

The Differences between the EU's Differentiation Policy and the BDS Movement

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A. Introduction

The differentiation policy led by the European Union (EU) distinguishes between the sovereign State of Israel within the 1967 borders and the occupied territories. The BDS Movement calls for what its initials stand for – boycott, sanctions and divestment – to be inflicted upon the whole State of Israel. Although they differ in essence, public discourse in Israel often confuses the two – whether unintentionally, stemming from ignorance, or intentionally because of certain political views. This paper aims to draw a clear distinction between the two policies in order to enable a more nuanced, less impassioned and more conducive dialogue in Israel and with the EU, along with an uncompromising fight against the BDS movement.

The EU's differentiation policy seeks to maintain trade and cooperation with the State of Israel within its 1967 borders, in adherence to international law and Europe's consumer protection laws – unlike the BDS movement that seeks to boycott and sanction the entire State of Israel. Recognizing the value of EU-Israel relationship, the EU's differentiation policy aims to incentivize Israel to resume negotiations with the Palestinians. The BDS movement, on the other hand, sets goals (such as revoking the right of return and abrogating the Law of Return) that if fully achieved would mean Israel's end as a Jewish state. The differentiation policy includes an element of normative condemnation but not delegitimization of the State of Israel as a whole, as espoused by the BDS movement. Whereas the differentiation policy implements existing international law, the BDS movement aspires to change the international perception of Israel even within its 1967 borders.

Currently, the economic implications of both the differentiation policy and the BDS movement are negligible. However, in the long term, the threat posed by the BDS activities is greater than that of the differentiation policy, since the BDS is not limited to the settlements. The UN recently issued a list of companies operating in the settlements, which could serve in the future to boycott the settlements and damage major companies that play a significant role in Israel's economy. The EU does not see any connection between its differentiation policy and the BDS movement, to which some European states oppose.¹

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¹ Susanna Terstal, EU Special Representative for the Middle East Peace Process, in [an address](#) to Mitvim's 2019 annual conference, November 2019.

B. The Differentiation Policy

The differentiation policy refers to measures by a third party (the EU, UN, various states and organizations) that differentiate legally, economically and practically between agreements implemented with Israel within its 1967 borders, and entities and activities by Israel/Israelis beyond these borders. The policy designates the areas beyond the 1967 borders: Judea, Samaria, the Gaza Strip, East Jerusalem, and the Golan Heights ("the territories") as excluded from bilateral ties with Israel. In other words, international relations and agreements with Israel stop at the 1967 borders and do not apply to the territories. This distinction is based on the prevailing approach of international law that opposes territorial takeover by war (whether offensive or defensive in nature). This approach stems from the lessons of World War II and the liberal order instituted thereafter, and is anchored in international law.

The EU's differentiation policy

Respecting the rule of law is one of the EU's fundamental principles. The differentiation policy adopted by the EU stems from a *domestic* goal of demonstrating respect for international law that does not recognize Israeli sovereignty over territories beyond the June 4, 1967 borderlines. According to the European position adopted in 1977, settlements violate the Fourth Geneva Convention (of 1949), which prohibits population transfers from the territory of an occupying power to occupied territory. This has been a consistent stand for years, dovetailing with international law and UN Security Council resolutions. The differentiation policy also has an *external* goal – condemning the occupation (and especially the settlements), on the one hand, and leveraging the EU's position to incentivize Israel to advance toward peace with the Palestinians based on the 1967 borders, on the other.

The legal dispute between the EU and Israel over the territorial applicability of their agreements, i.e. whether they apply beyond the Green Line – began two years after the signing of the Association Agreement in November 1995. The agreement framed the relations between the sides and upgraded the Israel-EU free trade area for industrial goods.² The issue of tariff exemptions was the nub of the dispute: where the agreement applies and exempts Israeli goods from EU import tariffs, and where it does not? Does the agreement apply only to Israel within the 1967 borders or also to the territories? The dispute escalated to an ultimatum presented by the EU. In 2004 it led then-Industry and Trade Minister Ehud Olmert to agree that the differentiation of customs exemptions of exports to the EU would not include the territories.³ Among Olmert's considerations was that the EU was Israel's main trading partner and tariffs on its entire exports to the EU would have seriously undermined Israeli exporters and the Israeli economy. Since 2005, the EU has been imposing duties on goods from the settlements, and the European Court of Justice in its *Brita* ruling reaffirmed this policy in 2010.⁴ The Israeli government established an indemnification fund for the customs imposed on settlements export to the EU.⁵

² The Association Agreement was signed during the Oslo process, with the expectation of an impending agreement between Israel and the Palestinians determining their borders. Article 83 of the agreement sets out its territorial application in somewhat vague terms, allowing each side its own interpretation: "This Agreement shall apply [...] to the territory of the State of Israel."

³ The customs differentiation between the sides was anchored in a technical agreement, which stipulated that customs duties only apply to goods from the settlements whereas duties on Palestinian goods are regulated by a separate, temporary association agreement with the EU, signed in 1997.

⁴ [Case C-386/08 Firma Brita GmbH v Hauptzollamt Hamburg-Hafen](#), 25 February 2010.

⁵ [Freedom of Information Report](#), Ministry of Economy and Industry, 2018 (in Hebrew).

The EU's differentiation policy is not a boycott of products from Judea, Samaria and the Golan Heights, but rather customs duties that raise their cost. In other words, exports from the territories can continue uninterrupted; the damage is only to the competitiveness of the goods, the cost of which is partly offset by government compensation. The repercussions for the Israeli economy are negligible. Exports from the territories amount to half percent of Israel's total exports, and one and half percent of the exports to the EU.⁶ On the other hand, the EU is Israel's main trade partner, with 2019 exports of goods and services totaling some \$16 billion. The EU is destination to 34% of Israeli exports of goods.⁷ EU tariffs on these exports would have severely undermined the Israeli economy given that the export sector account for some 30% of the GDP.⁸

In 2013, the EU expanded the differentiation policy from the customs arena to apply to all its agreements with Israel. In June 2013, the policy was applied for the first time on Israel's participation in the European Horizon 2020 program, the biggest international research and innovation program, launched in 2014. It provides funding for Israeli scientific and industrial research on a scope second only to that of the government and Israeli participation is very important.⁹ The European Commission issued guidelines designed to ensure that the agreement on Israel's participation in the program does not apply to the territories. In light of the program's importance, under significant pressure by Israel's academic and scientific community and following negotiations with the EU that lasted up to the last minute, the government of Israel "agreed not to agree". The territorial clause of the agreement was applied, but Israel added a number of reservations, chief among them was clarification that it rejects the EU's position that the occupied territories are not part of Israel. In addition, the Ministry of Science and Technology decided to allocate grants to researchers ineligible for international funding.¹⁰ The "territorial clause" included in the European guidelines was gradually introduced into all agreements between Israel and the EU.

In November 2015, the EU recommended labeling settlement products as a continuation of its differentiation policy.¹¹ The recommendation was intended to lead to implementation of European consumer protection laws mandating precise, non-misleading place of origin labeling, and it applies only to products protected by these regulations.¹² The EU recommended the following labeling language: "Product from the [West Bank] (Israeli settlement)", with West Bank replaced by Golan Heights/East Jerusalem/Gaza Strip, as relevant. The recommendation was not binding, and each member state could decide whether to adopt it.¹³

⁶ "Israel's economy in the shadow of the delegitimization campaign", Finance Ministry, 2015, p.7 (Hebrew).

⁷ "[Developments and Trends in Israeli Exports – Initial 2019 Summary](#)", *Israel Export Institute*, January 2020 (Hebrew).

⁸ "[Israeli Exports – Challenges and Solutions](#)", *Israel Export Institute*, September 2015 (Hebrew). See also, "[Israel Trade Statistics](#)", *World Integrated Trade Solutions*.

⁹ Israel has been an associated member of the multi-annual European research and development program since 1996, rejoining the program at every one of its four renewal points over the past two decades. See, "[20 years of Israeli participation in Horizon 2020 – EU Framework program](#)", *Israel Innovation Authority*, January 2017.

¹⁰ These grants are especially for Ariel University. See "[Jerusalem and EU agree on formula that allows Israel to join Horizon 2020 project](#)", *The Jerusalem Post*, November 26, 2013.

¹¹ "[Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967](#)," *European Commission*, November 11, 2015.

¹² This move was prompted by the EU Foreign Affairs Council's [decision](#) of May 14, 2012, section 6. The Commission located the EU regulations on country of origin labeling of products such as fresh fruit and vegetables, eggs, fish, wine, meat, honey and olive oil. The labeling guidelines refer to these products only.

¹³ Sixteen EU foreign ministers [supported the move](#): Luxembourg, Denmark, The Netherlands, the UK, Spain, France, Italy, Belgium, Sweden, Malta, Austria, Ireland, Portugal, Hungary, Slovenia and Finland. See also,

Member states that were already labeling products (for example the UK, Ireland, Sweden, The Netherlands, Belgium and Denmark) continued to do so. Only France changed its policy in the wake of the recommendations, issuing a regulation in November 2016 on labeling settlement products.

The European Court of Justice decision, November 2019, on a petition submitted against such labeling by the Psagot winery located next to the settlement, east of Ramallah, anchored the labeling recommendations in a legal ruling.¹⁴ The court ruled that labeling any product made outside Israel's 1967 borders as "made in Israel" misleads consumers. Clear labeling is required to enable consumers to know the precise origin of the product they want to consume.¹⁵ The extent to which the differentiation policy is implemented in the EU differs from state to state and from agreement to agreement. A study that examined 260 bilateral agreements between EU member states and Israel found that most states do not implement the differentiation policy uniformly.¹⁶

Additional examples of differentiation policy implementation

While the EU leads the way in terms of adopting the differentiation policy, it is not the only international body to do so. In December 2016, the UN Security Council adopted Resolution 2334, harshly condemning Israel's settlement policy and demanding an immediate halt of all activities relating to the settlements in order to preserve the two-state option. The resolution did not include sanctions against Israel, but its violation could constitute the basis for a future resolution imposing such sanctions.¹⁷ In February 2020, at the request of the UN Human Rights Office of the High Commissioner, the UN issued a list of 112 companies operating in the settlements.¹⁸ The list did not include proposed steps against these firms, but its publication was perceived as a tool to promote a settlement boycott in the future. Such a measure does not entail a boycott of Israel itself, and therefore is considered more legitimate and acceptable to governments, organizations and the public. The list includes some of Israel's leading corporations, (among them Bezeq, Shufersal, Cellcom, and a series of banks) along with multinational groups. Should the list lead to sanctions and divestment

Anders Persson, "'EU differentiation' as a Case of 'Normative Power Europe' (NPE) in the Israeli-Palestinian Conflict", *Journal of European Integration* 4(20), 2018, pp. 193-208.

¹⁴ [Case C-363/18 Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l'Économie et des Finances](#), November 12, 2019.

¹⁵ Raphael Ahren, "[On labeling settlement goods, the European Union is far from united](#)," *The Times of Israel*, December 2, 2019.

¹⁶ Hugh Lovatt, "[EU Differentiation and the Push for Peace in Israel-Palestine](#)," *European Council of Foreign Relations*, 2016. Some states made changes in specific project agreements with Israel and 18 issued directives cautioning business against direct contracts with settlements. However, most bilateral agreements between Israel and European states stand to benefit the settlements. More than half the agreements examined by Lovatt did not include a territorial reference at all, and about one quarter included vaguely phrased articles. So far, EU member states have made few attempts to enforce the EU guidelines on the issue. Nonetheless, it should be noted that Israel's main European trade partner, the UK, has declared that after Brexit, it would continue to exclude the settlements from its trade agreements with Israel.

¹⁷ Pnina Sharvit Baruch, "[Resolution 2334: The Legal Significance](#)", *Institute for National Security Studies*, December 30, 2016.

¹⁸ "[UN rights office issues report on business activities related to settlements in the Occupied Palestinian Territory](#)," *United Nations Human Rights, Office of the High Commissioner*.

from these companies, Israel's economy would sustain much more severe damage than that inflicted by the differentiation policy.

The US, too, has had an official policy since 1995 on labeling settlement products, but it is substantially different from the EU's. It stemmed from a 1994 request by the State Department to the Treasury for labeling guidelines. In response, the US Customs Department issued labeling obligations for all products made in the West Bank and Gaza, prohibiting "Made in Israel" labeling or any other form of the word "Israel".¹⁹ US policy does not differentiate between settlement products and those made by Palestinian firms, imposing the same labeling on all products made in the territories: "This product is made in the West Bank and/or Gaza". The labeling is purely geographic and does not include the word "settlements". In this sense, the labeling does not seek to create a differentiation specific to Israeli settlements and does not enable the American consumer to tell the difference between an Israeli and a Palestinian product. Unlike EU practice since 2004, the US labeling policy does not include the Golan Heights and East Jerusalem as part of the territories, although official US administration policy since 1967 (up to the Trump Administration) did not recognize Israeli sovereignty over those areas. In other words, the US position does not stem from the proscriptions of international law, but rather from the Oslo Accords, and constitutes preparation for an Israeli-Palestinian peace agreement and the establishment of a Palestinian state. Non-implementation of this instruction carries punitive 10% duty, but enforcement is in the hands of customs authorities in each of the 50 US states. Based on some case examinations, it does not appear to be enforced.²⁰

In contrast to the pro-active European policy, which differentiates between settlement products and Palestinian ones, and includes the Golan Heights and East Jerusalem in its labeling guidelines, US policy as mentioned, does not differentiate between settlement and Palestinian products and excludes the Golan and East Jerusalem. In recent years, US administrations have also refrained from any activity on the issue and avoided turning the labeling recommendations into an active tool with political aspects. In late 2016, the Obama Administration issued a reminder of the labeling instructions, presumably to convey a political message to Israel. Another significant difference between the US and European policies lies in the issue of duties on goods from the territories, with the US refraining from differentiation. The issue was regulated in 1997 when the US approved expanded customs exemptions under the 1985 free trade agreement with Israel in order to apply them to products made in the West Bank and Gaza, and it has since remained in force.²¹ Some US-Israel agreements, such as research agreements, do not apply to the territories. The US differentiation policy was adopted years before the EU's, but Israeli media rarely covers it.²²

South Korea recently added a territorial clause that excludes the settlements from its trade agreement with Israel, signed August 2019. South Korea is the world's 11th largest economy, and this is Israel's first of its kind agreement in Asia. This is another case in which Israel

¹⁹ Previous guidelines provided several labeling options, including use of the word "Israel". See, US Customs, Country of Origin Marking of Products from the West Bank and Gaza, Notice of Policy, T.D. 95-25, 60 Fed. Reg. 17607-01 (April 6, 1995); US Customs, Country of Origin Marking of Products from the West Bank and Gaza, Notice of Policy, T.D. 97-16, 62 Fed. Reg. 12269-02 (March 14, 1997); US Customs and Border Protection, "[West Bank Country of Origin Marking Requirements](#)," January 23, 2016.

²⁰ "[US issues telling reminder of labeling rules on Israeli products from West Bank](#)," *The Times of Israel*, January 28, 2016; Josh Ruebner, "[Labeling Israeli settlement products is US law, too](#)," *The Hill*, December 23, 2015; Lara Friedman, "[Settlement Product Labeling Policies, U.S. vs. EU](#)," *APN*, January 27, 2016.

²¹ *Ibid.*

²² "[U.S. Foreign Aid to Israel](#)," *Congressional Research Service*, August 7, 2019, pp. 25-26.

agreed to disagree on the agreement's territorial applicability and the Ministry of Economy established a fund to indemnify settlement exporters for duties on exports to South Korea. The Knesset has yet to ratify the agreement.²³ The Israeli government appears to prefer promoting the state's trade at the cost of political differentiation, perhaps because in terms of international law the territorial applicability of economic agreements does not constitute a precedent for recognition of sovereignty over those territories.

Some civil society organizations in the world, among them Jewish ones, advocate the differentiation policy. In the US, for example, J Street reports on the funding of Jewish institutions transferred to support activities in the West Bank. These organizations are motivated by an agenda that views recognition of the territories as an obstacle to the two-state solution and morally unjustifiable.²⁴ Private individuals sometimes undertake initiatives to promote differentiation. For example, in 2019 a Canadian court accepted a petition by David Kattenburg regarding the labeling of wines made in the settlements. Kattenburg defines himself as a human rights activist Jew who believes the Palestinians live under permanent military occupation and apartheid. His goal is to ensure precise labeling designating the production source in order to allow Canadian consumers to decide whether they support the settlements.²⁵

C. The BDS Movement

In 2005, Palestinians inspired by movements that agitated for boycott of South Africa's apartheid regime in the 1960s, formed the BDS movement. Its goal is to exert pressure on Israel by advocating its boycott (in all fields – diplomatic, economic, academic, cultural, sports and more), sanctions and divestment.²⁶ Its actions target Israel in its entirety, without differentiating between the sovereign state and the occupied territories. This movement seeks to de-legitimize and even demonize Israel. It spreads and encourages hatred of Israel.

The body leading the movement, the BDS National Committee, is headquartered in Ramallah. The Committee determines general policy, but the movement is not a hierarchic organization. It is a network of some 170 subgroups acting independently around the world, and the Committee does not have any control over them or authority on them. Therefore, the definition of the movement's goals can differ from one group to another. However, the National Committee has prioritized three key goals: Ending the Israeli occupation, equality for Israeli Palestinian citizens and recognition of the right of return of Palestinian refugees. While these goals, at first reading, do not seem radical, their full implication would be the abrogation of the Law of Return and an end to Israel's existence as the nation state of the Jewish people. The BDS movement rejects Zionism, and anti-Semitic overtones are identifiable in some of its offshoots.

²³ ["Israel inks free-trade deal with South Korea despite settlement row"](#), *Times of Israel*, August 21, 2019; Tal Schneider, ["Israel, South Korea complete free trade agreement talks"](#), *Globes*, August 21, 2019; Herb Keinon, ["Israel, South Korea conclude talks on Free Trade Agreement"](#), *The Jerusalem Post*, August 22, 2019.

²⁴ ["Settlements & Creeping Annexation"](#), *J Street*; ["AJC 2019 Survey of American Jewish Opinion"](#), *AJC*, June 2, 2019.

²⁵ [2019 FC 1003 David Kattenburg V Attorney General of Canada](#), 29 July 2019. Note that the Canadian government stated that it would appeal the court's decision: ["Canada to appeal ruling that settlement wines can't be labeled 'Made in Israel'"](#), *The Times of Israel*, September 7, 2019.

²⁶ ["What is BDS?"](#), BDS.

The National Committee has published several reports laying out the movement's main achievements, as it views them: Declarations of support and calls for boycotts on the part of various entities (such as academic associations), cancellation of performances by foreign artists and of visits and events in Israel, and judicial rulings and legislation adopted or revoked in other countries. One prominent example it cites is the cancellation of the Israel-Argentina soccer warm-up match in 2018 in which Lionel Messi was supposed to take part. While there is often a gap between the achievements for which the movement takes credit and actual events, shaping image and public perceptions may be no less important these days.²⁷

The Finance Ministry's Department of International Affairs issued a report in 2015 that sought to examine the BDS movement's effect on Israel's economy. According to the report, there has not been any concrete damage to Israel's economy. Most states, firms and investors in the world maintain regular contacts with Israel for pragmatic reasons. Only a few companies did openly report that they had stopped doing business in Israel and pulled out their investments because of the occupation.²⁸ Nonetheless, the report warned against extreme scenarios that could occur should Western states join the boycott. It also cited academic studies pointing to the significant effect of the state's image on its economy.²⁹ An analysis by the Institute for National Security Studies also argued that the BDS movement must overcome significant obstacles in order to inflict significant damage to the Israeli economy. First, a large part of Israeli exports is not vulnerable to boycott campaigns since it consists of intermediate components embedded into a variety of goods. Second, Israel's partners could presumably find alternatives to most Israeli products, but that would be costly for many manufacturers, who hold political influence and would object to decisions which are economically harmful to them. The analysis also pointed out that since many Israeli exports are manufactured by multinational corporations, they could mobilize the countries where they are based to block boycott measures harmful to their economic interests.³⁰ The implications of the BDS campaign have been manifested, however, in the transfer of Israeli plants from the territories into the state. Thus, for example, the Soda Stream manufacturing plant was moved from Mishor Adumim to Lehavim/Rahat, the Bagel-Bagel plant was moved from the Barkan industrial zone near Ariel to Safed, and alongside the "Ahava" cosmetics plant in kibbutz Mitzpe Shalem, an additional plant was built within the Green Line in the adjacent Tamar local council.

Israel's reaction to the boycott movement

In 2011, Israel adopted legislation ("The anti-Boycott Law") which aimed "to prevent damage caused by the phenomenon of boycotts imposed on various parties due to their relation to

²⁷ Amir Prager, "[Achievements According to the BDS Movement: Trends and Implications](#)," *Strategic Assessment* 22(1), April 2019 (Hebrew); David M. Halbfinger, Michael Wines and Steven Erlanger, "[Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign](#)," *The New York Times*, July 27, 2019.

²⁸ For example, the Norwegian KLP pension company pulled its investments from two international construction material companies in 2015 over their investment in Israeli companies in the territories. The companies that divested from Israel recognize its legitimacy and right to exist within the 1967 borders.

²⁹ "[State report: Boycott could cost Israel NIS 40 billion per year](#)", *Times of Israel*, June 7, 2015; "Israel's Economy in the Shadow of the Delegitimization Campaign," *Israel Finance Ministry*, February 1, 2015 (Hebrew).

³⁰ Nizan Feldman, "[In the Shadow of Delegitimization: Israel's Sensitivity to Economic Sanctions](#)", *Institute for National Security Studies*, Memorandum No. 163, January 2017.

the State of Israel. The boycotts are liable to damage trade, cultural or academic activities of the target of the boycott and to cause it grave damage, both financial and reputational." The law stipulates that imposing a boycott on Israel is a civil wrong to which Tort Law can be applied, and allows wronged entities to sue for damages. It also allows for the withholding of benefits from the boycotters. The law defines a boycott against the State of Israel as one that applies to Israel and "any area under its control", meaning that it applies to the territories, including the settlements. Passage of the law generated a protest over the bill's violation of free speech rights. Four petitions against it were submitted to the Supreme Court, some of them objecting to the phrasing "any area under its control" and others against the law in its entirety. The Justices unanimously dismissed the clause allowing punitive damages, and a minority sought to disqualify other elements of the law. The judges did not strike down the language regarding "any area under its control", but expressed varying opinions on its validity. Presumably, greater caution will be applied in the use of such language in future legislation with meticulous attention to its purpose.³¹

In 2017, Knesset member Yoav Kish of the Likud and others³² emended the bill, adding a cap on the amount of punitive damages. The Knesset's Constitution, Law and Justice Committee approved it for a first reading (but the bill has not progressed since then) even though the clause that was struck down by the High Court was left intact in almost identical language, and despite the objections of the Attorney General who pointed to its constitutional flaws. The Israel Democracy Institute and the Association for Civil Rights in Israel also protested the amended law. In explanatory notes to the bill, the lawmakers argued that fighting boycotts was necessary inter alia because of the growing BDS activity. However, as the committee's legal adviser explained, it would be very difficult for the state to enforce the law on non-Israelis, and therefore not only does the law violate free speech rights, it is also not effective in the fight against the BDS movement.³³

Up to a few years ago, Israel refrained from giving the BDS public resonance that only served to increase the movement's exposure and effect. The shift began in October 2015, when the State Security Cabinet decided to transfer the authority to act against the BDS movement and its delegitimization campaign against Israel from the Foreign Ministry to the Ministry of Strategic Affairs and Public Diplomacy, led by Minister Gilad Erdan.³⁴ Significant budgets were allocated for the new task. Erdan declared the BDS movement a strategic threat to Israel and gave it prominence in public discourse in Israel and abroad. The government of Israel identifies the BDS movement as anti-Semitic, a move perceived in various parts of the world as an attempt to disqualify all legitimate criticism of Israel.³⁵

Under Erdan, the ministry pushed through legislation preventing entry into the country of BDS supporters. The ministry funds Israeli delegations to go to the hubs of BDS activities abroad and funds visits of American students to Israel. It also works with public figures, Israeli, Jewish, and other organizations and often finances their anti-BDS activity. In addition, through the Justice Ministry, Erdan's ministry has retained the services of an

³¹ [Supreme Court ruling in the case of Avneri v. Knesset](#). The ruling determined that the demand for damages against anyone who knowingly publishes a public call to impose a boycott on the State of Israel, without having to prove damage, was unconstitutional.

³² The others were Nava Boker, Miki Zohar, Michael Malchieli, Tali Pluskov and Yifat Shasha Biton.

³³ [The Boycott Law 2.0](#), *Haaretz*, June 8, 2018.

³⁴ [Ministry of Strategic Affairs and Public Diplomacy](#).

³⁵ Muriel Asseburg, ["Putting the Controversy About BDS in Germany into Perspective,"](#) *Palestine-Israel Journal* 24(3), 2019.

international law firm to take legal action against BDS activists in Europe and North America. The Ministry has also issued reports accusing European states and organizations of allegedly funding organizations promoting anti-Israel boycotts. The Ministry has defined such activities as extremely sensitive from a diplomatic perspective and refused to reveal the legal activities undertaken, arguing that publication would undermine Israel's foreign relations.³⁶ In recent years, the Ministry has come under fire for lacking transparency regarding appointments, use of budgets and activities. Calls were made to restore the Foreign Ministry the authority taken from it to combat the BDS.³⁷ The Mitvim Institute's 2018 Foreign Policy Index showed that 55% of the public believes the Foreign Ministry should be in charge of dealing with the BDS issue, compared with 21% who believe a separate government ministry is required, as is currently the case.³⁸ The director general of the Foreign Ministry has also expressed criticism in the Knesset of the way the Ministry of Strategic Affairs operates.

In coordination and with the funding of the Ministry of Strategic Affairs, Jewish organizations in the US have advanced various initiatives in recent years to block BDS activity through legislation or declarations by governors against the movement and its supporters.³⁹ Indeed, in recent years, most US governors have adopted legislation and approved regulations curbing the support for anti-Israel BDS activities.⁴⁰ Certain EU states have adopted similar measures. For example, in May 2019, the German Bundestag classified BDS as an anti-Semitic movement, and the Austrian Parliament in February 2020 adopted a resolution on the fight against anti-Semitism and the BDS movement.⁴¹ Counter measures on the part of BDS supporters have focused on the violation of freedom of speech by such legislation and included court petitions against such laws.

D. Summary: The Difference between Differentiation and BDS

Political and public discourse in Israel often does not distinguish between the policy of differentiation and the BDS movement. Confusion of the two sometimes stems from ignorance. Often, though, this blurring of lines serves the domestic political needs of those harshly critical of the EU who are seeking to portray its stance as part of the BDS movement. It also serves those that ideologically view the territories as an integral part of Israel. In response to the EU labeling recommendation, for example, MK Isaac Herzog, as head of the opposition at the time, said the guidelines are "a win" for those who seek to boycott Israel.⁴² In response to the Psagot ruling, the Foreign Ministry said it "emboldens radical anti-Israel groups that advance and call for boycotts against Israel and deny its right to exist",⁴³ even though the decision by the European Court of Justice was directed only at products made in the settlements. The Ministry of Strategic Affairs also blurs the distinction between differentiation and BDS. In 2017, the Ministry Director General Sima Vaknin-Gil

³⁶ ["Israel Secretly Using U.S. Law Firm to Fight BDS Activists in Europe, North America"](#), Haim Levinson, Barak Ravid, *Haaretz*, October 26, 2017.

³⁷ ["Who Needs the Strategic Affairs Ministry?"](#) Yael Patir, *Haaretz*, October 20, 2019.

³⁸ ["The 2018 Israeli Foreign Policy Index"](#), *Mitvim Institute*, October 2018.

³⁹ Itamar Benzaquen and The Seventh Eye, ["Israeli ministry paying for anti-BDS propaganda in major news outlets"](#), *+972 Magazine*, January 2020.

⁴⁰ ["US Jewry and Its Fight against the Boycott of Israel"](#), *Ruderman Family Foundation*, January 2019.

⁴¹ ["Austrian Parliament condemns BDS movement as anti-Semitic"](#), Benjamin Weinthal, *The Jerusalem Post*, February 29, 2020.

⁴² ["EU settlement labeling is 'a win for BDS,' Herzog tells Hollande"](#), *Times of Israel*, January 22, 2016.

⁴³ ["Israel strongly rejects ECJ ruling"](#), *Israeli Ministry of Foreign Affairs*, November 12, 2019.

told the Knesset “the labeling of products is a certain symptom of delegitimization.”⁴⁴ However, the delegitimization relates to Israeli activities in the territories, not within the 1967 borderlines. While the BDS movement takes advantage of the differentiation policy for its own purposes, the EU emphasizes its rejection of the BDS movement and makes clear that the differentiation policy is based on international law and respects the legitimacy of the State of Israel within the 1967 borders, whereas the BDS goal is to undermine this position.

In fact, failure by Israeli representatives to underscore the distinction between the policies of differentiation and BDS, and to adapt their responses fittingly and separately to each one, countervails the Israeli interest of enfeebling the greatest threat, which is the BDS movement. Israel could even be serving the BDS movement policy when it seeks to blur the Green Line, and its representatives claim that occupied territories are just like sovereign Israel. The differentiation policy only boycotts the settlements. If Israeli representatives insist the settlements and Israel are one, a boycott of the settlements could turn into a boycott of Israel in its entirety.

The EU's differentiation policy, which seeks to maintain trade agreements beneficial to Israel in adherence to international law and Europe's consumer protection regulation, is significantly different from the BDS policy that seeks the imposition of boycotts and sanctions against Israel. The differentiation policy makes use of economic preferences as an incentive for Israel's return to the negotiating table, as reflected in the EU's offer of upgraded relations with Israel to the level of a “Special Privileged Partnership” once an Israeli-Palestinian peace agreement is achieved.⁴⁵ The EU's differentiation policy contains an element of normative condemnation of the settlements, but it does not delegitimize the State of Israel. For the time being, the economic consequences of both the differentiation and the BDS policies is negligible. However, the aspirations of the BDS movement to bring about a boycott of all of Israel and to undermine its economy comprehensively are far-reaching, and there is growing concern that the movement could create delegitimization and a negative image of Israel.

Whereas the BDS movement is seeking to undermine Israel's economy, some in the EU argue that the differentiation policy could even enable Israel's deeper integration into the EU. Understanding the substantial distinction between differentiation and BDS would enable more positive and beneficial Israeli discourse with the EU along with the relentless campaign against the BDS movement. The same is true against the backdrop of Prime Minister Benjamin Netanyahu's declarations regarding annexation of parts of the territories and inclusion of the issue in the April 2020 coalition agreement. These declarations have already generated sharp condemnation and warnings to Israel, and their implementation in official annexation measures is expected to bolster the BDS movement and perhaps the EU's differentiation policy, as well.

⁴⁴ Uri Blau, “[Inside the Clandestine World of Israel's 'BDS-busting' Ministry](#)”, *Haaretz*, March 26, 2017.

⁴⁵ “[A Special Privileged Partnership with Israel as an Incentive for Israeli-Palestinian Peace](#),” *Mitvim Institute and the Friedrich Ebert Stiftung*, May 2016.