department has recently taken steps to assure stricter enforcement of the EAA and its accompanying regulations, thereby minimizing the subversion of federal policy.⁶⁷

III. RECENT STATE RESPONSES

California, Illinois, Maryland, Massachusetts, New York, and Ohio have recently enacted legislation designed to deter participation in the boycott,⁶⁸ but the vast majority of states have taken no

⁶³ 50 U.S.C. App. § 2403(b)(1) (Supp. V 1975). In addition, the Secretary is authorized to issue regulations to fulfill the purposes of the antiboycott section, *Id.* at § 2403(a) (Supp. V 1975), and has done so. See 15 C.F.R. § 369 (1976); *Export Policy*, *supra* note 3, at 96-106 (analysis of the regulations).

⁶⁴ The President can prohibit or curtail exports for the United States "of any articles, materials, or supplies, including technical data or any other information" to effectuate the EAA's policies as stated in 50 U.S.C. App. § 2402 (Supp. V 1975). 50 U.S.C. App. § 2403(b)(1) (Supp. V 1975).

⁶⁵ 15 C.F.R. § 369.3 (1976), amending 15 C.F.R. § 369.1 (1975). See note 37 *supra*.

⁶⁶ ARAB BOYCOTT REPORT, *supra* note 7, at 28.

⁶⁷ The Department's action was stimulated by the 1976 televised Presidential debates. N.Y. Times, Oct. 8, 1976, at A-1, col. 4. The pressure on the Department of Commerce to disclose names of companies receiving and complying with boycott requests, however, began earlier. See N.Y. Times, May 27, 1975, at 5, col. 1. Because of the recent publicity, the Department released the names of companies that had received boycott requests after Oct. 3, 1976. N.Y. Times, Oct. 19, 1976, at 1, col. 6, and has issued rules requiring all Arab boycott requests after Oct. 3, 1976, to be made available for public scrutiny. N.Y. Times, Oct. 9, 1976, at 1, col. 1.

⁶⁸ See, e.g., 1976 Cal. Legis. Serv. ch. 366, at 1247 (West); ILL. ANN. STAT. ch. 16 ½, §§ 196, 200; ch. 29, §§ 91-96; ch. 38, § 60-3 (Smith-Hurd Supp. 1977). MD. COM. LAW CODE ANN. §§ 11-2A01 to 2A15 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. EXEC. LAW § 296 (13) (McKinney Supp. 1976); OHIO REV. CODE ANN. §§ 1129.11, 1153.05, 1331.01-1331.03, 1331.08, 1331.10-1331.11, 1707.44, 2307.832 (Baldwin 1976).

action. Some view the boycott as a delicate foreign policy issue best handled by the federal government,⁶⁹ while others have not felt the boycott's impact and remain unconcerned.⁷⁰ States have been influenced by many factors including the power of lobbyists,⁷¹ boycott-induced discrimination within state borders,⁷² and the apparent indifference of the federal government to the problem.⁷³

A. The Antiboycott Statutes

Euphemistically referred to as the antiboycott laws, the state laws are actually civil rights statutes prohibiting racial or religious discrimination. Provisions in each of the statutes make unlawful knowing participation in a discriminatory boycott or practice, or knowing aid or assistance of any other person in participating in a discriminatory boycott.⁷⁴

⁶⁹ See e.g. Letter from Joseph A. Lefante, Speaker of the New Jersey Assembly to the author (Sept. 17, 1976) (on file with the U. MICH. J.L. REF.)

⁷⁰ The majority of states may not feel the effects of the boycott. Several states, however, have proposed legislation similar to the initial six antiboycott states. See note 2 *supra*.

⁷¹ Many Jewish organizations, especially the Anti-Defamation League of B'nai B'rith, have been active in California, Massachusetts, and New York. Their efforts have extended beyond lobbying and include the publication and distribution of materials concerning the boycott. See, e.g., "If you do business in the Middle East . . . remember certain practices are ILLEGAL." Am. Jewish Comm. (Apr. 1976).

The American Jewish Congress organized Operation Stockholder to force the disclosure of business activities in the Middle East by publicly held corporations. Shareholders are urged to submit resolutions for consideration at annual meetings demanding disclosure of the information. Companies receiving shareholder resolutions must include them in their proxy statements or provide a written explanation to both the Securities and Exchange Commission and the stockholders of the reasons for refusing to publish the resolutions. Once included in a proxy statement, all shareholders are given an opportunity to approve or reject the resolution. [1976] 2 FED. SEC. L. REP. (CCH) ¶ 24,012. See also note 35 *supra*; Wall St. J., Feb. 18, 1977, at 5, col. 2.

⁷² A recent example of the tertiary boycott involved Sea Containers, Inc., which terminated an announced joint venture with the Israeli-American Fruit Carriers shipping line because it did not want to provoke ill feelings in the Arab nations where it has extensive port operations. See N.Y. Times, Sept. 3, 1976, at D-5, col. 1; see also Wash. Star, Mar. 17, 1976 (listing three businesses complying with the Arab boycott in Maryland).

Other than these examples, the *Bechtel* action, and banks complying through the issuing of letters of credit, no undisputed evidence is available regarding the extent of compliance within any states' borders. New York is currently collecting information to determine the extent of compliance within the state. The Assembly Office of Legislative Oversight and Analysis, Special Report to Assemblyman Joseph F. Lisa, Chairman of the New York Assembly's Governmental Operations Comm., *The Arab Boycott: Alive and Flourishing in New York*, June 10, 1976, at 4 [hereinafter cited as Special Report] (on file with the U. MICH. J.L. REF.). Most companies have cooperated with investigations, though the General Electric Co., after being subpoenaed, unsuccessfully challenged the Governmental Operations Committee's authority to collect such information. *General Electric Co. v. New York State Assembly Committee on Governmental Operations*, No. 75-CV-558 (N.D.N.Y. 1975) (injunction denied), No. 76-7032 (2d Cir. 1977) (default judgment) (on file with the U. MICH. J.L. REF.).

⁷³ See ARAB BOYCOTT REPORT, *supra* note 7, at 23-32.

⁷⁴ See 1976 Cal. Legis. Serv. ch. 366, 1247; Ill. Ann. Stat. ch. 16 ½, §§ 196, 200, ch. 29, §§ 91-96, ch. 38, § 60-3 (Smith-Hurd Supp. 1977); Md. Comm. Law Code Ann. §§ 11-2A01 -

Discriminatory practices are defined in a variety of ways. Generally it is illegal to enter into or carry out an expressed or implied provision of a contract, understanding, or arrangement which discriminates against a state citizen or business on the basis of race, color, creed, sex, national origin, or foreign trade relationship.⁷⁵ It is also illegal to refuse to deal with, grant, or accept letters of credit or any transfers of credit which discriminate against local persons.⁷⁶ The laws expressly prohibit discriminatory practices when foreign persons, governments, or international organizations—Arab nations or the Arab League—are involved.⁷⁷

The statutes are limited to discrimination, boycotting, or blacklisting that injures individuals or companies because of religion, race, national origin, or business associations. The laws do not prohibit discrimination outside the civil rights area. Because the laws address the tertiary boycott, they need not interfere with the federal government's ability to conduct foreign affairs. The provisions are an attempt to prevent federal preemption of the state laws which would result if they were found to be an undue burden on foreign or interstate commerce.⁷⁸ The statutes apply to "persons," which is defined to include individuals as well as banks and other financial institutions, partnerships, and governmental agencies.⁷⁹

11-2A15 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. Exec. Law § 296(13) (McKinney Supp. 1976); and Ohio Rev. Code Ann. §§ 1129.11, 1153.05, 1331.01-1331.03, 1331.08, 1331.10-1331.11, 1707.44, 2307.832 (Baldwin 1976).

⁷⁵ See 1976 Cal. Legis. Serv. ch. 1247 (West); ILL. ANN. STAT. ch. 29, § 93 (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. § 11-2A02(E) (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297.

⁷⁶ See 1976 Cal. Legis. Serv. ch. 1247 (West); ILL. ANN. STAT. ch. 29, § 94 (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. § 11-2A02 (Supp. 1976) (economic benefit between foreign entity and complying company); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. EXEC. LAW § 296-a (McKinney 1976); OHIO REV. CODE ANN. §§ 1125.11, 1153.05, 1331.01(6), 1331.02, 1707.44(H) (Baldwin 1976).

⁷⁷ See 1976 Cal. Legis. Serv. ch. 1247 (West); ILL. ANN. STAT. ch. 38, § 60-3(5) (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. § 11-2A02 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. EXEC. LAW § 296(13) (McKinney 1976); OHIO REV. CODE ANN. 1125.11, 1153.02, 1331.01, 1331.02, 1707.44 (Baldwin 1976).

⁷⁸ See ILL. ANN. STAT. ch. 29, § 96 (Smith-Hurd Supp. 1977) (severability clause); MD. COM. LAW CODE ANN. §§ 11-2A01, (Supp. 1976) (declaration of the policy not to impede the free flow of commerce or Congress' regulatory power over commerce); 1976 Mass. Adv. Legis. Serv. ch. 297 (does not prohibit conduct required by or expressly authorized by Congress); N.Y. EXEC. LAW § 296 (13) (McKinney Supp. 1976). Nonetheless, the attempts to prevent preemption will not prevent the federal government's displacement of state authority if the court finds express or implied preemption. See notes 112-33 and accompanying text *infra*.

⁷⁹ Generally "persons" includes companies, corporations, partnerships, associations, governmental agencies, shipping companies, banks and other financial institutions, and individuals. See 1976 Cal. Legis. Serv. ch. 366, at 1247 (West); ILL. ANN. STAT. ch. 29, § 92 (Smith-Hurd Supp. 1977) (expressly including financial institutions, shipping companies and governmental agencies); MD. COM. LAW CODE ANN. § 11-2A02(J) (Supp. 1976) (expressly including international labor organizations, educational institutions, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries); 1976 Mass. Adv. Legis. Serv. ch. 297; OHIO REV. CODE ANN. § 1331.01(A) (Baldwin 1976).

1. *Remedies*—Businesses guilty of participating in a discriminatory boycott risk heavy penalties for violating state law. Criminal penalties include a wide range of fines and prison terms.⁸⁰ Private remedies include treble damages, court costs, and reasonable attorney's fees.⁸¹

The antiboycott statutes also provide that contracts, arrangements, or combinations which result in discrimination are contrary to public policy, and are therefore null and void.⁸² Businesses complying with the boycott may also be prohibited from conducting business within the state where the discriminatory act occurred.⁸³ The penalties and remedies available lend support to Massachusetts Governor Dukakis' statement that the antiboycott laws are "a clear and unequivocal message to those who submit to Arab pressure tactics that we will not stand for this type of blatant discrimination."⁸⁴

2. *Enforcement*—State antiboycott laws provide the federal government,⁸⁵ state human rights commissions,⁸⁶ state attorneys general,⁸⁷ and private citizens⁸⁸ a role in enforcing the antiboycott laws. It remains to be seen, however, if the laws will actually be enforced. In New York, the state Human Rights Commission has

⁸⁰ See CAL. BUS. & PROF. CODE § 16755 (West Supp. 1976) (provides for fines not to exceed \$1 million for corporate violators or for individuals a fine not to exceed \$100,000 or imprisonment in a state prison for up to three years, one year in a county jail, or both); ILL. ANN. STAT. ch. 38, § 60-6 (Smith-Hurd Supp. 1977) (\$50,000 maximum fine); MD. COM. LAW CODE ANN. §§ 11-2A07, 11-2A11 (Supp. 1976) (\$50,000 fine, six months imprisonment, or both); N.Y. PENAL LAW §§ 80.05(a), 80.10 (McKinney 1972) (a class A misdemeanor involving a \$1000 fine for an individual and \$5000 for a corporation, following N.Y. EXEC. LAW § 298(a)(3) (McKinney Supp. 1976)); OHIO REV. CODE ANN. § 1331.03 (Baldwin 1976) (\$500 fine for each day a violation is committed or continued after due notice is received from the attorney general).

⁸¹ See 1976 Cal. Legis. Serv. ch. 366 (West); ILL. ANN. STAT. ch. 38, § 60-7 (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. §§ 11-2A09, 11-2A09(B)(4) (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; OHIO REV. CODE ANN. § 1331.08 (Baldwin 1976) (double damages).

⁸² See CAL. BUS. & PROF. CODE § 16722 (West 1969); MD. COM. LAW CODE ANN. § 11-2A12 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297.

⁸³ See CAL. BUS. & PROF. CODE § 16753 (West 1969); ILL. ANN. STAT. ch. 38, § 60-7(3) (Smith-Hurd Supp. 1977); N.Y. EXEC. LAW § 298-a(3) (McKinney Supp. 1976); OHIO REV. CODE ANN. § 1331.11 (Baldwin 1976).

⁸⁴ Press Release, Office of Governor Michael Dukakis (Aug. 18, 1976) (on file at the office of the U. MICH. J.L. REF.).

⁸⁵ See MD. COM. LAW CODE ANN. §§ 11-2A08, 11-2A09(b)(1) (Supp. 1976).

⁸⁶ See N.Y. EXEC. LAW § 293 (McKinney Supp. 1976).

⁸⁷ See CAL. BUS. & PROF. CODE § 16755 (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 60-6 (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. §§ 11-2A01, 11-2A07, 11-2A08 (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; OHIO REV. CODE ANN. § 1331.03, 1331.11 (Baldwin 1976).

⁸⁸ See 1976 Cal. Legis. Serv. ch. 366 (West); ILL. ANN. STAT. ch. 38, § 60-7(2) (Smith-Hurd Supp. 1977); MD. COM. LAW CODE ANN. § 11-2A09(b)(2) (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297; N.Y. EXEC. LAW § 297 (9) (McKinney Supp. 1976) (a personal cause of action unless the injured party has filed a complaint with the Human Rights Commission); OHIO REV. CODE ANN. § 1331.08 (Baldwin 1976).

endorsed the Lisa Law, but has also declared that it lacks sufficient resources for effective enforcement.⁸⁹

3. *Exemptions*—The Lisa Law prohibits all discriminatory practices which produce repercussions within New York state.⁹⁰ The other states seek, however, to limit the application of their laws in order to prevent interference with present or future congressional action. An express limitation in one statute, implied in others, is that the law cannot interfere with American foreign policy.⁹¹

Agreements dealing with the handling or shipping of goods and the choice of carrier for international transit are exempt from the Maryland and Massachusetts state laws⁹² because the primary boycott is a legitimate economic weapon with which the states will not interfere. Insofar as the primary boycott is operable, certain Arab requests are acceptable and can be fulfilled without violating any antiboycott statute.⁹³

In addition to the typical provisions, there are three unique provisions in the statutes. New York has a “long-arm” provision prohibiting unlawful discriminatory practices outside of the state against New York residents or registered corporations.⁹⁴ Maryland requires any state official or agency of the executive department to report violations of the statute to the Attorney General’s office.⁹⁵ The provision recognizes the difficulty of enforcement and “deputizes” members of the executive department to bring violations to the attention of the Attorney General. In addition, Maryland recognizes that companies inadvertently violating state law will only be required to provide written assurance that the prohibited acts

⁸⁹ See Hearings Before the New York Assembly Standing Comm. on Governmental Operations, Feb. 5, 1976, statement of Werner H. Kramarsky, the Commissioner of the Human Rights Division, at 5-8 (on file at the U. MICH. J.L. REF.).

⁹⁰ N.Y. EXEC. LAW § 298-a(1) (McKinney Supp. 1976) (prohibiting acts committed outside of the state against a state resident or registered corporation organized or authorized to do business in New York, if the act would constitute an unlawful discriminatory practice if committed within the state). See also OHIO REV. CODE ANN. § 2307.382(a)(6) (Baldwin 1976).

⁹¹ MD. COM. LAW CODE ANN. § 11-2A01 (Supp. 1976); see also 1976 Mass. Adv. Legis. Serv. ch. 297. Generally, states may not involve themselves in foreign relations, a power delegated to the President and the Congress. See *Hines v. Davidowitz*, 312 U.S. 52, 63-64 (1941). See also *Chinese Exclusion Case*, 130 U.S. 581 (1889). Thus, any state law intruding into foreign affairs would be held to be unconstitutional. See *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁹² See MD. COM. LAW CODE ANN. § 11-2A02(E) (Supp. 1976); 1976 Mass. Adv. Legis. Serv. ch. 297.

⁹³ See note 26 *supra*. Recognizing the boycott as a legitimate exercise of sovereign power, some states have declared that provisions requiring that a preference or priority be given to Arab products or nations are not considered discriminatory practices. See 1976 Mass. Adv. Legis. Serv. ch. 297; OP. CAL. ATT’Y GEN. NO. SO 76/54, at 7-10 (Nov. 24, 1976) (provisions with confiscation or war risk clauses are valid and not prohibited by California’s antiboycott laws because they are a practical reflection of existing relationships between nations).

⁹⁴ See note 90 *supra*.

⁹⁵ MD. COM. LAW CODE ANN. § 11-2A04 (Supp. 1976).

will cease.⁹⁶ Ignorance of an act may be an excuse. Proof of failure to comply with the Maryland law subsequent to an assurance of discontinuance, however, is prima facie evidence of a discriminatory practice and such violations will result in maximum penalties.⁹⁷

B. Administrative Problems

The state laws attempt to avoid the problems experienced by the federal government in its attempts to administer the EAA.⁹⁸ Nevertheless, New York's Lisa Law, the first antiboycott statute,⁹⁹ has been virtually ineffective.¹⁰⁰ For example, the major banks in New York continue to honor letters of credit affected by the boycott.¹⁰¹ The states must inevitably confront problems similar to those confronting the federal government in attempting to enforce the antiboycott laws.

Public officials may attempt to undermine the antiboycott scheme. In New York, key officials declared that the Lisa Law is detrimental to the state's economy and should be repealed.¹⁰² Subversion by public officials may produce questions concerning the actual state policy towards the boycott, foster additional confusion in the business community, encourage compliance to Arab demands, and make enforcement more difficult.¹⁰³

The business community remains uncertain as to what activities violate the antiboycott laws, and only two states have taken even minimal steps to outline the range of prohibited activities. The Attorneys General of California and New York have issued

⁹⁶ MD. COM. LAW CODE ANN. § 11-2A06 (Supp. 1976).

⁹⁷ *Id.*

⁹⁸ For example, the state antiboycott laws expressly allow private remedies, note 88 *supra*, to enhance the state's ability to prevent the discriminatory effects of the boycott. See notes 65-67 and accompanying text *supra* for a discussion of the EAA.

⁹⁹ See note 68 *supra*.

¹⁰⁰ See generally Special Report, *supra* note 72, at 1, recommending that guidelines concerning the interpretation of the Lisa Law be promulgated, that the New York Human Rights Commission enforce the Lisa Law, and that New York support strong federal legislation prohibiting the boycott. *Id.*

¹⁰¹ *Id.* at 1 & Conclusion at 1-2. See also BANKS AND THE BOYCOTT, *supra* note 5.

¹⁰² Special Report, *supra* note 72, at 3. While the "key officials" remain anonymous, the tone of the Report indicates that they are capable of upsetting the purpose of the Lisa Law. See *id.* In addition to possible administrative reprisals, the officials could be prosecuted for aiding discriminatory practices. The New York Human Rights Commission would have to prove that the actions of these officials led to unlawful discriminatory practices by companies who met with these officials. N.Y. EXEC. LAW § 296(13) (McKinney Supp. 1976). New York is the only state reporting such activity. Special Report, *supra* note 72. If other states' officials attempt to undermine the antiboycott scheme, the laws would become mere resolutions, without effect, thus fostering the boycott. See Balt. Sun, May 13, 1976, at C-1, col. 5.

¹⁰³ Special Report, *supra* note 72, at 2. Private suits may prevent the confusion caused by such subversion from nullifying the intent of the antiboycott laws. If a business was continuing to adhere to Arab demands, private suits could define the prohibited activities and revive the effectiveness of the law. See note 88 *supra*.

guidelines explaining that the laws apply to boycotts other than the primary boycott of Israel as well as to banks.¹⁰⁴ More specific guidelines would enhance the enforcement of the antiboycott laws by preventing businesses from taking advantage of the confusion by initiating or continuing compliance with Arab demands.¹⁰⁵

C. Challenges to the State Antiboycott Laws

The antiboycott laws raise important questions concerning the allocation of governmental power in the federal system. The Constitution confers specific, enumerated powers upon the federal government¹⁰⁶ leaving broad residual powers to the states.¹⁰⁷ Where the exercise of governmental powers by the national government conflicts or overlaps with state powers, the initial inquiry is the determination of whether or not the federal government has acted within the scope of its enumerated powers.¹⁰⁸ Assuming that the federal government has acted within the scope of its authority, conflicts are resolved by the doctrine of preemption. Although the precise effect of the preemption doctrine on particular state laws and regulations is difficult to predict, the resolution of conflicting assertions of authority is relatively easy where Congress has indicated the extent to which state activity must be displaced.¹⁰⁹

1. *Preemption*—In enacting the Export Administration Act of 1969,¹¹⁰ Congress relied on its power to regulate interstate and

¹⁰⁴ See CAL. OP. ATT'Y GEN. No. SO 76/54 (Nov. 24, 1976) (antiboycott law directed at the secondary and tertiary boycotts causes discriminatory effects); Letter from Louis J. Lefkowitz, Att'y Gen. of N.Y. to Speaker of the House of the N.Y. Assembly Stanley Steingut (Nov. 3, 1976) (the Lisa Law applies to banks and other financial institutions) (on file with the U. MICH. J.L. REF.).

¹⁰⁵ See Special Report, *supra* note 72, at 2. The Report implies that companies would be willing to cooperate with the Lisa Law if they were aware of all its implications. *Id.* The banking community appears to have reconsidered its opposition to the laws. For example, the Bank of America has announced that it would comply with the California guidelines. See Wall St. J., Dec. 2, 1976, at 16, col. 3. The Bank is complying with the California law, but believes that the problem can best be handled by Congress. Statement by the Bank of America, *Banks and the Boycott*, at 3 (undated) (on file with the U. MICH. J.L. REF.). Guidelines are necessary, as canons of construction, before the federal courts will determine the constitutional issues involved. See *Warden v. Younger*, No. C-76-2851 SC (N.D. Cal. Jan. 31, 1977), at 7 (preliminary injunction dismissed under abstention doctrine) (on file with the U. MICH. J.L. REF.).

¹⁰⁶ U.S. CONST. art. 1.

¹⁰⁷ U.S. CONST. amend. X. For an extended treatment of the basic pattern and theory of the Constitution with respect to the legislative powers of Congress, the significance of the express enumeration of powers, and the meaning of the tenth amendment in relation thereto, see 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 353-640, 675-708 (1953).

¹⁰⁸ *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd*; 405 U.S. 1035 (1972).

¹⁰⁹ Even an express preemption provision, however, does not establish a general preemption of all state laws, and a court must consider the legislative history of the statute and the congressional purpose in enacting it in order to determine the preemptive scope of the provision. See Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 542-49.

¹¹⁰ Pub. L. No. 91-184, 83 Stat. 841 (codified as amended at 50 U.S.C. App. §§ 2401-2413 (1970 & Supp. V 1975)).

foreign commerce.¹¹¹ Congress has the authority to regulate exports under the commerce clause,¹¹² including the lesser authority of promulgating regulations to control exports and incidents of commerce.¹¹³

Since Congress has the power to regulate exports and to discourage discrimination,¹¹⁴ the preemption doctrine determines the extent to which state power to regulate is displaced. The preemption doctrine relies upon the supremacy clause of the United States Constitution for its validity.¹¹⁵ In its classic formulation, the rule of decision established by this doctrine requires that when a state law stands as "an obstacle to the accomplishment and execution of the purposes and objectives of an Act of Congress"¹¹⁶ the federal law prevails and the state statute is invalidated. This statement is deceptively simple because it masks the complexity which is often inherent in the crucial determination that the state law constitutes an obstacle to the federal policy. Where Congress has explicitly articulated the bounds of preemption, the Court's task is relatively simple.¹¹⁷ Where Congress has not enumerated the extent to which the federal law is intended to displace state law, however, the task can be complex. In such an instance, the Court must define the appropriate bounds of federal and state authority.

The EAA does not express an intent to supersede state anti-boycott laws and regulations,¹¹⁸ and no federal policy statement

¹¹¹ U.S. CONST. art. I, § 8, cl. 3, 18.

¹¹² See, e.g., *Board of Trustees v. United States*, 289 U.S. 48 (1933); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹¹³ *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) (upholding the reporting requirement in foreign banking transactions); *Moon v. Freeman* 251 F. Supp. 941 (E.D. Wash.), *aff'd*, 379 F.2d 383 (9th Cir. 1966) (upholding the requirement that wheat exporters purchase wheat marketing export certificates).

¹¹⁴ See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). See also note 59 *supra*.

¹¹⁵ U.S. CONST. art. VI, cl. 2. A determination that a state law is void for obstructing a federal statute and is thus preempted rests on this clause. *Swift & Co. v. Wickham*, 382 U.S. 111, 120; 125 (1965). A state law may also be invalidated under other clauses of the Constitution in the absence of federal legislation if the Court determines that the mere grant of power to Congress excludes state legislation. See, e.g., *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959) (state requirement of contour mudguards on trucks invalid under the commerce clause); *Goldstein v. California*, 412 U.S. 546, 552-60 (1973) (U.S. CONST. art I, § 8, cl. 8, copyright power does not exclude all state copyright legislation).

¹¹⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). The Court has noted its frequent adherence to this articulation of the meaning of the supremacy clause. See *Goldstein v. California*, 412 U.S. 546, 561 (1973); *Perez v. Campbell*, 402 U.S. 637, 649-50 (1971), and the cases cited therein.

¹¹⁷ See *Murphy and La Pierre, Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 Colum. L. Rev. 393, 440-45 (1976).

¹¹⁸ The legislative history of the Export Administration Act, as amended, demonstrates no express intention to preempt state legislation protecting state citizens from discriminatory boycotts. The purpose of the Act is to continue export controls enacted in the Export Control Act of 1949, to streamline enforcement of the Act, to improve the compilation of trade statistics, and to be used flexibly to protect the American economy from depletion of

has been issued in the wake of the recent enactment of the state antiboycott laws.¹¹⁹ It appears that the state laws have not been expressly preempted.

The great majority of Supreme Court decisions on preemption have been in cases where Congress has been similarly silent on the relation of the federal law to potentially conflicting state laws.¹²⁰ To reconcile the operation of state and federal laws in the absence of explicit congressional guidance, the Court has formulated a doctrine of "implied" preemption.¹²¹ The inference of preemption is drawn either from the existence of a conflict between the federal and state laws or from the fact that Congress has so completely occupied a particular field as to leave no room for state regulation.¹²²

Although the standards for finding preemption are easily stated, their application to particular cases has been varied.¹²³ For instance, the decisions display inconsistent treatment of the degree

scarce resources and to reduce the serious inflationary impact of abnormal foreign demand. *See* S. REP. NO. 1024, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6234; S. REP. NO. 92, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3085; H.R. REP. NO. 524, 91st Cong., 2d Sess., reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2705. *See also* *Export Controls*, *supra* note 3, at 96-106.

¹¹⁹ *See* note 68 *supra*.

¹²⁰ The fact that the Court has been forced to define the scope of preemption in the absence of explicit congressional guidance was noted by Justice Harlan in the context of an extensive review of the Court's preemption decisions under the National Labor Relations Act, 29 U.S.C. §§ 151-158, 159-168 (1970):

The principle of preemption that informs our general national labor law was born of this Court's efforts, *without the aid of explicit congressional guidance, to delimit state and federal judiciary authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme.*

Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971) (emphasis added). Although the Court has only infrequently noted the absence of an explicit congressional determination of the scope of preemption, it is nonetheless true that almost every preemption case has been decided in this context. *See, e.g.*, *Jones v. Rath Packing Co.*, 45 U.S.L.W. 4323 (1977) (state commodities weight law was preempted because its lax standards conflicted with execution of federal policy); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (state trade secret law not preempted by operation of federal patent law); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (pervasive scheme of federal regulation of aircraft noise preempts local ordinances imposing a curfew on jet landings); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (federal test of ripeness of avocados to be marketed does not preempt state test).

¹²¹ Although the term "implied preemption" is an addition to the constitutional lexicon, it is a useful addition because it highlights the Court's role in formulating the doctrine of preemption. The Court itself has recognized that in the absence of an express congressional declaration, it should not infer preemption in the absence of conflict. *See, e.g.*, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960) (Court will not imply an intent to supersede unless actual conflict).

¹²² *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); *Franklin National Bank v. New York*, 347 U.S. 373, 378-79 (1954); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235-36 (1947).

¹²³ For comprehensive and thoughtful analyses of the Court's preemption decisions. *see* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Hirsch, *supra* note 169; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

of conflict necessary to support a finding of preemption,¹²⁴ and of reliance on a broad range of presumptive factors as the basis for an inference that Congress intended to occupy a field to the exclusion of state authority.¹²⁵ In one class of cases involving state laws designed to protect civil rights, public health, and safety, the Court has reiterated the familiar maxim that a federal statute will not be deemed to preempt state action unless there is a direct conflict or a clear manifestation of congressional intent.¹²⁶

Simultaneous compliance with federal and state antiboycott legislation is not impossible. To require this compliance would assure the greatest possible opposition to both the secondary and tertiary boycotts and their discriminatory effects. For example, if banks report boycott requests accompanying letters of credit transmittals and refuse to comply with Arab requests declared to be discriminatory practices, the policy objectives of both the state and federal approaches will be fulfilled.¹²⁷

Other presumptive factors, such as legislative history, the pervasiveness of the federal scheme of regulation, and the dominance of

¹²⁴ From the beginning of our constitutional history, it has been settled that where a state law collides with an Act of Congress, it is invalid under the supremacy clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 10-11 (1824). The Court, however, has not been able to draw a clear line between permissible and impermissible degrees of conflict. *Compare Perez v. Campbell*, 402 U.S. 637 (1971), with *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).

¹²⁵ The cases in which the Supreme Court has relied on these presumptive devices of congressional intent to exclude state regulation of a given field are legion. *See, e.g.*, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Hines v. Davidowitz*, 312 U.S. 52 (1941). The Court has also refused to find preemption in the absence of these presumptive factors of congressional intent. *See, e.g.*, *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405 (1973).

¹²⁶ *See, e.g.*, *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *California v. Zook*, 336 U.S. 725, 733 (1949).

¹²⁷ The recent concern in the United States over the boycott did not arise because of its impact on trade. The boycott's effect was first acknowledged in the investment banking sector in March 1974. *See ARAB BOYCOTT REPORT*, *supra* note 7, at 10. International commerce is highly dependent on the transmittal of letters of credit. A foreign importer who wishes to buy goods from an American business will purchase a letter of credit from its local bank for the cost of those goods. That bank will then transmit the letter of credit to a correspondent American bank, instructing it to pay the specified amount, but only after the American bank determines that all the conditions set forth in the letter were met. The bank issuing the letter guarantees the reimbursement of money advanced by the correspondent American bank and the issuing bank receives a fee based on a percentage of the total dollar value of the letter. *See generally* Harfield, *Trade without Tears, or Around Letters of Credit in 17 Sections*, 1952 WIS. L. REV. 298. Letters of credit issued by foreign banks on behalf of Arab importers frequently require American exporters to present documents to American correspondent banks certifying that the businesses have not violated provisions of the Arab boycott of Israel. *BANKS AND THE BOYCOTT*, *supra* note 5, at 5-6. American banks give effect to the Arab boycott by agreeing to handle a letter of credit including boycott compliance terms. Instead of losing business and being blacklisted, there is evidence that a posture of resistance would result in a significant reduction of such requests without an accompanying loss of bank business. In a number of instances, resistance by American banks to discriminatory requests caused Arab importers to withdraw their demands. *Id.* *See also* note 10 *supra*.

the national interest in the protection of civil rights, do not pose a threat to the antiboycott laws.¹²⁸

2. *Commerce Clause*—The enumerated powers of Congress are generally exclusive, permitting only congressional exercise of the power.¹²⁹ If any state regulation or statute affects Congress' power to exercise its exclusive powers, it could be found repugnant to that enumerated power and would be invalidated under the supremacy clause.¹³⁰ In determining whether the antiboycott laws may be invalidated by this federal prerogative, the initial inquiry concerns the effect of state laws on the federal government's enumerated powers. The attempt to frustrate "agreements" between domestic companies and foreign governments, which discriminate against state citizens, could affect the federal control over foreign commerce as derived from Congress' authority under the commerce clause.¹³¹ In addition, the prevention of discrimination within a state could be construed as impeding the free flow of commerce; companies in states without antiboycott statutes would have a competitive advantage in Arab nations that companies operating in the antiboycott states would not enjoy.

A complete discussion of the Court's treatment of the relation-

¹²⁸ Absent actual conflict between the state and federal antiboycott schemes, preemption will not be inferred. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960); note 134 and accompanying text *infra*. The Court has consistently upheld civil rights statutes unless it could "conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714, 722 (1963). See, e.g., *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945).

A bill introduced in the 95th Congress attempts to expressly preempt the state antiboycott laws. H.R. 5840, 95th Cong., 1st Sess. (1977) (Zablocki bill), expressly states "(t)he rules and regulations issued . . . shall preempt and supersede any provision of law or regulation of any State" which prohibits participation in the Arab boycott and "no State . . . may establish, continue . . . or enforce any such provision(s)." The Zablocki bill has provisions similar to the general state antiboycott provisions, see notes 74-79 and accompanying text *supra*. However, the strong measures could be diluted by the Executive Department actions. See *N.Y. Times*, Mar. 25, 1977, at D-1, col. 5 (Sec. of State Cyrus Vance suggesting amendments to the Proxmire Bill which would dilute its effect); *Wall St. J.*, Apr. 6, 1977, at 4, col. 3 (reporting dilution of the Proxmire bill by the Executive Department's misgivings).

¹²⁹ Between the powers which the Constitution denies the states, U.S. CONST. art. VI, and those which it reserves to the states, U.S. CONST. amend. X, lies a broad range of powers capable of being exercised concurrently by the states and the federal government. This range of concurrent powers is quite large because, although those powers enumerated by the Constitution and delegated to the federal government are generally prohibited to the states, the Constitution also delegates to the federal government broad general powers to provide for the "general welfare," U.S. CONST. art. I, § 8, cl. 1, and to make all laws "necessary and proper," U.S. CONST. art. I, § 8, cl. 18, to effectuate its other powers. The Constitution's delegation to Congress of the power to exercise legislation for the District of Columbia is one example of an enumerated power which clearly precludes any state regulation. U.S. CONST. art. I, § 8, cl. 17.

¹³⁰ For example, in *Zschemig v. Miller*, 389 U.S. 429 (1968), the Supreme Court held that the Oregon escheat law regulating the rights of heirs to receive property was invalid. The Court found that the statute, as construed by the Oregon courts, affected international relations, authority committed by the Constitution to Congress and the President. *Id.* at 440.

¹³¹ U.S. CONST. art. I, § 8, cl. 3.

ship between the commerce clause and state regulations is beyond the scope of this note.¹³² Nonetheless, it can be stated that the state's police power will be upheld even if its exercise affects interstate commerce in some manner,¹³³ but that state regulations substantially impeding interstate commerce will be invalidated.¹³⁴ The Supreme Court has stated that although the Constitution gives Congress the power to regulate commerce, it was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens."¹³⁵ Therefore, assuming that an antiboycott law results in some burden on commerce, the first question is whether that regulation substantially burdens commerce. The Court has uniformly upheld state civil rights laws absent a direct conflict with federal statutes.¹³⁶ In one instance, a state's interest in protecting the civil rights of its citizens has been deemed so important that enforcement of the statute involved was permitted despite its effect on foreign commerce.¹³⁷ Thus, any effect on commerce resulting from the enforcement of the antiboycott laws could be considered incidental and not a prohibitive burden on commerce.

Though the antiboycott laws do not constitute a direct burden on commerce, the Court has applied additional tests to state police power regulation. First, the state regulation must be reasonably adapted to the desired objective.¹³⁸ The Court has given some indication of what it will consider unreasonable in the commerce context. For example, in *Huron Portland Cement Co. v. City of Detroit*,¹³⁹ the Court concluded that a state may not impose a

¹³² For a discussion on the Court's analyses of the commerce clause and state regulations, see Dowling; *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940); Sholley, *Negative Implications of the Commerce Clause*, 3 U. CHI. L. REV. 556 (1936).

¹³³ See, e.g., *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R. R.*, 393 U.S. 129 (1968) (upholding a state law requiring a full train crew); *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950) (upholding a state order requiring company to take natural gas rateably fixed prices although 90 percent of gas went out of state); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) (upholding state law restricting weights and size of motor carriers).

¹³⁴ See, e.g., *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (invalidating state regulation which would have barred interstate milk from a major segment of the Florida milk market); *Morgan v. Virginia*, 328 U.S. 373 (1946) (invalidating state law segregating races on interstate buses); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (invalidating state law regulating length of interstate trains).

¹³⁵ *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960), quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876).

¹³⁶ See, e.g., *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963) (upholding state civil rights statute as it applied to an interstate air carrier's employment of pilots because it did not place an undue burden on interstate commerce); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948) (upholding state civil rights law as it applied to prohibiting discrimination in foreign commerce).

¹³⁷ *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

¹³⁸ *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

¹³⁹ 362 U.S. 440, 448 (1960).

burden either discriminating against interstate commerce or operating to disrupt its required uniformity.

The Court now applies a balancing test to resolve interstate commerce questions.¹⁴⁰ Where the state law attempts to achieve a legitimate local public interest, it will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.¹⁴¹ Once a legitimate local purpose is found, the burden imposed on commerce will be balanced against the local interests supporting the legislation in order to determine the ultimate question of constitutionality.¹⁴²

In applying these tests to the antiboycott laws, it has been held that civil rights laws are not an undue burden on commerce. They neither discriminate against interstate or foreign commerce, nor do they disrupt any required uniformity. Civil rights statutes protecting citizens from discrimination have been upheld by the Court as a reasonable means to the ends sought.¹⁴³

Thus, under traditional tests the antiboycott laws appear not to impose an undue burden on commerce. This conclusion is reinforced by the result in *National League of Cities v. Usery*.¹⁴⁴ The Court, in overruling *Maryland v. Wirtz*,¹⁴⁵ stated that "insofar as the challenged amendments [to the Fair Labor Standards Act] operate to directly displace the State's freedom to structure integral operations in areas of *traditional* governmental functions, they are not within the authority granted Congress by [the commerce clause]." ¹⁴⁶ Although the Court specifically recognized that Congress' power to regulate commerce is "plenary," it held that it was not absolute.¹⁴⁷ The Court's reluctance to use the commerce clause to invalidate state regulation of "traditional" functions

¹⁴⁰ The Court has struck down state regulations by applying the balancing test even where the regulation was nondiscriminatory. *See, e.g.,* *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529-30 (1959).

¹⁴¹ *A. & P. Tea Co. v. Cottrell*, 424 U.S. 366, 371-72 (1976), *quoting* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), *and* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960) (invalidating state regulation which would have barred interstate milk into Mississippi unless the other states accepted milk from Mississippi on a reciprocal basis).

¹⁴² *See, e.g.,* *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

¹⁴³ *See* *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

¹⁴⁴ 426 U.S. 833 (1976).

¹⁴⁵ 392 U.S. 183 (1968).

¹⁴⁶ 426 U.S. 833, 852 (emphasis added).

¹⁴⁷ *Id.* at 836; *see also* *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). There are many references to Congress' complete authority over foreign commerce, yet the Supreme Court has found that a state can regulate foreign commerce where there are local interests involved. *E.g.,* *Buck v. California*, 343 U.S. 99 (1952); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948).

could possibly be applied to other traditional functions such as the exercise of the police power to prevent discrimination.

D. Statutory Alternatives to Antiboycott Laws

A variety of current state statutes, including civil rights and antitrust laws, could also be employed to prevent the discriminatory effects of the Arab boycott.¹⁴⁸ State antitrust laws prohibit arrangements that restrain or could restrain trade or commerce.¹⁴⁹ Typically, only "unreasonable" restraints of trade and unjustified concerted refusals to deal are prohibited;¹⁵⁰ refusals to deal based on private political considerations have been considered unjustified.¹⁵¹ Thus, a company victimized by concerted boycott-inspired actions could use state antitrust laws in seeking relief.

Many state constitutions¹⁵² and civil rights laws¹⁵³ contain comprehensive provisions barring racial and religious discrimination by individuals and businesses. In addition, statutory provisions specifically prohibit racial or religious discrimination in employment.¹⁵⁴ These civil rights laws could be used to prevent discriminatory employment practices in American companies, including those inspired by the boycott.

In New York a number of boycott-related discrimination complaints have been brought under various civil rights statutes. For example, the Human Rights Commission warned employers that they face legal action if they discriminate in employment because of foreign pressures.¹⁵⁵

¹⁴⁸ Other statutes include: state restrictions on secondary boycotts, *e.g.*, TEX. REV. CIV. STAT. ANN. art 5154f (Vernon 1967); conspiracy statutes where a person or business induces another to breach a contract, *e.g.*, N.Y. PENAL LAWS § 105.00 (McKinney 1968 & Supp. 1976); and statutes prohibiting fraudulent representation and materially deceptive practices that would prohibit businesses from complying with an Arab blacklist without informing their stockholders or customers, *e.g.*, N.Y. EXEC. LAW § 63(12) (McKinney 1968 & Supp. 1976).

¹⁴⁹ *See, e.g.*, CAL. BUS. & PROF. CODE § 16720 (West 1969); ILL. ANN. STAT. ch. 38, § 60-1 (Smith-Hurd 1970 & Supp. 1976); N.Y. GEN. BUS. LAW § 340 (McKinney 1968 & Supp. 1976).

¹⁵⁰ *See, e.g.*, Harlem River Consumers Co-op, Inc. v. Associated Grocers of Harlem, Inc., 408 F. Supp. 1251 (S.D.N.Y. 1976); Triple D & E, Inc. v. Van Buren, 72 Misc. 2d 569, 339 N.Y.S.2d 821, *aff'd*, 42 A.D.2d 841, 346 N.Y.S.2d 737 (1972); Big Top Stores, Inc. v. Artsley Toy Shoppe, Ltd., 64 Misc. 2d 894, 315 N.Y.S.2d 897, *aff'd*, 36 A.D.2d 582, 318 N.Y.S.2d 924 (1970).

¹⁵¹ *E.g.*, I.P.C. Distributors, Inc. v. Chicago Moving Picture Mach. Operators Union, 132 F. Supp. 294 (N.D. Ill. 1955); *see also* Note, "Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 YALE L.J. 567 (1965).

¹⁵² *E.g.*, CAL. CONST. art. I, § 1; ILL. CONST. art. I, §§ 2, 17, 18, 20; N.Y. CONST. art. I, § 11.

¹⁵³ *E.g.*, CAL. CIVIL CODE §§ 51-54 (West 1969); ILL. ANN. STAT. ch. 38, §§ 13-1 - 13-4 (Smith-Hurd 1962); N.Y. EXEC. LAW §§ 290-301 (McKinney 1968 & Supp. 1976).

¹⁵⁴ *E.g.*, CAL. CIVIL CODE §§ 51-54 (West 1969); ILL. ANN. STAT. ch. 38, §§ 13-1 - 13-4 (Smith-Hurd 1962); N.Y. EXEC. LAW §§ 290-301 (McKinney 1968 & Supp. 1976).

¹⁵⁵ This warning occurred after an American company fired a Jewish receptionist because her job required greeting Arab visitors. *See* "If you do business in the Middle East . . .

The statutory alternatives complement the antiboycott laws, but it is uncertain whether the alternatives will be effectively used to combat the Arab boycott of Israel.

IV. CONCLUSION

This note has reviewed the state statutory responses to the discriminatory effects of the Arab boycott of Israel, examined potential challenges to the antiboycott laws, and reviewed existing statutory alternatives that can complement the antiboycott laws. An analysis of the antiboycott statutes indicates that their effectiveness will not be hampered by the supremacy clause, federal preemption, or Congress' authority to regulate interstate and foreign commerce. If Congress wants to displace the state laws with a federal antiboycott statute, it will have to expressly preempt the state enactments.

The state laws reflect a growing realization that the boycott poses a considerable threat to American commerce and that the federal government has moved too slowly to protect American citizens from the discriminatory effects of the boycott. In light of this, at least six states have taken steps to protect their citizens from the Arab boycott of Israel. If Congress fails to act, other states should consider enacting similar antiboycott statutes.

—*Maurice Portley*

Remember certain practices are ILLEGAL," American Jewish Comm., Apr. 1976, at 16. See also N.Y. Times, July 23, 1976, at A-3, col. 1 (American Jewish Committee filed a complaint with the New York Human Rights Commission against three local banks for violating the Lisa Law).