

knowingly complying with secondary boycotts against friendly countries. With a candid recognition that such legislation imposes costs on U.S. business, Congress should sensitively draft it to avoid overly broad risks of criminalization or unworkability in practice. Such legislation should also clearly preempt state and local antiboycott laws so as to avoid multiple state and local standards with their combined distortion of trade and business between states and additional risk of business criminalization. Most importantly, it should be clearly recognized that legislation alone will not end the secondary boycott and that the first line of effective defense must be diplomacy with each Arab Government involved.

The United States could, of course, permit compliance with the secondary boycott while making hortatory statements against compliance. Some have urged that any other policy could mean the loss of billions of dollars of trade with the Arab nations and thousands of American jobs. To accept, even *de facto*, that secondary boycotts are legitimate, however, would increase the risk of harmful economic pressure against U.S. business interests and undermine the ability of the United States to maintain objectivity and friendly relations with all sides in the Arab-Israeli conflict.¹⁷ In the long run these latter risks seem the greater.

FOREIGN AFFAIRS AND THE SEVERAL STATES: OUTLINE OF A THEORY FOR DECISION

*By W. Michael Reisman**

I would like to sketch, with what must be savage brevity, a theory accommodating needs for both centralization and dispersal of power-sharing in foreign affairs matters. I do not suggest that this is a theory consistently reflected in decision trends, but that it is one which might meet the complex objectives of the Republic.

¹⁷ This paper has not sought to examine the lawfulness of the Arab boycott under international law. For a general introduction to the debate, see J. Paust & A. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410 (1974), reprinted in MOORE (ed) *supra* note 1, at 391, and I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AJIL 591 (1974), reprinted in MOORE, (ed) *supra* note 1, at 421. See also the useful Symposium in 12 TEXAS INT'L L.J. 1-74 (1977). In addition to this general debate it is also useful in appraising the lawfulness of the boycott to consider the question of whether Arab League collective action encouraging the boycott is permissible under Article 53 of the UN Charter or whether it amounts to "enforcement action" that is impermissible unless taken with Security Council authorization. For some of the precedents, see J. N. MOORE, *LAW AND THE INDO-CHINA WAR* 296-349 (1972).

With respect to possible U.S. legal obligations in responding to the boycott, Israel has raised the question of whether U.S. acquiescence in the boycott would violate the U.S.-Israel Treaty of Friendship, Commerce and Navigation. See the Statement of Ze'ev Sher, *supra* note 3, at 3-4.

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Sharing in Context

Insofar as power-sharing in general, and in foreign affairs in particular, continues to be a basic value of the Republic, it would be a mistake to insist upon an absolute prohibition of state legislation in the domain of foreign affairs or international matters. Given the interpenetration of international and national systems, effective prohibition could paralyze state and local decisions.¹

The primary competence of the federal government in matters of foreign affairs should be recognized, but a coordinate—or, to paraphrase the UN Uniting for Peace Resolution,² “secondary”—competence should be recognized in the states. The arbiter in cases of conflicts should continue to be the courts. The courts’ judgment in cases of challenge to state initiatives should not be an automatic rejection of the initiative, but rather an independent consideration of the degree of preemption, in one form or another, by the federal government, the importance to the conduct of foreign relations *in that particular context* of the preemption, the extent of the policy discrepancy between the federal and state legislative or equivalent authoritative expressions, the extent to which one or the other is more consonant with the pertinent international norms in the case, and the nature and severity of the consequences of permitting the discrepancy to continue.

That the federal government, through treaty, executive agreement, or executive *ipse dixit*,³ has (or has not) said something cannot itself be a sufficient indicator of federal preemption or supremacy. The meaning of the communication, bearing in mind that silence is a communication, must be examined in context to discover what behavior is sought from the target, what implicit rewards or penalties are being implied, what contingencies for their application are being planned, and so on. Then the impact of the state’s legislation on the national program must be assessed for its degree of consonance or dissonance with the federal policy. The comparative consonance of the federal and state legislation with the appropriate international norms must also be assessed, for national judges may no more evade international law with claims of “superior orders” than may national officers. Finally, as with executive interventions in act-of-state cases, the degree of urgency of the entire matter for the Republic must be gauged. All of these considerations must be appreciated in context. The context itself is exceedingly complex.

¹ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 244 (1972).

² GA Res. 337A (V), 5 GAOR, Supp. (No. 20) 10, UN Doc. A/1775 (1950).

³ The *Nuclear Test* cases, [1974] ICJ REP. 253, which makes unilateral statements of political leaders potentially binding on their nations, has certain implications within the United States constitutional system. By characterizing executive statements as effective international commitments, the decisions in these cases raise questions about the appropriate degree of sharing of competence with regard to them between Congress and the executive. See also Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AJIL 1 (1977).

International patterns of communication are very intricate and the audiences diverse; the messages are often crafted to convey certain ambiguities, carry multiple and contingent meanings, and may be delivered through many channels. There are many possibilities for distortion and misunderstanding.

Four key principles should guide specific decisions. First, matters of central importance to the Republic, as an inclusive entity, should be in the primary competence of the federal government. As a corollary, matters which are not should be left to state and municipal legislation. Second, matters impacting on other nations are not *per se* of inclusive interest. All foreign affairs matters are not, by their nature, matters of urgency, matters requiring secrecy, or matters demanding a special expertise cultivated only by the federal government. Third, that the federal government has indicated a national policy in a certain area does not *eo ipso* exclude all state action if, to paraphrase the Supreme Court's holding in *Hines v. Davidowitz*,⁴ the projected state action does not in that or in other projected contexts unduly impede the realization of that policy. Fourth, single states should not be permitted a veto power over international matters of inclusive interest to the Republic.

The same state legislation might be deemed to be preempted at one moment, or for one purpose, but not at or for another: *cessat ratio, cessat lex*. Because of these special considerations, it may be more appropriate for courts to develop a spectrum of possible responses in competence conflicts rather than merely upholding or denying the constitutionality of particular state laws impacting on the foreign affairs area. For example, courts might consider enjoining application suspending the force of a particular state law for a specific period of time or suspending the proceedings pending a clarification of the political situation.

This theory might be illuminated in what must here be only the most suggestive form by looking first at state antiboycott legislation as it currently pertains to the Arab boycott and, then, briefly at state anti-discrimination legislation as it pertains to South African apartheid.

The States and the Arab Boycott

Most instruments of strategy in international law are not deemed to be lawful or unlawful by their nature. Lawfulness is determined by contextual analysis: who is using the strategy, for what purpose and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensurance to the precipitating event, with what degree of discrimination in targetting, and with what effects as a sanction and what peripheral effects on general political and economic processes.⁵ Economic instruments such

⁴ 312 U.S. 52, 67 (1941).

⁵ For some preliminary criteria for assessing lawfulness, see W. M. REISMAN, NULLITY AND REVISION 836-58 (1971); for detailed criteria for assessing the lawfulness in context of the use of the military instrument, see M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961).

as boycotts have been widely used. As with other strategies, their lawfulness has varied with the contexts in which they were deployed.⁶ I must respectfully disagree with Mr. Maw's conclusion that primary boycotts are per se lawful and with Professor Moore's conclusion that secondary and tertiary boycotts are necessarily unlawful.

In 1945, the Arab League⁷ began to develop a boycott of "the products of Jewish industry in Palestine."⁸ In 1951, the League established a Central Boycott Office in Damascus with branches in other Arab capitals and key trading cities.⁹ Since 1954, all 20 members of the Arab League have adopted as their municipal law a "Unified Law on the Boycott of Israel,"¹⁰ which is administered by the state and regional boycott offices.

The objectives of the boycott may be described as both offensive—seeking to weaken Israel through the economic instrument—and defensive—seeking to prevent Israeli infiltration into Arab countries under the guise of and through economic activities. Four techniques are employed to realize these purposes, two primary and two secondary:

(1) Persons within Arab countries may not conclude agreements or transactions with entities or persons in Israel, of Israeli nationality, or working for Israel.

(2) Goods may not be imported if made in Israel or containing Israeli components or materials. Some claim, and there is some substantiation, that "Israeli" has at times been a code word for Zionists or Jews and non-Jews who support Israel and that at times it has been a code word for Jews.¹¹

(3) "Foreign"—that is, non-Israeli—entities with offices in Israel are assimilated to the category of persons or entities affiliated with Israel and are subject to the trade prohibition.

(4) Trading with those who fall into the prohibited categories is itself prohibited.

Reliable data on the impact of the boycott on the Israeli economy in general or for particular sectors is hard to obtain.¹² It is clear, however, that the boycott has become increasingly troublesome and in some cases is of economic importance to certain American firms trading with Arab states, particularly since 1973. It may also involve deprivations of American Jewish merchants or non-Jewish Americans who exercise their First

⁶ For a general survey and documents, see 3 A. LOWENFELD, *INTERNATIONAL ECONOMIC LAW: TRADE CONTROLS FOR POLITICAL ENDS* (1977).

⁷ See generally H. HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES* (1975); M. KHALIL, *THE ARAB STATES AND THE ARAB LEAGUE* (1962).

⁸ Arab League Council, Resolution No. 16, Dec. 16, 1945 in 3 A. LOWENFELD, *supra* note 6, at 99.

⁹ Arab League Council Resolution No. 357, May 19, 1951.

¹⁰ For the Egyptian version, see Law No. 506, October 19, 1955, *JOURNAL OFFICIAL* No. 812, reprinted in 3 A. LOWENFELD, *supra* note 6, at 462.

¹¹ On the much publicized attempt of Arab banking and investment firms to exclude Jewish firms, see *NY Times*, March 4, 1975, at 43 col. 3. See generally, COTLER *et al*, *THE ARAB BOYCOTT IN CANADA: REPORT OF THE COMMISSION ON ECONOMIC COERCION AND DISCRIMINATION* 20 *et seq.* (1977).

¹² See, e.g., Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 *TEXAS L.R.* 1355, 1374. (1976).

Amendment rights in ways unacceptable to officials of the Arab Boycott Office. Discrimination against one group of merchants means discrimination in favor of others. U.S. traders whose ox is not being gored dismiss the boycott as a troubling trifle, or a transient problem which will only be exacerbated by official U.S. responses.

The lawfulness of the Arab boycott turns on the assessment of equities of the Middle Eastern conflict and the viability, international lawfulness, and *bona fides* of alternate solutions. Since assessment of direct and peripheral effects is an important aspect of determining lawfulness, the difficulty of making the determination is further compounded by the lack of reliable data.

The question of lawfulness has engaged our national decisionmakers because the secondary and tertiary dimensions of the Arab boycott have the effect of recruiting U.S. firms and forcing them to discriminate against other American nationals on grounds that our political system militantly prohibits. The federal government's response, accommodating many diverse and legitimate interests within the nation, has been conditioned by several conflicting considerations. One has been to protect our values and hence limit the corrosive effects of these aspects of the boycott on U.S. nationals. Another has been simultaneously to support a core Israeli position and, at the same time, to maintain our relatively amicable relations with those Arab states which are centrally involved in designing and implementing the boycott. These states are important to our global security planning. Our potential mediating role in the Middle East might be impeded or frustrated were we to alienate them. They may, moreover, be important as regional influences for moderation. In addition, their continuing purchases from us are quite significant for our trade and payments balances.

Because of these complex and conflicting objectives, the federal response has been low keyed, targeted at U.S. firms, for the most part implemented in complex bureaucratic processes, and reliant upon many channels in addition to the legislative. In many cases, the legislation has been "simulated," with ritual affirmation of policy but no effective means of implementation. The most severe sanctions appear to be denials of tax benefits.¹³ The executive's objective appears to be to accept as a matter within the national competence of the Arab states the primary boycott, but to reduce the effects of the secondary and tertiary boycott on U.S. nationals without alienating those Arab Governments deemed critical to other U.S. foreign policy objectives.¹⁴ In general the federal government's enthusiasm for antiboycott legislation is well under control.

¹³ Tax Reform Act of 1976, P.L. 94-455, Part VI: Denial of Certain Tax Benefits for Cooperation with or Participation in International Boycotts and in Connection with the Payment of Certain Bribes. After this paper was delivered, Congress passed and the President signed the Export Administration Amendment Act of 1977, which includes in Section 205 an express preemption clause.

¹⁴ The complex of legislation is presented in documentary form with some evaluation of effectiveness in LOWENFELD, *supra* note 6. See also Steiner, *supra* note 12, for a similar review, without documents but with assessments of political influences.

Within the United States, there are a number of examples of express state antiboycott statutes; in addition, many state antitrust laws could presumably be pressed into service against state citizens or others subject to local jurisdiction who complied with the boycott and the new Sovereign Immunity Act might even allow action against Arab state agencies.¹⁵ In deference to the *lex loci*, however, we might look at California's Berman Act,¹⁶ which came into force on January 1, 1977, adding two key provisions to the California Antitrust Statute.¹⁷ Section 1 of the Berman Act provides that no person within the state's jurisdiction shall be excluded or shall exclude another from a business transaction on the basis of a written policy imposed by a third person on the basis of, among other characteristics, a person's religion, ancestry, national origin, or because of business conducted in a particular location. Section 2 characterizes as unlawful trusts and restraints on trade contracts which include certifications that the contractor has not done any of the things set out in Section 1. Violations are subject to the sanctions of the state's antitrust act: voiding of the contract, treble damages liability to the injured party, forfeiture of the right to do business in the state, fines up to \$1 million, and imprisonment up to three years.

State antiboycott legislation, such as California's Berman Act, does not violate the manifest policies of the federal legislation. But in comparison with the federal law, the state acts are "loaded for bear." The choice of sanctions is different and potentially more severe, and the selection of targets and contingencies for the application of the sanctions is dispersed much more broadly in both the public and private sectors. In domestic federal-state cases, it has been held that the mere intensification of sanctions in a state statute otherwise similar to its federal counterpart does not violate the supremacy clause.¹⁸ This, however, appears to be an overly simple and wholly inappropriate doctrine for the federal-state problem in international matters. In many circumstances, legislation and a moderate sanction may be part of a larger ensemble of communications designed to influence a foreign government. A discordant note can be disruptive or even destructive of the effort.

In the time allotted to me today, I cannot subject the tension between the federal and state legislation with regard to the Arab boycott to the examination which I have suggested. A number of summary points, however, may be made. The Middle East is of key security and economic concern to the Republic as a whole, a point which is important in the allocation of competence in this area, but not dispositive. Without regard to the lawfulness of the Arab boycott itself, there is no question of the lawfulness of the federal response. Hence, we are not in that special situation in which state legislation would comply with the appropriate international norms while federal legislation would not. Nor are we in the

¹⁵ 28 USC §1605.

¹⁶ California Business and Professional Code §16721.

¹⁷ *Id.* §16700 *et. seq.*

¹⁸ *California v. Zook*, 336 U.S. 725 (1949). *But see*, *Jones v. Rath*, 97 S. Ct. 1305 (1977).

situation in which the states' interests in protecting their citizens are unreasonable or undue. Some of the groups behind the state legislation may be trying to force foreign policy in directions in which the federal government would not otherwise wish to go, but mixture of motives is a feature of all coalition politics and cannot, of itself, be permitted to invalidate the effort.

This is, however, a controversy in which policies of the states and the federal government are parallel, but have different sanction designs and enforcement programs. The discrepancy can impede the effectuation of national foreign policy. My own thinking is that federal explorations of possible political solutions in the Middle East are sufficiently delicate and complex to warrant a court's holding that state antiboycott legislation is, in the current context, improper.

States and Apartheid

Other problems in different contexts may suggest substantially different judicial responses. The Human Rights Commission of the City of New York enjoined the *New York Times* from publishing advertisements for South African firms seeking to recruit employees from the readership of the *Times*.¹⁹ Briefly, the grounds for the injunction were that, given South African Apartheid laws, the advertisements carried an implicit message that blacks need not apply. Hence publication of such ads in the United States permitted introjection of this Southern African virus into our body politic. The Commission's order was set aside in two instances of appeal and was ultimately rejected by the Court of Appeals,²⁰ the highest state court.

The decision has an extraordinary number of errors of international law and is particularly baffling in that it relies on an act of state doctrine and certain earlier decisions which have now been reversed and, moreover, do not apply to the facts of the case. I intend to concentrate today only on the most egregious errors in the court's consideration of the allocation of foreign affairs competence between the federal government and the states.

The court characterized the initial complaints against the *New York Times* as efforts to impose an economic boycott on the Government of South Africa.²¹ The Court proceeded to prohibit this action on grounds hardly less sweeping than those developed in the *Bethlehem Steel* case.

. . . a city agency was without jurisdiction to make and enforce its own foreign policy. The Government of the Republic of South Africa is, at the present, the legitimately constituted governmental authority for that country and has been recognized as such by our government. Although we believe, as a matter of principle, that the governments

¹⁹ American Committee on Africa et al v. New York Times, Decision of City of New York Commission on Human Rights, July 19, 1974, 13 ILM 962 (1974).

²⁰ Times Co. v. City of New York, 41 NY 2d 345 (1977).

²¹ *Id.* at 351-52.

of all nations should act in accord with natural justice, fairness and equity, it is beyond the province of the State courts, much less municipal agencies, to sit in review of the law of foreign governments . . .²²

The reasoning of the decision is as unfortunate as its result. The actions of South Africa, whose manifest illegality the court minimized by characterizing them as generally not in accord with “natural justice, fairness and equity,” have been authoritatively held by the International Court,²³ UN agencies, and the majority of scholars as fundamental violations of international law. One would have thought that no court in the world, excepting those in South Africa, would have had the temerity to ignore that condemnation. To fall back on discredited doctrines of act of state was a violation of unambiguous international law, of the efficacy of an international legal system, and, moreover, of recent Supreme Court decisions.²⁴

The New York Commission was interfering with no federal policy. Two judges writing in dissent observed that:

No “treaty or other unambiguous agreement regarding controlling legal principles” . . . has been cited to act as a basis for exception here. There being no present policy of the executive branch of the United States Government . . . requiring acquiescence in the United States in the discrimination practiced by the South African government, the well established policy of New York State against such acquiescence is operative . . .²⁵

Even supposing that there was a discrepant federal policy—let us assume the infamous “Tar Baby Memorandum”²⁶ was still effective—are we to understand that it is proper for national courts to join in the violation of fundamentally guaranteed international human rights? A state’s foray into international relations, or, as in this case, a state’s response to a foreign government’s foray into its own territory, is not per se a veto or a hindrance of national policy. Characterizing the consequences of the action of the New York Human Rights Commission, in the case under review, as “dire, for all the states”²⁷ is so ridiculous that respect for the judiciary inhibits further comment on it.

Under the theory and related tests that I am proposing, the court would have examined federal policy vis-à-vis South Africa, the network of federal legislation and the role it played in the aggregate of communications our government was beaming at Pretoria, the consonance or dissonance of New York’s acts, the comparative consonance or dissonance of

²² *Id.* at 352.

²³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). [1971] ICJ REP. 16.

²⁴ See *Dunhill v. Republic of Cuba*, 425 U.S. 682 (1976).

²⁵ 41 NY 2d 345, 361.

²⁶ LAKE, THE “TAR BABY” OPTION: AMERICA POLICY TOWARD SOUTHERN RHODESIA (1976).

²⁷ 41 NY 2d 345, 352.

both legislations with the relative norms of international law, and the extent to which New York's legislation and application contributed to or detracted from the national policy. I am inclined to think that this legislation by New York should have been upheld in the context of this case.

I submit that the application of the sorts of considerations which I have briefly proposed today would meet the simultaneous demands of a federal democracy and a national community seeking effectiveness in vital matters of foreign affairs. In the past several decades, the truism has been that the survival of the Republic requires a concentration of power in "external" or foreign affairs matters. Let us not forget that survival also requires an internal sharing of power. Our national experiment can fail on either of these grounds.

OVERVIEW OF THE BECHTEL LITIGATION

*By Richard J. Archer**

The Bechtel Company is an engineering contractor with its headquarters in the United States. The federal government alleged¹ that Bechtel and some of its affiliates violated antitrust laws by agreeing with others, presumably their Arab clients, not to deal with blacklisted subcontractors or with U.S. subcontractors who dealt with blacklisted companies. Since this was an antitrust case, it was essential to show some kind of agreement. If a firm decides on its own that it will deal with only South Africa, for example, or only Arab states, or only Israel, or only companies which refuse to deal with Russia, that is its own business. The agreement in Bechtel was the prime contract between Bechtel and its Arab clients. The government position did not involve the legal status of actions by Arab states or individual Arab clients, but rather Bechtel's refusal to do business with other U.S. companies.

An antitrust lawyer would say that boycotts are illegal *per se*. But does the antitrust law which applies among U.S. competitors apply equally when foreign commerce is involved? It is clearly illegal for a group of exporters collectively to refuse to handle the goods of a domestic manufacturer. American antitrust laws are concerned with restraints on the access of domestic competitors to foreign markets, but not whether Arab clients benefit from bidding competition.

In cases involving foreign commerce and activities in foreign countries, certain special defenses arise. One used by Bechtel is that the Sherman Act applies only to purely economic matters. Despite cases on point, we might question whether this defense applies to the Arab boycott, which obviously has a commercial purpose. The second defense involves extra-territoriality. Can the antitrust laws of the United States be applied to

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¹ *United States v. Bechtel Corporation*, Civ. No. C-76-99 (GBH) (N.D. Cal., filed Jan. 10, 1977).