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The Death of the Secondary Boycott Against Israel

Roger Alford (General Editor) (Notre Dame Law School) · Tuesday, May 25th, 2010

At the recent Northwestern Law School conference on the Israeli-Arab Dispute and International Law I had the good fortune to address one of the few bright spots in current Arab-Israeli relations.

Most international law scholars of the Arab-Israeli conflict seem to know little about international trade, and focus almost exclusively on the laws of war in their discussion of Middle East relations. Therefore when I was choosing my topic for discussion, I decided to analyze the current status of the Arab League boycott against Israel. The secondary boycott, of course, involves the blacklisting of any corporation that does business in Israel.

As a result of the secondary boycott, Arab consumers suffered because they did not have access to the most efficient source of goods and services. Israeli investment also suffered because foreign corporations often chose to sell their products to dozens of countries with hundreds of millions of consumers rather invest in one small country with a few million consumers. Third-country corporations were caught in the middle and forced to make hard choices that they should never have been forced to make.

The good news is that in the past fifteen years the secondary boycott against Israel has died a quiet death. According to official reports from the United States, of the twenty-two members of the Arab League, only three countries–Iraq, Libya, and Syria–continue to enforce a secondary boycott. Even then, it appears that only Syria is serious about it. USTR has recently stated that the secondary boycott "has extremely limited practical effect overall on U.S. trade and investment ties with most Arab League countries." As a practical matter, we are experiencing the death rattle of the secondary boycott against Israel.

One can only speculate about the cause of death, but I would hazard that it has much to do with the legalization of international economic relations. Since the end of the Cold War, thousands of bilateral investment treaties have been signed. Hundreds of those involve Arab countries, with Egypt having signed seventy-nine, Morocco seventy-three, Oman seventy-one, Lebanon forty-nine, Jordan thirty-five, etc. These BITs are unusually significant in that they depoliticize disputes by guaranteeing foreign investors the right to pursue treaty-based investment arbitration. If an investor is blacklisted as a result of the secondary boycott against Israel, then it likely has a viable claim for a BIT violation, such as compensation for conduct tantamount to an expropriation or denial of fair and equitable treatment.

Equally momentous is the binding nature of the WTO rules, which prohibit discriminatory import bans. The Arab League boycott violates WTO rules against MFN treatment and quantitative restrictions. Not surprisingly, none of the twelve Arab League countries that are WTO members enforce a secondary boycott, and only three of them–Kuwait, Saudi Arabia, and the UAE–continue to enforce a primary boycott.

Even the primary boycott is subject to a strong legal challenge before the WTO, but Israel thus far has decided to forego this avenue, concluding that "the boycott right now is on the defensive as a result of working behind the scenes…. We do not wish to politicize the WTO." One may take this at face value, or conclude that Israel fears that such a challenge would require the WTO to finally interpret the national security exception, an ambiguous provision that deserves careful interpretation in a less politically-volatile context.

WTO accession talks will continue to create pressure to eliminate the secondary boycott. In its accession talks, for example, Saudi Arabia confirmed that "the application of secondary and tertiary boycotts had been terminated in practice and in law." Recent WTO decisions involving China's accession commitments now make clear that those promises are subject to legal enforcement. The three secondary boycott holdouts–Iraq, Libya, and Syria–are all seeking WTO membership, and given the nature of accession talks, one can be sure that termination of the secondary boycott will be a precondition of their membership.

That's great news for the Arab street. The importance of promoting foreign investment is particularly acute in the Middle East. The Arab world is facing a ticking time-bomb, with approximately 70 percent of its population under twenty-five years old. It desperately needs to find ways for its growing population to contribute to its economy. For most Arab countries, the commitment to strengthen their economies and develop trade relationships has taken precedence over the desire to enforce a secondary boycott against Israel. Almost nine out of ten Arab countries have concluded that the costs of continued enforcement of the secondary boycott outweigh the benefits.

That's also great news for Israel. It is now enjoying a tremendous influx of foreign investment. The boycott's greatest risk was always that it would impede direct foreign investment into Israel. That fear no longer animates the discussion. In the same year that Israel was at war with Lebanon, it enjoyed record direct foreign investment of over $13 billion.

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