

Impact of Federal Anti-Boycott And Other Laws On BDS Campaigns
National Lawyers Guild - International Committee
October 2009

BDS activists should be aware that there is a federal law containing anti-boycott provisions – the Export Administration Act of 1979 (“Act”) – that opponents of an Israel boycott may assert makes boycotting Israel illegal. This memo is intended to provide you with responses to this assertion about boycotting and advice intended to help you formulate divestment campaigns. We caution you, however, that this memo is not intended to substitute for legal advice from an attorney relative to specific boycott or divestment activities or campaigns and that this memo is a preliminary draft and may have been revised. Please check our website: <http://www.nlginternational.org> for updates.

Background and Legal Context:

Advocacy of political positions and political action is the most highly protected form of speech under the First Amendment to the U.S. Constitution. The right to organize boycotts, to marshal economic pressure to effect political change, is protected under the First Amendment, although there are some statutory limitations. Federal labor laws, for example, limit the use of the secondary boycott as a weapon of organized labor. Statutory limits on the First Amendment right to advocate and organize political boycotts is subject to the same close judicial scrutiny applicable to all limitations on free speech and association.

Boycott campaigns:

The anti-boycott provisions of the Act are written in general terms to protect U.S. businesses and exporters from being forced into aligning their trade and commerce practices with the foreign policy of foreign countries hostile to U.S. foreign policy. Although the Act’s terms are general, the office of the Department of Commerce that administers the Act acknowledges that the statutory focus is the Arab League’s boycott of Israel. See: www.bis.doc.gov/complianceand enforcement. This memo addresses the issues raised by the Act’s general terms, despite its admitted focus on the Arab League’s boycott of Israel.

BDS campaigns that are conceived independently, rather than as support for or in response to pressure by a hostile foreign government or in concert with the Arab League’s boycott of Israel, do not violate the anti-boycott laws. This is because the Act specifically defines an “unsanctioned” foreign boycott as one that is “fostered or imposed *by a foreign country* against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.” 50 U.S.C. App. § 2407(a)(1). A boycott against the State of Israel or an Israeli company or concern would be prohibited under the EAA only if the boycott is specifically intended to support or comply with boycotts initiated by foreign countries. The phrase “foreign country” refers to the official government of the country and does not encompass NGOs.¹

¹ Activists should be aware that certain regulations issued by the Commerce Department

We understand that BDS activists may want to acknowledge in their boycott appeals and resolutions the fact that in 2005, more than 170 groups in Palestinian civil society called for a boycott of Israel. This call to action in 2005 was not governmental action, but a private call for international solidarity. Homegrown BDS campaigns inspired by the 2005 call and having the same or similar moral or political goals do *not* run afoul of the EAA.

Apart from the limited reach of the anti-boycott provisions, the Act that contains the anti-boycott provisions, the Export Administration Act, has expired. It is our opinion that the Act's anti-boycott provisions cannot lawfully be enforced unless the EAA is reenacted by Congress. Presidential Executive Orders purport to continue the Act, but this is, in our opinion, dubious authority for imposing sanctions for violation of the anti-boycott provisions. Nevertheless, the Act could be reenacted by Congress at any time. Therefore, our advice rests on an analysis of the Act as though it were still in effect.

Divestment campaigns:

There are numerous institutions and businesses for which the BDS movement might consider a divestment campaign. The purchase or sale of stock or investment or divestment of an interest in a business is beyond the reach of the anti-boycott laws because these laws are limited to activity involving "a sale, purchase or transfer of goods and services." Divestment from holdings of Israel bonds, stock in an Israeli business or a U.S. company doing business in or with Israel does not involve the "transfer, sale or purchase of goods." An investment decision involves a decision to own (or not own) property.

While the anti-boycott laws clearly do not apply to divestment campaigns or decisions, it is important to be aware of other considerations that do apply. BDS activists campaigning for divestment are likely to encounter the objection that to make an investment decision for social or political reasons, as opposed to pure business considerations, is a breach of "fiduciary duty." A "fiduciary" is a person with a legal duty to manage the money or assets of others exclusively in their best interests, either to protect assets or, depending upon the entity's investment policy, to maximize investment returns. A statutory version of the fiduciary duty is established in the Employee Retirement and Income Security Act or "ERISA," which applies to private employers' employee benefits funds, both retirement and "health and welfare"-type plans. Endowment plans and public university employee benefit plans are not subject to ERISA, but the same basic rules about "fiduciary duty" apply to them as well.² Mutual funds generally are not set up to function

and statements on the Commerce Department's Website refer in a shorthand fashion to the Act as proscribing boycotts in sympathy with "*foreign boycotts*." See, e.g., 15 CFR § 760.1(e)(1). The Act itself (quoted above) however, refers only to boycotts called for by a "*foreign country*." Moreover, other Commerce Department regulations state that a refusal to do business with Israel or a boycott of Israeli companies is illegal "*..when the refusal is pursuant to an agreement with the boycotting country, or a requirement of the boycotting country or a request from or on behalf of the boycotting country.*" 15 CFR § 760.2(a)(1). (Our emphasis).

² Some states have enacted somewhat different standards for fiduciary duty applicable to

as fiduciaries, but must administer the fund in accordance with the investment goals stated in the fund prospectus. If the fund prospectus states socially responsible investing goals, those goals must be honored.

Consideration by BDS activists for the fiduciary duties of fund managers or investment committees is essential, but these challenges can be overcome by understanding and addressing them. The Guild believes that these fiduciary duties do not preclude divesting from Israeli businesses or companies simply doing business in Israel, such as Caterpillar, even if based primarily on social or moral factors, *providing* the Fund is able to demonstrate that equal alternative investments are available and that divestment will not adversely affect the fund or create additional risk.³

The Guild believes that the fiduciary duties of fund trustees, including ERISA fund trustees, permit fund fiduciaries to divest from Israeli companies or U.S. or other companies, such as Caterpillar, that profit from Israel's occupation of Palestine, on the basis of social and political considerations affecting the security and potential return on investment. The fiduciary duty of fund trustees requires them to consider such factors, just as they would consider any other risk factors. A decision to divest from companies that maintain, support, or profit from the Occupation, based on the trustees' conclusion that the risks of such investment militate in favor of less politically volatile and more socially acceptable investment options is just as much "solely" for the benefit of participants and beneficiaries as decisions that are based on other market considerations. Certainly, fund trustees have no affirmative duty to hold onto their Israeli investments or investments in U.S. or other companies that profit from the Occupation. They are always free to reinvest elsewhere, provided the alternative investment is of equal value. Where investment options are comparable, the investment target that presents little or no risk that its

public retirement and other non-ERISA plans. Contact the Guild for assistance.

³ These requirements are specifically enumerated in a regulation applicable to ERISA plans adopted by the Department of Labor during the Bush administration in 2008:

Given the significance of ERISA's requirement that fiduciaries act 'solely in the interest of participants and beneficiaries,' the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA's fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal... In light of the rigorous requirements established by ERISA, the Department believes that fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.

73 Fed. Reg. 61,734, (October 17, 2008), 29 CFR 2509.08-1 (in relevant part).

activities will bring international condemnation and boycott decisions down upon it is the better, safer, more stable investment alternative.

The particular challenge of targeting ERISA funds is to make a persuasive case that investments in companies that profit from the occupation present investment risks that are absent from other investments of comparable value. The challenge is to educate fiduciaries to the particular risks presented by investing in, maintaining, expanding, or profiting from the unlawful and ever more broadly condemned occupation of Palestine. Increasingly, investment professionals have acknowledged that consideration of environmental, social, and political risks are factors that should be considered in conjunction with global investing. European funds now are beginning to act on their recognition of the specific risks presented by investments in Israel's occupation of and military aggression against Palestine, and grassroots activism in the U.S. will inevitably bring such awareness to our shores. As the movement to divest from Israel continues to grow, making the momentum to divest a formidable risk factor in itself, long-term investing in Israel becomes increasingly problematic. Indeed, it could become a breach of fiduciary duty to ignore such risks and treat Israeli companies as if they were located in Iowa.

BDS activists should become familiar with a fund's written investment policies or guidelines. Among other reasons, funds have increasingly adopted written policies directing their investment professionals to shun investments in companies or countries with a history of human rights abuses or participation in genocide. Armed with reputable reports such as the recently-released *Goldstone* report, see: <http://www2.ohchr.org/English/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>, BDS activists may succeed in holding funds with these guidelines to the letter of their written policy. Such investment policies are printed in the fund's prospectus and should be provided upon request. Alternatively, activists can seek these documents from public universities and other public employers or funds through a Freedom of Information or Public Records Act request.

Activists targeting educational institutions should mobilize to include in the fund's investment policy a requirement that the fund not invest in businesses that aid and abet in violations of international law, including in particular the commission of war crimes or crimes against humanity.

Summing Up:

Summing up, a political or humanitarian motive does not taint an investment decision that is sound under the fund's or plan's policies and any applicable fiduciary standards. However, a political or humanitarian motive cannot justify an investment decision that is unsound under these investment policies and standards. The DOL regulation quoted in footnote³, above clarifies that the fiduciary's duty under ERISA permits divestment based on social policy considerations as long as the alternative investment choices are of equal value and the basis for decision is documented by fund fiduciaries. All investment decisions must conform to a fund's investment policies. And, finally, the imprudence or risk of investing in Israel is a permissible and appropriate, perhaps mandatory, consideration to be weighed by fund trustees in making investment or divestment decisions.

Note: Special problems may arise in campaigns urging local or state governments to broadly divest from Israel including potential conflict with the federal government's exclusive right to regulate or control foreign commerce. There may be other similar conflicts and legal pitfalls. We advise groups involved in campaigns aimed at local government or state funds to seek detailed advice from an attorney. See: the contact information at the end of this memo for a referral.

This paper was a project of the NLG International Committee's Free Palestine Subcommittee. All groups seeking more detailed advice are invited to contact the Guild's International Committee for a referral to a Guild attorney familiar with these issues by contacting Matt Ross, at Matthew16Ross@gmail.com, Barbara Harvey, at blmharvey@sbcglobal.net or the Guild's national office, through Eric Sirotkin, sirotkin@igc.org.

APPENDIX OF RELEVANT STATUTES

50 U.S.C. App. § 2402(5):

It is the policy of the United States--

- (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;
- (B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

50 U.S.C. Appendix § 2407:

Foreign boycotts

(a) Prohibitions and exceptions

(1) For the purpose of implementing the policies set forth in subparagraph (A) or (B) of paragraph (5) of section 3 of this Act [section 2402(5)(A) or (B) of this Appendix], the President shall issue regulations prohibiting any United States person ... from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

- (A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country....
- (B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or any owner, officer, director, or employee of such person.

(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship ... with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary.

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

....

(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

... .

(c) Preemption

The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

73 Fed. Reg. 61,734 (October 17, 2008) (to be codified at 29 CFR 2509.08-1) (in relevant part) (emphasis added):

Given the significance of ERISA's requirement that fiduciaries act 'solely in the interest of participants and beneficiaries,' the Department believes that, *before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA's fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal.* . . . In light of the rigorous requirements established by ERISA, the Department believes that *fiduciaries who rely on factors outside the economic interests of the plan in making investment choices and subsequently find their decision challenged will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.*

THE EXPORT ADMINISTRATION ACT OF 1999 (S. Rep. No. 106-180, at 2 (Oct. 8, 1999):

“IEEPA was not intended to allow the President to maintain export controls indefinitely in the absence of congressional authorization. Without reauthorization, the current export control regime may be vulnerable to a judicial challenge. This Act corrects this legally unsatisfactory situation by reauthorizing national security and foreign policy export controls.”

Israel Aircraft Industries Ltd. v. Sanwa Business Credit Corp., 16 F.3d 198, 200 (7th Cir. 1994)
(affirming dismissal of suit; no private cause of action on behalf of claimed boycott victim):

The statute does not itself regulate private conduct, and it does not authorize private litigation. Instead it preempts claims under state law, § 8(c), 50 U.S.C. App. § 2407(c), without authorizing any substitute under federal law.