



PALESTINE LEGAL

June 10, 2015

FAQ: What is the Effect of the Congressional Anti-BDS Legislation?

Many Palestine activists are aware of the alarming anti-Boycott Divestment and Sanctions (BDS)/pro-settlement amendment attached to the behemoth trade bills that have been in the news lately. The amendment, reportedly drafted with the American Israel Public Affairs Committee's (AIPAC's) blessing,¹ was introduced in the House of Representatives in February 2015 as HR.825, the United States-Israel Trade and Commercial Enhancement Act ("the Amendment") by Rep. Peter Roskam (R-IL). It was added later to the larger Customs Bill as an amendment.² As there is a reasonable chance some version of the bill will pass, it's important to understand the Amendment, as well as its Senate counterpart,³ which passed in May 2015.

Update (July 1, 2015): *This week President Obama signed the Trade Promotion Authority bill into law.⁴ This law does not include Congressional policy statements opposing BDS and encouraging anti-BDS initiatives in state legislatures, as described on page 2 of this document. It also does not include any affirmative reporting requirements, as described on pages 3 below. The law does make "discouraging politically-motivated boycotts of Israel" to be a principal trade objective of free trade negotiations with the European Union, as described below. The Obama Administration has indicated that it will not interpret the new law to cover boycotts of Israeli settlements, as intended by the law's authors. In a statement, the State Department noted that "[t]he U.S. government has never defended or supported Israeli settlements or activity associated with them, and, by extension does not pursue policies or activities that would legitimize them."⁵*

How will the Amendment affect the BDS movement in the US?

It is crucial to keep in mind that the Amendment's impact on BDS organizing happening across the country will be minimal.

¹ Annie Robbins, "AIPAC behind new US/EU trade legislation designed to thwart BDS," Mondoweiss, Feb. 11, 2015, <http://mondoweiss.net/2015/02/behind-legislation-designed>.

² The Amendment language can be found in [HR 1890 \(Section 2, clause 19\)](#) and [HR 1907 \(Section 608\)](#).

³ The anti-BDS language in the Senate bill, described on page 3 of this document, can be found in [HR 1314 \(Section 102, clause 20\)](#) and [HR 644 \(Section 914\)](#).

⁴ The final language can be found in [HR 2146 \(Section 102 \(b\)\(20\)\)](#).

⁵ Chemi Shalev, "U.S. State Department: We won't protect Israeli settlements against boycott," Haaretz, Jul 1, 2015, <http://www.haaretz.com/news/diplomacy-defense/.premium-1.663831>.

The Amendment:

- Does **not** prohibit you from exercising your First Amendment-protected right to advocate for BDS, including on college campuses.
- Does **not** pull or threaten to pull federal or state funding from any institution that endorses BDS.
- Does **not** divest government assets from companies that endorse BDS.

Any effort to restrict, prohibit or chill BDS activities in the US would raise serious First Amendment concerns. The US Supreme Court has clearly stated that peaceful political boycotts are protected First Amendment speech, assembly and associational activities.⁶

What does the Amendment do?

1. It creates bad policy

While the Amendment is extremely troubling and sets forth terrible policy, its actual effects will likely be limited in the US. Remember, it is an amendment to a trade bill, so most of it deals with foreign trade partners. These provisions should not dissuade or deter on-the-ground BDS organizing in the US.

Most of the Amendment consists of general policy statements rather than affirmative steps that must be taken and can be enforced. To be sure, these policy statements are alarming. They declare Congressional support for strengthened economic ties with Israel; opposition to BDS; support for state initiatives aimed at discouraging BDS, including efforts to divest state funds from companies that boycott Israel, similar to the bill recently passed in Illinois⁷; and include language aimed at legitimizing Israeli settlements in the Occupied Palestinian Territory, which are illegal under international law and have long been condemned by U.S. administrations.

The Amendment also declares “discouraging politically motivated boycotts of Israel” to be a US negotiating objective during free trade negotiations with the European Union. And in an effort to limit the effect of foreign BDS policies, the Amendment prohibits US courts from recognizing or enforcing foreign judgments against Americans and American companies based on BDS-inspired laws abroad.⁸

⁶ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁷ Gershman, Jacob. "Illinois Lawmakers Pass Divestment Bill to Counter Israel Boycotts." *Wall Street Journal*, May 19, 2015, <http://blogs.wsj.com/law/2015/05/19/illinois-lawmakers-pass-divestment-bill-to-counter-israel-boycotts/>

⁸ For example, if European Country A passes a law penalizing companies that aid the Israeli occupation of Palestine and a court finds US-based company Hewlett Packard liable under that law, US courts would be prohibited from enforcing that judgement in the US. This does not prevent Country A from taking action, nor does it prevent any other country from recognizing Country A's judgment.

These policy statements and trade objectives are not applicable to the activities of U.S. activists, but they shape the US government’s position on these issues and impose that position on international trade relationships.

2. It includes two reporting requirements

The first compels the White House to report annually to Congress on any foreign country’s trade barriers against Israel or entities doing business with Israel, including in “Israeli-controlled territories,” as well as on decisions by “foreign persons” (which could include individuals, organizations, companies or other state-affiliated institutions) to restrict economic relations with Israel.⁹ It also requires the White House to report on the US’s efforts to discourage and dismantle such barriers and actions. It’s important to note that these provisions require the White House to report, but do not actually require the White House to do anything with or about the information reported.

The second requires foreign companies trading on the US stock market to report to the SEC whether they have “discriminated against doing business with Israel” or have been “advised by a foreign government or non-member state of the United Nations” to “discriminate against doing business with” Israel or entities operating in Israel or the Occupied Palestinian Territory. Perhaps even more troubling is a requirement that foreign companies report if they are the subject of boycotts, divestment, or sanctions due to their relationship with Israel. **While there are no penalties associated with these reporting provisions, they effectively make informants out of these foreign companies, using them to create an international BDS blacklist.**

What about the Senate?

In mid-May, the Senate passed the Trade Facilitation and Trade Enforcement Act of 2015.¹⁰ This legislation included an amendment that set forth a number of policy statements similar to the language in the House bill. However, **the Senate language differs substantially from the pending House bill in that it does not include any reporting requirements.** Because the Senate language differs from the pending House language, the two chambers will eventually have to negotiate identical language in conference in order for the bill to move forward and be signed into law.

What’s the significance of the Amendment?

The House Amendment creates dangerous policy that attempts to legitimize Israeli settlements by shielding even companies in “Israeli controlled territory” from BDS initiatives – which is a direct attack on European restrictions on trade or economic relations with settlements declared

⁹ This would, for example, require the US to report on Dutch banks’ prohibition on loans to Israeli banks because of their support of settlements that violate international law. It would also likely require reporting on decisions by other foreign entities, groups, NGOs and even individuals to endorse or engage in boycott or divestment activities.

¹⁰ Trade Facilitation and Trade Enforcement Act of 2015, H.R. 644, 114 Cong. (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/644/amendments>

illegal under international law. It also represents an effort to use the US's power and influence to quash BDS momentum abroad by imposing unreasonable trade objectives and reporting requirements on foreign countries and companies that respect international law and wish to make principled and responsible trade and investment decisions. This, in turn, is aimed at discouraging US companies from doing the same, and chilling individuals' rights to engage in BDS campaigns.

Does the Amendment affect BDS activism in the U.S.?

No, the Amendment should not affect BDS activism happening across the country. It does not prohibit or penalize BDS advocacy or activity. The Amendment's very existence is a sign that Israel and its advocates in the US are threatened by the growing BDS movement and feel its effects. The Amendment provides another opportunity for BDS activists to mobilize and bring attention to the human rights issues that motivate BDS campaigns.

If the Amendment becomes law, can it be legally challenged?

The Amendment, along with legislation being introduced in states across the country attacking BDS,¹¹ raises serious Constitutional and other legal questions. Palestine Legal will continue to work with partners to assess legal challenges to this and other anti-BDS legislation, which chills and threatens protected First Amendment activities. **Please contact us at info@palestinelegal.org with questions or concerns** about the legal implications of this legislation on you or others you know.

What else can people do to oppose this?

Palestine activists are organizing against this Amendment, as are many labor, environmental, immigrant rights and open-government activists who oppose Fast Track and the trade agreements for diverse reasons,¹² and with whom this legislation is an opportunity to build solidarity. Making your opposition known to your congressional representatives is critical to ensuring that elected officials respond to the concerns of their constituents. You can contact your Congress Member using US Campaign to End the Israeli Occupation's action alert [here](#).

¹¹ As of June 2015, anti-BDS resolutions and bills were passed or introduced in seven states in 2015. Resolutions condemning BDS passed in [Tennessee](#) and [Indiana](#). The Illinois legislature passed a [bill](#) requiring state pensions to divest from companies engaged in boycotts against Israel, and similar legislation was announced in [New York](#). In Pennsylvania, [a bill](#) prohibiting state funds from colleges and universities that endorsed BDS was introduced, and a [resolution](#) condemning boycotts against Israel was announced. And in South Carolina, [a bill](#) prohibiting the state from contracting with or procuring from businesses that engage in boycotts on the basis of race, color, religion, or national origin was signed into law.

¹² For more information about the broad opposition to Fast Track, visit <https://www.stopfasttrack.com>.