THE INTERNATIONAL LEGAL FORUM

LEGAL ANALYSIS OF BEN & JERRY'S BOYCOTT DECISION

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On July 19th, 2021, Ben & Jerry's announced that it would end distribution in Judea and Samaria (the West Bank) and east Jerusalem, and that it would not renew its contract with its Israeli licensee when the contract concludes at the end of 2022. Ben & Jerry's decision to boycott Israel is unprecedented in the explicitness in which its decision was explained. (Other companies such as Orange have hidden their boycott decisions in economic terms. Others, such as AirBnb have said that it is part of wider policy towards disputed territories). Therefore, in order to prevent other companies from adopting similar positions, it is crucial that supporters of Israel act immediately through the various legal and non-legal channels to pressure Ben & Jerry's to reverse its decision.

Ben & Jerry's is owned by Unilever, its parent company. Under the acquisition agreement, Ben & Jerry's maintains the right to make its own social justice policies, decided upon by an external board. However, Unilever is ultimately responsible for Ben & Jerry's. According to reports, Ben & Jerry's originally intended to end all Israeli operations but was overruled by Unilever. Unilever's CEO Alan Jope has publicly stated that he is opposed to boycotts and that the company remains "fully committed" to doing business in Israel, however, he has given no indication Unilever intends to force Ben & Jerry's to reverse its decision.

For many years, Ben & Jerry's has been the target of a vocal BDS campaign by far-left activists. The director of the company's external board, Anuradha Mittal, has a long history of anti-Israel statements and support for the BDS movement.

Since the boycott decision, there has been a significant pushback from Ben & Jerry's franchisee owners. Recently, the owners of over 30 stores in the United States published an open letter claiming that boycott decision and ensuing controversy has had an "adverse effect" and a "substantial financial cost" to the value of the independently owned franchises.

This brief will examine several legal issues surrounding Ben & Jerry's decision, the legality of business in Judea and Samaria and the potential consequences that this decision may have.

1. Legality of business operations in Judea and Samaria

Companies operating in Jerusalem, Judea and Samaria do so legally, in full compliance with relevant Israeli, domestic and international law. Indeed, national courts in the UK[1], France[2], the US[3] and Canada[4] have upheld the legality of economic operations in Jerusalem, Judea and Samaria. These cases unambiguously state that private economic activities originating in the disputed territories are legal and that international humanitarian law does not apply to private corporations or individuals. No national courts have decided otherwise.

Furthermore, business activities in territories considered to be occupied is ubiquitous and a well-established economic practice. Indeed many of the world's largest firms operate in occupied or disputed territories: Western Sahara, Nagorno-Karabakh, Northern Cyprus and Crimea. Such companies include Siemens, Crédit Agricole, BNP Paribas, Santander, Vodafone, Renault, Veolia, Trelleborg, Wärtsilä, and Turkish Airlines. It has never been suggested by the United Nations or by state attorney generals that these leading companies are violating international law by operating in these territories.

2. Israeli law: prohibition of discrimination based on residency

The Law Prohibiting the Discrimination in Products, Services, and Entry to Places of Entertainment and Public Places ("Law Prohibiting Discrimination") prohibits the discrimination in the provision of goods and services based on geographic location. Therefore, it may be a criminal offense to refuse to provide goods or services based on residency in Judea and Samaria. Someone who has been discriminated against due to their place of residence can file a claim against the discriminating business and be awarded a maximum of 50,000 shekels in damages. While some case law restricts the prohibited discrimination to that occurring solely in the physical business itself, other court decisions have recognized that refusal to deliver to certain areas is prohibited discrimination.[5]

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[1] Richardson v. Director of Public Prosecutions, [2014] UKSC 8 (Eng.)
[2] Cour d'Appel [CA] [regional court of appeal] Versailles, Mar. 22, 2013, No. 11/05331 (Fr.)
[3] US District Court (2005): Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019
[4] Bil'in (Village Council) v. Green Park International Ltd., 2009 QCCS 4151
[5] Beit Shemesh Magistrate Court 57974-01-18; Jerusalem Small Claims Court 16317-11-18

According to the Israeli licensee owner, Mr. Avi Zinger, Ben and Jerry’s demanded that he end distribution to Judea and Samaria as a condition for the renewal of his license. Such a condition may be illegal under Israeli law and therefore Mr. Zinger refused this condition.

Israeli consumers, businesses and distributors that have been discriminated against due to their location in Judea and Samaria may consider filing a claim based on the Law Prohibiting Discrimination against Ben and Jerry’s (the international company, not the Israeli licensee) or Unilever, the parent company.

3. American Anti-BDS Laws

To date, over 30 American states have passed laws against the Boycott, Sanctions, Divestment ("BDS") movement[6]. While the laws differ in various jurisdictions, they prevent non-US persons and companies that engage in the boycott of Israel from contracting with the state government or receiving government funding, as well as public sector pension investments. Compliance with anti-Israel boycotts can result in the loss of tax benefits, business, and stock value opportunities. These laws apply not only to companies incorporated in these jurisdictions, but also foreign companies operating in them.

Twelve states require their public pension funds to divest from businesses that boycott Israel and forbid the state to contract with boycotters. States like New Jersey (where Unilver’s American headquarters are based), Illinois, Florida and Texas may soon divest their public pension funds from Unilever. Other states such as Florida, Georgia, Michigan and Texas may soon be prohibited from contracting with Unilever.

Among the states that have already announced an investigation whether to divest or prohibit contracting with Ben & Jerry’s and Unilever are New York, New Jersey, Maryland, Texas, Florida and Illinois.

[6]Jewish Virtual Library, "State Anti-BDS Laws", https://www.jewishvirtuallibrary.org/anti-bds-legislation and UK Lawyers for Israel, "USA Anti-BDS Legislation" http://uklficharity.com/resources/anti-bds-2, Lawfare Project https://www.dropbox.com/s/um6pn49gvpx0zb8/LP_BDS_Memo_April_2019.pdf?dl=0

4. Federal Anti-Boycott Laws

Federal anti-boycott laws and regulations prohibit, discourage or penalize US persons from engaging in international economic boycotts which are not sanctioned by the United States. There are two distinct anti-boycott regimes, one administered by the US Department of Commerce, the other by the US Department of the Treasury.

The Anti-Boycott Act of 2018, Part II of the Export Control Reform Act of 2018 (ECRA), and the antiboycott provisions set forth in Part 760 of the Export Administration Regulations, 15 CFR parts 730-774 (EAR) are the current federal anti-boycott statutes whose administration and enforcement fall under the purview of the Department of Commerce's Bureau of Industry and Security (BIS).

Federal anti-boycott law rests on the condition of participating in a boycott at the request of a foreign country. Although the United States does not recognize the Palestinian Authority as a "state", American law has drawn a distinction between a state and a country.[7]

The Anti-Boycott Act of 2018

Under the Anti-Boycott Act of 2018, US persons are forbidden in their interstate or foreign commerce activities from complying or supporting any foreign boycott not sanctioned by the US. The prohibited conducts are not only refusing to do business with or in the boycotted country, or with any national, resident or company chartered in the boycotted country; refusing to employ or otherwise discriminating against any US person on the basis of race, religion, or national origin of that person or of any owner, officer, director, or employee of such person, providing information about those conditions, about any business relationship with or in the boycotted country, with any company chartered under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country are conducts that are equally sanctioned with the same

[7] "Country" means the political entity known as a nation" 19 CFR 134.1. For the definition of a "nation" see e.g.: Montoya v. U. S., 180 U. S. 21 ,201 Sup. Ct 45 ,358 L. Ed. 521; Worcester v. Georgia, 6 Pet. 8 ,539 L. Ed. 483; Republic of Honduras v. Soto, 112 N. Y. 19 ,310 N. E. 2 ,845 L. R. A. 8 ,042 Am. St. Rep. 744.

penalties as it is to furnish information about the contributions or the associations in the activities of any charitable or fraternal organization which supports the boycotted country.

Wilfully committing a violation or aiding or abetting in the commission may carry upon conviction, fines that might rise up to $1,000,000; or if a natural person, imprisonment for not more than 20 years, or both.

In addition, violations of the Anti-Boycott Act face civil penalties that may reach $300,000 or twice the value of the transaction, whichever amount is greater, the revocation of exports licenses, and a prohibition to export, reexport, or in-country transfer any controlled items.

<u>The Ribicoff Amendment to the 1976 Tax Reform Act (TRA)</u>

While the anti-boycott program of the Department of Commerce is better known, the effects of the regulations of the Department of Treasury are often overlooked, being identified mostly with the obligation placed upon US taxpayers to report operations in, with, or related to countries that the Department of the Treasury includes on its annual list of countries that may require participation in an international boycott, and with any other country from which they receive a request to participate in a boycott.

Under the Ribicoff Amendment to the 1976 Tax Reform Act (‘TRA’), the term “boycott participation or cooperation” is defined to include any agreement to refrain from doing business in or with the companies, or nationals of a boycotted country.

The Internal Revenue Code [USC. § 999(f)] sets for wilful failures to report participation in an unsanctioned boycott to the Internal Revenue Service (IRS), fines of no more than $25,000, imprisonment for not more than one year, or both.

Unlike the US Commerce Department’s anti-boycott regulations, the Internal Revenue Code (‘IRC’) provisions have a broader scope, reaching the conduct and sales activities of non-US affiliates who are members of a group controlled by a US taxpayer under the IRC, even if that conduct is not associated with an activity in US commerce.

Under the IRC, US taxpayers who cooperate with a foreign boycott are subject to the loss of tax benefits that the US government provides to exporters. These benefits include, among others, the foreign tax credit and the tax deferral available to US shareholders of a controlled foreign corporation ('CFC').

5. Conclusion

Companies operating in Judea, Samaria and east Jerusalem do so in full compliance with relevant Israel, domestic and international law. Ben & Jerry's decision to discriminate against Israeli citizens living in Judea, Samaria and east Jerusalem may expose them to potential anti-discrimination lawsuits.

More significantly, Ben & Jerry's decision violates American state anti-BDS and federal anti-boycott legislation. The company, as well as Unilever, its parent, may soon experience stiff financial consequences of state divestment and loss of contracts. Public officials and stakeholders must act quickly in order to make clear that boycotts of Israel are illegal and carry a steep financial and reputational cost.

This brief should not be construed as binding legal advice. Affected parties should consult their legal counsel before any action is taken.