Israel’s next legal battle

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It seems that once a month the headlines focus on a new international legal challenge facing Israel. In November 2019, the headlines announced the European Court of Justice’s ruling requiring the labeling of Israeli products from over the Green Line. In December 2019, it was the International Criminal Court prosecutor’s decision on “the Situation in Palestine.”

Here is the next challenge, which so far seems to have escaped the attention of the pro-Israel world:

An “all-star” team of European BDS (boycott, divestment and sanctions) groups, under the banner #StopSettlements, has just raised 10,000 euros to bring a case to the European Court of Justice (ECJ) demanding that the EU ban the import of all Israeli goods from Judea and Samaria.

And who is representing them? None other than Gilles Devers, the French lawyer who submitted the Palestinians’ first complaint against Israel to the ICC in 2014.

In the post-Brexit era, the EU is likely to be even more protective of its exclusive competencies over trade-related issues. Since the EU does not currently support a ban on settlement products, this means that initiatives like the Irish bill criminalizing their import are likely to be ultimately unsuccessful.

Unless the EU changes its position.

If it does, this would have a Europe-wide effect. And this is precisely what the BDS groups are aiming for.

The European BDS coalition, led by the lesser-known but not less important European Coordination of Committees and Associations for Palestine, submitted in July 2019 a European Citizens Initiative petition, calling for the regulation of “commercial transactions with an occupant’s entities based or operating in occupied territories by withholding products originating from there from entering the EU market.” To translate from EU-ese: An EU-wide settlement boycott.

The European Commission responded, “The proposed citizens’ initiative falls manifestly outside the framework of the Commission’s powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.” To translate from EU-ese: No.

The BDS coalition is now turning to the ECJ, the same court that recently affirmed the labeling requirement, asking it to require the European Commission to adopt the BDS initiative.

While the BDS groups have retained Devers, the legal legwork is being led by a new European BDS lawfare NGO, which pro-Israel advocates will likely be hearing from quite a bit in the coming years. The NGO is the European Legal Support Center (ELSC), set up in January 2019 by Dutch and Palestinian BDS-promoting groups to defend BDS in Europe. The NGO is explicitly modeled on ‘Palestine Legal’, the US legal group leading the charge to defend BDS on campus and challenge US state counter-BDS legislation.

Among the ELSC’s goals is challenging the growing international consensus around the International Holocaust Remembrance Alliance (IHRA) antisemitism definition. It aims to defend “activists and institutions against false and defamatory accusations of antisemitism... including legal challenges of the validity of the IHRA Working Definition of Antisemitism.”

The ELSC focused in its first year on challenging the counter-BDS measures adopted by Germany’s leading cities. It now is expanding its activity to Brussels.

TO BE CLEAR, the legal claims behind product labeling and behind a settlement ban are distinct. The EU has repeatedly stated that while it believes products from Jewish communities in Judea and Samaria should be labeled, it does not favor preventing their import. Nevertheless, it is hard to predict how the ECJ may rule in such a case, or what kind of processes the ECJ case may set in motion over the course of the next several years.

An important factor will be the position taken by the EU’s newly installed High Representative for Foreign Affairs and Security Policy (i.e. foreign minister) Josep Borrell. The former Spanish foreign minister, from Spain’s Socialist Workers’ Party, has been highly critical of the Israeli government, while lauding Iran. Nevertheless, it remains to be seen whether he will adopt a more constructive or more hostile attitude towards Israel than his predecessor, Federica Mogherini.

However, one development should already concern Israeli policy-makers. Over the last several years, Israel’s enhanced relations with central, eastern and southern European states have enabled it to derail several anti-Israel decisions on the EU-level, due to the requirement for unanimous decision-making. The Mission Letter sent by the European Commission president to Borrell upon the foreign policy chief’s entry into his new role signals a weakening of this requirement.

The EU Commission president’s letter declares: “We must overcome unanimity constraints that hamper our foreign policy. When putting forward proposals, you should seek to use the clauses in the treaties that allow certain decisions on the common foreign and security policy to be adopted by qualified majority voting.”

Among the steps that should be taken in response to this new BDS legal challenge, as well as to the possibility that the UN Human Rights Council will soon publish its blacklist, is to encourage US counter-measures. Several of these measures are included in the bi-partisan Israel Anti-Boycott Act, which would expand US counter-boycott legislation from the Arab League boycott to boycotts on the part of “international governmental organizations.”

Unfortunately, this legislation does not seem likely to advance in Congress any time soon, so other avenues for pursuing such measures should be explored.

Israel’s political and public diplomacy efforts in Europe should be redoubled. The attitude of some that “Europe is lost” is counter-productive and inaccurate.

In addition, to meet the upcoming challenges on the EU level, better coordination is needed between the pro-Israel organizations operating in the EU arena, as well as between these organizations and the relevant Israeli government bodies. While European BDS groups seem to be improving their coordination, the activities of the multitude of pro-Israel bodies operating in Brussels have more often been marked by competition than cooperation.

It would be nice, of course, for Israel not to have to deal with a new legal challenge every month. But given the continuing determination of the antisemitic BDS movement, it is better to prepare the day before than the day after.