

# Boycott, Divestment, Sanctions

Winning justice for the Palestinian people



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# Preface

**The catastrophe facing the Palestinian people is the defining global justice issue of our time. A third generation of Palestinian children is now being brought up in refugee camps inside and outside Palestine, living in chronic poverty and denied the right to return to their family homes. Hundreds of thousands more Palestinians suffer discrimination over access to public services, land rights and employment within Israel itself.**

For those living in the Occupied Palestinian Territories, the situation is critical. Israel's siege of Gaza has condemned its 1.5 million inhabitants to levels of poverty more commonly associated with sub-Saharan Africa – a humanitarian disaster with no end in sight. In the West Bank, the expansion of Israeli settlements, the continued construction of the Apartheid Wall, the military closure of the Jordan Valley and the annexation of East Jerusalem are creating an irreversible reality of permanent Occupation.

All the above actions are illegal under international law. Yet no Western government has been willing to call Israel to account for its crimes. Instead, the US, UK and other governments have consistently rewarded Israeli aggression with economic benefits and closer political ties. Support for 'our ally' in the Middle East has taken precedence over Palestinian rights at every turn.

This is why it is up to ordinary people around the world to take action. War on Want

supports the call from Palestinian civil society to build a global movement of boycott, divestment and sanctions against Israel until it complies with international law and meets the following three demands: an end to the Occupation; the right of return for Palestinian refugees; and equal rights for Palestinian citizens of Israel itself.

War on Want has worked in Palestine for over 30 years, building partnerships with popular movements and workers' organisations fighting for the rights of the Palestinian people. We have run hard-hitting campaigns to challenge UK and EU support for Israel's policies of aggression, and we have taken action to defend Palestinian human rights activists when they have been targeted for repression.

We call on all those who believe in human rights, justice and the rule of law to join us in this cause. Millions of ordinary people around the world took action to isolate the apartheid government in South Africa, and its brutal regime was defeated. War on Want believes that the global community has a similar duty to support the Palestinian people in the struggle for their rights.



**John Hilary**  
**Executive Director**  
**War on Want**

# Crisis in Palestine

02

Boycott, Divestment, Sanctions **Winning Justice for the Palestinian people**

**Palestine is in crisis. Today Palestinians are subjected to daily human rights abuse and live in crushing poverty in refugee camps and under Israeli occupation. The United Nations estimates that 60% of the population of the Occupied Palestinian Territories lives in poverty, due in large part to the devastation of the Palestinian economy by Israeli policies of control and closure.<sup>1</sup>**

In the Gaza Strip, strangled by an Israeli military and economic siege, four out of five people are dependent on food aid.<sup>2</sup> In the Jordan Valley, Palestinians struggle on parched land, living in mud huts and under plastic tents facing daily battles for water to survive. Millions of Palestinian refugees and displaced people face a future of uncertainty and fear. Thousands of Palestinian political prisoners are languishing in Israeli jails, many of them held illegally under 'administrative detention' without any charge.<sup>3</sup>

At the same time, Israel is forcibly displacing thousands of Palestinians from their homes in the Naqab (Negev) desert, as well as developing settlement expansion programmes in East Jerusalem which will confiscate more Palestinian land. Those people who have risen up against such policies have been targeted for intimidation, arrest or worse. In particular, Israel is intensifying its repression against Palestinians who resist the continued building of the illegal Apartheid Wall in the West Bank.

The situation in Israel and Palestine is not an intractable conflict between two equal sides. It is an Occupation by a powerful military state, armed and supported by the West, against an impoverished, stateless and displaced people. This report outlines the key issues facing Palestinians today and provides practical examples of how ordinary people around the world can support the Palestinian struggle for justice.



**Palestinians face daily human rights abuses under the Occupation**







A boycott action in Waitrose organised by War on Want for the global day of BDS action in March 2010

03

Photo: Jonathon Oppong-Wiafe



## ACT NOW BOYCOTT, DIVESTMENT, SANCTIONS

Palestinians have suffered from Israeli repression for over 60 years. Yet governments across the world have not only allowed Israel to act with impunity; they have actively rewarded Israeli aggression with economic benefits and closer political ties. The response from grassroots Palestinian civil society has been to call on people of conscience around the world to join them in a global boycott, divestment and sanctions (BDS) movement against Israel until it complies with international law.

Boycotts can be academic, cultural, sporting or focused on consumer goods. In the UK, the primary target of the boycott has been consumer goods produced in Israel, with a particular focus on goods from Israel's illegal West Bank settlements.

Divestment means identifying corporations which are complicit in the Occupation and ensuring universities, pensions and other public funds are not invested in such companies. Targets in the UK have included Caterpillar, which has supplied the Israeli military with

armoured bulldozers for the demolition of Palestinian homes, and Veolia, which is involved in the building of a tramway linking Jerusalem to illegal Israeli settlements.

Sanctions are a mechanism to express disapproval for a country's actions at a governmental level. Current campaigns have called for a suspension of EU trade preferences to Israel and an embargo on all arms deals between Israel and the UK.

Since its founding in 2005 by a coalition of over 170 Palestinian civil society organisations, the BDS movement has gone from strength to strength. It is now endorsed by trade unions, student unions, faith groups and prominent writers and artists all over the world. War on Want is a signatory to the BDS call and works in partnership with the Palestinian Boycott National Committee to mobilise action against companies complicit in Israel's crimes against the Palestinian people.

Palestinian BDS National Committee website: [www.bdsmovement.net](http://www.bdsmovement.net)



# Gaza: the world's largest prison

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***“Tragically, the international community largely ignores the cries for help, while the citizens of Gaza are treated more like animals than human beings... Never before in history has a large community been savaged by bombs and missiles and then deprived of the means to repair itself. The responsibility for this terrible human rights crime lies in Jerusalem, Cairo, Washington, and throughout the international community.”***

*Jimmy Carter, former US President, June 2009<sup>4</sup>*

The Gaza Strip is one of the most densely populated regions on earth. Approximately 1.5 million people live on a piece of land which is just 40km long and 9km wide.<sup>5</sup> Surrounded by a concrete and steel barrier built by Israel in the 1990s, Palestinians in

Gaza are trapped in the world's largest prison, with any movement of goods and people in and out of the strip severely restricted by Israel.

*“Everybody knows that we are not going to sort out the problem of the Middle East peace process while there is, effectively, a giant open prison in Gaza.” David Cameron, UK Prime Minister, June 2010<sup>6</sup>*

## **Under siege**

Since 2000, the Gaza Strip has been subject to a series of Israeli closure policies designed to isolate and restrict the movement of people and goods.<sup>7</sup> Israel imposed further economic restrictions on Gaza after Palestinians elected Hamas into government in 2006. When Hamas took



**A Palestinian home in Gaza is reduced to rubble after the Israeli assault in 2008-09**







control in 2007, the Gaza Strip was placed under military siege by Israel – blockaded by land, sea and air.<sup>8</sup>

The siege of Gaza has been identified as a war crime and a crime against humanity, as it punishes innocent civilians for offences they have not committed. As Richard Falk, the UN Special Rapporteur for the Occupied Palestinian Territories, has stated: “Such a massive form of collective punishment is a crime against humanity, as well as a gross violation of the prohibition on collective punishment in Article 33 of the Fourth Geneva Convention.”<sup>9</sup>

### Humanitarian disaster

The siege of Gaza has created a humanitarian catastrophe, crushing its economy. Foreign trade with Gaza is banned by Israel, and food and medical supplies are restricted. The list of goods Israel allows into Gaza is so punitive that even basic goods such as pasta, lentils, nappies and schoolbooks have been denied. Essential medical equipment and medicines are severely restricted, as are construction materials such as cement, glass and wood.<sup>10</sup> Israeli authorities have been known to refuse seriously ill patients permission to leave Gaza to receive treatment in medical centres in the West Bank or Israel.<sup>11</sup>



The lack of materials to maintain essential infrastructure has resulted in over 90% of Gaza's water being unfit for human consumption, due to high levels of nitrates and sewage in the water system.<sup>12</sup> According to the United Nations Environment Programme, this has led to an increase in 'blue baby syndrome', with children born discoloured from a form of anaemia caused by the high levels of nitrates in the water supply.<sup>13</sup>

*"The blockade of Gaza by Israel has been unacceptable, unnecessary and counterproductive... It has worsened conditions of life for one and a half million*

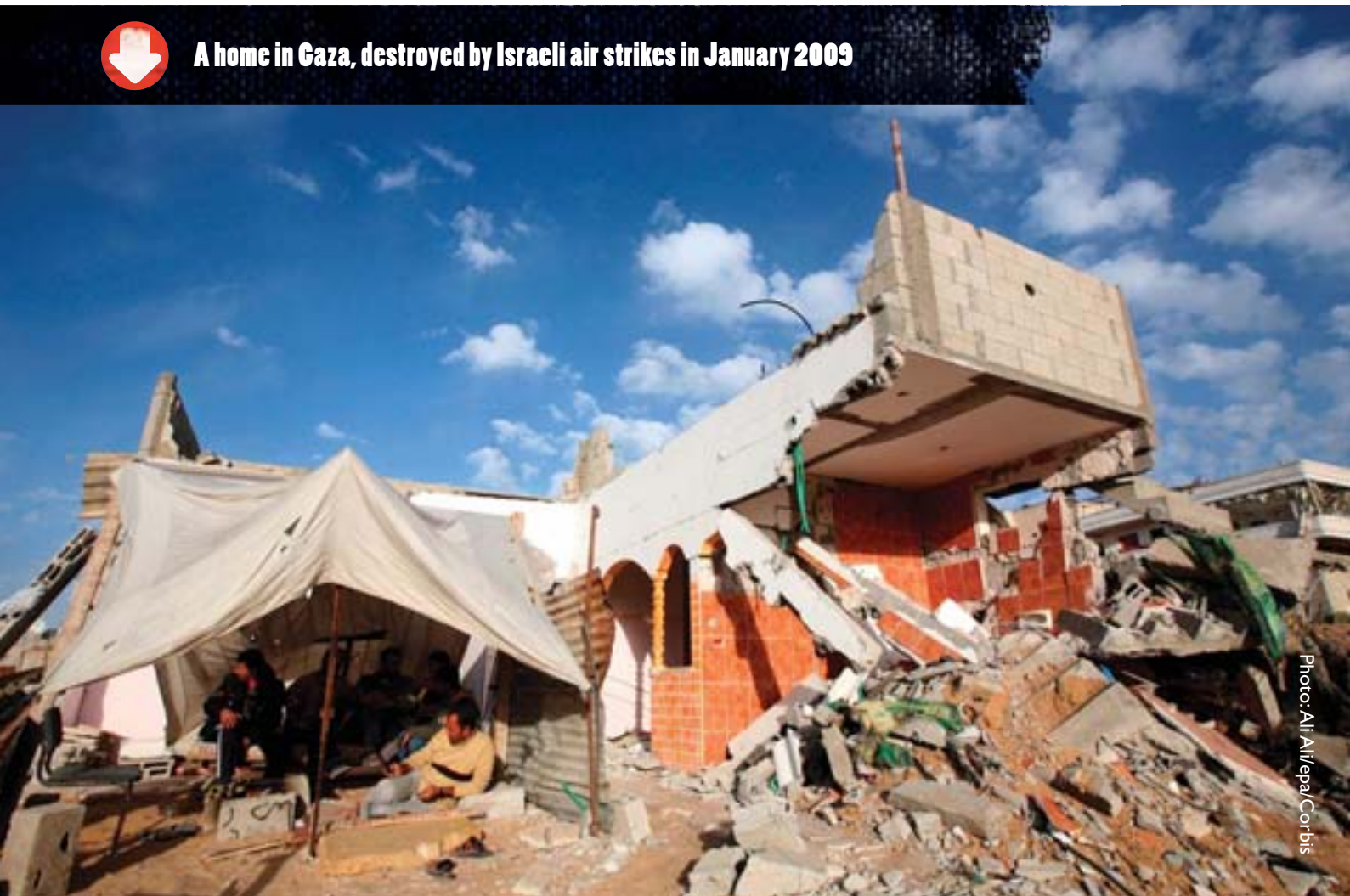
*Palestinians, deepened poverty and food insecurity, prevented reconstruction, and increased aid dependence by destroying livelihoods and economic activity."* John Holmes, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, May 2010<sup>14</sup>

### War crimes

Israel's war crimes in Gaza have not been limited to the siege. In December 2008, Israel embarked on a three-week assault on the people of Gaza codenamed Operation Cast Lead. The attack left over 1,400 Palestinians dead, including more than 300 children, and over 5,000 wounded.<sup>15</sup>



**A home in Gaza, destroyed by Israeli air strikes in January 2009**





During the attack, vital infrastructure such as schools, hospitals and UN buildings were targeted. Public buildings were attacked, including the Palestinian Legislative Council, the Gaza Central Prison, government ministries and every police station in the Strip. Homes, farms, fields and orchards were bulldozed by missiles and anti-tank mines, and the Israeli military deliberately targeted densely populated areas.

According to the report of the United Nations Fact-Finding Mission led by Justice Richard Goldstone (former chief prosecutor of the international war crimes tribunals for Yugoslavia and Rwanda), Israeli

soldiers used Palestinian civilians as human shields.<sup>16</sup>

The Goldstone Report found evidence that both the Israeli military and Hamas committed war crimes and crimes against humanity during the three weeks of the assault. Yet Israel experienced no international sanctions in response to its atrocities. The British government refused to condemn Israel's actions during the assault on Gaza, and subsequently abstained from a crucial vote at the UN to endorse the Goldstone Report. Instead, the UK continues to sell arms to Israel, providing it with the materiel with which to carry out its acts of aggression.

## **ACT NOW** END THE SIEGE OF GAZA

The siege of Gaza is one of the most brutal manifestations of the Israeli Occupation.<sup>17</sup> Whilst governments around the world have failed to take action against the siege, in recent years there have been several attempts by international civil society groups – including the Viva Palestina convoys, the Gaza Freedom March and the Free Gaza Movement – to break the siege by delivering humanitarian aid and political support to the people of Gaza. The Israeli authorities have met these attempts with brutal force. In May 2010, Israeli commandos attacked a flotilla of ships from the Free Gaza Movement in international waters, killing at least nine humanitarian activists.

Despite Israel's violent response to these initiatives, civil society groups have

continued their efforts to break the siege, offering a lifeline of international solidarity to the people of Gaza. You can find out how to support these initiatives by visiting

[www.freegaza.org](http://www.freegaza.org) or  
[www.vivapalestina.org](http://www.vivapalestina.org)

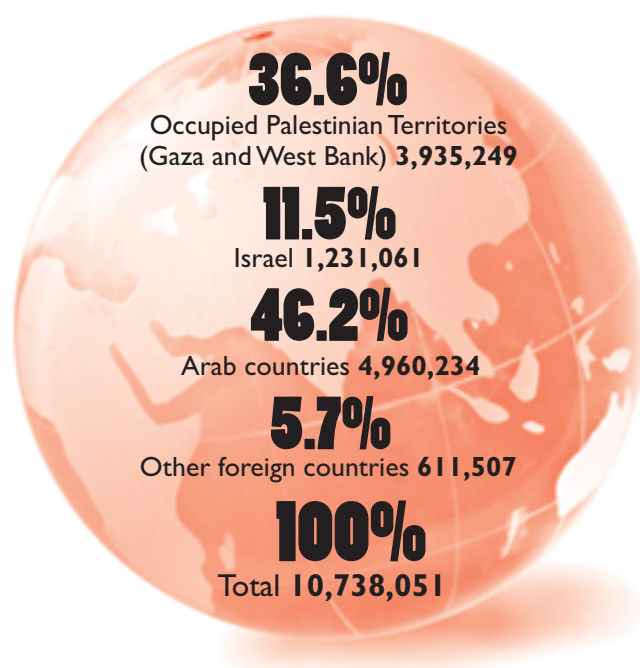
The British government has taken no concrete action to break the siege of Gaza. You can write to the Foreign Secretary and demand action to cut economic and military ties with Israel until the siege is lifted. Write to the Foreign Secretary, Foreign and Commonwealth Office, King Charles Street, London SW1A 2AH or visit [www.waronwant.org/gaza](http://www.waronwant.org/gaza) to take action.

# The silenced majority

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Israel's illegal practices in the **Occupied Palestinian Territories of the West Bank and Gaza** are well known. However, most Palestinians now live outside the **Occupied Palestinian Territories** and face a denial of basic rights as a result of Israel's policies and practices. **Palestinian refugees are the largest refugee population in the world, while Palestinians living within Israel survive as second-class citizens.**

Figure 1:  
**Population of Palestinians by country**



Source: *Palestinian Central Bureau of Statistics*<sup>18</sup>

## Refugees

The first wave of Palestinian refugees was created when over 700,000 Palestinians were driven from their homes in 1948-49 during the process that led to the state of Israel being created.<sup>19</sup> This event is known to Palestinians as the 'Nakba', Arabic for 'catastrophe'. Israel displaced thousands more people in 1967 when it took military control of the Gaza Strip, the West Bank and the Syrian Golan Heights, areas it continues to occupy to this day.

Over 4.7 million Palestinian refugees are currently registered with the United Nations Relief and Works Agency for Palestinians (UNRWA).<sup>20</sup> Many more refugees are unregistered. Taking into consideration the number of unregistered refugees, as well as those Palestinians forcibly displaced, the total number of Palestinian refugees and internally displaced people (IDPs) is reported as being closer to seven million.<sup>21</sup> This represents almost two thirds of the total number of Palestinians worldwide.

Today Israel continues to pursue policies which both directly and indirectly lead to the forced displacement of Palestinians. Israel's construction of the Apartheid Wall in the West Bank is destroying the farmland and houses in its path, threatening nearly 500,000 Palestinians with displacement.<sup>22</sup> House demolitions, forced evictions and the revocation of residency rights in places such as East Jerusalem have uprooted thousands of Palestinian families, many of whom have lived there for generations. In the Naqab (Negev) desert, the Israeli government is currently planning to demolish scores of Palestinian Bedouin villages, which will displace over 70,000 people.<sup>23</sup> John Dugard, former UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories, has likened these policies to ethnic cleansing.<sup>24</sup>

## Palestinians in Israel

Palestinian citizens of Israel comprise close to 20% of that country's total population.<sup>25</sup> These Palestinians remained in their homes during 1948-49, and have Israeli citizenship today. Yet in a state that defines itself as Jewish, they routinely face racism and discrimination over access to public services, land rights and employment.<sup>26</sup> More than half of the Palestinians living in Israel survive below the poverty line.<sup>27</sup>

Numerous discriminatory laws impact on Palestinians in Israel. Chief among them is the





## A mural at the Aida refugee camp in Bethlehem

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Photo: War on Want

National Planning and Building Law (1965), which re-assessed Palestinian villages in Israel and classified many Palestinians as non-residents with no legal status. As a result, scores of 'unrecognised' Palestinian villages receive no government services, and residents are routinely denied building permission for homes or public buildings.<sup>28</sup>

Elected in 2009 under the leadership of Binyamin Netanyahu, the current Israeli government has proposed several laws which would further entrench discrimination against Palestinians. These include the extension of a law denying citizenship and residency to Palestinians from the West Bank and Gaza who marry Palestinian citizens of Israel, and an attempt to outlaw the commemoration of the Nakba. Israeli Foreign Secretary Avigdor Lieberman has introduced a proposal to make Palestinian citizens of Israel who do not perform military or national service pay an additional tax.<sup>29</sup>

As a result of the systematic discrimination faced by Palestinians in Israel, the Palestinian Boycott, Divestment and Sanctions campaign has made the equal treatment of Palestinians in Israel one of its key demands.

## ACT NOW

### THE RIGHT OF RETURN

The right of Palestinian refugees to return to their homes and be paid reparations for loss of their homes and land is enshrined in international law and affirmed by UN General Assembly Resolution 194.<sup>30</sup> Yet this UN resolution, like many others pertaining to Palestine, has been ignored by Israel. As a result, there are now several generations of Palestinian refugees who have only known life in refugee camps. Nearly 1.4 million Palestinian refugees live in 58 recognised refugee camps in Jordan, Lebanon, Syria, the Gaza Strip and the West Bank, including East Jerusalem.<sup>31</sup>

In the early 1990s, in response to the failure of world leaders to include the issue of Palestinian refugees in the Oslo peace accords, Palestinian refugees and IDPs initiated a community-based movement of resistance to campaign for the right of return and to raise awareness of Israel's current displacement policies.

War on Want supports the right of return for Palestinian refugees and supports the work of BADIL, a grassroots organisation which defends and promotes the rights of Palestinian refugees: [www.badil.org](http://www.badil.org)

# Entrenching the Occupation

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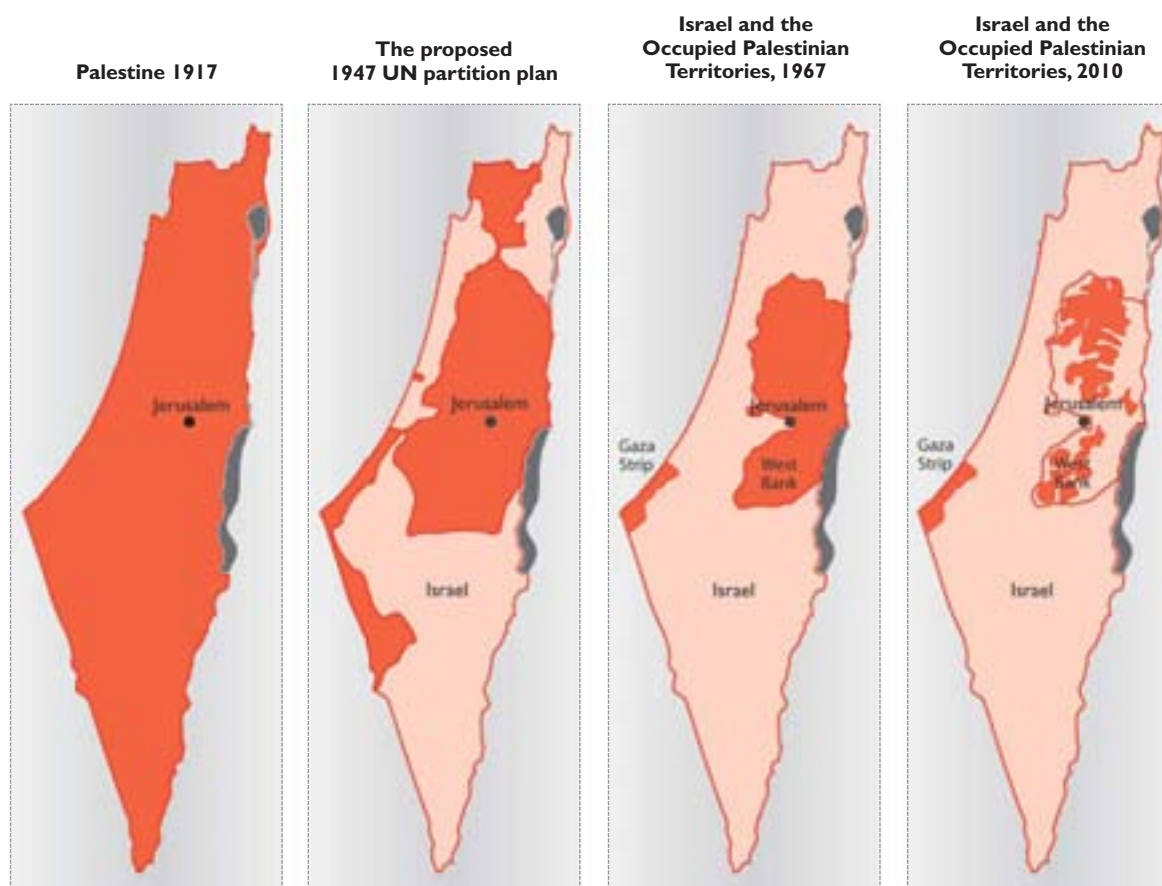
Since 1967 Israel has increasingly encroached on Palestinian land in the West Bank through settlement building programmes. Settlements are Israeli communities built on illegally occupied Palestinian land. They serve to create 'facts on the ground': physical manifestations of land-grabbing which make the Occupation into a seemingly irreversible reality.

Israel's settlements are illegal under the Fourth Geneva Convention, which forbids population transfer into territory occupied in war. They are widely condemned as obstacles to peace by the international community, which has repeatedly called on Israel to halt its settlement expansion plan. Some settlements occupy large areas of Palestinian land and form cities with populations of over

30,000 people.<sup>32</sup> There are currently over 500,000 Israelis living in illegal settlements in the West Bank, including occupied East Jerusalem, and new settlements and settlement expansion plans continue to be approved by the Israeli government.<sup>33</sup>

Settlements are linked to each other by an apartheid-style network of roads which Palestinians are forbidden from using. The expansion of settlement infrastructure such as highways and tunnels and the closure of areas surrounding the settlements by the Israeli military mean that fully 40% of the West Bank is now controlled by settlements.<sup>34</sup> This has led to the fragmentation of the West Bank, isolating Palestinian communities and curtailing freedom of movement.

Figure 2: **Palestinian loss of land, 1917-2010**







## ACT NOW FROM SETTLEMENT TO SHELF

High street stores in the UK profit from Israel's military Occupation by selling goods produced in illegal Israeli settlements in the West Bank. As entities that violate international law, settlements must not be legitimised and made financially viable through trade with the West. Campaigners have long called for a total ban on the sale of Israeli settlement goods in the UK. These goods range from beauty products made by companies like Ahava to wine and grocery products found in many high street stores.

Agrexco is one of Israel's largest exporters of fresh agricultural produce to the UK. The company is also one of the biggest exporters of produce from illegal Israeli settlements, marketing

60-70% of agricultural produce grown in settlements.<sup>35</sup> The UK government has admitted that Israeli producers do not distinguish between settlement and non-settlement produce, meaning that goods labelled as coming from Israel may instead come from a settlement.<sup>36</sup> War on Want supports the call from Palestinian civil society to boycott all Israeli goods until Israel complies with international law.

War on Want is campaigning to stop UK supermarkets profiting from Palestinian suffering. Act now and tell your local store to stop stocking Israeli goods. [www.waronwant.org/boycottisraeligoods](http://www.waronwant.org/boycottisraeligoods)

In addition to the settlements, which Israel claims are legitimate despite being illegal under international law, there are around 100 'outposts' in the West Bank.<sup>37</sup> Outposts are settler communities built without the authorisation of the Israeli state, and are often home to more radical Israeli settlers. These groups often react to the dismantling of outposts by Israeli authorities by committing violence against Palestinians, a tactic that has become more

frequent in recent years. Settler violence also serves to depopulate whole areas of the West Bank, with entire Palestinian communities sometimes displaced. The United Nations has found that up to 250,000 Palestinians are vulnerable to settler violence, and that the shortage of law enforcement officials and lack of accountability allows settler gangs to act with impunity.<sup>38</sup>

# Apartheid walls

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Boycott, Divestment, Sanctions **Winning justice for the Palestinian people**

**Israel uses concrete and metal walls to segregate, displace and exert control over Palestinians living in the Occupied Palestinian Territories. In the 1990s, Israel began erecting a wall around the Gaza Strip that facilitates today's blockade. On the Gazan side of the wall, the Israeli army demolished Palestinian homes, destroyed fields and uprooted orchards to make way for a buffer zone that flanks the wall along its entire length.<sup>39</sup>**

On a much larger scale, the Israeli government is currently constructing an Apartheid Wall in the West Bank that will similarly pen Palestinians into areas dictated by the Israeli state. In 2004 the International Court of Justice (ICJ) issued an advisory opinion declaring the construction of the Wall in the West Bank to be illegal. The ICJ opinion called for the Wall to be dismantled and for Palestinian communities affected by its path to receive reparations. Despite the ICJ ruling and international condemnation, the Wall continues to be built. It is now more than 60% complete.<sup>40</sup>

If finished, the Wall is set to measure over 700km long – the distance between London and Zurich, and more than four times as long as the Berlin Wall. The Apartheid Wall is twice as long as the Green Line, the international delineation of the Palestinian West Bank.<sup>41</sup> Almost 10% of the West Bank has been annexed by Israel through the erection of the Wall. While Israel claims its purpose is to provide security, the route of the Wall has been designated so that it encircles 80 Israeli settlements, indicating that its primary function is to incorporate these illegal communities into any future Israeli state.<sup>42</sup>

Almost 30,000 Palestinians are trapped between Israel and the Wall, cut off from friends and families and isolated from the economic and urban hubs of the West Bank. Around 28,000 more Palestinians are completely imprisoned by the Wall, connected to the rest of the West Bank only by a tunnel or gate controlled by the Israeli military. Another 126,000 Palestinians are surrounded by the Wall on three sides, their freedom of movement severely curtailed.<sup>43</sup>



**The Apartheid Wall runs through a village near Ramallah in the West Bank**







## Palestinians protest against the Apartheid Wall in the town of Ni'lin in the West Bank

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Photo: Ahmad Mesleh

Palestinians have opposed the building of the Wall through non-violent resistance in villages all across the West Bank. In recent years the Israeli authorities have increased their use of violent repression targeted at Palestinians protesting against the Wall. As Israel steps up its campaign

of intimidation against activists, the number of killings, injuries and arrests has grown markedly. Villages affected by the illegal Apartheid Wall such as Ni'lin, Al Ma'sara and Jayyous are subjected to regular raids by Israeli soldiers, who break into homes, fire teargas, smash windows and arbitrarily arrest and detain Palestinians. In Bil'in, which has a population of 1,779, over 1,300 injuries due to Israeli violence have been reported since 2005. Israeli forces have even targeted children with arrest.<sup>44</sup>

The targeted repression of anti-Wall activists has been widely condemned by the international community. UN Special Rapporteur Richard Falk has attacked Israel's policy of charging Palestinian activists for protesting against the Wall: "The manifest absurdity of such charges strongly suggests that Israeli intention is to demoralize the anti-wall campaign by criminalizing the non-violent human rights activism, a pattern that should be a matter of grave concern to the Human Rights Council."<sup>45</sup> The European Union has also criticised Israel for imprisoning human rights defenders engaged in non-violent protest against the Wall, with EU High Representative Catherine Ashton expressing concern that such action is intended to prevent Palestinians "from exercising their legitimate right to protest".<sup>46</sup>

## ACT NOW STOP THE WALL

War on Want works in close partnership with Stop the Wall, the grassroots Palestinian Anti-Apartheid Wall Campaign. Stop the Wall coordinates the work of popular committees in West Bank villages that will be affected by the Wall. The group mobilises Palestinian communities to non-violent resistance, while also exposing the destruction and human rights violations caused by the Wall. As well as seeking to halt construction of the Wall and have it dismantled, Stop the Wall aims to secure compensation for the Palestinians who have been affected by its path.

Stop the Wall is one of the founding organisations of the Palestinian campaign for Boycott, Divestment and Sanctions, which seeks to apply economic and political pressure on Israel until it complies with international law. In recent years the group has won several significant victories, such as convincing Norway's Government Pension Fund, one of the largest pension funds in the world, to divest from Elbit Systems, an Israeli security company involved in the construction of the Wall.

Stop the Wall and its popular committees of human rights defenders have faced increasingly severe repression, including the imprisonment without charge of its coordinator and youth officer, the arrest of scores of grassroots activists and an office raid by the Israeli military. International pressure from War on Want supporters played a key part in securing the release of Stop the Wall staff, and helped raise awareness of Israel's crackdown on human rights defenders.

[www.stopthewall.org](http://www.stopthewall.org)

# Apparatus of oppression

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***“I have been to the Occupied Palestinian Territory, and I have witnessed the racially segregated roads and housing that reminded me so much of the conditions we experienced in South Africa under the racist system of Apartheid. I have witnessed the humiliation of Palestinian men, women, and children made to wait hours at Israeli military checkpoints routinely when trying to make the most basic of trips to visit relatives or attend school or college, and this humiliation is familiar to me and the many black South Africans who were corralled and regularly insulted by the security forces of the Apartheid government.”***

*Archbishop Desmond Tutu, April 2010<sup>47</sup>*

In addition to using walls, Israel has enacted a series of measures to limit Palestinian freedom of movement and maintain control over the Occupied Palestinian Territories. There are over 650 physical obstacles to the freedom of movement in the West Bank alone.<sup>48</sup> Of these obstacles, 65 are checkpoints permanently manned by Israeli soldiers, while the remainder are temporarily manned checkpoints, roadblocks, earth mounds and trenches that bar access to roads, villages and cities. Israel also controls Palestinian movement with ad hoc ‘flying’ checkpoints which cause significant disruption due to their

unpredictability. The use of flying checkpoints has increased dramatically during 2010.<sup>49</sup>

Through a sophisticated system of administrative controls and physical boundaries, the Occupation affects every aspect of a Palestinian’s daily life. Cutting children off from school, preventing farmers from collecting water for their olive trees, or blocking pregnant mothers from getting to hospital, the Occupation has turned ordinary acts into extraordinary challenges.

According to the UN Office for the Coordination of Humanitarian Affairs, there was a steady increase in the number of physical barriers restricting movement in the West Bank from 2005 to 2009.<sup>50</sup> This includes passage into and out of the West Bank as well as movement within it. War on Want’s partner organisations on the ground report increased restrictions and harassment of Palestinian activists, including the imposition of travel bans on Palestinian human rights defenders.

*“Those restrictions on freedom of movement have in turn generated violations of a wide range of other human rights, such as the right to education, the right to work, the right to an adequate standard of living, the freedom of religion and the right to the highest attainable*



**A Palestinian waits at the checkpoint in Bethlehem, West Bank**





*standard of health.” Report of the United Nations Secretary-General, November 2009<sup>51</sup>*

### **IDs and permits**

In addition to physical impediments, an ID and permit system also restrains Palestinian movement. The permit system curtails the ability of Palestinians to work, trade, participate in civic life and socialise with family and friends. Vast areas of land, including East Jerusalem, are out of bounds for Palestinians lacking the required permit Israel demands. The permit system effectively turns Palestinians into illegal aliens in their own territory, and in recent years Israel has pursued a policy of forcible transfer for Palestinians from the West Bank to Gaza based on permit requirements. Israeli settlers, by contrast, need no permit to reside in the West Bank, even though the settlements violate international law.<sup>52</sup>

In violation of its obligations under the Fourth Geneva Convention, Israel is making its permit system more restrictive and thereby further violating Palestinians' human rights. Effective as of April 2010, a new Israeli military order defines Palestinians living in the West Bank without the appropriate permits as “infiltrators”, subject to deportation, transfer, criminal charges, fines and/or imprisonment. According to Israeli human rights organisation B'Tselem, this is the latest in a series of Israeli policies that aim to remove Palestinians from the West Bank by criminalising the mere fact of their presence in the territory.<sup>53</sup>

The Israeli government is also making it more difficult for foreign nationals to visit the West Bank, echoing restrictions which have long been in place in the Gaza Strip. The Israeli government is planning to introduce separate visas for foreigners visiting the West Bank, which will have a serious impact on thousands of Palestinians who are foreign passport holders or have spouses from another country.<sup>54</sup>

## **ACT NOW**

## **TELL BT TO DISCONNECT NOW**

In January 2010, BT Group PLC (formally British Telecom) allowed the Israeli telecommunications company Bezeq International to join its exclusive BT Alliance programme, giving the company preferential access to BT's products and services.<sup>55</sup> A subsidiary of Israel's largest telecommunications company Bezeq Group, Bezeq International provides telecommunications to illegal Israeli settlements, army bases and checkpoints in the West Bank.<sup>56</sup> By allowing Bezeq International into the BT Alliance programme, BT is legitimising its operations in the Occupied Palestinian Territories and supporting the infrastructure which enables illegal Israeli settlements to function.

BT is a signatory to the UN Global Compact, which commits the company to ensuring that it is not complicit in human rights abuses.<sup>57</sup> The company's internal business principles also include specific commitments to upholding human rights.<sup>58</sup> It is time for BT to put these commitments into practice and hang up on Bezeq International.

If you are a BT customer (or even if you're not), contact BT and ask them to remove Bezeq International from the BT Alliance Programme. You can take action at [www.waronwant.org/bt](http://www.waronwant.org/bt). Alternatively, you can email Ian Livingston, BT's Chief Executive, at [ian.livingston@bt.com](mailto:ian.livingston@bt.com) or write to him at BT Group plc, BT Centre, 81 Newgate Street, London EC1A 7AJ.



# Water wars

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**The Jordan Valley comprises approximately one third of the West Bank's most fertile agricultural land. In a region short of fresh water supplies, the Jordan Valley is also home to a third of the West Bank's underground water reserves.<sup>59</sup>**

Since seizing the West Bank in 1967, Israel has closed off the Jordan Valley as a military zone, imposing stringent restrictions on movement in and out of the area. Today over 50% of the Jordan Valley is controlled by illegal Israeli settlements and a further 46% is classified as a closed military zone. This leaves just 4% of the Valley's fertile land accessible to Palestinians for agricultural and residential use.<sup>60</sup>

Shortly after Israel invaded the Jordan Valley in 1967, one of its first acts was to seize control of water resources and destroy Palestinian water pumps and irrigation ditches.<sup>61</sup> In the Jordan Valley, the Israeli military frequently cuts off Palestinian water supplies and diverts water from Palestinian communities to illegal Israeli settlement farms

cultivating agricultural produce for export to Europe.<sup>62</sup> Israel also regularly rejects applications for Palestinian water and sanitation plants, while simultaneously expanding water services to illegal settlements.<sup>63</sup>

The Israeli state-owned water company Mekorot controls 38 wells in the West Bank and supplies water to the illegal settler population. Mekorot also operates wells and pumping stations that have been confiscated from Palestinians, and then bills the Palestinian West Bank Water Department for the water it takes.<sup>64</sup> The company is, in effect, selling Palestinians back their own water. In the summer months, when water in the region is in short supply, the company has prioritised services to Israeli settlements over Palestinian communities, which often experience water shortages.<sup>65</sup>

Having documented the devastating impact of Israel's water wars in the Jordan Valley, the UN has repeatedly called on Israel to cease its appropriation of Palestine's water.<sup>66</sup>



## An abandoned Palestinian village in the Jordan Valley







**Abu Zakar, a farmer, next to a demolished water tank in the Jordan Valley**

**17**



Photo: War on Want

## **ACT NOW**

### **DON'T DRINK STOLEN WATER – STOP EDEN SPRINGS**

Eden Springs Ltd (also known as Mayanot Eden or Mey Eden) is an Israeli company that bottles, markets and distributes mineral water. In the UK, the company operates as Eden Springs UK Ltd and provides bottled and plumbed water coolers for offices, city council premises and universities.

Eden Springs profits from the Occupation by extracting water from the Salukia Spring in the Golan Heights, where the company also has a bottling plant, in Katzrin. The Golan Heights are Syrian territory illegally occupied by Israel since 1967.

Campaigners in Scotland have led the fight against Eden Springs in the UK, and numerous university campuses, the Scottish Trades Union Congress,

Scottish Council for Voluntary Organisations and Scottish UNISON have cancelled their contracts with Eden Springs.

If Eden Springs UK Ltd supplies water to your office, trade union, community group or university, organise to cancel the contract with them in favour of a more ethical water provider. Write to the CEO of Eden Springs to let him know you are cancelling the contract because of the company's complicity in the Israeli Occupation. The UK Director of Eden Springs is Jean-Marc Bolinger and can be contacted at Eden Springs UK Ltd, Unit B, 3 Livingstone Boulevard, Blantyre, Glasgow G72 0BP.

You can also take action at [www.waronwant.org/edensprings](http://www.waronwant.org/edensprings)





# Annexing East Jerusalem

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Since 1967, Israel has occupied East Jerusalem, where it has pursued a series of policies such as forced displacement and border changes to ensure a Jewish majority in the city. The United Nations has repeatedly stated that Israel's annexation of East Jerusalem is in violation of international law.<sup>67</sup> According to the European Union's Heads of Mission, "Israel's actions in and around Jerusalem are one of the most acute challenges to Israeli-Palestinian peacemaking."<sup>68</sup>

Israel is accelerating its plans to forcibly displace Palestinians from East Jerusalem and to complete its annexation of the city. The removal of Palestinians from East Jerusalem is made possible through the creation of 'facts on the ground', including illegal settlements and the Apartheid Wall, which will trap the majority of Palestinians

with East Jerusalem residency cards between the Green Line and the Wall.<sup>69</sup> Israel is also pressing ahead with house demolitions and a restrictive permit regime which curtails where Palestinians can live, travel and work.<sup>70</sup>

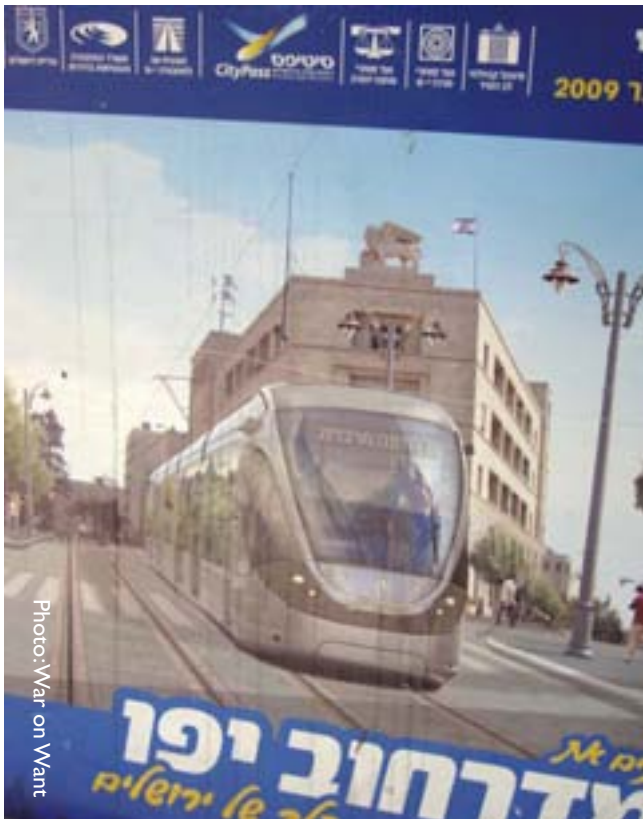
Israel has announced plans for mass demolitions of entire Palestinian neighbourhoods in East Jerusalem, such as Tel el Foul, Khalet el 'Ein, Al Abbasiya and Wadi Yasul, Sheikh Jarra and large areas of Silwan, threatening over 5,000 inhabitants.<sup>71</sup> Often house demolitions are carried out on the pretext of residents' lacking Israeli building permits. In fact, these demolitions are part of a broader strategy to drive out Palestinian families from East Jerusalem, many of whom have lived in the same homes for generations. Israel has also closed public institutions servicing Palestinian communities and limited access to basic public services to clear the city of Palestinians.<sup>72</sup>



**A Palestinian woman watches as her house in East Jerusalem is demolished by Israeli bulldozers**







House demolitions are also used as a form of collective punishment against families of Palestinians alleged to have carried out attacks on Israel, in order to deter those considered by Israel to be a threat.<sup>73</sup> Such actions violate international humanitarian law, and the United Nations Committee on Torture has expressed its concern over Israel's use of this form of collective punishment.<sup>74</sup>

As well as displacing Palestinians, Israel is encouraging the migration of its own citizens into East Jerusalem. Over a third of East Jerusalem has been designated by Israel for the construction of new settlements and housing projects.<sup>75</sup> This includes plans for a massive development for 100,000 Israeli settlers known as the E1 Plan. When finished, this settlement will sever East Jerusalem from the rest of the West Bank and also bisect the West Bank itself, severely restricting movement between its north and south halves.<sup>76</sup>

## ACT NOW DIVEST FROM VEOLIA

Veolia is a French multinational company that profits from Israel's illegal Occupation of Palestinian land. Known in the UK for collecting waste on behalf of local authorities and universities, Veolia is involved in a more deadly operation in Palestine. The company is a partner in the Jerusalem Light Rail project, which links West Jerusalem to illegal Israeli settlements in the West Bank, bypassing Palestinian villages and furthering the annexation of East Jerusalem. Veolia is also complicit in the Occupation by operating bus services in the West Bank which run on apartheid-style roads for settlers only. Through its subsidiary TMM, Veolia also collects waste from Israeli settlement farms deep in the Occupied Jordan Valley.<sup>77</sup>

Veolia's complicity in Israel's crimes has made it a target of international action. To date, the company has lost an estimated \$7 billion in contracts due to protests against its work in East Jerusalem. This includes Galway City Council in Ireland voting not to renew Veolia's contract to operate the city's underground transport system, as well as the loss of a \$4.5 billion contract to run the subway in Stockholm, Sweden.

In the UK, campaigners are targeting local authorities and universities to implement ethical contracting policies and break their waste management contracts with Veolia. Contact your local authority to find out if Veolia is contracted to carry out work in your area and, if so, demand the contract is cancelled until Veolia ends its complicity in Israel's crimes against the Palestinian people.

For more information, visit  
[www.waronwant.org/veolia](http://www.waronwant.org/veolia)



**VEOLIA**

ENVIRONMENTAL SERVICES

# Aiding the Occupation

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Boycott, Divestment, Sanctions **Winning justice for the Palestinian people**

Foreign aid has become a defining feature of the Palestinian economy – particularly in Gaza, where “the near hermetic closure... has generated almost blanket dependency on aid”.<sup>78</sup> Without aid, the misery and suffering of Palestinians would be more acute. Yet foreign aid also allows Israel to continue its Occupation of the West Bank and Gaza without bearing the financial consequences.

Under the Fourth Geneva Convention, Israel, as an occupying power, has obligations to fulfil with regards to the welfare of the Palestinians under its control. Instead, Israel has managed to shift those responsibilities onto the large number of foreign governments and international agencies which pump hundreds of millions of dollars

into the Occupied Palestinian Territories every year to rebuild the infrastructure destroyed by Israel. The European Union is the largest donor to the Occupied Palestinian Territories, sending 1.5 billion euros in aid over the three years of 2007-09.<sup>79</sup> The upshot is that Israel bears no cost for the damage it causes. Israel can destroy a Palestinian school or hospital safe in the knowledge that the international community will not only refrain from condemning its crimes, but will also pick up the tab.<sup>80</sup>

## Israel's special relationship

Despite its continuing breaches of international law and perpetration of human rights violations, Western governments continue to reward Israel with financial, military and diplomatic support. Indeed, the European Union has sought to develop even



**Binyamin Netanyahu, Israel's current Prime Minister, meets with David Cameron**



Photo: Gil Cohen Magen/X01316/Corbis





Photo: European Parliament/Pietro Naj-Oleari

closer political and economic ties with Israel, and in June 2008 announced a process to upgrade relations between the two.

The legal basis for these relations is the EU-Israel Association Agreement, which grants Israeli exports preferential access to EU markets. However, Article 2 makes the Association Agreement and all the trade preferences it bestows conditional upon respect for human rights by both sides.

Israel has continued to commit human rights violations since June 2008, when the process to upgrade EU relations began. Israel has tightened the Gaza blockade, accelerated the expansion of illegal settlements in the West Bank and increased the number of illegal checkpoints. In December 2008, Israel launched its murderous assault on Gaza, leading to the deaths of over 1,400 Palestinians, as described earlier in this report.

In the face of international outrage, the EU was forced to suspend the upgrading of its relations with Israel in 2009. However, a number of EU member states have since expressed their desire to continue with the process. In September 2010, Israel called on the EU to resume work on the upgrade, in

view of the holding of direct talks between Israel and the Palestinian Authority.<sup>81</sup> If the EU agrees to the upgrade of relations, it will send a clear signal to Israel that it can continue to violate Palestinian human rights with impunity.

## **ACT NOW** **SUSPEND THE EU-ISRAEL** **ASSOCIATION** **AGREEMENT**

Instead of rewarding Israeli aggression with an upgrade in diplomatic and economic relations, the EU should take action to prevent Israel from committing crimes against Palestinians in future. War on Want is campaigning for the suspension of the EU-Israel Association Agreement on human rights grounds, and for no resumption of the upgrade in EU-Israel relations. You can contact your MP and demand a suspension of the EU-Israel Association Agreement until Israel complies with international law by visiting [www.waronwant.org/EU-Israel](http://www.waronwant.org/EU-Israel)

# Arming insecurity

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The military has always played a central role in Israeli society. Israel has developed an industry that is pivotal in the country's economy. Israel is the seventh largest exporter of arms in the world, accounting for \$900 million of the global trade in 2008.<sup>82</sup> It ranks third in the world in terms of military spending as a percentage of GDP.<sup>83</sup> Israel is also the only country with nuclear weapons in the Middle East, although it refuses to admit this or to become a signatory to non-proliferation treaties.

Israel's arms industry generates \$6 billion in sales annually; Israel Aerospace Industries is one of the country's biggest private employers.<sup>84</sup> The Israeli arms industry is a global leader in military high technology, particularly electronics, security and surveillance technologies. In addition to being deployed extensively in the Occupied Palestinian Territories, surveillance technology

developed by the Israeli arms industry is exported throughout the world. This includes being used by London Underground, which has a contract with Israeli company Verint Systems for video surveillance, as well as the US government for its border fence with Mexico.<sup>85</sup> Israeli companies such as Israel Aerospace Industries, Israel Military Industries, Rafael and Elbit Systems have also profited from arms sales to regimes which other countries have refused to supply, such as South Africa during the Apartheid era and Burma today.<sup>86</sup>

The European market is important for Israeli companies, and the UK is no exception. The UK government uses Israeli military technology through the use of unmanned aerial vehicles (UAVs) or drones, which are increasingly being deployed in Pakistan and Afghanistan. The UK is developing its own drone in conjunction with the Israeli arms company Elbit Systems and the French company



An Israeli tank at the Gaza border in January 2009







Photo: Ahmad Mesleh/Stop the Wall

Thales. Israel's arms industry has also benefitted from preferential scientific research grants awarded under the EU-Israel Association Agreement.<sup>87</sup>

Despite Israel's documented human rights abuses, the UK continues to license the sale of arms to Israel. By authorising these sales, the UK government is in breach of its own arms export guidelines, which state that arms should not be sold to countries where they could be used for internal repression or external aggression.<sup>88</sup> On both points Israel is found wanting, yet in recent years the UK government has licensed the sale of combat aircraft, electronic warfare equipment, military aero-engines and surface-to-air missiles. The UK also approved the sale of components for Apaches and F-16s, which it admitted were likely to have been used during Operation Cast Lead.<sup>89</sup> By continuing to license the sale of arms to Israel, the UK government remains complicit in Israel's war crimes and human rights violations.

## **ACT NOW BUST ELBIT!**

Elbit Systems, Israel's largest private security and defence firm, specialises in drones, military electronics and surveillance systems. Elbit is also involved in the provision of surveillance and electronics systems along the Apartheid Wall in the West Bank and in surrounding settlements.

Elbit has factories in the UK where it makes components for weapons that are being used on Palestinians. At its Lichfield factory, Elbit manufactures engines for the Hermes 450 drones, which were used in the Operation Cast Lead assault on Gaza.<sup>90</sup> ParcAberporth, in Wales, is the testing ground for the UK's Watchkeeper drone, which is being developed jointly by Elbit and Thales at an estimated cost of £860 million.<sup>91</sup>

Elbit has become a target of activists around the globe. In September 2009, after years of campaigning by War on Want partner organisation Stop the Wall, the Norwegian government excluded Elbit from its state pension fund on ethical grounds.

War on Want is calling for a two-way arms embargo between the UK and Israel. This would see an end to all dealings with Elbit and other Israeli weapons companies, and an end to all licences for UK arms exports to Israel. Take action at

[www.waronwant.org/stoparmingisrael](http://www.waronwant.org/stoparmingisrael)



# Bringing the Occupation home

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***“It’s time. Long past time. The best strategy to end the increasingly bloody occupation is for Israel to become the target of the kind of global movement that put an end to apartheid in South Africa... The relevance of the South African model is that it proves that BDS tactics can be effective when weaker measures (protests, petitions, backroom lobbying) fail.” Naomi Klein, January 2009<sup>92</sup>***

The failure of governments around the world to hold Israel to account has led to a grassroots Palestinian call for a strategic citizen’s response. In 2005, a coalition of over 170 Palestinian civil society groups, including War on Want partners such as Stop the Wall, called on global civil society to join them in a boycott, divestment and sanctions (BDS) movement against Israel until it complies with international law and the following three demands are met:

1. Israel ends its Occupation and dismantles the Wall;
2. Arab-Palestinian citizens of Israel are granted full equality;
3. The right of Palestinian refugees to return to their homes and properties is promoted and protected.

The BDS movement is now endorsed by trade unions, student unions, faith groups, prominent writers, artists and solidarity movements from all over the world. In recent years the campaign has won significant victories, including:

- The Church of England has divested its £2.2 million holding in Caterpillar, and the Methodist Church in the UK has voted to boycott Israeli settlement goods.
- Norway’s state pension fund and Denmark’s Danske Bank have divested from Israeli arms company Elbit Systems.
- The UK government has bowed to consumer pressure and introduced guidelines on the labelling of settlement goods.
- The UK government has also revoked five licences for the sale of military equipment to Israel, in response to the Israeli attack on Gaza in 2008/09.
- Trade unions confederations in the UK, Ireland and South Africa have endorsed the BDS call, mirroring the support given by hundreds of individual unions around the world. Dockworkers’ unions in particular have led the way in direct action by refusing to unload ships of Israeli goods in California, India and Sweden.
- Musicians such as Faithless, Gil Scot Heron, Elvis Costello and Massive Attack have refused to play in Israel.
- Veolia has lost a \$4.5 billion contract to run the subway in Stockholm, Sweden over its participation in the Jerusalem Light Rail project.

Most significantly, BDS is already having an impact within Israel itself. In March 2009, the Israeli Manufacturers’ Association reported that of the 90 Israeli exporters it had interviewed, 21% had experienced a drop in demand due to boycotts, mostly from the UK and Scandinavian countries.

Get involved in the global BDS movement.

Join War on Want and support our campaigns and partners in Palestine in their struggle for equality and justice.

[www.waronwant.org/palestine](http://www.waronwant.org/palestine)





**War on Want works in partnership with the following organisations in Palestine:**

**Palestinian BDS National Committee**

The broad Palestinian civil society coalition working for boycott, divestment and sanctions against Israel until it complies with international law.

[www.bdsmovement.net](http://www.bdsmovement.net)

**Stop the Wall**

A grassroots organisation resisting the building of the Apartheid Wall in the West Bank. [www.stophthewall.org](http://www.stophthewall.org)

**Zaytoun**

A cooperative linking olive farming communities in the West Bank with UK markets. [www.zaytoun.org](http://www.zaytoun.org)

**BADIL**

A resource centre and advocacy group for Palestinian residency and refugee rights.

[www.badil.org](http://www.badil.org)

**Al-Haq**

An independent Palestinian legal and campaigning organisation promoting and protecting human rights and the rule of law.

[www.alhaq.org](http://www.alhaq.org)

**Sawt El-Amel**

A grassroots organisation promoting the rights of Palestinian workers in Israel.

[www.laborers-voice.org](http://www.laborers-voice.org)

**Alternative Information Centre**

A joint Palestinian-Israeli activist organisation which undertakes research, political advocacy and grassroots activism against the Occupation. [www.alternativenews.org](http://www.alternativenews.org)

## Notes

- <sup>1</sup>. The deep poverty rate is 48%, calculated from World Bank statistics for the West Bank and Gaza Strip on a population-weighted basis; *Programme of Assistance to the Palestinian People: 2009-2010*, United Nations Development Programme
- <sup>2</sup>. *Emergency Appeal 2010*, United Nations Relief and Works Agency for Palestine Refugees in the Near East, 2010
- <sup>3</sup>. *Quarterly Update on Palestinian Prisoners*, Addameer, April 2010; *Without Trial: Administrative Detention of Palestinians by Israel and the Incarceration of Unlawful Combatants Law*, B'Tselem, October 2009
- <sup>4</sup>. A Wright, 'President Carter and Citizen Activists Witness Deliberate Destruction in Gaza', *The Huffington Post*, 18 June 2009
- <sup>5</sup>. Gaza covers 360 square kilometres, and has an average population density of 4,167 per square kilometre, making it the sixth most densely populated region in the world. 'The World Factbook – Gaza Strip', Central Intelligence Agency, [www.cia.gov/library/publications/the-world-factbook/geos/gz.html](http://www.cia.gov/library/publications/the-world-factbook/geos/gz.html), accessed 29 September 2010; *West Bank and Gaza Strip population census 2007*, UNRWA, January 2010
- <sup>6</sup>. D Cameron, House of Commons debate 'G8 and G20 summits', Hansard House of Commons, 28 June 2010
- <sup>7</sup>. *OCHA Special Focus: The Closure of the Gaza Strip: The Economic and Humanitarian Consequences*, United Nations Office for the Coordination of Humanitarian Affairs, December 2007
- <sup>8</sup>. 'Security Cabinet declares Gaza hostile territory', Israel Ministry of Foreign Affairs, 19 September 2007; *OCHA Special Focus: The Closure of the Gaza Strip: The Economic and Humanitarian Consequences*, United Nations Office for the Coordination of Humanitarian Affairs, December 2007
- <sup>9</sup>. 'Gaza aid convoy killings: "Those responsible must be held criminally accountable" – UN expert', United Nations Office of the High Commissioner for Human Rights, 31 May 2010
- <sup>10</sup>. *Failing Gaza: No rebuilding, no recovery, no more excuse*, Crisis Action, December 2009
- <sup>11</sup>. *OCHA Special Focus: Locked In: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip*, United Nations Office for the Coordination of Humanitarian Affairs, 14 August 2009
- <sup>12</sup>. *Troubled waters: Palestinians denied fair access to water*, Amnesty International, October 2009
- <sup>13</sup>. *Environmental Assessment of the Gaza Strip following the escalation of hostilities in December 2008 – January 2009*, United Nations Environment Programme, September 2009; 'Resting and Restoring Gaza Strip's Underground Water Supplies Emerges as Top Priority Says UNEP', United Nations Environment Programme, 14 September 2009
- <sup>14</sup>. 'Statement of John Holmes, United Nations Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, on the "Free Gaza" Flotilla Crisis', United Nations Office for the Coordination of Humanitarian Affairs, 31 May 2010
- <sup>15</sup>. *Operation 'Cast Lead': 22 days of death and destruction*, Amnesty International, July 2009; *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Human Rights Council, 25 September 2009
- <sup>16</sup>. *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, United Nations Human Rights Council, UN document A/HRC/12/48, 25 September 2009
- <sup>17</sup>. Despite the withdrawal of its settlers, Israel's continued control of the borders, territorial sea and airspace of Gaza means that it remains an occupying power subject to obligations under the Fourth Geneva Convention; see *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, UN document E/CN.4/2005/29, 7 December 2004
- <sup>18</sup>. *Palestine in Figures 2009*, Palestinian Central Bureau of Statistics, Palestinian National Authority, 2009
- <sup>19</sup>. Paul McCann surveys the differing figures for the numbers of refugees created in 1948, concluding that the most reliable is the 726,000 given by the UN Economic Survey Mission of 1949; see P McCann, 'The Role of UNRWA and the Palestine Refugees', in *Palestine-Israel Journal of Politics, Economics and Culture*, vol 15, no 4 & vol 16, no 1, 2008-2009
- <sup>20</sup>. 'Refugee Figures', United Nations High Commission for Refugees, [www.unhcr.org/pages/49c3646c1d.html](http://www.unhcr.org/pages/49c3646c1d.html), accessed 19 July 2010. Only the refugees registered in 1948 and their descendants comprise today's 4.7 million registered refugees; see 'About UNRWA: Palestinian Refugees', United Nations Relief and Works Agency for Palestine Refugees in the Near East, [www.unrwa.org/etemplate.php?id=86](http://www.unrwa.org/etemplate.php?id=86), accessed 19 July 2010
- <sup>21</sup>. *Survey of Palestinian Refugees and Internally Displaced People 2008-2009*, BADIL, 2009
- <sup>22</sup>. Ibid
- <sup>23</sup>. Ibid
- <sup>24</sup>. *61st General Assembly Third Committee 23rd and 24th meetings*, United Nations General Assembly, UN document GA/SHC/3858, 19 October 2006
- <sup>25</sup>. M Badarne, *Separate and Unequal: The History of Arab Labour in pre-1948 Palestine and Israel*, Sawt el-Amel, 2006
- <sup>26</sup>. 'Historical Background: History of the Palestinians in Israel', Adalah, [www.adalah.org/eng/backgroundhistory.php](http://www.adalah.org/eng/backgroundhistory.php), accessed 29 September 2010
- <sup>27</sup>. M Badarne, *Separate and Unequal: The History of Arab Labour in pre-1948 Palestine and Israel*, Sawt el-Amel, 2006
- <sup>28</sup>. 'The Palestinian Minority in the Israeli Legal System', Adalah, [www.adalah.org/eng/backgroundlegalsystem.php](http://www.adalah.org/eng/backgroundlegalsystem.php), accessed 29 September 2010
- <sup>29</sup>. *One year for Israel's New Government and the Arab Minority in Israel*, Mossawa Center, April 2010
- <sup>30</sup>. *Resolution 194 (III)*, United Nations General Assembly, 11 December 1948



31. 'About UNRWA: Palestinian Refugees', United Nations Relief and Works Agency for Palestine Refugees in the Near East, [www.unrwa.org/etemplate.php?id=86](http://www.unrwa.org/etemplate.php?id=86), accessed 19 July 2010
32. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the Secretary-General*, UN General Assembly, UN document A/64/516, 6 November 2009
33. *West Bank Movement and Access Update*, United Nations Office for the Coordination of Humanitarian Affairs, May 2009; *By Hook and By Crook: Israeli Settlement Policy in the West Bank*, B'Tselem, July 2010; R McCarthy, 'Israel approves more construction in West Bank settlement', *The Guardian*, 8 March 2010
34. *Access Denied: Israeli measures to deny Palestinians access to land around settlements*, B'Tselem, September 2008
35. Evidence given by Amos Orr, General Manager of Agrexco, at trial of activists in November 2006 which stated that Agrexco markets 60-70% of the agricultural produce grown in Israeli settlements in the Occupied Territories; Phyllis Starkey, *Statement to the House of Commons Adjournment debate on the EU-Israel Association Agreement*, Hansard House of Commons, 27 January 2010
36. S McCarthy-Fry MP, *Statement by the Exchequer Secretary to the Treasury to the House of Commons Adjournment debate on the EU-Israel Association Agreement*, Hansard House of Commons, 27 January 2010
37. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the Secretary-General*, UN General Assembly, UN document A/64/516, 6 November 2009
38. *Israeli Settler Violence and the Evacuation of Outposts*, UN Office for the Coordination of Humanitarian Affairs, November 2009
39. J Alexander, *Conflict, Economic Closure and Human Security in Gaza*, Oxford Research Group, 2007
40. *Occupied Palestinian Territory: West Bank Barrier Route Projections - July 2010*, UN Office for the Coordination of Humanitarian Affairs, July 2010
41. Ibid
42. *West Bank Movement and Access Update: June 2010*, UN Office for the Coordination of Humanitarian Affairs, June 2010
43. *Occupied Palestinian Territory: West Bank Barrier Route Projections - July 2010*, UN Office for the Coordination of Humanitarian Affairs, July 2010
44. *Repression allowed, Resistance denied: Israel's suppression of the popular movement against the Apartheid Annexation Wall*, Stop the Wall, 9 July 2009
45. *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, UN Human Rights Council, UN document A/HRC/13/53, 15 January 2010
46. 'Statement by EU High Representative Catherine Ashton on conviction of human rights defender Abdallah Abu Rahman', Brussels, 24 August 2010
47. D Tutu, 'Divesting from Injustice', *The Huffington Post*, 13 April 2010
48. *West Bank Movement and Access Update: June 2010*, UN Office for the Coordination of Humanitarian Affairs, June 2010; the figure was obtained by adding the 505 physical obstacles throughout the West Bank excluding Hebron H2 area, plus the over 80 physical obstacles in the Hebron H2 area, plus 63 barrier crossings.
49. *West Bank Movement and Access Update: June 2010*, UN Office for the Coordination of Humanitarian Affairs, June 2010
50. *West Bank Movement and Access Update: May 2009*, UN Office for the Coordination of Humanitarian Affairs, May 2009; *Checkpoints and Barriers: Searching for Livelihoods in the West Bank and Gaza Gender. Dimensions of Economic Collapse*, World Bank, February 2010
51. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the Secretary-General*, UN General Assembly, UN document A/64/516, 6 November 2009
52. *Separated Entities: Israel Divides Palestinian Population of West Bank and Gaza Strip*, B'Tselem, September 2008
53. 'Palestinian and Israeli Human Rights Groups Call for End to Israeli Military West Bank Deportation Policy', B'Tselem, 13 May 2010
54. J Cook, 'Israel brings Gaza restrictions to West Bank', *Electronic Intifada*, 18 August 2009
55. 'Bezeq International joins BT Alliance with gold partner status', BT, [www.btplc.com/News/Articles/ShowArticle.cfm?ArticleID=A21FF7F3-0965-4753-9174-6489EC5C1A83](http://www.btplc.com/News/Articles/ShowArticle.cfm?ArticleID=A21FF7F3-0965-4753-9174-6489EC5C1A83), 18 January 2010
56. 'Bezeq - The Israeli Telecommunications Corporation', Who Profits?, Coalition of Women for Peace, [www.whoprofits.org/Company%20Info.php?id=738](http://www.whoprofits.org/Company%20Info.php?id=738), accessed 29 September 2010
57. 'Global Compact Principles: BT's Communication on Progress', BT, [www.btplc.com/Responsiblebusiness/Ourstory/Sustainabilityreport/Indexes/GCPIIndex/index.aspx](http://www.btplc.com/Responsiblebusiness/Ourstory/Sustainabilityreport/Indexes/GCPIIndex/index.aspx), accessed 29 September 2010
58. 'The Way We Work', BT, [www.btplc.com/TheWayWeWork/Relationships/Humanrights/index.htm](http://www.btplc.com/TheWayWeWork/Relationships/Humanrights/index.htm), accessed 29 September 2010
59. *Fact Sheet: Jordan Valley*, Save the Children UK, October 2009
60. *The Jordan Valley Under Occupation: Colonization, isolation and expulsion*, Stop the Wall, 2006
61. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the Secretary-General*, UN General Assembly, UN document A/64/516, 6 November 2009
62. *Troubled waters: Palestinians denied fair access to water*, Amnesty International, October 2009
63. *Written Submission of the Center on Housing Rights and Evictions (COHRE) to the Committee Against Torture on its 42nd Session on the occasion of the Periodic Review of Israel*, Center on Housing Rights and Evictions, May 2009

- <sup>64</sup>. 'Water in the Palestinian Territories', LifeSource, [www.lifesource.ps/?module=a14](http://www.lifesource.ps/?module=a14), accessed 30 March 2010; data compiled from the records of the Palestinian Water Authority, the Palestinian Central Bureau of Statistics, and the Water, Sanitation and Health Monitoring Project.
- <sup>65</sup>. *The Humanitarian impact of Israeli settlements and other infrastructure in the West Bank*, UN Office for the Coordination of Humanitarian Affairs, July 2007
- <sup>66</sup>. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan: Report of the Secretary-General*, UN General Assembly, UN document A/64/516, 6 November 2009
- <sup>67</sup>. Ibid
- <sup>68</sup>. *European Union Heads of Mission Report on East Jerusalem*, European Union, December 2009
- <sup>69</sup>. *Occupied Palestinian Territory: West Bank Barrier Route Projections - July 2010*, UN Office for the Coordination of Humanitarian Affairs, July 2010
- <sup>70</sup>. *European Union Heads of Mission Report on East Jerusalem*, European Union, December 2009
- <sup>71</sup>. *The Planning Crisis in East Jerusalem: Understanding the Phenomenon of "Illegal" Construction*, UN Office for the Coordination of Humanitarian Affairs, April 2009
- <sup>72</sup>. *Report on Violations of the Right to Adequate Housing in the occupied Palestinian territory in the first quarter of 2009*, Centre on Housing Rights and Evictions, May 2009
- <sup>73</sup>. 'House Demolitions as Punishment: Punitive house demolitions from the perspective of international law', B'Tselem, [www.btselem.org/english/punitive\\_demolitions/legal\\_basis.asp](http://www.btselem.org/english/punitive_demolitions/legal_basis.asp), accessed 19 July 2010
- <sup>74</sup>. *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory including East Jerusalem: Report of the Secretary General*, UN General Assembly, UN document A/64/517, 6 November 2009
- <sup>75</sup>. *The Planning Crisis in East Jerusalem: Understanding the Phenomenon of "Illegal" Construction*, UN Office for the Coordination of Humanitarian Affairs, April 2009
- <sup>76</sup>. *Fact Finding Mission to Gaza and the West Bank*, British-Palestine All Party Parliamentary Group, May 2009
- <sup>77</sup>. A Nieuwhof, 'Veolia tries to spin its involvement in the occupation', *Electronic Intifada*, April 2010
- <sup>78</sup>. *Emergency Appeal 2010*, United Nations Relief and Works Agency for Palestine Refugees, [www.unrwa.org/userfiles/2010012143927.pdf](http://www.unrwa.org/userfiles/2010012143927.pdf), 2010
- <sup>79</sup>. 'EC Assistance to the Palestinians', European Union, [www.eeas.europa.eu/occupied\\_palestinian\\_territory/ec\\_assistance/index\\_en.htm](http://www.eeas.europa.eu/occupied_palestinian_territory/ec_assistance/index_en.htm), accessed 29 September 2010
- <sup>80</sup>. S Hever, *Political Economy of Aid to Palestinians Under Occupation*, Alternative Information Center, 2008
- <sup>81</sup>. B Ravid, 'Israel pushes EU to upgrade ties in light of renewed peace talks', *Ha'aretz*, 13 September 2010
- <sup>82</sup>. 'Facts & Figures: Top 10 arms exporting countries', Campaign Against Arms Trade, 17 October 2009
- <sup>83</sup>. Calculated from 2003-08 averages, and excluding Eritrea because only 2003 figure provided; *SIPRI Yearbook 2010: Military expenditure as a share of GDP, 2003-2008 (table)*, Stockholm International Peace Research Institute, [www.sipri.org/research/armaments/milex/resultoutput/milex\\_gdp](http://www.sipri.org/research/armaments/milex/resultoutput/milex_gdp), 2010
- <sup>84</sup>. 'Israel Military Guide: Military Industry', GlobalSecurity.org, [www.globalsecurity.org/military/world/israel/industry.htm](http://www.globalsecurity.org/military/world/israel/industry.htm), accessed 29 September 2010; *SIPRI Yearbook 2010: Armaments, Disarmament and National Security*, Stockholm International Peace Research Institute, July 2010
- <sup>85</sup>. 'London Underground to improve railway security with Verint networked video solutions', Verint, 20 September 2004, [www.verint.com/corporate/releases\\_view.cfm?article\\_level1\\_category\\_id=7&article\\_level1\\_id=360&pageno=1&year=2004](http://www.verint.com/corporate/releases_view.cfm?article_level1_category_id=7&article_level1_id=360&pageno=1&year=2004), accessed 29 September 2010; L Goldman, 'Israeli Technology to Keep US Borders Safe', *Israel21C*, 15 October 2006; S Kanon, 'Israeli Security Technology Keeps Mass Transit Safe', *Israel21C*, 23 October 2005
- <sup>86</sup>. *Arming the Occupation: Israel and the arms trade*, Campaign Against Arms Trade, 2002
- <sup>87</sup>. *NeoConOpticon: The EU Security-Industrial Complex*, Transnational Institute and Statewatch, 2009
- <sup>88</sup>. C Taylor, 'Arms Exports to Israel', House of Commons Library, document SN/IA/4931, International Affairs and Defence Section, 13 January 2009
- <sup>89</sup>. *Scrutiny of Arms Export Controls (2010): UK Strategic Export Controls Annual Report 2008, Quarterly Reports for 2009, licensing policy and review of export control legislation*, Committee on Arms Exports Controls, 2010
- <sup>90</sup>. D Pallister, 'British link with drone aiding the Israeli war effort', *The Guardian*, 9 January 2009
- <sup>91</sup>. *Memorandum from the Ministry of Defence May 2003, Defence - Written Evidence: Annex A*, House of Commons, 9 July 2003; *Boycott Elbit Systems: Stop arms trade with Israel!*, Stop the Wall, 2009
- <sup>92</sup>. N Klein, 'Israel: Boycott, Divest, Sanction', *The Nation*, 26 January 2009



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Cover picture: Palestinians protesting against the illegal annexation of their land by Israel  
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# Israel and the Boycott, Divestment, and Sanctions (BDS) Movement

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## Summary

This report provides information and analysis on a boycott, divestment, and sanctions (“BDS”) movement against Israel. The BDS movement is generally seen as a loose grouping of actors from various countries who advocate or engage in economic measures against Israel or Israel-related individuals or organizations, though defining precisely what may or may not constitute BDS activity is subject to debate.

The report also analyzes economic measures that “differentiate” or might be seen as differentiating between (1) Israel in general and (2) entities linked with Israeli-developed areas and settlements (whose legality is questioned under international law). Such settlements are found in the West Bank, East Jerusalem, and Golan Heights—areas that Israel has controlled and administered since the 1967 Arab-Israeli war. Debate is ongoing in the United States and elsewhere about whether economic differentiation (such as with regard to product labeling policies) between Israel proper and Israeli settlements constitutes a form of BDS.

The report also discusses

- Anti-BDS or anti-differentiation efforts to date, including U.S. legislative action and proposals at the federal and state level.
- Legislative considerations arising from existing antiboycott law, First Amendment issues, and issues regarding congressional powers over commerce and foreign affairs.

These considerations present a number of policy questions for Congress and the Trump Administration. For more information, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti.

The labeling of certain products imported from the West Bank is a subject with some connection to the debate regarding the BDS movement and economic differentiation. There appear to be some similarities between U.S. and European Union (EU) labeling laws and guidelines. Both jurisdictions call for the West Bank to be identified as the place of origin, but a November 2015 European Commission notice called for the labels for certain imports into the EU—Israel’s largest trading partner—to provide additional information to EU consumers by further differentiating between products from Israeli settlements and from non-settlement areas within the West Bank. This has fueled debate about whether the EU’s guidelines might constitute, encourage, or foreshadow punitive economic measures against Israel.

In 2015 and 2016, President Barack Obama signed trade and customs legislation (P.L. 114-26 and P.L. 114-125, respectively) that opposed BDS-related measures against Israel. However, the Administration asserted—including in a presidential signing statement for P.L. 114-125—that certain provisions in the legislation that sought to treat “Israeli-controlled territories” beyond 1949-1967 armistice lines (including West Bank settlements) in the same manner as Israel itself were not in line with U.S. policy. Some legislation proposed in the 115<sup>th</sup> Congress contains similarly controversial language.

Participating in the BDS movement would not appear to place a U.S. organization in violation of existing federal antiboycott legislation, which targets organizations’ participation in foreign boycotts. No foreign state has proclaimed that it participates in the BDS movement, and the movement does not have a secondary tier targeting companies that do business in or with Israel. If Members of Congress are inclined to propose legislation regarding BDS, they might consider using, as points of reference, legal and regulatory frameworks Congress and the executive branch



have used to designate actors of concern under various rubrics having to do with trade and/or national security.

Opponents of the BDS movement or of economic differentiation have proposed the enactment of legislation that would prohibit the provision of public funding to U.S. corporations, academic institutions, groups, or individuals that engage in BDS activity. Some scholars and commentators have argued that such legislation would raise First Amendment concerns, while others have argued that such legislation would be consistent with the First Amendment. The constitutionality of a restriction on the availability of public funds would depend upon the particulars of the legislation at issue.

Some state and local governments have enacted or are considering measures to counteract BDS-related or differentiation measures. State and local economic sanctions meant to influence foreign politics ordinarily raise three related constitutional issues: (1) whether they are preempted by federal law under the Constitution's Supremacy Clause, (2) whether they burden foreign commerce in violation of the dormant Foreign Commerce Clause and, if so, whether they are protected by the market participant exception; and (3) whether they impermissibly interfere with the federal government's exclusive power to conduct the nation's foreign affairs. Some Members of Congress have proposed legislation intended to preserve state and local anti-BDS or anti-differentiation measures.

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## Introduction

This report provides information and analysis on the following:

- Background on a “BDS” (boycott, divestment, and sanctions) movement against Israel.
- Private economic measures and product labeling policies—including those of the United States and European Union (EU)—that “differentiate” between (1) Israel in general and (2) entities linked with Israeli-developed areas and settlements in the West Bank, East Jerusalem, and Golan Heights (areas that Israel has controlled and administered since the 1967 Arab-Israeli war).
- Anti-BDS or anti-differentiation efforts to date, including federal and state legislation and proposals.
- Legislative considerations arising from existing antiboycott law, First Amendment issues, and issues regarding congressional powers over commerce and foreign affairs.

Congress and the Trump Administration currently face a number of policy questions on these issues. The BDS movement exists within a larger context of Israel’s complex economic and political relations with the world. For more information, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by Jim Zanotti.

## Background

### The BDS Movement

The BDS movement is generally seen as a loose grouping of actors from various countries who advocate or engage in economic measures against Israel or Israel-related individuals or organizations, though defining precisely what may or may not constitute BDS activity is subject to debate.<sup>1</sup> Those who are part of the movement or support it generally express sympathy for the Palestinian cause. No foreign government has acknowledged participating in the BDS movement, and the movement does not have a secondary tier targeting companies that do business in or with Israel.

In July 2005, various Palestinian civil society groups issued a “Call for BDS.”<sup>2</sup> These groups compared their grievances against Israel to the “struggle of South Africans against apartheid,” and

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<sup>1</sup> See, e.g., Sean F. McMahon, “The Boycott, Divestment, Sanctions Campaign: Contradictions and Challenges,” *Race & Class*, vol. 55, issue 4, July-September 2014; Marc Tracy, “With All the Boycott Israel Talk, What Is BDS?,” *newrepublic.com*, February 2, 2014; RAND Corporation, *The Costs of the Israeli-Palestinian Conflict*, 2015. Some commentators have claimed that a number of the civil society groups involved in the BDS movement receive a large amount of their funding from European governments. See, e.g., Testimony submitted for a July 28, 2015, hearing of the House Oversight and Government Reform Committee, Subcommittee on National Security, by SodaStream CEO Daniel Birnbaum and law professor Eugene Kontorovich, available respectively at <https://oversight.house.gov/wp-content/uploads/2015/07/7-28-2015-Natl-Security-Hearing-on-BDS-Birnbaum-SodaStream-Testimony.pdf>, pp. 59-60; and <https://oversight.house.gov/wp-content/uploads/2015/07/7-28-2015-Natl-Security-Hearing-on-BDS-Kontorovich-Northwestern-Testimony.pdf>, p. 3 and footnote 5.

<sup>2</sup> <http://www.bdsmovement.net/call>.

sought international support for “non-violent punitive measures”<sup>3</sup> against Israel unless and until it changes its policies by (in the words of the “call”)

1. ending its occupation and colonization of all Arab lands and dismantling the Wall;<sup>4</sup>
2. recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
3. respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN [General Assembly] resolution 194.<sup>5</sup>

Specifically, these Palestinian civil society groups called upon “international civil society organizations and people of conscience all over the world to impose broad boycotts and implement divestment initiatives against Israel similar to those applied to South Africa in the apartheid era,” and sought to have this audience pressure their “respective states to impose embargoes and sanctions against Israel.”<sup>6</sup>

The stated goals of the movement to change Israel’s treatment of Palestinians might, if achieved, have broader implications for the demographic and sociopolitical structure of Israel within its original 1948 borders.<sup>7</sup> For example, some Israelis and their supporters voice concern that the movement’s demands for an end to “occupation” of Arab lands and for promoting a “right of return” for Palestinian refugees could endanger Israel’s identity as a Jewish state if the demands were interpreted as insisting that refugee populations be able to live and vote in Israel.

Israeli officials strenuously oppose the BDS movement, and statements by U.S. officials have consistently denounced any boycotts or other punitive economic measures targeting Israel. In their Senate confirmation hearings in January 2017, Secretary of State Rex Tillerson and Permanent Representative to the United Nations Nikki Haley stated their opposition to BDS-related measures.<sup>8</sup>

## **Differentiation Between Israel and the Settlements**

Debate is ongoing in the United States and elsewhere about whether economic “differentiation” (such as through product labeling policies) between (1) Israel proper and (2) Israeli-developed areas and settlements in the West Bank, East Jerusalem, and Golan Heights constitute a form of BDS. Some individuals and groups who proclaim the need to maintain Israel’s Jewish identity publicly oppose BDS measures against companies inside Israel, but voice support for economic measures that target the settlements or those doing business there.<sup>9</sup> These individuals and groups

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<sup>3</sup> Ibid.

<sup>4</sup> The “Wall” is a term commonly used by Palestinians to describe the separation barrier that Israel has built in various areas roughly tracking (though departing in significant ways at some points from) the 1949-1967 Israel-Jordan (West Bank) armistice line, also known as the “Green Line.”

<sup>5</sup> These three objectives are found at <http://www.bdsmovement.net/call>.

<sup>6</sup> <https://bdsmovement.net/call>.

<sup>7</sup> See, e.g., McMahon, op. cit.; Tracy, op. cit.

<sup>8</sup> In his January 11 hearing, Secretary Tillerson indicated that actions by countries that are seen to advance BDS-related goals would “shade” the U.S. view of those countries. In her January 18 hearing, Ambassador Haley said, “I will not go to New York and abstain when the U.N. seeks to create an international environment that encourages boycotts of Israel.”

<sup>9</sup> See, e.g., Nathan Hersh, “Want to fight boycotts of Israel? Boycott West Bank settlements instead,” *Washington Post*, (continued...)



sometimes cite international political and legal views calling into question the legitimacy of Israeli civilian communities and businesses in areas that Israel has controlled since the 1967 Arab-Israeli war.<sup>10</sup>

For example, some European countries' pension funds and companies have withdrawn investments or canceled contracts owing to concerns regarding connections with settlement activity, as distinguished from broader anti-Israel economic measures.<sup>11</sup> Also, the leading councils of a number of U.S.-based Christian churches have either voted to divest from companies with settlement ties or have considered doing so.

### **Developments Involving International Organizations**

On December 23, 2016, the U.N. Security Council adopted Resolution 2334 (or UNSCR 2334) by a vote of 14 in favor, zero against, and one abstention by the United States. The resolution, among other things:

- reaffirms that settlements established by Israel in "Palestinian territory occupied since 1967, including East Jerusalem," constitute "a flagrant violation under international law" and a "major obstacle" to a two-state solution and a "just, lasting and comprehensive peace";
- reiterates the Council's demand that Israel "immediately and completely cease all settlement activities"; and
- calls upon all states to "distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967."

Following the adoption of UNSCR 2334, Palestinian political leaders indicated that they will campaign "to require that other countries not just label products made in the settlements, but ban them."<sup>12</sup> Claims by Palestinian activists and observers that the resolution provides legal and political backing for future boycotts were accompanied by expressions of consternation by Israeli observers.<sup>13</sup> Although the Palestinian Authority (PA) supports boycotts of settlement products, it generally opposes wider boycotts of Israel.<sup>14</sup> One analyst asserted that because UNSCR 2334 distinguishes between Israel and the settlements, the resolution "flies in the face of the demands of many BDS supporters, by explicitly advocating a two-state solution, including a secure (and legitimate) Israel."<sup>15</sup>

Other notable actions or developments from the past two years include:

(...continued)

December 19, 2016; Todd Gitlin, et al., "For an Economic Boycott and Political Nonrecognition of the Israeli Settlements in the Occupied Territories," *New York Review of Books*, October 13, 2016; Peter Beinart, "To Save Israel, Boycott the Settlements," *New York Times*, March 18, 2012.

<sup>10</sup> The most-cited international law pertaining to Israeli settlements is the Fourth Geneva Convention, Part III, Section III, Article 49 *Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, which states in its last sentence, "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Israel insists that the West Bank does not fall under the international law definition of "occupied territory," but is rather "disputed territory" because the previous occupying power (Jordan) did not have an internationally recognized claim to it, and given the demise of the Ottoman Empire at the end of World War I and the end of the British Mandate in 1948, Israel claims that no international actor has superior legal claim to it.

<sup>11</sup> See, e.g., Barak Ravid, "Denmark's Largest Pension Fund Divests From German Firm Which Operates Quarries in Israeli Settlements," *Ha'aretz*, December 15, 2016; Bernard Avishai, "The E.U. vs. B.D.S: The Politics of Israel Sanctions," *New Yorker*, January 22, 2016; Noah Browning, "Major Dutch pension firm divests from Israeli banks over settlements," Reuters, January 8, 2014; Ministry of Finance (Norway), "Three companies excluded from the Government Pension Fund Global," press release, August 23, 2010, <https://www.regjeringen.no/en/aktuelt/three-companies-excluded-from-the-governor/id612790/>.

<sup>12</sup> Peter Baker, "A Defiant Israel Vows to Expand Its Settlements," *New York Times*, December 27, 2016.

<sup>13</sup> Jumana al Tamimi, "Boycott move buoyed by UN resolution," *Gulf News*, December 26, 2016; Alan Baker, "The Dangers of UN Security Council Resolution 2334 (2016)," Jerusalem Center for Public Affairs, December 26, 2016.

<sup>14</sup> Uri Savir, "Why the PA is distancing itself from BDS movement," *Al-Monitor Israel Pulse*, May 8, 2016; Yoel Goldman, "Abbas: Don't Boycott Israel," *Times of Israel*, December 13, 2013.

<sup>15</sup> Natan Sachs, "What's new and what's not in the U.N. resolution on Israeli settlements," Brookings Institution (Markaz blog), December 26, 2016.

- In March 2016, the U.N. Human Rights Council adopted a controversial resolution which, among other things, requested that the U.N. Office of the High Commissioner for Human Rights produce a database of all business enterprises that have “directly and indirectly, enabled, facilitated and profited from the construction and growth of the (Israeli) settlements.”<sup>16</sup> This action was denounced by Israeli as a “blacklist” and by the United States as biased against Israel.<sup>17</sup>
- In March 2017, a special committee from the International Federation of Association Football (FIFA), soccer’s international governing body, warned Israel that it could face suspension from international competition if it continues to allow clubs from West Bank settlements to play in its national league.<sup>18</sup>

## Impact and Israeli Responses in Larger Political Context

BDS or economic differentiation measures exist within a larger context of international criticism of Israel. Israel and many of its supporters, along with the international media, frequently raise the possibility of Israel’s “isolation” (or, as some Israelis characterize it, “delegitimization”).<sup>19</sup> Some Israeli officials and outside observers have downplayed the concern, pointing to improvements in Israel’s relations with a number of countries.<sup>20</sup> Moreover, while some divestment from and boycotts of Israel or Israeli goods have taken place in recent years,<sup>21</sup> such measures appear to have had little overall effect on Israel’s economy. For example, one observer pointed to the tripling of foreign investment in Israel from 2005 to 2016 to claim that BDS or related economic measures against Israel have not been successful.<sup>22</sup>

In September 2015, the Israel-based company SodaStream closed its West Bank factory and relocated its operations inside Israel, though its CEO claimed that the BDS movement had only a “marginal” effect on these changes.<sup>23</sup> Reportedly, all of SodaStream’s West Bank-based Palestinian employees (between 500 and 600) were laid off because none could obtain permits from Israeli authorities to work at the new location.<sup>24</sup> A common Israeli assertion is that BDS advocates or those who differentiate economically between Israel and West Bank settlements harm the employment situation of West Bank Palestinians.<sup>25</sup> Many Palestinians and some international human rights groups counter this assertion by stating that Palestinians would be able to enjoy greater job prospects if Israeli settlements and movement/access/zoning restrictions in the West Bank did not constrain Palestinians’ entrepreneurial capacities or their ability to attract

<sup>16</sup> See U.N. Human Rights Council resolution 31/36 (A/HRC/31/L.39), March 22, 2016, paragraph 17; and paragraphs 96 and 117 of Human Rights Council Document, A/HRC/22/63, *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, February 7, 2013.

<sup>17</sup> Mohamad Torokman, “U.S. condemns U.N. call for list of firms operating in West Bank,” Reuters, March 31, 2016; Transcript of Remarks by Ambassador Nikki Haley, U.S. Permanent Representative to the United Nations, Geneva, Switzerland, June 6, 2017, available at <https://usun.state.gov/remarks/7828>.

<sup>18</sup> “Israel fumes over world soccer official’s ultimatum,” Agence France Presse, March 24, 2017.

<sup>19</sup> See, e.g., Lidar Grave-Lazi, “First Situation Room to Combat BDS Opens in US,” jpost.com, January 24, 2017.

<sup>20</sup> Ruthie Blum, “Israel’s Outgoing Foreign Ministry Chief Dispels ‘Myth’ of Jewish State’s Diplomatic Isolation,” *Algemeiner*, October 20, 2016.

<sup>21</sup> Avishai, op. cit.

<sup>22</sup> Sangwon Yoon, “The Boycott Israel Movement May be Failing,” *Bloomberg*, June 2, 2016.

<sup>23</sup> “SodaStream Leaves West Bank as CEO Says Boycott Antisemitic and Pointless,” *theguardian.com*, September 2, 2015.

<sup>24</sup> “SodaStream fires last Palestinian workers after permit row,” Agence France Presse, February 29, 2016.

<sup>25</sup> See, e.g., David Horovitz, “Victory for BDS as SodaStream’s last Palestinian workers lose their jobs,” *Times of Israel*, February 29, 2016.



international employers or outside investment.<sup>26</sup> Some Israelis attempt to justify constraints on West Bank Palestinians by reference to concerns about security for Israeli citizens located in Israel proper and the settlements.

While widespread consensus across Israel's political spectrum favors countering economic and political measures targeting Israel, there is debate over the extent to which changes in Israeli policy toward Palestinians can improve international attitudes toward Israel. Right-of-center political figures within the government sometimes portray criticisms of Israeli actions as pretexts for more deep-seated prejudice against Israel and/or Jews, while left-of-center figures within the opposition periodically criticize government leaders for steps that may have the potential to undermine support for Israel in international fora.<sup>27</sup>

Israeli political leaders routinely denounce BDS, and Israel's government has reportedly allocated about \$26 million in annual funding to the Ministry of Strategic Affairs aimed at countering BDS-related activities.<sup>28</sup> Such countermeasures apparently include assertive public diplomacy, outreach to enlist anti-BDS allies within the Jewish diaspora, and digital initiatives like gathering intelligence on activist groups.<sup>29</sup> Some current and former Israeli diplomats were cited in 2016 as saying that robust Israeli efforts to counter BDS may backfire by providing the movement with free publicity and by possibly alienating would-be diaspora supporters—including in the United States—via polarizing rhetoric.<sup>30</sup> Some private individuals and organizations have raised funds and public awareness in an effort to counter pro-BDS sentiment in the United States (such as on college campuses and social media websites) and elsewhere,<sup>31</sup> and Israel and a number of organizations held an anti-BDS summit in May 2016 at the U.N. General Assembly.<sup>32</sup>

In March 2017, Israel's Knesset (parliament) passed a law that allows the government to block entry into the country of nonresidents who publicly call for a boycott against Israel or Israelis in West Bank settlements, or are associated with organizations that do so.<sup>33</sup> Some of the law's opponents warn of negative consequences to Israel if it keeps out those who assert that they support its interests by means of their opposition to settlements.<sup>34</sup>

## Labeling Products from Israeli Settlements

Debates regarding policies that govern the labeling of consumer products imported into the European Union and United States from Israeli settlements, as well as the broader implications of such policies, have become part of the overall policy discussion regarding BDS and differentiation.

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<sup>26</sup> See, e.g., Human Rights Watch, *Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violation of Palestinian Rights*, 2016.

<sup>27</sup> See, e.g., Lahav Harkov, "Netanyahu says Israel's image improving as he defends Foreign Ministry's diplomatic efforts," *Jerusalem Post*, July 26, 2016.

<sup>28</sup> Daniel Estrin, "Covertly, Israel prepares to fight boycott activists online," Associated Press, February 17, 2016.

<sup>29</sup> Ibid.; Ben Caspit, "Did Israel's reaction to BDS drive movement's growth?" *Al-Monitor Israel Pulse*, April 27, 2016.

<sup>30</sup> Caspit, "Did Israel's reaction to BDS drive movement's growth?" op. cit.

<sup>31</sup> Grave-Lazi, op. cit.; "Saban said to quit anti-BDS campus initiative he launched with Adelson," Jewish Telegraphic Agency/*Times of Israel*, October 1, 2015.

<sup>32</sup> Cathryn J. Prince, "Israel hosts first-ever anti-BDS conference at UN," *Times of Israel*, June 1, 2016.

<sup>33</sup> Joshua Mitnick, "Law in Israel bans boycott backers," *Los Angeles Times*, March 7, 2017.

<sup>34</sup> Ibid.

## European Union Policy

Given that the 28-country European Union (EU) is Israel's largest trading partner,<sup>35</sup> Israeli officials routinely express concern regarding prospects of reduced Israel-EU economic cooperation as a consequence of Palestinian-related developments. Dating back even to the previous decade, some EU member states have taken a number of steps to "differentiate between Israel and its settlements project in the day-to-day conduct of bilateral relations."<sup>36</sup> The EU does not view such "differentiation" measures as part of or supporting the BDS movement.

On November 11, 2015, the European Commission issued a notice setting forth guidelines regarding labeling of certain products<sup>37</sup> imported into EU countries from areas that Israel captured in the 1967 Arab-Israeli war, along with an accompanying factsheet.<sup>38</sup> The labeling notice provides that products in question coming from Israeli settlements in the West Bank (including East Jerusalem) or Golan Heights should be clearly differentiated from products coming from Israel and those produced (generally by Palestinian-run businesses) outside of settlements in the West Bank, Golan Heights, and Gaza Strip. According to one media report, "EU diplomats say there are no serious plans for additional measures" and that the EU "insists the move is purely technical, applying the EU policy that settlements are illegal."<sup>39</sup> The factsheet accompanying the notice stated

The EU does not support any form of boycott or sanctions against Israel. The EU does not intend to impose any boycott on Israeli exports from the settlements. The Commission will only help Member States to apply already existing EU legislation. The indication of origin will give consumers the possibility to make an informed choice.

The Israeli Foreign Ministry responded to the European Commission notice with a statement that read in part, "We regret that the EU has chosen, for political reasons, to take such an exceptional and discriminatory step, inspired by the boycott movement."<sup>40</sup> After the move, Israel suspended contact with several EU bodies until a February 2016 conversation between Prime Minister

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<sup>35</sup> According to the European Commission's Directorate General for Trade, for 2015 the countries of the European Union accounted for 30.2% of Israel's total trade volume, while the United States accounted for 20.5%. Document available at [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113402.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113402.pdf). General EU-Israel trade information is available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/israel/>.

<sup>36</sup> Hugh Lovatt and Mattia Toaldo, "EU Differentiation and Israeli Settlements," European Council on Foreign Relations (ECFR), July 2015. According to one report, the EU has excluded products from settlements from trade preferences for over a decade. "EU sets rule for labeling products made in West Bank settlements," *Al Jazeera*, November 11, 2015.

Additionally, various EU governments have cautioned investors about legal, political, and economic risks supposedly involved in doing business with Israeli settlements. Andrew Rettman, "EU states promote settler boycott amid Israel crisis," *EUObserver*, July 4, 2014.

<sup>37</sup> The labeling rules are required for fresh fruit and vegetables, wine, honey, olive oil, eggs, poultry, organic products, and cosmetics; and are optional for pre-packaged foodstuffs and the majority of industrial products.

<sup>38</sup> The text of the notice is available at [http://eeas.europa.eu/delegations/israel/documents/news/20151111\\_interpretative\\_notice\\_indication\\_of\\_origin\\_of\\_goods\\_en.pdf](http://eeas.europa.eu/delegations/israel/documents/news/20151111_interpretative_notice_indication_of_origin_of_goods_en.pdf), and the factsheet at [http://eeas.europa.eu/delegations/israel/documents/news/20151111\\_indication\\_of\\_origin\\_fact\\_sheet\\_final\\_en.pdf](http://eeas.europa.eu/delegations/israel/documents/news/20151111_indication_of_origin_fact_sheet_final_en.pdf). According to one report, "EU foreign ministers made the decision in 2012 but Brussels has repeatedly delayed producing its guidelines, saying it was working on the details." Rory Jones, "Israel Decries EU Label Rules For Settlers," *Wall Street Journal*, November 12, 2015. In April 2015, 16 of 28 foreign ministers of EU member states signed a letter encouraging EU foreign policy chief Federica Mogherini to issue the notice, and the European Parliament passed a nonbinding resolution in support of this step in September 2015.

<sup>39</sup> Jones, *op. cit.*

<sup>40</sup> Text of statement available at <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-condemns-EU-decision-on-labeling-11-Nov-2015.aspx>.



Netanyahu and the High Representative of the EU for Foreign Affairs, Federica Mogherini.<sup>41</sup> Palestine Liberation Organization Secretary General Saeb Erekat called the European Commission notice “a significant move toward a total boycott of Israeli settlements, which are built illegally on occupied Palestinian lands.”<sup>42</sup> Some Israelis from the left of the country’s political spectrum reportedly signed a petition welcoming the move.<sup>43</sup>

Some Members of Congress viewed the implementation of a policy of different labeling for goods from Israeli settlements in negative terms. Two days before the European Commission issued its notice, 36 Senators sent a letter to Mogherini urging her not to adopt the labeling guidelines.<sup>44</sup>

A State Department deputy spokesperson in the Obama Administration reacted to the guidelines the day after their issuance. He said that the Administration did “not believe that [EU] labeling [of] the origin of products is equivalent to a boycott.”<sup>45</sup> He further said that U.S. laws for Israeli settlement exports are somewhat similar in requiring them to be marked as products of the West Bank, but that the U.S. laws do not require further differentiation between products from and not from settlements.<sup>46</sup>

The economic impact of the EU guidelines has been somewhat muted. Some attribute that at least partly to decisions by some EU member states—facing Israeli government pressure—not to implement the guidelines in a robust way.<sup>47</sup> One media report citing EU officials emphasized that exports to the EU from within Israel’s “internationally recognized borders” still receive preferential customs treatment, and that product labeling analogous to what the EU prescribed has taken place in the United Kingdom (UK) for a few years with “no negative economic effect.”<sup>48</sup> According to one media report, less than one percent of Israel’s annual trade with the EU has been affected by the guidelines.<sup>49</sup>

Debate has persisted about the implications of EU differentiation measures and proposals.<sup>50</sup> An October 2016 report from a European think tank asserted that “One year on, progress on the [EU] application of differentiation has been slow, but important. EU consensus around differentiation has broadened, and European diplomats have taken concrete steps to own and defend it.”<sup>51</sup> The report also acknowledged the “genuine threat of a resurgence of anti-Semitism” while making the case that differentiation is not a discriminatory measure.<sup>52</sup> By contrast, one Israeli journalist

<sup>41</sup> Ori Lewis, “Israel says has mended fences with EU in Netanyahu-Mogherini call,” *Reuters*, February 12, 2016.

<sup>42</sup> William Booth, “A Furor over Redefining ‘Made in Israel,’” *Washington Post*, November 12, 2015.

<sup>43</sup> Andrew Rettman and Peter Teffer, “EU Shops to Mark ‘Israeli Settlement’ Products,” *EUObserver*, November 11, 2015.

<sup>44</sup> Text of letter available at [http://www.cruz.senate.gov/files/documents/Letters/20151109\\_EU\\_IsraelLetter.pdf](http://www.cruz.senate.gov/files/documents/Letters/20151109_EU_IsraelLetter.pdf).

<sup>45</sup> Bradley Klapper, “US OK With New EU Labeling Rule for Israeli Settlement Goods,” *Associated Press*, November 12, 2015. At a daily press briefing the day before the European Commission issued its labeling notice, the deputy spokesperson had said that it could be “perceived as a step on the way” to a boycott.

<sup>46</sup> *Ibid.* See also U.S. Customs and Border Protection, *op. cit.*

<sup>47</sup> Nigel Wilson, “Israel: EU labelling rules have ‘non-existent impact,’” *Al Jazeera*, December 12, 2016.

<sup>48</sup> “EU sets rule for labeling products made in West Bank settlements,” *op. cit.*

<sup>49</sup> Wilson, *op. cit.*

<sup>50</sup> See, e.g., Teodora Coptil, “EU-Israel relations: Trojan horses, snakes, ladders and boycotts,” *European Jewish Press*, May 25, 2017; Sarah Leah Whitson, “Chipping Away at 50 Years of Occupation,” *Public Diplomacy Magazine*, June 5, 2017.

<sup>51</sup> Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine,” *European Council on Foreign Relations*, October 31, 2016.

<sup>52</sup> *Ibid.*

characterized the EU labeling system as a “deceptive nascent phase in a slippery slope campaign to impose a full BDS program on Israel.”<sup>53</sup>

Given tensions between the EU and Israel over Israeli settlement policy, some may fear that the EU could seek to review and possibly expand differentiation measures.<sup>54</sup> According to one early 2017 news report, some EU diplomats have called for the EU to ensure full implementation of the labeling guidelines. At the same time, this press report noted that EU foreign policy chief Mogherini has not been enthusiastic about the labeling guidelines and appears to have little appetite for further differentiation measures.<sup>55</sup>

## U.S. Policy

Under U.S. law, eligible articles imported into the United States from Israel, the West Bank, or the Gaza Strip are covered under the 1985 U.S.-Israel Free Trade Agreement (IFTA).<sup>56</sup> In January 2016, the Customs and Border Protection (CBP) Agency (within the Homeland Security Department) restated and clarified country of origin marking (i.e., labeling) requirements, based on previous executive branch guidance, as follows:

...goods produced in the West Bank or Gaza Strip shall be marked as originating from “West Bank,” “Gaza,” “Gaza Strip,” “West Bank/Gaza,” “West Bank/Gaza Strip,” “West Bank and Gaza,” or “West Bank and Gaza Strip.” It is not acceptable to mark the aforementioned goods with the words “Israel,” “Made in Israel,” “Occupied Territories-Israel,” or any variation thereof. Goods that are erroneously marked as products of Israel will be subject to an enforcement action carried out by U.S. Customs and Border Protection.<sup>57</sup>

A few days after CBP issued these requirements, one commentator wrote: “It is unknown to what degree settlement exporters (and importers of settlement goods) comply with U.S. regulations. Anecdotal evidence indicates that to a great extent they do not, raising questions about the need for stronger enforcement and penalties for non-compliance.”<sup>58</sup>

In February 2016, proposed legislation was introduced in the House (H.R. 4555 and H.R. 4503) and Senate (S. 2474) that would have permitted products exported to the United States from West

<sup>53</sup> Benjamin Weinthal, “European Affairs: BDS spreading like wildfire in Europe?” *Jerusalem Post*, March 5, 2016.

<sup>54</sup> See, e.g., Jodi Rudoren, et al., “E.U. Move Fans Fear of Boycott Aimed at Israel,” *New York Times*, November 12, 2015; Lovatt and Toaldo, *op. cit.*

<sup>55</sup> Andrew Rettman, “EU Diplomats Blame Israel for Jerusalem Volatility,” *EUObserver*, January 27, 2017.

<sup>56</sup> United States-Israel Free Trade Area Implementation Act of 1985 (P.L. 99-47), as amended in 1996 by P.L. 104-234 (West Bank and Gaza Strip Free Trade Benefits). The text of the IFTA is available at [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005439.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp). The IFTA rules of origin specify that products are eligible for duty-free treatment if (1) the product is the growth, product, or manufacture of a party, or a new or different article of commerce that has been grown, treated, or manufactured in a party; (2) imported directly from one party to another party; and (3) the cost or value of the materials plus the direct costs of processing operations is not less than 35% of the appraised value of the product.

<sup>57</sup> U.S. Customs and Border Protection, West Bank Country of Origin Marking Requirements, Cargo Systems Messaging Service #16-000047, January 23, 2016. Previous executive branch guidance on the subject had been provided via Treasury Decision (T.D.) 95-25, available at <http://www.gpo.gov/fdsys/pkg/FR-1995-04-06/html/95-8454.htm>; T.D. 97-16, available at <http://www.gpo.gov/fdsys/pkg/FR-1997-03-14/pdf/97-6434.pdf>; and Presidential Proclamation 6955 of November 13, 1996, available at <http://www.gpo.gov/fdsys/pkg/FR-1996-11-18/pdf/96-29613.pdf>.

<sup>58</sup> Lara Friedman, “Settlement Product Labeling Policies, U.S. vs. EU,” Americans for Peace Now, January 27, 2016. See also David Horowitz, “There’s a general condemnation of the West that you hear in many places: Is America withdrawing, is the West withdrawing?” *Times of Israel*, February 23, 2016.



Bank settlements to be labeled “Made in Israel.” None of these bills were enacted during the 114<sup>th</sup> Congress.

## **Anti-BDS or Anti-Differentiation Legislative Action and Proposals**

For additional analysis of enacted and proposed legislation discussed in this section, see “General Antiboycott Legislative Considerations,” “Potential First Amendment Issues Facing Laws Intended to Deter BDS Activity,” and “Federal Preemption Questions: Commerce Clause and Foreign Affairs” below.

### **In Congress**

A number of U.S. policymakers and lawmakers have stated opposition to or taken action against the BDS movement. Some Members of Congress argue that the BDS movement is discriminatory and are seeking legislative options to limit its influence. See **Table 1** below for a list of proposed anti-BDS or anti-differentiation legislation under congressional consideration.

In June 2015, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26) was enacted into law. This law provided trade promotion authority (TPA)<sup>59</sup> to the President regarding the negotiation of certain U.S. trade agreements, including the proposed U.S.-EU Transatlantic Trade and Investment Partnership (T-TIP). The law included a trade negotiating objective for T-TIP (U.S.-EU negotiations to achieve a comprehensive and “high-standard” free trade agreement) aimed at BDS-related activity. The trade negotiating objective, as enacted, discouraged politically motivated economic actions “intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories.”

During and after congressional deliberations, public debate regarding this trade negotiating objective focused on whether EU “differentiation” between commerce with Israeli settlements and commerce with Israel constitutes or promotes BDS-related activity.<sup>60</sup> The State Department spokesperson’s office weighed in on the debate with a statement following the enactment of P.L. 114-26 that included the following passage:

The United States has worked in the three decades since signing the U.S.-Israel Free Trade Agreement – our first such agreement with any country – to grow trade and investment ties exponentially with Israel. The United States government has also strongly opposed boycotts, divestment campaigns, and sanctions targeting the State of Israel, and will continue to do so.

However, by conflating Israel and “Israeli-controlled territories,” a provision of the Trade Promotion Authority legislation runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity. Every U.S. administration since 1967 – Democrat and Republican alike – has opposed Israeli settlement activity beyond the 1967 lines. This [Obama] Administration is no different. The U.S. government has never defended or supported Israeli settlements and activity

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<sup>59</sup> For more information, see CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by Ian F. Fergusson.

<sup>60</sup> Sarah Saadoun, “Don’t Protect Israeli Settlement Trade,” *The Hill*, May 15, 2015; Melissa Apter, “Home Run for Cardin,” *Baltimore Jewish Times*, April 30, 2015; Lara Friedman, “The Stealth Campaign in Congress to Support Israeli Settlements,” December 1, 2015.

associated with them and, by extension, does not pursue policies or activities that would legitimize them.<sup>61</sup>

In February 2016, President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 (the Customs Act, P.L. 114-125) into law. The Act contains a provision similar to the one in P.L. 114-26 that opposes punitive economic measures (such as measures advocated by a non-governmental boycott, divestment, and sanctions [BDS] movement) against businesses in Israel or Israeli-controlled territories. However, the Obama Administration asserted—including in a presidential signing statement—that certain provisions in P.L. 114-125 that seek to treat “Israeli-controlled territories” beyond 1949-1967 armistice lines (including West Bank settlements) in the same manner as Israel itself are not in line with U.S. policy.<sup>62</sup>

**Table 1. Proposed Anti-BDS or Anti-Differentiation Legislation Under Consideration: 115<sup>th</sup> Congress**

Bill Number	Name and Description
S. 720	<b>Israel Anti-Boycott Act.</b> A bill to amend the Export Administration Act of 1979 to include in the prohibitions on boycotts against allies of the United States boycotts fostered by international governmental organizations against Israel, and to add opposition to economic measures taken against Israel as an additional possible basis for the President, in consultation with the House Financial Services and Senate Banking committees, to make a national interest determination to deny applications for credit at the Export-Import Bank for non-financial or non-commercial reasons.
H.R. 1697	<b>Israel Anti-Boycott Act.</b> Substantially similar to S. 720.
S. 170	<b>Combating BDS Act of 2017.</b> To provide for nonpreemption of measures by State and local governments to divest from entities that engage in commerce-related or investment-related boycott, divestment, or sanctions activities targeting Israel (including persons doing business in Israel or Israeli-controlled territories), and for other purposes.
H.R. 2856	Substantially similar to S. 170.

## State Level Legislation

Since 2015, various U.S. states have also enacted or proposed anti-BDS or anti-differentiation legislation. Some legislation explicitly applies to situations involving both Israel and “Israeli-controlled territories,”<sup>63</sup> while observers speculate about the territorial applicability of other legislation that is less explicit.<sup>64</sup>

Examples of enacted legislation on the state level come under two broad categories:

- **Investment-Focused.** Laws that appear to require state investment vehicles to divest from or avoid investing in companies that—as specified variously in each state’s legislation—are characterized as engaging in, potentially engaging in, or advocating economic measures antithetical to Israel.<sup>65</sup> In 2016, New York

<sup>61</sup> Full text of statement cited by an AP reporter at <https://twitter.com/APDiploWriter/status/615969535087218688>, June 30, 2015.

<sup>62</sup> See, e.g., a presidential signing statement for P.L. 114-125 (H.R. 644) at <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/signing-statement-hr-644>.

<sup>63</sup> This is the case in Arizona, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, New Jersey, Ohio, and Texas.

<sup>64</sup> See, e.g., <https://peacenow.org/WP/wp-content/uploads/State-BDS-and-Settlement-legislation-table.pdf>.

<sup>65</sup> States that have enacted legislation to this effect include Arizona, Arkansas, Colorado, Florida, Illinois, Indiana, (continued...)



Governor Andrew Cuomo signed an executive order similar in content to other states' legislation on this subject.<sup>66</sup>

- **Contracting-Focused.** Laws that appear to prohibit public entities from transacting business with entities that—as specified variously in each state's legislation—are characterized as engaging in, potentially engaging in, or advocating economic measures antithetical to Israel.<sup>67</sup>

Additionally, as of May 2017, all 50 U.S. governors and the mayor of Washington, DC, had reportedly signed onto an initiative sponsored by the American Jewish Committee (AJC) entitled “Governors Against BDS.”<sup>68</sup>

## General Antiboycott Legislative Considerations<sup>69</sup>

The existing U.S. antiboycott regime was largely crafted to address the Arab League (League of Arab States) boycott of Israel. Members might consider the extent to which the existing regime could be applied or modified with respect to efforts to address the BDS movement.

The Arab League boycott has three tiers. The primary boycott prohibits citizens of an Arab League member state from buying from, selling to, or entering into a business contract with either the Israeli government or an Israeli citizen. The secondary boycott extends the primary boycott to any entity worldwide that does business in Israel. The tertiary boycott prohibits Arab League members and their nationals from doing business with a company that deals with companies that have been blacklisted by the Arab League.

In the late 1970s, the United States passed antiboycott legislation establishing a set of civil and criminal penalties to discourage U.S. individuals from cooperating with the Arab League boycott.<sup>70</sup> U.S. antiboycott efforts are targeted at the secondary and tertiary boycotts. U.S. legislation was enacted to “encourage, and in specified cases, require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction. They have the effect of preventing U.S. firms from being used to implement foreign policies of other nations which run

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(...continued)

Iowa, New Jersey, and Texas.

<sup>66</sup> See the text of Executive Order 157, signed on June 5, 2016, at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_157\\_new.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf).

<sup>67</sup> States that have enacted legislation to this effect include Arizona, Arkansas, Florida, Georgia, Iowa, Michigan, Ohio, Pennsylvania, Rhode Island, South Carolina, and Texas. California enacted legislation in September 2016 that requires parties seeking state contracts to certify that any policy that they have adopted against a sovereign nation or people (including Israel) is not discriminatory under specified civil rights or employment and housing legislation.

<sup>68</sup> See [http://www.ajc.org/site/c.7oJILSPwFfJSG/b.9394655/k.A643/Governors\\_United.htm](http://www.ajc.org/site/c.7oJILSPwFfJSG/b.9394655/k.A643/Governors_United.htm). The text of the statement on which the AJC seeks governors' signatures is available at [http://www.ajc.org/atf/cf/%7Bf56f4495-cf69-45cb-a2d7-f8eca17198ee%7D/GOVERNORS\\_AGAINST\\_BDS\\_STATEMENT.PDF](http://www.ajc.org/atf/cf/%7Bf56f4495-cf69-45cb-a2d7-f8eca17198ee%7D/GOVERNORS_AGAINST_BDS_STATEMENT.PDF).

<sup>69</sup> This section was authored by Martin A. Weiss, Specialist in International Trade and Finance.

<sup>70</sup> See CRS Report RL33961, *Arab League Boycott of Israel*, by Martin A. Weiss. U.S. regulations define cooperating with the boycott as (1) agreeing to refuse or actually refusing to do business in Israel or with a blacklisted company; (2) agreeing to discriminate or actually discriminating against other persons based on race, religion, sex, national origin, or nationality; (3) agreeing to furnish or actually furnishing information about business relationships in Israel or with blacklisted companies; and (4) agreeing to furnish or actually furnishing information about the race, religion, sex, or national origin of another person. The export-related antiboycott provisions are administered by the Department of Commerce and potentially fine and/or imprison U.S. persons participating in the boycott. The Internal Revenue Service (IRS) administers tax-related antiboycott regulations that deny tax benefits to U.S. taxpayers that participate in the boycott.

counter to U.S. policy.”<sup>71</sup> According to the Department of Commerce, in FY2016, 549 requests by Arab League members to participate in the boycott were reported to U.S. officials. The majority (325 requests) were from the United Arab Emirates, followed by Qatar (73) and Iraq (54).<sup>72</sup>

Participating in the BDS movement would not appear to place a U.S. organization in violation of existing federal antiboycott legislation, which targets organizations’ participation in foreign boycotts. No foreign state has proclaimed that it participates in the BDS movement, and the movement does not have a secondary tier targeting companies that do business in or with Israel.

Some Members of Congress have introduced legislation seeking to extend existing antiboycott penalties to BDS-related activity. If enacted, the Israel Anti-Boycott Act (S. 720, H.R. 1697—see **Table 1**) would amend federal antiboycott legislation to also apply to boycotts fostered by international governmental organizations against Israel. Members might also consider legal and regulatory frameworks that Congress and the executive branch have used to designate actors of concern under various rubrics having to do with trade and/or national security. One option would be to create a dual system under which Congress could explicitly designate foreign BDS “offenders” (either individuals or entities) through legislation, while also authorizing executive branch agencies (including the State, Treasury, or Commerce Departments) to designate foreign “offenders” via case-by-case determinations based on a number of criteria. Such criteria could include market behavior and its impact or potential impact on Israel, evidence of intent, coordination with other parties, etc. Congress could require the executive branch to justify its designations/nondesignations through reports, either as a matter of course or upon congressional or congressional leadership request. Such congressional designation measures, however, could raise bill of attainder concerns under the Constitution, as well as definitional concerns in identifying BDS participation.<sup>73</sup>

## Potential First Amendment Issues Facing Laws Intended to Deter BDS Activity<sup>74</sup>

As discussed above, opponents of the BDS movement have proposed the enactment of legislation, either at the federal or U.S. state level, which would limit or deter participation in BDS-related activities and/or economic “differentiation” (between Israel and Israeli settlements).<sup>75</sup> These proposals have taken a number of forms. For instance, an early iteration of congressional legislation would have restricted the availability of federal funds to entities,

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<sup>71</sup> Website of the Office of Antiboycott Compliance; <http://www.bis.doc.gov/AntiboycottCompliance/oacrequirements.html>.

<sup>72</sup> U.S. Department of Commerce, Bureau of Industry and Security, *Annual Report to the Congress for Fiscal Year 2016*, Washington, DC.

<sup>73</sup> A bill of attainder is a legislative act that imposes punishment without a trial. Such acts are expressly forbidden in Article 1, Section 9 of the Constitution. Designations for the purpose of implementing sanctions are subject to due process, that is, a designated person or entity is likely entitled to notice and opportunity to be heard by a neutral decision-maker prior to the implementation of sanctions. (The process that is due depends on the severity of sanctions, among other things.) For more information, see CRS Report R40826, *Bills of Attainder: The Constitutional Implications of Congress Legislating Narrowly*, by Kenneth R. Thomas.

<sup>74</sup> This section was authored by Kathleen Ann Ruane, Legislative Attorney.

<sup>75</sup> See *supra* “Anti-BDS or Anti-Differentiation Legislative Action and Proposals”. For ease of expression without any judgment as to the two concepts’ similarity or difference as a matter of law or policy, references to legislation addressing “BDS activity” or “BDS-related activity” in this section on First Amendment issues will also be deemed to include legislation addressing differentiation.

including universities, which engaged in BDS activity.<sup>76</sup> More recently, some states have enacted laws that prohibit government contractors from boycotting or discriminating against countries including Israel.<sup>77</sup> Other states have taken action to restrict the investment of state funds in entities that engage in BDS activity.<sup>78</sup> Under these restrictions, state pension funds, for example, may be required to divest from companies engaged in BDS activity.

Some scholars and commentators have argued that legislation and other government action designed to deter or eliminate BDS activity potentially would raise First Amendment concerns,<sup>79</sup> while others have argued that such action would be consistent with the First Amendment or would not implicate the First Amendment at all.<sup>80</sup> This section discusses key concepts and precedents that might factor into a reviewing court's analysis of the constitutionality of certain proposed and enacted laws and executive actions related to BDS activity.

In sum, the degree to which a restriction on BDS activity would implicate the First Amendment and whether, even if it did, it would nonetheless be permissible turns on a number of unsettled questions. The first and most obvious is whether the act of refusing to deal with Israel or Israeli-affiliated entities is expressive conduct protected by the First Amendment. Important to this analysis may be whether those participating in BDS activity are attempting to make a political statement or are attempting to gain an economic advantage. Another relevant factor may be whether the government, in enacting the restriction, may be viewed by a reviewing court to be suppressing a disfavored message or, instead, to be regulating discriminatory conduct. Answers to these questions would likely turn on the text of the specific statutes at issue, as well as a number of other factors that may be difficult to predict.

## Is BDS Activity Speech Protected by the First Amendment?

The First Amendment to the Constitution, incorporated against the states by the Fourteenth Amendment,<sup>81</sup> provides that “Congress shall make no law ... abridging the freedom of speech ....”<sup>82</sup> According to the Supreme Court, “the First Amendment [generally] means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its

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<sup>76</sup> See Protect Academic Freedom Act, H.R. 4009, 113th Cong. (2014).

<sup>77</sup> See *supra* “State Level Legislation”.

<sup>78</sup> *Id.*

<sup>79</sup> Recent Legislation, *First Amendment – Political Boycotts – South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts*, 129 HARV. L. REV. 2029, 2031-32 (2015) (arguing that the BDS boycott of Israel is protected by the Constitution); Letter from the Ctr. for Constitutional Rights, Nat'l Lawyers Guild, and Council on Am.-Islamic Relations, to Rep. John Kline (Feb. 11, 2014), available at [http://www.ccrjustice.org/sites/default/files/assets/files/Letter-re-HR4009-Kline\\_2-11-14\\_CCR-NLG-CAIR.pdf](http://www.ccrjustice.org/sites/default/files/assets/files/Letter-re-HR4009-Kline_2-11-14_CCR-NLG-CAIR.pdf); Rosie Gray, *Major Jewish Groups Won't Back Boycott Bill*, BUZZFEED (Feb. 6, 2014), [https://www.buzzfeed.com/rosiegray/major-jewish-groups-wont-back-boycott-bill?utm\\_term=.tdVrV8G4BD#.cdp7KAwONn](https://www.buzzfeed.com/rosiegray/major-jewish-groups-wont-back-boycott-bill?utm_term=.tdVrV8G4BD#.cdp7KAwONn) (last visited May 5, 2017) (quoting legal observers arguing that funding restrictions tied to BDS activity would be an unconstitutional restriction on speech, as well one legal scholar who disagreed with this concluding).

<sup>80</sup> Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAGAZINE (July 13, 2015), <http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds>; Eugene Volokh, *Bill to block federal funding to universities that boycott Israel*, WASH. POST: VOLOKH CONSPIRACY (Feb. 2, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/07/bill-to-block-federal-funding-to-universities-that-boycott-israel/>; see also Marc A. Greendorfer, *The Inapplicability of First Amendment Protections to BDS Movement Boycotts*, 2016 CARDOZO L. REV. DE NOVO 112 (2016) (arguing that BDS activity against Israel should not receive First Amendment protection).

<sup>81</sup> See *Murdoch v. Pennsylvania*, 319 U.S. 105, 108 (1943) (“The First Amendment, which the Fourteenth makes applicable to the states, declares...”).

<sup>82</sup> U.S. CONST. amend. I.



content.”<sup>83</sup> The Freedom of Speech Clause refers specifically to the freedom of *speech*.<sup>84</sup> Some non-verbal conduct, however, may also convey a message and be entitled to protection under the First Amendment.<sup>85</sup>

The Supreme Court has found that the government generally has more leeway to regulate expressive conduct than it has to regulate pure speech.<sup>86</sup> Nonetheless, there are limits on the government’s ability to regulate conduct protected by the First Amendment.<sup>87</sup> The government normally may not, for example, regulate conduct *because* of its expressive elements.<sup>88</sup>

The Supreme Court has generally interpreted refusals to do business, including through boycotts,<sup>89</sup> as conduct that may be permissibly regulated.<sup>90</sup> Boycotts aimed at gaining an economic advantage for the boycotting parties are generally considered to be within the government’s power to regulate and even to prohibit.<sup>91</sup> However, boycotts aimed at achieving something other than an economic advantage, particularly when the motivation is political or social in nature, may have more of an expressive element which, according to Supreme Court precedent, could qualify for First Amendment protection.<sup>92</sup>

No definitive precedent exists examining whether BDS activity is protected by the First Amendment.<sup>93</sup> Scholars who have written and commented on the issue disagree,<sup>94</sup> leading one

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<sup>83</sup> *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

<sup>84</sup> U.S. CONST. amend. I.

<sup>85</sup> *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.... Conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’”) (internal citation omitted).

<sup>86</sup> *Id.* at 406 (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (“[The government] may not, however, proscribe particular conduct *because* it has expressive elements.”) (emphasis in original). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (striking down a state statute that prohibited certain conduct, such as cross-burning, with the intent to intimidate others on the basis of their race, gender, or religion because the statute impermissibly discriminated on the basis of viewpoint).

<sup>89</sup> The act of joining together with others and agreeing not to do business with a particular entity or entities is commonly understood to constitute a boycott. *Boycott*, WEBSTER’S NEW COLLEGIATE DICTIONARY (5th ed. 1977).

<sup>90</sup> *See FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426 (1990).

<sup>91</sup> *Id.* at 426-28 (holding that a boycott involving attorneys that refused to accept cases unless the fees they were paid were raised was a violation of the antitrust laws); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982) (observing that the Supreme Court “has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association”).

<sup>92</sup> *See Claiborne Hardware*, 458 U.S. at 912-15.

<sup>93</sup> One opinion of a federal district court in 2017 does touch on the issue of whether the First Amendment is implicated by BDS activity against Israel. *Bronner v. Duggan*, 2017 U.S. Dist. LEXIS 48917 (D.D.C. 2017). In that case, members of the American Studies Association (ASA) brought suit against the ASA and its board members alleging that a resolution to boycott Israeli academic institutions had been improperly adopted and that its adoption constituted a breach of fiduciary duty, breach of contract, and other violations. *Id.* at \*1-\*4. The defendants claimed, among other things, that to rule against them would violate their First Amendment rights because engaging in the boycott was constitutionally protected speech. *Id.* at \*27-\*28. The district court did not examine whether boycotting Israeli academic institutions was constitutionally protected speech. Instead, the court appears to have presumed for the purposes of the case at issue that it is, and held, nonetheless, that a ruling against the defendants in these circumstances would not violate their constitutional rights. *Id.* at \*28. The court reached this conclusion because, to trigger First Amendment protection, the alleged infringement must have arisen from state action, and “the Court’s passive enforcement of the obligations expressly assumed by the parties does not constitute state action” *Id.* at \*28-\*29.

<sup>94</sup> *See Recent Legislation*, *supra* note 79 (arguing that BDS activity is protected speech); Greendorfer, *supra* note 80 (continued...)

commentator to describe the question as a “thorny” one and others to acknowledge that the answer to the question may not be straightforward.<sup>95</sup> Participants and advocates of the BDS movement characterize their activity as speech protected by the First Amendment.<sup>96</sup>

To support this argument, BDS supporters may point to the Court’s decision in *NAACP v. Claiborne Hardware*.<sup>97</sup> In that case, the Court held that an economic boycott of white-owned businesses by black citizens was entitled to First Amendment protection. The Court distinguished the situation from typical boycotts intended to secure an economic advantage for a particular business interest. While recognizing the government had considerable power to restrict economically motivated boycotts, the Court in *Claiborne Hardware* held that the “right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, *politically motivated* boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”<sup>98</sup>

It may be argued that, like the *Claiborne Hardware* boycotters, BDS participants’ intent is to cause economic harm, but their aim is not to destroy competition.<sup>99</sup> Instead, BDS proponents’ stated aim is to place pressure on Israel to make desired policy changes.<sup>100</sup> Moreover, the BDS participants might claim that their activity is non-violent and politically motivated, designed to force governmental change.<sup>101</sup> Following that reasoning, it might be argued that their activity should receive a similar degree of protection under the First Amendment as the boycott at issue in *Claiborne Hardware*.

There are, however, characteristics that distinguish the protected boycott in *Claiborne Hardware* from the BDS movement, which might factor into a reviewing court’s analysis as to whether BDS activity is similarly protected by the Constitution.<sup>102</sup> For instance, the *Claiborne Hardware* boycott involved an effort to influence the policies of domestic local governments and to vindicate rights guaranteed by the U.S. Constitution.<sup>103</sup> Matters of foreign policy were not

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(...continued)

(arguing that BDS activity is not protected speech); Kontorovich, *supra* note 80 (arguing the state legislation directed at BDS activity does not violate the First Amendment); Volokh, *supra* note 80 (arguing the federal legislation directed at BDS activity would not violate the First Amendment).

<sup>95</sup> Gilad Edelman, *Cuomo and B.D.S.: Can New York State Boycott a Boycott?*, THE NEW YORKER (June 16, 2016), <http://www.newyorker.com/news/news-desk/cuomo-and-b-d-s-can-new-york-state-boycott-a-boycott> (quoting Professor Ronald Collins as saying “[while] I wouldn’t say categorically that there’s a First Amendment violation here, I would say that it raises a number of thorny First Amendment issues” and quoting other law professors describing the complexity of the question surrounding possible constitutional protection for BDS activity).

<sup>96</sup> See PALESTINE LEGAL AND CTR. FOR CONSTITUTIONAL RIGHTS, THE PALESTINE EXCEPTION TO FREE SPEECH at 34-5 (2015), available at <https://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/560c2e0ae4b083d9c363801d/1443638794172/Palestine+Exception+Report+Final.pdf> (arguing that BDS activity against Israel is protected speech).

<sup>97</sup> 458 U.S. 886 (1982).

<sup>98</sup> *Id.* at 913 (italics added).

<sup>99</sup> See *id.* at 914 (finding that while the boycotters intended to cause economic harm, their aim was not to destroy legitimate competition); see also *supra* “The BDS Movement”.

<sup>100</sup> See *Claiborne Hardware*, 458 U.S. at 914 (finding that the boycotters intended to “vindicate rights of equality and freedom that lie at the heart of the Fourteenth Amendment itself”); see also *supra* “The BDS Movement”.

<sup>101</sup> See *Claiborne Hardware*, 458 U.S. at 914 (holding that the state’s ability to regulated “economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott”); see also *supra* “The BDS Movement”.

<sup>102</sup> See Greendorfer, *supra* note 80 at 116 (distinguishing the boycott at issue in *Claiborne Hardware* from BDS activity).

<sup>103</sup> *Claiborne Hardware*, 458 U.S. at 913.

examined by the Court.<sup>104</sup> The BDS movement, on the other hand, seeks to influence the conduct of a foreign government, Israel, perhaps in contravention of the foreign policy of the United States.<sup>105</sup> Courts generally provide broad deference to Congress and to the executive branch in matters of foreign affairs.<sup>106</sup> It remains unclear whether that deference might affect a court's judgment regarding the degree to which the government may permissibly seek to deter BDS activity.

There is another important difference between *Claiborne Hardware* and regulation of BDS activity. In *Claiborne Hardware*, the Court explicitly noted that it was not deciding that "a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity."<sup>107</sup> The *Claiborne Hardware* Court left open the question of whether a statutory boycott restriction tailored by a legislature to balance legitimate competing interests might survive constitutional review even if it burdened protected speech.<sup>108</sup>

At least one commentator has argued that a Supreme Court decision issued the same year as *Claiborne Hardware* provides support for the argument that BDS activity is not protected by the Constitution.<sup>109</sup> In *International Longshoremen's Ass'n, v. Allied Intern., Inc.*, the Court upheld a statutory prohibition on certain union boycotts as applied to a politically motivated boycott against a foreign government's policies.<sup>110</sup> At issue in the case was a union's decision, in the wake of the Soviet Union's invasion of Afghanistan, to stop handling Russian products. A U.S. importer of Russian products challenged the union's actions as violating the National Labor Relations Act, which prohibits "unions from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any person."<sup>111</sup> In reviewing the case, the Supreme Court considered whether, among other things, the boycott was protected by the First Amendment.

The Court held that the union's boycott was prohibited by federal law and the statutory prohibition did not raise First Amendment concerns.<sup>112</sup> With regard to the union's argument that the boycott was protected by the First Amendment, the Court observed that it had previously held that secondary picketing by union members was not protected activity under the First Amendment.<sup>113</sup> The Court went on to conclude that it was "even clearer" that the boycott at issue

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<sup>104</sup> *Id.*; see also Greendorfer, *supra* note 80 at 116.

<sup>105</sup> See *supra* "The BDS Movement".

<sup>106</sup> See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28-30 (2010) (deferring to the judgment of Congress that restrictions on the provision of material support, even in the form of speech, to foreign terrorist organizations, would advance the government's interest in combatting terrorism); *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 76 (1993) ("[The] nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of this Court.'") (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)).

<sup>107</sup> *Claiborne Hardware*, 458 U.S. at 915 n. 49.

<sup>108</sup> See *id.*

<sup>109</sup> Greendorfer, *supra* note 80 at 119. See also Kontorovich, *supra* note 80 (arguing that *Claiborne Hardware* is not applicable to restrictions on government contracting with or investment in those engaged in BDS activity and that existing statutory prohibitions against boycotts are justified for similar reasons as BDS restrictions, making restrictions on BDS activity arguably permissible).

<sup>110</sup> 456 U.S. 212 (1982).

<sup>111</sup> *Id.* at 222.

<sup>112</sup> *Id.* at 226-27.

<sup>113</sup> *Id.*



was entitled to “still less consideration under the First Amendment” because such conduct was “designed not to communicate but to coerce.”<sup>114</sup>

The Court’s opinion in *International Longshoremen’s Ass’n*, however, may not provide precise support for arguments regarding the permissibility of statutory restrictions on BDS activity. For example, *International Longshoremen’s Ass’n* dealt with restrictions on union boycotting activity.<sup>115</sup> Such restrictions traditionally have been viewed by the Court (including in *Claiborne Hardware*) as permissible “as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”<sup>116</sup> BDS activity does not primarily involve activities by unions or collective bargaining organizations, which may limit the applicability of Court jurisprudence regarding the First Amendment implications of government restrictions on union-led boycotts.

Some commentators also point to federal statutes and executive orders that have restricted the ability of U.S. persons to participate in boycotts sponsored or enforced by a foreign government, to argue that BDS activity may permissibly be restricted.<sup>117</sup> For example, the Export Administration Act of 1979 imposed criminal penalties on U.S. persons engaged in “any boycott fostered or imposed by a foreign country against a country which is friendly to the United States.”<sup>118</sup> The EAA regulations prohibited, among other things, U.S. persons from responding to questionnaires sent by the Arab League to aid those countries in their boycott against Israel.<sup>119</sup> These regulations were unsuccessfully challenged on First Amendment grounds by some companies who wished to respond to questionnaires that they received.<sup>120</sup>

The U.S. Court of Appeals for the Seventh Circuit upheld the restriction on answering the Arab League questionnaire, and found that the restriction was a constitutionally valid regulation of commercial speech.<sup>121</sup> Commercial speech regulations are reviewed under a more lenient standard than regulations of political speech.<sup>122</sup> The plaintiffs in these cases had attempted to argue that their decision to answer the questionnaire was political speech, warranting full First Amendment protection because “the decision to boycott Israel is itself a political decision,” and, therefore, “their answers to the questionnaires should be viewed as attempts to influence political decision

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<sup>114</sup> *Id.* (citing *NLRB v. Retail Store Employees*, 447 U.S. 607, 616 (1980); *American Radio Ass’n v. Mobile S.S. Ass’n*, 419 U.S. 215, 229-231 (1974)).

<sup>115</sup> *Id.*

<sup>116</sup> *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 912 (1982) (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 616-17 (1980)).

<sup>117</sup> *See Greendorfer*, *supra* note 80 at 120 (arguing that the Export Administration Act (EAA) prohibits boycotts against Israel); Edelman, *supra* note 95; *but see* Recent Legislation, *supra* note 79 at 2037-38 (arguing that the EAA might be unconstitutional under current precedent and distinguishing the activity prohibited by the EAA from BDS activity).

<sup>118</sup> The EAA expired in 1994 and, after a brief reauthorization, again in 2001, but regulations issued pursuant to the EAA have remained in effect pursuant to executive orders issued under separate authorities. P.L. 96-72, § 8(a)(1) (1979); JOHN T. MASTERSON JR., OFFICE OF THE CHIEF COUNSEL FOR INDUS. AND SEC., LEGAL AUTHORITY: EXPORT ADMINISTRATION REGULATIONS 2 n.1 (2016). The Ribicoff Amendment to the Tax Reform Act of 1976 might also be of interest because it creates a disincentive to participate in “an international boycott” by denying certain tax advantages to those persons. P.L. 94-455, § 1061 (1976) (codified as amended at 26 U.S.C. § 999).

<sup>119</sup> P.L. 96-72, § 8(a)(1) (1979); MASTERSON JR., *supra* note 118, at 2 n.1.

<sup>120</sup> *Briggs & Stratton Corp. v. Baldrige*, 728 F. 2d 915 (7th Cir. 1984); *Trane v. Baldrige*, 552 F. Supp. 1378 (W.D. Wis. 1983); *Briggs & Stratton Corp. v. Baldrige*, 539 F. Supp. 1307 (E.D. Wis. 1982).

<sup>121</sup> *Briggs*, 728 F. 2d at 918.

<sup>122</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

making.”<sup>123</sup> The Seventh Circuit disagreed, finding instead that “the appellants do not seek to answer the questionnaire in order to influence the Arabs’ decision to conduct or enforce a trade boycott with Israel. ... They wish through their answers only to show that the boycott’s sanctions should not be applied to them, because they have not violated its terms.”<sup>124</sup> In other words, they sought to protect their economic interests and not to engage in political arguments. The Seventh Circuit, therefore, held their speech was commercial and affirmed the lower court’s finding that the regulations were properly tailored to withstand scrutiny.<sup>125</sup>

BDS activity may be distinguishable from the activity prohibited and regulated by the EAA. The EAA prohibited participation in boycotts enforced by foreign governments.<sup>126</sup> BDS activity is not enforced by a foreign government.<sup>127</sup> Furthermore, unlike the companies that challenged the EAA regulations, BDS participants generally do not appear to be seeking to protect their own economic interests, rather, they appear to seek to pressure Israel to change its policies.<sup>128</sup> It might, therefore, be argued that BDS activity is not commercial speech, but political speech, and regulations of political speech generally are scrutinized more closely than commercial speech restrictions. For these reasons, the case law upholding regulations promulgated under the EAA might not provide directly analogous precedent to regulations of BDS activity. However, the regulations at issue in the Seventh Circuit case applied unambiguously to speech.<sup>129</sup> They prohibit the communication of information from one party to another via speech.<sup>130</sup> The case did not examine whether the activity of boycotting a foreign nation for political or economic reasons was speech protected by the Constitution or the degree to which that activity might be restricted even if it is protected speech.

The cases discussed above indicate that politically motivated boycotts generally may receive some degree of constitutional protection. However, the government may have greater leeway to regulate boycotts, even politically motivated boycotts, than it has to regulate pure speech, particularly where the boycotters have the power to coerce neutral third parties to comply with a boycott. Whether a particular statute or regulation burdening BDS activity would withstand scrutiny would likely turn on a number of factors, which may be difficult to predict, but could include the type of regulation at issue, the actors (i.e., would-be boycotters) to which it applied, and whether it was viewed by a reviewing court to be aimed at suppressing a particular message.

## **Potential Restrictions on the Provision of Government Funding to Entities Engaged in BDS**

An early congressional proposal to deter participation in the BDS movement would have restricted participating entities from receiving government funding, igniting a debate about the

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<sup>123</sup> *Briggs*, 728 F. 2d at 917.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 918.

<sup>126</sup> P.L. 96-72, § 8(a)(1) (1979). *See* Recent Legislation, *supra* note 94 at 2038 (“A key feature of [the EAA] is that they apply only to boycotts organized by *foreign nations* against allies of the United States. ... By contrast, BDS is led by civil society groups, not foreign sovereigns or terrorist organizations.”).

<sup>127</sup> *See supra* “The BDS Movement”.

<sup>128</sup> *Id.*

<sup>129</sup> *Briggs*, 728 F. 2d at 916-17 (adopting the lower court opinion, *Briggs*, 539 F. Supp. 1307 (E.D. Wis. 1982), but writing separately to clarify that the regulations applied to commercial speech rather than “traditional” speech).

<sup>130</sup> *Briggs*, 539 F. Supp. at 1312-13 (describing the regulations).

constitutionality of such a restriction.<sup>131</sup> The government has broad powers under the Spending Clause of the Constitution to tax and spend for the general welfare.<sup>132</sup> The powers granted by the Spending Clause include the powers to limit what can be done with federal funds in order to ensure that they are used in accordance with Congress's will.<sup>133</sup> However, the Supreme Court has found that the First Amendment does limit the conditions that can be placed on the receipt of federal funds.<sup>134</sup> Whether the government constitutionally may restrict the availability of federal funding to entities engaged in BDS activity could depend upon a number of factors, including the specifics of the funding restriction at issue and whether it is intended to target or suppress speech.

Some scholars have argued that, even if there is arguably some expressive quality to BDS activity, proposals to restrict entities engaged in BDS activity from receiving government funding should be viewed as possible prohibitions on discrimination.<sup>135</sup> Specifically, some commenters have likened a possible restriction on discrimination against Israel-affiliated entities to other constitutionally permissible legislative prohibitions on discrimination, such as government restrictions against race-based discrimination by private entities.<sup>136</sup>

Two cases identified in support of this argument are *Grove City College v. Bell* and *Christian Legal Society v. Martinez*.<sup>137</sup> In *Grove City College*, the Supreme Court held that Title IX of the Higher Education Amendments of 1972, which bans sex discrimination by universities that receive federal funds, did not violate the First Amendment rights of the educational institutions accepting the funds.<sup>138</sup> According to the Court, "Congress is free to attach reasonable and

<sup>131</sup> See Protect Academic Freedom Act, H.R. 4009, 113th Cong. (2014).

<sup>132</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>133</sup> *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2327-28 (2013) ("The [Spending] Clause provides Congress broad discretion to tax and spend for the 'general welfare,' including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends.").

<sup>134</sup> *Id.* at 2328 (striking down a requirement that a recipient of federal funds adopt a policy of advocating "abstinence only" that applied to the entire organization, rather than only to the portion of the organization that was implementing the federally funded program).

<sup>135</sup> Kontorovich, *supra* note 80; Volokh, *supra* note 80.

<sup>136</sup> Kontorovich, *supra* note 80; Volokh, *supra* note 80. Laws prohibiting discrimination on the basis of affiliation with Israel are arguably not wholly analogous to prohibitions on discrimination on the basis of race, sex, religion, gender or sexual orientation. Courts generally consider traits like race, religion, sex, and national origin to be immutable characteristics, either unchangeable as a result of birth or central to a person's identity, and afford them a higher degree of constitutional protection. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities on the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility....'" (internal citations omitted)); see also Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 4 (2015) (outlining the concept of immutability in court decisions and arguing against its use); Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 173 (2011) (also discussing immutability and approving of its use to guide court analysis). It might be argued that discrimination on the basis of affiliation with Israel is discrimination on the basis of national origin. See Edelman, *supra* note 95. However, if it is the case that discrimination against Israeli-affiliated companies is synonymous with discrimination on the basis of national origin, such a finding might throw the constitutionality of other existing prohibitions in doubt. For example, there may then be questions surrounding whether a state law restricting business with Iranian companies discriminates on the basis of national origin. *Id.* The immutable characteristic of natural origin as applied to individual persons may, therefore, be different than the national origin or location of a company.

<sup>137</sup> Volokh, *supra* note 80.

<sup>138</sup> *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984).



unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.”<sup>139</sup>

In *Christian Legal Society*, the Court upheld a public law school’s requirement that student groups allow all interested students to join their organizations in order to be recognized by the school and to receive the benefits of recognition (e.g., recognized student groups could receive financial assistance from the school for their events).<sup>140</sup> The Christian Legal Society (CLS) argued that the law school’s nondiscrimination policy violated CLS’s First Amendment rights to limit its membership to Christians. The Supreme Court disagreed.<sup>141</sup> According to the Court, the law school’s policy did not require the group to refrain from discrimination directly. Instead, the law school’s policy placed only “indirect pressure” on the group to allow any interested student to join regardless of that student’s religious beliefs.<sup>142</sup> If CLS wished to continue to discriminate in its membership, all it needed to do was forgo government subsidy.<sup>143</sup> Furthermore, the Court noted that the law school’s nondiscrimination policy had no effect on the beliefs any organization wished to espouse.<sup>144</sup> Instead, the policy regulated CLS’s conduct “without reference to the reasons motivating that behavior.”<sup>145</sup>

Applying the reasoning of these cases in the present context, if a federal funding restriction applied only to BDS activity, without reference to motivation, and did not restrict a funding recipient’s ability to speak about boycotts or to express an opinion about Israel, it could be argued that such a restriction would be constitutional. Under this reasoning, people would remain free to communicate their beliefs about Israel’s policies and the wisdom of placing economic pressure on the country, but would not be free to engage in conduct that discriminated on the basis of a person’s association with Israel.<sup>146</sup> On the other hand, some have argued that laws aimed at restricting or deterring BDS activity, even if they would apply only to refusals to deal and not to the expression of support for the BDS movement, are nonetheless aimed at suppressing the message communicated by BDS participation and raise First Amendment issues.<sup>147</sup> Supreme Court precedent has indicated that funding restrictions intended to suppress the private parties’ expression of a particular viewpoint are unconstitutional.<sup>148</sup> In *Christian Legal Society* the Court upheld the anti-discrimination requirement but explicitly noted that the requirement did not “target conduct on the basis of its expressive content.”<sup>149</sup> Opponents of BDS-related funding

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<sup>139</sup> *Id.*

<sup>140</sup> *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010).

<sup>141</sup> *Id.* at 669 (“CLS enjoys no constitutional right to state subvention of its selectivity.”).

<sup>142</sup> *Id.* at 682.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 696.

<sup>145</sup> *Id.*

<sup>146</sup> See Volokh, *supra* note 80 (“Most important, the bill doesn’t restrict university speech based on content or viewpoint ... but only for actually boycotting Israel: refusing to deal with Israeli institutions or scholars.”).

<sup>147</sup> See Recent Legislation, *supra* note 79 at 2031-32; Gray, *supra* note 79 (quoting a legal advocate as arguing that funding restrictions related to BDS activity would be an unconstitutional restriction on speech); Abraham H. Foxman, *Op-Ed: Comprehensive Approach to Fighting BDS is Needed*, JEWISH TELEGRAPHIC AGENCY (May 29, 2015) (“Legislation that bars BDS activity by private groups, whether corporations or universities, strikes at the heart of First Amendment-protected free speech, will be challenged in the courts and is likely to be struck down. A decision by a private body to boycott Israel, as despicable as it may be, is protected by our Constitution.”).

<sup>148</sup> See *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) (upholding a denial of a tax deduction for lobbying, but pointing out that the restriction on the availability of the deduction would likely be unconstitutional if the denial of funding was aimed “at the suppression of dangerous ideas”).

<sup>149</sup> *Christian Legal Soc’y*, 561 U.S. at 696 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992)).

restrictions might claim that a restriction on federal funding to entities engaged in BDS activity would be a restriction enacted *on the basis of* the message communicated by the BDS movement, which could arguably place the restriction outside the Court's holding in *Christian Legal Society*. In other words, they might argue that in enacting the funding restrictions, the government was attempting to disfavor a message the government dislikes, and the funding restriction may implicate the First Amendment for that reason.

Even if the First Amendment is implicated by a restriction on funding to entities engaged in BDS activity, in general, the government is not required to fund goals with which it does not agree.<sup>150</sup> The government generally may prohibit recipients of federal funds from using those funds in a way the government does not approve, provided that the restrictions on the use of the funds are germane to the federal interest in the program to which the funds are directed.<sup>151</sup> For example, the Supreme Court has held that the government could prohibit the use of federal funds for family planning services to advocate or provide referrals for abortion.<sup>152</sup> However, under Supreme Court precedent, the government cannot prescribe what an entity that receives federal funds may say with private money.<sup>153</sup> Therefore, the government could not require recipients of federal funds to espouse a government-approved policy that applied to the entire organization, including the portion funded privately.<sup>154</sup> Consequently, even if BDS activity is protected by the Constitution, the government may be able to restrict the use of federal funds by entities engaged in the BDS movement to support BDS activity, so long as the conditions on the use of the funds are germane to the federal interest being funded and do not burden speech funded privately.

## Restrictions on Government Contractors and State Investments

As discussed earlier, since 2015 some states have taken action related to BDS activity. Generally, these actions fall into two categories: (1) prohibitions on state contracting with entities that engage in BDS activity and (2) divestment of state assets from companies that participate in BDS.<sup>155</sup>

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<sup>150</sup> *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (refusing to “hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals.”).

<sup>151</sup> *See id.* at 193-95 (upholding restrictions on communications about and referrals for abortions within a federally-funded family planning program); *see also Regan*, 461 U.S. at 550-51 (finding that Congress could choose not to provide tax incentives to lobbying speech while providing those tax incentives to other kinds of speech without running afoul of the First Amendment). *See* CRS Report R44797, *The Federal Government's Authority to Impose Conditions on Grant Funds*, by Brian T. Yeh (listing four limitations on the government's power to place conditions on federal funding: “(1) ‘the condition must be unambiguously established ...; (2) [it must] be germane to the federal interest in the particular national projects or programs to which the money is directed; (3) [it must] not violate a separate constitutional provision, such as the First Amendment ...; and (4) [it must] not cross the line from enticement to coercion....”).

<sup>152</sup> *Rust*, 500 U.S. at 198.

<sup>153</sup> *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321 (2013); *see also FCC v. League of Women Voters*, 468 U.S. 364 (1984) (holding that the government could not prohibit radio broadcast stations that received some portion of their operating budgets from public funds from editorializing with private donations.).

<sup>154</sup> *Agency for Int'l Dev.*, 133 S. Ct. at 2332.

<sup>155</sup> *See supra* “State Level Legislation”.

## Government-Contractor Restrictions

Some states have either considered or enacted legislation to restrict state contracting with entities engaged in BDS activity.<sup>156</sup> Similar to the arguments surrounding proposed restrictions on government funding for entities engaged in BDS activity against Israel, some scholars and commentators argue that these laws bar discrimination by government contractors against Israel and Israeli-affiliated entities, and, thus, do not raise First Amendment concerns.<sup>157</sup> Government contractors in many situations are already prohibited from discriminating on the basis of race, color, religion, sex, and national origin.<sup>158</sup> If a reviewing court accepted the argument that the state government contracting restrictions applied only to discriminatory conduct and were not aimed at suppressing a particular viewpoint, the restrictions might be upheld.

However, similar to the arguments surrounding potential government funding restrictions, if BDS activity is protected speech, the First Amendment may limit the government's ability to restrict that activity by government contractors.<sup>159</sup> The Supreme Court has held that government contractors do not surrender their First Amendment rights as a result of the contract.<sup>160</sup> Government contractors, therefore, retain their rights to engage in speech on matters of public concern, outside of the performance of the contract, and the Constitution limits the government's ability to terminate the contract on the basis of their speech.<sup>161</sup> However, the Supreme Court has also acknowledged that the government has legitimate interests as a contracting party, which may outweigh the First Amendment rights of contractors in some circumstances.<sup>162</sup> Reviewing courts therefore weigh contractors' rights to engage in speech on matters of public concern against the government's rights and interests as a contractor to determine whether the limitation on speech rights is permissible under the circumstances.<sup>163</sup> If a reviewing court determined that a restriction on a government contractor's ability to engage in BDS activity outside the scope of the contract limited the speech of the contractor, a court might balance the competing interests of the state and the contractor to determine whether the limitation was permissible.

Another distinction that may be important is whether the contracting restriction applies to existing government contracts or to contracts prior to their formation.<sup>164</sup> The Supreme Court has held only that the Constitution limits the termination of existing contracts in retaliation for engaging in protected speech.<sup>165</sup> The Court has not opined on whether this protection would extend to new bids for government contracts, i.e., whether the Constitution limits the government's ability to

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<sup>156</sup> *Id.*

<sup>157</sup> Kontorovich, *supra* note 80; Edelman, *supra* note 95 (discussing constitutional issues that might be raised by New York governor's executive order directing state agencies to cease doing business with entities that support the BDS movement).

<sup>158</sup> See 42 U.S.C. § 2000e-2 (prohibiting employers from discriminating against an individual because of the "individual's race, color, religion, sex, or national origin"); Exec. Order No. 11,246, 30 Fed. Reg. 12319, 12935 (1965).

<sup>159</sup> See *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (holding that "independent contractors do enjoy some First Amendment protection..."); *O'Hare Trucking Serv. Inc. v. City of Northlake*, 518 U.S. 712, 720-21 (1996) (finding that the government may not condition the contracting relationship on party affiliation "unless it has some justification beyond dislike of the individual's political association"); see also Recent Legislation, *supra* note 79 at 2033-34.

<sup>160</sup> *Umbehr*, 518 U.S. at 685.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 678-79.

<sup>163</sup> *Id.* at 685.

<sup>164</sup> Recent Legislation, *supra* note 79 at 2035.

<sup>165</sup> *Id.*



deny the award of a contract on the basis of the contractor's otherwise-protected speech.<sup>166</sup> Lower courts that have considered this question have disagreed on this issue.<sup>167</sup>

## State Investment Restrictions

Certain states have also taken action to divest state funds from entities engaged in BDS activity.<sup>168</sup> For example, the governor of New York recently signed an executive order requiring all state agencies to divest funds from entities engaging in BDS activity.<sup>169</sup> As with previously analyzed restrictions, the key issues in determining the constitutionality of such actions are whether BDS activity is protected by the First Amendment and, if it is, the degree to which the government is attempting to suppress a disfavored message by enacting the restrictions on investment.<sup>170</sup>

Proponents of state action to restrict investment in entities engaged in BDS activity argue that BDS is not protected speech and investment restrictions, therefore, do not implicate the First Amendment.<sup>171</sup> If a reviewing court were to accept that argument, the state restrictions on investment arguably could be permissible under the First Amendment.

Other observers, however, have noted that the constitutional status of BDS activity is, at the least, unclear.<sup>172</sup> If BDS activity is protected by the First Amendment, the constitutionality of a restriction on state investment in entities engaged in that activity would also be uncertain.<sup>173</sup> According to one scholar whether a state limitation on investing its funds in entities because of their speech might violate the First Amendment is without "direct precedent, at least at the Supreme Court."<sup>174</sup>

The closest analogue appears to be the Supreme Court's line of cases analyzing restrictions on government funding, discussed earlier.<sup>175</sup> In the Court's most recent opinion analyzing a government funding restriction on speech, Chief Justice Roberts distilled the Court's precedent in this area, writing that "the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* Compare *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F. 3d 378, 385 (5th Cir. 2006) ("Since First Amendment rights have been afforded to individuals applying for employment with the government no different result should be afforded to bidders."), with *McClintock v. Eichelberger*, 169 F. 3d 812, 817 (3d Cir. 1999) (declining to extend First Amendment protections to new bidders).

<sup>168</sup> See *supra* "State Level Legislation".

<sup>169</sup> N.Y. Executive Order 157, signed on June 5, 2016, at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_157\\_new.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_157_new.pdf).

<sup>170</sup> See Edelman, *supra* note 95 (observing while analyzing Governor Cuomo's executive order that "[the] first challenge is figuring out whether companies that join B.D.S. are engaging in free speech at all. ... But, even if the courts would view B.D.S. as a form of free speech, that doesn't necessarily mean Cuomo's order is unconstitutional.").

<sup>171</sup> *Id.* (quoting Alphonso David, counsel to Governor Cuomo, "[BDS activity] is not protected speech ... [It] is conduct that is being advanced to inflict economic harm."); Kontorovich, *supra* note 80 ("The new laws relate to state contracting and public pension funds' investments. They simply limit a state's business relationships with companies that discriminatorily limit their own business relations. These laws do not prohibit any kind of speech.").

<sup>172</sup> Edelman, *supra* note 95 (quoting one legal scholar as characterizing the issue as raising "a number of thorny First Amendment issues"); Gray, *supra* note 79 (noting conflicting opinions about the constitutional protection of BDS activity).

<sup>173</sup> Edelman, *supra* note 95.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

speech outside the contours of the program itself.”<sup>176</sup> A court reviewing state investment restrictions might, therefore, examine whether the restriction represented the government’s expression of support for a specific public policy or an attempt by the government to “leverage” its investing power “to regulate speech.”<sup>177</sup>

## **Federal Preemption Questions: Commerce Clause and Foreign Affairs<sup>178</sup>**

As noted above, some state and local governments have enacted or are considering measures to counteract BDS-related or differentiation measures. State and local economic sanctions meant to influence foreign politics ordinarily raise three related constitutional issues: (1) whether they are preempted by federal law under the Constitution’s Supremacy Clause, (2) whether they burden foreign commerce in violation of the dormant Foreign Commerce Clause and, if so, whether they are protected by the market participant exception; and (3) whether they impermissibly interfere with the federal government’s exclusive power to conduct the nation’s foreign affairs.<sup>179</sup> The constitutionality of any given state or local measure would depend upon the particulars of the legislation at issue.

### **Preemption by Federal Statute**

The Supremacy Clause of the Constitution establishes that federal statutes, treaties, and the Constitution itself are “the supreme Law of the Land.”<sup>180</sup> Accordingly, states can be precluded from taking actions that are otherwise within their authority if federal law is thereby impeded. The extent to which a federal statute preempts state law in a given area is within the control of Congress. Congress may, by clearly stating its intent, choose to preempt all state laws, no state laws, or only those state laws with certain attributes.<sup>181</sup> When Congress enacted the antiboycott provisions of the Export Administration Act (EAA) in 1977,<sup>182</sup> for example, it expressly preempted any state or local measure that “pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.”<sup>183</sup>

Even absent an express preemption provision such as that found in the EAA, an act of Congress can impliedly preempt state or local action. Where Congress has not expressly preempted state

<sup>176</sup> *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l*, 133 S. Ct. 2321, 2328 (2013); *see also* Edelman, *supra* note 95 (describing one legal scholar as observing that “the key question is whether the government is simply stating its views or using the threat of withdrawing funding to pressure people to change their message”).

<sup>177</sup> *See* Edelman, *supra* note 95 (In analyzing New York State’s executive action, quoting one legal scholar as observing that “It’s one thing to say, ‘We just want clean hands,’ and another to try to put pressure on those entities that support the B.D.S. movement.”).

<sup>178</sup> This section was authored by Jennifer K. Elsea, Legislative Attorney.

<sup>179</sup> For a more in-depth overview of these issues, *see* CRS Report RL33948, *State and Local Economic Sanctions: Constitutional Issues*, by Michael John Garcia and Todd Garvey, from which some of the material in this section is drawn.

<sup>180</sup> U.S. CONST., Art. VI, cl. 2.

<sup>181</sup> *See generally* *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“The purpose of Congress is the ultimate touchstone” with respect to preemption questions).

<sup>182</sup> P.L. 96-72, § 8, Sept. 29, 1979, 93 Stat. 521.

<sup>183</sup> 50 USC § 4607(c).

and local laws, two types of implied federal preemption may be found: *field preemption*, in which federal regulation is so pervasive that one can reasonably infer that states or localities have no role to play,<sup>184</sup> and *conflict preemption*, in which “compliance with both federal and state regulations is a physical impossibility,”<sup>185</sup> or where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>186</sup> The Supreme Court felled a Massachusetts law on the latter ground because the law imposed sanctions on Burma (Myanmar) in such a way that frustrated the implementation of a federal statutory scheme also targeting Burma.<sup>187</sup>

In order to preclude implied preemption, Congress may sometimes include non-preemption language in sanctions legislation. One bill in the 115<sup>th</sup> Congress has been introduced to preserve state and local anti-BDS or anti-differentiation measures. The Combating BDS Act of 2017, S. 170 (see **Table 1**), would permit state and local governments to divest their own assets from or prohibit government contracting with certain entities that they determine engage in BDS-related activity, as defined by the bill and subject to its restrictions. The bill appears to be modeled on Section 3 of the Sudan Accountability and Divestment Act of 2007, which provides that certain state and local actions targeting Sudan are not preempted by any federal law.<sup>188</sup>

## Foreign Commerce Clause

The Constitution provides Congress with the authority to regulate both interstate and foreign commerce.<sup>189</sup> In addition to this affirmative grant of constitutional authority, the Supreme Court has recognized that the Commerce Clause implies a corresponding restraint on the authority of the states to interfere with commerce, even absent congressional action.<sup>190</sup> This inferred restriction arising from congressional inaction is generally referred to as the “dormant” Commerce Clause. Under this established principle, states and localities are prohibited from unreasonably burdening or discriminating against either interstate or foreign commerce unless they are authorized by Congress to do so.<sup>191</sup> In a series of cases involving state taxes, the Supreme Court has set out criteria for examining whether state measures impermissibly burden *foreign* commerce where affirmative congressional permission is absent. In sum, the Court has required a closer examination of measures alleged to infringe the Foreign Commerce Clause than is required

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<sup>184</sup> See, e.g., *Wardair Canada Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 6 (1986).

<sup>185</sup> *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>186</sup> *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 2501 (2012) (quoting *Fla. Lime*, 373 U.S. at 142-43, and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-49 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983).

<sup>187</sup> *Crosby*, 530 U.S. at 373-74 (noting that such obstacles are to be identified by “examining the federal statute as a whole and identifying its purpose and intended effects”).

<sup>188</sup> P.L. 110-174, 121 Stat. 2516, codified at 50 U.S.C. § 1701 note.

<sup>189</sup> U.S. CONST. Art. I, § 8, cl. 3.

<sup>190</sup> See, e.g., *Cooley v. Bd. of Wardens of Port of Philadelphia*, 53 U.S. 299 (1851).

<sup>191</sup> See *New York v. United States*, 505 U.S. 144, 171 (1992) (“While the Commerce Clause has long been understood to limit the States’ ability to discriminate against interstate commerce, that limit may be lifted...by an expression of the ‘unambiguous intent’ of Congress.”) (internal citations omitted); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87-93 (1984). See also *Kraft Gen. Foods v. Iowa Dept. of Revenue*, 505 U.S. 71, 81 (1992) (“Absent a compelling justification ... a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”).



for those alleged to infringe its interstate counterpart,<sup>192</sup> but has also provided some room for state measures in situations where a federal role is not clearly demanded.<sup>193</sup>

Where Congress has not clearly immunized a state selective purchasing or divestment law, a state may defend a challenged law by invoking the market participant doctrine, which protects those laws in which the state or local government acts as a buyer or seller of goods rather than as a regulator.<sup>194</sup> Consequently, state and local measures that pertain to the investment of government funds, as well as measures that regulate government procurement, may be defended on the ground that the state or local government is merely making investment or purchasing choices for itself and not regulating other investors or buyers, as the case may be. The market participant doctrine, however, may not apply where the state seeks to affect behavior beyond the immediate market in which it is operating; the doctrine does not immunize laws from other constitutional challenges; and the Supreme Court has suggested the doctrine may not even apply in Foreign Commerce Clause cases.<sup>195</sup>

## **Intrusion into Foreign Affairs**

“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>196</sup> Consequently, state or local laws that encroach on the federal government’s authority over foreign affairs may be deemed constitutionally impermissible. In its 1968 decision in *Zschernig v. Miller*,<sup>197</sup> the Supreme Court struck down an Oregon law prohibiting nonresident aliens from inheriting property unless they could demonstrate to the Oregon state courts that their

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<sup>192</sup> See *Japan Line, Ltd. v. Cty. of Los Angeles*, 441 U.S. 434 (1979). One reason for the difference was that the state tax at issue on an instrumentality in foreign commerce “may impair federal uniformity in an area where federal uniformity is essential,” or, in other words, may “prevent [] the Federal Government from ‘speaking with one voice when regulating commercial relations with foreign governments.’” *Id.* at 446-48, 451. See also *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

<sup>193</sup> *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (holding that state statutes that might otherwise violate the “one voice” standard may be valid if there is no clear indication that Congress had intended to bar the state practice). The Court also suggested that “Congress may more passively indicate that certain state practices do not ‘impair federal uniformity in an area where federal uniformity is essential....’” *Id.* at 323. Moreover, it has indicated that Congress “need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce....” *Id.*

<sup>194</sup> See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-10 (1976) (“Nothing in the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”).

<sup>195</sup> See, e.g., *South-Central Timber Dev., Inc.*, 467 U.S. at 99 (downstream effects); *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984) (no immunity from other constitutional challenges); *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38, n.9 (1980) (application in Foreign Commerce Clause cases unclear).

The Federal Court of Appeals for the First Circuit in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), concluded that the State of Massachusetts was not acting as a market participant in enacting its Burma sanctions law because it was “attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies’ interactions with Massachusetts.” *Id.* at 63. The court also found that in any event the state would not be shielded from scrutiny under the Foreign Commerce Clause because of questions as to whether the market participant exception “applies at all (or without a much higher level of scrutiny) to the Clause.” *Id.* at 65. See also *Antilles Cement Corp. v. Acevedo Vilá*, 408 F.3d 41, 46-47 (1st Cir. 2005). The Supreme Court in *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) struck the Massachusetts Burma law on federal preemption grounds without taking up the Foreign Commerce Clause issue.

<sup>196</sup> *United States v. Pink*, 315 U.S. 203, 232 (1942). See also, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“The Federal Government, representing as it does the collective interests of the...states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”).

<sup>197</sup> 389 U.S. 429 (1968).

home countries allowed U.S. nationals to inherit estates on a reciprocal basis and that payments to foreign heirs from the Oregon estates would not be confiscated. Although the federal government had not exercised its power in the area, the Supreme Court nonetheless found that the inquiries required by the Oregon statute would result in “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>198</sup> The Court distinguished an earlier decision, *Clark v. Allen*,<sup>199</sup> which had upheld a similar California statute on the ground that the statute in that case could be implemented through “a routine reading of foreign law” and did not require the particularized inquiries demanded by the Oregon statute.<sup>200</sup>

The Supreme Court reaffirmed *Zschernig* and the dormant foreign affairs power in 2003 when it struck down a California law requiring insurers to report life insurance policies held by Holocaust victims because the law interfered with an executive agreement supporting a German initiative to resolve Holocaust insurance claims without litigation.<sup>201</sup> It appears to be an open question whether Congress can permit state and local regulations that conflict with federal foreign policy,<sup>202</sup> or whether states and localities that enact such measures can invoke a “market participation” exception to shield them from challenges on foreign policy grounds.<sup>203</sup> Prior to enactment of the Sudan Accountability and Divestment Act of 2007, a federal district court enjoined enforcement of an Illinois law that prohibited the deposit of state or municipal funds in any financial institution that does business in or with Sudan, on the basis that the law interfered with the federal government’s dormant foreign policy power.<sup>204</sup> It does not appear that any court has yet addressed whether the non-preemption language in the Sudan Accountability and Divestment Act of 2007 would effectively shield similar state laws from legal challenges.

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<sup>198</sup> *Id.* at 432.

<sup>199</sup> 331 U.S. 503 (1947).

<sup>200</sup> *Zschernig*, 389 U.S. at 433-36.

<sup>201</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

<sup>202</sup> Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 206 (2011) (noting that President George W. Bush objected in a signing statement to non-preemption language Congress included in the Sudan Accountability and Divestment Act of 2007). In his signing statement, President Bush wrote:

This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.

Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres. Doc. 1645 (Dec. 31, 2007).

The language in § 3 of the Sudan Accountability and Divestment Act, like similar language in S. 170, may arguably be interpreted to apply to preemption under the Supremacy Clause but not interference in foreign policy in conflict with the dormant foreign affairs power.

<sup>203</sup> Schaefer, *supra* note 202, at 260-61 (citing lower court cases finding a market participant exception to dormant foreign affairs doctrine but noting the Supreme Court has not expressly ruled on the issue).

<sup>204</sup> *Nat’l Foreign Trade Council, Inc. v. Giannoulas*, 523 F. Supp. 2d 731 (N.D. Ill. 2007). The court also enjoined the law’s provision regarding divestment of pension funds, but on foreign commerce grounds and not the dormant foreign affairs power.

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