Written evidence on the Economic Activity of Public Bodies(Overseas Matters) Bill submitted by UK Lawyers for Israel (UKLFI) (EAPBB01)

Executive Summary

- The Bill justifiably and effectively addresses important objectives, including
    - the need for the UK to have a coherent foreign trade policy;
    - compliance by the UK with international trade law;
    - securing best value for money in procurement and best returns on investment of public funds; and
    - prohibiting divisive use of public authorities to pursue political campaigns of little or no relevance to their functions that promote racist hostility.
- The Bill has been misinterpreted in a published legal opinion by Richard Hermer KC.
- Contrary to the views expressed in that opinion, the Bill complies with the UK's international obligations.

About us

1. This evidence is provided by Jonathan D. C. Turner on behalf of UK Lawyers for Israel (UKLFI), a voluntary association of lawyers who support Israel. Further information about the organisation is available on our website at www.uklfi.com.

2. UKLFI has considerable experience of invoking laws and rules in the UK and other countries to counter boycotts, divestment and sanctions (BDS) directed against Israel. These matters have included (for example):
    - BDS motions or proposed motions by Lancaster City Council,[1] Belfast City Council[2] and Dublin City Council,[3] amongst others;
    - proposed divestment by Merseyside Pension Fund;[4]

[1] https://www.uklfi.com/lancaster-overrules-bds-motion
[2] https://www.uklfi.com/bds-motion-at-belfast-city-council-withdrawn
[3] https://www.uklfi.com/dublin-councils-chief-executive-nixes-israel-and-hewlett-packard-boycott
[4] https://www.uklfi.com/wirral-divestment-proposal-fails

- campaigns for divestment by Local Government Pension Schemes generally in Scotland and in England and Wales;[5]
- proposed procurement advice by the Welsh government promoting BDS;[6]
- BDS resolutions by about 30 student unions at UK universities;[7]
- Boycott decisions by academic and professional associations, including the RIBA and ENMESH;[8]
- a BDS Bill in the Irish parliament;[9]
- proposed divestments by the Norwegian Oil Fund;[10]
- measures preventing Israeli sportspersons competing in international competitions, including judo in Abu Dhabi, badminton in Saudi Arabia,[11] squash[12] and paralympic swimming[13] in Malaysia, and triathlons in Jordan and Saudi Arabia;[14]
- the attempt by the Palestinian Football Association to obtain the suspension of the Israeli Football Association from FIFA.

As a result, we are very familiar with the issues raised by BDS as well as with relevant laws and rules, their application and their limitations.[15]

3. The writer is chief executive of UKLFI and has led most of our work countering BDS. He is a practising barrister specialising in intellectual property, competition and international trade law. He is the co-author of a recent article titled *"Occupied Territories and the Exceptions to WTO and EU Rules on grounds of Public Morality, Public Order and Public Policy"* [2023] EBLR 695,[16] as well as other contributions to the literature in the fields of intellectual property, free trade and competition law. Further information about the writer is available at https://threestone.law/barrister/jonathan-dc-turner/ and www.jonathanturner.com.

4. The writer will be available to give oral evidence to the committee, if requested.

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[5] https://www.uklfi.com/lawyers-challenge-unlawful-interference-by-un-rapporteur-in-uk-pension-schemes
[6] https://www.uklfi.com/welsh-government-to-replace-boycott-proposal-with-wellbeing-guidelines
[7] e.g. https://www.uklfi.com/city-university-students-union-bds-motion-cancelled-following-complaint-to-charity-commission; https://www.uklfi.com/attempt-to-promote-bds-by-the-backdoor-barred-at-warwick-uni; https://www.uklfi.com/aberdeen-university-students-association-overturn-bds-policy
[8] https://www.uklfi.com/research-network-confirms-2021-conference-in-israel-after-boycott-decision-reversed
[9] https://www.uklfi.com/bds-bill-falls-as-irish-parliament-is-dissolved
[10] https://www.uklfi.com/norwegian-oil-fund-warned-not-to-discriminate-against-israel
[11] https://www.uklfi.com/saudi-badminton-players-and-coach-suspended-for-snubbing-israeli-at-tournament
[12] https://www.uklfi.com/squash-championship-cancelled-after-malaysia-bans-israeli-team
[13] https://www.uklfi.com/paralympic-swimming-update
[14] https://www.uklfi.com/first-israeli-competes-in-saudi-triathlon-event
[15] Some recognition of our work is given in footnote 5 of the opinion of Richard Hermer KC discussed below
[16] https://kluwerlawonline.com/journalIssue/European+Business+Law+Review/34.4/20366

Objectives served by the Bill

5. A primary objective of the Bill is to ensure a coherent foreign trade policy of the UK which is not undermined by inconsistent local government policies on foreign trade. There is a very strong public interest in enabling free trade and competition, uncomplicated by a multiplicity of different regimes and restrictions. In view of the importance of the public sector in developed economies, this public interest extends to public procurement, as is recognised by the adoption of a specific World Trade Organisation (WTO) Agreement relating to public procurement and detailed EU Regulations.

6. While it may occasionally be justified to detract from this high public interest by imposing boycotts or sanctions in order to promote other aims of foreign or security policy, this should only be done sparingly and carefully, taking into account all relevant considerations of foreign, security and economic policy. It should also only be done where there is a realistic prospect that the boycott or sanction will be effective, otherwise the economic damage done will be in vain. This will very much depend on the economic clout that can be brought to bear, which it turn is likely to depend on international cooperation.

7. In view of these considerations, it is highly desirable for foreign trade policy to be conducted at the national or regional level, and not at local level. Indeed it may be noted here that the EU has exclusive competence for foreign trade policy, with only very limited exceptions for national or sub-national measures. This is why the BDS Bill introduced into the Irish parliament by Senator Frances Black was illegal, as the Irish government rightly concluded.[17]

8. Another objective of the Bill is or should be to secure compliance with the UK's obligations under international trade law, including the WTO Government Procurement Agreement (GPA), the GATT, the GATS and free trade agreements with other countries including Israel. The UK's commitments of non-discrimination under the GPA apply to a great many UK public bodies. Boycotts by sub-national authorities may also amount to measures of equivalent effect to quantitative restrictions prohibited under the GATT and may contravene rules on non-

[17] See the statements in the Irish Parliament bySimon Coveney TD (Deputy Prime Minister and Minister for Foreign Affairs and Trade) at https://www.oireachtas.ie/en/debates/debate/seanad/2018-07-11/13/ and https://www.oireachtas.ie/en/debates/debate/seanad/2018-07-11/17/, Helen McEntee TD (Minister of State for European Affairs) at https://www.oireachtas.ie/en/debates/debate/seanad/2018-12-05/27/, and subsequently the Michéal Martin TD (Prime Minister) https://www.oireachtas.ie/en/debates/question/2020-07-21/section/7/; and Answer of Vice-President Mogherini on behalf of the European Commission to European Parliamentary Question P-000081/2019(ASW) https://www.europarl.europa.eu/doceo/document/P-8-2019-000081-ASW_EN.html

discrimination in the GATT and the GATS. Exceptions to these rules are limited and are the subject of extensive case-law of the WTO Appellate Body and Panels.[18]

9. A further objective is to secure best value for money in public procurement and best returns on investment of public bodies including pension schemes. In one way or another, the UK national government bears a considerable proportion of the financing of most public bodies and has a corresponding interest in ensuring that money is not wasted. The national government also has the stewardship of the national economy which includes ensuring that public sector borrowing remains affordable. It is reasonable to prohibit local government and other sub-national authorities wasting money in the pursuit of their own foreign policies.

10. Finally, but very importantly, it must be recognised that BDS promotes division and racist hatred. It is typically racist, in singling out Israel, the only Jewish state, and ignoring serious human rights violations elsewhere in the world. Extensive research at US universities, carried out by the Amcha Initiative, has found that BDS directed against Israel promotes hostility against Jews.[19] As one of its many reports concluded:

> *"The best statistical predictor of anti-Jewish hostility, as measured by actions that directly target Jewish students for harm, is the amount of BDS activity".*[20]

11. The long history of persecution of Jews from the Middle Ages to the Nazis has also shown that boycotts of Jews lead to hostility and violent attacks against them. While this may not be logical or even comprehensible to an intellectual person, we have to accept the empirical evidence and take people as they are.

Comments on the opinion of Richard Hermer KC

12. I have reviewed an opinion of Richard Hermer KC of 26 June 2023 which we understand was prepared for members of the Shadow Cabinet. I disagree with many of the points made in it.

13. §6 of the opinion states that *"all public bodies are already prohibited in law from pursuing policies, or taking any actions that are directly, or indirectly, antisemitic or otherwise discriminate against Jewish people."* This statement is too wide. The prohibitions apply only to discriminatory conduct in the exercise of public functions. Moreover, indirect discrimination can be difficult to prove and is negated

[18] Discussed in the article cited in §3 above
[19] https://amchainitiative.org/reports/
[20] https://amchainitiative.org/wp-content/uploads/2016/03/Antisemitic-Activity-at-U.S.-Colleges-and-Universities-with-Jewish-Populations-2015-Full-Report.pdf, p19

if the public body shows that it is a proportionate means of achieving a legitimate aim.

14. §9 of the opinion claims that clause 1 of the Bill is badly drafted and suggests two possible interpretations. In my view, clause 1 of the Bill is clear and both of the interpretations postulated in the opinion are wrong.

15. The key substantive provision in clause 1(2) contains terms that are defined in the subsequent clauses 1(3)-1(6). It should be noted that the definition of *"territorial consideration"* in clause 1(3) is independent of the definition of *"foreign state conduct"* in clause 1(4).

16. In order to get a clear understanding of clause 1(2) it is helpful to write into it the definitions in clauses 1(3) and 1(4). Since this results in a long sentence, it is also then helpful to substitute *"which indicates that"* for the phrase *"which would cause a reasonable observer of the decision-making process to conclude that"*. The result is as follows:

> *"The decision-maker must not have regard to a consideration that relates specifically or mainly to a particular foreign territory in a way that indicates that the decision was influenced by political or moral disapproval of the conduct or policy of a foreign state authority".*

17. The first interpretation postulated by Mr Hermer is that

> *"the Bill is directed at the policies of foreign governments only in so far as they relate to territorial disputes, or disputes limited to particular territories, whether they be internal or external territories to the foreign government".*

This is too narrow, since there is no restriction on the kind of conduct or policy of a foreign state authority that could be the subject of apparent disapproval. The reference to *"a particular foreign territory"* is in the separate criterion regarding a consideration to which the decision-maker has regard.

Thus, for example, clause 1(2) applies to a decision not to procure from Israeli companies because of Israeli military action in Gaza. The *"territorial consideration"* condition is met because the decision maker has regard to a consideration that relates specifically to Israel. The *"foreign state conduct"* condition is met because the decision maker is evidently influenced by the conduct of the Israel Defence Forces.

18. The second interpretation postulated by Mr Hermer is that

"the Bill prohibits any relevant decisions based on moral or political disapproval of a foreign government".

This appears to be too broad, since it omits the condition for the prohibition to apply that the decision-maker has regard to a *"consideration that relates specifically or mainly to a particular foreign territory"* (unless this is included in the words *"relevant decisions"*).

19. Mr Hermer's opinion goes on in its §§13-16 to express the view that it is extraordinary and unacceptable for a national government and parliament to restrict sub-national bodies from taking procurement and investment decisions on the basis of considerations relating specifically to a particular foreign territory and influenced by political or moral disapproval of the conduct or policy of a foreign state authority. It is suggested that this would be a "profound change".

20. This is not correct:

    (a) As matters stand, local authorities in England, Wales and Scotland are required by section 17 of the Local Government Act 1988 to exercise procurement functions without reference to the country or territory of origin of supplies to contractors or the location in any country or territory of the business activities or interests of contractors.

    (b) A succession of EEC and EU Directives and UK regulations implementing them have required UK public authorities to make procurement decisions purely on the basis of technical and commercial considerations, subject only to limited exceptions.

    One of these exceptions is *"where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable"*. The EU Court of Justice has pointed out that the purpose of this exception is to enable contracting authorities to exclude operators which have proven unreliable[21] and that a specific and individual assessment of the conduct of the economic operator concerned must be carried out.[22]

    In my view, this exception does not allow exclusion of tenders by companies on the ground that they or connected companies operate in occupied territories, since this does not make them unreliable to carry out procurements

[21] Cases C-41/18 *Meca* at §§29-30 and C-267/18 *Delta* at §26
[22] Case C-465/11 *Forposta*

in the UK. On the contrary operating in occupied territories is a common commercial practice carried on by many leading international businesses.[23]

(c) The UK has accepted international obligations under the GPA to ensure that many of its public authorities do not discriminate against suppliers, services or goods of other States Parties to the GPA.

(d) At common law, non-financial factors may only be taken into account in investment decisions by trustees of pension funds if (1) the trustees have good reason to think that scheme members would share the concern and (2) the decision would not involve a risk of significant financial detriment to the fund.[24]

21. In any case, for the reasons expressed in §§5-11 above, it is entirely rational for a national government and parliament to reserve foreign trade policy to be determined at national or even supra-national level.

22. §17 of Mr Hermer's opinion objects to the reference in clause 1(2) to the conclusion that would be drawn by a reasonable observer. It is said that this *"adds an additional layer of uncertainty and capriciousness"*. However, it seems to me that this formula has justifiably been used to make the test more objective than it would be if it referred to the subjective intention of the decision-maker. Similar references to the reasonable observer are widely used throughout English law. It is also consistent with the purpose of this legislation of securing community cohesion, since from this point it matters how the decision is perceived.

23. The opinion goes on to discuss the power accorded by clause 3 of the Bill to the Secretary of State, subject to affirmative resolutions of both House of Parliament, to make additional exceptions to the substantive prohibition in clause 1. The opinion claims in §21 that this *"infantilises all other public bodies"*. However, in my view, for the reasons set out above, it is rational and legitimate for a national government and parliament to determine that foreign trade policy should be conducted exclusively at the national level – not because local councils are infantile, but because operating at national level allows foreign trade policy to be conducted with consistency, clout and cost effectiveness.

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[23] Eugene Kontorovich, *Economic Dealings with Occupied Territories* 53 Columbia Journal of Transnational Law 584 (2015) and *Some State Practice Regarding Trade With Occupied Territories* in Antoine Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories* (London & New York; Routledge, 2020); Kohelet Policy Forum, *Who Else Profits* (2017) and *Who Else Profits, Second Report* (2018) https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2017/06/WhoElseProfits_most-final-19.6.pdf and https://euiha41fnsb2lyeld3vkc37i-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/WhoElseProfits-e-version.pdf;

[24] Law Commission, *Fiduciary Duties of Investment Intermediaries*, Law Com No. 350, HC 368 (30/6/2014) §6.34

24. In §22 the opinion makes the unsubstantiated assertion that *"local authorities in the UK played a prominent and powerful role in the South Africa boycott campaign".* Even if this were true, it is very doubtful that this had a material impact. On the contrary, it has been reported that in spite of, and because of, her opposition to sanctions, Margaret Thatcher was able to play and did play an important role in ending apartheid in South Africa, in a way that only a national leader could.[25]

25. In §23 the opinion complains that the Schedule to the Bill does not provide comprehensive subject-matter exemptions. However, this objection does not appear to have any substance, since the Bill would give the national government power to add exemptions, subject to affirmative resolutions of both Houses of Parliament, when it appears necessary or desirable to do so.

26. The opinion then discusses clause 3(7) of the Bill in its §§24-30. This clause would exclude from the general power of the Secretary of State to add exemptions from the substantive prohibition in clause 1 the power to add exemptions *"relating specifically or mainly to (a) Israel, (b) the Occupied Palestinian Territories and (c) the Occupied Golan Heights."*

27. §25 of the opinion criticises this for singling out Israel and territories under Israel administration. It is understandable that the promoters of the Bill thought it desirable to include this provision, given the persistence and intensity of racist BDS campaigns targeting Israel.

28. In any case, the assertions in the following paragraphs of Mr Hermer's opinion are incorrect. In §26 it is asserted that clause 3(7) is difficult to reconcile with British policy in favour of a two-state solution based on the 1967 lines. However, consistent British policy has been to support a two-state solution by means other than trade sanctions. Furthermore, the opinion is wrong to claim that the alleged occupation by Israel of these territories is *"deemed an unlawful occupation in international law"*. This does not accord with the position of the UK government or the views of most international lawyers.

29. There is also a suggestion in §26 of the opinion that clause 3(7) of the Bill would equate the "Occupied Palestinian Territories" with Israel. However, the terms of clause 3(7) themselves distinguish between Israel and territories now under Israeli control beyond the 1949 armistice lines. Statements by the FCDO and other conduct of the UK government also regularly distinguish between Israel and these territories. While §5 of the non-binding UN Security Council Resolution 2334 (which is not actually mentioned in the opinion) calls upon States *"to distinguish, in their relevant dealings, between the territory of the State of Israel and the*

[25] https://www.theguardian.com/world/2013/apr/10/margaret-thatcher-apartheid-mandela

territories occupied in 1967", it does not specify any particular manner of doing so.

30. §27 of the opinion presents a hypothetical situation in a way that suggests a degree of animosity on the part of the writer. He seems to support collective punishment by the imposition of sanctions against a whole community if some of its members have been hostile or violent towards a neighbouring community. Furthermore, the points made in this paragraph of the opinion are fallacious:

    (a) Under existing legislation, a local authority would be compelled to accept a tender without reference to the territory of origin, in the absence of national trade sanctions. So the Bill does not remove any existing power of local authorities.

    (b) The Bill would only apply to a decision that is apparently influenced by disapproval of the conduct or policy of a foreign state authority, so it would not prohibit a decision apparently influenced only by disapproval of violent conduct of individuals.

    (c) National government can impose trade sanctions, if and when appropriate, and this will remain the position if the Bill is enacted. The opinion is therefore wrong to say that the Secretary of State will be unable to do anything about it.

31. §§28-30 of the opinion claim that the Bill would breach the legal obligation of States to see to it that any impediment to the exercise by the Palestinian people of its right to self-determination is brought to any end, as identified by the International Court of Justice (ICJ) in its non-binding Advisory Opinion in the case titled *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[26] However,

    (a) The suggestion that trading with Israeli communities in the West Bank or East Jerusalem is in some way an impediment to the exercise by the Palestinian people of its right to self-determination is not substantiated and has not been accepted by the UK or other States. On the contrary, many Palestinians are employed by Israeli businesses in the West Bank and East Jerusalem at much higher salaries than they would be paid by Palestinian employers, thereby contributing substantially to the Palestinian economy.[27]

[26] Case No. 131, ICJ Reports (2004) p136 at §159

[27] See Danny Tirza, "The Effects of BDS and Denormalization on West Bank Industrial Zones" in Dan Diker (ed) "Defeating Denormalization: Shared Palestinian and Israeli Perspectives on a New Path to Peace", Jerusalem Center for Public Affairs, 2018

(b) Application of a right of self-determination requires the will of the peoples concerned to be fully established.[28] This is recognised in the Oslo Accords which provide the internationally approved framework for enabling Palestinian Arabs to exercise their entitlement to self-determination. A central part of this framework is the election of a Palestinian Authority to represent the Palestinians and express their will.[29] Unfortunately, there has been no election of the Palestinian Authority since 2006. The lack of a properly representative body is currently a fundamental impediment to the exercise by Palestinians Arabs of a right of self-determination. This is not a hypothetical point: an opinion poll conducted by the Palestinian News Agency, SHFA, in late 2021 found that 93% of Arabs in East Jerusalem prefer the continuation of Israeli rule of the whole city.[30]

32. §§31-36 of Mr Hermer's opinion criticise clause 4 of the Bill, which would prohibit a person subject to clause 1 from publishing a statement indicating that the person intends to act in a way that would contravene clause 1 or would intend to do so if it were lawful. The opinion does not consider the purpose of this clause, which appears to be to address measures of the kind considered in the *Jewish Human Rights Watch* case[31] such as resolutions to boycott products from a particular territory *"insofar as legal considerations allow"*. Such measures are liable to have an adverse impact on community cohesion and they can also restrict procurement or investment in practice through confusion or deterrence.

33. The opinion considers that clause 4 of the Bill is incompatible with Art. 10 of the European Convention on Human Rights. However, clause 4(1) would only apply to *"A person who is subject to section 1"*. Clause 4(2) specifies that *"A person is "subject to section 1 if section 1 is capable of applying to a decision made by the person"*. In accordance with clause 2(1) of the Bill, clause 1 applies to *"a procurement decision or an investment decision in relation to which the decision-maker is subject to section 6 of the Human Rights Act 1998 (acts of public authorities)"*. Thus clause 4 only restricts expression by public authorities that are not protected by the European Convention on Human Rights.[32]

34. §37 of the opinion criticises clause 7(8) of the Bill on the ground that it would compel public bodies to provide legally privileged documents to enforcement authorities. However, I doubt that this is the intent or effect of this clause, which

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[28] See §4 of Opinion No. 4 of the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission), English translation published by the University of Ljubljani at https://www.pf.uni-lj.si/media/skrk_mnenja.badinterjeve.arbitrazne.komisije.1_.10.pdf

[29] Oslo II Accord, 8th and 9th Recitals and Arts. I-IX

[30] https://www.shfanews.net/post/102082

[31] *Jewish Rights Watch v Leicester City Council* [2016] EWHC 1512, [2018] EWCA 1551

[32] European Convention on Human Rights, Art. 34, *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2003] UKHL 37 at §8

merely specifies that providing information to an enforcement authority does not breach any obligation of confidence or other restriction on disclosure. It does not follow that an enforcement authority is entitled to insist on the disclosure of legally privileged material.

35. §38 of the opinion objects to clause 6(6) of the Bill, which allows the Secretary of State, subject affirmative resolution of both Houses of Parliament, to change, create or remove the enforcement authorities empowered to enforce the substantive provisions of the Bill. In my view this provision is quite unexceptional. It does not confer a power to alter the substantive provisions themselves and it does not affect the jurisdiction of the Administrative Court to enforce the substantive provisions or to review the conduct of enforcement authorities.

Conclusion

36. The Bill justifiably and effectively addresses important objectives and complies with the UK's international obligations.

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