



## **The Anti-Israeli Boycott as Discrimination against Jewish Groups and Israeli Persons: International, European and National Legal Trends**

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### **Executive summary**

During the recent decade, supported and inspired by an anti-Israeli boycott movement, some organizations, companies, student councils and academic associations across countries in Europe and the Americas, have instated a boycott of Israeli products, universities and persons. This paper presents legal aspects of the boycott and counter-boycott movements. For this purpose relevant aspects of international law will be analyzed, including:

- The argument employed by the delegitimization movement is that third parties are under an international law-based obligation to cease their relations with the Israeli settlements. This argument has been contradicted by recent national courts' interpretation of international law and by the legal opinions of others.
- Countering the boycott via international human rights law principles. Calls to boycott Israel in U.N. forums and the anti-Israeli boycott movement's singling out of Israel may violate international human rights principles, including the

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U.N. Charter mandated "equal treatment of all nations" and the International Convention on Combating Racial Discrimination.

- The boycott may also be in violation of international trade agreements' principle of non-discrimination.

This paper also examines European Union law, specifically:

- Consumer protection and funding regulations. The E.U. does not have a policy for handling its relations with disputed territories, nor does it consistently apply its laws upon these territories.
- The European Court of Human Rights, in determining the lawfulness of calls to boycott Israel in France, has emphasized the difference between expressing a political opinion and calling for a boycott; whereby expressing a political opinion was deemed protected under the right to free speech, whereas calling for a boycott, conversely, could be deemed a discriminatory action. The European Court also emphasized the importance of whether the entity calling for a boycott was acting *ultra vires* (beyond the scope of one's vested powers), concluding that the mayor of a French city calling for a boycott was not entitled to take the place of the government in calling for a boycott of a foreign country.<sup>2</sup> That is, an individual person has the autonomy to decide for oneself whether to buy or not buy a certain product. A sovereign state also has the right to decide to sever economic ties with another state (provided this does not violate trade agreements, as we shall see below). Entities situated, however, between a state and an individual person – town councils, companies, municipalities, persons in official capacities (including representatives of state universities) – do *not* have an automatic right to call for a boycott, and the lawfulness of any such call must be examined via the applicable domestic framework.

Indeed, the anti-Israeli boycott's prevalence in recent years has induced national states to decide on the legal status of anti-Israeli boycotts within their jurisdictions, via court rulings, the enactment of new laws (so called "anti-boycott" laws), or by issuing governmental notices or statements:

- Some countries have unequivocally declared that boycotting of Israeli products is against the law. The basis for justifying these pronouncements, however, differs in each country based on its own legal framework and culture:
  - France, for example, bases its prohibition of the boycott against Israel on its discrimination law, declaring in effect that the boycott of Israelis "economic discrimination" and inciting to discrimination of a national group. (Spain employs a similar argument.)
  - The United Kingdom, while emphasizing the detrimental effect of the boycott on "fueling antisemitism and undermining community relations", takes on a different approach, i.e. that boycotting Israeli

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<sup>2</sup> For a discussion of the European Court judgment on pages 14-15 herein.

companies is in violation of trade agreements, and clarifies that only the government is authorized to call for a boycott of another country.

- Similarly to the U.K., the United States has enacted a federal law that supports the individual states' anti-boycott laws, and declares that boycotts, divestments and sanctions against Israel violate world trade agreements' principles of non-discrimination,
- On the contrary, however, other countries like The Netherlands and Sweden have announced via governmental statements that the activities of the anti-Israeli boycott campaigns are protected under the constitutional right to freedom of expression.
- Apart from anti-boycott laws, some European banks have recently begun to shut down BDS campaign accounts; some as part of the declared illegality of the boycott (e.g., France), other banks close down these accounts simply by exercising the discretion afforded to them under domestic banking law (e.g., Germany).

## Introduction

The matter of political boycotts encompasses several and varied fields of law: international humanitarian and human rights law, European law, national anti-boycott laws, anti-discrimination laws, and civil trade laws. The recent boycott movement against Israel has also raised several legal questions. Among them: are boycotts and anti-boycott laws protected under the right to freedom of expression? If so, is any person or entity entitled to call for a boycott of another country? Does a call to boycott Israeli products and academic institutions constitute a discrimination and harassment of Israeli persons or Jewish people in the respective country? Many countries have re-examined these questions in light of the boycott movement's prevalence, and have thus further clarified the lawfulness of boycotts and their connection to matters of freedom of expression, non-discrimination and free-trade relations.

The anti-Israeli boycott movement, also known as the Boycott, Divestments and Sanctions movement ("BDS", or "Anti-Israeli boycott movement") began in 2005 with a campaign endorsed by Palestinian civil society organizations. Omar Barghouti, one of its founders, has described the movement's three main objectives: "ending the occupation, ending the racial discrimination in Israel and the system of apartheid and the right of return."<sup>3</sup> Spurred on by the movement, some organizations, companies, student councils and academic associations in European countries as well as in the U.S. and Canada have instated either a wholesale boycott or a boycott of Israeli products, companies and universities with connections to the Israeli settlements. The movement has been especially prominent in Californian university campuses, where all student government councils approved divestment resolutions.<sup>4</sup> While the anti-Israeli boycott movement has cast itself as a rights-based organization, its far-reaching demands, in effect aiming to undermine Israel's future as the Jewish State, have cast a doubtful light on their actual, underlying motivations: Is this a peace-seeking movement or is it one which incites to discrimination and hatred against one country, its companies, universities and citizens?

This paper will examine the anti-Israeli boycott within the legal framework of antisemitism- and anti-discrimination law. For this purpose, it is first important to set forth the relevant categories for discussing antisemitism from a legal perspective. While very few countries' penal codes mention the word "antisemitism", it is generally considered to be subsumed within the scope of more general laws. These types of laws include: (1) laws prohibiting incitement to hatred on the basis of religion, race and ethnicity ("hate speech laws"); (2) non-discrimination laws; (3) penal code provisions establishing "aggravating circumstances", or enhanced penalties for offences committed with a motivation of hate ("hate-crimes laws); (4) defamation laws, racial/religious insult, collective insult, (5) desecrating places of

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<sup>3</sup> "Interview with BDS co-founder Omar Barghouti: Banned by Israel from traveling threatened with worse", Glenn Greenwald, 13 May 2016, The Intercept, *available at* <https://theintercept.com/2016/05/13/interview-with-bds-advocate-omar-barghouti-banned-by-israel-from-traveling-threatened-with-worse/>.

<sup>4</sup> "Campus Debates on Israel Drive a Wedge Between Jews and Minorities", Jennifer Medina, Tama Lewin, 9 May 2015, International New York Times, *available at* [http://www.nytimes.com/2015/05/10/us/campus-debates-on-israel-drive-a-wedge-between-jews-and-minorities.html?\\_r=0](http://www.nytimes.com/2015/05/10/us/campus-debates-on-israel-drive-a-wedge-between-jews-and-minorities.html?_r=0).

worship, (6) prohibiting banned parties/organizations, and (7) prohibiting Nazi or fascist symbols and propaganda.

The calls for broad-spectrum bans of Israeli products, academic institutions and persons, adversely affect, and create a hostile environment for the Jewish individuals and communities living in that country. This effect is most clearly witnessed by Jewish students across university- and college campuses. Moreover, the boycott may be considered discrimination on the basis of nationality (i.e., against Israeli citizens). In this context, countries have applied hate speech, hate crime and anti-discrimination laws upon the activities of the anti-Israeli boycott (categories 1, 2, and 3 above).

It is also important to note the differences between a purely legal and non-legal approach in combating antisemitism. A non-legal approach may call certain expressions and actions as antisemitic (e.g., the EUMC Working Definition of Antisemitism), or may attribute an antisemitic *motivation* to certain expressions and behaviors. In this sense, many aspects and expressions employed by the boycott of Israel have been criticized as *motivated by* antisemitic sentiment, or as part of the New-Antisemitism phenomenon; that is, that sentiments of hatred and bigotry - that once targeted Jewish people, but have become unacceptable after the Holocaust and World War II - now target the State of Israel. In this sense, the extreme delegitimizing rhetoric levelled at Israel and denying its right to exist, is deemed antisemitic.

Conversely, and disregarding for a moment the underlying, harder to definitively prove motivations at the basis of the anti-Israeli boycott campaign, legal arguments made against it are that: (1) its activities may be considered discriminatory on the basis of nationality, (2) its activities are types of hate crimes, when involving a base offence of vandalism, for example, (3) calls to boycott may violate international trade agreements' non-discrimination clause, and that (4) extreme anti-Israeli rhetoric can constitute hate speech. To clarify, the distinction is this: instead of focusing on the *difficulty to prove antisemitic motives underlying* the delegitimizing, singling out and boycotting of Israel, it would be far more effective to focus on the *already proven activities and their results and argue they constitute legally recognized categories of discrimination and incitement to hatred*. As we shall see, in some countries, this linking of anti-Israeli boycott activities to discrimination and incitement to hatred has already been recognized in the European Court of Human Rights and national courts.

The delegitimization and boycott movement accuses and singles out Israel as the worst violator of human rights, to the exclusion of all other countries. While in the private realm a person is entitled, obviously, to hold a political opinion riddled with double standards, this is not the case when this opinion is catapulted into a call for *collective action*, which may thus be deemed discriminatory. As emphasized by the European Court of Human Rights, there is a difference between expressing a political opinion and calling for a boycott.<sup>5</sup> In this vein, the Israeli Supreme Court also considered the boycott as a form of discrimination, stating that: "Discrimination on the basis of affiliation to a country of origin harms the individual based on actions and

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<sup>5</sup> For a discussion of the judgment, see page 14-15 herein.

behaviors that are not dependent upon him, and constitute a sort of "collective punishment" that is inappropriate."<sup>6</sup>

Moreover, there is also a difference between expressing a political opinion and crossing the line into "hate speech" (forbidden in European countries) that incites to discrimination and hatred against a national group. In recent years, anti-Israeli expressions and activities have been examined in the light of laws prohibiting "incitement to hatred" across Europe, to varying degrees of success.<sup>7</sup>

This paper presents the legal aspects of the boycott and anti-boycott movements, and for this purpose analyzes relevant international law based arguments, including: countering the boycott via international human rights law principles and the boycott's violation of World Trade Organization agreements. It may be argued that the calls to boycott Israel in U.N. forums and the anti-Israeli boycott's singling Israel violate international human rights principles, specifically the U.N. Charter mandated "equal treatment of all nations" and the International Convention Combating Racial Discrimination. It may also be argued that the boycott violates the non-discrimination clause of international trade agreements. The paper also examines European Union law, specifically consumer protection and funding regulations; concluding that the E.U. does not have a policy for handling its relations with disputed territories, and therefore applies its laws inconsistently upon these territories.

Lastly, we will present domestic countering efforts. Some countries, like France and Spain, have declared that anti-Israeli boycotting activities constitute discrimination on the basis of nationality. In addition, The United Kingdom has stated that boycotting Israeli companies is in violation of trade agreements. The United States has enacted a federal law declaring that boycotts, divestments and sanctions against Israel violate world trade agreements' principles of non-discrimination, and supporting American states' anti-boycott laws. Conversely, the Netherlands and Sweden have stated that the activities of the anti-Israeli boycott movement should be protected under the constitutional right to freedom of expression.

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<sup>6</sup> Justice H. Melcer, Supreme Court Justice Decision, Uri Avineri et al v. Knesset et al, summary in English *available at* [https://www.adalah.org/uploads/Boycott\\_decision\\_apri\\_2015\\_english\\_summary.pdf](https://www.adalah.org/uploads/Boycott_decision_apri_2015_english_summary.pdf).

<sup>7</sup> For a discussion on the varying interpretation of anti-Israeli hate speech, see pp. 16-17 herein.

## Section I: International Law

This section will examine the international human rights perspective on calls to boycott another state, and under which circumstances a call to boycott another country is in compliance with the established norms of international law. These issues will be answered by examining aspects of international trade law, human rights and humanitarian law. Lastly, the anti-Israeli boycott movement's core argument, namely, that third-parties are prohibited from engaging in any relations with Israeli entities complicit with the Israeli settlement enterprise on the basis on an "obligation of non-recognition" ostensibly arising from international law norms, will also be presented and analyzed.

### *International human rights law; U.N. Charter*

Generally speaking, a call to boycott or sanctions may be made according to Article 41<sup>8</sup> of the U.N. Charter, which authorizes the Security Council to initiate economic sanctions against a country, when it deems there are threats or breaches to the peace or acts of aggression.<sup>9</sup><sup>10</sup> While the right to carry out economic boycotts or sanctions is recognized under the U.N. Charter, a boycott must adhere to the rules of international human rights norms. On the basis of the U.N. Charter articles guaranteeing the equal treatment to all nations<sup>11</sup>, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of Racial Discrimination ("CERD"), Aleksandra Gliszczynska-Grabias, from the Poznan Human Rights Center at the Polish Academy of Sciences, argues that the anti-Israeli boycott and the calls to boycott in the forums of the U.N. may involve actions that constitute discrimination on the basis of nationality or incitement to hatred or violence against Israelis, and are thus in violation of the U.N. Charter's guarantee of equal treatment to all nations.<sup>12</sup> That is to say, the call to boycott may be deemed a case of discrimination against Israeli citizens if they are singled out on the basis of their nationality.<sup>13</sup> It is important in this respect to note some examples to the unequal treatment of Israel by the U.N. Human Rights Council, which has been extensively documented and commented on. The U.N.'s and the E.U.'s treatment of Israel have been widely criticized as a "singling out of Israel", holding it to higher standards than those demanded of other countries. The U.N. Human Rights Council in March voted to create a "blacklist" of companies

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<sup>8</sup> Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

<sup>9</sup> Article 39 is also relevant: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

<sup>10</sup> United Nations Charter, signed in San Francisco on 26 June 1945, *available at* <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html>.

<sup>11</sup> The U.N. Charter, which binds all its Member States, also determines that nations must be treated equally (articles 1(2) and 2(1)).

<sup>12</sup> "Anti-Israeli Boycotts: European and International Human Rights Law Perspective", Aleksandra Gliszczynska-Grabias, *Deciphering the New Antisemitism*, 2015, edited by Alvin H. Rosenfeld, Indiana University Press, pp. 430-453.

<sup>13</sup> *Ibid.*

operating in the West Bank, East Jerusalem and the Golan Heights, a motion that passed with 32 countries voting in favor, and none against. The "The United Nations and Antisemitism" Report Card<sup>14</sup> succinctly states as follows:

"Paradoxically, one of the greatest violators on the UN Charter's equality guarantee has been the UN body charged with establishing and enforcing international human rights, the Human Rights Council."

Kofi Annan spoke of "the intense focus given to some actions taken by Israel, while other situations sometimes fail to elicit similar outrage" gave an impression of "bias and one-sidedness".<sup>15</sup> Decades-long of these singling out activities have undoubtedly prepared the ground for the anti-Israeli boycott movement. Holding one member state to a higher standard than others is in breach of the right to equality. The EUMC Working Definition of Antisemitism determines that this singling out and holding of Israel to higher standards not expected or demanded of any other democratic nation is an example of antisemitism<sup>16</sup>. In a complementary manner, from a legal perspective it suffices to say that this treatment is discriminatory and unequal. Israel, like any other country, has the right to receive a balanced, equal, non-selective application of the rule of law upon it.

#### *Do anti-Israeli boycotts violate international trade agreements?*

Given that there is no standard international approach to dealings with disputed territories, specific trade agreements should be examined. Economic sanctions against Israel may violate specific trade and commerce treaties, especially World Trade Organization agreements. For example, WTO's Government Procurement Agreement requires all signatories to it to "treat suppliers equally". In 2015, the U.K. Government stated<sup>17</sup> that since both the E.U. and Israel were signatories, any trade between the U.K. and Israel would fall under the agreement's provisions - and any discrimination against Israeli suppliers in this regard would violate this Agreement.<sup>18</sup> Similarly, U.S. Federal law, passed in 2015, declared that:

"[T]he boycott, divestment, and sanctioning of Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities is contrary to the General Agreement on Tariffs and Trade (GATT) principle of non-discrimination."<sup>19</sup>

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<sup>14</sup> "The United Nations and Anti-Semitism", 2004-2007 Report Card, *available at* [http://secure.unwatch.org/site/c.bdKKISNqEmG/b.1359197/k.6748/UN\\_Israel\\_AntiSemitism.htm](http://secure.unwatch.org/site/c.bdKKISNqEmG/b.1359197/k.6748/UN_Israel_AntiSemitism.htm)

<sup>15</sup> Ibid.

<sup>16</sup> EUMC Working Definition of Antisemitism, *available at* <http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism/>.

<sup>17</sup> U.K. "Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts", Information Note 01/16, 17 February 2016, *available at* <https://www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations>.

<sup>18</sup> *Available at* <https://www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts>.

<sup>19</sup> The United States-Israel Trade and Commercial Enhancement Act of 2015.

That is to say, the U.S. and the U.K. governments have both stated that in their view the boycott against Israeli products was in breach of WTO agreements. And, it is important to reiterate: the boycott violates these agreements on the basis of its breach of the non-discrimination principle guaranteed therein.

*"Obligation of non-recognition" argument*

Lastly, it is important to address one of the anti-Israeli boycott movement's most damaging claims against Israel, which is supported by some European officials and legal scholars:<sup>20</sup> Namely, that under international law, third-parties are under an "obligation of non-recognition" with regard to the Israeli occupied territories; a requirement to limit or cease economic activities with the Israeli settlements, the West bank and the Golan Heights, so as not to give any legal effect to an occupying entity's human rights violations.<sup>21</sup> That Israel - as a (an allegedly) grave violator of international humanitarian law, in committing war crimes as they are defined in the Geneva Convention and the Rome Statute – must be isolated until it ceases all violations and, importantly, agrees to the anti-Israeli boycotters' own perspective of international law: including a one-state solution and a right of return to Palestinians, thereby annihilating Israel as the Jewish State. Consequently, the anti-Israeli boycott campaign does not claim that third party states and companies *should* boycott Israeli products, but that they *must* do so - that they are under no less than an international law based obligation to do so. This use of international law is the anti-Israel boycott movement's main method to delegitimize and isolate Israel from the international community.

But does this international law obligation exist? The answer is not nearly as clear-cut as presented by the boycott movement. The existence of an "obligation of non-recognition" has been disputed by legal opinions of the U.N. Security Council's and the E.U. Parliament's legal advisors.<sup>22</sup> It has also been refuted by the French Court of Appeals and the U.K. Supreme Court.<sup>23</sup> In *France-Palestine Solidarite v. Alstom*<sup>24</sup>, the French Court of Appeal ruled that the Geneva Conventions did not apply to private companies and therefore, they were not limited in their economic activities in such territory. Similarly, in a recent U.K. Supreme Court case<sup>25</sup> it was argued that selling dead-sea products constituted an "aiding and abetting of Israeli settlement activity" and therefore a violation of international law. The U.K. court rejected this argument and declared that a company's economic relations with an occupied territory were not a violation of the Geneva Conventions. These court cases, as well as varied state practices in this regard, support the argument that international law does not restrict third party companies' activities in occupied or annexed territories with settlements.<sup>26</sup>

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<sup>20</sup> Economic Dealings with the Occupied Territories, Eugene Kontorovich, Columbia Journal of Transnational Law, 2015, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Cour d'Appel (CA) [regional court of appeal] Versailles, March 22, 2013.

<sup>25</sup> Richardson vs. Director of Public Prosecutions.

<sup>26</sup> "Economic Dealings with the Occupied Territories", Eugene Kontorovich, Columbia Journal of Transnational Law, 2015, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>.

In this vein, U.S. Federal Law similarly determines that U.S. courts are prohibited from enforcing foreign judgments declaring that a U.S. person violated the law by conducting business with an Israeli company, whether situated in Israel or Israeli controlled territory. This federal law is important in further establishing international law in this respect.

In light of the above, it can be said that there is no consistent international practice with respect to disputed territories, and therefore no international law-based obligation to boycott Israel. In the absence of an international law *prohibition*, the more precise question is whether and under which circumstances a state, organization, company or individual *may*, if it so chooses, to boycott an occupied or disputed territory.

## Section II: European law

Generally, the European Union may impose sanctions on countries, provided such are not contrary to its own laws or trade agreements. Indeed, during the past decade the E.U. has imposed over thirty sanctions on countries around the world.<sup>27</sup> The European Commission has stated it was against the boycott of Israel. (However, since it does not consider the Israeli settlements as part of Israel's territory, consequently a boycott of products from the Israeli settlements could ostensibly not be considered a boycott of Israel). At any rate, regardless of this official position, the European Commission's measures in recent years with respect to Israel have given anti-Israeli boycott efforts an extra moral boost. The labelling regulations make an anti-Israel boycotters' life easier. While the extent of the economic damages attributed to the labelling regulations on Israeli exports from the settlements is still unclear<sup>28</sup>, such measures bear at the very least a symbolic impact which plays into the hands of the boycott movement. It is nevertheless important to clearly differentiate between the anti-Israeli boycott movement proper and the labelling issue. Any unwarranted lumping together not only over-simplifies a complex and multilayered issue; it is also counterproductive.<sup>29</sup>

### *EU customs and consumer protection*

E.U. customs legislation dealing with the labelling of products imported into the Union has sparked much debate and controversy during recent years. In November

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[territories/](#), 630. "State practice widely supports the view that third-party companies face no restrictions as a result of such situations, except perhaps when it comes to the extraction of natural resources.

<sup>27</sup> "The EU Sanctions Landscape in 2015: Everything a German Firm Needs to Know", 24 April 2015, Debevoise & Plimpton Publications, available at <http://www.debevoise.com/insights/publications/2015/04/the-eu-sanctions-landscape-in-2015>.

<sup>28</sup> Statistics from "Labelling Settlement Products: Economic or Symbolic Pressure?", Daniel Tkatch, 25 November 2015 : "Around one third of Israel's export goes to the EU, a total of \$20-30 billion per year. Only around 1% of these exports originate in the occupied territories. In comparison, the EU's imports from Palestine amounted to a mere \$19 million in 2014. Israel's Economy Ministry estimated the direct loss that Israeli producers would sustain from a diminished demand...".

<sup>29</sup> "The Phenomenon of Delegitimizing Israel– Trends and Counteractions" (in Hebrew), Pnina Sharvit Baruch and Koby Michael, 2015, Law and National Security Newsletter, INSS, available at <http://heb.inss.org.il/index.aspx?id=4257&researcherid=97>.

2015, the European Commission published an "Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967"<sup>30</sup>. The Interpretative Notice states that:

"Since the Golan Heights and the West Bank (including East Jerusalem) are not part of the Israeli territory according to international law, the indication 'product from Israel' is considered to be incorrect and misleading (...)." <sup>31</sup>

Labelling products must be "correct and not misleading for the consumer"<sup>32</sup>. One type of misleading practice may be in the geographical or commercial origin of the product. In this respect, products originating from the Israeli settlements are required to be marked differently from those made in the "territory of Israel" as recognized by the E.U. Moreover, a product from a certain Israeli settlement is considered correctly labelled when marked "Israeli settlement", rather than "West Bank" or "Golan Heights". This is necessary, according to the European Commission's interpretation of E.U. consumer protection laws, in order for the "average consumer to take a transactional decision that he would have not taken otherwise."<sup>33</sup> While the Member States may decide on the type and severity of the penalties for violating the labelling rules, they must nevertheless ensure that such penalties are "effective, proportionate and dissuasive".<sup>34</sup> The E.U. may launch infringement proceedings on Member States in violation of the labelling regulations.<sup>35</sup>

The European Commission has reiterated that the Interpretative Notice is merely a "technical clarification of existing regulations" and not a new law.<sup>36</sup> It has also stated that the free-trade agreement between the E.U. and Israel<sup>37</sup> does not, and has never applied to products from the settlements, and that the applicability of any agreements between the E.U. and Israel are limited to the "territory of Israel" as recognized by the E.U.<sup>38</sup> The European Commission maintains therefore that such measures are not part of any effort to boycott Israel, and furthermore, that it is opposed to such boycott of

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<sup>30</sup> Published on 11 November 2015.

<sup>31</sup> Article 7 of the Interpretative Notice.

<sup>32</sup> Article 6(1) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market). Moreover, the Unfair Commercial Practices Directive (Regulation (EC) No. 2006/2004 of the EP and of the Council

<sup>33</sup> Article 7(1) of Directive 2005/29/EC.

<sup>34</sup> Prior to this Interpretative Notice, U.K., Denmark and Belgium had already placed consumer labelling requirements on products originating from Israeli settlements.

<sup>35</sup> Article 3 of the Interpretative Notice.

<sup>36</sup> EU Unfair Commercial Practices Directive 2005/29/EC.

<sup>37</sup> Euro-Mediterranean Agreement Establishing an Association Between the European Communities and their Member States, of the One Part, and the State of Israel, of the Other Part, E.U.-Isr., 20 November 1995, 2000 O.J. (L 147) 3, entered into force 1 June 2000, *available at* [http://eeas.europa.eu/delegations/israel/documents/eu\\_israel/asso\\_agree\\_en.pdf](http://eeas.europa.eu/delegations/israel/documents/eu_israel/asso_agree_en.pdf).

<sup>38</sup> Press Release by the Council of the European Union, 10 December 2012, *available at* [http://europa.eu/rapid/press-release\\_PRES-12-516\\_en.htm](http://europa.eu/rapid/press-release_PRES-12-516_en.htm). For the press release: "all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip". Moreover, In 2010, the European Court of Justice ruled that the EU-Israel trade agreement did not apply to the West Bank. See, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of the Court (Fourth Chamber) of 25 February 2010, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0386&from=EN>.

Israel. (The U.S. Government has similarly stated it did not view the labelling of products from the settlements as a boycott of Israel.<sup>39</sup>).

The labelling regulations, however, have been viewed by the Israeli Government as discriminatory and connected to, or at least "inspired by", the ongoing rise of the anti-Israel boycott movement.<sup>40</sup> Immediately after its publication, the Israeli Ministry of Foreign Affairs stated as follows:

"Israel condemns the decision of the European Union to label Israeli products originating from areas that are under Israeli control since 1967. (...)

It is puzzling and even irritating that the EU chooses to apply a double standard concerning Israel, while ignoring that there are over 200 other territorial disputes worldwide, including those occurring within the EU or on its doorstep. The claim that this is a technical matter is cynical and baseless."

Indeed, and needless to say, the Israeli settlements are not the only disputed territory in the world, nor are they the only territory not recognized by the E.U. or by the majority of member states. The labelling guidelines as applied to Israel are not a part of a general policy consistently applied on all disputed territories.

In a similar vein, in July 2013 the E.U. published the "Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments" (the "Funding Guidelines").<sup>41</sup> The Funding Guidelines stated that the various E.U. bodies could "no longer fund or dispense awards, prizes and grants to commercial companies, public bodies and organizations working in the territories occupied by Israel since June 1967." As with the labelling issue, the E.U.'s position on funding, labelling and trading as it pertains to Israel, is inconsistent with other countries with disputed territories. In actuality, there is no consistent E.U. policy for dealing with disputed territories, only an array of different practices. Moroccan-controlled Western Sahara is a good example of these varied practices, for several reasons.<sup>42</sup> First, unlike some other disputed territories, Western Sahara has many natural resources and extensive trade relations with Europe. Within Western Sahara there is a significant settlement enterprise established by Morocco. Declared an "occupied territory" by the U.N. General Assembly and no state has recognized Morocco's sovereignty to the territory. Needless to say, neither has the E.U. Nevertheless, in the E.U.-Morocco Fisheries Agreement, the Western Sahara region is implicitly included.<sup>43</sup> Moreover, the E.U. has not taken any

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<sup>39</sup> "US: EU labeling of settlement goods not a boycott", <http://www.jta.org/2015/11/13/news-opinion/united-states/u-s-understands-e-u-labeling-of-settlement-goods-says-not-a-boycott>. See also, "The E.U. versus B.D.S.: The Politics of Israel Sanctions", Bernard Avishai, 22 January 2016, *The New Yorker*, available at <http://www.newyorker.com/news/news-desk/the-e-u-vs-b-d-s-the-politics-of-israel-sanctions>.

<sup>40</sup> "Ministry of Foreign Affairs' response to EU decision regarding product labeling", 11 November 2015, available at <http://mfa.gov.il/MFA/PressRoom/2015/Pages/Israel-condemns-EU-decision-on-labeling-11-Nov-2015.aspx>.

<sup>41</sup> 2013/C 205/5, 19 July 2013.

<sup>42</sup> For an in-depth analysis of the Western Sahara case as compared with Israeli settlements, see, *Economic Dealings with the Occupied Territories*, Eugene Kontorovich, *Columbia Journal of Transnational Law*, 2015, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>. pp.600-615.

<sup>43</sup> *Ibid*, 608.

measures, as it has with Israel, to make sure any funds to Morocco do not enter Moroccan-controlled Western Sahara.<sup>44</sup> Lastly, products exported from the Western Sahara are still labelled "Made in Morocco".<sup>45</sup>

Apart from these inconsistent applications, some legal scholars have also questioned the European Commission's interpretation of their own consumer regulations. For example, with respect to the labelling issue, the European Commission has claimed that the average consumer would want to know that products came from Israeli settlements rather than merely from "Israel" or from "the West Bank". An argument may be made that it is not the *average* consumer who is interested in the labelling of products from Israeli settlements, but rather a specific type of consumer who is interested in such labelling for the purpose of boycotting Israel.<sup>46</sup> As an example Kontorovich brings the French court case on the boycott of *SodaStream*, an Israeli company with operations in the West Bank<sup>47</sup>. The company was accused for committing "fraud on the origin" for labelling its products "made in Israel". The court ruled that such labelling was not fraudulent as it did not deceive a "typical" consumer and, at any rate, that any such inaccuracies were inconsequential when compared to the illegality of calling for a boycott according to French law<sup>48</sup>.

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<sup>44</sup> In responding to claims of inconsistent practices, the E.U. makes a distinction between an "occupied territory" and the Western Sahara's status of a Non-Self Governing Territory. However, as argued by Kontorovich, these terms are not mutually exclusive. A territory may be occupied and at the same time non self-governing. See the argument in *ibid*, pp. 610-611.

<sup>45</sup> "The E.U., Morocco and the Western Sahara": a chance for peace.", Vish Sakthivel, 10 June 2016, European Council on Foreign Relations, available at [http://www.ecfr.eu/article/commentary\\_the\\_eu\\_morocco\\_and\\_the\\_western\\_sahara\\_a\\_chance\\_for\\_justice\\_7041](http://www.ecfr.eu/article/commentary_the_eu_morocco_and_the_western_sahara_a_chance_for_justice_7041).

<sup>46</sup> Economic Dealings with the Occupied Territories, Eugene Kontorovich, *Columbia Journal of Transnational Law*, 2015, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>, 632. Eugene Kontorovich analyzes the U.K. Supreme Court case of *Richardson v. Director of Public Prosecution*, [2014] UKSC 8 (Eng.), and brings the district judge's opinion, with respect to products labelled as originating from "Dead Sea, Israel" and not "Occupied Palestinian Territory". The judge dismissed this and ruled it was not misleading in the sense of consumer protection law. As stated in the article, the labelling "could only influence the subset of consumers who do not boycott Israel but boycott Israeli products from across the Green Line, and this does not meet the 'average' consumer test."

<sup>47</sup> Tribunal de grande instance [TGI] [ordinary court of original jurisdiction], Paris, 4 ch., 2d sec., Jan. 23, 2014, No. 13/06023, available at <http://www.intjewishlawyers.org/main/files/Decision%20Sodastream%20%28anglais%29.pdf>.

<sup>48</sup> Economic Dealings with the Occupied Territories, Eugene Kontorovich, *Columbia Journal of Transnational Law*, 2015, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>, 633-634. That is, "consumer deception was not an adequate basis for requiring particular origin labelling in products coming from an occupied territory."

### *European Court of Human Rights' position on boycotts*

The case of *Willem v. France* involved the applicant, Jean-Claude Willem, former mayor of the French city of Seclin.<sup>49</sup> In 2002, Willem announced during a town council meeting that he intended to boycott the sale of Israeli products in his municipality, as a protest of Israeli government anti-Palestinian policies. After receiving a complaint from the Jewish community, the public prosecutor charged Willem with inciting to discrimination under the Press Act of 1881. Willem was acquitted by the Lille Criminal Court, but the ruling was overturned on appeal in 2003, and he was fined 1,000 euros. The French Court of Cassation upheld the verdict. Willem appealed before the European Court of Human Rights (Strasbourg) and argued that given that his call to boycott Israeli products constituted was part of a political debate which was a matter of public interest, his conviction under the French courts violated his right to freedom of expression, protected by Article 10 of the European Convention of Human Rights.

The European Court held that there was a difference between stating a political opinion and inciting to commit a discriminatory act, and that Willem had been convicted for the latter. As Willem's rhetoric was not limited to a mere denouncing of a certain policy, but had gone the extra mile and called for action - a boycott of Israeli products - he had been convicted for this rather than for expressing a political opinion.<sup>50</sup> To be clear, however, if an individual person decides, for him or herself, to boycott any product for any reason, politically motivated or otherwise, this is obviously protected by the right to the freedom of thought and conscience. But once a mayor, or any person in an official position, imposes such a decision on his constituents, this cannot be considered as remaining within the realm of protected free speech. Moreover, in calling for a boycott, Willem had deviated from the powers vested in him as mayor, since, according to the French public prosecutor, only a government authority was authorized to declare sanctions or boycotts from another country. The European Court accepted this view, and held that the applicant's actions were an incitement to discrimination that was not protected by the European Convention on Human Rights.

The European Court stressed, however, that while this was the case according to French law, it would give other member States a "margin of appreciation" to handle these matters. That is, since French law and case law was so clear on the matter of boycotts, the European Court upheld the French courts' decision in this case. However, if the European Court would be asked to decide upon a call to boycott case originating from a different member state, with different incitement laws, then the ruling may be different as well.

Two important points are highlighted by this court ruling. Firstly, that the manner in which a boycott is undertaken is relevant: was it done *ultra vires*, outside the

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<sup>49</sup> *Willem v. France*, Application No. 10883/05, ECtHR judgment of 10 December 2009. There is no official English translation of the judgment (which was issued in French), and all the translations of the excerpts from the judgment are by Aleksandra Gliszczynska-Grabias, from "Anti-Israeli Boycotts: European and International Human Rights Law Perspective", Aleksandra Gliszczynska-Grabias, *Deciphering the New Antisemitism*, 2015, edited by Alvin H. Rosenfeld, Indiana University Press, pp. 430-453.

<sup>50</sup> *Willem v. France*, Application No. 10883/05, ECtHR judgment of 10 December 2009, para 35.

appointed person's authority? Secondly, there is a critical difference between expressing a critical view of a government and calling for an action that may be deemed discriminatory.

### **Section III: Individual States' responses to anti-Israeli boycotts**

Generally, economic boycotts or sanctions may be carried out under international law.<sup>51</sup> Any state may, in principle, break diplomatic relations, limit or cease its economic relations with another state. But the state must show, according to international law, that its measures do not violate international trade agreements and that –"its actions were taken in response to tortious actions of another state that immediately threatened its security...the reaction should not exceed the harm posed by the acting state."<sup>52</sup> The question is who is the entity calling for the boycott: the U.N. Security Council, a regional organization, a group or an individual person? Under which circumstance may sanctions be imposed against a state and by whom? In the following we will show some countries' legal responses to the boycott movement against Israel, via court rulings, enactment of laws and governmental notices.

#### **France**

France has been considered a pioneer in utilizing legal tools to counter anti-Israel boycotts during the past decade, and ten court cases have already been tried against anti-Israel boycotters.<sup>53</sup> France has been against advocating for boycotts, however, well before the current boycott movement against Israel. The following laws and articles are relevant in order to understand why the French legal system is so well-suited for utilizing legal measures to counter anti-Israel boycotts:

- (1) Article 225-1 and 225-2 of the French Penal Code, prohibiting on unlawful discrimination. This article is also applied to actions contrary to an "ordinary exercise of any economic activities".<sup>54</sup> France has well-established case-law which recognizes the concept of "economic discrimination".
- (2) Article 24 of the Freedom of the Press Act of 1881 ("*Loi Gaysott*") on inciting to racial discrimination.<sup>55</sup> This article provides an exception to the protection of the media's freedom of expression, namely any "incitement to discriminate".

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<sup>51</sup> "Arab Economic Boycott of Israel: The International Law Perspective", Greene, Preston L. Jr. *Vanderbilt Journal of Transnational Law* 11.1 (1978): 77-94.

<sup>52</sup> *Ibid*, 93.

<sup>53</sup> "BDS a Hate Crime? In France, Legal Vigilance Punishes anti-Israel Activists", 15 February 2015, JTA, available at <http://www.haaretz.com/jewish/1.574361>. Interestingly, the same law which is used in France to counter boycotts against Israel is also used to prohibit any boycotts of Iran in protest of its nuclear program.

<sup>54</sup> Paragraph 20, European Court of Human Rights Judgment, *Willem v. France Judgment*. As cited in "Anti-Israeli Boycotts: European and International Human Rights Law Perspective", Aleksandra Gliszczynska-Grabias, *Deciphering the New Antisemitism*, 2015, edited by Alvin H. Rosenfeld, Indiana University Press, pp. 430-453.

<sup>55</sup> Law of Freedom of the Press of 29 July 1881, as amended up to 2010. The law imposes fines of up to €50,000 on a person or entity that 'incites to discrimination, to hate or to violence against a person

- (3) Another law adopted in 2003, (the so-called "Lellouche Law") provided higher punishment and further anti-discrimination protection to "national groups", and is highly relevant to countering nationality-based discrimination.

#### *Recent court cases*

Two separate court cases involving anti-Israel boycott activists were recently upheld by the French Cassation Court<sup>56</sup>. The first appeals ruling from 27 October 2015 involved two incidents in 26 September 2009 and 22 May 2010, during which 12 anti-Israel boycott activists held demonstrations in and around a supermarket, handed out pamphlets, and, while calling for a boycott of Israeli products, vandalized the store and threw kosher products on the floor. A local criminal court convicted the activists who planned and took part in the incidents of "calling for discriminatory acts" and a penalty of €12,000 (€1,000 for each perpetrator). The French Cassation Court upheld this conviction and stated that actions undertaken in order to place a boycott were hate crimes and constituted prohibited discrimination.<sup>57</sup>

On 30 March, 2016, in a second appeals ruling, the French Cassation Court upheld a lower criminal appeals court's ruling which convicted seven boycott activists who had demonstrated in 2010 outside a supermarket selling Israeli products of inciting discrimination and fined them each with an €1,000 penalty. The Cassation Court upheld this conviction in 2016.

#### *The foundation of France's successful anti-boycott framework*

The French court rulings are important, as they highlight the relatively new legal terrain that is extreme anti-Israeli rhetoric, and answer the following: when do political statements and demonstrations cross the threshold into prohibited discrimination or incitement to hatred? The answer to this will be based on, among other things, the prosecutor's or judge's interpretation of when the one turns into the other.

While the French cases exemplify one end of the interpretative spectrum, a recent case in Austria illustrates the other end. In December 2014, a person posted a picture of Hitler with this caption: "I could have annihilated all the Jews in the world, but I left some of them alive so you will know why I was killing them...". The Austrian prosecutor's response was that the person had merely been expressing its displeasure over Israel, and that this constituted "legitimate criticism of Israel". This response was widely criticized by the Austrian Jewish community. The prosecutor's office went on to prosecute the case, and the perpetrator was sentenced with a penalty of one year

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or a group of persons on the basis of extraction, affiliation or non-affiliation with an ethnic group, nation, race or religion."

<sup>56</sup> France's highest court of final appeal.

<sup>57</sup> "Austrian prosecutor: Call to kill Jews is legal criticism of Israel", 11 February 2015, Benjamin Weinthal, Jerusalem Post, *available at* <http://www.jpost.com/Diaspora/Austrian-prosecutor-Call-to-kill-Jews-is-legal-criticism-of-Israel-390760>.

probation and a fine of 720 euros.<sup>58</sup> As shown in the Austrian case, the importance of justice and enforcement agencies' understanding of the new anti-Israeli forms of hate speech cannot be overstated.

Two other factors in France's robust anti-boycott legal framework should also be emphasized:

(1) It is helpful that the French "incitement to discrimination" law includes protection of "national groups" and thus was employed for convicting hate speech directed at groups based on nationality (i.e., Israeli persons). This has turned to be effective in prohibiting boycott statements made against Israel, since the boycott is targeting Israeli products.

(2) The recognition of the concept of "economic discrimination".

In this sense, France is one of the first countries<sup>59</sup> to expressly uncover, via legal measures, the connection between extreme anti-Israeli rhetoric and prohibited hate speech. Criticism of policies (Israeli or otherwise) is protected under the right to freedom of expression, whereas the use of inciting, hate-filled speech targeting a national group (e.g., Israeli persons) is not. It is important to clarify this distinction, as it is at the heart of the current debate between the right to hold a political opinion and the prohibition to incite against a person based on a protected category. As recently expressed by French prime-minister Manuel Valls, "It is perfectly obvious how we have shifted from criticism of Israel to anti-Zionism and from anti-Zionism to antisemitism."<sup>60</sup> This shift must be addressed by following France's example and amending the incitement laws to include the protected category of "nationality", or "national groups", and to call for training of justice and law enforcement departments across Europe on these new forms of hate speech.

In light of these victories against the anti-Israel boycott in France, some have called for adopting similar laws in other European countries.<sup>61</sup> In another recent development, some banks in Europe have shut down the operations of BDS campaign bank accounts.<sup>62</sup> In February 2016, *BNP Paribas*, a French bank, closed the accounts

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<sup>58</sup> "Afghan Man Convicted for Antisemitic Facebook", 24 February 2016, Kantor Center Database, available at <http://www.kantorcenter.tau.ac.il/afghan-man-convicted-antisemitic-facebook-posts>.

<sup>59</sup> Note also that in Germany, a court in Essen ruled that extreme anti-Israeli rhetoric (chanting "Death to the Zionists") was used as code for Jews and was therefore deemed to be prohibited incitement. The judgment was upheld by an appeals court. See, "Report: German Court Rejects Appeal of Man Who Shouted 'Death to Zionists' at Protest", 26 May 2015, *The Algemeiner*, available at <http://www.algemeiner.com/2015/05/26/report-german-court-rejects-appeal-of-man-who-shouted-death-to-zionists-at-protest/#>.

<sup>60</sup> "France's criminalization of Israel boycotts sparks free speech debate", 21 January 2016, *France 24*, available at <http://www.france24.com/en/20160120-france-boycott-israel-bds-law-free-speech-antisemitism>.

<sup>61</sup> "Will the French Anti-Boycott Law Lead to a Pan-European Law?", Freddy Eytan, 11 November 2015, Jerusalem Center for Public Affairs, available at <http://jcpa.org/will-the-french-anti-boycott-law-lead-to-a-pan-european/>.

<sup>62</sup> See section herein on Germany. Also, Erste Group, an Austrian bank, closed down BDS Austria's account in April 2016.

of BDS Campaign held by its subsidiary in Munich.<sup>63</sup> In May 2016, another French bank, *Credit Mutuel*, reportedly shut down the account of BDS France.<sup>64</sup>

## United Kingdom

In February 2016, the U.K. Government released a "Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts."<sup>65</sup> The objective of the Policy Note is to "stop inappropriate procurement boycotts by public authorities". It also reminds public authorities that only the U.K. Government is authorized to call for formal legal sanctions. Therefore, any public authorities, including town councils, public bodies, local authorities<sup>66</sup>, funded in any way by the Government, may not impose procurement boycotts (i.e., boycotting tenders of suppliers from certain countries) on their own accord. The Note also states that "town hall boycotts undermine good community relations, poisoning and polarizing debate, weakening integration and fueling anti-Semitism", as well as harm international trading agreements. Severe penalties may be imposed on any public body in violation of the regulations.

Importantly, the Policy Note also states that any procurement boycotts are in breach of international trade agreements. The World Trade Organization Government Procurement Agreement requires all its signatories<sup>67</sup> to "treat suppliers equally". As both the E.U. and Israel are signatories, this would include any trade between the U.K. and Israel. The Policy Note determines that "Any discrimination against Israeli suppliers involving procurements would therefore be in breach of the Agreement."<sup>68</sup>

This Policy Note was issued subsequent to three U.K. councils' passing motions to boycott products from companies operating in "illegal" settlements in the West Bank, between 2010 and 2014.<sup>69</sup> Most strikingly was George Galloway's call to make the city of Bradford West, an "Israel-free zone", that is, free of Israeli persons as well.

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<sup>63</sup> "Exclusive: Second largest German bank shuts anti-Israel BDS account", Benjamin Weinthal, 14 June 2016, *The Jerusalem Post*, available at <http://www.jpost.com/printarticle.aspx?id=456721>.

<sup>64</sup> "Exclusive: Major French bank closes anti-Israel BDS account", Benjamin Weinthal, 19 May 2016, *The Jerusalem Post*, available at <http://www.jpost.com/printarticle.aspx?id=454436>.

<sup>65</sup> "Procurement Policy Note: Ensuring compliance with wider international obligations when letting public contracts", Information Note 01/16, 17 February 2016, available at <https://www.gov.uk/government/publications/procurement-policy-note-0116-complying-with-international-obligations>.

<sup>66</sup> The new guidance extends to central government, executive agencies, non-departmental public bodies, the wider public sector, local authorities and National Health Service bodies.

<sup>67</sup> Signatories of the WTO's Government Procurement Agreement are: Armenia, Aruba, Canada, the E.U., Iceland, Israel, Japan, Hong Kong China, Liechtenstein, Montenegro, New Zealand, Norway, Singapore, South Korea, Switzerland, Chinese Taipei, and the U.S.

<sup>68</sup> "Press Release: Putting a stop to public procurement boycotts", U.K. Government, Cabinet Office and Crown Commercial Service, 17 February 2016, available at <https://www.gov.uk/government/news/putting-a-stop-to-public-procurement-boycotts>. In August 2014, prior to the U.K. Policy Note, the Scotland Government published a rather opposite procurement notice, strongly discouraging Scottish councils from carrying out trading and investments from illegal settlements. Four Scottish councils resolved to boycott Israeli goods.

<sup>69</sup> Leicester City Council (decision in November 2014 to boycott goods produced in Israeli settlements in the West Bank), Gwynedd Council (decision in October 2014), and Swansea City Council (decision in June 2010).

Jewish Human Rights Watch brought judicial charges against the councils on the grounds that they had ignored their duty to eliminate discrimination and harassment of British Jewish people. In 2016, the High Court ruled in favor of the council, stating that the councils' resolutions did not affect any existing or potential contracts.<sup>70</sup> The organization announced it would appeal the decision.

As stated above, both Israel and the E.U. are signatories to the WTO Procurement Agreement. Therefore, U.K.'s interpretation of its provisions, stating that the boycotting of Israeli products violates this agreement, is significant beyond the scope of U.K. domestic law and could be argued to have implications on all E.U. countries and their economic relations with Israel.

## Germany

The anti-Israeli boycott movement has not gained significant momentum in Germany.<sup>71</sup> Consequently, no court rulings or government notices have been given specifically stating the legal status of anti-Israeli boycotts.

Generally speaking, however, Germany does have an anti-boycotting law. According to the *German Foreign Trade and Payments Ordinance*<sup>72</sup>, German residents are prohibited from making any statements which amount to a call for boycott against another country.<sup>73</sup> Any violations are considered administrative offences and subject to fines. Most recently, the German Commerzbank has closed the account of *Der Semit*, the pro-BDS website. It is important to note, however, that German banking law entitles banks to shut down accounts at their own discretion, with no need to provide any reason.<sup>74</sup>

## The United States

From a comparative legal perspective, it should be noted that the U.S. legal system staunchly protects the First Amendment right to free speech. As such, it upholds a rigorous standard for allowing free speech and, consequently, a low standard for protecting against hate speech. Contrary to the situation in Europe, where all European states have enacted "incitement to hatred" prohibitions, the U.S. does not have such laws in place (except for the prohibition of expressions that causes an imminent threat to violence or "fighting words"). Subsequently, calls for boycotts

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<sup>70</sup> "Israel boycott ban: Three councils cleared of antisemitism over Israeli goods boycott", Gabriel Samuels, 28 June 2016, The Independent, available at <http://www.independent.co.uk/news/uk/israel-boycott-ban-three-councils-cleared-of-anti-semitism-over-boycott-of-israeli-goods-a7107691.html>.

<sup>71</sup> "Germany's BDS movement and the paradox of anti-Semitism", Yermi Brenner, AlJazeera, 21 April 2016, available at <http://www.aljazeera.com/indepth/features/2016/04/germany-bds-movement-paradox-anti-semitism-160421084206294.html>.

<sup>72</sup> Section 4a of Germany's Foreign Trade Ordinance.

<sup>73</sup> "What happens when sanctions regimes conflict?", Sanctions Guide, Freshfields,Bruckhaus, Deringer, available at <http://www.freshfields.com/en/global/Sanctions/duringpage9/>.

<sup>74</sup> "Exclusive: Second largest German bank shuts anti-Israel BDS account", Benjamin Weinthal, 14 June, 2016, <http://www.jpost.com/Diaspora/Exclusive-Second-largest-German-bank-shuts-anti-Israel-BDS-account-456721>.

have historically been protected under the First Amendment. Therefore, in its response to the anti-Israeli boycott movement, the U.S. does not have at its disposal some of the legal tools employed in Europe (i.e., use of incitement to hatred or discrimination clauses). Rather, given this broader scope of free speech, the anti-Israeli boycotts are mostly challenged for their violation of trade agreements and via enacting state laws divesting from companies who boycott Israeli products ("Anti-boycott laws").

Similar to the E.U., however, the U.S. also demands different labelling for products originating from Israel and those from the settlements.<sup>75</sup>

### *U.S. federal-level initiatives*

Generally speaking, the U.S. free trade agreement with Israel has been interpreted as applying on Israeli settlement products.<sup>76</sup> On 24 February 2016, the "Trade Facilitation and Trade Enforcement Act" of 2015 became law. This Act includes the "United States-Israel Trade and Commercial Enhancement Act"<sup>77</sup>. Section (b) of the law states as follows:

"Congress –

1. – 3. (...);
4. opposes politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel such as boycotts, divestment or sanctions;
5. notes that the boycott, divestment, and sanctioning of Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities **is contrary to the General Agreement on Tariffs and Trade (GATT) principle of non-discrimination**;
6. encourages the inclusion of politically motivated actions that penalize or otherwise limit commercial relations specifically with Israel such as boycotts, divestment from, or sanctions against Israel as a topic of discussion at the U.S.-Israel Joint Economic Development Group (JEDG) and other areas to support the strengthening of the United States-Israel commercial relationship and combat any commercial discrimination against Israel;
7. supports efforts to prevent investigations or prosecutions by governments or international organizations of United States persons on the sole basis of such persons doing business with Israel, with Israeli entities, or in Israeli-controlled territories; and
8. supports American States examining a company's promotion or compliance with unsanctioned boycotts, divestment from, or sanctions against Israel as part of its consideration in awarding grants and contracts and supports the divestment of State assets from companies that support or promote actions to boycott, divest from, or sanction Israel."

According to U.S. Federal law, therefore, boycotts against Israel are considered a violation of WTO agreements. In addition, the law authorizes state and local

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<sup>75</sup> "U.S. issues telling reminder labeling rules on Israeli products from West Bank", 28 January 2016, The Times of Israel, *available at* <http://www.timesofisrael.com/us-restates-labeling-rules-on-israeli-products-from-west-bank/>.

<sup>76</sup> Harvard Law Review: Volume 129, Number 7, May 2016.

<sup>77</sup> United States-Israel Trade and Commercial Enhancement Act, *available at* <https://www.congress.gov/bill/114th-congress/house-bill/644/text>. Section (a) of the Act: "More than \$45 billion in goods and services is traded annually between the two countries in addition to roughly \$10 billion in United States foreign direct investment in Israel."

government measures (to be elaborated upon below) to divest public taxpayer funds from companies engaged in anti-Israeli boycotts. As the law applies to Israel and "any territory controlled by Israel", it does not distinguish between a boycott of products from Israeli settlements and a wholesale boycott of Israeli companies and products. Moreover, the law prohibits U.S. Courts from enforcing foreign judgments declaring that a U.S. person violated the law by conducting business with an Israeli company, whether situated in Israel or Israel-controlled territory. Besides the importance of this provision for domestic U.S. law purposes, it is also significant in further establishing international law in this respect<sup>78</sup>; namely, it strengthens the argument that, contrary to the anti-Israeli boycotters' endorsed view, there is no obligation of non-recognition with respect to dealing with companies conducting business in Israeli controlled territory.<sup>79</sup>

### *U.S. state laws and court rulings against the boycott*

Since 2014, at least twelve U.S. jurisdictions have enacted laws against the boycott. These laws require state pension funds to divest from any investments in companies that boycott Israeli businesses that have connections with Israeli settlements. Moreover, according to some such laws, like the South Carolina anti-boycotting law, a pre-condition for receiving state contracting is that the company does not boycott Israel. States that have passed these laws include Arizona, Colorado, Florida, Georgia, Illinois, Indiana<sup>80</sup>, Iowa and South Carolina. New York Gov. Andrew Cuomo recently signed an executive order banning state agencies from investing in companies that support the anti-Israeli boycott.<sup>81</sup>

Illinois was the first state to pass such a law in May 2015.<sup>82</sup> The law prohibits the state's pension fund from investing in companies that boycott Israel or the settlements.<sup>83</sup> Indiana and Colorado passed similar laws. South Carolina's law, enacted in 2015, disqualifies companies that support the Anti-Israeli boycott from receiving state contracts.<sup>84</sup> The Florida and Arizona anti-boycott laws include both the pension fund divestment requirement and a disqualification of companies from receiving state contracts should they boycott Israel. On 28 June 2016, New Jersey passed its own anti-boycott law, prohibiting the state from investing pension and annuity funds in companies that boycott Israel or Israeli businesses. According to the

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<sup>78</sup> "New federal law fights European boycotts of Israel", Eugene Kontorovich, 30 June 2015, The Washington Post, available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/30/new-federal-law-fights-european-boycotts-of-israel/>.

<sup>79</sup> See section international law above on "obligation of non-recognition argument", pp.5-6.

<sup>80</sup> Indiana state legislature passes - <http://www.haaretz.com/jewish/news/1.649147>.

<sup>81</sup> "New Jersey Becomes 13th State to Pass anti-BDS Legislation", 28 June 2016, Haaretz, <http://www.haaretz.com/world-news/americas/1.727593>.

<sup>82</sup> "Illinois passes historic anti-BDS bill, as Congress mulls similar moves", Eugene Kontorovich, 18 May 2015, The Washington Post, available at [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/?tid=a\\_inl](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/?tid=a_inl).

<sup>83</sup> Economic Dealings with the Occupied Territories, Eugene Kontorovich, Columbia Journal of Transnational Law, 2015, 599, available at <http://jtl.columbia.edu/economic-dealings-with-occupied-territories/>,

<sup>84</sup> "South Carolina Disqualifies Companies Supporting BDS from Receiving State Contracts", 10 May 2016, Harvard Law Review, available at, <http://harvardlawreview.org/2016/05/s-c-code-ann-11-35-3500-2015/>.

law, divesting from such companies must occur no later than two years since the law's entry into force. The bill will be signed into law after receiving the Governor's signature.<sup>85</sup>

In 2015 the Washington Supreme Court overturned a lower court's ruling that protected a company from lawsuits over its boycott of Israeli products. The lower court, the Thurston County Superior Court, had ruled in favor of a company that had officially voted to boycott Israeli products. The Supreme Court overruled this, and declared that the plaintiffs may have their claims heard in court.<sup>86</sup>

#### *Countering the boycott of Israeli academic institutions*

During the past years, the American Studies Association, the Anthropological Association as well as Women's Studies have instituted a boycott against Israeli academia. The academic boycott is based on the premise that all Israeli academic institutions are complicit in "planning, implementing, and whitewashing Israel's regime of oppression."<sup>87</sup> In April 2016, U.S. professors affiliated with the American Studies Association took the matter of the academic boycott to court.<sup>88</sup> They filed a lawsuit to the Federal District Court of the District of Columbia alleging that the activists who pushed for adopting the Association's resolution to boycott Israel had abused their positions within the association, and thus violated the association's own stated mission of promoting knowledge and advancing the study of American culture.<sup>89</sup> The suit further claims that since a non-profit must operate in accordance with its own charter, therefore in calling for the resolution the activists had acted *ultra vires*, beyond the authority vested in them, and were thus in violation of the District of Columbia's Non-Profit Corporation Act. Jerome Marcus, legal counsel to the plaintiffs, argued that non-profits must act within the scope and for the purposes they were established and on the basis of which they were entitled to non-profits status and benefits. Calling for a boycott was not within this scope. The case is still pending. If the court will decide to accept the plaintiffs' legal arguments, this will no doubt encourage more law suits countering the academic boycott.

#### **A comparative view - other noteworthy developments**

In 2011, **Israel's** parliament passed the "Law for Prevention of Damage to State of Israel through Boycott"<sup>90</sup>. The law entitles persons to file civil claims for damages against persons or organizations that call for any type of boycott against Israel or Israeli organizations, or territories under Israeli control. Moreover, the law empowers

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<sup>85</sup> "New Jersey Becomes 13th State to Pass anti-BDS Legislation", 28 June 2016, Haaretz, *available at* <http://www.haaretz.com/world-news/americas/1.727593>.

<sup>86</sup> Washington State Court Ruling Opens Door to Suit Over Israel Boycott, 30 May 2015, Haaretz, <http://www.haaretz.com/jewish/news/1.658765>

<sup>87</sup> "Interview with BDS co-founder Omar Barghouti: Banned by Israel from traveling threatened with worse", Glenn Greenwald, 13 May 2016, The Intercept, *available at* <https://theintercept.com/2016/05/13/interview-with-bds-advocate-omar-barghouti-banned-by-israel-from-traveling-threatened-with-worse/>.

<sup>88</sup> "U.S. Professors take academic boycott of Israel to court", Rebecca Shimoni Stoil, 21 April 2016, The Times of Israel, <http://www.timesofisrael.com/us-professors-take-academic-boycott-of-israel-to-court/>.

<sup>89</sup> Ibid.

<sup>90</sup> Passed on 11 July 2011.

the minister of finance to set regulations disqualifying any such entities calling for a boycott from being considered in government tenders (South Carolina recently employed the same restriction – see below), and from receiving certain state benefits (including the removal of entities' tax exempt status.)<sup>91</sup> After being widely criticized, in April 2015 the Israel's Supreme Court upheld most of the law's provisions. The court declared that the law's violation of the right to freedom of expression was proportionate and intended for a worthy purpose. The court did, however, cancel one of the law's articles entitling compensation amounts without setting a maximum amount, and without having to prove actual damages had been incurred.<sup>92</sup> Similar to the European Court case<sup>93</sup>, the Israeli court ruling also clarified the distinction between expressing a political opinion and calling for a boycott. That is, expressing certain political opinions (which form the basis for a call for boycott) is protected under the right to freedom of expression, whereas the call for a boycott itself is not.

The **Spanish** government has reiterated its opposition to the anti-Israel boycott movement. In May 2016, Spain's constitutional tribunal stated, albeit in a non-binding recommendation, that anti-Israel boycott activities infringed upon the right to equality and freedom from discriminatory treatment, and therefore violated both the Spanish Constitution and the European Human Rights Convention on Human Rights.<sup>94</sup> The tribunal's recommendation came after several Spanish municipalities attempted to pass anti-Israeli boycott motions, four of which passed successfully.

In **The Netherlands**, the anti-Israeli boycott campaign gained traction. In 2015, PGGM, the country's largest pension fund, divested its investments from Israeli banks. Moreover, the water company *Vitens* declared it would cease to work with the Israeli water company Mekorot, since it supplied water to the settlements. Most recently, in 26 May 2016, the Dutch Government announced that anti-Israeli boycotting activities were protected under the Dutch Constitution's right to freedom of expression. Sweden also expressed the same view of the anti-Israeli boycott.<sup>95</sup>

The **Canadian** Government has long been opposed to boycotts based on race, national or ethnic origin or religion. In February 2016, the parliament passed a motion in February 2016 declaring that the anti-Israeli boycott campaign demonized and delegitimized Israel. Moreover, the motion condemned "any and all attempts by Canadian organizations, groups or individuals to promote the BDS movement, both here at home and abroad".<sup>96</sup> On the same day, students in McGill University in Montreal passed a non-binding motion supporting the anti-Israeli boycott movement

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<sup>91</sup> The Supreme Court of Israel HCJ 5239/11, HCJ 5392/11, HCJ 5549/11, HCJ 2072/12, Uri Avnery et al v. Knesset et al, Concerning the constitutionality of the Law Preventing Harm to the State of Israel by Means of Boycott. Summary of decision issued by the Supreme Court of Israel on 15 April 2015, Translation from the original Hebrew by Adalah.

<sup>92</sup> Ibid.

<sup>93</sup> See pp. 12-13 herein.

<sup>94</sup> "BDS is Anti-Constitutional and Discriminatory, Spanish Tribunal Rules", 24 May 2016, Jewish Telegraphic Agency, available at <http://www.jta.org/2016/05/24/news-opinion/world/bds-is-anti-constitutional-and-discriminatory-spanish-tribunal-rules>.

<sup>95</sup> "In huge blow to Israel, Netherlands declares BDS 'free speech'", Tovah Lazaroff, 26 May 2016, The Jerusalem Post, available at <http://www.jpost.com/printarticle.aspx?id=455162>.

<sup>96</sup> "Canadian Parliament overwhelmingly passes anti-BDS motion", JTA, 23 February 2016, available at <http://www.jpost.com/Diaspora/Canadian-Parliament-overwhelmingly-passes-anti-BDS-motion-445797>.

against Israel. Several other universities across Canada have passed pro-BDS motions as well.