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Israel and the Boycott, Divestment, and Sanctions (BDS) Movement

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November 24, 2015

Congressional Research Service
7-....
www.crs.gov
R44281

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

This report provides information and analysis on a boycott, divestment, and sanctions ("BDS") movement against Israel, as well as on 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 (of disputed legality). 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. The report also discusses

- Anti-BDS or anti-differentiation efforts to date, including U.S. legislative action and proposals at both the federal and state level.
- Legislative considerations drawing from existing antiboycott law and from First Amendment issues.

The BDS movement exists within a larger context of Israel's complex economic and political relations with the world. Since the breakdown of the last round of Israeli-Palestinian negotiations in April 2014, challenges that Israel has faced to its international economic and cultural relations have received greater public attention. Many Israeli officials and other observers speculate that Israel could, over time, face greater international isolation. For more information, see CRS Report RL33476, *Israel: Background and U.S. Relations*, by (name redacted). Congress and the Obama Administration currently encounter a number of policy questions related to the BDS movement and other international economic measures affecting Israel.

There appear to be some similarities between U.S. and EU laws and guidelines for labeling of certain products imported from the West Bank. Both jurisdictions require the West Bank to be identified as the place of origin, but a November 11, 2015, European Commission notice requires that the labels for certain imports into the EU—Israel's largest trading partner—provide additional information to its consumers by further differentiating between products from Israeli settlements and from non-settlement areas. This has fueled debate about whether the EU's guidelines might contravene international trade commitments under the World Trade Organization (WTO) or constitute, encourage, or foreshadow punitive economic measures against Israel.

The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26), enacted in June 2015, contains a trade negotiating objective for the U.S.-EU Transatlantic Trade and Investment Partnership (T-TIP) that discourages 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." Public debate over P.L. 114-26 focused on whether economic actions differentiating between commerce with Israeli settlements and commerce with Israel constitute or promote BDS-related activity. In a statement after the law's enactment, the State Department reiterated its continued opposition to BDS activity targeting Israel, but asserted that the inclusion of the phrase "Israeli-controlled territories" in P.L. 114-26 "runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity."

In November 2015, two Senators proposed an amendment to H.R. 22 (Surface Transportation Reauthorization and Reform Act of 2015) that, if enacted, could lead the Export-Import Bank of the United States to deny credit applications in cases where the executive branch discerns a need to advance U.S. policy in opposing politically motivated behavior intended to penalize or otherwise limit commercial relations with Israel-related persons or entities. Observers question whether and to what extent the proposed amendment might affect the "carefully crafted compromise" on H.R. 22 and its proposed reauthorization of the Export-Import Bank's charter.

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 have proposed the enactment of legislation that would prohibit the provision of federal funding to United States 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 federal funds would depend upon the particulars of the legislation at issue.

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Introduction

Since the breakdown of the last round of Israeli-Palestinian negotiations in April 2014, challenges to Israel's international economic and cultural profile appear to have received greater public attention, based on media accounts. Congress and the Obama Administration currently encounter a number of policy questions related to this subject. This report provides information and analysis on the following:

- Background on a "BDS" (boycott, divestment, and sanctions) movement against Israel.
- Economic measures—including by the United States and European Union (EU)—that "differentiate" or might be seen as differentiating 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 U.S. legislative action and proposals at both the federal and state level.
- Legislative considerations drawing from existing antiboycott law and from First Amendment issues.

The BDS movement exists within a larger context of Israel's complex economic and political relations with the world. For more information, seeCRS Report RL33476, *Israel: Background and U.S. Relations*, by (name redacted)

Background

A BDS movement against Israel has gained support among some organizations in a range of countries.[1] In July 2005, various Palestinian civil society groups issued a "Call for BDS."[2] These groups compared their grievances against Israel to the "struggle of South Africans against apartheid," and sought international support for "non-violent punitive measures"[3] 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;[4]

[1] 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.

[2] http://www.bdsmovement.net/call.

[3] Ibid.

[4] 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."

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 resolution 194.[5]

The stated goals of the movement are ostensibly linked to Israel's treatment of Palestinians, but, according to some analysts, if these goals are realized, they might have broader implications for the demographic and sociopolitical structure of Israel within its original 1948 borders.[8] 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 interpreted as insisting that refugee populations be able to live and vote in Israel in such a way that leads to a more "binational" reality. Some individuals and groups who proclaim the need to maintain Israel's Jewish identity publicly oppose BDS measures against companies inside Israel, yet nevertheless voice support for efforts to divest from Israeli companies doing business in Israeli-developed areas and settlements in the West Bank, East Jerusalem, and Golan Heights.[9]

Pro-BDS Palestinian NGO: Possible U.S. Grant Recipient?

At least one Palestinian non-governmental organization that is listed as a signatory to the July 2005 "Call for BDS" claims to have received grants from a U.S. government source.

MIFTAH (The Palestinian Initiative for the Promotion of Global Dialogue and Democracy) carries out a number of activities aimed at advancing the Palestinian national cause and strengthening Palestinian democracy and civil society.[6] Annual financial statements on its website for indicate that MIFTAH received grants in 2013 and 2014 from the "U.S. Consulate" (presumably the Consulate General in Jerusalem).[7]

Many Israeli officials and other observers speculate that Israel could, over time, face greater international isolation.[10] Some Israelis argue or imply that efforts to isolate them—including economic measures such as BDS—are led by implacable enemies determined to spread anti-Israel and anti-Semitic attitudes, and thus bear little or no relationship to Israel's policies.[11] Other Israelis assert a more direct relationship between at least some international behavior toward Israel (economic or otherwise) and Israeli policies such as the construction of settlements. This

[5] These three objectives are found at http://www.bdsmovement.net/call.

[6] MIFTAH's website (http://www.miftah.org/AboutUs.cfm) states as its mission, "Established in Jerusalem in December 1998, with Hanan Ashrawi as its Secretary-General, MIFTAH seeks to promote the principles of democracy and good governance within various components of Palestinian society; it further seeks to engage local and international public opinion and official circles on the Palestinian cause. To that end, MIFTAH adopts the mechanisms of an active and in-depth dialogue, the free flow of information and ideas, as well as local and international networking."

[7] According to MIFTAH's 2013 and 2014 financial statements, the aggregate total of the U.S. Consulate grants to MIFTAH appears to have been $175,000, and other donors to MIFTAH include the International Republic[an] Institute (IRI) and various United Nations bodies and Western government or government-affiliated entities (including from Canada, United Kingdom, Ireland, the Netherlands, and Norway). Statements available at http://miftah.org/Programmes/FinancialStatements/FS-2013-Final.pdf and http://www.miftah.org/Programmes/FinancialStatements/FS-2014-Final.pdf.

[8] See, e.g., McMahon, op. cit.; Tracy, op. cit.

[9] See, e.g., Jodi Rudoren, "Netanyahu Calls International Criticism an Effort to 'Delegitimize Israel," *New York Times*, June 1, 2015; Peter Beinart, "To Save Israel, Boycott the Settlements," *New York Times*, March 18, 2012.

[10] "Us and them," *Economist*, August 2, 2014.

[11] See, e.g., Rudoren, op. cit.

latter subset of Israelis routinely laments what they characterize as uncompromising approaches by their leaders toward the Israeli-Palestinian conflict.[12]

In denouncing the BDS movement in May 2015, Israeli Prime Minister Binyamin Netanyahu said, "We are in the midst of a great struggle being waged against the State of Israel, an international campaign to blacken its name."[13] According to the *Associated Press (AP)*, the BDS movement's "decentralized organization and language calling for universal human rights have proven difficult to counter."[14] According to a 2015 think tank report, BDS "has not reached a point at which it has a significant negative effect on Israel," but the movement is growing.[15] Though difficult to quantify, some divestment from and boycotts of Israel or Israeli goods have taken place.

Regarding economic measures to date, *AP* reported in July 2015 that

> Battles have taken place in U.S. food co-ops and city councils. The movement has helped organize several boycotts by U.S. and British academic unions and has made inroads on American campuses. Roughly a dozen student governments have approved divestment proposals.
>
> Entertainers, including Roger Waters, Elvis Costello and Lauryn Hill have refused to perform in Israel. The BDS movement also claims responsibility for pressuring some large companies to stop or alter operations in Israel, including carbonated drink maker SodaStream, French construction company Veolia and international security firm G4S.[16]

Such developments have amplified the controversy surrounding BDS-related issues.[17] In September 2015, SodaStream closed its West Bank factory and relocated its operations inside Israel, though its CEO claims that the BDS movement had only a "marginal" effect on these changes.[18] According to one report, in the weeks prior to the final relocation, only 120 of the 600 Palestinians employed at the previous factory had Israeli work permits to come to the new one, despite the company's efforts to get permits for more employees.[19] An unsuccessful May 2015 Palestinian effort to suspend Israel from FIFA (soccer's global governing body) for alleged improper treatment of Palestinian athletes has led some Israelis to voice concern about possible future efforts to ban Israel from international sporting events and conferences.[20]

[12] Ibid.

[13] Leslie Susser, "Boycott Takes Center Stage," *Jerusalem Report*, July 13, 2015.

[14] Tia Goldenberg, "Growing BDS Movement Raises Alarm among Israeli Leaders," *AP*, July 7, 2015.

[15] RAND Corporation, op. cit., p. 178.

[16] Goldenberg, op. cit.

[17] See, e.g., Jennifer Medina and Tamar Lewin, "Views on Israel Drive a Wedge in Campus Life," *New York Times*, May 10, 2015; David Makovsky and Raquel Saxe, "BDS's Useless Politics of Confrontation," *Times of Israel*, May 22, 2015.

[18] "SodaStream Leaves West Bank as CEO Says Boycott Antisemitic and Pointless," *theguardian.com*, September 2, 2015.

[19] Ibid. For more background on the issue and discussion of the relocation's impact on Palestinian employees, see Josh Mitnick, "What SodaStream's Palestinian Employees Think About Scarlett Johansson," *Gawker*, February 1, 2014; "SodaStream to shut West Bank factory," *Jewish Telegraphic Agency*, October 29, 2014.

[20] Rudoren, op. cit.

"Differentiation" Between Israel and Its Settlements

As discussed above, some parties have drawn or attempted to draw a distinction between interaction with Israel in general and interaction with entities linked with Israeli settlements. For example, some European countries' pension funds and companies have withdrawn investments or canceled contracts owing to concerns regarding connections with settlement activity,[21] as distinguished from broader anti-Israel economic measures. Also, before SodaStream closed its West Bank factory, it had begun identifying the West Bank as the place of origin on its product labels for exports to the United States, in response to a fair trade practices complaint filed with Oregon's state government by activist groups.[22] Additionally, the leading councils of a number of U.S.-based Christian churches have either voted to divest from companies with settlement ties or considered doing so.

The Palestinian Authority (PA) has generally supported boycotts of the "products of the settlements" instead of general boycotts of Israel,[23] perhaps in part because of Palestinians' socioeconomic links with Israel since 1967. However, the PA did establish a boycott of six Israeli companies and of fruit imported from Israel during a period in early 2015 when Israel responded to Palestinian actions regarding the International Criminal Court (ICC) by withholding the transfer of various tax and customs revenues it collects on behalf of the PA.[24]

Existing U.S. Trade 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).[25] A 1996 proclamation by President Bill Clinton stated that, for purposes of the IFTA, "articles of Israel" that otherwise meet the IFTA's requirements may be treated as though they are directly shipped from Israel even if they are shipped from the West Bank or Gaza.[26] In August 24, 2015, email correspondence with CRS, a U.S. official explained the executive branch's understanding of how U.S. law applies to country of origin labeling for articles produced in the West Bank and Gaza:[27]

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[21] Madison Marriage and John Reed, "US Pension Funds to Divest from Israel Boycotters," *ft.com*, May 31, 2015.

[22] "SodaStream Begins Labeling its West Bank Products," *Times of Israel*, April 9, 2015; Celine Hagbard, "Oregon activists succeed in getting Israeli company 'SodaStream' to change labeling." *International Middle East Media Center*, April 5, 2015. Its labels for West Bank-produced products had previously stated, "Made in Israel." Ibid. The Oregon activist groups have reportedly also filed a claim alleging that SodaStream's earlier labeling practices violate U.S. federal regulations. Hagbard, op. cit.

[23] Yoel Goldman, "Abbas: Don't Boycott Israel," *Times of Israel*, December 13, 2013.

[24] Daoud Kuttab, "West Bank Boycotts Six Israeli Companies," *Al-Monitor Palestine Pulse*, April 9, 2015. For more information on the ICC issue, see CRS Report RL34074, *The Palestinians: Background and U.S. Relations*, by (nam e redacted)

[25] 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. 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.

[26] Presidential Proclamation 6955 of November 13, 1996, available at http://www.gpo.gov/fdsys/pkg/FR-1996-11-18/pdf/96-29613.pdf.

[27] Treasury Decisions applicable to country of origin labeling for products produced in the West Bank and Gaza include T.D. 95-25, available at http://www.gpo.gov/fdsys/pkg/FR-1995-04-06/html/95-8454.htm; and T.D. 97-16, available at (continued...)

The marking statute, Section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article.

The country of origin for marking purposes is defined at Section 19 CFR 134.1(b), to mean the country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of Part 134. A substantial transformation is effected when a manufacturer or processor converts or combines an article into a new and different article resulting in a change in name, character, or use.

The above framework, for purposes of determining the country of origin of a good, does not permit merely transiting or being shipped from a particular country or locale, to confer country of origin. That is if a good is produced in Israel, it remains such no matter from where it is shipped, provided no further work effecting a substantial transformation is done outside of Israel. Similarly if a good is produced in the West Bank or Gaza, it remains a product of such no matter who produced it and no matter from where it is shipped, provided no further work effecting a substantial transformation is done outside of the West Bank or Gaza.

The 1996 presidential proclamation regarding the FTA treatment of "articles of Israel" shipped from the West Bank or Gaza does not add any ambiguity to the general rule that goods produced in the West Bank or Gaza should be labeled as such (and not as "Made in Israel").

European Union: Product Labeling and Other Measures

Given that the 28-country EU is Israel's largest trading partner,[28] Israeli officials routinely express concern regarding prospects of reduced Israel-EU economic cooperation as a consequence of Palestinian-related developments. In recent years, with the Israeli-Palestinian peace process largely stalemated, 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."[29]

(...continued)

http://www.gpo.gov/fdsys/pkg/FR-1997-03-14/pdf/97-6434.pdf.

[28] Moti Bassok, "Complete EU boycott would cost Israel billions of dollars, Finance Ministry warns," *haaretz.com*, July 9, 2015. According to the European Commission's Directorate General for Trade, for 2014 the countries of the European Union accounted for 30.4% of Israel's total trade volume, while the United States accounted for 19.2%. Document available at 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/.

[29] Hugh Lovatt and Mattia Toaldo, "EU Differentiation and Israeli Settlements," European Council on Foreign Relations (ECFR), July 2015. A July 20, 2015, press release from the Council of the EU entitled "Council Conclusions on the Middle East Peace Process" included the following passage: "The EU and its Member States reaffirm their commitment to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to settlement products. The EU expresses its commitment to ensure that - in line with international law - all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967." The EU issued guidelines in July 2013 prohibiting funding to Israeli organizations in West Bank, East Jerusalem, or Golan Heights settlements, and only permitted Israel's inclusion in its Horizon 2020 research and innovation program in late 2013 after Israel agreed that funding would not go to organizations operating in settlements. 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 (continued...)

On November 11, 2015, the European Commission issued a notice setting forth guidelines regarding labeling of certain products[32] imported into EU countries from areas that Israel captured in the 1967 Arab-Israeli war, along with an accompanying factsheet.[33] 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."[34] The factsheet accompanying the notice states

> 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.

World Trade Organization (WTO) Issue?

Two law professors anticipated the European Commission's November decision on labeling, and—in a report published by an Israeli think tank—allege that the decision constitutes a special restriction against Israel. According to the professors, such a restriction "violates the fundamental rules of the [General Agreement on Tariffs and Trade]/WTO system, under which even otherwise valid trade restrictions are void if not applied uniformly to WTO members."[30] There is ongoing debate regarding the consistency with which the EU applies its standards on product labeling and the extent to which the Israeli-Palestinian dispute is analogous to territorial disputes in other parts of the world.[31]

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."[35] Palestine Liberation Organization Secretary General Saeb Erekat called the notice "a significant move toward a total boycott of

(...continued)

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.

[30] Avi Bell and Eugene Kontorovich, *Challenging the EU's Illegal Restrictions on Israeli Products in the World Trade Organization*, Kohelet Policy Forum, Policy Paper No. 18, October 2015. See also Eugene Kontorovich, "Europe Mislabels Israel," *New York Times*, November 13, 2015; Yonah Jeremy Bob, "Can Israel sue the European Union before the WTO over the labeling crisis?," *jpost.com*, November 17, 2015.

[31] See, e.g., Cnaan Liphshiz, "Is EU discriminating against Israel by labeling settlement goods?," *Times of Israel*, November 12, 2015.

[32] 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.

[33] 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, and the factsheet at 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. Three EU countries—the U.K., Belgium and Denmark—already label goods coming from Israeli settlements." 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.

[34] Jones, op. cit.

[35] Text of statement available at http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-condemns-EU-decision-on-labeling-11-Nov-2015.aspx.

Israeli settlements, which are built illegally on occupied Palestinian lands."[36] Some Israelis from the left of the country's political spectrum reportedly signed a petition welcoming the move.[37]

According to a media report, "products from the occupied West Bank, the Golan Heights and East Jerusalem that will now require special labels amount to less than 1 percent of Israel's $13 billion in annual exports to the [EU's] 28 countries."[38] However, according to an Israeli media report, if other EU guidelines are strictly adhered to, they "could affect Israeli banks and other businesses with branches in the West Bank."[39] According to one Israeli commentator, "There isn't a bank in Israel that could avoid that kind of credit marking. With the Israeli banking system intimately connected to the European system, this could be a watershed moment for the Israeli economy."[40] Nevertheless, some analysts assert that EU member states are divided over how to deal with Israel and are unlikely to take measures that could substantially harm Israel's economy. One media report citing EU officials has emphasized that exports to the EU from within Israel's "internationally recognized borders" still receive preferential customs treatment, and that product labeling analogous to the EU has taken place in Britain for a few years with "no negative economic effect."[41]

Debate persists about the implications of EU differentiation measures and proposals. A July 2015 European Council on Foreign Relations (ECFR) report asserts that EU policies seek "the deeper integration of Israel with Europe," not Israel's isolation. The report also counters official Israeli statements, which generally make little or no distinction between those who support BDS measures against all Israeli entities and those who only support economic measures targeting settlement-linked entities. The report states that EU measures are not discriminatory but rather "the legal consequence of Israel's attempts to integrate economically with Europe while making the illegal settlements part of that integration."[42] By contrast, one Israeli journalist has characterized EU policy over the past two years as "more or less" leading a "voluntary boycott of West Bank settlements."[43]

Anti-BDS or Anti-Differentiation Efforts and Legislative Action and Proposals to Date

A number of U.S. policymakers and lawmakers, as well as private individuals and organizations, have stated opposition to or taken action against the BDS movement. See **Table 1** below for a list of enacted and proposed anti-BDS legislation. Some prominent American businesspeople are

[36] William Booth, "A Furor over Redefining 'Made in Israel,'" *Washington Post*, November 12, 2015.

[37] Andrew Rettman and Peter Teffer, "EU Shops to Mark 'Israeli Settlement' Products," *EUObserver*, November 11, 2015.

[38] Jodi Rudoren, et al., "E.U. Move Fans Fear of Boycott Aimed at Israel," *New York Times*, November 12, 2015.

[39] Leslie Susser, "European Arm-Twisting," *Jerusalem Report*, November 17, 2014. See also Rudoren, et al., op cit.; Lovatt and Toaldo, op. cit.

[40] Ben Caspit (translated from Hebrew), "Possible EU Sanctions Alarm Israeli Banks," *Al-Monitor Israel Pulse*, August 12, 2015.

[41] "EU sets rule for labeling products made in West Bank settlements," op. cit.

[42] Lovatt and Toaldo, op. cit.

[43] Bassok, op. cit.

contributing and soliciting funds for a range of anti-BDS efforts, particularly on university campuses.[44]

Some Members of Congress argue that the BDS movement is discriminatory and are seeking legislative options to limit its influence. On June 29, 2015, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26) was enacted. This law provides trade promotion authority (TPA)[45] to the President regarding the negotiation of certain U.S. trade agreements, including the proposed Trans Pacific Partnership (TPP), and the U.S.-EU Transatlantic Trade and Investment Partnership (T-TIP). The law includes a trade negotiating objective for T-TIP (ongoing 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, discourages 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 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.[46] 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 Administration is no different. The U.S. government has never defended or supported Israeli settlements and activity associated with them and, by extension, does not pursue policies or activities that would legitimize them.[47]

On November 9, 2015, 36 Senators sent a letter to EU foreign policy chief Federica Mogherini urging her not to implement the policy of different labeling for goods from Israeli settlements. The letter claimed that the policy "appears intended to discourage Europeans from purchasing these products and promote a de-facto boycott of Israel," and that it would be "damaging to the prospects of a negotiated solution to this [the Israeli-Palestinian] conflict."[48] On November 12, State Department deputy spokesperson Mark Toner said that the Administration does "not believe that [EU] labeling [of] the origin of products is equivalent to a boycott."[49] He further said that

[44] Nathan Guttman, "Haim Saban Dumps Pro-Israel Coalition Over Sheldon Adelson's Right-Wing Push," *Jewish Daily Forward*, September 30, 2015.

[45] For more information, see CRS In Focus IF10038, *Trade Promotion Authority (TPA)*, by (name redacted) .

[46] 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.

[47] Full text of statement cited by an *AP* reporter at https://twitter.com/APDiploWriter/status/615969535087218688, June 30, 2015.

[48] Text of letter available at http://www.cruz.senate.gov/files/documents/Letters/20151109_EU_IsraelLetter.pdf.

[49] Bradley Klapper, "US OK With New EU Labeling Rule for Israeli Settlement Goods," *Associated Press*, November (continued...)

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.[50] In a November 10 daily press briefing (the day before the European Commission issued its labeling notice), Toner had said that it could be "perceived as a step on the way" to a boycott.

On November 18, 2015, two Senators sent a letter to two other Senators who have conference responsibilities for H.R. 22 (Surface Transportation Reauthorization and Reform Act of 2015).[51] The current House- and Senate-passed versions of H.R. 22 include extensions of the general statutory charter of the Export-Import Bank of the United States, whose authority expired on July 1, 2015.[52] The letter advocated for an amendment to H.R. 22 that could affect credit decisions of the Export-Import Bank. Observers question whether and to what extent the proposed amendment might affect the "carefully crafted compromise" on the bill and its proposed reauthorization of the Export-Import Bank's charter.[53]

The proposed amendment to H.R. 22 would specifically grant discretion to the executive branch to determine[54] when a case clearly and importantly implicates U.S. national interests in "opposing policies and actions that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with citizens or residents of Israel, entities organized under the laws of Israel, or the Government of Israel." In the case of such an executive branch determination, this area of U.S. concern (along with some other areas of concern previously specified in the Export-Import Bank Act of 1945 [12 U.S.C. 635(b)(1)(B)]) would constitute nonfinancial/noncommercial grounds under which the Export-Import Bank "should" deny an application for credit. The Senators' letter expressed consternation with the November 11, 2015, European Commission labeling notice, and read, in part

> As authors of the anti-BDS provisions in TPA [P.L. 114-26], we believe that the United States should bring not only its foreign policy but also its economic institutions, relationships, and leverage to bear on this issue. As the official export credit agency of the U.S., the Ex-Im Bank has a clear role to play.

During 2015, various U.S. states have also enacted anti-BDS legislation (see **Table 2**). An Illinois law enacted on July 23, 2015, requires the managers of state government pensions to identify companies that boycott Israel as "restricted companies" and, under certain circumstances, divest from direct or indirect holdings in any such companies. A South Carolina law enacted on June 4, 2015, prohibits public entities in the state from transacting business with entities unless those entities represent that they do not or will not boycott parties for any links to a jurisdiction with which the state can enjoy open trade.

(...continued)

12, 2015.

[50] Ibid.

[51] Text of letter available at http://static.politico.com/bd/81/43ace7d24e5b9aa65d7a23d23975/portman-cardin.... pdf. For additional context, see Burgess Everett and John Bresnahan, "Israeli-Palestinian politics injected into Ex-Im battle," *Politico*, November 24, 2015.

[52] For more information on this topic, see CRS Report R43671, *Export-Import Bank Reauthorization: Frequently Asked Questions*, coordinated by (name redacted) .

[53] Everett and Bresnahan, op. cit.

[54] Information on how such determinations (also known as "Chafee determinations") may be made is available at http://www.exim.gov/news/reports/competitiveness-reports/human-rights.

Table 1. Enacted and Proposed Congressional Anti-BDS and/or Anti-Differentiation Legislation

(since 113th Congress)

Congress	Bill Number	Name and Description
Enacted		
114th	P.L. 114-26 (Enacted June 29, 2015)	**Bipartisan Congressional Trade Priorities and Accountability Act of 2015.** (Section 102(b)(20)). Includes discouraging politically motivated economic action against Israel (including with regard to Israeli-controlled territories) as a principal U.S. trade negotiating objective for T-TIP.
Proposed		
114th	Unnumbered amendment to H.R. 22	**Surface Transportation Reauthorization and Reform Act of 2015.** Would specifically grant discretion to the executive branch to determine when a case clearly and importantly implicates U.S. national interests in "opposing policies and actions that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with citizens or residents of Israel, entities organized under the laws of Israel, or the Government of Israel," and thus is a case in which the Export-Import Bank "should" deny an application for credit on nonfinancial/noncommercial grounds.
114th	H.Res. 402	Expresses the sense of the House of Representatives regarding politically motivated acts of boycott, divestment from, and sanctions against Israel, and for other purposes.
114th	H.Res. 318	Condemning resolutions or policies calling for or instituting a boycott of Israeli academic institutions or scholars by institutions of higher learning and scholarly associations.
114th	H.R. 825	**United States-Israel Trade and Commercial Enhancement Act**. Would apply the T-TIP principal trade negotiating objective provision from P.L. 114-26 to trade negotiations in general, while also (1) requiring an annual presidential report on BDS actions by foreign entities or international organizations; (2) prohibiting U.S. courts from recognizing or enforcing any foreign judgment against a U.S. person based on that person's conduct of Israel-related business; and (3) requiring foreign entities to include information regarding discriminatory economic treatment related to Israel on any required U.S. securities filings.
114th	H.R. 644	**Trade Facilitation and Trade Enforcement Act of 2015.** Earlier versions of this bill passed by the two houses in 2015 either did not include Israel-related language (House) or confined Israel-related language to statements of policy encouraging anti-BDS actions (Senate). On June 12, 2015, the House approved an amendment of a Senate-amended version. This new version remains under consideration by both houses. Section 908 of this version largely mirrors the provisions of H.R. 825, except that it does not include the securities filings provision.
114th	S. 1269	Other version of Trade Facilitation and Trade Enforcement Act of 2015.
114th	H.R. 1907	Other version of Trade Facilitation and Trade Enforcement Act of 2015.
114th	H.R. 2645	Would amend title 5, United States Code, to prevent the Thrift Savings Fund from investing in any company that boycotts Israel.[a]
114th	S. 619	**United States-Israel Trade Enhancement Act of 2015.** Includes various principal U.S. trade negotiating objectives discouraging politically motivated economic action against Israel.
114th	H.R. 1572	**Boycott Our Enemies not Israel Act.** Would amend Export Administration Act of 1979 to discourage economic action against U.S. persons or U.S.-friendly countries; would require prospective U.S. contractors to certify that they do not engage in or support any boycott against Israel.

Congress	Bill Number	Name and Description
113th	H.R. 4776	Would prohibit an institution of higher education that participates in a boycott of the Israeli government, economy, or academia from receiving funds from the U.S. Federal Government.
113th	H.R. 4009	**Protect Academic Freedom Act**. Would make academic institutions ineligible for certain federal funding if they are found to be boycotting Israeli academic institutions or scholars.

a. For information on the Thrift Savings Plan and its administration, see CRS Report RL30387, *Federal Employees' Retirement System: The Role of the Thrift Savings Plan*, by (name redacted) .

Table 2. State-Level Anti-BDS and/or Anti-Differentiation Legislation

(enacted or adopted)

Date Enacted or Adopted	State	Bill Number	Source
July 23, 2015	Illinois	SB1761	http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1761&GAID=13&DocTypeID=SB&SessionID=88&GA=99
June 18, 2015	New York	Resolution K705-2015	http://open.nysenate.gov/legislation/bill/K705-2015
June 4, 2015	South Carolina	H3583	http://www.scstatehouse.gov/sess121_2015-2016/bills/3583.htm
April 24, 2015	Tennessee	SJR0170	https://legiscan.com/TN/bill/SJR0170/2015
April 22, 2015	Indiana	House Resolution 59	https://iga.in.gov/legislative/2015/resolutions/house/simple/59

General Antiboycott Legislative Considerations

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.[55] U.S. antiboycott efforts are targeted at the secondary and tertiary boycotts. U.S.

[55] See CRS Report RL33961, *Arab League Boycott of Israel*, by (name redacted) . 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 (continued...)

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 counter to U.S. policy."[56] The current list of countries that request U.S. companies to participate or agree to participate in boycotts prohibited under U.S. law includes Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Yemen.[57] The list remains unchanged since Iraq returned to the list of boycotting countries in August 2012. According to the Department of Commerce, in FY2014 626 requests by Arab League members to participate in the boycott were reported to U.S. officials. The majority (342 requests) were from the United Arab Emirates, followed by Qatar (86) and Iraq (72).[58]

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.

Members of Congress may be inclined to propose legislation regarding BDS. As points of reference in doing so, Members might 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.[59]

First Amendment Issues: Restrictions on Federal Funding to Entities Engaged in BDS

As discussed above, opponents of the BDS movement have proposed the enactment of legislation that would prohibit the provision of federal funding to United States corporations, academic

(...continued)

boycott.

[56] Website of the Office of Antiboycott Compliance; http://www.bis.doc.gov/AntiboycottCompliance/oacrequirements.html.

[57] "List of the Countries Requiring Cooperation with an International Boycott, Department of the Treasury," Department of the Treasury, 80 F.R.17152, March 31, 2015.

[58] U.S. Department of Commerce, Bureau of Industry and Security, *Annual Report to the Congress for Fiscal Year 2014*, Washington, DC.

[59] 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 (name redacted) .

institutions, groups, or individuals that engage in BDS activity.[60] Some scholars and commentators have argued that such legislation restricting the provision of federal funds to those engaged in BDS activity would raise First Amendment concerns,[61] while others have argued that such legislation would be consistent with the First Amendment.[62] The constitutionality of a restriction on the availability of federal funds would depend upon the particulars of the legislation at issue.

The government may prohibit recipients of federal funds from using those funds to express speech with which the government disagrees. 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.[63] However, the government cannot prescribe what an entity that receives federal funds may say with private money. 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.[64] Consequently, the government may be able to restrict the use of federal funds to express support for the BDS movement if the conditions on the use of the funds do not burden speech funded privately.

As some scholars have noted, however, proposals to restrict funding to entities engaged in BDS activity have not, to date, sought to restrict pure speech, but rather have sought to restrict the recipients' conduct.[65] Opponents of BDS activity related to Israel have proposed restricting funds to persons or organizations that refuse to deal with Israel or with companies on the sole basis of their connection to Israel. Some scholars argue that this kind of restriction should be viewed as an anti-discrimination measure that regulates conduct rather than speech and, therefore, should be analyzed in the same way as any prohibition on discrimination. Professor Eugene Kontorovich and Professor Eugene Volokh have likened a possible restriction on discrimination against Israel-affiliated entities solely on the basis of their Israeli affiliation to prohibitions on discrimination against persons based upon their race, religion, gender, or sexual orientation.[66]

Professor Volokh has pointed to two main cases that he asserts support this argument: *Grove City College v. Bell* and *Christian Legal Society v. Martinez*.[67] In *Grove City College*, the Supreme Court held that Title IX of the Higher Education Amendments of 1972, which bans sex

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[60] See "Anti-BDS or Anti-Differentiation Efforts and Legislative Action and Proposals to Date," *supra*.

[61] Letter from the Center for Constitutional Rights, National Lawyers Guild, and Council on American-Islamic Relations, to Rep. John Kline (February 11, 2014), available at 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 (February 6, 2014) (quoting Floyd Abrams arguing that funding restrictions tied to BDS activity would be an unconstitutional restriction on speech).

[62] Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAGAZINE (July 13, 2015); Eugene Volokh, *Bill to block federal funding to universities that boycott Israel*, The Volokh Conspiracy, WASH. POST (February 2, 2014).

[63] Rust v. Sullivan, 500 U.S. 173 (1991).

[64] 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.).

[65] Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAGAZINE (July 13, 2015); Eugene Volokh, *Bill to block federal funding to universities that boycott Israel*, The Volokh Conspiracy, WASH. POST (February 2, 2014).

[66] *Id.*

[67] *Id.* See also Rosie Gray, Major Jewish Groups Won't Back Boycott Bill, BUZZFEED (February 6, 2014); 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.").

discrimination by universities that receive federal funds, did not violate the First Amendment rights of the educational institutions accepting the funds.[68] According to the Court, "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[69] Title IX did not prohibit any institution from discriminating based on sex. It only prohibited those that chose to receive federal funds from doing so.

In *Christian Legal Society*, the Court upheld a 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.[70] The Christian Legal Society (CLS) argued that the law school's nondiscrimination policy violated their First Amendment rights to limit their membership to Christians. The Supreme Court disagreed.[71] The law school's policy did not require the group not to discriminate directly. Instead, it placed only "indirect pressure" on the group to allow all to join.[72] If CLS wished to continue to discriminate in its membership, all it needed to do was forgo government subsidy. Furthermore, the Court noted that the nondiscrimination policy had no effect on the beliefs any organization wished to espouse. Instead, it regulated their conduct "without reference to the reasons motivating that behavior."[73] Thus, under these cases, if the restriction applied only to the activity of BDS, 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.

On the other hand, expressive conduct is protected by the First Amendment.[74] Consequently, some scholars have argued that restrictions on federal funding to entities engaged in BDS activity would burden protected expressive activity and may be unconstitutional as a result.[75] Some BDS-related activity may have enough of an expressive quality so as to be protected by the First Amendment. For example, in *NAACP v. Claiborne Hardware*, black citizens boycotted white-owned businesses that discriminated against black people.[76] The business owners sued the boycotters under state law. The Supreme Court 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."[77] Following that reasoning, advocates for the BDS movement could argue that "[b]oycotts to obtain human rights and equality are one of the canonical examples of expressive conduct protected by the First Amendment."[78] If an entity engaging in a constitutionally protected boycott is denied federal funding *because* of the

[68] Grove City College v. Bell, 465 U.S. 555, 575-76 (1984).

[69] *Id.*

[70] Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

[71] *Id.* at 669 ("CLS enjoys no constitutional right to state subvention of its selectivity.").

[72] *Id.* at 682.

[73] *Id.* at 696.

[74] See Texas v. Johnson, 491 U.S.397 (1989) (holding that flag burning is symbolic speech protected by the First Amendment).

[75] Rosie Gray, Major Jewish Groups Won't Back Boycott Bill, BUZZFEED (February 6, 2014) (quoting Floyd Abrams arguing that funding restrictions related to BDS activity would be an unconstitutional restriction on speech).

[76] 458 U.S. 886 (1982).

[77] *Id.*

[78] Palestinian Solidarity Legal Support, The Legality of Academic Boycott: Frequently Asked Questions, available at http://palestinelegalsupport.org/wp-content/uploads/2014/01/FAQonLegalityofBoycott_1.10.14_FINAL_SH.pdf.

government's desire to suppress that constitutionally protected expression, an argument could be made that the denial of federal funding on that basis is unconstitutional.

Supreme Court precedent has indicated that funding restrictions intended to suppress the expression of a particular viewpoint are unconstitutional.[79] Opponents of BDS-related funding restrictions might argue that any restriction on federal funds flowing to entities engaged in BDS activity is intended to suppress speech in opposition to various Israeli policies. However, the Supreme Court has noted in *Christian Legal Society* that "[e]ven if a regulation has a differential impact on groups wishing to enforce [a discriminatory policy], 'where the [government] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express [an idea].'"[80] Consequently, if the restriction applied only to activity, regardless of the motivations for that activity, and permitted the funding recipient to make its views known, then it might be upheld as constitutional despite its disparate impact on persons that hold and espouse a particular viewpoint.

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[79] 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").

[80] *Christian Legal Soc'y*, 561 U.S. at 696.

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