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Boycott Law Bulletin

nely news coverage and expert analysis of anti-boycott and anti-bribery laws, regulations and court developments for corporate executives, exporters, bankers, attorneys, accountants and U.S. and foreign government officials.

Commerce/Treasury Enforcement

"Commerce/Treasury Enforcement" is a regular monthly feature of the Boycott Law Bulletin. It provides news and information about the U.S. government's anti-boycott enforcement policies, procedures and actions.

By Mark A. Bruzonsky

Mark Bruzonsky, a consultant on Middle East affairs with the Washington firm of International Associates, writes this column monthly for the Boycott Law Bulletin.

COMMERCE SECRETARY KLUTZNICK DISCUSSES ANTIBOYCOTT PROGRAM.

In an exclusive interview with the Boycott Law Bulletin, newly appointed Commerce Secretary Philip M. Klutznick answers questions (submitted in writing) concerning his Department's enforcement of the antiboycott program.

Among other things, Secretary Klutznick reveals that the Office of Antiboycott Compliance has initiated more than 300 investigations of possible antiboycott violations, and that attorneys for the Commerce, State and Treasury Departments have determined that Nigeria's boycott requirements pose no problem for U.S. companies under the U.S. antiboycott regulations.

Secretary Klutznick also says: there is no conflict between the antiboycott program and the administrations efforts to promote U.S. exports; he is not optomistic about the prospects for other industrial nations enacting their own antiboycott laws and regulations; that the coming Administrative Proceedings hearing in the Core Laboratories case will be significant if only because it is the first antiboycott action to go before an adlaw judge; and he sees no conflict arising which would force the U.S. to choose between foreign oil supplies and the enforcement of antiboycott regulations.

Following is the text of the interview with Secretary Klutznick:

Question: After what has been criticized as a slow start, Commerce's Antiboycott Compliance Staff has come forward with a small number of civil cases enforcing the antiboycott provisions of the Export Administration Act (EAA). Are you satisfied with the progress so far of your department's enforcement efforts?

Klutznick: I am generally satisfied with the progress of the Department's enforcement efforts in a new and difficult area. What criticism there might have been was probably directed to the number of announced enforcement actions. This is a misleading indicator for a relatively new enforcement program. While we anticipate announcement of many more enforcement actions during the coming months, what I regard as more significant are the more than three hundred investigations initiated since the program began, and the excellent response to the law and the regulations we have seen on the part of the business community.

Question: In general, how do you reconcile the obvious need for expanding U.S. exports with the seriously inhibiting effects of the antiboycott laws and regulations?

Klutznick: I would first take issue with your description of the antiboycott program as "seriously inhibiting" the expansion of U.S. exports. That simply does not appear to be the case. U.S. exports in 1979 to the boycotting countries of the Middle East and North Africa increased by approximately 18% over 1978.

While we have heard from a number of companies about business deals that were allegedly lost due to the antiboycott law, it has not been demonstrated that such failures are necessarily a result of U.S. law. There is no direct conflict between the antiboycott program and our program to promote U.S. exports. The antiboycott law is not intended to inhibit trade with any part of the world. On the contrary, a principal purpose of the statute is to create equal trade opportunities for all U.S. firms and to prevent them from being shut out of certain markets by other U.S. firms which support or enforce another country's boycott.

The antiboycott law called upon the Department to carry out the careful balance struck by Congress in that law and to develop a regulatory program to fulfill its antiboycott goals while minimizing the impact on U.S. exports. I believe the Department has been successful.

Question: In part, the EAA itself was designed to promote U.S. trade with the Arab world, including trade by companies currently blacklisted by various Arab states. Yet the EAA effectively makes it impossible for a blacklisted U.S. company to get itself removed from the blacklist since the law prohibits provision of information to boycott offices. Thus currently blacklisted U.S. companies who might otherwise be removed from the blacklist remain blacklisted because they cannot provide even publicly available information such as annual reports to Arab boycott offices. Shouldn't this situation be remedied?

Klutznick: One of the primary means used by Arab countries to enforce their boycott of Israel is the request for "information." Therefore, I strongly support the statutory and regulatory prohibition against U.S. persons furnishing information about their business relationships with boycotted countries or blacklisted persons. When a request for such information is received from a boycott office, it must be presumed that the information is sought for boycott purposes. If U.S. companies were permitted to respond to such requests, even indirectly by furnishing publicly available information, a boycott purpose would nevertheless be served. There is no statutory exception for such circumstances — the idea is to force the boycott office to do its own research if it desires the information and to deter U.S. companies from assisting in the collection of the requested information.

I might add, too, that it has been the Department's experience that the Arab boycott is not uniformly enforced. For example, a company may refuse to respond to a request for boycott-related information and not get blacklisted, or a company may be blacklisted but continue to do business with Arab countries.

Question: Is there any chance that the proposed Commerce survey of boycott-related activities of U.S. foreign subsidiaries in their non-U.S. commerce transactions might be cancelled?

If the survey is conducted, according to some legal authorities the information it produces will expose U.S. companies to prosecution. Does Commerce intend to use the survey information for any prosecutions under the EAA?

And what access will other U.S. enforcement agencies — the Treasury and Justice Departments — have to the Commerce study results? And will all information be released to the public?

Klutznick: I can't foresee any circumstances that would lead the Department to cancel the proposed survey. However, we have received several substantive comments raising questions concerning its form, scope and authority. The Department is carefully considering all such comments, and until our review is completed, we will not be able to comment further on the details of the survey. As a general matter, information submitted by any firm pursuant to a survey will be treated like all information obtained during our administration of the EAA — public access to all such information is governed by the confidentiality provisions of the EAA and by the Freedom of Information Act.

Question: A recent Congressional Research Service study shows that European countries and Japan are adamantly opposed to enacting and enforcing their own antiboycott legislation regulations. Further, some of these countries seem to be quite annoyed by the extraterritorial reach of the U.S. antiboycott legislation. England, for instance, is moving to curb the reach of the EAA. Given this situation, and in view of the fact that no other country is likely to enact antiboycott laws similar to our own, U.S. companies are placed at a competitive disadvantage in the Arab market. Can anything be done to improve this situation for U.S. companies?

Klutznick: U.S. companies, backed by the authority of U.S. law, are able to resist boycott demands and still secure the business. Major boycotting countries have made significant changes which lessened the impact of their boycott practices. This is reflected in the substantial decline in the number of boycott requests directed to U.S. firms since passage of the law. It is our aim to be as helpful as possible to U.S. companies.

Other countries have stated their opposition to foreign boycotts, but as of this date none has adopted regulations comparable to U.S. antiboycott provisions. The development of a common policy with the United States would help minimize any adverse trade consequences for U.S. companies, but we are not optomistic that foreign governments will implement antiboycott laws in the forseeable future.

Question: So far, there have only been civil charges brought by the Antiboycott Compliance Staff enforcing the EAA. Do you anticipate that there will be criminal charges filed in the near future, or will civil actions predominate?

Klutznick: The Department has established a working relationship with the Justice Department. Should the Department determine that the facts of a particular case warrant initiation of criminal proceedings it will not hesitate to refer the matter to Justice.

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Question: The Antiboycott Compliance Staff is criticized by some as being shy of litigation, seeking small fines and quick consent agreements rather than proceeding with administrative proceedings on alleged antiboycott violations. Does this mean that Commerce is soft-pedaling antiboycott enforcement? Or are the prospects for convictions so slim that small fines and consent agreements are the only way to proceed with effective enforcement?

Klutznick: The Department is quite willing to go to hearing in order to enforce the antiboycott provisions, either when a respondent company requests a hearing, or at our request in appropriate circumstances. It is true that, to date, most of the enforcement actions have been resolved through the consent agreement approach, but this is because the companies involved have preferred to settle the matter in that way. Accordingly, it is not accurate to conclude that the Department is "shy of litigation" or is "softpedaling antiboycott enforcement." We will continue an enforcement program that is vigorous, fair and just and that motivates companies to conform to the law.

Question: What is or will be your personal inclination in the antiboycott enforcement program: Education (consent agreements, small fines, giving business time to catch up, be educated on antiboycott compliance) or Enforcement (administrative proceedings, perhaps criminal charges, stiff fines, using the impact of stiff enforcement to deter business from cooperating in boycotts)?

Klutznick: While we would not characterize "education" and "enforcement" in the terms you have, we intend to make use all of the tools available to us. Our experience has demonstrated that this approach has succeeded in motivating compliance with the law.

Question: Are there pressures from the public for stronger antiboycott enforcement than is so far the case?

Klutznick: Those concerned with strong antiboycott enforcement recognize that the law has been and will be vigorously enforced.

Question: Core Laboratories of Dallas is contesting the antiboycott charges brought against it by Commerce. As this is the first test of rules in administrative proceedings, do you see the Core Labs case as being especially significant?

Klutznick: Although the Core Labs case is not the first case in which charges have been served upon a company alleging violations of the antiboycott provisions, it is the first case which is expected to go to hearing before an administrative law judge. As with any new enforcement program, I think the first case to go to hearing, regardless of the company involved or the violations alleged, can fairly be said to be a significant one.

Question: Conflict between U.S. antiboycott law and Iraqi boycott requirements has already affected U.S. companies' access to Iraqi crude oil. Iraqis claim that other Arab oil producers will or may adopt similar boycott-related oil purchase agreements that will put U.S. companies out of contention for oil purchasing. Do you see this as a potential serious problem, a potential serious challenge to the antiboycott rules? Will the U.S. choose antiboycott over oil in this case?

Klutznick: We do not believe that that claim will materialize. Boycotting country governments appear to see the law as an attempt to protect U.S. business from anti-competitive behavior and safeguard the rights of U.S. citizens, and they appear to recognize our legitimate interest in that regard.

Question: Nigeria has boycott lanugage in its oil purchase agreements that is still outstanding. Commerce, Treasury and State have teamed up to go to Nigeria to work on the problem. What are your expectations?

Klutznick: The language contained in Nigerian oil purchase agreements has been examined by lawyers in the Departments of Commerce, Treasury and State. In their opinion, the provisions of these agreements do not appear to create a problem for American oil companies under U.S. antiboycott law.

CORE LABS CASE GETS HEARING DATE.

The antiboycott case involving Core Laboratories, Inc., of Dallas, Texas, will be heard by Administrative Law Judge Hugh J. Dolan on May 2, 1980.

Although the time and location of the hearing have not yet been announced, it is expected that the hearing will be held at the Commerce Department.

COMMERCE TO ISSUE REVISED SURVEY FOR FURTHER PUBLIC COMMENT.

The Commerce Department's proposed survey of U.S. foreign subsidiaries concerning their boycott-related activity in transactions outside U.S. commerce is to be reissued in revised form for additional public

comment, according to informed sources.

The survey, which is to be directed at the domestic parent companies, was first issued for comment last October [See October 1979 issue]. The proposed survey drew considerable public comment, mostly negative [See December 1979 issue].

Apparently because of the extensive criticism of the proposed survey, Commerce has made several changes in the survey – so many changes that the Department feels it necessary to seek yet another round of public comment before actually conducting the survey. The revised proposed survey will be released for comment in a matter of some weeks.

FORMER ASSISTANT SECRETARY MARCUSS WILL OPEN WASHINGTON OFFICE JUNE 1 FOR NEW YORK FIRM OF MILBANK, TWEED.

Former Acting Assistant Secretary of Commerce Stanley J. Marcuss has informed the Bulletin that he will open the first Washington D.C. office on June 1 for the New York law firm of Milbank, Tweed, Hadley & McCloy.

The prestigious New York law firm does a lot of business with international companies. One of its senior partners, John J. McCloy, has advised several Presidents.

Attorneys in Washington describe Marcuss' move to Milbank, Tweed as "interesting" and "enviable."