Touro Law Review

Volume 34
Number 4 *Dedicated to Professor Ilene Barshay*

Article 12

2018

Applied Anti-Semitism: The BDS Movement and the Abuse of Corporate Social Responsibility

Alexander B. Traum

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

 Part of the International Trade Law Commons

Recommended Citation

Traum, Alexander B. (2018) "Applied Anti-Semitism: The BDS Movement and the Abuse of Corporate Social Responsibility," *Touro Law Review*: Vol. 34: No. 4, Article 12.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol34/iss4/12

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

APPLIED ANTI-SEMITISM: THE BDS MOVEMENT AND THE ABUSE OF CORPORATE SOCIAL RESPONSIBILITY

*Alexander B. Traum**

INTRODUCTION

In their efforts to demonize, delegitimize and, ultimately, destroy Israel as a Jewish and democratic state, activists in the so-called Boycotts, Divestment, and Sanctions (hereinafter "BDS") movement target a wide range of Israeli institutions including, among others, universities,[1] non-profit arts groups,[2] and for-profit companies.[3] As its name implies, the BDS movement promotes global boycotts of and divestment from Israel-based business and Israeli-made products,

* Alexander B. Traum, an attorney in private practice, is a former Brechner Legal Fellow at the Anti-Defamation League.

[1] *See* Peter Walker & Ian Black, *UK Academics Boycott Universities in Israel to Fight for Palestinians' Rights*, GUARDIAN (Oct. 27, 2015, 5:20 PM), https://www.theguardian.com/world/2015/oct/27/uk-academics-boycott-universities-in-israel-to-fight-for-palestinians-rights; Lidar Gravé-Lazi, *Israeli, US University Heads Combat BDS Calls For Academic Boycotts*, JERUSALEM POST (Apr. 26, 2016, 4:52 PM), http://www.jpost.com/Israel-News/Israeli-US-university-heads-combat-BDS-calls-for-academic-boycotts-452369; Theodore Kupfer, *The Anti-Israel Left Suffers a Rare, Close, and Welcome Defeat in Academia*, NAT'L REV. (June 9, 2016, 8:00 AM), http://www.nationalreview.com/article/436379/bds-movement-academic-association-says-no-it-refreshing-change-pace; Valerie Strauss, *Dozens of Universities Reject Academic Boycott of Israel (Update)*, WASH. POST (Dec. 23, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/12/23/dozens-of-u-s-universities-reject-academic-boycott-of-israel/?utm_term=.fd1534dd33c9.

[2] *See* Yaniv Halily, *Amid BDS Threats, Israeli Arts Festival Opens in Edinburgh*, YNETNEWS.COM (Aug. 3, 2017, 10:23AM), https://www.ynetnews.com/articles/0,7340,L-4998110,00.html; Kyle Smith, *Artists Against Theater*, NAT'L REV. (July 7, 2017, 8:00 AM), http://www.nationalreview.com/article/449286/bds-boycott-israeli-play-will-go-lincoln-center-stands-firm; Beth Kissileff, *Inside the Artistic Boycott Movement*, TOWER (Mar. 2015), http://www.thetower.org/article/inside-the-artistic-boycott-movement.

[3] *See* Laurie Goodstein, *Presbyterians Vote to Divest Holdings to Pressure Israel*, N.Y. TIMES (June 20, 2014), https://www.nytimes.com/2014/06/21/us/presbyterians-debating-israeli-occupation-vote-to-divest-holdings.html; Michelle Nichols, *U.N. Expert Calls for Boycott of Companies in Jewish Settlements*, REUTERS (Oct. 25, 2012, 4:15 PM), https://www.reuters.com/article/us-palestinians-israel-un/u-n-expert-calls-for-boycott-of-companies-in-jewish-settlements-idUSBRE89O1II20121025.

Published by Digital Commons @ Touro Law Center, 2018

as well as seeks the imposition of punitive financial sanctions on the Jewish state. As part of this effort, the BDS movement wraps itself in the mantle of Corporate Social Responsibility (hereinafter "CSR"), a theory and practice of corporate governance premised upon the idea that corporations not only have fiduciary duties to their shareholders but also have duties with respect to the broader public and planet. Ultimately, however, the BDS movement abuses the language, logic and legal foundations of CSR in furtherance of its goal to isolate Israel via market forces. In doing so, itpromotes not merely an anti-Israel agenda, but also a fundamentally anti-Semitic one.

This Article provides an overview of how the BDS movement uses the rhetoric of CSR to further its objectives. This Article traces this rhetorical thread from the writings of leading BDS advocates to the campaigns against the international conglomerates that do business in Israel. In the most prosaic sense, the BDS movement is undeniably an anti-Israel movement. Just as an animal rights activist's boycott of the fur industry is anti-fur, the BDS movement's boycott of Israel is anti-Israel. But is the BDS movement anti-Semitic?

Despite being indebted to the considerable scholarship examining the anti-Semitism underlying the BDS movement and its agenda, this Article does not passively accept the BDS movement's anti-Semitism as an *a priori* truth.[4] Instead, by analyzing the movement's disingenuous embrace of CSR as an organizing principle this Article seeks to unmask, however thinly veiled, the BDS movement's fundamental anti-Semitism. The BDS movement reveals its nakedly anti-Semitic agenda through the manner in which it engages with CSR. First, the BDS movement ignores Israeli companies' contributions to the Palestinian economy. Second, it overlooks the benefit of mutual Israeli-Palestinian cooperation that Israeli-based companies promote. Third, the movement disregards the

[4] *See* Joel S. Fishman, *The BDS Message of Anti-Zionism, Anti-Semitism, and Incitement to Discrimination*, 18 ISRAEL AFF. 412 (2012) (discussing the convergence of anti-Semitism and anti-Zionism); KENNETH L. MARCUS, THE DEFINITION OF ANTI-SEMITISM 146 (2015) (exploring the connections between anti-Semitism and anti-Zionism); Harold Brackman, *Boycott Divestment Sanctions (BDS) Against Israel: An Anti-Semitic, Anti-Peace Poison Pill*, SIMON WIESENTHAL CTR. (March 2013), at 5, http://www.institutobrasilisrael.org/cms/assets/uploads/_BIBLIOTECA/_PDF/antissionismo-e-antissemitismo/eb4ef1affbb63af00d3d0f76f26daa4d.pdf ("The ultimate verdict: the BDS Movement is a manipulator's gambit and magnet for the naïve that would lead twenty-first century seekers of a brave new world not forward but back into history's nightmares of irrational politics and obsessive hatreds."); THE CASE AGAINST ACADEMIC BOYCOTTS OF ISRAEL (Cary Nelson & Gabriel Noah Brahm eds. 2014) (evaluating the role of anti-Semitism in the campaign to boycott Israeli academics).

context of terrorism and war in which these companies operate. Lastly, it imposes a dual standard on Israel, overlooking the egregious labor and human rights violations of companies that operate in other countries.

This Article seeks to fill a void in the scholarship on "new anti-Semitism."[5] Though there is significant scholarship on how international organizations and human rights groups have manipulated the discourse of human rights to delegitimize Israel and discredit Zionism, there is a dearth of scholarship on how the discourse of CSR has been manipulated towards these same ends.[6] The BDS movement's abuse of CSR reveals the movement's disingenuousness when it purports to support a peaceful resolution to the conflict. Moreover, this abuse of CSR provides yet further evidence of the linkage between anti-Zionism and anti-Semitism. Understanding this phenomenon from a theoretical perspective has important practical implications, as a range of institutions—from universities to pension funds to local and national governments—consider how to approach the clamoring chorus that calls for the boycott of and divestment from Israeli companies or companies that do business in Israel.

Part I of this Article offers an overview of the BDS movement, including its origins, tactics and ideology. In addition to providing a general history of the movement, this section synthesizes prior scholarship that has examined the anti-Semitic impulse underlying the BDS movement. Part II of this Article offers a discussion of the ways in which the BDS movement misappropriates CSR, examining the writings of the movement's leading thinkers and the rhetoric of many of its advocacy campaigns. Part III argues that, despite the BDS movement's embrace of CSR, anti-BDS advocates should not cast aside CSR as an organizing principle, however counterintuitive this may seem. Instead of snubbing CSR and ceding this rhetorical and intellectual space to the BDS movement, anti-BDS advocates must

---

[5] *See* discussion on the nexus between anti-Zionism and anti-Semitism *infra* Part I.B.2.

[6] *See* Anne Bayefsky, *The UN and the Jews*, COMMENT. MAG. (Feb. 1, 2004), https://www.commentarymagazine.com/articles/the-un-and-the-jews/ (discussing the U.N.'s complicity in anti-Semitism through its human rights organs); Gerald M. Steinberg, *Abusing the Legacy of the Holocaust: The Role of NGOs in Exploiting Human Rights to Demonize Israel*, 16 JEWISH POL. STUD. REV. 3 (2004) (noting that human rights groups are "exploiting the language of universal human rights to promote the particular political and ideological agenda of demonizing Israel and the new anti-Semitism"). *See also* GIL TROY, MOYNIHAN'S MOMENT: AMERICA'S FIGHT AGAINST ZIONISM AS RACISM (2013) (examining the United Nation's infamous Resolution 3379, better known as the "Zionism is Racism Resolution").

reclaim CSR as a tool to expose the BDS movement as the anti-Semitic-fueled engine that it is. This Article concludes by demonstrating how an embrace of CSR principles by anti-BDS advocates provides a theoretical foundation for the anti-BDS laws that state legislatures are currently enacting and Congress is debating.

I. THE BDS MOVEMENT

A. Origins and Agenda

The BDS movement is a loose coalition of individuals and institutions, some private, others state-sponsored, that seek to impose economic punishment on Israel for its alleged mistreatment of the Palestinians.[7] Though the BDS movement in its current iteration traces its origins back to the early 2000s, economic warfare against the State of Israel is hardly new. Since the modern state's founding in 1948, Israel has been subject to campaigns to punish the state economically. These initial campaigns focused less on Israel's alleged policy failings and more on disregard for the state's very existence; the Arab League's pressuring of companies to break off relations with Israel was a lynchpin of the League's anti-Israel strategy since the state's inception.[8] Beginning in the late 1990s, Arab states ceased to rigorously enforce their boycotts against Israel, and in some instances

[7] While the BDS movement is composed of a variety of organizations, some non-governmental and others state-sponsored, this Article does not distinguish between individual groups but instead uses the general term "BDS movement" to refer to such groups collectively. Distinctions between the various groups are irrelevant for purposes of this Article, as the groups share the same goals, employ similar rhetoric and, at times, feature the same key players. While the identity of an organization involved in a specific BDS campaign discussed within this Article can be found within the citation's references, the analysis of this Article is unaffected by identifying which specific BDS organization is responsible for the respective campaign discussed.

[8] *See* Martin A. Weiss, *Arab League Boycott of Israel*, CONG. RES. SERV. (Aug. 25, 2017), https://fas.org/sgp/crs/mideast/RL33961.pdf. As the Congressional Research Service report notes, there are three "tiers" to the Arab League's official boycott of Israel. *Id.* at 2. The first tier prohibits citizens of an Arab League member state from entering into any commercial relationship with either the Israeli government or an Israeli citizen. *Id.* The second applies the boycott to any entity, no matter where domiciled or operating, that does business in Israel. *Id.* The third tier prohibits an Arab League member state and its citizens from doing business with companies that engage with other companies that have been blacklisted by the Arab League. *Id.* The Arab League members are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, the Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. Weiss, *supra*.

abandoned this strategy altogether. This relaxation (or abandonment) of the Arab League boycott by member states was due to a combination of U.S. pressure and the undeniably attractive opportunities that such states sought to gain through trade arrangements with Israel.[9] Accordingly, the Arab states are no longer the primary propagators of boycotts against Israel—the non-governmental sector has superseded the Arab states. As we shall see, however, the line between state and non-state actors remains porous.[10]

While the present-day version of the BDS movement does not have an official founding moment, the UNESCO-sponsored World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa in 2001 is rightly seen as the birthplace of the movement.[11] The Durban conference, promoted as a collective global response to racism, ironically and sadly, devolved into an anti-Semitic hate-fest.[12] In conjunction with the conference, a group of non-profit groups produced "The NGO Declaration," which assumed outsized import given the participation in the forum of prominent NGOs such as Amnesty International and Human Rights Watch.[13] The Declaration announced support for an organized campaign of economic warfare against the State of Israel. Article 164 of the Declaration asserted that the "targeted victims of

---

[9] Weiss, *supra* note 8.

[10] *See* Anne Herzberg, *NGOs and the New Anti-Semitism*, *in* GLOBAL ANTI-SEMITISM: A CRISIS OF MODERNITY 171-86 (Charles Asher Small ed. 2013); Gerald M. Steinberg, *From Durban to the Goldstone Report: The Centrality of Human Rights NGOs in the Political Dimension of the Arab-Israeli Conflict*, 18 ISRAEL AFF. 372 (2012).

[11] Herzberg, *supra* note 10, at 173 ("The 'Durban Strategy' has underpinned a decade of anti-Israel efforts by NGOs, including the global boycott, divestment, and sanctions (BDS) movement against Israel; NGO-initiated lawsuits throughout Europe and North America against Israeli officials for 'war crimes' ('lawfare'); campaigns in the UN (e.g., the Goldstone mission, Human Rights Council) and other international fora such as the European Parliament; and 'pursuing the parastatal Zionist organizations worldwide' by 'dealing with them legally as racist, colonial institutions.'" (citation omitted)).

[12] Tom Lantos, *The Durban Debacle: An Insider's View of the UN World Conference Against Racism*, 26 FLETCHER F. ON WORLD AFF. 31 (2002) (providing an insider's account of the conference by Rep. Tom Lantos, one of the U.S. delegates who walked out of the conference and called it an "anti-American, anti-Israeli circus").

[13] *Palestinians and Palestine: NGO Forum, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UNIV. DAYTON, http://academic.udayton.edu/race/06hrights/Wcar2001/ngoforum/Palestinans.htm (last visited Sept. 27, 2018) [hereinafter "NGO Forum"]. While not an official conference document, the circulation of this declaration was widespread.

Israel's brand of apartheid and ethnic cleansing methods have been in particular children, women and refugees."[14] Article 424 called upon

> the international community to impose a policy of complete and total isolation of Israel as an apartheid state as in the case of South Africa . . . the imposition of mandatory and comprehensive sanctions and embargoes, the full cessation of all links (diplomatic, economic, social, aid, military cooperation and training) between all states and Israel.[15]

Thus, the Declaration effectively announced a new policy for the boycott Israel movement with NGOs leading the campaign of economic warfare against Israel, taking the place formerly occupied by the Arab states.

The BDS movement's purported goals are often presented in cryptic terms, with such ambiguity serving to obscure the movement's underlying aim of destroying the State of Israel (as opposed to positively seeking Palestinian statehood alongside a State of Israel, such pursuit the so-called "two state solution"). When Palestinian NGOs subsequently issued a "Call for BDS" in 2005, these groups compared their opposition to Israel to the "struggle of South Africans against apartheid," and sought international support for "non-violent punitive measures" unless and until Israel changes its policies by:

> 1. Ending its occupation and colonization of all Arab lands and dismantling the Wall;
> 2. Recognizing the fundamental rights of the Arab-Palestinian citizens of Israel to full equality; and
> 3. Respecting, protecting and promoting the rights of Palestinian refugees to return to their homes and properties as stipulated in UN resolution 194.[16]

Such a call is emblematic of the BDS movement's embrace of ambiguity to advance its agenda. The very heart of the movement's agenda is cryptic. What does "occupation and colonization" mean? Does the "occupation" refer to all settlements, including civilian towns and cities, or does it merely address the land controlled by Israeli

---

[14] *Id*. at art. 164.

[15] *Id*. at art. 424.

[16] Palestinian Civil Society, *Palestinian Civil Society Call for BDS*, BDS (July 9, 2005), www.bdsmovement.net/call.

military forces? What does "all Arab lands" mean? Does this refer to the territories Israel conquered in the 1967 war? Or does it encompass all land held by Israel since its founding in 1948? Or does it refer even more broadly to any land that once constituted part of the *Yishuv*, the Jewish community under Ottoman and then British rule?

The BDS movement's ambiguity allows the movement to reach a variety of different audiences across the political spectrum. Those inclined toward a two-state solution are permitted to interpret the BDS movement's call as opposition to the ongoing existence of the settlements that were built on land captured by Israel in 1967, while others, seeking the complete destruction of the State of Israel, have license to interpret such a call in an absolutist manner. As we shall see further in Part II of this Article, which explores the movement's embrace of CSR, this manufactured ambiguity and linguistic flexibility is one of the hallmarks of the BDS movement.

B. Anti-Zionism and Anti-Semitism

Anti-Semitism, like all complex phenomena, defies a simple definition. Anti-Semitism is not merely "Jew-hatred," a phrase, like "anti-Semitism" itself, that begs for further explication. In order to address how deeply the BDS movement is inspired by anti-Semitic ideology, it is imperative that we clearly define the term and, unlike the BDS movement, strive for linguistic precision. At its core anti-Semitism is an ideology, but it can also take the form of a social movement, a religious imperative, or an emotional impulse.

1. What is Anti-Semitism?

Historian Robert Wistrich famously characterized anti-Semitism as "the world's longest hatred."[17] Characterizing this hatred as "long" connotes two essential features of anti-Semitism. In the vertical sense, anti-Semitism has endured and evolved over millennia with each generation reflecting certain continuities and divergences from the prior one.[18] In the horizontal sense, anti-Semitism has crossed

[17] *See generally* ROBERT WISTRICH, THE LONGEST HATRED (1991).

[18] See Robert Wistrich's magisterial study on the worldwide history of anti-Semitism, A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO GLOBAL JIHAD (2010). Other worthwhile studies on the history of global anti-Semitism include Anthony Julius's TRIALS OF THE DIASPORA: A HISTORY OF ANTI-SEMITISM IN ENGLAND (2010) and Walter Laqueur's THE CHANGING FACE OF ANTI-SEMITISM: FROM ANCIENT TIMES TO THE PRESENT DAY (2006).

cultures, countries, and classes. Anti-Semitism has never had a single address and no group has ever held a monopoly on this hatred. Given the varied and volatile quality of this global phenomenon, arriving at a concise yet meaningful definition is challenging yet crucial. As with medicine, diagnosing the disease is essential before identifying the proper treatment.

The term "anti-Semitism" was coined in 1879 by the German journalist Wilhelm Marr to describe the anti-Jewish campaigns underway in central Europe at that time.[19] Since then various definitions have surfaced. For many years, Merriam-Webster's definition of anti-Semitism as "hostility toward or discrimination against Jews as a religious, ethnic, or racial group" was the dominant version.[20] This definition, however, fails to identify the distinct qualities of anti-Semitism as compared to other forms of religious or racial prejudice and falls short in capturing anti-Semitism's multifaceted dimensions.

In recent years, a new working definition produced in 2005 by the European Union Monitoring Centre on Racism and Xenophobia (hereinafter "EUMC"), an EU body that monitors racism and anti-Semitism in EU member states, became the widely influential definition.[21] Such definition provides that, "Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."[22] Commentary accompanying the definition makes clear that "such manifestations could also target the State of Israel, conceived as a Jewish collectivity," and can be manifested through "speech, writing, visual forms and

---

[19] *See generally* WISTRICH, *supra* note 17.

[20] *See Contemporary Global Anti-Semitism: A Report Provided to the United States Congress*, U.S. DEP'T ST. (Mar. 13, 2008), https://2009-2017.state.gov/documents/organization/102301.pdf.

[21] *Working Definition of Antisemitism*, EUR. F. ON ANTISEMITISM, https://european-forum-on-antisemitism.org/definition-of-antisemitism/english-english (last visited Sept. 27, 2018). According to news reports, the EUMC has since rescinded this working definition. *See* JTA, *EU Drops its 'working definition' of Anti-Semitism*, TIMES ISR. (Dec. 5, 2013, 2:40 AM), https://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/. The U.S. Department of State, however, has since appropriated this working definition as its own. *See Defining Anti-Semitism*, U.S. DEP'T ST. (May 26, 2016), https://www.state.gov/s/rga/resources/267538.htm.

[22] *Working Definition of Antisemitism*, *supra* note 21.

action."[23] The EUMC definition provides certain contemporary examples that go beyond both the traditional Christological forms of anti-Semitism including the blood libel and accusation of deicide as well as the more modern forms of Nazi-like racial bigotry, including:

- Calling for, aiding, or justifying the killing or harming of Jews [often] in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a collective—such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust). Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.[24]

The EUMC definition puts greater emphasis on what scholars have identified as the "new anti-Semitism" as opposed to older definitions that were influenced by traditional forms of Christian anti-Semitism or modern Nazi-like racial anti-Semitism. While both traditional Christian anti-Semitism and modern racial anti-Semitism demonized individual Jews and the collective Jewish people as an evil "other" responsible for the ills of the world, the new anti-Semitism

[23] *Working Definition of Antisemitism*, *supra* note 21.

[24] *Working Definition of Antisemitism*, *supra* note 21.

treats Israel and its supporters using similar language and logic. In other words, Israel has become the Jew among nations.

2. Anti-Zionism as the New Anti-Semitism

Irwin Cotler, the former Minister of Justice and Attorney General of Canada and renowned human rights activist, has identified a particularly useful and comprehensive set of eight "indices" of the "new [a]nti[-S]emitism."[25] The first indicator, "State-Sanctioned Genocidal Antisemitism," is exemplified by the Iranian regime's declarations seeking to destroy Israel, the official platforms of terrorist organizations such as Hamas, Hezbollah and Al-Qaeda, and the religious fatwas issued in certain parts of the Muslim world in which genocidal calls against Jews and Israel are presented as religious prescriptions.[26]

The second, "Denial of Fundamental Rights," is the denial of Israel's right to exist and by extension the Jewish people's right to political self-determination.[27] This indicator also includes denial of the Jewish people's historical connection to the land of Israel, and thus serves not only to undermine the legitimacy of the State of Israel itself but also to label Israelis as colonizers and criminals.

The third, "Antisemitism Under the Cover of Anti-Racism," is a form of ideological anti-Semitism that "disguises itself as part of the struggle *against* racism" and is exemplified by infamous "Zionism is Racism" resolution at the UN and accusations that Israel is an apartheid state or worse, a Nazi-like state, in its treatment of the Palestinians.[28]

The fourth, "Discriminatory Treatment in the International Arena," involves the discriminatory treatment and the double standards that Israel faces at international institutions, particularly at the UN-affiliated Human Rights Council in Geneva, Switzerland.[29]

The fifth indicator concerns the rise of the Far Right in Europe and the resurgence of anti-Semitism on the continent emanating from this corner of the population.[30]

---

[25] Irwin Cotler, *Global Antisemitism: Assault on Human Rights*, INST. FOR STUDY GLOBAL ANTISEMITISM POL'Y (2009), https://isgap.org/wp-content/uploads/2013/08/ISGAP-Working-Papers-Booklet-Cotler-09-copy.pdf.

[26] *Id*. at 6.

[27] *Id*. at 7.

[28] *Id*. at 8 (emphasis added).

[29] *Id*. at 9.

[30] Cotler, *supra* note 25, at 10.

The sixth, "Cultural Antisemitism," emanates from the liberal intelligentsia that is overly eager to blame Israel for much of the problems of the Mideast and beyond.[31]

The seventh indicator is the global Boycott, BDS movement, which seeks academic, university, trade union and related boycotts and divestments against Israel, Israeli institutions, and Israeli individuals.[32]

The eighth, "The Old/New *Protocols of the Elders of Zion*," comprises various conspiracy theories on international Jewish power and nefariousness akin to the infamous Russian forgery, including accusations that Jews were behind the 9/11 attacks or that Jewish doctors infected Palestinians with AIDS.[33] Fundamentally, the BDS movement segregates Jews and directs its ire solely at Israel as opposed to the dozens of other countries that engage in far worse abuses both in scope and scale.

It is not merely the singling out of Israel among the nations that reveals the BDS movement's malice. It is also the movement's anti-Zionist foundation that reveals its anti-Semitic agenda. Criticism of specific Israeli policies is not anti-Zionism. Rather, anti-Zionism is, at its core, a rejection of Zionism, the theoretical foundation of Israel, which holds that the Jewish people are a nation entitled to self-determination. Thus, anti-Zionism's rejection of Jewish self-determination and Jewish peoplehood itself should properly be understood, in most instances, as a manifestation of anti-Semitism.

3. The BDS Movement's Fundamental Anti-Semitism

The BDS movement is not interested in merely criticizing specific policies of the Israeli government. It is negationist, if not exterminationist, in its outlook, seeking the political dissolution, and, at times, the physical destruction, of the Jewish State. Despite certain linguistic ambiguity and flexibility regarding its ideal outcome, the BDS movement is rather transparent in its vociferous anti-Zionism, its denial of the collective Jewish people's right to national sovereignty.

For example, in a 2011 publication by BDS group Corporate Watch entitled "Targeting Israeli Apartheid: a Boycott, Divestment

---

[31] Cotler, *supra* note 25, at 11.

[32] Cotler, *supra* note 25, at 12.

[33] Cotler, *supra* note 25, at 13.

and Sanctions Handbook," the group did not mince words with respect to its opposition to the existence of the State of Israel, stating:

> BDS is thus not just about the wall, or the occupation of the West Bank and Gaza. It is a holistic approach to Israel's militarism and its racist and apartheid policies against Palestinians, both inside 1948 Israel and in the Palestinian territories occupied in 1967: from the ethnic cleansing of 1947-9 to the state-orchestrated marginalisation of majority Palestinian municipalities, such as Nazareth; from the current state-orchestrated Judaization of Jerusalem to the harassment and house demolitions intended to push communities out of areas coveted by the state for Jews, both in the villages of the West Bank and the unrecognised Palestinian villages within Israel. BDS presents countless possibilities for effective grassroots campaigning, ranging from consumer action to workplace organising and direct action. The BDS movement has the potential to bring the Palestinian struggle to the doorsteps of those who profit from Israeli apartheid.[34]

As is clear here, the BDS movement's gripes are not merely with Israel's "occupation of the West Bank and Gaza" but rather the state's very creation and continued existence. In other words, it is not 1967 that raises the ire of the BDS movement but rather it is 1948 (or even earlier, if one is to consider the pre-state Jewish community).

It is in this context that we analyze the BDS movement and its rhetorical and theoretical manipulation of CSR. The BDS movement's abuse of CSR as an operating principle exposes the disingenuousness of its self-righteous calls for good corporate governance and reveals the essential anti-Semitism propelling its agenda.

---

[34] Tom Anderson et al., *Targeting Israeli Apartheid: A Boycott, Divestment and Sanctions Handbook*, CORP. WATCH (2011), at III, https://corporateoccupation.files.wordpress.com/2012/01/targeting-israeli-apartheid-a-boycott-divestment-and-sanctions-handbook.pdf.

II. THE BDS MOVEMENT AND CORPORATE SOCIAL RESPONSIBILITY

A. The Meaning of Corporate Social Responsibility

Generally speaking, Corporate Social Responsibility, or CSR, is a theory and practice of corporate governance that posits that corporations not only have fiduciary duties to their shareholders, i.e. the responsibility to maximize shareholder value, but also owe duties to other internal and external stakeholders.[35] CSR assumes that corporations, particularly large and multinational ones, have the financial and human capital to confront and solve, or at least mitigate, global challenges. These challenges include, among others, human rights abuses, environmental degradation, government corruption and income inequality.[36]

Since the 1990s, nongovernmental organizations and international and regional institutions, like the United Nations and the European Union, respectively, have sought to redefine the traditional role of the corporation. Whereas the traditional role of the corporation has been that of an economic entity aiming to maximize financial profits and maintain the interests of shareholders, the new role of the corporation, through the perspective of CSR, adds to this the promotion of social and environmental welfare.[37] Thus, under the CSR

---

[35] *See* Devin Thorpe, *Why CSR? The Benefits of Corporate Social Responsibility Will Move You To Act*, FORBES (May 18, 2013, 5:04 PM), https://www.forbes.com/sites/devinthorpe/2013/05/18/why-csr-the-benefits-of-corporate-social-responsibility-will-move-you-to-act/#3fd9a13965a3; V. Kasturi Rangan et al., *The Truth About CSR*, HARV. BUS. REV. (Jan/Feb. 2015), https://hbr.org/2015/01/the-truth-about-csr (noting that "well-managed companies seem less interested in totally integrating CSR with their business strategies and goals than in devising a cogent CSR program aligned with the company's purpose and values").

[36] *See* Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831 (2008). It is worth noting that while CSR is the most commonly used term, the terms "social enterprise," "corporate citizenship" and "creative capitalism" also generally refer to a corporation's policies and programs that account for both the economic and social consequences of the firm's actions. For convenience and clarity, this Article will consistently use the term CSR and not one of its putative synonyms. It is also worth noting, albeit in footnote, that this Article's reference to the "corporation" or the "corporate form" is not intended to exclude other legal entities that engage in commercial activities, such as the limited liability company, the partnership, etc. The use of the term "corporation" is simply intended for clarity so as to mirror the term "Corporate Social Responsibility."

[37] For a view on the traditional role of the corporation, see e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970), at 5, http://umich.edu/~thecore/doc/Friedman.pdf ("Whether blameworthy or not, the use of the

perspective, a corporation's board of directors owes duties not only to shareholders, but also to other stakeholders including employees, consumers, suppliers, international diplomacy and the environment.[38]

A report issued by the European Commission on strategies to promote CSR in the EU provides useful guidance for defining CSR. The report proposes defining CSR as "the responsibility of enterprises for their impacts on society."[39] A prerequisite for meeting such responsibility, the report stated, is compliance with relevant legislation and collective agreements between the various parties as well as the

cloak of social responsibility, and the nonsense spoken in its name by influential and prestigious businessmen, does clearly harm the foundations of a free society."); Theodore Levitt, *The Dangers of Social Responsibility*, HARV. BUS. REV. 36, 41 (1958) ("Business will have a much better chance of surviving if there is no nonsense about its goals—that is, if long-run profit maximization is the one dominant objective in practice as well as in theory. Business should recognize what government's functions are and let it go at that, stopping only to fight government where government directly intrudes itself into business. It should let government take care of the general welfare so that business can take care of the more material aspects of welfare"); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002) (advocating for an "enlightened value maximization" theory of corporate governance, which "uses much of the structure of stakeholder theory but accepts maximization of the long run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders").

[38] The scholarly literature on CSR is vast, and the purpose of this Article is not to provide a comprehensive review of such literature. *See, e.g.*, William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992); Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005); Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001); Aaron K. Chatterji & Barak D. Richman, *Progressive Visions of the Corporation: Understanding the "Corporate" in Corporate Social Responsibility*, 2 HARV. L. & POL'Y REV. 33 (2008); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); Amiram Gill, C*orporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452 (2008); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992); Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

[39] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU strategy 2011-14 for Corporate Social Responsibility*, EUR. COMMISSION (Oct. 25, 2011), at 6, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf (noting that companies seeking a formal approach to CSR should guidance from sources such as the OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights).

integration of the "social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy."[40]

Perhaps the most influential guidance on the meaning and scope of CSR is the UN Global Compact, a voluntary initiative for businesses that seek to align their respective operations with CSR principles and which contains ten principles in the areas of human rights, labor, environment and anti-corruption.[41] The Ten Principles of the United Nations Global Compact are a synthesis of previously accepted international conventions and norms, including the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. In the realm of human rights, the Ten Principles' "Principle 1" is that "businesses should support and respect the protection of internationally proclaimed human rights" and "Principle 2" holds that business should "make sure that they are not complicit in human rights abuses."

In practice, a corporation's engagement with CSR principles can manifest itself in three ways. The first manifestation of CSR is a corporation's activities that would demonstrably benefit shareholders in the long run even if costly to the enterprise in the short run.[42] For example, a corporation expending resources on preventing environmental degradation may prevent an environmental disaster that may adversely affect the corporation's bottom-line at a later time. The second manifestation of CSR is a corporation's activities intended to mitigate harms for which the corporation is a causal factor even if there is no direct shareholder benefit to be gained from such mitigation.[43] This is where, for example, a corporation cleans up environmental damage caused by the corporation's operation but where the resources expended on such remediation has no benefit, direct or indirect, on its shareholders. The third manifestation is a corporation's activities for which the corporation is neither directly responsible nor which would benefit shareholders, even in the long run.[44] An example of this

---

[40] *Id*.

[41] *Ten Principles of the United Nations Global Compact*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Oct. 4, 2018).

[42] *See* Kerr, *supra* note 36.

[43] *See* Kerr, *supra* note 36.

[44] *See* Kerr, *supra* note 36.

manifestation is a corporation dedicating resources to the reforestation in the Amazon rainforest where neither the enterprise nor any of its consumers or suppliers have any connection to the Amazon rainforest.

As the next section shows, the BDS movement has disingenuously embraced the rhetoric of CSR, misappropriating the language and logic of CSR to further its anti-Semitic agenda.

B. The BDS Movement's Embrace of Corporate Social Responsibility

The BDS movement often deploys the rhetoric of CSR in a superficial manner. The movement employs CSR as a mere buzzword in its propaganda campaigns. As is typical of propagandist rhetoric, the BDS movement does not engage in a meaningful explication of how its campaign against a targeted company promotes CSR principles. At other times, however, the BDS movement coopts CSR concepts and practices in substantive ways. It is this more sophisticated manipulation of CSR principles that deserves our discerning scrutiny. As we shall see, the BDS movement's seeming fidelity to CSR ignores or misleads on key facts. Beyond factual omissions and misrepresentations, the BDS movement's dual standards reveal the BDS movement's anti-Semitic impulse.

From the financial sector to pharmaceuticals, fashion, and automobiles, the BDS movement's targets include a wide range of companies. The movement's boycotts are broad, not only targeting companies that demonstrate open support for Israel but even admonishing companies that have tangential connections to the Jewish State.

The BDS movement has focused considerable attention on the global financial services sector. For example, the BDS movement has targeted the French insurance company, AXA, accusing it of supporting the "Israeli occupation, colonialism and apartheid" and calling on the company to divest its holdings in three Israeli banks—Hapoalim, Leumi and Mizrahi Tefahot—as well as Elbit Systems, an Israel-based international defense electronics company.[45] According to the campaign against AXA, such Israeli banks are "heavily involved

[45] Ali Abunimah, *Insurance Giant AXA Urged to End Support for Israeli War Crimes*, ELECTRONIC INTIFADA (July 31, 2017), https://electronicintifada.net/blogs/ali-abunimah/insurance-giant-axa-urged-end-support-israeli-war-crimes.

in Israel's illegal colonization of the occupied West Bank."[46] Referencing AXA's professed commitment to the 10 Principles of the UN Global Compact, the BDS movement stated "AXA's commitment to respect the 10 principles of the UN Global Compact is an empty shell as long as AXA continues to profit from the oppression of the Palestinian people and the ongoing occupation of Palestinian lands."[47]

In addition to AXA, the BDS movement has advocated that other financial institutions, such as BNP Paribas, Crédit Agricole, Société Générale, and Groupe *BPCE*, divest from Israeli banks and cease managing the financial holdings of these banks. Israeli banks, the campaigns contend, "contribute to the financing of settlements" by financing the construction of homes, factories, telephone and Internet connections, and surveillance equipment.[48] As in the campaign against AXA, the BDS movement pointed towards the institutions' own corporate social responsibility policies, alleging that their cooperation with Israeli banks constitute a violation of their commitments to human rights and international norms.[49]

Allianz, the German financial services company, is also a popular target of the BDS movement. Through subsidiaries, Allianz is an investors in two Israeli companies, Elbit Systems and G4S. As discussed above, Elbit Systems is an Israeli defense company.[50] G4S is a global security firm that provides security equipment to Israel, including luggage scanning machines and full body scanners. Due to its investments in these two companies, the BDS movement has accused Allianz of supporting companies that "profit directly from Israeli occupation, apartheid and colonialism."[51] Using the terminology of CSR, the BDS campaign has focused on Allianz's Code of Conduct as well as the UN Global Compact, of which Allianz is a signatory, declaring that given that

> Allianz cannot credibly prove that it can prevent Elbit from participating in the construction and maintenance

---

[46] *Id.*

[47] *Id.*

[48] *Report: The Dangerous Liaisons of French Banks with Israeli Settlement*, CCFD-TERRE SOLIDAIRE, https://ccfd-terresolidaire.org/infos/paix-et-conflits/rapport-les-liaisons-5786 (last updated Mar. 30, 2017).

[49] *Id.*

[50] *No Allianz with Israeli Apartheid*, STOP WALL, https://www.stopthewall.org/sites/default/files/No%20Allianz%20with%20Israeli%20Apartheid%20Campaign%20Guide.pdf (last visited Oct. 4, 2018).

[51] *Id.* at 2.

> of the Wall and the settlements and G4S from participating in the violations of international law and human rights in the Israeli prison system, it has to end its relationships with and divest from these companies.[52]

The BDS movement has also targeted the Israeli pharmaceuticals industry, accusing Israel of restricting the import of medications to the Palestinian territories to those drugs that are registered in Israel and thereby blocking cheaper generic pharmaceuticals from Arab states, China and India from entering the territories.[53] In a campaign against the Israeli cosmetics company Dr. Fischer Pharmaceuticals, the BDS movement pointed towards the company's use of the Dead Sea for its raw materials. According to this campaign, "the North Western coast of the Dead Sea is in the Israeli occupied West Bank. Palestinians[']access to the Dead Sea is tightly controlled by Israel and the Palestinians are unable to benefit from its resources. Israel exploits the Dead Sea by extracting mud and minerals from the area and through the tourist industry."[54]

Any company involved, however peripherally, in the Israeli construction and building sector is a favorite target of the BDS movement. HeidelbergCement, a German building materials company, has been targeted by the BDS movement for manufacturing building materials used in the Israeli construction industry and for operating a quarry in the West Bank.[55] The BDS movement's campaign against HeidelbergCement cited the UN Sub-Commission on the Promotion and Protection of Human Rights' defined norms, published in 2003, on the responsibilities of transnational corporations and other business enterprises with regard to human rights; such norms stating that transnational entities "have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the

---

[52] *Id*. at 5.

[53] *Captive Economy—The Pharmaceutical Industry and Israeli Occupation*, WHO PROFITS (July 2012), https://whoprofits.org/content/captive-economy-pharmaceutical-industry-and-israeli-occupation.

[54] *Dr. Fischer Pharmaceuticals—Exploiting the Dead Sea*, CORP. OCCUPATION (Mar. 23, 2010), https://corporateoccupation.org/2010/03/23/dr-fischer-pharmaceuticals-exploiting-the-dead-sea/.

[55] Adri Nieuwhof, *HeidelbergCement Tries to Sell West Bank Mines as Legal, Boycott Pressures Grow*, ELECTRONIC INTIFADA (July 12, 2009), https://electronicintifada.net/content/heidelbergcement-tries-sell-west-bank-mines-legal-boycott-pressures-grow/8340.

rights and interests of indigenous peoples and other vulnerable groups."[56] According to the campaign against HeidelbergCement, the company "is involved in Israel's violations of international law and the company acts against the rights and interest of the indigenous Palestinian people" in contravention of UN norms.[57]

In 2010, a coalition of Palestinian groups appealed to COOP Italia, an Italian company that operates the largest supermarket chain in Italy, to refrain from partnering with Carmel Agrexco, an Israeli exporter of produce. A letter from such groups alleged that Carmel Agrexco "is responsible for marketing 60-70% of the agricultural produce grown in Israel's illegal settlements in the occupied Palestinian territory" and thus by entering into such a partnership, COOP Italia "does not mitigate, on the contrary it reinforces, COOP's complicity in Israel's system of occupation, colonisation and apartheid."[58] The letter maintains that COOP Italia's cooperation with the Israeli agricultural exporter violates the company's commitment to CSR, stating "[w]ithin the legal and ethical framework of corporate responsibility and corporate complicity a company bears the responsibility for all its commercial undertakings that may violate human rights, labour and environmental standards."[59]

International clothing companies have also not been spared, becoming targets merely for operating within the country's borders. In 2010, in response to the Swedish fashion company H&M's planned opening of a store in Jerusalem, the BDS movement called for a "total boycott" of the global fashion giant until "reaching a total boycott of the chain, until it has ended its complicity in Israel's system of occupation, colonization and apartheid against the Palestinian people."[60] Although the BDS movement's campaign literature acknowledged that many international chains operate in Israel, it nevertheless maintained that H&M's actions were particularly

---

[56] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (approved August 13, 2003 by U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003)).

[57] Nieuwhof, *supra* note 55.

[58] Palestinian BDS National Committee, *Palestinian Civil Society Urges COOP to Boycott Agrexco*, BDS (Oct. 7, 2010), https://bdsmovement.net/news/palestinian-civil-society-urges-coop-boycott-agrexco.

[59] *Id.*

[60] *H&M Whitewashing Israel's Colonization of Jerusalem, BDS National Committee Calls for Boycotting H&M!*, BDS (Mar. 16, 2010), https://bdsmovement.net/news/hm-whitewashing-israels-colonization-jerusalem-bds-national-committee-calls-boycotting-hm.

objectionable because of the company's "decision to invest substantially in Israel after its criminal war of aggression on Gaza and in the midst of its intensified colonization of Jerusalem in contravention of international law can only be understood by Palestinians and supporters of just peace around the world as a form of support for Israel's abhorrent violations of international law and human rights."[61] The BDS campaign pointed to the UN Global Compact's directive for companies not to be "complicit in human rights abuses," accusing H&M for "violating its own commitments to the UN's principles of ethical investment."[62]

The BDS movement has also targeted car companies, such as Hyundai, the South Korean car company. The BDS movement accused Hyundai of allowing Israel to use its machinery in the demolition of Palestinian homes.[63] In calling for a boycott of the car company, the BDS movement urged the company to end "its involvement in Israeli crimes committed against the Palestinian people, particularly in Jerusalem and the Naqab (Negev)."[64]

SodaStream, an Israeli drinks company, has been a particularly popular target of the BDS movement.[65] SodaStream operated a factory in the West Bank settlement of Ma'ale Adumim, and the BDS movement alleged that the company exploited its Palestinian workers and "use[s] its Palestinian workers to deflect attention away from its role in maintaining Israel's unjust colonial system."[66] In 2015, SodaStream closed down this factory, relocating its operations within the country's pre-1967 borders and terminating many of its nearly 600 Palestinian employees.[67] As discussed further in Section C below, the

---

[61] *Id.*

[62] *Id.*

[63] Boycott, Divestment & Sanctions Committee of Palestinian Citizens of Israel (BDS48), *Hyundai Targeted for Boycott Campaign by Palestinian Human Rights Defenders in Israel*, BDS (Feb. 7, 2017), https://bdsmovement.net/news/hyundai-targeted-boycott-campaign-palestinian-human-rights-defenders-israel.

[64] *Id.*

[65] Such popularity might be due to the visibility of the company's celebrity spokesperson, Scarlett Johansson, as well as the international brand recognition of the company, which manufactures a popular consumer home carbonation product.

[66] Stephanie Westbrook, *SodaStream "treats us like slaves," Says Palestinian Factory Worker*, ELECTRONIC INTIFADA (May 9, 2013), https://electronicintifada.net/content/sodastream-treats-us-slaves-says-palestinian-factory-worker/12441.

[67] *SodaStream Leaves West Bank as CEO Says Boycott Antisemitic and Pointless*, GUARDIAN (Sept. 2, 2015, 11:42 PM), https://www.theguardian.com/world/2015/sep/03/sodastream-leaves-west-bank-as-ceo-says-boycott-antisemitic-and-pointless.

BDS movement's campaign against SodaStream adversely impacted the livelihood of its Palestinian workers and the economic development of the territories.

The BDS movement's campaigns described above are representative of the movement's cooption of CSR as a weapon in its arsenal against Israel. Such cooption is not incidental. It is instrumental in the BDS movement's theoretical foundations and practical functions. BDS advocates and the movement's public intellectuals have explicitly justified their overall agenda based upon their vision of corporate social responsibility.[68] For example, in 2013, Dalit Baum, an Israeli scholar who is the director of economic activism at the pro-BDS group American Friends Service Committee, co-founded Who Profits from the Occupation, which has been called "the first organized attempt to move anti-occupation activism into the realm of corporate responsibility."[69] This organization focuses on advising investors if their portfolios include companies involved in perpetrating the "continued Israeli control over Palestinian and Syrian land."[70] The organization includes an online database that enables investors to see if their portfolios include "companies that are commercially complicit in the occupation."[71] In tying the BDS movement to CSR principles, specifically in the realm of socially responsible investing, Baum contends that "[i]t doesn't matter what you think of the occupation or the settlements [b]ut all of us can agree that when the big corporations come in and profit from it, then we, as citizens, lose whatever agency we have."[72]

---

[68] Michael Schaeffer Omer-Man, *The End of Normalcy for Israeli Settlements?*, +972 (Jan. 29, 2016), https://972mag.com/the-end-of-normalcy-for-israeli-settlements/116422/ ("Part of a burgeoning worldwide movement encouraging corporate social responsibility, a number of companies and investment funds, particularly in Europe, have been quietly reducing their ties with the Israeli settlement enterprise. For some, that has meant pulling out of the Israeli market almost entirely.").

[69] Nathan Guttman, *BDS Battle Heats Up on New Front—Socially Responsible Investing*, FORWARD (May 3, 2016), https://forward.com/news/339863/bds-battle-heats-up-on-new-front-socially-responsible-investing/.

[70] *See About Who Profits*, WHO PROFITS , https://whoprofits.org/content/about-who-profits (last visited Oct. 4, 2018).

[71] *Id.*

[72] Guttman, *supra* note 69.

C. The BDS Movement's Manipulation of Corporate Social Responsibility

1. The BDS Movement Imposes a Double Standard on Israel

The BDS movement's obsessively single-minded preoccupation with Israel and the state's alleged misdeeds, and its conspicuous silence regarding other countries whose human rights records are demonstrably worse than Israel's, reveals the double standard that the movement imposes on Israel. Only Israel, and businesses that have any nexus to the state, are seen as worthy targets according to the BDS movement. Through its maniacal fixation on the Jewish state, the movement ostensibly asserts that Israel's alleged human rights abuses and all-around awfulness are of such a scale and scope as to dwarf the many injustices presently occurring throughout the world.

In adhering to this gross double standard, the BDS movement disregards the many documented violations of human rights occurring worldwide and overlooks the companies that do business with such regimes. Ignored is the Iranian regime's targeting of minorities—including the Kurds, Ahvazis, Azeris, and Baluchis—for what the U.S. Department of State has characterized as "arbitrary arrest, prolonged detention, and physical abuse."[73] Disregarded is Burma's oppression of its Rohingya Muslim minority, which some commentators have called a genocide.[74] Overlooked are China's severe restrictions on its citizens' civil and political rights and the repression of those who dare to stand up to the regime.[75] The persecution of Russia's LGBT

---

[73] *See Country Reports on Human Rights Practices for 2016: Iran*, U.S. DEP'T ST., https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265496#wrapper (last visited Oct. 4, 2018).

[74] Ishaan Tharoor, *In 2017, The World Let a 'genocide' Unfold*, WASH. POST (Dec. 18, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/12/18/in-2017-the-world-let-a-genocide-unfold/?utm_term=.bae4e180b4b9.

[75] *See Country Reports on Human Rights Practices for 2016: China*, U.S. DEP'T ST., https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265328#wrapper (last visited Oct. 4, 2018) ("Other serious human rights abuses included arbitrary or unlawful deprivation of life, executions without due process, illegal detentions at unofficial holding facilities known as black jails, torture and coerced confessions of prisoners, and detention and harassment of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others whose actions the authorities deemed unacceptable." (internal quotation marks omitted)).

community and the Putin regime's apparent refusal (and, at times, tacit, if not explicit encouragement) to address the systemic violence perpetrated against this vulnerable community has not raised the ire of the BDS movement.[76]

The bias implicit in the double standard that the BDS movement imposes on Israel is so ludicrous as to border on parody. But it is hardly surprising. Israel is familiar with being subject to a different, more exacting, standard than other countries. For example, in the UN General Assembly and its affiliated Human Rights Council, the vibrant yet imperfect democracy of Israel is the source of global opprobrium—greater than North Korea (gulags), Syria (mass murder), or Iran (key financier of international terrorism).[77] Such bias and double standard are certainly important data points in making the case for the BDS movement's anti-Semitic impulse. However, such argument is not sufficient. A supporter of the BDS movement can easily retort that the movement's focus on Israel does not mean that the movement absolves, let alone endorses, human rights violations elsewhere. Just as a nongovernmental organization that is exclusively focused on preventing the deforestation of the Amazon Rainforest does not mean it is not also against deforestation in the Congo Rainforest, the counterargument goes, the BDS movement's focus on Israel does not suggest that it condones other human rights violators. Given this potential retort, the analysis of the BDS's movement's anti-Semitism must go beyond the charge that the movement imposes a double standard on Israel, no matter the soundness of such charge. Indeed, the substance of the movement's allegations against Israel, and the way it uses CSR principles in connection with such allegations, must be scrutinized and then challenged. The succeeding sections seek to do just that.

---

[76] *See Country Reports on Human Rights Practices for 2016: Russia*, U.S. DEP'T ST., https://www.state.gov/j/drl/rls/hrrpt/2016humanrightsreport/index.htm?year=2016&dlid=265466#wrapper (last visited Oct. 4, 2018) ("Human rights groups reported continuing violence against LGBTI individuals. Openly gay men were particular targets of attacks, and police often failed to respond adequately to such incidents.").

[77] Anne Bayefsky, *Say what?! UN Human Rights Council Declares Israel World's No. 1 Human Rights Violator*, FOX NEWS (Mar. 24, 2017), http://www.foxnews.com/opinion/2017/03/24/say-what-un-human-rights-council-declares-israel-worlds-no-1-human-rights-violator.html ("In its history, the Council has condemned Israel more often than any other of the 192 UN states. Comparative totals after this session's pogrom tell the story: Israel – 78 resolutions and decisions, Syria – 29, North Korea – 9, and Iran – 6. As for Saudi Arabia, Russia, and China, there's nothing at all.").

2. The BDS Movement Disregards the History of the Israeli-Palestinian Conflict

To read the literature disseminated by the BDS movement, one would have no choice but to conclude that Israel is a war-mongering, land-conquering, colonial oppressor.[78] As the BDS movement paints it, Israel is a foreign power that has stolen land, imposed apartheid and committed ethnic cleansing. Israel is the unabashed aggressor and the Palestinian people are the helpless victims confronting a savage assault on both their individual lives and national aspirations. It is not merely that the BDS movement simplifies the long and complicated history of the Israeli-Arab conflict or ignores inconvenient facts that contradict or undermine its constructed narrative; the BDS movement's propaganda disregards reality completely. The BDS movement pays no heed to the historical Jewish connection to the land of Israel and the continuous Jewish presence in the land for thousands of years; the Arab pogroms in pre-state Palestine; the imperialism of the Ottoman and British empires and the anti-colonialist impulse of the Zionist movement; the United Nation's partition plan and Israel's acceptance of this compromise; the wars of independence (1948) and survival (1967 and 1973); Israel's overtures of peace—including several offers of Palestinian statehood—and the rejections of such proposals; and the fact that Arabs make up approximately twenty percent of Israeli citizenry and have full political and civil rights, equal to those retained by the Jewish majority.

The BDS movement's refusal to sincerely engage with this reality shows the movement's embrace of CSR is disingenuous. The BDS movement uses CSR as just another weapon in its arsenal of delegitimization. The BDS movement makes no sincere effort to engage with the reality of the conflict. A serious embrace of CSR principles, on the contrary, would confront this challenging history and understand whether the parties' actions are defensible in light of that history. The BDS movement's conspicuous and reckless disregard for history reveals the insincerity of its cooption of CSR.

---

[78] *See Israeli Settler Colonialism and Apartheid*, BDS, https://bdsmovement.net/colonialism-and-apartheid (last visited Oct. 4, 2018) ("Israel was formed in 1948 through the brutal displacement of nearly 800,000 Palestinians and the destruction of more than 530 towns and villages. This pre-meditated ethnic cleansing is known as al-Nakba, the catastrophe. Since then, Israel has implemented a regieme [sic] of settler colonialism, apartheid and occupation over the Palestinian people.").

3. The BDS Movement Overlooks Israel's Confrontation with War and Terrorism

In addition to disregarding the history of the conflict, the movement also dismisses Israel's present-day security threats. The threat of terrorism—whether in the form of highly coordinated attacks like those that occurred during the Second Intifada or the recent occurrences of ISIS-inspired knife and vehicle attacks—is not only overlooked but, at times, even justified as the understandable outcome of a dispossessed people seeking freedom, the actions of so-called "freedom fighters" or "resistance fighters."[79] The threat of war—whether emanating from the armies of the neighboring Arab states or the militias of Hamas and Hezbollah—is disregarded.[80] So, too, is the existential threat stemming from the nuclear ambitions, however temporarily curtailed, of the Iranian regime.

The BDS movement's conspicuous disregard for the threats that confront Israel, as well as the country's real national security needs, further reveals the disingenuousness of the movement's embrace of CSR. Of course, the proper balancing of a state's national security needs and civil liberties is hardly an exact science and serious people can and should debate how to strike an appropriate balance. The BDS movement simply does not engage in this exercise.

---

[79] William A. Jacobson, *Anti-Israel Activism Comes to Elementary School*, FORWARD (Dec. 21, 2016), https://forward.com/scribe/357765/anti-israel-activism-comes-to-elementary-school/; Joseph S. Spoerl, *Whitewashing Palestine to Eliminate Israel: The Case of the One-State Advocates*, JERUSALEM CTR. FOR PUB. AFF. (Apr. 12, 2016), http://jcpa.org/article/whitewashing-palestine-eliminate-israel-case-one-state-advocates/ ("On the rare occasions when [BDS movement leader Omar] Barghouti alludes to the violence of groups such as Hamas, he calls them "resistance fighters" and hints that they only attack Israel after Israel launches unprovoked attacks against them.").

[80] It is not merely that the BDS movement absolves Hamas of moral responsibility, but rather that the two movements are linked ideologically and, at times, financially. Jonathan Schanzer, *Israel Imperiled: Threats to the Jewish State*, FOUNDATION FOR DEFENSE DEMOCRACIES, Apr. 19, 2016, http://docs.house.gov/meetings/FA/FA18/20160419/104817/HHRG-114-FA18-Wstate-SchanzerJ-20160419.pdf ("In the case of three organizations that were designated, shut down, or held civilly liable for providing material support to the terrorist organization Hamas, a significant contingent of their former leadership appears to have pivoted to leadership positions within the American BDS campaign."); Jonathan S. Tobin, *The Link Between Hamas and BDS*, COMMENTARY MAG. (Apr. 20, 2016), https://www.commentarymagazine.com/anti-semitism/link-between-hamas-and-bds ("The one degree of separation between Hamas and BDS is just one more piece of evidence of the malevolence of a cause that pretends to be about human rights but which actually serves as a front for blood-soaked terrorists that hate Jews.").

In reading the myriad of publications, press releases and interviews given by members of the BDS movement, one will not find any such serious consideration of the legitimate security needs of the State of Israel as balanced against the civil liberties of the Palestinians. In furthering its apartheid aims, the BDS movement contends, Israel's security measures are *de facto* and *de jure* illegitimate and illegal.[81] But adhering to principles of CSR does not require that a nation abdicate its responsibility to safeguard its citizenry and to take appropriate and proportionate actions in light of threats posed. CSR is intended to exist in the real world and to allow for a state to undertake legitimate and legal security measures.

The disingenuousness of the BDS movement's professed adherence to CSR principles is further revealed by the movement's choice of which companies to target. For example, in censuring the German financial services giant Allianz for its ownership of a minority interest in G4S, a security company operating in Israel, the BDS movement assailed G4S for providing security equipment to Israel, including luggage scanning machines and full body scanners used at security checkpoints.[82] The BDS movement has similarly advocated for boycotts against Hewlett Packard, condemning the technology company for providing "technology, equipment and services to the Israeli military, including for the checkpoints and ID card system that underpin Israel's apartheid policies and its movement restrictions for Palestinians."[83]

In these campaigns, the BDS movement does not consider Israel's legitimate security concerns. The campaigns do not even entertain the possibility that Israel might need technologically sophisticated checkpoints to thwart would-be terrorists from entering the state. In automatically construing Israel's counter-terrorism measures as simply a means of reinforcing an apartheid agenda, the implicit message of the BDS movement is that "all lives matter," other than Israeli (read Jewish) ones.

---

[81] *G4S: Securing Israeli Apartheid*, BDS, https://bdsmovement.net/stop-g4s (last visited Oct. 4, 2018) (arguing that the security equipment that G4S provides the Israel Defense Forces serves to secure apartheid in Israel).

[82] *No Allianz with Israeli Apartheid*, *supra* note 50.

[83] *Boycott HP*, BDS, https://bdsmovement.net/boycott-hp (last visited Oct. 4, 2018).

4. The BDS Movement Ignores Israeli Companies' Contributions to the Palestinian Economy and the Benefit of Mutual Israeli-Palestinian Cooperation

Perhaps the most damning indictment against the BDS movement's wrapping itself in the mantle of CSR is how such boycotts, if implemented, would actually harm those people the movement purports to help. The purpose of CSR is to align corporate values with humanitarian ones; the BDS movement's actions actually impede any such alignment. Israeli companies employ significant numbers of Palestinian workers. Successful boycotts against these companies would cause many Palestinians to lose their jobs, which would ultimately reverberate to the Palestinian economy as a whole. Boycotts also erode mutual trust among Israelis and Palenstinians, which is built when Israelis and Palestinians work together side by side. Mutual trust is certainly a necessary ingredient for any future peace.

The harm wrought by the BDS movement's campaigns against Israeli companies is not merely theoretical. The case of SodaStream is illustrative. In 2015, the Israeli company shuttered its factory in the West Bank settlement of Ma'ale Adumim and relocated its operations within the country's pre-1967 borders, resulting in the termination of many of the factory's nearly 600 Palestinian employees.[84] Although we cannot be sure of the BDS movement's role in the company's decision to close its Ma'ale Adumim factory, the BDS movement cheered and eagerly took credit for this development. Indeed, the BDS movement, if it had its way, would enthusiastically welcome other Israeli companies shuttering their doors, which would invariably hurt Palestinian workers, who would lose their jobs, and the local Palestinian economy, which would suffer from increased unemployment and decreased capital.

While this Article focuses on the BDS movement's abuse of CSR, it is worth pointing out that the BDS movement's counterproductive behavior extends beyond the corporate sphere. The movement's boycotts of Israeli academics and artists target those citizens of Israel who are most amendable to challenging Israel's

[84] *SodaStream*, *supra* note 67.

current policies vis a vis the Palestinians.[85] By censuring and boycotting such individuals, the BDS movement alienates potential allies. Israeli hospitals and medical technology companies serve those suffering from illness beyond Israel's borders, including, of course, Palestinians.[86] The BDS movement's targeting of these individuals and institutions further reveals the disingenuousness of the movement's claim to support peace and prosperity for the Palestinians.

III. CORPORATE SOCIAL RESPONSIBILITY AND THE FIGHT AGAINST DELEGITIMZATION

The most productive way to counter the BDS movement's abuse of CSR is to actually accept CSR as a legitimate organizing principle. That is, instead of accusing CSR of being an inherently biased program that will inevitably turn on Israel, anti-BDS advocates should marshal CSR principles and practices in furtherance of *their* agenda. Beyond the moral justification for CSR, embracing CSR simply makes strategic sense.

CSR is no longer relegated to fringe activists bent on undermining the capitalist order, but rather is widely accepted by the business sector itself—if not enthusiastically, then at least as a *fait accompli* or as a marketing gimmick. In other words, strategically, it is no longer viable to simply dismiss CSR as an aberration, a passing fad. CSR is here to stay for the foreseeable future and it is within this intellectual milieu that anti-BDS advocates must operate. This section discusses how CSR principles can be employed in the fight against the BDS movement. Specifically, this section details the historical antecedents of using CSR principles to counter economic warfare against Israel as well as the current anti-BDS legislation promulgating in state capitals and percolating in Washington D.C.

---

[85] Josef Federman & Collin Binkley, *Israeli Professors Shunned as Global Boycott Grows. Right Target?*, CHRISTIAN SCI. MONITOR (Feb. 1, 2016), https://www.csmonitor.com/World/Middle-East/2016/0201/Israeli-professors-shunned-as-global-boycott-grows.-Right-target (noting that "Israeli universities are widely seen as liberal bastions, and their professors are some of the most vocal government critics").

[86] Fares Akram, *Gaza Strip Patients Find Help in Israeli Hospitals*, TIMES ISR. (May 19, 2015, 2:09 PM), https://www.timesofisrael.com/israeli-hospitals-treat-gaza-residents-children/ (citing a World Health Organization report estimated that 3,840 Gazans were treated in Israel in 2013, the most recent year available).

A. The History of the United States' Position on the Economic Boycott of Israel

The U.S.'s recent legislative activity designed to combat the BDS movement is a logical extension of the U.S.'s existing anti-boycott regime, which was originally constructed to address the Arab League boycott of Israel.[87] Though the Arab League boycott of Israel commenced with the state's creation in 1948, the first official United States response came in 1965, when Congress adopted legislation that required any U.S. persons and companies to report to the U.S. Department of Commerce any foreign state request to cooperate in a boycott against a country friendly to the United States.[88] For the next ten years, this anti-boycott regime received scant attention until 1977 when Congress passed new anti-boycott regulations that not only maintained the mandatory reporting requirements to the U.S. Department of Commerce set forth in the earlier law, but also expressly prohibited U.S. persons and companies from engaging in acts to "comply with, further or support" foreign boycotts not otherwise sanctioned by the United States.[89] Such anti-boycott provisions were included in the Export Administration Act of 1979 (hereinafter "EAA")[90] and in the Ribicoff Amendment to the Tax Reform Act of 1976 (hereinafter "TRA").[91] The EAA imposes civil and criminal penalties against U.S. companies that cooperate in unsanctioned boycotts and the TRA denies tax benefits to U.S. companies for such actions.

Since the existing anti-boycott regime targets U.S. persons that participate in a boycott initiated by a foreign power, the current laws

---

[87] *See* Matthew E. Silverman, *The Free Speech Implications of US Anti-Boycott Regulations*, 18 INT'L TRADE & BUS. L. REV. 1, 6 (2015); Marc A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal*, 22 ROGER WILLIAMS U. L. REV. 1, 144-46 (2017).

[88] Silverman, *supra* note 87; Greendorfer, *supra* note 87.

[89] David Cain, *International Business Communication and Free Speech:* Briggs & Stratton Corp. v. Baldridge, 9 B.C. INT'L & COMP. L. REV. 131, 135 (1986).

[90] Section 8 of The Export Administration Act of 1979 (50 U.S.C. § 2407) has expired but its provisions are effective under the authority granted to the President in the National Emergencies Act (hereinafter "NEA") (50 U.S.C. §§ 1601-1651) and the International Economic Emergency Powers Act (50 U.S.C. app. § 2407), most recently under Executive Order 13222 signed August 17 2001 by President George W. Bush (Continuation of Export Control Regulations, 66 Fed. Reg. 44,025 (Aug. 17, 2001)). The regulations promulgated by the U.S. Commerce Department implementing this regime are found in the Export Administration Regulations (5 C.F.R. § 760.1 et seq. (2018)).

[91] *See* 19 U.S.C. § 4452(a)(6)(B)-(C)(1) (2018).

arguably do not extend to participation in the BDS movement, an initiative whose genesis is largely nongovernmental rather than state-sponsored.[92] The recent legislative activity at the Federal level updates this anti-boycott regime to definitively cover anti-Israel boycotting activities that emanate beyond the Arab League boycott. It is on the state level, however, the laboratories of democracy, where the most dynamic legislative and executive activity is occurring.

B. The Legislative Response to the BDS Movement

1. Legislative Activity at the State Level

Since 2015, the legal fight against the BDS movement has been concentrated in state capitals across the country. In recent years dozens of state governments have enacted anti-BDS laws. These laws fall into two general categories: investment-focused laws and contract-focused laws. The former category of laws requires state investment vehicles—such as pension funds—to divest from or avoid investing in companies that are engaged in the economic boycott of Israel, and the latter prohibit public entities from transacting business with entities that engage in such boycotting activities.

An Illinois law prohibiting state pension funds from investing in foreign firms that participate in the BDS movement's campaign against Israel inaugurated state legislative activity.[93] Representative of the investment focused-laws, the Illinois law directs the state's pension funds to make their best efforts to identify all companies that boycott Israel and, under certain circumstances, divest themselves of their holdings.[94] South Carolina followed suit with its own anti-boycott law; though the law is not limited to boycotts against Israel, the legislative history clearly shows that it was specifically intended to combat the

[92] As noted above in Section I, such strict bifurcation between activity emanating from the nongovernmental sector and state-sponsored activity is imprecise as many countries provide support, material and otherwise, to the BDS movement and international and regional institutions that further the BDS movement's agenda.

[93] Marina Bolotnikova, *Illinois Passes Anti-BDS Bill*, TABLET (May 20, 2015), http://www.tabletmag.com/scroll/191152/illinois-passes-anti-bds-bill; Eugene Kontorovich, *Illinois Passes Historic Anti-BDS bill, as Congress Mulls Similar Moves*, WASH. POST (May 18, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/18/illinois-passes-historic-anti-bds-bill-as-congress-mulls-similar-moves/?utm_term=.b03b3c57f873.

[94] 40 ILL. COMP. STAT. 5/1-110.16 (2018).

BDS movement.[95] Representing a more contract-focused law, the South Carolina statute bans the state from contracting with companies engaged in certain kinds of boycotts. Specifically, the law defines boycott as "to blacklist, divest from, or otherwise refuse to deal with a person or firm when the action is based on race, color, religion, gender, or national origin of the targeted person or entity."[96] The statute specifically carves out from the definition of "boycott" corporate decisions to refuse doing business with a certain firm or person based on business or economic reasons or specific conduct of a targeted person or firm. The statute also exempts any public entity of a foreign state when the boycott is applied in a nondiscriminatory manner.[97] Unlike the Illinois measure, South Carolina's statute is not limited to businesses that boycott Israeli companies. The statute, which prohibits public entities from contracting with businesses that engage in a boycott "based [on the] race, color, religion, gender, or national origin of the targeted person or entity," is not specifically directed at combatting boycotts of Israel, but certainly encompasses such boycotts, as is the statute's intent.[98]

South Carolina's facially neutral statute is atypical. Most of the states' laws enacted to combat the BDS movement specifically target the movement's agenda and activities. For example, Indiana's anti-boycott law requires mandatory state divestment from any company that participates in "the promotion of activities to boycott, divest from, or sanction Israel."[99] The Indiana law notes that the BDS movement violates "fundamental principles of the United States" in its attempt to "delegitimize Israel's existence," "demonize the Jewish state," or "undermine the Jewish people's right to self-determination."[100] In August 2016, New Jersey enacted S-1923, which prohibits the state's Division of Investments from investing its $68.6 billion pension fund in any company that "boycotts the goods,

---

[95] Gil Hoffman, *How Did South Carolina Pioneer BDS Legislation?*, JERUSALEM POST (Dec. 17, 2016), http://www.jpost.com/Diaspora/How-did-South-Carolina-pioneer-BDS-legislation-475530 ("[South Carolina State Rep. Alan] Clemmons said a 2011 speech by U.S. President Barack Obama in which he called for two states for two peoples with Jerusalem as the capital of both inspired him to work against dividing Jerusalem and pressuring Israel to give up its heartland.").

[96] S.C. CODE ANN. § 11-35-5300(A) (2018).

[97] *Id.*

[98] *Id.*

[99] IND. CODE § 5-10.2-11-1 (2018).

[100] *Id.*

products, or businesses of Israel, boycotts those doing business with Israel, or boycotts companies operating in Israel or Israeli-controlled territory."[101] The bill's recitals note that "[n]ationality-based boycott actions are often veiled discrimination, and it is against the public policy of New Jersey to support such discrimination."[102] These laws are representative of the myriad of state anti-BDS laws being enacted across the country and currently percolating in state legislatures.

In addition to curbing pernicious boycotts like the ones the BDS movement advocates, these state laws also give protection to companies that do business with Israel and are themselves the target of a BDS campaign. Such state anti-BDS laws provide relief from any external pressure levied against these businesses which are able to respond that they are merely complying with the laws on the books, rather than making any kind of political statement.

2. Legislative Activity at the Federal Level

In Congress, a bipartisan group of legislators has put forth bills aimed to support the state-sponsored anti-BDS laws and further combat the BDS movement's agenda at the Federal level. In January 2017, Senators Marco Rubio (R-FL) and Joe Manchin (D-WV) in the Senate and Representatives Patrick McHenry (R-NC) and Juan Vargas (D-CA) in the House introduced the Combating BDS Act of 2017 (S. 170 and H.R. 2856, respectively).[103] If enacted, the law would authorize state and local governments to enforce measures to divest their assets from, prohibit investment of their assets in, or restrict contracting with: (1) an entity that engages in a commerce- or investment-related boycott, divestment, or sanctions activity targeting Israel; or (2) an entity that owns or controls, is owned or controlled by, or is under common ownership or control with such an entity.[104] In other words, the bill would clarify that such state and local laws are not preempted by any Federal law or policy. The bill does, however, set forth specific requirement with respect to notice, timing, and

---

[101] 2016 N.J. Sess. Law Serv. ch. 24 (West) (codified as N.J. STAT. ANN. § 52:18A-89.14 (2018)). *See also* S. 1923, 217th Leg. 1st Sess. (N.J. 2016).

[102] 2016 N.J. Sess. Law Serv. ch. 24 (West).

[103] Combating BDS Act of 2017, S. 170, 115th Cong. (2017); Combating BDS Act of 2017, H.R. 2856, 115th Cong. (2017).

[104] *Id.*

opportunity for comment with which a state or local government must comply prior to adopting or enforcing such anti-BDS laws.[105] The bill would also amend Section 13(c)(1) of the Investment Company Act of 1940 to prohibit a person from bringing any civil, criminal, or administrative action against a registered investment company based solely upon that company's divestment from securities issued by a person that engages in a commerce- or investment-related "boycott, divestment, or sanctions activity targeting Israel."[106]

Another anti-BDS bill is currently winding its way through the committee process in Congress. Introduced by Senators Ben Cardin (D-MD) and Rob Portman (R-OH) in the Senate, and Representatives Peter Roskam (R-IL) and Juan Vargas (D-CA) in the House, the Israel Anti-Boycott Act (S. 720 and H.R. 1697, respectively) would amend the EAA to prohibit any U.S. person engaged in interstate or foreign commerce from supporting (1) any request by a foreign country to impose any boycott against a country that is friendly to the United States and that is not itself the object of any form of boycott pursuant to United States law or regulation, or (2) any boycott fostered or imposed by any international governmental organization against Israel or any request by any international governmental organization to impose such a boycott.[107] The second prong effectively expands existing U.S. anti-boycott laws to international organizations like the United Nations and the European Union.[108] The bill would also amend the Export-Import Bank Act of 1945 to include as a reason for the bank to deny credit applications for the export of goods and services between the United States and foreign countries, opposition to "policies and actions that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with citizens or residents of Israel, entities organized under the laws of Israel, or the Government of Israel."[109]

The anti-BDS law-making activity emanating from state capitals and the halls of Congress is progressing at a frenetic pace. Such pace is revealing. It shows that the public understands that the BDS movement's motivating impulse is prejudice, not humanitarian

---

[105] *Id.*

[106] *Id.*

[107] Israel Anti-Boycott Act, S. 720, 115th Cong. (2017); Israel Anti-Boycott Act, H.R. 1697, 115th Cong. (2017).

[108] *Id*.

[109] *Id*.

concerns. Consequently, at this stage, any attempt at synthetizing this rapidly developing body of law would be proven outdated and incomplete in short order. The anti-BDS laws are in fact manifestations of the proper application of the language and logic of corporate social responsibility. The next section provides a further discussion, from both a theoretical and pragmatic perspective, of how corporate social responsibility can be embraced to counter the BDS movement's anti-Israel agenda and anti-Semitic impulse.

C. Countering the BDS Movement by Embracing Corporate Social Responsibility

Whether one agrees or disagrees with his conception of the corporation, Milton Friedman's vision of a corporation motivated exclusively by the maximization of shareholder value is one that is increasingly in decline.[110] According to a study by KPMG, approximately two-thirds of the 4,900 surveyed issue CSR reports.[111] Furthermore, three quarters of these companies (73%) acknowledge the issue of human rights as a business issue.[112] CSR is undeniably on the rise. This is the intellectual and cultural milieu in which the BDS debate is occurring. Which side of the BDS debate is seen as successfully aligned with the principles of CSR will have a significant impact in the debate of whether to support or oppose boycotts against Israel. That is why it is imperative to expose not only the BDS movement's embrace of CSR as the fraud that it is, but also that anti-BDS activists are the ones who are actually carrying the mantle of CSR.

By ignoring Israeli companies' contributions to the Palestinian economy, the benefit of mutual Israeli-Palestinian cooperation that Israeli-based companies promote, the context of terrorism and war in which these companies exist, and the dual standard imposed on Israel as compared to other egregious labor and human rights violators, the BDS movement reveals the disingenuous of its embrace of CSR. CSR principles promote economic cooperation and development in lesser-

---

[110] *See supra* note 37.

[111] José Luis Blasco & Adrian King, *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017*, KPMG, Oct. 2017, https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf. The 4,900 companies surveyed include the top 100 companies by revenue in each of the 49 countries researched in the study. *Id*.

[112] *Id*.

developed economies. CSR principles appreciate that economic uplift and empowerment leads to a greater chance of peace in fractious societies. CSR principles recognize that efforts that undermine such uplift actually are an affront to peace, stability and human rights. CSR principles acknowledge the realities faced by companies in dangerous regions, and by no means dictate that nations sacrifice their own citizenry to achieve desired political outcomes.

Most importantly, CSR principles reject racism and anti-Semitism. As this Article demonstrates, the BDS movement is infected with anti-Semitism. The movement's fundamental anti-Zionism, its denial of Jewish political sovereignty and national identity are antithetical to the liberalism espoused by CSR, which recognizes the sovereignty and the national aspirations of minorities. Anti-BDS advocates must not shy away from this essential argument; embracing CSR requires the rejection of the BDS movement and its anti-Semitic agenda.

Anti-BDS laws are not merely a measure to support the State of Israel. They are measures that support good corporate governance. The logic supporting these laws should not be limited to governmental agencies and decision making. This logic is also applicable to the private sector. Investors, whether individuals or institutions, should recognize that pressure to divest from Israel-connected businesses is counter to the principles and policies of CSR; resisting such pressure is indeed an embrace of CSR.

CONCLUSION

The BDS movement is one of today's most significant manifestations of the New Anti-Semitism, in which ancient prejudices and conspiracies are updated and applied to our contemporary age. Today is an age of the nation-state, in which politics is the most hallowed of our religions.

In the spirit of the times, Israel has become the stand-in for the Jew. And thus, rather than it being the Jew that poisons the well, it is Israel that poisons the harmony among nations. Rather than it being the Jew that drinks the blood of Christian children, it is Israel that spills the blood of Palestinian ones. Rather than it being the Jew that is guilty of deicide, it is Israel that is guilty of apartheid, a modern-day murder of our global faith in anti-racism.

The BDS movement comes into this toxic mix and coopts our current era's commitment to a responsible capitalism where managers are committed to their firm's bottom-line as well as society's bottom-line. The BDS movement's embrace of this contemporary ethos of corporate social responsibility is a fraud; a racket used instrumentally to promote an anti-Israel and fundamentally an anti-Semitism agenda. In countering the BDS movement's embrace of CSR, anti-BDS advocates should not reactively discard CSR but rather themselves embrace CSR as a valuable tool in the fight against the BDS movement specifically and modern-day global anti-Semitism generally.