Economic Warfare Against Israel: Its Status in United States Law and International Trade Law

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Chairman DeSantis, Ranking Member Lynch, and honorable members of the Subcommittee, thank you for inviting me testify about the program of economic warfare against Israel, and its implications for U.S. and international trade law. I am a professor at Northwestern University School of Law, specializing in constitutional and international law. My writings about the legal aspects of the Arab-Israeli conflict have been published in numerous leading academic journals. In particular, I have extensively researched and published about the legal aspects of boycotts against Israel. I have also advised on the drafting of anti-boycott laws in South Carolina and other states.

I will first briefly sketch the background of economic warfare campaigns against Israel. Then I will discuss U.S. law and policy in response to such boycotts. In particular, I will show that U.S. policy has consistently opposed boycotts of all Israeli entities and individuals, regardless of the political status of their location. Next, I will show that there is no basis for the argument that international law supports at least some kinds of boycotts of Israel. Finally, I will turn to the most dangerous kind of boycotts and sanctions – those implemented by countries. Such measures – including some pending in the European Commission – themselves violate international trade law. Finally, I conclude by outlining how several current measures before Congress strengthen and modernize the U.S.'s longstanding anti-boycott, pro-trade policy.

Background on Economic Warfare Against Israel

Israel has been subject to an organized campaign of economic warfare since its inception. Efforts to boycott Israel and to force companies around the world to break off relations with it were centerpieces of the Arab League's strategy against Israel since 1948.[1] Dating back to the 1960s, Congress has consistently opposed such "economic warfare" against "countries friendly to the United States." Arguments that such boycotts were not fundamentally anti-Semitic, but rather merely protesting Israeli injustices – which of course is what the Arab League saw itself as doing – have never been taken seriously by Congress.

Starting in the late 1990s and early 2000s, Arab countries significantly relaxed, and often abandoned enforcement of the boycott. Today, the Arab states are no longer the main belligerents in the campaign of economic warfare against Israel, in part because of successful U.S. pressure, and in part because of a growing desire for normalized trade relations with Israel.[2] While this development should be applauded as a step towards peace in the region, others have taken up the baton.

The most visible modern incarnation of the boycott movement can be traced to the UNESCO-sponsored Durban Conference in 2001.[3] A forum of NGOs at the meeting – which the United States refused to participate in because of its manifestly anti-Semitic

[1] See Andreas F. Lowenfeld, 3 Trade Controls for Political Ends 313-15 (Matthew Bender 2d ed 1983).
[2] See Martin A. Weiss, "Arab League Boycott of Israel," Congressional Research Service, pp. 2-3. https://www.fas.org/sgp/crs/mideast/RL33961.pdf.
[3] World Conference Against Racism, NGO Forum Declaration at Durban, 3 September 2001, Articles 425-426, http://www.i-p-o.org/racism-ngo-decl.htm.

nature – prepared a new strategy for continuing the economic warfare against Israel.[4] Instead of the Arab League taking the lead in pushing companies to boycott Israel, NGOs would assume this role. Thus the so-called "Boycott, Divestment, and Sanctions" campaign is not some grass-roots effort initiated by "Palestinian civil society" in 2005, but a well organized campaign, backed by U.N. agencies and often funded by European governments, that picks up where the Arab League boycott left off.[5]

It makes no difference that the boycotts targeted by earlier laws were promulgated by countries, and the current round is promoted by private groups (which are often funded by governments). This is simply the economic parallel of the move from traditional state vs. state warfare to warfare through guerilla and other unorganized groups. Indeed, the same groups behind "BDS" lobby the European Union and other governmental actors to impose sanctions on Israel – BDS and European measures are deeply intertwined.[6] Crucially, the 1970s boycott laws, like the laws recently passed in South Carolina and Illinois, addressed private companies' adherence to boycotts of Israel, regardless of the motive of the boycott proponents or participants.

Yet current boycott efforts are not solely the provenance of private groups. The European Commission is reportedly promulgating sanctions of its own against Israeli products.[7] When such measures are backed by government authority, they are far more threatening than private boycott campaigns.

U.S. Policy on Boycotts of Israeli Entities

The U.S. has long opposed any and all boycotts of Israeli entities. Indeed, laws passed in the 1970s make it a criminal offense for companies to participate in the boycott organized by the Arab League. Unfortunately, new moves to impose discriminatory sanctions on Israel are being planned by the European Union, as will be discussed below. In response to this, provisions of the recently enacted Trade Promotion Authority instruct the Executive Branch to adopt as part of its trade negotiation policy the goal of "discourag[ing] politically motivated actions to boycott, divest from, or sanction Israel"

[4] Rep. Tom Lantos, "The Durban Debacle: An Insider's View of the UN World Conference Against Racism," FLETCHER FORUM ON WORLD AFFAIRS VOLUME 26:1 Winter/Spring 2002, pp. 1-2.

[5] It is not clear how "civil society" in any meaningful sense can exist in a non-free, non-liberal regime like that in the Palestinian Authority. For additional discussion of the history of the BDS movement, see Gerald M. Steinberg, *From Durban To The Goldstone Report: The Centrality Of Human Rights Ngos In The Political Dimension Of The Arab-Israeli Conflict*, ISRAEL AFFAIRS, 18:3, 2012.

[6] For example, the BDS group Al Haq (one of the participants in the 2001 Durban conference) in a 2013 paper called on the EU and UN bodies to boycott Israeli produce. Defence for Children International - Palestine Section, was a signatory to 2005 BDS call. It has petitioned "the international community as a whole," to "enforce[] sanctions against Israel until such time as ends the siege of Gaza and the occupation of the occupied Palestinian territories." The watch-dog group NGO Monitor has documented many more such connections.

[7] *See* Barak Ravid, *Ireland Looks to Advance E.U. Ban on West Bank Settlement Products*, HAARETZ, Nov. 9, 2012, *available at* http://www.haaretz.com/blogs/diplomania/ ireland-looks-to-advance-E.U.-ban-on-west-bank-settlement-products-1.476425.

by foreign countries.[8] This measure was unanimously adopted in Congress when introduced as an amendment by Rep. Peter Roskam.[9]

Additional important federal legislation along these lines is still pending. Another part of the Roskam Amendment, now in the Customs Reauthorization bill that is in conference, would further improve the anti-boycott legislation in various ways, including requiring the Executive to report on boycott activities. It also would protect U.S. firms and individuals from suits in foreign courts, based on entirely invented rules of international law that seek to make areas under Israeli jurisdiction off-limits for business.

Recently, states have begun to take action as well. South Carolina has passed a law restricting contracting with companies that boycott countries with open trade relations with the U.S., while Illinois prevents its state pension funds from investing in companies that boycott Israel.[10] In both states, the laws were passed unanimously, in a bipartisan effort. Numerous other states are currently considering such laws. States that have passed such laws regard boycotts against Israel as discriminatory, and do not wish to subsidize discrimination. Moreover, the states understand that politically-motivated boycotts are bad business, and that companies implementing such policies can expect do so at a cost to their performance.

Finally, these laws provide important protection to companies from being targeted by boycotts. The companies targeted by boycott campaigns do not ones that oppose doing business in Israel – to the contrary, they are precisely targeted because they already do business there. Boycott proponents seek to pressure these companies, often with disruptive and illegal activity such as trespassing, to undo their considered business decisions. The state contracting and investment laws provide a protection to companies facing such campaigns: they can reply that they are complying with an existing regulatory regime.

Another provision of the pending Roskam Amendment specifically encourages such state legislation, and such Congressional action would be very important in helping states to avoid becoming parties to discriminatory and unsound business practices. Finally, H.R.

[8] An Act to amend the Internal Revenue Code of 1986 to allow Federal law enforcement officers, firefighters, and air traffic controllers to make penalty-free withdrawals from governmental plans after age 50, and for other purposes., H. Res. 2146, 114th Cong., 1st sess. (January 6, 2015): H1. http://www.gpo.gov/fdsys/pkg/BILLS-114hr2146enr/pdf/BILLS-114hr2146enr.pdf

[9] For a discussion of the passage of and reaction to this provision, see Eugene Kontorovich,, *The State Department's Response to Israel Boycott Law – a line-item veto for trade legislation?*, WASHINGTON POST: VOLOKH CONSPIRACY, July 10, 2015 available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/10/the-state-departments-response-to-israel-boycott-law-a-line-item-veto-for-trade-legislation/.

[10] See Eugene Kontorovich, *Illinois passes History anti-BDS Bill, as Congress mulls similar moves*, WASHINGTON POST: VOLOKH CONSPIRACY BLOG, May 18, 2015 available at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/.

1572, introduced in March by Rep. Doug Lamborn, would restrict federal contracts to companies that boycott Israel.[11]

It is important to note that none of the current laws ban or otherwise prohibit boycotting Israel. They simply refuse to make the government a partner to such activity on the grounds that it weakens an important trading partner, is a bad business decision, and often disguises national or religious discrimination. Companies are free to boycott Israel, but not on the government's dime. Moreover, none of these laws in any way ban or restrict calls for or activism promoting boycotts of Israel, and thus raise no First Amendment issues.[12]

The Scope of Anti-boycott laws

Nonetheless, some have objected to these recent federal and state laws on the grounds that they do not exclude Israeli companies based in, or with operations in, Jerusalem, the West Bank, and the Golan Heights.

These critics are wrong. Applying U.S. trade and anti-boycott laws to these areas is entirely consistent with U.S. practice and policy, and with international law. Excluding any areas would represent a reversal in fifty years of U.S. legislation, and also introduce massive uncertainty and indeterminacy in the application of these laws.

The question of international trade and economic policy is separate from questions of sovereignty and diplomacy, both as a matter of international law and practice, and U.S policy. The U.S. has a long-standing policy of extending Israeli national treatment to Israeli products in disputed territories, while not recognizing Israeli claims of sovereignty over the areas.[13] The U.S.-Israel FTA accords the same treatment to products from all areas under Israeli jurisdiction, including those areas beyond the so-called "Green Line" – colloquially called "settlements." The U.S. approach is in keeping with practice of our allies and trade partners. For example, the Canada-Israel FTA specifically applies "with respect to Israel the territory where its customs laws are applied," thus incorporating the territories.[14] There is no basis for thinking U.S. trade laws, and protections for trade partners, need to be any more limited.

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[11] A bill to require certifications by prospective contractors with the United States Government that they are not boycotting persons, and for other purposes., H. Res. 1572, 114th Cong., 1st sess. (March 24, 2015): H1. https://www.congress.gov/bill/114th-congress/house-bill/1572/text?q=%7B%22search%22%3A%5B%22boycott+our+enemies%22%5D%7D

[12] For an extended treatment of the First Amendment issues involved, see Eugene Kontorovich, *Can States Fund BDS?*, TABLET MAGAZINE (July 13, 2015). http://www.tabletmag.com/jewish-news-and-politics/192110/can-states-fund-bds

[13] United States-Israel Free Trade Area Implementation Act; Designation of Qualifying Industrial Zones, a Notice by the Trade Representative, Office of the United States 11/16/2005, available at https://www.federalregister.gov/articles/2005/11/16/05-22750/united-states-israel-free-trade-area-implementation-act-designation-of-qualifying-industrial-zones As the proclamation by President Cliknton makes clear, the U.S. treats Israeli products in the West Bank as "articles of Israel". See Presidential Proclamation 6955 of November 13, 1996 (61 FR 58761), par. 6-7, available at http://www.gpo.gov/fdsys/pkg/FR-1996-11-18/pdf/96-29613.pdf

[14] Canada-Israel Free Trade Agreement, Art. 1.4.:1(b) (1997).

Similarly, the 1977 Anti-Boycott Amendments to the Export Administration Act do not apply merely to Israeli companies in what the U.S. may regard as sovereign Israeli territory, but also punish boycotts directed at Israeli "nationals" or with any "business concern organized under the laws" of Israel.[15]

Some supporters of Israel boycotts argue that they merely disagree with Israeli government policy regarding the disputed territories (though the leaders of the movement make clear their objection is to the existence of the Jewish State). But such objections were also held by those who wanted to comply with prior boycotts of Israel. The Arab League opposed Israel's presence in Judea and Samaria as vigorously as today's boycotters, but this did not stop Congress from passing criminal sanctions against compliance with the boycott. In signing the 1977 anti-boycott law, Pres. Carter observed that "the issue goes to the very heart of free trade among nations," and that the boycotts were in fact "divisive" measures aimed particularly at Jews. No one protested that the law would apply to boycotts of companies in disputed areas.

Some have inaccurately suggested that such laws "would treat Israel's West Bank settlements as a part of Israel."[16] In fact, the opposite is true. The TPA provision, for example, refers separately to "the State of Israel" and "territories under its jurisdiction." Such language *distinguishes* between them – if anything, the two separate phrases indicate that such territories are not part of the State of Israel. And there can be no objection to having simply the same substantive rules apply to Israel and the territories, a policy that has been followed by the U.S. in the trade context for decades, and explicitly adopted by Pres. Clinton under the U.S.-Israel Free Trade Implementation Act.

The provisions that have been enacted or are under consideration are thus quite different from the passport provision recently held unconstitutional by the Supreme Court in *Zivotofsky v. Kerry*. There, a passport law was challenged for referring to "Jerusalem" as being in "Israel," against the Executive's view of the matter. Such a passport designation would assimilate Jerusalem to Israel and amount to an act of recognition, the administration argued. Here, the "territories" are not being referred to as part of Israel, or any other country. Nothing in *Zivotofsky* suggests presidential exclusivity in recognition requires substantively different trade laws to apply to non-recognized territory. By that astounding reasoning, Congress would not be allowed to legislate the same visa procedures for Israelis in Tel Aviv as those in Jerusalem. Indeed, in oral arguments in the *Zivotofsky* case, the Solicitor General conceded Congress's preeminence in trade legislation, even when it contradicts Executive foreign policy.

More generally, there is no principle that Congress cannot legislate with respect to

[15] 50 App. U.S.C.A. § 2407(a)(1)(A)

[16] Matt Duss, American Law And Boycotting Israel, Letter to the Wall Street Journal (June 2, 2015) http://www.wsj.com/articles/american-law-and-boycotting-israel-1433189049; see also Melissa Apter, *Anti-BDS Section of Trade Bill in Danger of Non-Enforcement, Jewish Exponent* (July 7, 2015) http://www.jewishexponent.com/headlines/2015/07/anti-bds-section-of-trade-bill-in-danger-of-non-enforcement

territory under the *de facto* control or military occupation of another country. For example, in 2014 the United States explicitly authorized foreign aid to Morocco to be spent in Western Sahara. The Consolidated Appropriations Act of 2014 states that funds "that are available for assistance for Morocco should also be available for assistance for the territory of the Western Sahara," and "Western Sahara" is listed in the annual foreign aid legislation as a subheading specifying where funds supporting Morocco may be spent." While the policy of the U.S. does not recognize Moroccan sovereignty over Western Sahara, no one has suggested that this law undermines that policy, or "conflates" Moroccan settlements in territory with Morocco itself.[17] I would suggest that a similar clarification regarding the spending of funds allocated to Israel would be welcome and benign.

Moreover, while several U.S. Administrations have opposed increases in the Jewish population of the territories ("settlement growth") none has ever opposed business activity by Israelis in these areas. None has ever suggested that businesses in these areas, including activity by U.S. companies, should be choked off. Indeed, such boycott action seeks to impose a particular solution to the conflict, outside of negotiations by the parties. Thus boycotts contradict longstanding U.S. policy of a negotiated solution.

One can have settlements without business activity and business activity without settlements. For example, most people living in the West Bank make their living inside the Green Line. These are not remote colonies, but places literally next door to established Israel economic centers. And one can have business activity without settlements — many Israel factories employ local Palestinians, or even Israelis residing inside the Green Line. Indeed, for these reasons the United Kingdom Supreme Court just last year held that Israeli factories in the West Bank are separate from, and do not cause settlements.[18] Only a radical redefinition of settlements as meaning "Jews having any kind of physical or constructive activity" would cover this. And that would go far beyond any policy the U.S. has ever considered.

Finally, this is not just about so-called "settlements" in the West Bank – it is also about Western Jerusalem and the Golan Heights. The position of the Executive regarding Jerusalem requires Congress to make clear that its legislation regarding Israel extends to "territories under its jurisdiction." The current Administration, like its predecessors, insists that even western Jerusalem is simply not located in the State of Israel. The President has used this as an excuse not to apply legislation designating "Israel" as the place of birth for American citizens born in the capital city. Thus if Congress wants proper foreign trade or any legislation within its enumerated powers that may relate to Israel to apply in the country's capital, it must language like "territories under its jurisdiction," which makes no claims about sovereignty, but only designates the intended

[17] Pub. L. No. 113-76, § 7041(h), 128 Stat. 5, 522. This was in keeping with Congress's intent that "funds provided . . . for Morocco may be used in regions and territories administered by Morocco." Alexis Arieff, Cong. Research Serv., *Morocco: Current Issues* 16 (2013), *available at* http://fas.org/sgp/crs/row/RS21579.pdf.

[18] See Richardson and other (Appellants) v Director of Public Prosecutions, [2014] UKSC 8 (Eng.).

territorial application of valid laws. Without such language, even western Jerusalem might not be covered by such laws, based on the Executive's position about the status of Jerusalem.

Moreover, the Oslo Accords explicitly confirm Israeli civilian jurisdiction in the areas of Israeli civilian communities, pending a final settlement. This naturally includes the ability to do business. As sponsor and official witness of the Oslo Agreements, the U.S. has a responsibility to protect Israel from actions that would undermine its rights under that instrument.

Finally, language referring to "territories under Israel's jurisdiction" is necessary to apply these laws to the Golan Heights. There is no sensible reason for restricting business activity in this area. The Golan Heights is not part of any "two-state solution" for such activity to allegedly threaten. And since the goal of such boycotts is to drive Israel out of the Golan Heights, they can only contribute to the current mass violence and anarchy ripping through the region.

The Argument that Boycotts of Israel are Justified or Required by International law

A major contention of the economic campaign against Israel is that its control over the Golan Heights and parts of the West Bank violates international law and that it is also illegal for Jews to live in these areas (the claim of "illegal settlements"). As a result of this alleged illegality, they further claim that it is illegal for Israel to conduct business in these areas, and that third parties have a duty to boycott such illegal businesses.

Even assuming, for the sake of argument, that Israel has no claim to these territories, these contentions have absolutely no basis in binding international law. They contradict fifty years of state practice, the opinions of all courts to have ruled on the issue, and all relevant treaties. The evidence for this is overwhelming, as I survey at length in a newly published article in the Columbia Journal of Transnational Law, *Economic Dealings With Occupied Territories.*[19] The evidence that such activity is legal is overwhelming, and only some broad points can be mentioned here.

First, there is state practice. U.S. companies, like those of countries around the world, have long been active in occupied territories like Western Sahara (Morocco) and Northern Cyprus (Turkey), without any objections from the State Department, or any calls for boycotts. The United States occupied West Berlin until 1990, in a situation that at the time seemed of indefinite duration. No one raised an eyebrow when Burger King opened a branch in the American Zone.

The United States does not recognize the legitimacy of the Turkish presence in Northern Cyprus, which has occupied the area since invading it in 1974 and populated it with tens of thousands of settlers. Yet this has never been thought to be a barrier to companies

[19] Eugene Kontorovich, *Economic Dealings With Occupied Territories,* 53 COLUMBIA JOURNAL TRANSNATIONAL LAW 584 (2015), available at http://jtl.columbia.edu/economic-dealings-with-occupied-territories/

doing business there. Firms with visible street-level retail presences in the territory include banks such as HSBC and food franchises, such as Johnny Rockets, Kentucky Fried Chicken, and Domino's Pizza, which opened just last year. Indeed, the U.S. State Department encourages and advises American firms on how to develop business opportunities in the territory.[20] None of this is thought to contradict U.S. policy of calling for unitary Cypriot sovereignty over the Island.

In the international arena, the Fourth Geneva Convention explicitly countenances business in occupied territory, and the employment of people residing there in factories and other businesses.[21] In 2000, the Deputy Secretary General of the U.N. was asked for a legal opinion on oil exploration by a U.S. and French company in Moroccan-occupied Western Sahara. His opinion surveyed existing international law and concluded that there is no prohibition on doing business in such occupied territories, even against the objections of the occupied people. The same position was recently adopted by the Legal Adviser to the European Parliament. And just last year, the United Kingdom Supreme Court and a French appeals court ruled that companies do not violate international law by doing business in Israeli-controlled territory in the West Bank. There are simply no cases to the contrary.

To put it simply, occupation is not uncommon. Leaving aside the question of whether occupation accurately describes the status of Israel's presence in the territories, the economic warfare directed at it is unique.

Thus attempts to carve out an area of "safe" boycotts of Jewish economic activity in certain areas have no relationship with U.S. policy or international law. They also undermine any possible basis for a viable Palestinian state. Especially with the collapse of so many surrounding Arab states, it is clear that economic viability for a Palestinian entity depends on close ties and extensive trade with Israel. But if any such commerce is prevented from developing – if these areas are forcibly cut off from ties with the Israeli economy, any future Palestinian state will be born an economic orphan. Indeed, the international law of occupation specifically *requires* an occupying power to engage in economic activities in the territories it controls. Indeed, boycott proponent's indifference to their plans' massive negative effects on the livelihoods of Palestinians reveals that the real purpose is to hurt Israel, not to help Palestinians.

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[20] See U.S. & Foreign Commercial Service, U.S. Dep't Of Comm. & U.S. Dep't Of State, *Doing Business In Cyprus: 2014 Country Commercial Guide For U.S. Companies*, available at http://photos.state.gov/libraries/cyprus/788/pdfs/CCG2014final.pdf. Other U.S. companies retail business with a presence in northern Cyprus including apparel stores like Adidas and U.S. Polo Association, and other franchises such as Western Union, Orkin Pest Control, and GNC vitamin stores. Some of this information was provided by a fact-finding visit to Northern Cyprus by my research assistant, Wilson Shirley. Photographic documentation on file with the author.

[21] The Fourth Geneva Convention of 1949 countenances contracts between the occupying power and the occupied population. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 52, ¶ 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The only prohibited economic measures suggested by the Geneva Conventions are those aimed at "creating unemployment" in order to coerce protected persons to work for or in the occupying power. *See id.*, art. 52, ¶ 2. In other words, the Convention prohibits some measures *restricting* trade – if anything, it is boycotts that contradict the spirit of Conventions..

Potential European Measures and their Implications for International Trade Law

More potentially harmful than the "BDS Movement" is the planned economic actions of the EU against Israel. These are more serious both because they involve the power of state actors, and because they violate the fundamental rules of the international trading system – the General Agreement on Trade and Tariffs and World Trade Organization treaties. Thus they threaten to establish dangerous precedents about the use of trade restrictions for political ends, while inflicting economic harm on Israel.

In the next few months - possibly as early as September - the European Commission plans to adopt a measure requiring special labeling for Israeli goods related to "settlements," as well as other restrictions, including the outright exclusions on some agricultural products. These are not general measures applying to trade with what the EU considers occupied territories; rather, they are special sanctions aimed solely at Israel.

Thus the statements of European officials show that these actions are another step in a systematically implemented series of increasingly serious trade restrictions against Israel. Proposed future steps include restrictions on all Israeli banks because of their operations in disputed territories. In other words, the EU is self-consciously attempting to pioneer a new model for trade with Israel and relationship to the areas under Israeli jurisdiction that fundamentally differs from its relationships with other countries.

The proposed EU measures are unlawful trade barriers against Israeli products. They violate European duties under multilateral and bilateral trade agreements. In particular, the proposed measures raises strong claims by Israel under articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade, as well as the Articles IX, X and XIII of the General Agreement on Trade and Tariffs, Article 2.3 and 5.6 of the Agreement on the Applications Sanitary and Phytosanitary Measures, among others.

European foreign ministers lobbying for the labeling measure have justified the anti-Israel measure on the grounds of consumer protection.[22] Others have claimed that the labeling measure is necessary under the territorial clauses of the EU-Israel Association Agreement.[23] These arguments, as well as others relating to the underlying status of the territories, are of little help to the EU in the trade law context. Research by Prof. Avi Bell and I has shown that even if the European view of the status of the territories were correct, it would not excuse restrictive trade measures.

Indeed, a recent European Parliament study concedes that the EU imposes unique restrictions on Israeli that are not consistent with its treatment of what it considers similar

[22] A letter from Sebastian Kurz et al. to Federica Mogherini (13 April 2015). Available at: http://www.haaretz.co.il/st/inter/Hheb/images/simun.pdf.

[23] European Parliament, Debates on application of the EU-Israel Association Agreement, Strasbourg, 4 September 2003. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20030904+ITEM-006+DOC+XML+V0//EN&language=CS#top.

situations with Morocco and Turkey.[24] From an international trade perspective, such an admission is fatal. Even extraordinary exceptions to the General Agreement on Tariffs and Trade (GATT) rules, like restrictions put in place to protect public morals, are only valid if generally and non-discriminatorily applied.[25] The growing EU trade policy towards Israel violates the core GATT and WTO norm of non-discrimination.[26] Indeed, even if the consumer protection rationale the EU advances for labeling were valid, its discriminatory application would make it illegal.[27] But the European excuse that "settlement" labeling is a required measure of consumer protection is not credible and has already been rejected by the Supreme Court of the United Kingdom,[28] as well as by the European Commission itself in its dealings with other countries such as Morocco (regarding imports from Western Sahara).[29]

Nor is there any merit to the EU's contention that its trade obligations to Israel only apply to what it regards as Israeli sovereign territory. There is no principle in trade law restricting the application of trade agreements to sovereign territory. Trade agreements often apply to areas where sovereignty is not recognized or disputed, such as Taiwan, the Falkland Islands (Malvinas), and the Palestinian Authority. Indeed, the EU itself includes occupied Western Sahara within the territorial scope of its treaties with Morocco, undermining its contentions about Israel.

Moreover, the scope of GATT and WTO agreements expressly extends beyond the sovereign territory of states to areas under their control. The GATT itself defines the scope of its territorial application: "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility..."[30] The U.S. has always been of the view that the territorial scope is self-judging: other parties cannot determine the territorial scope of a state's GATT obligations. Thus when Cuba protested the U.S. applying GATT treatment to the

[24] EU Parliament, Directorate-General for External Policies: Policy Department. *Occupation/annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy*, pp 44 and 51 (June 2015). .

[25] See General Agreement on Tariffs and Trade Article XX(a).

[26] For a discussion about the compatibility of discriminatory foreign policy with GATT provisions, see Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 Chicago Journal of International Law 283 (2003), available at http://nd.uchicago.edu/cjil/vol4/iss2/5.

[27] While often characterizing the restrictions as purely technical and ministerial, senior EU officials also often champion them as tools to promote renewed negotiations between Israel and the Palestinians. Such expressly political purposes for what are framed as trade measures are precisely what the WTO system prohibits.

[28] See Press Summary: Richardson and another v Director of Public Prosecutions, February 5, 2014, p. 2 available at https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0198_PressSummary.pdf.

[29] See Parliamentary Questions, *Answer Given by Mr. Çioloş on behalf of the Commission*, Parliamentary Question No. E- 003971/2013, June 11, 2013, 2014 O.J. (C 20 E) 1, 137.

[30] See supra 22, Art XXV1(5)(a) (emphasis added).

Panama Canal Zone – an area where it had no sovereign claim – the U.S. rejected the protest, in a stance that ultimately prevailed.[31]

The EU's attempt to use trade restrictions as a tool of foreign policy and the manifestly discriminatory nature of these policies contradict the core values of the WTO system. As one of the major pillars and architects of that system, the U.S. has as much to lose as anyone by the corruption of the rules designed to protect open trade from politics and to guarantee most favored nation treatment to all parties.

Recommendations

The faces of the boycott proponents have changed, but their goals and motives remain the same. Of the various boycott efforts, the planned measures of the European Commission receive less public attention, but have a far greater potential impact. That is because companies are not naturally interested in trade restrictions; the same is not true of governments.

Current legislative efforts in Congress and statehouses to modernize U.S. anti-boycott laws are entirely consistent with long-standing U.S. policies of opposing discriminatory economic warfare against Israel and other friendly nations. Such laws are essential for upholding U.S. policies against discrimination on the basis of nationality, protecting an ally and important trading partner from hostile measures, protecting the possibility of a negotiated solution to the Israel-Arab conflict, and upholding the integrity of international trade law.

Congress should work to pass the anti-boycott measures in H.R. 1907,[32] which takes mild but helpful measures to address all the issues discussed in this testimony. Section (f) makes unenforceable in U.S. court foreign judgments against U.S. persons which is based on a determination by a foreign court that "the location in Israel, or in any territory controlled by Israel, of the facilities at which the business operations are carried out is sufficient to constitute a violation of law." This provision pushes back against lawfare efforts that seek to exclude U.S. companies from areas where they can lawfully do business under general international law, as well as under U.S. law. Such foreign judgments would attempt to create "no trade zones" that are fundamentally contrary to principles of international law.

Any judgment that would fall under section (f) would be a gross perversion of international law.[33] Indeed, it is evidence of how egregious it would be that there are to

[31] Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments?*, 26 Fordham Int'l. L. J. 572 (2002).

[32] Report No. 114–114, Part I. sec. 608 (incorporating HR 825, the US-Israel Trade and Commercial Enhancement Act).

[33] Even Prof. James Crawford, a sharp critic of Israel hired by British trades unions to write an opinion on the illegality of doing business with "settlements" in the West Bank was forced to concede that there is no such prohibition. James Crawford, Trades Union Cong., Opinion: *Third Party Obligations With Respect To*

date no known judgments of this kind. Yet there are many unsuccessful lawsuits brought, and more threatened. For many U.S. companies, threats of meritless but hard-to-dismiss suits in potentially hostile foreign fora can have a significant chilling effect on business decisions. This provision effectively protects U.S. firms from such nuisance suits based on invented notions of international law.

Because this involves international law, the U.S. has interests that go beyond the typical foreign judgments situation, where recognition is given largely regardless of the U.S. view of the foreign law. Unlike foreign law, *international law* is shaped through state practice: countries doing things can slowly redefine international law. Suits like those subject to section (f) seek to use European and other fora to create a new rule of international law, one to which the U.S. has not acceded. Such a rule would have potentially wide-reaching implications for U.S. firms doing business in disputed areas around the world.

Section (b)(5) addresses potential EU sanctions. It states the U.S.'s position that politically motivated governmental sanctions against Israel violate the GATT. This is an important statement of commitment to the most-favored nation rule in international trade, and the separation of politics from trade disputes. It can have a strong deterrent effect on European policy, by significantly weakening their case in the event their actions were challenged before the WTO's dispute resolution system.

Finally, section (b)(8) expresses support for further state legislation along the lines of South Carolina and Illinois, making it clear that such state action is fully in line with federal policy.

H.R. 1572, still in committee, prevents federal contractors from engaging in discriminatory boycotts of Israel. This measure, much like the South Carolina law, ensures that the federal government does not promote discriminatory policies that weaken its trading partners. Such a measure is in keeping with existing federal rules. It is a blend of the strict anti-boycott policy of the existing federal Anti-Boycott Laws with existing anti-discrimination rules, which require that contractors certify that they do not engage in a variety discriminatory practices not otherwise forbidden by law. As President Obama said of such rules, "America's federal contracts should not subsidize discrimination," even when the discriminatory actions are legal and reflect sincere personal views and commitments.

All these provisions are well within the zone of past congressional and executive policy, and simply update boycott laws to confront current challenges (while at the same timing adopting a softer and less restrictive approach than the 1970s laws). Nothing in the Constitution, U.S. law or policy, or international law, interferes with Congress acting on this enumerated power to prevent insidious discrimination, strengthen an ally, prevent actions to prejudice a negotiated solution, and defend the integrity of the international trading system.

Israeli Settlements In The Occupied Palestinian Territories (Jan. 24, 2012), available at http://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf/

Professor Eugene Kontorovich, biographical statement
Professor Eugene Kontorovich teaches at Northwestern University School of Law. He specializes in constitutional and international law. He is one of the world's preeminent experts on international law and the Israel-Arab conflict. He is also a consultant to the Israel Allies Foundation.

He is regularly called on to advise legislators and cabinet members in the U.S., Israel, and Europe on questions pertaining to Israel and international law. He has testified before Congress on Middle East issues and international law, served as a consultant for the U.S. Defense Department, and wrote a Supreme Court amicus brief in the Jerusalem passport case. Prof. Kontorovich also plays a leading role in the drafting of laws about Israel boycotts in U.S. states.

Prof. Kontorovich has published dozens of scholarly articles in leading law reviews and peer-reviewed journals in the United States and Europe, including the *Stanford Law Review, University of Pennsylvania Law Review, Virginia Law Review, International Journal of Criminal Justice,* and many more. His scholarship has been cited in leading international law cases in the U.S. federal courts and abroad.

His expertise is often sought out and quoted by major news organizations such the New York Times, Wall Street Journal, NPR News, Associated Press, LA Times, and numerous television and radio programs. Prof. Kontorovich's popular writings have appeared in the *Wall Street Journal, Los Angeles Times*, POLITICO, *Commentary, Haaretz*, and numerous other leading publications. He is a regular contributor to the *Washington Post's* Volokh Conspiracy legal blog.

He has been honored with a fellowship at the Institute for Advanced Study in Princeton, in 2011-12, and with the Federalist Society's prestigious Bator Award, given annually to a young scholar (under 40), for outstanding scholarship and teaching.

He attended the University of Chicago for college and law school, and ultimately taught there. After law school, he clerked for Judge Richard Posner on the United States Court of Appeals for the Seventh Circuit. In a previous career, he was a newspaperman at Wall Street Journal, the New York Post, and the Forward.