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United States v. Bechtel Corporation: Antitrust and the Arab Blacklist

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UNITED STATES V. BECHTEL CORPORATION: ANTITRUST AND THE ARAB BLACKLIST

In January 1977, the Antitrust Division of the Justice Department and the Bechtel Corporation entered a proposed final settlement of the antitrust suit[1] filed by the United States one year earlier. The complaint had charged that Bechtel, one of the world's largest construction firms, and four of its affiliates, had implemented the Arab League boycott of Israel and of "pro-Israeli" domestic firms.[2] This settlement of the Antitrust Division's first attack on the thirty-year-old Arab boycott has resulted in a consent accord which outlines a permissible course of conduct for United States firms seeking trade with the Arab world, but leaves unanswered a broad range of antitrust issues sure to be raised in subsequent private suits.[3] This note will examine and attempt to resolve several of the issues raised in the *Bechtel* suit, and in addition, will examine the course of conduct licensed by the consent accord.

I. BACKGROUND—THE BOYCOTT

The Arab boycott was initiated in 1946, when several Arab League[4] countries organized a boycott of products manufactured by "Zionist" entities. The boycott was broadened in 1951 and 1952 to include those persons and firms conducting commercial relations with Israel or otherwise supporting Israel's economic development.[5] To coordinate the boycott, the Arab League countries established a Central Boycott Office in Damascus, Syria.[6] The Arab

1. United States v. Bechtel Corp., No. C-76-99 (N.D. Cal., filed Jan. 16, 1976), 747 ANTITRUST & TRADE REG. REP. (BNA) A-8 (Jan. 20, 1976), *consent decree proposed,* 796 ANTITRUST & TRADE REG. REP. (BNA) E-1 (Jan. 10, 1977).

2. Complaint, United States v. Bechtel Corp., No. C-76-99, [hereinafter cited as Complaint] *reprinted in* 747 ANTITRUST & TRADE REG. REP. (BNA) D-1 (Jan. 20, 1976).

3. *See* Freedman Seating Co. v. General Motors, Corp., No. 76-C-197 (N.D. Ill., filed Jan. 19, 1976).

4. The Arab League nations are: Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, People's Republic of Yemen, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates (including Abu Dhabi and Dubai) and Yemen Arab Republic. *See* Complaint, *supra* note 2, para. 3.

5. Complaint, *supra* note 2, para. 14.

6. *Hearings on Discriminatory Arab Pressure on U.S. Business Before the*

League Council, a management committee of representatives from the twenty member nations, sets boycott policy for the confederated organization through legislative resolutions, suggests implementing interpretations, and polices the boycott through a commercial espionage network geared to investigate suspected violations.[7] These collective actions, although influential, do not carry the force of law within the member countries. Consequently, the boycott remains only loosely centralized, with each country defining and enforcing the boycott through its own governmental structure.[8]

The primary target of the boycott is, of course, Israel. The boycott has assumed larger proportions by adding secondary and even tertiary targets, namely, all individuals and firms regarded by the Arab League as "operating in support of Israel."[9] The notable feature of this secondary boycott is the notorious "blacklist" which catalogues all such "pro-Israeli" entities. The objective is to bar all trading between League countries or their nationals and foreign firms that maintain proscribed types of commercial relations with Israel. In furtherance of this objective, the League's member governments require foreign firms trading with Arab clients to complete detailed questionnaires and to certify that their conduct is consistent with the boycott.[10] Generally, boycott policy prohibits establishment of a commercial installation in Israel, significant investment in Israeli firms, and service as an agent of Israeli business.[11] Most significantly, it seeks to exclude foreign-manufactured products that include components produced by blacklisted firms. Thus, an American firm with no Israeli ties may be barred from exporting its products to the Arab world if such products incorpo-

Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 1st Sess. 14 (1975) [hereinafter cited as *Bingham Hearings*].

7. *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess., 442-44 (1975) [hereinafter cited as *Church Hearings*]. *See generally Hearings on S. 425, Amendment No. 24 Thereto S. 953, S. 995, & S. 1303 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Stevenson Hearings*].

8. *Church Hearings, supra* note 7, at 213; Stern, *On and Off the Arabs' List*, NEW REPUBLIC, Mar. 27, 1976, at 9.

9. *Church Hearings, supra* note 7, at 449.

10. *See id.* at 372, 449-69; Schwartz, *The Arab Boycott and American Responses: Antitrust Law or Executive Discretion*, 54 TEX. L. REV. 1260, 1263-64 (1976).

11. *Church Hearings, supra* note 7, at 442-76.

rate components produced, for example, by a firm with an office in Israel.[12] Various renderings of the blacklist fix the American segment at anywhere from 1,500 to 1,800 firms,[13] including goliaths such as General Motors, National Broadcasting Company, Burlington Industries, Republic Steel, Pratt & Whitney Corporation, and Xerox.[14]

Interpretations of boycott principles reportedly vary from one Arab country to another, and enforcement is often spotty.[15] That American business, loath to overlook the potential of the Mid-East market, has heeded the principles of the once largely symbolic boycott is, however, beyond dispute. Whether the blacklist is "an attempt to undermine Israel" or "an attempt to inject antisemitism into Western business,"[16] the Israelis at least claim that the boycott is responsible for changing investment patterns in that country.[17]

II. United States Policy

Until late 1975, the de facto policy of the United States toward the Boycott could be characterized as one of condonation, in seeming disregard of the Export Administration Act of 1969,[18] which declared a congressional purpose

> to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, [and] to encourage and request domestic concerns engaged in the export of articles, materials, supplies or information, to refuse

12. *Id.* at 449-53.

13. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict,* 54 Tex. L. Rev. 1355, 1363 (1976). *Compare Church Hearings, supra* note 7, at 195 *with Stevenson Hearings, supra* note 7, at 178.

14. Schwartz, *supra* note 10, at 1264-65.

15. *See* Guzzardi, *That Curious Barrier on the Arab Frontiers,* Fortune, July 1975, at 82, 168. *See also* Letter from Roderick Hills, Securities and Exchange Commission Chairman, to Representative Benjamin Rosenthal (June 1, 1976), *reprinted in Hearings on Effectiveness of Federal Agencies' Enforcement of Laws and Policies Against Compliance, by Banks and Other U.S. Firms, With the Arab Boycott, Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Governmental Operations,* 94th Cong., 2d Sess. 44-50 (1976) [hereinafter cited as *Rosenthal Hearings*].

16. *See* Wall St. J., Feb. 14, 1975, at 8, col. 1, *quoted in Stevenson Hearings, supra* note 7, at 178.

17. Wall St. J., March 25, 1975, at 20, col. 2.

18. 50 U.S.C. App. § 2402(5) (1970 & Supp. V 1975) (expired Sept. 1976).

> to take any action, including the furnishing of information and the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts. . . .[19]

The statute, however, merely encouraged noncompliance with the boycott. In implementing the Act, the Commerce Department required only that domestic firms report any compliance requests; the forms drafted for this purpose explained that compliance was not illegal.[20] In fact, whatever subtle discouragement of compliance was effected through these reports was largely offset by the Department's continued circulation of trade opportunity notices[21] originating in compliance-demanding Arab countries. A dramatic example of the Administration's efforts to shield complying firms was provided by Commerce Secretary Rogers C.B. Morton's appearance before the Moss Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.[22] Secretary Morton refused to disclose the names of reporting firms on the ground that to do so "might expose [boycotting firms] to economic pressures and counter boycotts by certain domestic groups."[23] Threatened with a contempt citation, Morton relented, exacting in return a Subcommittee pledge of strict confidentiality.

The Administration executed a sharp policy change in November 1975, when President Gerald R. Ford ordered the Commerce Secretary to "prohibit U.S. exporters and related service organizations from answering or complying in any way with boycott requests that would cause discrimination against U.S. citizens or firms on the basis of race, color, religion, sex, or national origin."[24] In exercising his discretionary powers under the Export Administration Act, the President pledged to give "bigotry no sanction,"[25] but studiously avoided mention of the Arab League, or of any particular boycott, focusing instead on "foreign boycott prac-

19. *Id.*

20. U.S. Dep't of Commerce Form DIB-621. *See* Schwartz, *supra* note 10, at 1270 & n.58.

21. *Id.* at 1270.

22. *See Hearings on Contempt Proceedings Against Secretary of Commerce, Rogers C.B. Morton, Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *Moss Hearings*].

23. N.Y. Times, Aug. 28, 1975, at 4, col. 5.

24. Statement by President Ford, 11 WEEKLY COMP. OF PRES. DOC. 1305, 1306 (Nov. 20, 1975).

25. *Id.* at 1305.

tices."[26] However, the Ford Administration continued to oppose the antiboycott legislation proposed by the opposition party.

III. UNITED STATES v. BECHTEL CORPORATION

The Justice Department filed a civil antitrust suit[27] against the Bechtel Corporation and four of its affiliates on January 16, 1976. The complaint charged the San Francisco-based heavy-construction concern with boycott compliance, which allegedly effected concerted refusal to deal with blacklisted companies in connection with Arab projects.[28] The complaint also charged that Bechtel demanded similar compliance from its subcontractors.[29] The government claimed that the actions of Bechtel resulted in suppression of United States competition in export trade, denied United States firms freedom of choice in selecting subcontractors, and constituted a violation of section 1 of the Sherman Act.[30] The complaint sought to enjoin defendants from implementing the alleged concerted refusal to deal.

Bechtel answered[31] with some dozen defenses, the most notable of which were as follows:

(1) no Sherman Act "combination or agreement" can be found where the alleged collaboration was with "immune" foreign governments;
(2) both Bechtel and its Arab customers have the right to "select" those with whom they will deal, and all such selections were unilaterally made;
(3) Sherman Act proscriptions extend only to commercially-motivated boycotts, and not to those political or religious in nature; and
(4) Bechtel was merely complying with the commercial laws of a foreign sovereign and was thus immune.

However, the United States District Court for the Northern District of California apparently will not try the issues raised by the *Bechtel* parties in view of the fact that a consent accord[32] was

26. *Id.*
27. United States v. Bechtel Corp., No. C-76-99.
28. Complaint, *supra* note 2, para. 21.
29. *Id.*
30. *Id.* paras. 20, 23.
31. Defendant's Answer, United States v. Bechtel Corp., No. C-76-99 [hereinafter cited as Answer], *reprinted in* 762 ANTITRUST & TRADE REG. REP. (BNA) F-1 (May 4, 1976).
32. 796 ANTITRUST & TRADE REG. REP. (BNA) E-1 (N.D. Cal. Jan. 10, 1977) [hereinafter cited as Proposed Final Judgment].

proposed on January 10, 1977. The accord recognizes the right of Arab nations to decide from what sources they will buy while imposing some restrictions on the extent to which Bechtel may facilitate these choices. The lengthy document details the ground rules for United States-Arab trade and thereby embodies the first official statement of antitrust policy on the subject. The accord restrains Bechtel from "implementing" the boycott within the United States,[33] but substantially qualifies this prohibition with a series of provisions and interpretations.[34] The consent accord, even when finalized,[35] does not extinguish the legal issues surrounding the Arab Boycott, and is in fact inadmissible in a subsequent suit against Bechtel or any other defendant.[36] At least one private suit arising out of the boycott has already been filed,[37] and others can be expected. These actions will undoubtedly revive some of the same antitrust issues raised by the aborted *Bechtel* suit. These issues are best examined by focusing on the *Bechtel* facts.

IV. THE ARAB BOYCOTT AS A CONCERTED REFUSAL TO DEAL

In order to establish that boycott actions constitute a violation of section 1 of the Sherman Act, complainant must prove that defendant's actions constituted a group boycott, that is, a "combination or conspiracy" in unreasonable restraint of interstate or foreign commerce.[38] The conventional rule is that proof of a concerted refusal to deal establishes a per se violation of the Sherman Act.[39] Under the *Bechtel* facts, the complainant will have substantiated the allegations of a refusal to deal simply by showing that the defendants, in connection with Arab construction projects, have refused to accept or consider the bids of otherwise qualified subcontractors who are themselves blacklisted or who trade with blacklisted firms.[40] Proof of such conduct, however, does not

33. *Id.* § IV(A).
34. *Id.* § V.
35. *See* 15 U.S.C. § 16(b)-(h) (1976).
36. *Id.* § 16(h). *See* Kestenbaum, ANTIBOYCOTT BULL. at 23 (Feb. 1977).
37. *See* Freedman Seating Co. v. General Motors Corp., No. 76-C-197.
38. Section 1 prohibits "every contract, combination . . . or conspiracy, in restraint of trade . . . ." 15 U.S.C. § 1 (1976).
39. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Northern Pacific Ry. v. United States, 356 U.S. 1 (1958); Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).
40. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

establish a Sherman Act violation since "refusals to sell, without more, do not violate the law."[41] While it is true that concerted refusals to deal fall within the proscriptions of the antitrust laws, a unilateral refusal is merely the exercise of a trader's "independent discretion as to parties with whom he will deal," and constitutes no Sherman Act violation.[42] The Supreme Court's clearest articulation of this principle, grounded in traditional notions of freedom of contract, is in *United States v. Colgate & Co.*[43] In *Colgate,* the Court was faced with a resale price maintenance scheme effected through defendant manufacturer's policy of refusing to sell to price-cutters. The Court found no Sherman Act violation in the absence of any "agreement" to implement the scheme between Colgate and the complying dealers.[44]

Illustrative of trade practices held to constitute a concerted refusal to deal is *Fashion Originators Guild of America v. FTC.*[45] The defendants there argued that the dress-making industry was being undermined by "style pirates," manufacturers who copied original dress designs and sold the copies at reduced prices. In an attempt to curb this practice, original designers formed the Fashion Originators Guild, and agreed to refuse to sell to retailers who also sold garments copied from a Guild member's designs. The Supreme Court, stressing the Guild's elaborate enforcement structure, held that the "style piracy" campaign constituted a concerted refusal to deal and thus was a Sherman Act violation.[46] The combination in the *Fashion Originators* case was express, and the anticompetitive purpose clear. In cases presenting less classic examples of private combinations,[47] courts have also found a concerted refusal to deal, and have even inferred the requisite conspiracy element.[48]

41. Times-Picayune Publ. Co. v. United States, 345 U.S. 594, 625 (1953). *See generally* Barber, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U. PA. L. REV. 847, 861 (1955).

42. United States v. Colgate & Co., 250 U.S. 300, 307 (1919). *See also* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967) (dictum).

43. 250 U.S. 300.

44. *Id.* Note however that the Court has imposed important limitations on the *Colgate* doctrine. Lack of an express exclusionary agreement is no bar to a finding of Sherman Act liability. *See* cases cited note 48 *infra.*

45. 312 U.S. 457.

46. *Id.*

47. The Court detailed defendant's elaborate espionage network and its multi-tiered system of trial and appellate tribunals. *Id.* at 462-65.

48. *See, e.g.,* Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968); Albrecht v. Herald Co., 390 U.S. 145 (1960); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Loraine Journal Co. v. United States, 342 U.S. 143

V. The Conspiracy Element

In a suit against Bechtel or another boycott defendant, the crucial question will be not so much whether there has been a refusal to deal with blacklisted firms, but whether these refusals were part of a combination or conspiracy to exclude such firms. The Antitrust Division apparently designed the *Bechtel* complaint to support three theories of the combination underlying Bechtel's commercial dealings with Arab entities, any one of which a court might adopt in finding a concerted refusal to deal. It is submitted that each of these theories poses significant problems for either the government in an enforcement action or for a private litigant.

A. *Preexisting Arab Conspiracy*

The *Bechtel* complaint alleges that Bechtel "entered into and implemented in the United States a combination and conspiracy which resulted in an unreasonable restraint of . . . commerce."[49] The government evidently had hoped to show that Bechtel joined a preexisting combination between the Arab League nations and Bechtel's clients, Arab business concerns. The immediate difficulty with this theory is that the horizontal segment of the preexisting arrangement is outside the scope of domestic antitrust jurisdiction because of foreign governmental involvement. It has been noted that premising the requisite conspiracy element on an alleged combination between a domestic defendant and an exempt foreign sovereign is a "novel" approach.[50] The novelty of such a combination undermines the suitability of this theory as a framework for establishing the requisite conspiracy.

Apart from this impediment, however, the international conspiracy theory raises an international conflict of laws question since the asserted combination exists, if at all, by virtue of foreign governmental action. The Supreme Court recently stated that the act of state doctrine, in substance a choice of law rule, "precludes the courts of this country from inquiring into the validity of public acts a recognized foreign sovereign committed within its own terri-

(1951); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Eastman Kodak Co. v. Southern Materials Co., 273 U.S. 359 (1927).

49. Complaint, *supra* note 2, para. 20.

50. Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, and* United States v. Bechtel Corporation, 54 Tex. L. Rev. 1411, 1418 (1976). *But see* Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (1976).

tory."[51] If the outcome of the issues in a given case turns upon the act of a foreign sovereign within its own territory, United States courts will not inquire into the legality of that act and will instead recognize its validity regardless of domestic laws.[52]

The act of state doctrine is well-illustrated by *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*[53] The Sheikh of Umm al Qaywayn, one of the Trucial States,[54] granted the plaintiff an exclusive concession to extract and sell oil in the sheikdom. Defendant held a similar concession from the Sheikh of Sharjah, an adjacent sheikdom. Having discovered that an area of plaintiff's concession contained surprisingly rich oil deposits, defendants allegedly induced the Sheikh of Sharjah to assert sovereignty over the oil-laden territory. When the Sheikh of Umm al Qaywayn acceded to the neighboring Sheikh's assertion, the area in dispute fell within the defendants' concession. Defendants interposed the act of state doctrine as a defense to allegations of a conspiracy to "catalyze" the actions of the foreign sovereign in violation of the Sherman Act. The court dismissed the antitrust suit, agreeing with the defendants that a trial on the merits would require it to assess the propriety of the acts of another sovereign committed within that sovereign's jurisdiction.

In view of the holding in *Occidental* that the alleged international anticompetitive conspiracy was not appropriate for domestic judicial inquiry, a Sherman Act complaint which relies on a combination between domestic defendants and foreign sovereigns for the conspiracy element is troublesome.

B. *Conspiracy Among Competing Non-Arab Firms*

A second conspiracy theory suggested by the *Bechtel* complaint

51. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964), *quoted in* Alfred Dunhill of London, Inc., v. Republic of Cuba, 425 U.S. 682, 706 (1975).

52. *See generally, e.g.,* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; American Banana Co. v. United Fruit Co., 312 U.S. 347 (1909); Underhill v. Hernandez, 168 U.S. 250 (1897).

53. Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law,* 9 INT'L LAW. 617, 631 (1975); *see* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682; First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 431-34, 436-37; 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-54 (1968); Henkin, *Act of State Today: Recollection in Tranquility,* 6 COLUM. J. TRANSNAT'L L. 175 (1967).

54. 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd per curiam,* 461 F.2d 1261 (9th Cir. 1972), *cert. denied,* 409 U.S. 950 (1972).

assumes a horizontal combination among non-Arab private concerns,[55] American and otherwise, as a result of their respective agreements with the Arab clients to conform to and implement the boycott. It might not be necessary to demonstrate direct contact and collusion among competing firms to prove this horizontal combination, for courts may infer such a combination.[56]

In *Interstate Circuit, Inc. v. United States,*[57] the Supreme Court declared that it is "enough that, knowing that concerted action was contemplated . . . , the [competing firms] gave their adherence to the scheme and participated in it."[58] The evidence in *Interstate Circuit* showed that two affiliated Texas film exhibitors had circulated among eight film distributors, controlling seventy-five percent of the market, a written proposal that each distributor grant the exhibitors exclusive rights to first run films in the area. In return, the exhibitors would agree to maintain a premium admission price. Each of the distributors, ostensibly independently, accepted. In finding a conspiracy, the Court examined the "unilateral" decisions of the distributors, noting that: (1) all eight knew that each had received the same proposal; (2) all the distributors had made major and complex alterations in their contracts with the exhibitors, resulting in uniform agreements between the exhibitors and each of the distributors; and (3) the scheme would fail unless all eight agreed.[59]

In a subsequent case, the Court demonstrated that no conspiracy will be inferred in the absence of a strong motive for concerted action. In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,*[60] a theatre owner charged that several film distributors had acted pursuant to a combination to restrain trade in denying him first-run exhibition rights. The plaintiff could prove no direct contact among the defendants, and the Supreme Court refused to infer an agreement from the parallel conduct of the distributors, citing evidence of valid business reasons for individual refusals to deal with the plaintiff.[61] It is generally agreed that parallel conduct will not support the inference of a conspiracy, absent a demonstration that the decisions of the actors were interdependent.[62] Only

55. The Trucial States are now known as the United Arab Emirates.
56. Complaint, *supra* note 2, para. 19.
57. *See* cases cited note 48 *supra.*
58. 306 U.S. 208.
59. *Id.* at 226.
60. *Id.* at 226-27.
61. 346 U.S. 537 (1954).
62. *Id.*

where the parallelism characterizing the activities of a group of competitors would be difficult to achieve absent some agreement will a conspiracy be inferred.

The *Bechtel* complaint alleges that the defendants "knew of the existence" of the "well-known and generally recognized . . . aforesaid Arab Boycott."[63] It was clearly within the individual interest of Bechtel and each of its competitors to comply with the policies of the Arab boycott since this was a prerequisite to doing business in the Arab world. Further, the interdependence of decision making required by *Interstate Circuit* is not present in the *Bechtel* facts. In *Interstate Circuit,* the refusal of even a single distributor to adopt the exclusive first-run proposal could have destroyed the effectiveness of the anticompetitive scheme. In such a situation, the inference of a conspiracy is appropriate. On the other hand, the competitive position of Bechtel vis-á-vis the Arab world deteriorates as its competitors submit to Arab boycott demands. Thus, the compliance decisions of Bechtel and its competitors were *independent* rather than *interdependent.* Inference of a combination among these competitors is decidedly inappropriate.

C. *Coercion by Bechtel of its Subcontractors*

The final combination theory proposed by the *Bechtel* complaint relies on a finding that Bechtel has imposed trading restrictions on its subcontractors and thus effected a horizontal combination at that level.[64] The evil perceived in such an arrangement is that it undermines the freedom of the subcontractor to choose his trading partners.[65] This theory rests heavily on the approach taken by the Supreme Court in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[66] and *United States v. Parke, Davis & Co.*[67] These cases illustrate that whether the arrangement is effected by vertical pressure from one level of traders downward to the next, or by an "understanding" among the firms on the lower level, it constitutes a Sherman Act conspiracy if it impairs trader discretion.

The plaintiff in *Klor's,* a small appliance retailer, charged that a large chain of retailers, Broadway-Hale Stores, had induced ten leading appliance manufacturers to cease dealing with the plain-

63. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655, 658 (1962).

64. Complaint, *supra* note 2, para. 19.

65. *Id.* para. 21.

66. 8 LAW & POL'Y INT'L BUS. 799, 808 (1976).

67. 359 U.S. 207.

tiff. Noting Broadway-Hale's position of market dominance, the Court found a conspiracy among the manufacturers and the defendant Broadway-Hale.

The Court in *Parke, Davis* invalidated a manufacturer's retail maintenance program. Distinguishing *Colgate,* the Court found that the defendant manufacturer had gone far beyond the announcement of its trading terms.[68] Instead, Parke, Davis had used "subterfuge" to coerce its distributors and retailers into a prohibited vertical combination. By distinguishing *Colgate,* the Court in *Parke, Davis* demonstrated that the unilateral refusal to deal remains outside the prohibitions of the Sherman Act. If a trader desires to deal in a certain product and freely accedes to the manufacturer's announced terms, the resultant arrangement is protected by the *Colgate* doctrine. The Court reaffirmed this principle in *Albrecht v. Herald Co.,*[69] indicating that a non-coercive plan to exclude competitors establishes no prohibited combination if all adherents willingly participate.

Establishing coercion will be largely a factual matter. Although the *Bechtel* complaint alleges that Bechtel "require[d] [its] Subcontractors to refuse to deal with Blacklisted Persons,"[70] there are no further allegations to indicate that Bechtel did anything more than announce its trading terms. Moreover, there is a strong suggestion that Bechtel's subcontractors acted in their own self-interest in accepting Bechtel's terms.

Thus, had *Bechtel* gone to trial, to proceed under a Bechtel-subcontractor combination theory, the Government would have been required to prove both: (1) that Bechtel demanded its subcontractors cease dealing with blacklisted firms, and (2) that these subcontractors did so unwillingly, and only in the face of coercion by Bechtel. The same burden would be imposed today in a renewed effort by the Antitrust Division or in a private suit. It would seem impossible, however, to establish this conspiracy theory if Bechtel or another boycott defendant remains within the guidelines of the proposed consent accord. The accord assumes that Bechtel will accept *all* bids and exert no pressure whatsoever.[71]

VI. Concerted Refusals to Deal—Illegal Per Se?

Although the Supreme Court has generally applied a rule of per

68. 362 U.S. 29.
69. *Id.* at 36-47.
70. 390 U.S. 145 (1968) (dictum).
71. Complaint, *supra* note 2, para. 21.

se illegality to group boycotts,[72] that inflexible standard has in some cases given way to considerations of public policy. In such circumstances, the Court has adopted a rule of reason and made detailed inquiry into the purposes and effects of such boycotts, and considered justifications for them.[73]

Similarly, the lower federal courts have undermined the notion that all group boycotts are illegal per se. The trend in these courts is to limit the per se rule to boycotts with clearly demonstrable anticompetitive purposes.[74] The line of cases suggest that the "rule of reason may be applicable to boycotts involving competitors where the motives for exclusion are not directly profit related."[75] This trend was begun by the Supreme Court itself in *White Motor Co. v. United States,*[76] where the Court reviewed a summary judgment in a case involving franchising contracts between a manufacturer and its dealer. The Court, never having considered vertically-imposed territorial restrictions, refused to apply a per se rule, noting:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be classified as *per se* violations of the Sherman Act.[77]

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72. Proposed Final Judgment, *supra* note 32, § IV(F).

73. *See, e.g.,* United States v. Topco Assoc., 405 U.S. 596 (1972); United States v. General Motors Corp., 384 U.S. 127.

74. *See, e.g.,* Silver v. New York Stock Exch., 373 U.S. 341 (1963); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

75. *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); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); Dalmo Sales Co. v. Tyson's Corner Regional Shopping Center, 429 F.2d 206 (D.C. Cir. 1970); Jos. E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). *See also* Note, *A Re-Examination of the Boycott Per Se Rule in Antitrust Law,* 48 TEMP. L.Q. 126, 148 (1974); Coons, *Non-Commercial Purpose as a Sherman Act Defense,* 56 NW. U. L. REV. 705 (1962).

76. Dalmo Sales Co. v. Tyson's Corner Regional Shopping Center, 429 F.2d at 208.

77. 372 U.S. 253 (1963).

The circuit courts have inferred from *White Motor* that a per se rule is inappropriate where "the very novelty and complexity of the questions indicate that they should [be] resolved only after a full trial."[78] In *Worthen Bank & Trust Co. v. National BankAmericard Inc.*, the restrictive membership plan of a bank credit card system was held not to constitute an illegal per se concerted refusal to deal. The *Worthen* court reversed a summary judgment, reasoning as in *White Motor,* that "the novelty and importance of the question was the determining factor in applying the rule of reason. . . ."[79]

The propriety of Bechtel's refusal to deal with blacklisted domestic firms in connection with Arab projects is a novel, complex, and important issue. The *Bechtel* facts are unique in that the motives behind the Arab boycott cannot be categorized neatly as "directly profit related."[80] As noted earlier, it can be said that domestic firms charged with boycott compliance are not motivated by an intent to exclude any domestic subcontractor. Rather, these firms have independently opted to comply with the trading terms announced by their Arab clients, and are thus acting within the protection of the *Colgate* doctrine. Further, although the express Arab motive in exacting these terms is to exclude certain domestic subcontractors, the Arab objective is not commercial, but political. In fact, the Arab clients have sacrificed the commercial advantages which normally accrue from increased bidder competition, choosing instead to exclude certain bidders on political grounds. Consideration of the Arab purpose in imposing these restrictions, and the motive of American business in complying, highlights the absence of a plausible and established conspiracy theory essential for a per se refusal to deal claim. Moreover, this politically-motivated boycott, not directly profit related, stems from the actions of foreign sovereigns. Hence, the competing considerations in the act of state doctrine serve to complicate the issues presented by the Arab trade restrictions.

Ultimately, the issue in an antitrust challenge to the Arab boycott is the extent to which domestic firms will be permitted to engage in foreign trade. The complexities of the Arab boycott are apparent, and the importance of American presence in burgeoning,

78. *Id.* at 263 (citations omitted).

79. Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d at 126 (citing Department of Justice amicus brief).

80. *Id.*

vital foreign markets is indisputable. Bearing in mind the Supreme Court's statement that "only after considerable experience with certain business relationships will courts classify them as per se violations," it is clear that a domestic firm's boycott compliance deserves more pointed inquiry than a per se rule provides.

VII. Sovereign Compulsion

Only one case factually comparable to *Bechtel* has reached decision. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*[81] the district court avoided a finding of per se illegality by recognizing sovereign compulsion as a full defense to an alleged concerted refusal to deal. Plaintiff, an American refining concern, sued for treble damages under the Sherman and Clayton Acts,[82] alleging that defendants had organized a "concerted boycott designed to deny Interamerican Venezuelan crude oil required for its operations."[83] The chief executive of Interamerican and another principal stockholder were considered political enemies of the Venezuelan regime in power at the time.

The Venezuelan government had granted oil production and sale concessions to defendants, Texaco Maracaibo (Supven) and Monsanto Venezuela (Monven). Supven and Monven in turn sold to Amoco Trading Company, an American firm operating outside Venezuela. The Venezuelan Ministry of Mines and Hydrocarbons regulates the sale of Venezuelan crude by its concessionaires.[84] Violators of the Ministry's regulations risk suspension of the concession.[85] The Ministry ordered the concessionaires to prevent Venezuelan crude from reaching Interamerican, at least partly because of the firm's connection to *personnae non gratae.*[86] Both Supven and Monven, along with defendant Amoco, informed Interamerican of the government's restrictions and ceased supplying the plaintiff. Interamerican charged a group boycott.

81. Dalmo Sales Co. v. Tyson's Corner Regional Shopping Center, 429 F.2d at 208.

82. 307 F. Supp. 1291 (D. Del. 1970).

83. 15 U.S.C. §§ 1-7, 12-27 (1976). Section 4 of the Clayton Act provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. § 15 (1976).

84. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. at 1292.

85. *Id.* at 1294.

86. *Id.*

The defendants did not deny the refusal to deal, but argued instead that the boycott had been compelled by the Venezuelan government, and that such foreign sovereign compulsion was a complete defense to a Sherman Act claim. The United States District Court for the District of Delaware agreed, found the Venezuelan government had in fact compelled the defendants to boycott *Interamerican*, and dismissed the complaint. Acknowledging that *Interamerican* presented a case of first impression, the court found support for the compulsion defense in Supreme Court dicta.[87]

In *Continental Ore Co. v. Union Carbide and Carbon Corp.*,[88] the Canadian government had appointed Electro Met, a subsidiary of Union Carbide, as its exclusive vanadium purchasing agent. Plaintiff, Continental Ore, alleged that Union Carbide had refused to deal with Continental, an American vanadium dealer, in an attempt to monpolize Canadian sales for the parent Union Carbide. The Supreme Court disallowed Union Carbide's defense that there could be no Sherman Act violation where the defendant was "acting in a manner permitted by Canadian law."[89] The Court did observe, however, that there was "no indication that . . . any [Canadian] official . . . directed that purchases from Continental be stopped."[90] Commentators have inferred from this dictum that the *Continental Ore* result might have been different if the Canadian government had in fact directed the refusal to deal.[91]

Similarly, in *United States v. Watchmakers of Switzerland Information Center, Inc.*,[92] the United States District Court for the Southern District of New York faced a collective agreement among Swiss manufacturers and certain American firms to impede the American watch industry by suppressing the export of Swiss watch parts.[93] An arm of the Swiss government which regulated the industry approved and encouraged the "collective," but did not require participation.[94] The district court held the defendants liable

87. The Ministry may have also desired to keep Venezuelan crude oil from entering "unnatural" markets (Canada and Europe) and to prevent resale of the oil at a low price by a bonded refinery such as Interamerican's.

88. 370 U.S. 690 (1962).

89. *Id.* at 707.

90. *Id.* at 706.

91. *See, e.g.*, Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925, 934 (1963); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 136-37 (1967).

92. [1963] TRADE CASES ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

93. *Id.* at 77,416.

94. *Id.* at 77,426.

for the restraint notwithstanding its legality under Swiss law, but again noted: "If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing."[95]

In *Interamerican,* the court discussed both the *Continental Ore* and *Swiss Watch* cases, and considered "self-evident" the assumptions of both cases that acts compelled by a sovereign become acts of the sovereign, and that "[t]he Sherman Act does not confer jurisdiction on United States courts over acts of foreign sovereigns."[96] The court found further support in the analogous doctrine of *Parker v. Brown*[97] and among antitrust scholars.[98]

The *Interamerican* rationale is grounded in the dual policy considerations of international comity and fairness to American firms doing business in foreign states. American courts are reluctant to "sit in judgment on the acts of the government of another done within its own territory,"[99] for courts generally defer to the executive matters touching upon foreign affairs. Moreover, the *Interamerican* court thought it unfair to force American corporations operating abroad to violate the laws of the host country by complying with domestic law.

The *Bechtel* defendants raised the *Interamerican* sovereign compulsion defense as an absolute bar to Sherman Act liability.[100] Had *Bechtel* gone to trial, the defendants would have argued that since boycott compliance is commanded by the laws of the Arab nations,[101] Bechtel could not be the subject of a Sherman Act claim.[102]

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95. *Id.* at 77,456.

96. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. at 1298.

97. 317 U.S. 341 (1943). In *Parker* the Court held that acts performed in compliance with a state regulatory program cannot be the basis of Sherman Act liability. In the view of the *Interamerican* court, it would similarly distort the Sherman Act and the Constitution to permit liability for acts of a foreign sovereign. 307 F. Supp. at 1298 n.18.

98. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 94 (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS §§ 2.16, 2.17 (1958); Fugate, *supra* note 91, at 932.

99. Underhill v. Hernandez, 168 U.S. at 252.

100. Answer, *supra* note 31, paras. 16-20.

101. General Union of Chambers of Commerce, Industry & Agriculture for Arab Countries, the Arab Boycott of Israel: Its Grounds and Regulations, *reprinted in Moss Hearings, supra* note 22, at 146-49; Head Office for the Boycott of Israel, General Secretariat, League of Arab Countries, General Principles for Boycott of Israel (June 1972), *reprinted in Church Hearings, supra* note 7, at 442-76.

102. "It is beyond the competence and jurisdiction of United States courts to

Commentators have previously noted important distinctions, however, between the *Bechtel* and *Interamerican* facts.[103] *Interamerican* concerned Venezuelan export regulations. The subject oil supplies were clearly within the control of the Venezuelan government. In *Bechtel,* however, the commodities in trade, and construction services and supplies are within United States control, and beyond the reach of Arab jurisdiction. Further, the plaintiff boycott victims in *Interamerican* operated a bonded refinery; the Venezuelan oil was bound for export and not intended to enter United States commerce. By enlisting Bechtel in the boycott effort, the Arab League was able to extend its import restrictions to United States corporations' solicitations of competing bids from among other such firms. *Bechtel* thus involves a direct distortion of the competitive process by an American national within United States borders and a consequent interference with domestic commerce not present in *Interamerican.*[104] Finally, the profitable exploitation of an oil concession typically involves heavy capital expenditures by the concessionaire in the host country. The *Interamerican* court was reluctant to require the defendant to jeopardize this capital outlay. Unlike the *Interamerican* defendants, Bechtel's losses, if it refused to comply with the boycott, might not be "tantamount to expropriation."[105]

The *Interamerican* court did not expressly limit its holding to the instant facts and has been sharply criticized in this regard.[106] *Interamerican* also failed to set out any more than the barest theoretical foundation for the result. The court cited several treatises as authority for the compulsion defense, but a closer examination indicates that these authorities[107] would limit the availability of

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adjudicate the propriety of the sovereign acts of foreign states or to interfere with compliance by persons and firms with the laws of foreign sovereign states which govern the business and commerce of the respective foreign states." Answer, *supra* note 31, para. 28.

103. *See, e.g.,* Kestenbaum, *supra* note 50, at 1425 n.83; Note, *The Antitrust Implications of the Arab Boycott,* 74 MICH. L. REV. 795, 815-16 (1976); 8 LAW & POL'Y INT'L BUS. at 818-20. *See generally* Note, *Development of the Defense of Sovereign Compulsion,* 69 MICH. L. REV. 888 (1971).

104. *See* 8 LAW & POL'Y INT'L BUS. at 818-20.

105. Note, *The Antitrust Implications of the Arab Boycott, supra* note 103, at 816.

106. *See* authorities cited note 103 *supra.*

107. *See* note 98 *supra. See also* H. KRONSTEIN, J. MILLER & I. SCHWARTZ, MODERN AMERICAN ANTITRUST LAW 267 (1958); 4 BUSINESS REGULATION IN THE COMMON MARKET AND AMERICAN ANTITRUST LAW 238 (J. Rahl ed. 1970); Timberg,

the defense to actions taken within the compelling host's jurisdiction.[108] The Supreme Court suggested the same limitation in *Continental Ore.*[109] There is substantial authority then for an absolute defense of sovereign compulsion where the allegedly anticompetitive activity takes place within the foreign sovereign's borders. However, since the *Bechtel* suit involved activities centered within the United States, reliance on *Interamerican* is perhaps inappropriate. It should be clear from the foregoing discussion that vindication of the policies underlying the defense demands some form of modified sovereign compulsion insulation in other circumstances.

VIII. Proposals for Reasonableness Determination

Between the extremes of a rigid rule of per se illegality and an absolute defense lies the flexibility of the rule of reason. If a court were to adopt a rule of reason approach to international political boycotts, the reasonableness inquiry would go beyond the issue of whether or not the particular business behavior resulted in a restraint on trade. In addition, the court would also consider whether that practice is unreasonable in an international setting, and whether considerations of comity render application of the federal antitrust laws imprudent. *Restatement (Second) of Foreign Relations Law of the United States* calls for a similar "balancing" approach:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) the vital national interests of each of the states,
>
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,

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United States and Foreign Antitrust Laws Governing International Business Transactions, in A Lawyer's Guide to International Business Transactions 619, 624 (Surrey & Shaw eds. 1963); Graziano, *supra* note 91, at 116.

108. "If the acts are those of a foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, *requires* private parties to perform the anticompetitive acts." Fugate, *supra* note 91, at 932.

109. 370 U.S. at 706.

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[110]

A rule of reason analysis in Arab boycott cases might properly be built around the sovereign compulsion framework.

One commentator has suggested that courts should presume the validity of the sovereign compulsion defense.[111] Once the defendants have established that the alleged anticompetitive practices were compelled by a foreign sovereign, plaintiffs would have the burden of demonstrating that other factors outweighed the considerations of comity underlying the defense. The court, in determining whether or not to allow the defense, would apparently consider among other factors the locus of the allegedly anticompetitive behavior, and whether or not the defendant knew that such behavior would be compelled.[112] This approach thus results in too strict a rule against compliance with trade restrictions such as the Arab boycott.

A better approach would incorporate a similar presumption that the defense was available to defendants compelled by a foreign sovereign to act in violation of the antitrust laws. As indicated earlier, substantial authority suggests that the presumption becomes conclusive where the allegedly anticompetitive conduct occurred within the foreign jurisdiction.[113] Bechtel could not claim this absolute defense since its boycott activity was centered in the United States. Even as to domestic boycott activity though, the court should disallow the defense of sovereign compulsion only upon a showing that domestic economic stability requires a tempering of deferential policies. In this regard, the court should consider whether the offending trade practice constitutes a serious breach of domestic norms, and whether the quantitative impact of the defendant's activity significantly impairs the competitive process.

The *Interamerican* trade restraint affected only the plaintiff firm. Since the restriction was ordered by the Venezuelan government and did not have a significant impact on United States com-

110. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

111. Note, *Development of Defense of Sovereign Compulsion, supra* note 103, at 904-10.

112. *Id.*

113. *See* notes 107 & 108 *supra.*

merce, the district court was prudent in dismissing the Sherman Act complaint, thereby avoiding international conflict. The Arab boycott, however, involves a substantial segment of American trade.[114] A federal court would seem justified in finding antitrust liability for implementation of the boycott through domestic conduct.

IX. THE PROPOSED *Bechtel* CONSENT ACCORD

The proposed accord similarly draws a sharp distinction between boycott activity within the United States and mere involvement with boycotting Arab clients. The lengthy document details the ground rules for United States-Arab trade, and in this regard embodies the first official statement of antitrust policy on the subject. The accord restrains Bechtel from "implementing" the boycott within the United States, but substantially qualifies this prohibition with a series of other provisions and interpretations.[115] Bechtel may not exclude any United States blacklisted person or firm from its recommendations, evaluations, or lists of possible suppliers in connection with a major construction project[116] in an Arab League country. If from this complete list of potential subcontractors the Arab client "specifically" and "unilaterally" chooses a particular subcontractor, ignoring all blacklisted firms, Bechtel may still act as prime contractor.[117] The Justice Department does not consider Bechtel's further dealings with subcontractors, chosen on a discriminatory basis by the Arab client, "conspiratorial action which violates antitrust law."[118]

If the Arab client chooses not to select one particular subcontrac-

114. The Justice Department stated that the Arab League countries awarded United States prime contractors over $1 billion worth of contracts in 1974. Complaint, *supra* note 2, para. 9. A congressional study estimates that reported boycott-affected transactions in 1974 covered goods and services valued at almost $20 million. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., REPORT ON THE ARAB BOYCOTT AND AMERICAN BUSINESS 10 (Subcomm. Print 1976). The Commerce Department places the figure for the first half of 1975 at $203 million. SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, REPORT TO ACCOMPANY S. 953, S. REP. No. 632, 94th Cong., 2d Sess. 5 (1976).

115. Proposed Final Judgment, *supra* note 32, § IV(C).

116. *Id.* § IV(F).

117. *Id.* § V(C).

118. Competitive Impact Statement § IV(E), United States v. Bechtel Corp., No. C-76-99, *reprinted in* 796 ANTITRUST & TRADE REG. REP. (BNA) E-4 (Jan. 11, 1977).

tor for each phase of a construction project, preferring merely to "launder" the list of subcontractors originally submitted by the prime contractor, Bechtel's responsibilities must be severely diminished. In such a situation, Bechtel must limit its activity to advising the Arab client as to which of the subcontractors on the list represents the best choice.[119] Bechtel may not proceed to solicit bids, make a final selection from the laundered list, or even procure, in its own name or in the name of the Arab client, any goods or services from the chosen subcontractor. Under the accord, Bechtel is also free to ignore *all* United States subcontractors and to solicit bids only from non-blacklisted foreign firms operating outside the United States. Should Bechtel solicit even one United States bid, however, the contractor can exclude no United States firm from consideration. In distinguishing between anticompetitive conduct committed by the defendants within the United States, and participation in Arab projects subject to discriminatory restrictions, the proposed *Bechtel* accord follows a pattern established in a series of earlier antitrust consent decrees.[120]

The importance of the *Bechtel* accord, then, is that it permits United States firms to engage in trade with the vast Arab market without fear of antitrust liability arising from a conflict of trade laws. By withholding Sherman Act strictures from foreign-centered conduct, the accord has avoided impinging Arab sovereignty. By prohibiting discriminatory trade practices within the United States, the accord significantly impedes the furtherance of Arab anticompetitive objectives by United States nationals. The focus of the accord is to encourage Arab clients to at least view the bids and proposals of blacklisted firms, and to this end the accord prohibits any "screening" or "gatekeeping" by Bechtel or another United States prime contractor. Significantly, the accord does not force an early confrontation on the boycott issue between the United States prime contractor and the Arab client. Section V(A) of the accord expressly permits the United States contractor to execute a contract outside the United States, providing that the commercial laws of the host country apply, so long as the contractor's actual performance of such a contract is within the terms of the accord.

119. *Id.* at § IV(G).

120. *See, e.g.*, United States v. Gulf Oil Corp., [1960] TRADE CASES ¶ 69,851, at 77,349 (S.D.N.Y.); United States v. Standard Oil Co. (NS), [1960] TRADE CASES ¶ 69,849, at 77,340 (S.D.N.Y.).

The *Bechtel* accord serves the public interest by removing the uncertainty which would arise from the prolonged delay involved in a full trial. Such uncertainty would severely hamper American participation in the Mid-East market.

In view of the novel, unprecedented international setting of the Arab boycott, antitrust courts could be understandably hesitant to apply a rule of per se illegality, preferring instead to make a deeper inquiry into the effects of a flat prohibition on participation. The sovereign compulsion doctrine and the *Interamerican* precedent cannot be completely disregarded. A full scale trial might foster significant acrimony and bitterness and result in a court-imposed sanction against Bechtel no more restrictive than the rule of the proposed accord.

James H. Longstreet