



PMB Briefing Paper

Control of Economic Activity (Occupied Territories) Bill 2018 (PMB)

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Abstract

This Briefing Paper examines provisions contained in the *Control of Economic Activity (Occupied Territories) Bill 2018 (PMB)*, in advance of Pre-Committee Stage Scrutiny (PCSS) of the Bill by the Select Committee on Foreign Affairs and Trade. This Bill proposes to make it an offence for a person to import or sell goods or services originating in an occupied territory or to extract resources from an occupied territory in certain circumstances; and to provide for related matters.

Contents/Abbreviation/Glossary.....	1
Summary	2
Introduction.....	4
Key Issues/Areas for Discussion.....	5
Introduction and the main provisions of the Bill	7
Policy arguments in favour of and against this Bill.....	10
Government response to the Bill.....	12
Policy Implications of the Bill.....	14
Sanctions as a policy instrument (and international comparators)	14
Economic, Social and Environmental Impacts	16
Legal	24
Alternative Approaches.....	27
Further Reading.....	28

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This Briefing Paper has been commissioned by the Oireachtas Library & Research Service to assist members in their consideration of the Control of Economic Activity (Occupied Territories) Bill 2018 [PMB]. The authors of the paper are: John Spicer and Abdul Malik of Europe Economics, and Mirja Gutheil, Quentin Liger and Harry Heyburn of Optimity Advisors.

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Abbreviation/Glossary

EU	European Union
Green Line	The de facto border of the State of Israel before the 1967 war (also referred to as the 1967 border or the 1949 Armistice border). It does not include East Jerusalem, the Golan Heights, the Gaza strip or the West Bank.
Occupied territories	The definition provided in the Bill considers the following as occupied territories: a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been confirmed as such in a decision or advisory opinion of the International Court of Justice, the International Criminal Court, an international tribunal, designated as such for the purposes of this Act in a regulation made by the Minister for Foreign Affairs and Trade
TFEU	Treaty on the Functioning of the European Union
UN Security Council Resolution 446	Concerning the issue of Israeli settlements in the "Arab territories occupied by Israel since 1967, including Jerusalem"
UN Security Council Resolution 2334	Concerning the Israeli settlements in "Palestinian territories occupied since 1967, including East Jerusalem"

Summary

- The *Control of Economic Activity (Occupied Territories) Bill 2018* was introduced by Senators Frances Black, Alice-Mary Higgins, Lynn Ruane, Colette Kelleher, John G. Dolan, Grace O'Sullivan and David Norris. The Bill was presented in the House on 24 January 2018 (Seanad first stage). The Bill underwent second stage debate in the Dáil on 5 December 2018.
- The overall aim of the Bill is to disincentivise illegal settlement expansion by ending economic support (through the trade of settlement goods) to states which are in breach of international humanitarian law with regard to their occupation of another state.
- The Bill's geographical scope includes the Palestinian and Syrian territories occupied by the State of Israel; while other occupied territories are either clearly out of scope or unclear.
- The Bill is in line with UN Security Council Resolution 2334, which calls upon all states, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.
- The Bill is supported by Palestinian leaders, Amnesty International and the International Federation for Human Rights.
- The Bill has broad political support. The Government agrees with its intention and spirit despite opposing it.
- The Bill has been condemned by Israeli Government officials.
- The Government has chosen to oppose the Bill as it does not believe it is compatible with EU law and therefore will not achieve its aim of disincentivising illegal settlement expansion.
- The Government's opposition to the Bill rests on three key issues
 - Legal: the Bill could violate European Law, as issues of international trade fall under the common commercial policy of the EU.
 - Political: The Bill could undermine Ireland's diplomatic relations with both the United States (US) and Israel.
 - Practical: The impact of the Bill may be broad, however, the Bill is expected to have very little direct financial impact and is therefore unnecessary.
- The Government believes the most effective course of action with regard to occupied territories is to work to find a solution at the EU level.
- The proposals under this Bill may have legal, environmental, economic and social implications.
- The direct economic impact of the Bill is unlikely to be important given the limited size of imports from settlement territories (estimated between € 1 million and € 1.5 million); It is likely that the State of Israel would impose retaliatory measures which would have a larger impact (Ireland imported € 77.4 million and exported € 268 million worth of goods from and to Israel in 2017).
- The largest potential negative impact of the Bill would be retaliation by the US. It is unclear whether this would materialise, but if they were to, the impact on the Irish economy would be important.
- There is uncertainty as to whether the Bill goes against EU rules on trade or could be covered by exemptions on the ground of public policy as per article 36 Treaty on the Functioning of the EU (TFEU). Case law clarifies some concepts but does not provide a clear answer.
- There is uncertainty as to the effectiveness of the Bill in achieving its policy objectives. It is generally accepted that sanctions and divestment played a role in the end of the Apartheid

regime in South Africa. However, as these sanctions were driven by the US, they had an important economic impact.

- At the international level, some measures targeting occupied territories have been introduced in Denmark and Chile, although their impact is uncertain. Furthermore, some local authorities have introduced boycotts of occupied territories but their impact is uncertain.

Introduction

This Briefing Paper is divided into seven sections as follows:

Section 1: Key issues / areas for consideration;

Section 2: Main provisions / principal elements of the Bill;

Section 3: Policy arguments in favour of and against this Bill;

Section 4: Policy implications (environmental, economic, social and legal);

Section 5: Alternative approaches / initiatives; and

Section 6: Further reading.

The key issues identified in this Briefing Paper (Section 1) are intended to provide Members, and particularly the Members of the Select Committee on Foreign Affairs and Trade, with a range of possible issues, set in context.

Key Issues/Areas for Discussion

This section sets out a list of possible issues that require clarification or further examination as identified by the authors of this paper. It must be stressed that the identification of these key issues, based on published secondary sources, is not intended to be prescriptive. By highlighting prominent key issues within this paper, the objective is to add value and facilitate efficient and effective scrutiny by providing the Committee with a reference point to aid their deliberations when conducting their detailed scrutiny of this Private Members' Bill.

Text Box 1: Key issues / areas for discussion on the Control of Economic Activity (Occupied Territories) Bill

Key Issue 1: legality of the Bill

The legality of the Bill has been questioned with regards EU law :

Competence for international trade falls under the common commercial policy of the European Union (EU). Under Article 3 of the Treaty on the Functioning of the European Union, TFEU, the common commercial policy is an exclusive competence of the Union. Passing the Bill could therefore be deemed contrary to European Law.

Article 36 TFEU provides for exceptions where it can be justified on the basis of "*public policy [...]; the protection of health and life of humans*". Member states could be entitled to seek derogations to Article 3 TFEU when it serves a fundamental interest of that state, such as ensuring respect for international humanitarian law or domestic laws.

The advice of the Attorney General is that this argument is not well founded, and that the Court of Justice of the European Union interprets such unilateral restrictions on trade imposed by member states very narrowly.¹

Key Issue 2: Geo-political considerations

Ireland's Influence in the Middle East peace process

Passing the Bill could remove Ireland's objectivity in discussions on the peace process in the Middle East, as well as undermine the influence of the Irish Government in direct interaction with the Israeli Government.

Relationship with the US and Israel

The Bill could undermine economic and diplomatic links to both the US and Israel. Israel has been outspoken in its criticism of any measures taken against the occupied territories. Some form of response by Israel or the US is a possibility.

¹ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

Key Issue 3: Practical considerations

Little Direct economic impact

The direct economic impact the Bill will have on the Occupied Territories will be relatively small, currently Ireland imports between €1 million and €1.5 million from West Bank settlements annually. Imports from the settlements are mainly agricultural goods. Israel's annual exports to Ireland were € 77.4 million in 2017.

The single Market for goods and services

There are implementation issues with regard to the single market for goods and services. EU labelling requirements are only applicable to some goods. Additionally, many of the goods come into Ireland from other EU countries. They make their way from the settlements, into other EU countries and come into Ireland that way. They are multinational sourced goods and this makes identifying place of origin more challenging.

Defining an Occupied Territory

The Bill will apply by default to territories in respect of which there is clear international consensus on the status of an occupation as outlined in the judgments of international courts, including the ICJ and ICC².

Key Issue 4: Are sanctions an effective policy instrument given the objectives of the proponents of this Bill ?

Historical examples

The most famous use of control of economic activities, which have inspired the Boycott, Divestment, Solidarity (BDS) movement, is the campaign of economic sanctions against Apartheid South Africa. In the US, the movement, initiated in the early 1960s, gained momentum in the 1980s. It ultimately led to the Comprehensive Anti-Apartheid Act of 1986 which imposed economic, political, and social sanctions. The full impact of the Act in the end of the Apartheid regime is unknown, however, it is generally accepted to have played a role.

While it is unlikely that sanction will have a direct impact on the achievement of the policy objectives, a number of NGOs emphasise how passing such a Bill in one country could have a domino effect and will enhance the likelihood of the objectives being achieved.

² Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

Introduction and the main provisions of the Bill

The *Control of Economic Activity (Occupied Territories) Bill 2018* was introduced by Senators Frances Black, Alice-Mary Higgins, Lynn Ruane, Colette Kelleher, John G. Dolan, Grace O'Sullivan and David Norris, on 24 January 2018³. The purpose of the legislation is to prohibit the import or sale of a good or service originating in an occupied territory or to extract resources from an occupied territory in certain circumstances.

An occupied territory is defined in the Bill as a territory which is occupied within the meaning of the Fourth Geneva Convention, and which has been:

- Confirmed as such in a decision or advisory opinion of the International Court of Justice,
- Confirmed as such in a decision of the International Criminal Court,
- Confirmed as such in a decision of an international tribunal, or
- Designated as such for the purposes of this Act in a regulation made by the Minister for Foreign Affairs and Trade.

If the Bill is passed, the Minister for Foreign Affairs and Trade will be required to publish on the internet and maintain a list of all territories for the time being constituting a relevant occupied territory.⁴

The substantive elements of the proposed legislation are summarised below:

Table 1: Main provisions of the Bill (summary)

Part	Heading	Detail (Summary)
Part 1	Preliminary and general	This part provides definitions of key concepts used in the Bill (such as 'occupied territories') as well as mechanisms for ministers to make regulations to enable the provisions of the Bill to have full effect
Part 2	Settlement Goods, Services and Natural Resources	This part provides (i) the extra-territorial scope of the Bill, (ii) a full list of economic activities within the scope of the Bill, i.e.: <ul style="list-style-type: none"> - the importation of settlement goods; - the sale of settlement goods; - the provision of a settlement service; - the extraction resources from a relevant occupied territory
Part 3	Penalties and Defences	This part sets out: <ul style="list-style-type: none"> (i) the penalties for parties found guilty of being in breach of the provisions of the Bill; and (ii) the receivable arguments a person charged with an offence relating to the Bill can use as defence.

³ House of Oireachtas, Control of Economic Activity (Occupied Territories) Bill 2018.

⁴ House of Oireachtas, Control of Economic Activity (Occupied Territories) Bill 2018.

The Bill contains one substantive section which is to make it a criminal offence for an Irish Citizen (or citizen ordinarily resident in the state), a company (incorporated under the Companies Act 2014 or an unincorporated body whose center of control is exercised in Ireland):

- to import or attempt to import goods from;
- to sell or attempt to sell settlement goods to;
- to provide a service, or assist another person to provide a service, in;
- to engage, or attempt to engage in, or assist another person to engage in, the extraction of resources from an occupied territory or its associated territorial waters.

The Minister for Foreign Affairs and Trade must prepare and maintain an up to date list of occupied territories within the scope of the Bill as defined in Section 2. Certain territories would, at present, fall within the scope of the Bill, others are clearly excluded, while the status of a third category of territories is unclear. The bullet points below provide a list of territories which are currently occupied according to Article 42 of the 1907 Hague Regulations⁵⁶

- Israeli-occupied Palestinian (the Gaza strip, East Jerusalem and the West Bank) and Syrian (the Golan Heights) territories are **clearly under the scope of the definition**;
- Other military occupied territories are clearly **not within the scope of the Bill**, such as territories annexed or “occupied by an armed group under the influence of a foreign power”⁷; namely Russia as is the case in Ukraine (the Donetsk-Luhansk region and the annexed Crimean peninsula), Georgia (South Ossetia and Abkhazia), Moldova (Transnistria), Armenia as is the case in Azerbaijan (Nagorno-Karabakh), or Turkey as is the case in Cyprus (Northern Cyprus).
- Finally, the case of Western Sahara, a territory occupied by Morocco **is unclear**, in particular due to the disputed *International Court of Justice Advisory Opinion on Western Sahara*⁸. While Moroccan news outlets have reported the Kingdom’s Government view that the territory would be outside of the scope of the Bill,⁹ others such as the Global Action Legal Network argue that the Irish Government would have to include the territory within the scope of the Bill.¹⁰

⁵ "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁶ Parts of Syria are currently under occupation by Turkey, although unlike the territories listed below, the situation has not stabilised.

⁷ European Parliament DG EXPO, Occupation/Annexation of a Territory: Respect for International Humanitarian Law and Human Rights and Consistent EU Policy, 2015

⁸ Cour internationale de justice – Sahara Occidental – avis consultatif du 16 octobre 1975.

⁹ See for instance lesiteinfo.com – ‘Le projet de loi irlandais ne concerne pas le Sahara’, 15 July 2018.

¹⁰ GLAN, Irish Seanad (Senate) votes to approve unprecedented Occupied Territories Bill, 11 July 2018.

The geographical scope of regions where the Bill applies may change following future rulings and opinions of international courts. The possibility for debate about whether a territory is an occupied territory or not for the purposes of this Bill exists.

A 'money message' may be required for this Bill to proceed to formal committee stage. Article 17.2 of the Constitution prevents the Dáil from passing resolutions involving the "appropriation of revenue or other public moneys" without a 'money message' from the Government signed by the Taoiseach.

While the Bill does not appear to involve the "appropriation of revenue or other public moneys", a few aspects can potentially have a cost; they include:

- The administrative cost of updating and maintaining a list of occupied territories within the scope of the Bill as defined in Section 2;
- Costs relating to the implementation and enforcement of the Bill; the wording of the Bill is unclear as to where the burden of proof of origin lies and whether costs would be borne by the importing firm or trading authorities.

Policy arguments in favour of and against this Bill

The overall aim of the Bill is to disincentivise illegal settlement expansion by ending economic support (through the trade of settlement goods) to States which are in breach of international humanitarian law with regard to their occupation of another state.

The Bill does not represent a boycott of Israel or a ban on Israeli products, although the territories occupied by the State of Israel would be in the scope of the Bill.

In 2015, the European Commission issued new guidelines for the labelling of some products made in Israeli settlements on occupied land¹¹. These measures seek to incentivise change through a campaign of information, underpinned by the assumption that more informed consumers will make equitable choices when it comes to purchasing settlement goods.

Additionally, in 2016, the UN adopted Security Council Resolution 2334¹², which called upon all States, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.

The sponsors of the Bill suggest that these measures although useful, do not go far enough to achieve the objectives of disincentivising illegal settlement expansion.

Since the adoption of UN Security Council Resolution 2334, rather than “immediately and completely ceasing all settlement activities in the occupied Palestinian territory, including East Jerusalem, and fully respecting all of its legal obligations” the state of Israel has continued its settlement of Palestinian territory, with the Israeli Government approving the construction of the first new settlement in 20 years¹³. This “flagrant violation of international law” the Bill sponsors suggest, is proof that the current measures are not sufficient and that the actions laid out in this Bill represent a logical next step¹⁴.

The direct effects of introducing the Bill is unlikely to bring about significant change due to the relative size of Irish imports of settlement goods vis-à-vis Israeli export revenue (see data in Table 1, Section on the Implications of the Bill below). However the key to success for this Bill will lie in its ability to engage other EU and Third country states in similar unilateral action, or to spur collective action at the EU or international level. In this sense the Bill is largely symbolic in nature and if it is to achieve its stated aim it will require support from other nation states, an outcome which is outside the direct control of the Irish Government. However, if the Bill is to overcome its most fundamental obstacle---its legality at the European level--- it will set a precedence clearing the way for other member states to pursue similar measures should they so wish, with a reduced risk of violating EU law.

¹¹ European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967.

¹² United Nations security Council, Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016

¹³ United Nations security Council, Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016

¹⁴ United Nations security Council, Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016

The proposals included in this Bill do have environmental, economic, social and legal implications, as detailed in this Paper.

On 30 January 2018, during second stage debate, the sponsors put forward their arguments for proposing the Bill, including reference to Irish, EU and World Trade Organisation (WTO) rules, the fourth Geneva Convention and judgments from the international court of justice and the international criminal court¹⁵.

Key points included:

- Central to the Bill is a desire to respect international humanitarian law and human rights.
- It is a chance for Ireland to state strongly that it does not support the illegal confiscation of land and the human suffering which inevitably results.
- International law is clear that the type of settlements targeted by the Bill violate the prohibition of the fourth Geneva Convention on the transfer of civilian populations into occupied territories and constitute a war crime. By extension they also break domestic Irish Law.
- As international law is clear that the settlements are illegal, the goods they produce are, in effect, the proceeds of crime.
- The most high profile and modern example of this issue is the Israeli settlement of the Palestinian West Bank:
 - This settlement has been condemned repeatedly by the EU, UN, and Irish Government, International. For example through UN security council resolution 2334 and 446¹⁶.
 - Ireland and its EU partners, state that the West Bank, including east Jerusalem, Gaza and the Golan Heights, are territories which have been occupied by Israel since 1967, and that they are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution to the conflict impossible.
 - The construction of illegal settlements has seen extreme water shortages, lack of electricity, restrictions on movement, house demolitions and land confiscation.
 - The Bill makes the same distinction the EU makes between goods from Israel and goods from illegal settlements beyond its borders.
- The Bill provides for the option to go beyond this but only where there is agreement between the Minister and both Houses of the Oireachtas.
- In 2012, the Oireachtas Joint Committee on Foreign Affairs and Trade, with members from across all political parties, called for such a move on the basis that it could have a strong and effective impact on suffering in the region.
- At the EU level, the issue, may be at a point of paralysis. The Tánaiste and Minister for Foreign Affairs and Trade have stated that there is no prospect of co-ordinated EU action.

Sponsors also highlight that the Bill is part of the Irish people' history of bringing about real change through boycotts. In 1984 workers from Dunnes Stores went on strike, refusing to handle South African products in protest of the apartheid policies in place in South Africa at the time.¹⁷ The protest drew huge public support and in 1987 the Irish Government banned the import of South

¹⁵ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

¹⁶ United Nations security Council, Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016; United Nations security Council, Resolution 446 (1979).

¹⁷ The Irish Times, How 11 striking Irish workers helped to fight apartheid, 6 December 2013

African goods, becoming the first western government to impose a complete ban on South African Products.

The Bill has been endorsed by NGOs including Amnesty international and The International Federation for Human Rights (FIDH).¹⁸

Government response to the Bill

On 30 January, Minister for Foreign Affairs and Trade (Deputy Simon Coveney) detailed the Government response to the Bill¹⁹. While clearly understanding the motivation and intentions of the proponents of the Bill, the Government opposes the Bill for the following stated reasons:

1. The Bill is contrary to EU law and requires the State to do something which is not in its power;
2. The Bill would create real difficulties for business in Ireland and for Irish businesses in the United States, which could find themselves placed between incompatible legislative demands;
3. The Bill would marginalise and reduce Ireland's ability to positively impact the peace process in this region;
4. The Government does not believe the Bill would have any significant effect on ending the Israeli settlement project;

The key points from Minister Coveney's address are outlined below:

- The Government has consistently and repeatedly condemned the construction and expansion of settlements and that the Irish authorities have conveyed these concerns to the Israeli authorities at the highest level, and highlighted them in interventions at EU, UN and in other international fora.
- The Government is going to oppose the Bill because Ireland has supported, and will continue to support, action at EU level which differentiates between settlements and Israel.
- Issues of international trade fall under the common commercial policy of the EU. Under Article 3 of the TFEU, the common commercial policy is an exclusive competence of the Union. The argument that a public policy exception could apply to this Bill may not be well founded, as the Court of Justice of the European Union may interpret such unilateral restrictions on trade imposed by member states very narrowly.
- The legal position is such that no member state has yet taken the step of taking action on a national basis on this issue. This Bill is proposing that Ireland be the first country to do so.
- If a way around the legal and practical challenges were found, and the Bill were adopted, the direct impact on settlements would be minimal.
- At this critical moment in the Middle East peace process, it could undermine the impact the Irish Government might have in its direct interaction with the Israeli Government.
- Ireland has its greatest impact of all on foreign policy when it acts in concert with others. Working with our EU partners may allow Ireland to magnify its influence.

¹⁸ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

¹⁹ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

- The Government may wish to avoid adding to the polarisation on either side of the Atlantic on this issue. The perception is that the EU is supporting Palestinians and the US is supporting Israelis. The Government should be concerned with closing this gap, and not widening it.
- Successive Irish Governments have opposed boycotts of Israel. The Government disagrees with those activists advocating a policy of boycott, divestment and sanctions.
- The Government believes that such actions are counterproductive, and that they do not help increase understanding in Israel of why the international community has such a concern about occupation²⁰.

The evidence base for the arguments presented in favour of and against the proposals in this Bill are teased out in the Section below, 'Policy Implications of the Bill'.

²⁰ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

Policy Implications of the Bill

There is considerable uncertainty about the policy implications of the Bill, since it will largely depend on the response of the international community. Possible implications are discussed under two headings (a) the usefulness of sanctions as a policy instrument, (b) Economic, Social and Environmental implications and (c) Legal implications.

Sanctions as a policy instrument (and international comparators)

Central to the rationale behind this Bill is the proposition that ending economic support (through the trade of settlement goods) to states which are in breach of international humanitarian law with regard to their occupation of another state, will directly or indirectly affect the behaviour of the occupying State.

Economic sanctions are an integral part of international relations, from a demand side they largely exist in the form of tariffs, quotas or boycotts. Economic sanctions became increasingly popular as a tool of foreign policy after the end of the Cold War.²¹ The aim of economic sanctions is to effectively enforce international norms and prevent conflict without the use of military force. However in the 1990's when UN economic sanctions failed to stop conflicts in the former Yugoslavia, Somalia, Liberia, and Rwanda, the use of economic sanctions was criticised as ineffective and possibly counterproductive, in part due to their ability to strengthen support for authoritarian regimes by stoking up nationalism.²²

However, a more recent move toward so called 'smart' or 'targeted' sanctions, addressing specific industries within a state have proved popular. The theory of smart sanctions acknowledges that boycotts, tariffs or quotas alone do not represent a comprehensive solution to the problem at hand.²³

Banning imports from occupied territories – Existing legislation at country level

This Bill is believed to be the first national bill which would ban the import of goods from occupied territories, however some countries have been found to target occupied territories.

Action is beginning to be taken at the international level following UN Security Council Resolution 2334. This resolution obliges states to refrain from any action that would constitute recognition of Israel's illegal extension of sovereignty into Palestinian land and calls on states to differentiate in their dealings between Israel and occupied Palestinian territory.²⁴ Examples where law makers have taken action in this area include Denmark and Chile.

²¹ Garfield Richard, Economic Sanctions, Humanitarianism, and Conflict After the Cold War. Social Justice, Vol. 29, No. 3 (89), Global Threats To Security (2002), pp. 94-107.

²² Pape Robert, Why Economic Sanctions Do Not Work, The MIT Press, International Security Vol. 22, No. 2 (Fall, 1997), pp. 90-136.

²³ Cortright David, Lopez George, Smart Sanctions: Targeting Economic Statecraft, Rowman and Littlefield Publishers, UK.

²⁴ United Nations security Council, Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016;

Denmark

In January 2018, the Danish parliament voted to exclude Israeli settlements in the West Bank from bilateral agreements with Israel.²⁵ Additionally it has decided to strengthen Government guidelines against investing in projects in the West Bank by both public and private bodies. The resolution expresses support for a list of Israeli companies operating in the territories. The list is being formulated by the UN High Commissioner for Human Rights. It is unclear whether the measure is currently being applied.

Chile

The resolution approved in Chile in November 2018 includes a demand from the Government to examine all agreements signed with Israel, in order to ensure they only cover territories within the Green Line. The second clause requests that the Chilean Foreign Service ensure that future agreements relate to territories within Israel.²⁶

It was also decided to give guidelines to Chilean citizens visiting or doing business in Israel, so that they understand the historical context and "not support colonization or cooperate with human rights violations in the occupied territories"²⁷.

Finally, the resolution calls for the creation of a so-called mechanism to forbid imports of products made in settlements.

The resolution adopted is non-binding.²⁸

Boycotts from occupied territories – Comparison at local level

A number of instances have been found where boycotts have been organised at local (regional or municipal level). For reasons of competency, those measures do not ban the trade of goods and services with occupied territories.

In 2015, the Icelandic capital of Reykjavik passed a resolution boycotting all Israeli-made goods. Following pressure from Israel, including criticism from Israel's foreign minister, the proposal was amended to indicate that the Council will only be boycotting those goods produced in occupied areas.

In November and December 2016, the Norwegian municipalities of Trondheim and Tromsø voted to introduce a boycott of Israeli goods and services produced in Palestinian territory occupied since 1967. Although three right-wing opposition parties filed official complaints, a review by the Norwegian foreign ministry has concluded that boycotts of goods and services from Israeli settlements are legal under the country's laws. This could pave the way for similar resolutions in other municipalities.

²⁵ See for example *Haaretz*, 'In Landslide Vote, Denmark Excludes Settlements From Agreements With Israel' 26 January 2018.

²⁶ National Congress of Chile.

²⁷ National Congress of Chile.

²⁸ <http://www.inss.org.il/publication/decisions-ireland-chile-ban-products-settlements/>

Other initiatives

The UN's Office of the High Commissioner for Human Rights is creating a database to publish the names of companies doing business in the occupied territories.²⁹ It has noted that 206 companies are alleged to be doing business in the settlements, but is yet to list them.³⁰ In November 2018, Airbnb, one of the companies known to be carrying out business in the settlements announced that it will remove from its listings of all homes in Israeli settlements in the occupied West Bank, adding that the company unequivocally rejects the Boycott, Divestment and Sanctions (BDS) movement, which urges wide-ranging economic measures to protest against the decades-long Israeli occupation of Palestinian territories.³¹

Economic, Social and Environmental Impacts

Ireland's trade with Israeli-occupied territories is relatively small (circa. €1 million - € 1.5 million per annum). However, it is possible that the Bill breaches European law and will leave Ireland subject to fines. Moreover, it may attract economic or other sanctions from Israel, the US or some US states.

It is difficult to determine the exact volume of exports from the occupied territories to the EU or Ireland because trade data for settlements are not separated from Israeli trade data. Trade data are available for territories under the control of the Palestinian National Authority, or for the State of Israel. However, data for the territories which are under *de facto* Israeli sovereignty while being part of the occupied territories (settlement exports) are not disaggregated from Israeli trade data.

In 2012, the Israeli Ministry of Foreign Affairs informed the World Bank that settlement exports to the EU amounted to € 230 Million, approximately 2% of total Israeli exports to the EU.³² Assuming this figure is correct, the table below provides the estimated value of imports from the State of Israel as a whole and from settlements in occupied territories.

Table 1: Value of imports to Ireland from Israel and settlements in occupied territories, 2013-2017³³

Year	2013	2014	2015	2016	2017
Israel	€ 127,685,842	€ 96,905,919	€ 168,228,946	€ 88,405,617	€ 77,491,300
Settlement territories ³⁴	€ 2,553,717	€ 1,938,118	€ 3,364,579	€ 1,768,112	€ 1,549,826

The difficulties in assessing the value of exports from the settlement territories also apply to the types of goods exported. According to research undertaken by a coalition of NGOs, the most common types of product imported from the occupied territories into Europe are agricultural goods. These include dates, grapes, peppers, fresh herbs, cut flowers, avocados, citrus fruits, tomatoes,

²⁹ Business and human rights Resource Center, UN creates database of companies operating in Israeli settlements in occupied West Bank & East Jerusalem.

³⁰ United nations Office of the High Commissioner for Human Rights, UN rights office issues report on business and human rights in settlements in the occupied Palestinian territory

³¹ Airbnb press room, Listings in disputed regions, November 2018.

³² International federation of Human rights, Trading Away Peace: How Europe helps sustain illegal Israeli settlements, 2012.

³³ Eurostat, Comext data available at <http://epp.eurostat.ec.europa.eu/newxtweb/>

³⁴ Data calculated as 2% of imports from Israel.

aubergines, cucumbers and potatoes³⁵. These products are most likely to be found in the Irish stores during winter months when they are out of season in Europe.

Retaliatory sanctions from the State of Israel are very likely. This will likely have an impact on Ireland's trade relationship with Israel. According to the World Bank, Ireland imports around \$70 million from Israel, with machinery and Electronics accounting for almost 40% of the value of those imports.

Table 2: Main imports from Israel to Ireland (2017) ³⁶

Product Group	Import (US\$ Thousand)	Import Product Share (%)
Machinery and Electronics	27,756.71	39.73
Chemicals	8,186.09	11.72
Plastic or Rubber	6,177.58	8.84
Vegetable	4,100.01	5.87
Metals	3,224.4	4.62
Stone and Glass	2,994.84	4.29
Food Products	2,887.37	4.13
Transportation	2,487.31	3.56
Textiles and Clothing	2,371.35	3.39
Wood	495.18	0.71
Minerals	283.29	0.41
Hides and Skins	102.32	0.15
Animal	99.93	0.14
Footwear	5.49	0.01
Fuels	0.24	0
Miscellaneous	8,686.98	12.44

Sanctions would likely also have a larger impact on Ireland's exports to Israel which totalled over \$305 million in 2017. This is likely to affect mainly the chemical industry which accounts for almost half of the total value of Irish exports to Israel (46.8%).

³⁵ Ibid.

³⁶ World Bank data available at <https://wits.worldbank.org/CountryProfile/en/Country/IRL/Year/2017/TradeFlow/EXPIMP/Partner/ISR/Product/All-Groups#>

Table 3: Main Exports from Ireland to Israel (2017) ³⁷

Product Group	Export (US\$ Thousand)	Export Product Share (%)
Chemicals	142,988.37	46.83
Machinery and Electronics	96,700.48	31.67
Food Products	31,844.12	10.43
Plastic or Rubber	7,666.01	2.51
Animal	3,177.82	1.04
Textiles and Clothing	2,291.16	0.75
Metals	1,956.45	0.64
Fuels	1,637.74	0.54
Wood	1,123.92	0.37
Transportation	850.84	0.28
Stone and Glass	592.92	0.19
Vegetable	405.67	0.13
Footwear	19.81	0.01
Hides and Skins	31.36	0.01
Minerals	0.01	0
Miscellaneous	14,031.5	4.6

Any form of sanction by the Government of the US may have a serious negative impact on the Irish economy. There are over 700 US-owned businesses operating in Ireland directly employing 155,000 people, and supporting a further 100,000 employees.³⁸ This accounts for approximately 20% of employment in Ireland.³⁹ In 2018 Ireland exported \$52,891 million worth of goods to the US.⁴⁰ Additionally US investment in 2017 accounted for 67% of all foreign direct investment in Ireland.⁴¹ Further, three of Ireland's ten largest companies, in terms of annual turnover, are US businesses, (Apple, Google and Microsoft)⁴².

The Bill could create legal issues for US companies operating in both Ireland and Israel. The US implemented anti-boycott laws in the mid-1970s to prevent national companies from boycotting trade with Israeli companies. At the federal level, the Export Control Reform Act 2018 encompasses the Anti-Boycott Act of 2018.⁴³ The aim of this legislation is to prohibit US companies from implementing other countries' foreign policies when those policies disagree with US policy. In addition, at the state level, 26 states have enacted further anti-boycott legislation.⁴⁴

³⁷ World Bank data available at <https://wits.worldbank.org/CountryProfile/en/Country/IRL/Year/2017/TradeFlow/EXPIMP/Partner/ISR/Product/All-Groups#>

³⁸ American Chamber of Commerce Ireland, US-Ireland Relationship, Key Facts.

³⁹ American Chamber of Commerce Ireland, US-Ireland Relationship, Key Facts.

⁴⁰ United States Census Bureau, Trade in Goods with Ireland, 2018.

⁴¹ Central Statistics Office, Statistics, Foreign Direct Investment annual, 2017.

⁴² Irish Times Top 1000 companies

⁴³ 115th US congress, Export Control Reform Act of 2018

⁴⁴ According to the US Campaign for Palestinian Rights, Jewish Voice for Peace, and Palestine Legal pressure groups – see <https://palestinelegal.org/righttoboycott>.

Initial research has not allowed the identification of any examples of actions taken against individual businesses or countries for violating the law by the US or the 26 states. It is therefore impossible at this stage to authoritatively assess the likelihood of economic sanctions imposed by the US or individual states.

Economic

Stakeholder	Detail
Exchequer / Government	<p>Costs</p> <ul style="list-style-type: none"> ▪ Potential fines imposed if Ireland is found to have breached EU laws on trade policy.⁴⁵ ▪ Enforcement Costs. The Bill creates new criminal offences, and will thus have consequent costs resulting from investigation and prosecution of crimes, as well as a possible additional burden on the prison system. There is already a mechanism in place that differentiates between products from Israel and the “occupied territories”.⁴⁶ If that ceases to be appropriate for Irish law enforcement purposes, or other disputed areas are classified as “occupied territories”, then there may be costs associated with determining the place of origin of a product. ▪ Potential lost tax revenues arising from a fall in trade with occupied territories. This is not likely to be material, unless regions of the world where Irish trade is more significant are reclassified in the future as “occupied territories”. ▪ Potential lost tax revenue arising from a fall in trade with the US. ▪ Potential increase in social security-related costs if fall in US investment leads to increased unemployment levels. The US accounts for 67% of Foreign Direct Investment (FDI) in Ireland.⁴⁷ ▪ If other disputed areas are reclassified as “occupied territories”, there are possible implications for government revenues and costs if other countries adopt policies that hinder their own firms’ trading with Ireland because of Ireland’s sanctions. <p>Benefits</p> <ul style="list-style-type: none"> ▪ Potential for increased trade and investment from jurisdictions where there is strong support for Ireland’s action. This additional trade and investment may increase tax revenues and reduce social security payments (through employment).
Consumers/Public	<p>Costs</p> <ul style="list-style-type: none"> ▪ Higher prices or a reduced range of products because of a ban on imports from occupied territories. Currently, the affected goods would include certain fruits, vegetables

⁴⁵ <https://www.consilium.europa.eu/en/policies/trade-policy/>

⁴⁶ http://www.eeas.europa.eu/archives/delegations/israel/documents/news/20151111_interpretative_notice_in_dication_of_origin_of_goods_en.pdf

⁴⁷ <https://www.amcham.ie/about-us/us-companies-in-ireland/stats-facts.aspx>

Stakeholder	Detail
	<p>and cosmetics (that use minerals from the Dead Sea). The value of goods affected is relatively small. If other disputed territories were to be reclassified as “occupied territories” the impact could be more significant.</p> <ul style="list-style-type: none"> ▪ Potential loss of jobs – US companies employ over 150,000 people in Ireland; these jobs could be at risk if US anti-boycott legislation prompts US companies to exit Ireland.⁴⁸ <p>Benefits</p> <ul style="list-style-type: none"> ▪ This Bill does not seem likely to create any economic benefits to Irish consumers.
Private Companies	<p>Costs</p> <ul style="list-style-type: none"> ▪ Loss of trade with occupied territories. This is not likely to be significant given the current situation, but it is always possible that other disputed areas will be designated “occupied territories” that are economically more important to Ireland. ▪ Possibility of fines from the US authorities and not being allowed to operate in the US.⁴⁹ <p>Benefits</p> <ul style="list-style-type: none"> ▪ Potential increase in demand for Irish products from consumers overseas who oppose Israel’s occupation of Palestine.

⁴⁸ <https://www.amcham.ie/about-us/us-companies-in-ireland/jobs-in-us-companies.aspx>

⁴⁹ <https://www.bis.doc.gov/index.php/enforcement/oac>

Social

Stakeholder	Detail
Exchequer / Government	<p>Costs</p> <ul style="list-style-type: none"> • Could undermine diplomatic relations with both the US and Israel. • As US companies with subsidiaries in Ireland may potentially be violating the anti-boycott provisions of the US Export Administration Regulations.⁵⁰ • As external trade rules are an exclusive competence of the European Union, unilateral action taken by Ireland could undermine the integrity of the single market. This could result in reputational issues for the Irish government at the European Level. • Could undermine relations with the business community, as it places restrictions on their imports.⁵¹ • May be interpreted as partisan, which could degrade Ireland's ability to positively impact peace negotiations in the middle east as an objective mediator in the future.⁵² • Could undermine public trust between the Irish government and specific communities within Ireland. • Could promote smuggling which undermines the authority of the government. <p>Benefits</p> <ul style="list-style-type: none"> ▪ Sends a strong signal of support to Palestinian leaders and the Palestinian communities both within and outside of Palestine. ▪ Ireland would be the first EU member state to take action in this way. This leadership stance could garner respect amongst supporters of a two-state solution. ▪ The ban on imports from the occupied territories, will shift consumer and business demand towards substitute goods produced in other territories or even at home in Ireland. This spill over effect should have a positive effect on other businesses, which as a result, they may view the Irish government more favourably. ▪ Sends a message to governments and people across the globe that Ireland will not sit on its hands when it comes to

⁵⁰ US Bureau of Industry and security, Export Administration Regulations Restrictive Trade Practices or Boycotts, 14 October 2016.

⁵¹ Brookings Institute, Economic Sanctions: Too Much of a Bad Thing, 1 June 1998

⁵² Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

Stakeholder	Detail
	<p>the illegal occupation of territories, this could garner admiration and respect for the moral stance of the Irish government</p>
Consumers/Public	<p>Costs</p> <ul style="list-style-type: none"> • Limits the selection of goods and services available for consumers to purchase, and could, in future cases, drive up the market price of the banned products, if a significant portion of Ireland’s imports of that good were initially imported from an occupied territory⁵³. • May create a market for smuggled goods (goods from occupied territories). Although this market may very likely be small (possibly with no material effect) evidence suggests the proceeds of illegal markets would likely fuel other illicit activities, this would not be conducive to the welfare of the general public. • If US introduced trade sanctions or trade with the US fell, as previously noted this could lead to unemployment. This unemployment has an economic impact with regard to lost income, however there is also an indirect social impact, that is the reduction in quality of life experienced by unemployed individuals. <p>Benefits</p> <ul style="list-style-type: none"> ▪ It may create an intangible benefit to members of the public who support the Irish government introducing sanctions.
Private Companies	<p>Costs</p> <ul style="list-style-type: none"> • Could jeopardise the relationship between Irish businesses and US and Israeli businesses⁵⁴. • Businesses will need to be more diligent in monitoring their supply chain, this has an administrative cost but also places an intangible burden on businesses with regard to compliance. This is best understood as a nuisance cost to businesses. • There is a potential economic gain to be realised by flaunting regulation. This creates perverse incentives, which have the potential to create a hostile business atmosphere (often intangible and largely immeasurable).

⁵³ European Journal of Political Economy, The impact of economic sanctions on international trade: How do threatened sanctions compare with imposed sanctions?, Volume 56, January 2019, Pages 11-26

⁵⁴ US Bureau of Industry and security, Export Administration Regulations Restrictive Trade Practices or Boycotts, 14 October 2016

Stakeholder	Detail
	<p>Benefits</p> <ul style="list-style-type: none"> ▪ Could attract businesses who support the stance of the Irish government. ▪ Could increase demand for Irish products in territories which oppose illegal occupation. ▪ The symbolism could led to an increase in consumer confidence by those who support the government's stance. This would result in a degree of economic growth benefiting business

Environmental

Stakeholder	Detail
Consumers/Public	<p>Costs</p> <ul style="list-style-type: none"> • Goods purchased by Irish consumers as a substitute to goods produced in the occupied territories may have to travel from further afield and could thus have a larger carbon footprint. These goods include dates, grapes, peppers, fresh herbs, cut flowers, avocados, citrus fruits, tomatoes, aubergines, cucumbers and potatoes. <p>Benefits</p> <ul style="list-style-type: none"> • Alternatively, the substitute good may have a smaller carbon footprint, especially if produced locally. For example potatoes, or peppers and tomatoes grown in southern Europe. • The reduced demand for settlement products could slow the rate of expansion of settlement construction on rural lands.

Legal

Issues of international trade fall under the common commercial policy of the EU. Under article 3 of the TFEU, the common commercial policy is an exclusive competence of the Union; article 34 TFEU prohibits restrictions on imports between member states. However, article 36 TFEU limits the reach of article 34 by allowing member states to prohibit or restrict:

“imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however,

constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

The European Court of Justice’s case law provides interpretation as to how these restrictions should be understood. The ‘*cassis de Dijon*’ case, where the court found that in the absence of agreed rules at EU level, goods legally sold in one member state may not be prohibited in another, is the seminal case enshrining the concept of mutual recognition of goods within the EU⁵⁵. Public morality and public policy are the two article 36 restrictions which could be relevant to the Bill.

Case law from the European Court of Justice can be summarised as follows:

- **Public morality** – In *Henn and Darby*, the court found that the UK’s ban on the import of pornographic material was justified as it is up to the country to set the standards of public morality within its own territory⁵⁶. While upholding its previous doctrine with regards public morality, the court subsequently found in *Conegate* that the import of “love dolls” was justified given there was no legislation prohibiting the manufacture or marketing of similar goods in the country⁵⁷. Overall, the court’s jurisprudence shows that while member states are free to determine moral standards within their own territory, they cannot place a greater burden on non-domestically manufactured goods.
- **Public policy and public security** – the relevant cases relating to public policy and public security restrictions are:
 - o *Thompson and others*, where the defendants were accused of illegally minting and melting imported coins. The court found that, while there was an economic justification to the decision, the Treaties only prohibit *certain kinds* of economic justifications. It found that there was a public policy exemption given minting and melting of precious metals could be regarded as involving a fundamental interest of the State.⁵⁸
 - o In *Campus Oil*, the Irish government’s decision to require importers of petroleum products to buy a share of their oil from the Irish National Petroleum Company was found justified by the court as it was deemed reasonable to ensure the viability of a refinery that could meet essential needs in times of crisis⁵⁹.

In both cases, the court’s argument was that the measures did not constitute arbitrary discrimination nor a disguised restriction on trade between member states. Furthermore, the measures were accepted as they reflected concerns that went beyond purely economic ones.

⁵⁵ Judgment of the Court of 20 February 1979. - Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. Measures having an effect equivalent to quantitative restrictions. Case 120/78.

⁵⁶ Judgment of the Court of 14 December 1979. Regina v Maurice Donald Henn and John Frederick Ernest Darby. Reference for a preliminary ruling: House of Lords - United Kingdom. Prohibition on imports - Justification on grounds of public morality - Art. 36 of the Treaty - Pornographic articles. Case 34/79.

⁵⁷ Judgment of the Court (Fourth Chamber) of 11 March 1986. Conegate Limited v HM Customs & Excise. Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. Restrictions on imports - Grounds of public morality. Case 121/85.

⁵⁸ Judgment of the Court of 23 November 1978. Regina v Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss. Reference for a preliminary ruling: Court of Appeal (England) - United Kingdom. Means of payment and movements of capital. Case 7/78.

⁵⁹ Judgment of the Court of 10 July 1984. Campus Oil Limited and others v Minister for Industry and Energy and others. Free movements of goods - Supply of petroleum products. Case 72/83.

However, relevant case law is circumstantial at best, and while it helps define the grounds for restrictions to article 34 TFEU, it generally relates to cases where the restrictions apply to goods produced in the EU. In the absence of specifically relevant case law, it is unclear whether the provisions of the Bill would be covered by the article 36 exemptions.

Alternative Approaches

A number of alternative approaches to the Bill's objective of disincentivising illegal settlement expansion could be considered.

Work towards a solution at EU level

The first one is the approach (laid out by the Minister for Foreign Affairs and Trade (Deputy Simon Coveney) on the 30 January 2018, in his address at the second stage debate) is to work to try and find a solution at the European level, possibly around strengthening labelling guidelines. He stresses that “working with our EU partners allows us to magnify our influence”⁶⁰. Working at the EU level, has ensured that goods from settlements, when imported into the EU, are excluded from the low tariff rates applied to Israeli goods and has also resulted in the European Commission issuing new guidelines for the labelling of some products made in Israeli settlements on occupied land. Minister Coveney noted that reaching consensus at EU level is hard but that the government would be open to consideration of whether the EU's approach on settlement products could be tightened up further, when the political climate in the EU allows for that.

Bans on settlement goods at local authority level

Another alternative approach would be to look at bans on settlement goods at the local authority level. In April 2018 Dublin City Council voted to support economic sanctions against Israel, including a boycott of certain Israeli goods. However the main challenge facing this approach lies in getting officials to implement it as there are suggestions that implementation could violate national or EU law.

Exclude settlement territories from any future bilateral deal between Ireland and Israel

A third approach would be to introduce measures similar to those passed in Denmark and Chile which exclude settlement territories from any future bilateral deal between Ireland and Israel. These approaches importantly commit to an additional campaign of information in which the government uses guidelines to educate citizens visiting or doing business in Israel, so that they understand the historical context and the illegality of occupation. The aim here is that consumers when provided with better information will make more informed choices.

⁶⁰ Seanad Éireann debate, Control of Economic Activity (Occupied Territories) Bill 2018: Second Stage, 30 January 2018

Further Reading

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