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The Antitrust Implications of the Arab Boycott

The Arab-Israeli conflict has not been limited to military confrontation. The Arab states have long engaged in a boycott of Jewish economic interests in the Middle East. Since 1951, the League of Arab States has maintained a Central Boycott Office (with headquarters in Damascus and branches in League countries) to coordinate boycott activities. Through a study of trade journals, the collection of hearsay information, and the distribution of questionnaires to foreign companies, the Office assembles a master list of businesses whose connections with Israel are considered detrimental to Arab interests. It disseminates the master list to member states, many of which have official boycott departments within their economic or commercial government bureaucracy. Each country's government department then independently decides whether the League's recommendations should be implemented against particular foreign export, import, investment, or banking enterprises.

1. See L. PRESTON, Trade Patterns in the Middle East 49-51 (1970). For general discussion of the economic impact of boycott agreements, see Bouvè, The National Boycott as an International Delinquency, 28 AM. J. INTL. L. 19 (1934); Lauterpacht, Boycott in International Relations, 14 BRIT. Y.B. INTL. L. 125 (1933).


3. L. PRESTON, supra note 1, at 51.

4. The practice of demanding information through questionnaires was challenged in 1965 by a bill seeking to make any response to such questionnaires illegal. See generally 2 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. (1965). The amendment finally approved by Congress encouraged, but did not mandate, refusal to comply with boycotters' requests for information. See Export Administration Act, 50 U.S.C. §§ 2401-13 (Supp. 1975). It did require that such requests from boycotters be reported to the Department of Commerce. Export Administration Act § 4b, 50 U.S.C. § 2403(b) (Supp. 1975).

Representative Holtzman states that from 1970 through 1974 exporters reported 44,709 transactions involving Arab requests for discriminatory practices against Israel. 121 CONG. REC. H6580 (daily ed. July 10, 1975). There is little question that many more requests for information have gone unreported. On May 21, 1975, the Department of Commerce reported that at least 49 American exporters had violated the Act by failing to disclose that they had been asked to participate in the boycott. Five were formally charged for this failure. See N.Y. Times, May 22, 1975, at 8, col. 1 (late city ed.). More recently, the Department has demanded that companies report their responses to the boycott demands. See Detroit Free Press, Sept. 29, 1975, at E1, col. 1. An anonymous Department official has stated that, in most of the estimated 50,000 transactions with Arab countries since 1970, American companies have complied with Arab demands. See N.Y. Times, Dec. 10, 1975, at 7, col. 1 (late city ed.). The American Jewish Congress has filed suit in federal court demanding disclosure of the names of companies complying with the Arab boycott. See N.Y. Times, May 27, 1975, at 5, col. 1 (late city ed.).

5. For example, in Lebanon the boycott office is part of the Ministry of National Economy. See G. GRASSMUCK & K. SALEH, Reformed Administration in Lebanon 75 (1970).
According to official boycott regulations and policy statements, activities that can lead to blacklisting and subsequent boycotting 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 a blacklisted firm, and the conduct of normal trade with Israel, particularly the importation of Israeli goods. Although the boycott has never been a sham, until recently it has been considered little more than a symbolic gesture of Arab unity against Israel. In part, this can be attributed to the haphazard implementation of the blacklist. Some companies on the list have never participated in activities violative of the boycott regulations, while others conspicuous in their dealings with Israel have not been blacklisted. More importantly, however, the Arabs' limited economic power made the boycott relatively ineffective. Western companies had little to lose if excluded from Arab markets.

Since the Arab-Israeli War of October 1973, the Arab oil-producing nations have emerged as a principal world economic force. American businesses now have an interest in participating in the "petrodollar" bonanza of oil revenues—an interest that can best be furthered by joining in Arab construction projects, by exporting technology and goods, and by attracting Arab capital to be used for American business expansion. Not surprisingly, therefore, overt

6. L. PRESTON, supra note 1, at 51-52. The regulations also proscribe foreign ships both from calling on Israeli ports before calling on Arab ports and from transporting Israeli goods. Foreign banks are prohibited from doing business in Arab lands if they establish outlets in Israel or do other business that involves substantial dealing with Israel. Id. at 52.

7. A number of major corporations such as Coca-Cola Company and Ford Motor Company have been banned from the Arab world while their major competitors have been free to operate there. See N.Y. Times, Jan. 26, 1975, § 3, at 1, col. 3 (late city ed.). See also Guzzardi, That Curious Barrier on the Arab Frontier, FORTUNE, July 1975, at 82.

8. See Guzzardi, supra note 7, at 84-85.

9. The most notable of these are Hilton International, Inc., which owns hotels in both Tel Aviv and Cairo (where Arab League meetings have been held), IBM, and the defense giants, General Electric and McDonald-Douglas. Id. at 168.

10. The Arab-dominated Organization of Petroleum Exporting Countries (OPEC) has become a force that Western statesmen can no longer ignore. It is estimated that in 1974 OPEC revenues were $105 billion, $55 billion of which was available for foreign investment and $50 billion of which was used to purchase goods and services. See 121 CONG. REC. H6579-81 (daily ed. July 10, 1975) (testimony of Representative Holtzman).

There is some evidence that high oil prices and the recession in the West have reduced the demand for oil, causing a drop in OPEC revenues in recent months. See Samuelson, Too Little Too Late, NEW REPUBLIC, Jan. 3, 1976, at 12. Still, it is predicted that over the next several years the Arab countries will accumulate vast sums of investment capital. See N.Y. Times, Jan. 4, 1975, at 2, col. 1 (late city ed.) (describing massive Saudi Arabian development and construction projects planned for the next five years). See generally Demaree, Arab Wealth as Seen Through Arab Eyes, FORTUNE, April 1974, at 108; Arabs and Their Money—A Lot of Ways To Spend It, U.S. NEWS & WORLD REP., Jan. 14, 1974, at 60.
acts of Arab pressure and American business compliance have become more commonplace in recent months. A number of companies are reported to be negotiating actively with the Arab Boycott Office about removal from the blacklist,\textsuperscript{11} several have dropped their affiliations with the American-Israeli Chamber of Commerce,\textsuperscript{12} and a decrease in American investment in Israel has been noted.\textsuperscript{13} Moreover, it has been alleged that American companies have been coerced into terminating economic dealings with other American companies on the blacklist,\textsuperscript{14} that businesses have attempted to purge themselves of Jewish directors, officers, and employees,\textsuperscript{15} and that anti-Jewish specifications have been filed with executive search firms.\textsuperscript{16} Finally, evidence that the Arabs have employed still other forms of coercion abroad\textsuperscript{17} suggests that American businesses may be subject to increasingly aggressive uses of Arab economic might in the future.\textsuperscript{18}

Clearly, American business practices are being interfered with, general principles of free trade are being thwarted,\textsuperscript{19} United States foreign aid to Israel is being undermined, and the American economy is being threatened with the spread of discriminatory business practices.\textsuperscript{20} The complacency of the past must now be replaced by an appreciation of the dangers that the boycott poses to American economic and political institutions.\textsuperscript{21}

\textsuperscript{11} These companies include Ford Motor Company, Xerox Corporation, and Coca-Cola Company. See Guzzardi, supra note 7, at 170, 172; N.Y. Times, Feb. 24, 1975, at 7, col. 1 (late city ed.).
\textsuperscript{12} Wall St. J., March 25, 1975, at 20, col. 2 (midwest ed.).
\textsuperscript{13} Id.
\textsuperscript{14} See N.Y. Times, March 29, 1975, at 44, col. 2 (late city ed.).
\textsuperscript{15} Id. at 49, col. 3. Several private companies have been charged by the Anti-Defamation League of B’nai B’rith with bowing to Arab demands that no Jews be sent to Saudi Arabia for any purpose. See N.Y. Times, Feb. 24, 1975, at 1, col. 4 (late city ed.).
\textsuperscript{16} See N.Y. Times, March 4, 1975, at 49, col. 3 (late city ed.).
\textsuperscript{17} For example, N.M. Rothschild & Sons, S.G. Warburg & Co., and Lazard Freres were excluded from such projects as the raising of a $25 million loan to Air France and a $100 million fund to finance French highways. See N.Y. Times, Feb. 8, 1975, at 1, col. 2 (late city ed.). Similar practices were reported to be taking place in London. See N.Y. Times, Feb. 13, 1975, at 1, col. 5 (late city ed.).
\textsuperscript{18} See N.Y. Times, Feb. 12, 1975, at 2, col. 1 (late city ed.).
\textsuperscript{20} 121 Cong. Rec. H6579 (daily ed. July 10, 1975). Commissioner Pollack of the SEC has said that "no society can long exist if it permits itself to be blackballed or blacklisted by persons asserting economic leverage." N.Y. Times, Feb. 24, 1975, at 40, col. 1 (late city ed.).
This Note focuses on the legal means that can and should be used to challenge both the economic pressures exerted upon American companies and the subsequent participation by such companies in the boycott of Israel and blacklisted firms. The Note contends that, while “quiet diplomacy and persuasion” are perhaps the only means short of full-scale economic warfare available to the United States to eliminate completely Arab economic pressures and their coercive effects, the United States antitrust laws are sufficient to counteract many of the boycott’s actual or potential manifestations. Specifically, the Note demonstrates that the Arab boycott and the discriminatory conduct it induces are violative of the antitrust laws despite both the unique political purposes underlying the boycott and the presence of conspiratorial conduct abroad. It shows that the “sovereign immunity,” “act of state,” and “sovereign compulsion” doctrines are not defenses that generally can shield American defendants (and even some foreign entities) from antitrust prosecution. Finally, the Note concludes with the suggestion that new legislation should be enacted to clarify possible ambiguities in the present antitrust laws.

I. APPLICATION OF THE ANTITRUST LAWS

A. The Arab Boycott: An Illegal Concerted Refusal To Deal

The initial question to be resolved is whether the refusal on the part of Arab states and American companies to deal with Israel and blacklisted firms violates section 1 of the Sherman Act, which prescribes any “combination ... in restraint of trade or commerce.”

Boycott agreements are generally understood to be illegal per se under section 1. As a review of the leading cases indicates, crucial in the determination whether a refusal to deal constitutes an illegal boycott are the exercise of coercive methods and a resultant restraint on freedom of trade. For example, in *Eastern States Retail Lumber Dealers’ Association v. United States*, retailers who compiled

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22. N.Y. Times, Feb. 27, 1975, at 16, col. 5 (late city ed.).
23. On January 16, 1975, the Justice Department decided to test this use of the antitrust laws by filing suit against Bechtel Corporation and four related companies for conspiracy to boycott individuals and companies blacklisted by Arab nations. The Department alleged that the defendants had conspired since early 1971 “to refuse to deal with blacklisted persons as subcontractors in connection with major construction projects in Arab League countries.” N.Y. Times, Jan. 17, 1976, at 5, col. 3 (late city ed.).
27. 234 U.S. 600 (1914).
a blacklist and then refused to deal with wholesalers who sold directly to consumers. The Supreme Court held that when a dealer, through a conspiracy and combination with others, seeks to “obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among . . . actual or possible customers of the offenders, he exceeds his lawful rights . . .” 28

Similarly, in *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 29 the Supreme Court held illegal a combination among a large retail store and its suppliers, wherein the suppliers agreed to sell merchandise to the retailer’s competitor only at discriminatory prices or on highly unfavorable terms. The Court emphasized that such a combination deprived the plaintiff of its freedom to buy . . . in an open competitive market and [tended to drive] it out of business as a dealer in the defendants’ products. It deprived the manufacturers and distributors of their freedom to sell to [the plaintiff] at the same prices and conditions made available to [its competitor], and in some instances forbade them from selling to it on any terms whatsoever. It interfered with the natural flow of interstate commerce. 30

This concern for the market consequences of coercive pressures is perhaps most clearly articulated in *Duplex Printing Press Co. v. Deering*. 31 There, union representatives pressured the complainant’s actual and prospective customers “to withhold or withdraw patronage from [the] complainant” 32 in order to force the acceptance of union demands. The Court held that such a “secondary boycott” must be enjoined because it acts “to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and actual dispute—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the antitrust laws . . .”. 33

Surely the compilation of a blacklist by the Arabs amounts to a coercive attempt to restrain trade and to alter trade patterns, conduct found illegal in *Eastern States*. The Arab and American refusal to deal also infringes upon the freedom of manufacturers and distrib-

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28. 234 U.S. at 614.
30. 359 U.S. at 213.
31. 254 U.S. 443 (1921).
32. 254 U.S. at 466.
33. 254 U.S. at 477-78. *See also* Lowe v. Lawlor, 208 U.S. 274, 294 (1908) (holding illegal a combination “aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes . . .”).
utors to sell, and thereby interferes with the freedom of both American and Israeli targets to purchase goods and technology on the open market, consequences crucial to the decision in *Klors*. Finally, the coercive pressure exerted by the Arabs against American firms constitutes a secondary boycott of the sort condemned in *Deering*; it is, after all, "the general public upon whom the cost must ultimately fall." It thus appears that both the Arab entities and the American companies that act in concert with them are engaging in activities generally found illegal per se under the Sherman Act.

The analysis, however, cannot end here, for concerted refusals to deal are almost universally intended to create direct economic or competitive advantages for the boycotters. In contrast, the Arab boycott involves atypical purposes. The Arab participants seek to "advance political or military purposes, while the American participants act on the basis of business calculation in response to threats of Arab economic retaliation. It therefore becomes necessary to determine whether uniqueness of purpose requires a rejection of the per se approach to coercive restraints of trade.

While few courts have had to face the problem, as both *Council of Defense v. International Magazine Co.* and *I.P.C. Distributors, Inc. v. Chicago Moving Picture Machine Operators Union* demonstrate, the antitrust laws have been applied to restraints of trade that are not motivated by the promise of economic benefit to the boycotters. In *Council of Defense*, a patriotic organization was held in violation of the antitrust laws for conspiring to boycott and restrain the sale of Hearst magazines in New Mexico. The specific conduct complained of was the launching of a publicity campaign designed to condemn the magazines and praise those retailers that no longer marketed them. Part of the campaign involved the publication of an "Honor Roll" of "real Americans" who no longer sold the objectionable magazine. No competitive relationship or purpose influenced the defendants. They were motivated by apparently sincere feelings that the Hearst Corporation was pro-German and that its periodicals undermined the American war effort. Nevertheless, the court, citing as authority a number of cases in which the combination had taken place in a typical economic setting, held that the acts "amounted to a conspiracy to boycott or blacklist the magazines" and

35. 267 F. 390 (8th Cir. 1920).
37. See also *Southern Christian Leadership Conference, Inc. v. A.G. Corp.*, 241 S.2d 619 (Miss. 1970) (consumer boycott of grocery store was an unlawful conspiracy notwithstanding that boycotters' purpose was to force store to abandon alleged discriminatory hiring policy).
38. 267 F. at 396.
39. 267 F. at 396.
were thus illegal.\textsuperscript{40} In \textit{I.P.C. Distributors}, union operators had refused to run a film distributed by the plaintiff to a local theater because one of the stars was on a blacklist of alleged communist sympathizers. The court similarly ignored the boycotters' lack of economic motivation and found a sufficient cause of action under the antitrust laws based solely on the public's interest in being able to see first-run movies.\textsuperscript{41}

In these cases, patriotic and political purposes did not prompt the courts to look beyond coercion and restraint of trade. They stand as authority that the existence of noneconomic purposes cannot vitiate a finding of illegality under the Sherman Act. If such an approach were adopted by courts in litigation involving Arab participants in the boycott against Israel and American companies, the coercive effects of that boycott would require a finding of per se illegality.\textsuperscript{42}

\textsuperscript{40} 267 F. at 411-12.
\textsuperscript{41} 132 F. Supp. at 298. For a discussion and background of motion picture political blacklisting, see Note, "Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 Yale L.J. 567 (1965).
\textsuperscript{42} There are, of course, problems with embracing a comprehensive rule that political purposes can \textit{never} excuse coercive conduct that results in restraint of trade. Such a rule would make per se illegal the refusal of Black citizens to buy from a retail store that discriminates against Blacks in its hiring practices, the boycott of Japanese products by Americans concerned about the extinction of the whale, and the consumer boycott of Gallo wine or California lettuce. Although these acts are at least minimally coercive and result in restraint of trade, the value of free political expression makes automatic application of the Sherman Act in these settings questionable indeed.

It might therefore be desirable for courts to adopt a more refined analysis when dealing with political purposes, one that would accommodate certain forms of economic coercion in limited settings. It would seem consistent with the thrust of leading boycott cases to reserve a per se rule in any secondary boycott situation in which coercive pressure, as opposed to persuasion, is placed on parties neutral to the dispute between the initiating boycotters and their primary target. Using this approach, a secondary boycott of a store selling Gallo wine would be illegal, while a consumer boycott of the wine itself would at least escape a finding of per se illegality. In the Arab boycott context, this approach would assure a finding of illegal coercive restraint of trade in any case involving a blacklisted American company. Under such an approach, only the primary dispute between the Arab states and Israel could avoid a finding of per se illegality—a result having limited importance since the major concern of American courts should be coercion directed against Americans or coercion exercised by Americans.

A second approach to refusals to deal might also be adopted to accommodate both the individual's interest in political expression and the public's interest in freedom of trade: A per se rule could be applied to combinations of businesses, while a "rule of reason" could be applied to combinations of individuals when no secondary coercion is involved. Businesses have no compelling need for freedom of political expression, and the economic impact of their refusals to deal may often be great. Thus, the per se rule is appropriate. Individuals, on the other hand, should be permitted to show that their purposes are somehow consonant with the protection of interests recognized in American law. Thus, the interest of Blacks to mobilize politically to secure civil rights is manifestly a recognized one. See, e.g., Henry v. First Natl. Bank of Clarksdale, 50 F.R.D. 251 (1970). The same would seem true for the protection of environmental interests, labor interests, see Coons, supra note 34, at 733-
A similar approach should be adopted with regard to the American participants. As noted above, American companies participate in the boycott on the basis of business calculations. Thus, it must be determined whether a finding of per se illegality is appropriate, given that the courts occasionally have permitted combinations in restraint of trade to be excused for legitimate business purposes. For example, in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, a supplier had allegedly terminated a distributor in order to transfer all wholesale rights to a rival distributor. The court held that there was no antitrust violation since the manufacturer’s reason for the termination was to improve the distribution of its products. Similarly, a line of cases has established the right of trade associations to pass regulations concerning the behavior of their members and to establish legitimate standards for admission or exclusion.

This limited business purpose exception to per se application of the Sherman Act in concerted refusal to deal cases should not be applied to American participants in the Arab boycott. In the first place, *Seagram* and the other cases recognizing the exception did not involve secondary boycotts. In fact, the court in *Seagram* questioned whether a combination that excluded one distributor in favor of another involved coercion at all in the sense understood by *Klors* and related cases. Clearly, American firms that refuse to deal with

34, religious interests, *see*, e.g., Watch Tower Bible & Tract Soc. v. Dougherty, 337 Pa. 286, 11 A.2d 147 (1940), and many other purposes that might stimulate consumer combinations. Even under this test, which should be an easy one to meet, the Arab purpose of undermining the economy of a nation with the ultimate aim of eliminating that nation from the world scene would hardly seem legitimate.

43, 416 F.2d 71, 76 (9th Cir. 1969).

44. *See*, e.g., Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (defendant’s bylaws preventing a card-issuing member bank from becoming a card-issuing member of rival credit system held not per se illegal because the bylaws advanced legitimate economic purposes necessary to the functioning of such credit card systems); Dalmo Sales Co. v. Tyson’s Corner Regional Shopping Center, 308 F. Supp. 988 (D.D.C.), *affd.*, 429 F.2d 206 (D.C. Cir. 1970) (shopping center could exclude competitor from membership in order to maintain the center’s “fashion image”); Molinas v. National Basketball Assn., 190 F. Supp. 241 (S.D.N.Y. 1961) (permanent suspension of plaintiff from the association for violating no-gambling regulation held a legitimate disciplinary rule); Hughes Tool Co. v. Motion Picture Assn. of America, Inc., 66 F. Supp. 1006 (S.D.N.Y. 1946) (removal by the association of a seal of approval from a member’s film and refusal to promote the film held consistent with proper self-regulatory and moral censorship).

45. In all these cases, the courts distinguished the justifiable characteristics of the conduct of the combiners from that which characterizes illegal combination. For example, the court in *Seagram* cited with approval the remarks of Barber, *supra* note 26, at 103:

The issue in these cases is not the existence or nonexistence of concerted refusals to deal, but rather whether the purpose and effect of the operation of the contract, association, exchange or joint sales agency was such as unreasonably to exclude outsiders from participation in the trade in question. The principle of the group boycott cases—that it is prima facie unreasonable for a dominant group to combine to coerce—is not here applicable.
blacklisted American targets are engaging in a secondary boycott. And, whatever the business purposes behind refusing to deal with Israel, those companies form an avowedly coercive enterprise. Moreover, American courts have consistently refused to recognize economic coercion as an affirmative defense in wholly domestic antitrust cases.\(^46\) Although there are valid reasons for applying a discretionary test in some situations in which economic coercion is exercised by foreign sovereigns, as in the Arab case, this test should be applied to American participants not at the outset, in deciding whether there is an antitrust violation, but at a later stage, in evaluating the affirmative defense of sovereign compulsion.\(^47\)

### B. Extraterritoriality

The Arab boycott involves two distinct components: (1) the secondary boycott by Arab entities directed against American companies, and (2) the boycott by Arab entities and American companies directed against Israel or blacklisted American companies. Although the activities of both components illegally restrain trade, the fact that such activities involve foreign parties and are conducted, at least in part, outside the United States suggests that the boycott may not be subject to the jurisdiction of the antitrust laws. It is therefore necessary to assess the applicability of established principles of extraterritoriality to the Arab boycott.

It is clear that the Sherman Act does extend to the combined boycott activities of the Arab entities and American companies since it is a well-established rule that federal laws have extraterritorial application where some of the parties are American and some of the illegal activity occurs within the United States.\(^48\) In the Arab-American combination to restrain trade, much of the activity, including corporate decision-making and the making and breaking of sales or investment deals, has a physical situs within the United States. Similar conspiratorial activities within American borders were found by the Supreme Court to trigger extraterritoriality in United States v. Sisal Sales Corp.\(^49\) In Sisal, American banks had planned and effectuated manipulations of the sisal market in order to monopolize the production, importation, and sale of that Mexican-produced fiber. As the Court explained:

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46. See text at notes 120-22 infra.
47. See text at notes 106-27 infra.
49. 274 U.S. 268 (1927).
Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein . . . . The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction. . . . [B]y their own deliberate acts, here and elsewhere, [the defendants] brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.50

The fact that some of the Arab boycott activities occur outside the United States does not remove the conspiracy from the extraterritorial application of the federal antitrust laws. In Sisal, Mexican legislative enactments regulating the supply and marketing of sisal were necessary to effectuate the conspiracy. Similarly, in Continental Ore Co. v. Union Carbide & Carbon Corp.,51 the Supreme Court held that a conspiracy between an American corporation and its Canadian subsidiary to monopolize the vanadium market was subject to the antitrust laws because of the parent corporation’s conduct within the United States. Though the conspiracy was consummated in Canada, the Court concluded that a “conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”52 Thus, where American companies yield to Arab pressures and combine with Arab entities to alter United States-Israeli trade patterns, such conduct will bring the parties within the jurisdiction of the federal antitrust laws.

Although it is less clear that the secondary boycott activities of Arab entities against American companies have an American situs, they too can be reached by the rule that antitrust jurisdiction extends to conspiratorial activity, whatever the situs, that intends to and does affect United States commerce. As the Second Circuit declared in United States v. Aluminum Co. of America,53 “[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”54 The court held that the Sherman Act should be applicable to any conspiracy that is intended to and does affect United States imports and exports, if such conspiracy would be illegal if perpetrated within the United States.55 Subsequent decisions have

50. 274 U.S. at 276.
52. 370 U.S. at 704. Continental and Sisal effectively overrule American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908), which had completely denied the reach of federal antitrust laws to acts taking place outside of the United States.
53. 148 F.2d 416 (2d Cir. 1945).
54. 148 F.2d at 443.
affirmed that the rule applies to conduct abroad affecting either exports or imports, \textsuperscript{56} that the character of the restraint of trade and not the amount of commerce affected is determinative of illegality, \textsuperscript{57} and that no effect on prices within the United States need be alleged to make the restrictive conduct illegal per se. \textsuperscript{58}

Thus, the Sherman Act should be applicable to the activities of Arab entities directed against blacklisted American companies. The intention of diverting American trade and investment from Israel has been admitted openly by Arab leaders. \textsuperscript{59} In addition, the boycott has the actual effect of excluding many exporters from Arab markets and rearranging trade patterns between the United States and the Middle East. If nothing else, the exclusion of large corporations such as Ford Motor Company and Coca-Cola Company \textsuperscript{60} from Arab states should be a sufficient basis for the extraterritorial application of the antitrust laws. \textsuperscript{61} In sum, therefore, both components of the Arab boycott should be within the jurisdiction of American courts.

\section*{II. Arab and American Defenses to Antitrust Violations}

\subsection*{A. Sovereign Immunity}

Notwithstanding that a cause of action under the Sherman Act clearly exists, the various parties to the Arab boycott may be able to avoid application of that statute. An initial defense that might shield at least some parties to the boycott is the doctrine of sovereign immunity, which prevents American courts from entertaining suits against certain foreign entities. \textsuperscript{62} In order to determine whether this defense can be asserted successfully by any of the participants, it is necessary to examine separately the status of the three types of Arab

\begin{footnotesize}
\textsuperscript{59} See N.Y. Times, Feb. 17, 1975, at 9, col. 1 (late city ed.).
\textsuperscript{60} See note 7 supra.
\textsuperscript{61} Such exclusion would most certainly meet the standard adopted by Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965) [hereinafter Restatement], which modifies the Alcoa decision by requiring that the effect within the territory of the United States be substantial and occur as a direct and foreseeable result of the conduct outside of the United States.
\textsuperscript{62} See generally id. § 65.
\end{footnotesize}
entities involved in the boycott: states and state officials, government corporations, and international organizations.

The general principle that sovereign immunity protects a state from the application of another state's laws would undoubtedly shield Arab heads of state, economic or trade officials, and officers in government boycott offices responsible for the blacklist. The defense extends not only to states, but also to ministers and agents of states with respect to acts performed in an official capacity. In two recent cases involving fact situations somewhat analogous to the Arab boycott, such immunity was apparently assumed. Thus, in Occidental Petroleum Corp. v. Buttes Gas & Oil Co., where the American corporate defendant was accused of conspiring with Iran, Britain, and the Trucial States to deprive the plaintiff of oil concessions in the Persian Gulf, the states were never joined as parties. Similarly, in Interamerican Refining Corp. v. Texaco Maracaibo, the Venezuelan Ministry of Hydrocarbons, which had ordered the corporate defendants not to deal with the plaintiff, was not joined as a defendant.

The applicability of the doctrine of sovereign immunity to institutions such as the Kuwait International Investment Company, which has unusual status as a branch of the national government and an entity active in world financial affairs, is less certain. Immunity generally does not extend to foreign corporations, although it might, under some circumstances, extend to "a corporation created under [a foreign state's] laws and exercising functions comparable to those of an agency of the state." The justification for not recognizing corporate immunity was clearly articulated in United States v.

63. See id. §§ 65-66. A statement of May 19, 1952, by the Acting Legal Adviser of the Department of State explained:

According to the new or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (Jure Imperii) of a state, but not with respect to private acts (Jure Gestionis). There is agreement . . . that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.


66. In Interamerican, the court stated that the Sherman Act "does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anti-competitive practices of persons and corporations." 307 F. Supp. at 1298. Although, as will be demonstrated below, the court confused sovereign immunity with the act of state doctrine, the holding with regard to jurisdiction over foreign sovereigns seems correct.


68. RESTATEMENT, supra note 61, § 66(g).
Deutsche Kalisyndikat Gessellschaft. Although the defendant corporation there was created, controlled, and largely owned by the French government, and although the corporate proceeds were paid into the national treasury and used for government purposes, the court did not consider the corporation to be "identical in any respect" with France, and it thus refused to recognize immunity:

A foreign sovereign cannot authorize his agents to violate the law in a foreign jurisdiction, or to perform any sovereign or governmental functions within the domain of another sovereign, without his consent. He, therefore, cannot claim as a matter of comity or otherwise that the act of the alleged agent in such cases is the act of the sovereign, and that a suit against the agent is in fact a suit against the sovereign. This is especially so when such alleged agent is a foreign corporation, or an officer, agent, or employee of a foreign corporation which is doing business here only by consent, which cannot be assumed to be given, except on condition that they shall be subject to our laws. 69

Ultimately, the denial of sovereign immunity to foreign corporations is necessary to protect fundamental United States interests. If immunity were recognized, foreign corporations would possess the rights and privileges associated with commercial intercourse, including the right to sue in United States courts, and yet would be able to escape the enforcement of United States laws and regulations. American corporations would thus be placed at a competitive disadvantage, and both American corporations and individuals would be left remediless if injured by the activities of foreign corporations. 70 Arab corporations, such as the Kuwait International Investment Company, should therefore be subject to the antitrust laws of the United States.

The final Arab entity participating in the boycott—the Arab League—should also not be able to invoke the defense of sovereign immunity. The International Organizations Immunities Act 72 provides immunities equal to those enjoyed by foreign states only to public international organizations in which the United States participates, and no recent judicial decisions have granted immunity from

69. 31 F.2d 199 (S.D.N.Y. 1929).
70. 31 F.2d at 203. This case cannot be seen as conclusive authority upon which to base refusal to grant sovereign immunity to the Kuwait International Investment Company and entities like it since the defendant did have some private stockholders and sold products for others, as well as for the government. However, the court was impressed with the argument that the company had an existence distinct from that of its stockholders, which seems to imply that even complete government ownership might not create sovereignty. See also Coale v. Société Co-operative Suisse des Charbons, Basle, 21 F.2d 180, 181 (S.D.N.Y. 1921) (holding that, where the Swiss government did business by means of a corporation organized by the government, the corporation "as a corporate entity, was liable for its corporate obligations").
American laws to an international organization in the absence of an agreement between the organization and the federal government. The United States is not a member of the Arab League nor has it any treaties in force with the League, and it would be clearly unreasonable to maintain that the United States has in any way consented to the League's boycott activities. Thus, the Arab League and its boycott offices should not be shielded by the doctrine of sovereign immunity.

B. Act of State

Although neither American corporations nor some foreign entities participating in the Arab boycott can invoke the protection of sovereign immunity, they might, because of the involvement of foreign sovereigns in the conspiracy, be able to invoke the act of state doctrine to escape application of the antitrust laws. It is submitted, however, that the act of state doctrine is inapposite to the Arab boycott. First, only a few cases have applied the doctrine in the antitrust context, and the authority of these cases appears to be vitiated by contrary decisions of the Supreme Court. Second, the "acts" of the Arab sovereigns can be distinguished from the sovereign "acts" in those cases that have applied the doctrine. Finally, the policies underlying the act of state doctrine would not be furthered by applying the doctrine to the Arab boycott.

The most recent application of the act of state doctrine to antitrust litigation was in *Occidental Petroleum*, where the American defendant was charged with conspiring to induce the Trucial States to claim territory in and to exclude a competitor from the Persian Gulf. The court refused to consider the antitrust claims against the American corporate defendant on the ground that "the act of state doctrine surely bars" judicial inquiry into the "authenticity" and "motivations" of the acts of foreign sovereigns.

As authority for its holding, the *Occidental Petroleum* court relied almost exclusively on the early Supreme Court decision in

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73. Consent would be one way of creating immunity. *See Restatement, supra* note 61, § 83(2).

74. This doctrine applies solely to acts of sovereign states, such as Egypt, Syria, and Kuwait, and not to acts of organizations affiliated with those states, such as the League of Arab States. The conduct of the League can therefore be scrutinized fully by American courts. *See text at notes 50-61 supra.* For examples of the types of sovereign acts required to invoke the act of state doctrine, see *Victory Transp. Inc. v. Comisaría General de Abastecimientos y Transportes*, 356 F.2d 354, 363 (2d Cir. 1964); *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966).


78. 331 F. Supp. at 110.
American Banana Co. v. United Fruit Co. The complaint in American Banana alleged that the defendant, in an attempt to monopolize, had induced the government of Costa Rica to seize the plaintiff's banana plantation. The Court concluded that it could not find that acts committed within the jurisdiction of Costa Rica, a foreign sovereign, were illegal since such acts were not proscribed by that sovereign: "[A] seizure by a state is not a thing that can be complained of elsewhere in the courts . . . . [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper." Although it acknowledged that Sisal and Continental Ore overruled American Banana on the issue of the extraterritoriality of United States antitrust laws, the Occidental Petroleum court maintained that American Banana remains authority for the contention that "the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." This continued reliance on American Banana seems misplaced, however, given the fact that in neither Sisal nor Continental Ore did the Supreme Court apply the act of state doctrine despite the active involvement in each of a foreign sovereign in the conspiracy.

Even if American Banana remains good authority for applying the act of state doctrine to some antitrust cases, it should not be construed to validate the doctrine's application in all antitrust contexts. An analysis of both antitrust and nonantitrust cases in which the doctrine has been invoked indicates that it has been applied only where the sovereign's acts are within its own territory and involve either the seizure of property, decrees that affect personal rights, or the implementation of domestic economic programs. Most of these cases have involved acts of confiscation by the sovereign that result in subsequent disputes over the title or proceeds from the sale of property. American courts have consistently refused to examine the validity of acts such as the confiscation of

80. 213 U.S. at 357-58.
81. 274 U.S. 268 (1927).
82. 370 U.S. 690 (1962).
83. 331 F. Supp. at 110.
84. 331 F. Supp. at 109.
hides and gold bullion by military forces during the Mexican Civil War, and the seizure by the Cuban government of sugar and a tobacco factory. In a few cases, the doctrine has been applied to sovereign acts of domestic administration that affect the personal rights of individuals within the sovereign's territory. Thus, in the leading case of Underkill v. Hernandez, the Supreme Court refused to adjudicate the right of the commander of a revolutionary army in Venezuela (later the recognized government) to refuse the plaintiff a passport to leave an occupied city. Similarly, American courts have refused to consider claims involving the validity of a Costa Rican revocation of citizenship or a German revocation of pension rights. Finally, the act of state doctrine has been applied in some cases involving sovereign acts of economic regulation. Thus, in Wells Fargo & Co., Express, S.A. v. Tribolet, the court allowed invocation of the doctrine to bar scrutiny of a Mexican state's enactment of regulations governing the organization of vegetable production and marketing within Mexico.

The general rule that appears to govern these cases is that American courts will allow invocation of the act of state doctrine when the sovereign's acts are not intended to have extraterritorial effects (even though the acts may have "some indirect impact" beyond the sovereign's boundaries) and when the acts can be completed by

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89. See, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
93. 168 U.S. 250, 252 (1897).
94. 168 U.S. at 254.
97. 46 Ariz. 311, 50 P.2d 878 (1935).
98. 46 Ariz. at 319, 50 P.2d at 88.
99. See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968), modified as to damages, 433 F.2d 686 (2d Cir. 1970), where the court deter-
the sovereign itself within its own territory. As the Court of Appeals for the Fifth Circuit has stated:

The underlying thought expressed in all the cases touching upon the Act of State Doctrine is a common-sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the res before it and acts in such a manner as to change the relationship between the parties touching the res, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity.100

Conversely, American courts have not permitted invocation of the doctrine where the sovereign acts either were intended to have extraterritorial effects or required completion beyond the sovereign's territorial limits. Thus, in Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.,101 the original owners of cigar companies expropriated by the Cuban government were allowed to recover payments for shipments of cigars since the accounts receivable for the sales had their situs in the United States at the time of the expropriation. Similarly, owners of confiscated Cuban property have been permitted to retain rights to United States trademarks,102 and an original owner of paintings confiscated by the German government succeeded in efforts to replevy them because the act of confiscation had not been effectuated within German territory.103

Although an Arab sovereign’s “acts” of creating official boycott offices within the state bureaucracy, refusing to import or export, and denying investment privileges within the state's territory might, if taken alone, be considered appropriate for invocation of the act of state doctrine, such acts cannot properly be analyzed apart from the acts of threatening American companies with reprisals and ordering American companies not to deal with Israel or blacklisted parties. The boycott decisions and enforcement procedures conducted within the territory of Arab sovereigns must be viewed as integral parts of the Arab policy of coercion that is intended to have effects within the United States and that is in fact dependent upon such effects.

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101. 392 F.2d 706 (5th Cir. 1968).
for its success. Since the sovereign acts of the Arab boycott are unlike the acts that have traditionally triggered the act of state doctrine, the parties to the boycott should not be permitted to escape the application of United States antitrust laws merely because of the conspiratorial involvement of Arab sovereigns.

This conclusion is strongly buttressed by an analysis of the policies that the act of state doctrine is intended to effectuate. One of the primary purposes of the doctrine is to prevent "embarrass[ment to] the conduct of foreign relations."\(^{104}\) In cases where the doctrine has been invoked, the embarrassment avoided by judicial abstention only concerned American foreign relations with a single nation: Abstention had no significant impact upon relations with other states. In contrast, the Arab boycott involves American foreign relations not only with the Arab bloc but also with Israel. While both parties are hostile to each other, both are generally friendly to the United States. The refusal of American courts to apply the antitrust laws to the boycott would have a substantial impact on United States-Israeli relations since it would amount to the selection of a policy favorable to the Arab states. Since application of the doctrine will not promote international comity and will not avoid embarrassing the United States, American courts should not abstain from adjudicating boycott-related disputes. More importantly, most cases that have invoked the act of state doctrine have involved acts that neither affected fundamental American interests nor clearly violated United States laws.\(^{106}\) In contrast, the Arab boycott interferes substantially with the operation of the American economy in violation of the clearly articulated policies of the Sherman Act. Judicial abstention is not warranted when its consequence is to permit such pervasive and unprecedented intrusion into American economic affairs.

C. Sovereign Compulsion

A final defense that may be raised by some parties to the boycott is the doctrine of sovereign compulsion.\(^{106}\) Consideration of the applicability of this defense in the Arab boycott context is particularly important because of its potential availability to American par-

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105. For example, the seizure of American property abroad without compensation, although contrary to American public policy, is not clearly violative of either international or American law. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-30 (1964). Moreover, the cases where the act of state doctrine has been invoked in the antitrust context have not involved concerted conspiracies by foreign sovereigns designed expressly to intimidate American businesses. See American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Occidental Petroleum Corp. v. Butte Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971).
participants who are clearly not shielded by either sovereign immunity or territorial limitations of the antitrust laws.

Courts have applied the doctrine of sovereign compulsion to cases in which the foreign nation requires the defendant to engage in activities within the sovereign's territory that are violative of United States antitrust laws. In particular, courts have applied the doctrine where the foreign nation's laws directly mandate the defendant to commit the illegal acts. Often, courts applying the doctrine in this manner will enjoin the defendant from entering into combinations violative of the antitrust laws but will limit the injunction so as not to require the defendant "to do, or omit to do, any act in a foreign nation in violation of any law or decree of any court of competent jurisdiction of said foreign nation . . . ." 107

Courts have also applied the sovereign compulsion doctrine in a few cases in which the defendant was threatened with termination of its business interests or expropriation of its assets if it transgressed sovereign regulations in order to comply with the antitrust laws. The most recent application of the doctrine in this situation was in Interamerican Refining Corp. v. Texaco Maracaibo Co. 108 There, a ministry of the government of Venezuela had ordered Superior Oil of Venezuela, a concessionaire regulated by Venezuelan laws, to terminate oil sales to a particular New Jersey refinery. 109 The court, concluding that Superior could escape application of United States antitrust laws by invoking the doctrine of sovereign compulsion, stated: "When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on United States Courts over acts of foreign sovereigns." 110 In both United States v. Gulf Oil Corp. 111 and United States v. Standard Oil Co. (New Jersey) 112 the courts took a similar approach. In those cases, the defendants were enjoined from entering into any agreements or combinations to fix prices, divide markets, or allocate production with any competitors engaged in the production, refining, distribution, or sale of petroleum products. However, both injunctions were tailored to be inapplicable

\[\text{where the combination . . . is participated in . . . pursuant to request or official pronouncement of policy of the foreign nation or nations within which the transactions which are the subject of}\]

110. 307 F. Supp. at 1298.
such combinations take place, or of any supranational authority having jurisdiction within such nation or nations; and where failure to comply with which request or policy would expose [the defendants] to the risk of the present or future loss of the particular business in such foreign nation or nations which is the subject of such request or policy.\textsuperscript{113}

Significantly, these cases all involved corporations engaged in the development and marketing of natural resources. Such firms are peculiarly dependent upon the regulation of foreign nations and thus are uniquely subject to the demands of the territorial sovereign. Moreover, the activities of Superior Oil, Standard Oil, and Gulf Oil were all conducted primarily within the sovereign's territorial limits.\textsuperscript{114} The coercion to which American participants in the Arab boycott are subject differs substantially from the coercion that justified application of the sovereign compulsion defense in these cases. American firms are not directly mandated by the laws of Arab states to comply with the boycott. Nor do the vast majority of American firms have vital assets or business interests within the Arab states that are threatened by the boycott.\textsuperscript{115} Finally, and most importantly, the conduct demanded of American firms has no substantial territorial nexus with the Arab nations. The acts of American firms that participate in the boycott occur largely within the United States.

Although American companies may incur economic reprisals for noncompliance with the boycott, they are not compelled to comply. They retain the choice of obeying the antitrust laws and sacrificing optimal profits. Similar economic coercion was held not to be a defense against application of the antitrust laws in \textit{United States v. Watchmakers of Switzerland Information Center, Inc.}\textsuperscript{116} In \textit{Watchmakers}, the court held that a "convention" among the various elements of the Swiss watch industry, pursuant to which the participants limited their sales to United States manufacturers and importers, and which bound both United States companies and their Swiss subsidiaries, was an unreasonable restraint of trade. Recognizing that the Swiss government supported such restrictive practices in the watch industry, the court nonetheless indicated that the defense could not be invoked in the absence of "direct foreign governmental action compelling the defendants' activities."\textsuperscript{117} While the court did not

\textsuperscript{113} 1960 Trade Cas. at 77,349.
\textsuperscript{114} The court in \textit{United States v. United Fruit Co.}, 1958 Trade Cas. 73,790, 73,801 (E.D. La. 1938), emphasized that the doctrine applies only to acts in countries other than the United States.
\textsuperscript{115} Oil companies are the most obvious examples of firms whose assets would be subject to expropriation for failure to comply with the boycott. For an approach to the sovereign compulsion defense that takes the threat of extreme economic loss into account, see text at notes 126-27 infra.
\textsuperscript{117} 1963 Trade Cas. at 77,456-57.
clearly define the type of compulsion that would serve as a defense to application of the antitrust laws, it indicated specifically that certain activities are not encompassed by the defense: "The arguments of business necessity and foreign trade conditions . . . cannot immunize the restraints imposed by [the defendants] upon United States commerce." The court emphasized that "[i]f such arguments were accepted by the courts, the American antitrust laws would become a 'dead letter.' " This result is consistent with a number of domestic cases that have refused to recognize a defense of economic coercion when defendants participated in a boycott against a primary target only to avoid becoming the object of a secondary boycott.

Only one case—Interamerican—has extended the doctrine of sovereign compulsion to economic coercion under circumstances similar to the Arab boycott. The court there permitted the Amoco Trading Company (Amoco), an American corporation that served as middleman between Superior Oil and the New Jersey target, to invoke the defense even though the only possible consequence of noncompliance with the Venezuelan directive was a loss of profit opportunities for Amoco and even though Amoco, unlike Superior Oil, was not engaged in activities within Venezuelan territory. In so applying the doctrine, the court drew no distinction between the nature of the coercion exerted upon each defendant. Because such application of the doctrine is unsupported by other precedent, a fact that the court failed to recognize, Interamerican does not provide substantial authority for recognizing a defense of sovereign compulsion for all defendants subject to economic pressures by a foreign nation.

118. 1963 Trade Cas. at 77,457.
119. 1963 Trade Cas. at 77,457.
120. Thus, in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), in which the defendant movie producers and distributors, who had discriminated against small independent exhibitors, were found in violation of the Sherman Act, the Supreme Court noted: "There is some suggestion . . . that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants . . . . [T]hat circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." 334 U.S. at 161. Similarly, in United States v. Bausch & Lamb Optical Co., 321 U.S. 707 (1944), the Court, concluding that whether "this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose [was] immaterial," 321 U.S. at 723, held that a conspiracy between a distributor and wholesalers to maintain retail prices through a distribution system was violative of the Sherman Act. See also Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); The Flintkote Co. v. Lysfjord, 246 F.2d 368, 375 (9th Cir.), cert. denied, 355 U.S. 835 (1957) ("coerc[ion] by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor").
122. 307 F. Supp. at 1296.
Nonetheless, under some circumstances, recognition of a sovereign compulsion defense for defendants subject to economic coercion does seem appropriate. One reason for rejecting a defense of economic coercion in domestic cases has been the availability to coerced parties of adequate legal remedies. A party coerced or threatened by an American entity can sue for injunctive relief to prevent economic retaliation. It can also notify both the Justice Department and the Federal Trade Commission, either of which might prosecute the coercers for boycott activities. Finally, once the threatened party has suffered economic retaliation, it can sue for treble damages under the Clayton Act. In contrast, a defendant subject to economic coercion by foreign entities beyond the reach of United States antitrust laws has no such remedies available. Furthermore, in some cases the losses with which a defendant is threatened may be particularly severe. If such losses are tantamount to expropriation, the defense of sovereign compulsion may in fact be appropriate. Therefore, rather than adopt an inflexible rule, courts should follow a case-by-case approach in order to give adequate consideration to both the particular hardships to which some defendants may be subject and the necessity for strict enforcement of the antitrust laws.

Although use of such a balancing approach in the Arab boycott context may shield some American defendants, the general rule should remain that the defense of economic coercion is inapposite to antitrust violations. Violations of the antitrust laws by American firms should be excused only in the exceptional case. Thus, one factor that courts should consider is the impact that the threatened economic reprisals would have had upon the defendant firms. The defense would only be appropriate for companies that would be grievously damaged as a result of noncompliance with the boycott. Another factor that courts should assess is the history of a firm's com-

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126. See United States v. Standard Oil Co. (New Jersey), 1960 Trade Cas., 77,335, 77,340 (S.D.N.Y. 1960) (decree enjoining oil companies from combining in restraint of trade contained an exception to "no combination" requirement where company was forced to comply with a foreign sovereign's request to violate antitrust laws or risk "the present or future loss of the particular business in such foreign nation . . . "); United States v. Gulf Oil Corp., 1960 Trade Cas. 77,344, 77,349 (S.D.N.Y. 1960). The business loss exception recognized for oil companies is not typical of exceptions contained in injunctions affecting less vulnerable industries which generally apply only where the company is required by foreign law to violate the terms of the injunction. See, e.g., United States v. American Smelting & Ref. Co., 1957 Trade Cas. 73,402 (S.D.N.Y. 1957).
mercial involvement in the Arab world. The defense would only be appropriate for companies whose participation in Arab economic affairs antedates the recent intensification of boycott pressures. It would certainly be an inappropriate defense for a firm that has never done business with Arab nations but that now seeks Arab petrodollars and is willing to participate in the boycott in order to obtain them.127

A final factor that courts should consider is the nature of the conduct that American firms perpetrate in compliance with Arab pressures. Courts should be extremely reluctant to apply the defense when the defendant's conduct is directed against other American companies. For example, an American contractor that discriminates among subcontractors on the basis of their compliance with the boycott should only be allowed to invoke the defense when the other factors weigh heavily in his favor. Moreover, the defense should never be permitted when an American firm is pressured to engage in activities that transgress fundamental American political and social values. For example, a defendant should not be permitted to invoke the defense when it has pressured another American company into dismissing Jewish executives or ending "Zionist" political affiliations. Such activities intrude too substantially into American domestic affairs to be tolerated under any circumstances.

III. PROPOSALS FOR LEGISLATIVE CHANGE

This Note has attempted to demonstrate that current American law can be used to combat the Arab boycott. However, despite the fact that the existing law seems sufficient to deal with the boycott, new congressional action is warranted to clarify ambiguous principles that might engender judicial confusion in this relatively untested area of antitrust litigation. One bill recently introduced in Congress, H.R. 5246,128 would, if enacted, impose criminal and civil penalties upon companies that employ economic means to coerce other firms to discriminate against Americans because of religion, race, national origin, or lawful support for or trade with another country.129 In addition, the bill proposes sanctions against any individual or business entity that, in response to coercion or in order to avoid economic reprisals, cooperates with or participates in an illegal boycott, even if "the coercion is exerted by a foreign government or by a business

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127. This should hold true as well for companies with long-established business ties in the Arab world that seek to expand their economic relations by terminating dealing with Israel.
129. H.R. 5246, 94th Cong., 1st Sess. § 246(c) (1975), provides: "Whoever willfully violates subsection (a) shall be fined not to exceed $100,000, or imprisoned not to exceed three years, or both if an individual, or fined not to exceed $1,000,000 if any person other than an individual."
enterprise not subject to the jurisdiction of the United States."

Commendably, the bill would prohibit the use of coercion by one American company against another. It also would clearly provide that boycott activities can be illegal even if not motivated by a competitive purpose, that extraterritorial boycott behavior can be reached by the antitrust laws, that the sovereign compulsion defense does not bar actions against American businesses complying with the boycott, and that foreign corporations, such as the Kuwait International Investment Company, cannot invoke the doctrine of sovereign immunity. Thus, if enacted, H.R. 5246 would ensure application of the antitrust laws to all American and some foreign participants in the Arab boycott.

Although the bill would be an effective means of curtailing the influence of the Arab boycott on American economic affairs, it is submitted that one modification may be warranted. The present bill would prevent courts from recognizing the defense of sovereign compulsion for American defendants. As indicated previously, courts should be permitted to recognize the defense in those extraordinary cases in which the defendant is threatened with grievous financial loss and the impact of the defendant's conduct on the American economy is minimal.

In addition to enacting legislation to clarify extant antitrust laws, Congress must also consider enacting legislation to prohibit American companies from furnishing any trade information in response to questionnaires distributed by the Arab League Boycott Office. Proscription of compliance with Arab information demands would substantially impair the effectiveness of the boycott machinery and would help avert the insidious intrusion of Arab economic power into American business practices. If such a law were enacted, no firms could legally respond to Arab questionnaires and silence therefore could no longer be construed as a "pro-Zionist" stance triggering economic reprisals. If the Arabs are denied the information necessary to compile a blacklist, American firms might be encouraged to exercise their freedom of choice in international commercial affairs.

Whatever course is chosen, the American legal system must respond to the pressures and dangers of the Arab boycott. Such an intrusion into American economic life and society is intolerable. The courts are fully equipped under existing law to take strong ac-

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131. H.R. 5246, 94th Cong., 1st Sess. § 246(h)(2)(A) (1975), expressly defines "business enterprise" as any person "whose purposes, functions, and activities taken as a whole, customarily are attributable to and carried on by private enterprise for profit in this country, even if such person is wholly owned by a government and no part of its net earnings inures to the benefit of any private shareholder or individuals . . . ."
132. See text at notes 123-27 supra.
133. See note 4 supra.
tion against the boycott. Even so, congressional action is desirable since legislation could clarify ambiguous legal concepts that, if misinterpreted, might impair the ability of courts to deal effectively with the Arab boycott. Moreover, congressional action would symbolize a national determination to fight back against international economic coercion.