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July 1, 2015

Congressman Peter Roskam  
2246 Rayburn House Office Building  
Washington, DC 20024

Via Facsimile: (202) 225-1166

Dear Congressman Roskam:

I spoke with your office earlier today regarding the State Department's position on certain anti-boycott provisions of the recently enacted Trade Promotion Authority legislation. This letter is to follow up on that conversation.

As I mentioned to your office staff, the State Department has disclaimed the provisions of the Trade Promotion Authority that relate to boycotts focused on certain territories under Israeli control.

The following is from the State Department's Press Office, dated June 30, 2015:

*[B]y conflating Israel and "Israeli-controlled territories," a provision of the Trade Promotion Authority legislation runs counter to longstanding U.S. policy towards the occupied territories, including with regard to settlement activity. Every U.S. administration since 1967 – Democrat and Republican alike – has opposed Israeli settlement activity beyond the 1967 lines. This Administration is no different. The U.S. government has never defended or supported Israeli settlements and activity associated with them and, by extension, does not pursue policies or activities that would legitimize them.*

Your office indicated that the inclusion of language on boycotts that originated in your bill, "The United States-Israel Trade and Commercial Enhancement Act" (H.R. 825), later adopted in the House of Representatives' and Senate's versions of the Trade Promotion Authority bills, was a condition to your support of the Trade Promotion Authority legislation.

Your bill clearly made no distinctions between boycotts of commercial activity within the borders of the State of Israel and boycotts of commercial activity in territories under the control of Israel; in fact, your bill explicitly defined prohibited boycotts as follows:

*[t]he term "boycott, divestment from, and sanctions against Israel" means actions by states, non-member states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to*

*penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories.*

The final text of the Trade Promotion Authority law had a definition that is substantially similar to your bill's definition:

*[the] term "actions to boycott, divest from, or sanction Israel" means actions by states, non-member states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories.*

Your bill was introduced with enumerated policy statements opposing what is known as the "BDS Movement" and your public statement upon the signing of the Trade Promotion Authority legislation by President Obama reiterated this objective. To wit, you noted that

*[The Trade Promotion Authority legislation] is an historic milestone in the fight against Israel's enemies, as American opposition to insidious efforts to demonize and isolate the Jewish state is now the law of the land. The bipartisan bill enacted today conditions any free trade agreement with the European Union on its rejection of BDS.*

Thus, it is difficult to reconcile the State Department's rejection of the unambiguous language of the law and the clearly expressed intent of Congress in approving the legislation.

With great appreciation for your work in creating legislation to counter the BDS Movement's attacks on commercial relations with an important and longstanding American ally and BDS attempts to hijack the conduct of American foreign policy, I ask for your position on the State Department's repudiation of that part of the Trade Promotion Authority's anti-boycott provisions that relate to Israeli controlled territories.

While the State Department's role in enforcing anti-boycott provisions of the Trade Promotion Act is unclear (to be charitable), we are all aware of the expansive role this administration has claimed in having "prosecutorial discretion" with regard to non-enforcement of laws (or elements of laws) that are not in line with the President's agenda. There is a very real possibility that the Executive branch may take action that undermines parts or all of the anti-boycott provisions of the Trade Promotion Authority law, even if the law grants that branch no such authority.

Furthermore, since the State Department put Congress on notice that the Executive branch rejects parts of the anti-boycott provisions of the Trade Promotion Authority, can you clarify how this will affect Congressional action on related legislation still under debate, such as the Trans-Pacific Partnership, the Transatlantic Trade and Investment Partnership, and the Trade in Services Agreement? As a recent Congressional Research Service report noted,

*Technically, [Trade Promotion Authority] is not necessary to begin or even conclude trade negotiations, but it is widely understood to be a key element of defining congressional authority, and of passing trade agreement implementing legislation. Therefore, its renewal can*

*be construed as signaling serious congressional support for moving ahead with trade negotiations. Addressing congressional concerns over the definition and operation of [Trade Promotion Authority] may be a central part of the debate.<sup>1</sup>*

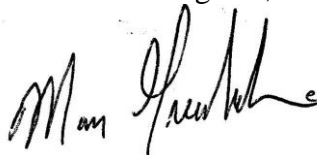
If the State Department's repudiation of certain anti-boycott provisions of the Trade Promotion Authority stands, it would seem that you, and other members of Congress, have several avenues of recourse.

First, you could condition any Congressional approval of the Trans-Pacific Partnership, Transatlantic Trade and Investment Partnership and Trade in Services Agreement on the Executive branch (i) reversing its repudiation of the anti-boycott provisions relating to Israeli controlled territories and (ii) rejecting all elements of the BDS Movement as an impermissible interference with US commercial relations and US foreign policy.<sup>2</sup>

Second, since the Trade Promotion Authority only obligates Congress to undertake an expedited up or down vote on trade agreements presented by the President, you (and other members of Congress) will continue to have the power to vote down any and all trade agreements presented under Trade Promotion Authority for so long as the Executive branch refuses to execute (or otherwise interferes with) the anti-boycott provisions thereof. Making it clear to President Obama that Congress will hold up any and all trade agreements if he obstructs the anti-boycott provisions of the law would be a powerful, effective and ongoing check on any Executive branch attempts to legitimize anti-Israel boycotts.

Again, thanks to you and your office for the important work on protecting our commercial and foreign policy interests and I look forward to hearing your response.

Best regards,



Marc A. Greendorfer

Cc: Senator Ben Cardin  
Senator Rob Portman  
Representative Juan Vargas

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<sup>1</sup> Ian F. Ferguson, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, Congressional Research Service (June 15, 2015) 7-5700, RL33743, available at <https://fas.org/sgp/crs/misc/RL33743.pdf>.

<sup>2</sup> My paper, "The BDS Movement: That Which We Call a Foreign Boycott, by Any Other Name, Is Still Illegal" includes a detailed legal discussion of these points. You can download a copy of the paper at <http://papers.ssrn.com/abstract=2531130>. In this vein, while the State Department's noted that US policy has never sought to legitimize Israeli settlement activity, US policy has also clearly rejected any foreign intervention in shaping and implementing foreign policy goals. So while the US may not approve of settlement activity, it also doesn't approve of foreign boycotts against Israel. The State Department's new position, however, upends this longstanding doctrine by implicitly approving of BDS activity that is directed at Israeli controlled territory. Since BDS, as a movement, is committed to the destruction of Israel and doesn't differentiate between Israel and the territories, anything that supports BDS has the effect of supporting attacks on Israel's right to exist as a state.