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The Application of US Anti-Boycott Laws: From the Arab League to Ireland

Richard L Shamos*

Introduction

On 24 January 2019, the lower house of the Irish parliament, the Dáil Éireann, passed the Control of Economic Activity (Occupied Territories) Bill (the ‘Irish Boycott Act’),¹ which prohibits Irish residents and companies from purchasing or selling goods and services from or to certain territories in Israel.² The Irish Boycott Act was previously approved by the upper house of the Irish parliament, the Senead Éireann, in July 2018, and is currently awaiting advancement to the final stages of reconciliation and approval. If ultimately signed into law, the Irish Boycott Act would make Ireland the first country outside the Arab League officially to promote a boycott of Israeli goods and services. This legislative development comes at a time when most Arab League countries have abandoned boycotts of Israel in whole or in part,³ and amid deepening economic ties between Ireland, the United States and the European Union in the wake of the

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1 Control of Economic Activities (Occupied Territories) Bill 2018, *Oireachtas Éireann* www.oireachtas.ie/en/bills/bill/2018/6 accessed 24 July 2019.

2 *Ibid* ss 3–9. See also Martin Weiss, ‘Arab League Boycott of Israel’, Congressional Research Service, 25 August 2017. Certain territory in Israel remains under international disputes, which are beyond the scope of this article, and so for the purposes of this discussion should be understood as territory under Israeli control.

3 See n 2 above. ‘One official commented to the Egyptian newspaper *Al-Ahram* that “boycotting Israel is something that we talk about and include in our official documents but it is not something that we actually carry out – at least not in most Arab States”.’

United Kingdom's exit from the European political union.⁴ As a result, owing to anti-boycott laws in effect in the US, the Irish Boycott Act could have a significant impact on American companies, as many American financial institutions have relocated or redomiciled operations to Dublin in order to maintain economic ties to the EU after Brexit. This article examines the history of the Arab League's boycott of Israel and its recent emergence in Ireland, the development of US anti-boycott laws and their relation to international trade law, and the potential repercussions of the Irish Boycott Act on American financial institutions.

The Arab League's boycott of Israel

A brief history

The Arab League was formed in March 1945 towards the end of the Second World War,⁵ and from the outset embraced a policy of boycotting Israeli goods and services with the adoption of Resolution 70 in December 1945, recommending that all Arab states establish national boycott offices and 'refuse to deal in, distribute, or consume Zionist products or manufactured goods'.⁶ After Israel's establishment as a nation state in 1948, this boycott of Israel and Israeli companies was formalised in 1950 under Arab League Council Resolution 357, and in 1951, the Arab League established a Central Boycott Office (CBO) in Damascus to expand the boycott to secondary blacklisted companies and coordinate with the various national boycott offices in each Arab country.⁷ In 1954, the boycott was extended to cover tertiary relationships with blacklisted companies.⁸

4 See n 75 below.

5 While the Arab League was formed in 1945, Arab boycotts of Jewish businesses in the Middle East date back much further, and include several predecessor congressional delegations. Notably, in the 1890s, Arab residents called upon the Ottoman rulers of Palestine to halt Jewish immigration and land sales to Jewish persons, and after the collapse of the Ottoman empire in 1918, the Palestine Arab Congress was formed in opposition to Jewish activities and called on Arabs to boycott Jewish businesses and development. In 1931, the World Islamic Congress followed suit, passing a resolution calling on Muslim countries to boycott trade with Jewish businesses in Palestine. See 'Effects on the Arab League Boycott of Israel on U.S. Businesses', US International Trade Commission (USITC), Publication 2827 (November 1994), 6. See also Sara Regeur, 'Rutenberg and the Jordan River: A Revolution in Hydro-electricity' (1995) 31(4) *Middle Eastern Studies* 691–729.

6 The Arab Boycott of Israel: New Efforts and Old Problems. US Central Intelligence Agency, August 1982 (declassified).

7 See n 5 above, USITC.

8 *Ibid.*

Since its implementation, the Arab League's boycott of Israel has passed through several phases of development. A foundational phase began with the inception of the Arab League in 1945 during which the bureaucratic apparatus for implementation of the boycott was developed, culminating with the Suez crisis in 1956, and subsequent United Nations Security Council Resolution 118, which required 'free and open transit through the Canal without discrimination, overt or covert'.⁹ After 1956, the boycott entered a phase of implementation and routinisation (or in some cases, stagnation), during which the boycott was variably applied, enforced or ignored.¹⁰ This period extended until a series of conflicts in 1973, when the Organization of Arab Petroleum Exporting Countries instituted an embargo on oil shipments to the US and other industrialised nations, and multiple Arab countries invaded Israel during the Yom Kippur War.¹¹ The oil embargos caused the price of gasoline in the US to quadruple,¹² resulting in a recession and huge transfers of wealth from oil importing countries to oil exporting countries.¹³ As a result, Western countries began taking legislative action to counter the effects of the boycott, leading to a period of legislative reaction that extended until the collapse of the Soviet Union in 1989.¹⁴ This period includes the passage in the US of the anti-boycott provisions of the Export Administration Act of 1979 and the Ribicoff Amendment to the Tax Reform Act of 1976,¹⁵ as well as the Camp David Accords in 1978 and subsequent peace accords, which brought about the end of Egypt's participation in the Arab League boycott (and conversely led to an economic embargo of Egypt by the Arab League and the eventual assassination of Anwar Sadat in 1981).¹⁶ From 1989 until 2001, a period of relative peace and prosperity ensured, during which participation in the boycott of Israel was further eroded. Notably in 1993, Israeli and Palestinian leaders entered into the Oslo Accords, which laid the foundation for cooperative economic development,¹⁷ and in 1994, the

9 UN Security Council, Resolution of 13 October 1956, s/3675.

10 See n 5 above, USITC.

11 *Ibid.*

12 Michael Corbett, 'Oil Shock of 1973–74', Federal Reserve Bank of Boston www.federalreservehistory.org/essays/oil_shock_of_1973_74 accessed 24 July 2019.

13 The USITC report estimates this transfer of wealth amounted to \$100bn in 1974, compared with \$20bn in 1972. See n 5 at 5.

14 A number of EU countries, including France, Germany and the Netherlands, have enacted laws making cooperation with unsanctioned boycotts unlawful. *Ibid* 18. See also Clyde Mark, 'The Arab Boycott of Israel', *CRS Report for Congress*, 92-802 F, 10 November 1992, at 6.

15 HR 10612 (94th), Tax Reform Act (Public Law 94-521 – 17 October 1976), www.govtrack.us/congress/bills/94/hr10612/text accessed 24 July 2019.

16 Saad Eddin Ibrahim, 'The Vindication of Sadat in the Arab World', Research Memorandum of The Washington Institute, No 22 (October 1993).

17 Avi Shlaim, 'The Oslo Accord' (1994) 23(3) *Journal of Palestine Studies* 24–40.

Gulf Cooperation Council, including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE), announced that they would no longer enforce the secondary and tertiary boycotts of Israel.¹⁸

This period began to unwind in the early 2000s, when the Second Intifada erupted after the collapse of the second Camp David Accords, and ultimately ended in 2001 with the 9/11 terror attacks. Since 2001, the boycott of Israel has undergone a phase of transformation, during which its mechanics have transformed from instruments of national law (which have been effectively combatted by anti-boycott laws and free trade agreements) to advocacy through non-governmental organisations (NGOs) and intergovernmental organisations such as the UN.¹⁹ This process now appears to be culminating in a new era of legislative action and reaction, with several UN resolutions preceding the Irish Boycott Act,²⁰ as well as legal counter-measures, including a pending bill in the US that would apply US anti-boycott law to UN resolutions,²¹ and a recent resolution by the German Bundestag opposing boycott, divestment and sanctions (BDS) (as defined below) and withdrawing government funding for BDS activities.²²

Mechanics of the Arab League boycott

The Arab League's boycott of Israel consists of a primary boycott, which prohibits economic activity with Israel; a secondary boycott, which prohibits doing business with blacklisted companies that do business in Israel; and a tertiary boycott, which prohibits companies from doing business with companies that have economic relationships with blacklisted companies or Israel.²³ The boycott is implemented by local Arab governments and coordinated through the Congressional Budget Office (CBO), each of which applies this multi-tiered scrutiny of primary, secondary and tertiary relationships with the State of Israel.²⁴ The primary boycott is enforced through certification procedures, which either require that such goods be

18 See n 2 above, at 3.

19 See, eg, Reut Cohen and Avraham Eli, 'North American Jewish NGOs and Strategies Used in Fighting BDS and the Boycott of Israeli Academia', *Israel Studies* Vol 23, No 2, pp 194–216.

20 UN Security Council Resolution 2334 is identified in the debate history as a basis for the Irish Boycott Act.

21 HR 1697, 'Israel Anti-Boycott Act', 115th Congress (2017–2018).

22 Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN, 'BDS-Bewegung entschlossen entgegentreten – Antisemitismus bekämpfen'. Drucksache 19/10191 (15 May 2019).

23 See n 2 above.

24 See n 6 above, at 2.

identified as made outside Israel or prohibit Israeli goods at Arab ports of entry.²⁵

The secondary boycott prohibits Arab nationals and companies from doing business with non-Israeli companies that have a nexus to Israel or otherwise ‘act in support of the economy of Israel’,²⁶ and is generally enforced through a blacklist of such companies. Pursuant to the Arab League’s ‘General Principles for the Boycott of Israel’, a company may be blacklisted if it meets any number of criteria, including economic, political and religious criteria. These criteria include where a company:

- has a main or branch factory, assembly plant or regional head office in Israel;
- licenses its trademark or engages in joint ventures with Israeli companies;
- engages in financial transactions with Israeli companies (eg, through acquisition or sale of shares, bonds or loans);
- supplies advice, technical expertise, products or raw materials to Israeli manufacturers or distributes Israeli products; or
- has Israeli citizens and/or ‘Zionist/Jewish’ sympathisers in policy-making positions or is owned 50 per cent or more by ‘pro-Zionist’ persons.²⁷

A blacklist is maintained by the CBO and is enforced by member states.²⁸

The tertiary boycott extends to companies that do business with blacklisted companies and may be applied, for example, if a contractor is using the services of a blacklisted company.²⁹ Owing to its complexity and the generally inconsistent application of the boycott among member states, the tertiary boycott is less frequently exercised, although it does provide states with flexibility to impose the boycott for ambiguous reasons.³⁰

In practice, firms have been blacklisted for a variety of reasons. Coca-Cola was notably blacklisted in 1966 after licensing a bottling plant near Tel Aviv and so remained until 1991, as was Ford Motor Company, which licensed an assembly plant in Israel.³¹ Where a local boycott authority suspects that a company may be engaged in business with Israel or with a blacklisted company, it will often send a questionnaire seeking further information, and failure to respond to such a questionnaire may result in blacklisting. Companies may be blacklisted for arbitrary reasons as well. Notably, Xerox Corporation was allegedly blacklisted for sponsoring a documentary on Israel, and Disney’s *Snow White and the Seven Dwarfs* was allegedly included

25 Nancy Turck, ‘The Arab Boycott of Israel’ (1977) 55(3) *Foreign Affairs* 472–493.

26 See n 5 above, USITC.

27 *Ibid* 10.

28 See n 2 above.

29 *Ibid*.

30 See n 25 above. See also n 5 above, USITC.

31 *Ibid*.

in the boycott because, in the animated film, the Prince's horse was named Samson.³² The boycotts have reached European companies in addition to American ones, notably during the bank scandal of 1975, when banks in London and Paris discovered that they had been excluded from Eurobond underwritings because of the boycott.³³ French automobile firm Renault was likewise blacklisted in 1981, with varying degrees of compliance throughout the Arab world.³⁴

The economic effects of the boycott have also been extensively studied³⁵ and shown to result in substantial losses to American businesses, and at times to prohibit American companies from doing business with one another.³⁶

The Irish Boycott Act: transitioning to a new boycott order

International law and the boycott

While implementation of a boycott of Israel at the national level has continued to erode among Arab states, promotion of the boycott has intensified at intergovernmental organisations, notably the UN and related NGOs.³⁷ This shift became pronounced during the 2001 World Conference against Racism in Durban, South Africa, which was organised under UN Educational, Scientific and Cultural Organization (UNESCO) auspices, and where NGOs and governments co-opted the UN Conference to target Israel;³⁸ the US eventually withdrew from the conference.³⁹

During the ensuing decade, nation states have tested the limits of international legislative and judicial processes by promoting a transnational boycott of Israel through BDS and through resolutions adopted by UN bodies

32 1984 Survey of Books Relating to the Law (1984) 82(4) Mich L Rev 1053–57.

33 *Ibid.*

34 See n 6 above.

35 See n 5 above, USITC.

36 *Ibid* viii and 23 ('These effects included increased delays in concluding transactions and associated costs, difficulty in obtaining intellectual property protection if blacklisted, and the blacklisting of firms with names similar to those of blacklisted firms').

37 See n 19 above.

38 Luisa Blanchfield, 'The 2009 U.N. Durban Review Conference: Follow-Up to the 2001 U.N. World Conference Against Racism', CRS Report for Congress (20 November 2008).

39 In his withdrawal statement, Secretary of State Colin Powell remarked, 'I know that you do not combat racism by conferences that produce declarations containing hateful language, some of which is a throwback to the days of "Zionism equals racism;" or supports the idea that we have made too much of the Holocaust; or suggests that apartheid exists in Israel; or that singles out only one country in the world – Israel – for censure and abuse.' Statement by Secretary Colin L Powell. World Conference Against Racism. US State Department. Washington, DC, 3 September 2001.

(which involve majority votes with no protections for nations comprising ethnic minorities). Notably, the UN Human Rights Council (UNHRC), which is based on geographical distribution rather than substantive criteria,⁴⁰ has experienced consistent pressure from the Arab League and the Organization of Islamic Cooperation, which together represent close to a third of UN member states and about half of the African and Asia Pacific groups (which in turn hold over half the seats on the UNHRC (26 of 47)),⁴¹ to pass resolutions critical of Israel.⁴² In fact, the UNHRC has sponsored more resolutions critical of Israel than all other nations in the world combined.⁴³ This has caused considerable tension with Western nations, which possess only seven seats on the council and have recently abstained from or voted against UNHRC resolutions,⁴⁴ and in 2018, the US withdrew from the council altogether, citing bias in its decision-making.⁴⁵ In addition to the UNHRC, the UN General Assembly has consistently passed resolutions critical of Israel, with more than 80 per cent of its country-specific resolutions each year exclusively targeting Israel.⁴⁶ Arab states have also consistently sought to have the International Criminal Court sanction Israel,⁴⁷ and in 2012, the UN General Assembly admitted the Palestinian Authority as a non-member observer state in order to enable their participation in International Criminal Court (ICC) proceedings, resulting in the referral by the Palestinian Authority of an investigation of Israel.⁴⁸ While these international resolutions and investigations do not have the force of law, they have in turn laid the foundation for legal action by individual nation states and were cited frequently by Irish politicians in the debates leading up to passage of the Irish Boycott Act.⁴⁹

40 RES/60/251, 'Human Rights Council'. Resolution adopted by the General Assembly on 15 March 2006 accessed 24 July 2019.

41 *Ibid.*

42 UN Human Rights Council's Resolutions www.un.org/unispal/human-rights-council-resolutions accessed 24 July 2019.

43 'The U.N. and Israel: Key Statistics from UN Watch' <https://unwatch.org/un-israel-key-statistics> accessed 24 July 2019.

44 In the US, the US House of Representatives in 2008 (in advance of Durban II) issued House Resolution 1361 articulating an American policy response to the Durban narrative. H Res 1361, US House of Representatives, 23 September 2008.

45 Laura Koran, 'US leaving UN Human Rights Council – "a cesspool of political bias",' CNN www.cnn.com/2018/06/19/politics/haley-pompeo-human-rights-bias/index.html accessed 24 July 2019.

46 See 43 above.

47 Bar Levy and Shir Rozenzweig, 'Israel and the International Criminal Court: A Legal Battlefield', 2016 Strategic Assessment.

48 *Ibid.*

49 See, eg, Dáil Éireann debate – Wednesday, 23 January 2019, and Seanad Éireann debate – Wednesday, 28 November 2018 www.oireachtas.ie/en/debates accessed 24 July 2019.

The Irish Boycott Act

Ireland is a curious incubator for the development of Israeli boycott laws, given its membership of the EU and close cultural ties with the US.⁵⁰ However, viewed within the context of Ireland's history of occupation by the British, one can understand how the Durban anti-colonialist narrative might resonate with the Irish historical conscience. In fact, the Irish Parliament referred to its experience of occupation by the British in its debates surrounding the Irish Boycott Act, and often appealed to UN resolutions and public international bodies as forming a legal basis upon which to forge a national legislative response.⁵¹ While the EU has not taken any measures to restrict trade with Israel (and based on the recent action of the German Bundestag, this seems unlikely),⁵² Ireland stands poised to become the first European nation to participate at an official state level in a boycott of Israeli goods and services.

While boycotts generally share a common mode of operation, there are a number of unique aspects to the Irish boycott of Israeli goods and services. Notably, the Irish Boycott Act does not plainly state its application to the State of Israel, but rather employs definitions that purport to apply to Israeli territory that lies beyond the 1967 borders. Notably, 'occupied territory' is defined by reference to the Geneva Convention, the International Criminal Court, an international tribunal or, lastly, as determined by the Irish Minister for Foreign Affairs.⁵³ Although this reference to international law is intended to provide an aura of legitimacy, these definitions are remarkable in the scale of their deference to foreign bodies of law that are driven by decision-making occurring outside Ireland (and often by undemocratic nations). By incorporating these foreign legal elements into its definitions, the Irish Boycott Act inscribes them into Irish national law and transforms them from pluralistic international policy to actual law – a novel development in the dissemination of the boycott of Israel.

Operationally, the Irish Boycott Act shares similarities to the Arab League's primary boycott, and likewise applies extraterritorially to any domestic company, national or branch office that engages in prohibited trade with Israeli companies. Notably, the Irish Boycott Act prohibits the provision of 'settlement services' or the sale (or importation) of 'settlement goods', which are each broadly defined to include any goods or services that derive from

50 See, eg, 'U.S. Relations with Ireland', Fact Sheet – US Department of State Bureau of European and Eurasian Affairs (29 March 2016) <https://2009-2017.state.gov/r/pa/ei/bgn/3180.htm> accessed 24 July 2019.

51 *Ibid.*

52 See 22 above.

53 See n 1 above, Art 3.

Israeli territory that lies outside the 1967 borders ‘in whole or in part’.⁵⁴ Because Israel does not recognise the 1967 borders as a national boundary, Israeli companies operate freely within the entirety of Israeli national territory, and so any business activity with a company located in Israel is likely to result in a transaction in a ‘settlement service’ or ‘settlement good’. Furthermore, neither the US nor the EU recognises the 1967 borders as a national boundary of Israel, and so any business activity by an Irish entity with a US or EU company that involves Israel would potentially result in a violation of the Irish Boycott Act. In this manner, the Irish Boycott Act shares similarities with the secondary boycott implemented by the Arab League in that it potentially applies extraterritorially to non-Irish companies that do business in both Ireland and Israel.

US anti-boycott laws

Passed largely in response to the Arab League’s boycott of Israel, anti-boycott laws in the US include provisions of the Export Administration Act of 1979 and the Ribicoff Amendment to the Tax Reform Act of 1976.⁵⁵ Under the Export Administration Regulations (EAR), US persons are prohibited from participating in an unsanctioned international boycott.⁵⁶ The provisions of the EAR are implemented by the US Department of Commerce’s Bureau of Industry and Security (BIS), and regulate a long list of goods and services.⁵⁷ These include economic activities in commodities, defence industries, aerospace, technology, software and telecommunications, among others. In addition, the US Internal Revenue Code of 1986, as amended (the ‘Tax Code’), imposes significant federal tax penalties on companies that participate in unsanctioned boycotts.⁵⁸ The provisions of the Tax Code apply to entities in any business with a US tax nexus (there are no prescribed categories of industries), and are enforced by the US Internal Revenue Service (IRS). In addition, the US has generally maintained that secondary and tertiary boycotts are inconsistent with Article I of the General Agreement on Tariffs and Trade (GATT).⁵⁹

The territorial application of each of the EAR and the Tax Code is broad, reaching the non-US subsidiaries and branches of US-based companies, the non-US parents of US operating companies and US investors in non-

54 *Ibid* Art 2.

55 HR 10612 (94th), Tax Reform Act (Public Law 94-521 – 17 October 1976) www.govtrack.us/congress/bills/94/hr10612/text accessed 24 July 2019.

56 Title 15, US Code of Federal Regulations (CFR), Part 760.

57 15 CFR 774.

58 15 CFR 764.3(a) and (b)

59 See n 5 above, USITC.

US entities.⁶⁰ Historically, these anti-boycott provisions of US law have targeted the application of the Arab League's extraterritorial boycott of Israel to US companies. As the Irish Boycott Act similarly purports to apply extraterritorially, such activities would likewise trigger the application of US anti-boycott laws to the Irish business activities of US companies.

As a result, if the Irish Boycott Act were to be signed into law, US financial institutions with operations in Ireland, investors in Irish vehicles and non-US financial institutions with operations in both Ireland and the US could face penalties arising out of their Irish operations, potentially requiring such firms to redomicile their Irish operations to a non-boycotting country. Such an Irish exit in the wake of Brexit poses a significant threat to the stability of international financial markets, and American financial institutions and investors with ties to Ireland should be assessing the scope of such risks.

EAR

Under the EAR, a US person's participation in a foreign boycott is prohibited,⁶¹ and a violation may result in a permanent exclusion from certain cross-border business activities, as well as a fine of up to \$50,000 and five years' imprisonment for 'knowing' violations of the law, and a fine of up to \$1m and ten years' imprisonment for 'wilful' violations of the law.⁶² In addition, US persons are required to report information on boycott requests received during the course of business to the Bank for International Settlements (BIS). The scope of activities that constitute participation in a boycott is broad, and includes refusals to do business, discriminatory actions, the furnishing of information on boycotted countries or blacklisted persons, furnishing information that may otherwise form the basis for discrimination (eg race, religion or nationality) and certain discriminatory practices in banking and finance with respect to letters of credit.

Tax Code

Unlike the EAR, the anti-boycott provisions of the Tax Code do not include a general prohibition on conduct, but rather impose certain specific federal income tax penalties on any person or member of a controlled group that engages in or cooperates with an unsanctioned international

60 15 CFR 760.1 (see 'United States Person') and www.irs.gov/pub/irs-pdf/f5713.pdf accessed 24 July 2019.

61 15 CFR 760.2.

62 See n 58 above.

boycott.⁶³ In particular, Tax Code sections 908, 952 and 995 provide for certain disallowances related to a boycotting entity's income. Under section 999 of the Tax Code, such penalties are imposed on individual companies participating in boycotts, as well as parent or sister companies that are part of a 'controlled group'. As a result, the tax provisions could have potentially sweeping repercussions for conglomerate financial institutions that operate in a country requiring participation in or cooperation with an international boycott as a condition of doing business. Notably, a 1997 study on the effect of US anti-boycott laws indicated that country-level boycott participation rates were inversely related to the magnitude of US penalties, meaning that the US penalties resulted in a drop in economic activity.⁶⁴

Section 999 also imposes a reporting obligation on any person, or member of a controlled group, that 'has operations in, or related to': (1) a country on the anti-boycott list maintained by the Secretary of the Treasury; or (2) any other country in which such person had operations where such person 'knows or has reason to know that participation in or co-operation with an international boycott is required as a condition of doing business'.⁶⁵ Any requests to participate in such unsanctioned boycotts are required to be reported to the IRS on Form 5713, 'International Boycott Report'.⁶⁶ The countries currently included on the anti-boycott list maintained by the Department of the Treasury include Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, the UAE and Yemen.⁶⁷

Activities that qualify as participation in and cooperation with a boycott include any agreement to refrain from:

- doing business with or in a particular country;
- doing business with a US person engaged in business with or in a particular country;
- doing business with any company whose management is made up in whole or in part of individuals from a particular country; and
- employing individuals of a particular nationality, race or religion.⁶⁸

Where a person is found to have participated in an unsanctioned boycott, the Tax Code requires such person to determine and apply to their tax calculations an 'international boycott factor' equal to the fraction of such person's operations in the boycotting country divided by their worldwide

63 26 USC 999(a)(1). (See also 26 USC 7701, which defines a 'domestic' person as a US entity.)

64 James R Hines, 'Taxed Avoidance: American Participation in Unsanctioned Foreign Boycotts', NBER Working Paper No 6116 (July 1997).

65 *Ibid.*

66 See n 60 above, IRS.

67 Treasury Notice of 16 May 2018, 83 FR 22751.

68 26 USC 999(b)(3)(A).

operations.⁶⁹ Section 999 establishes the scope of operations that involve participation in or cooperation with an international boycott, providing that ‘all operations of the taxpayer or such group in that country... shall be treated as operations in connection with which such participation or cooperation occurred, except to the extent that the person can clearly demonstrate [otherwise]’.⁷⁰ A company’s operations within a boycotting country therefore create a presumption of participation in or cooperation with the boycott. As a result, American companies have historically seldom conducted financial operations through boycotting countries, as the boycott factor would be presumed to apply to all business lines affected by such financial operations. Accordingly, financial institutions with widespread European activities conducted through Ireland may risk having a large portion of their worldwide income classified as deriving from operations in a boycotting country, resulting in a high international boycott factor being applied to such income.

Such classification is given effect in Tax Code sections 908, 952 and 995. Notably:

1. under section 908 of the Tax Code, any person or member of a ‘controlled group’, which includes affiliates with 50 per cent or greater ownership,⁷¹ that has participated in or cooperated with an unsanctioned boycott, is required to reduce their foreign tax credits by the international boycott factor;
2. under section 952, the ‘subpart F income’ of such person is increased by a percentage (which amount would not otherwise be subject to current taxation in the US), corresponding to the international boycott factor, resulting in an increase in current taxable income for the relevant taxable year; and
3. under section 995, the \$10m deferral allowed for the qualified export receipts of a domestic international sales corporation (DISC) is required to be scaled down in proportion to the international boycott factor.⁷²

As a result, taxpayers and conglomerates that participate in unsanctioned boycotts may experience a substantial increase in taxable US income during any tax year in which they ‘participate in or cooperate with’ an unsanctioned boycott.

69 26 USC 999(c).

70 26 USC 999(b)(1).

71 26 USC 993(a)(3).

72 26 USC 908, 952 and 995.

Effect of anti-boycott laws on cross-border transactions in Ireland

Owing to the requirements of US regulatory and tax law, if Ireland were to implement the Irish Boycott Act, the effect on US financial institutions and companies with operations in Ireland could be profound. Under the EAR, all US institutions would be required to assess whether their economic or investment activities involve goods and services regulated by the EAR. If this were to be the case, such institutions would be required to redomicile such business lines and ring-fence their activities to occur outside Ireland, or otherwise potentially face steep fines and criminal liability under US law.

The effects under the Tax Code, which covers all economic activities of US persons and is not limited to a list of goods and services, would be far reaching. As a preliminary matter, the implementation of the Irish Boycott Act would appear to be sufficient for the Department of Treasury to identify Ireland, together with the specified participants in the Arab League, on its list of boycotting countries. In the event the Treasury did not do so, Ireland would nonetheless be likely to be deemed as a country for which participation in an international boycott is required as a condition of doing business under Tax Code section 999(a) (1) (B). Accordingly, enactment into law of the Irish Boycott Act would be likely to result in the Irish business operations of all US financial institutions being subject to a presumption of participation in an unsanctioned boycott.⁷³

In the wake of Brexit, Ireland has emerged as one of the most popular jurisdictions for redomiciliation of European operations, with major financial institutions relocating their European businesses to Dublin, and many non-EU financial institutions relying on Irish-based entities and investment companies to access the European market.⁷⁴ Indeed, major American financial institutions, as well as European financial institutions with substantial American operations, have moved their European headquarters from London to Dublin, including Bank of America, Citi, Morgan Stanley and Barclays.⁷⁵ In addition, Ireland has emerged as a favoured domicile of American hedge fund managers, with the Irish collective asset-management vehicle (ICAV) providing a popular vehicle for offering American investment managers' strategies into Europe.

73 'Issuance of New Boycott Guidelines', 43 FR 3455-3470, at 3458 (25 January 1978). See D-1.A. 'All operations of that person... will be presumed to be operations in connection with which there was participation in or cooperation with an international boycott', and D-2.A., 'that person... or that group bears the burden of proof'.

74 'Dublin remains top location for financial services firms post-Brexit', Ernst & Young (7 January 2019) www.ey.com/ie/en/newsroom/news-releases/news-ey-dublin-remains-top-location-for-financial-services-firms-post-brexit accessed 24 July 2019.

75 Arthur Beesley, 'Cautious Dublin reaps benefits of Brexit exodus' *Financial Times* (London 12 February 2019) www.ft.com/content/c5d4b930-1d5f-11e9-b2f7-97e4dbd3580d accessed 24 July 2019.

Such international conglomerates generally rely on tax treaties and preferential terms of the Tax Code, which permit deferral of their worldwide income from being subject to taxation in the US, including the terms of sections 908 and 952. As a result, if the Irish Boycott Act were adopted into law in Ireland, major financial institutions could potentially suffer significant tax losses in the US owing to the application of the international boycott factor to their global operations. Notably, the anti-boycott laws apply to a controlled group of corporations, and the Treasury has issued guidance clarifying that ‘every member of a controlled group of corporations... is required to report under Section 999(a) if any member of the controlled group has operations in or related to a boycotting country’.⁷⁶ In addition, the international boycott factor is applied to a group as a whole, and not solely with respect to a single member of that group, which could potentially result in a cascading disqualification of tax benefits under sections 908 and 952.⁷⁷ Non-US financial institutions with US subsidiaries would likewise fall subject to the negative tax repercussions, which could potentially implicate non-Irish business lines with a nexus to the US. Such a loss of tax deferrals could result in a spike in realised income for the relevant financial conglomerate. As a result, publicly traded US financial institutions should conduct an in-depth review of the potential financial repercussions of the Irish Boycott Act, add relevant risk disclosures to their US securities filings and explore potential outsourcing and ring-fencing of their Irish businesses in order to limit the spread of the adverse tax repercussions.

US investment managers that are utilising an Irish fund structure face a similar quandary when offering fund strategies into Europe. Typically, US investment managers participating in such Irish structures act as a sub-adviser to an alternative investment fund manager (AIFM) of a domestic Irish vehicle, such as a private limited company or ICAV, which involves a sub-delegation agreement between the Irish AIFM and the US manager. Under Treasury guidance, a single provision in the sub-delegation agreement to comply with Irish law could be sufficient to establish such US manager’s participation in or cooperation with an unsanctioned boycott.⁷⁸ Accordingly, US managers should review their contractual documentation with Irish vehicles and AIFMs that they advise to assess potential risks. In the event such managers are unable to overcome the

76 43 FR 3455, see n 73 above.

77 *Ibid* 3461. See F-3.A. ‘The international boycott factor of a controlled group is applied separately under sections 908(a), 952(a) (3), and 995(b) (1) (F) to each individual member of the controlled group.’

78 *Ibid* at 3462. See H.4.A. ‘Entering into a contract that requires compliance with the laws, regulations, requirements or administrative practices of [a boycotting country] constitutes an agreement under section 999(b) (3) [to participate in or cooperate with an international boycott].’

presumption of participation in or cooperation with an international boycott, all of such manager's income from their Irish activities would be subject to the application of the international boycott factor. In addition, where US managers have set up their own AIFMs or Irish fund vehicles, such entities could potentially pass through taxable US income to their US parent entities, and would otherwise require that such US managers and parent entities globally report their activities in the boycott jurisdiction on Internal Revenue Service (IRS) Form 5713.

Finally, the reporting obligations and application of the international boycott factor may likewise apply to US investors in Irish vehicles. The Treasury requires that US shareholders in a corporation, as well as US partners in a partnership, report their business activities in a boycotting jurisdiction.⁷⁹ In the event that the Irish Boycott Act is signed into law, US investors in Irish vehicles may therefore be required to identify and report on their investment activities in Irish-domiciled vehicles as a participation in an unsanctioned boycott, and would potentially be subject to higher levels of taxation in the US on their Irish-source income. Such tax repercussions could result in investor flight from Irish vehicles and the necessity for US investment managers to redomicile their investment funds in a European jurisdiction that does not require participation in an unsanctioned international boycott as a condition of doing business. Given this, managers with funds and operations in Ireland should ensure that the risks of operating in a boycotting jurisdiction are adequately disclosed in their offering documents and engage with investors to limit the repercussions from participation in or cooperation with an unsanctioned international boycott.

Conclusion

As the international community settles into a new phase of legislation and legislative reaction, national laws remain vital to defining the character of the international economic system. While boycotts of the Jewish population in the Middle East predate the formation of the State of Israel, Israeli companies and nationals remain controversial targets for economic sanctions. After undergoing a period of development and decay, the Arab League boycott of Israel has recently entered into a phase of transformation, characterised by a transitioning from national governments to supranational organisations such as the UN and NGOs. With the passage of the Irish Boycott Act, the boycott of Israel appears to be entering a new phase, marked by renewed conflict between national and international laws, which could result in significant shifting in the global financial order.

⁷⁹ *Ibid* 3455–57. See A-4.A. 'Each U.S. shareholder of a foreign corporation must file the section 999(a) report.' See also A-17.A. 'If a partnership has operations in or related to a boycotting country... each partner is required to file Form 5713.'

