From: johnminto@orcon.net.nz
To: Enquiries
Subject: Letter for the Chief Executive Matt Whineray
Date: Friday, 11 December 2020 4:38:09 PM
Attachments: Letter to Superfund - 11 December 2020.docx
Legal opinion - 25 September 2019.pdf

Kia ora,

Please pass on the attached letter and accompanying legal opinion to the Chief Executive.

Nā,

John Minto
21 York Street
Waltham
Christchurch 8023
03 5500132
0220850161
johnminto@orcon.net.nz

"Charity provides crumbs from the table; justice provides a place at the table"
Bill Moyers

Palestine Solidarity Network Aotearoa

11 December 2020

Matt Whineray
Chief Executive Officer
NZ Super Fund

enquiries@nzsuperfund.co.nz

Kia ora Mr Whineray,

Request for the NZ Super Fund to withdraw its investments from the companies named by the UN Human Rights Council as assisting in breaches of international law and human rights

I refer to our previous correspondence concerning the above matter, comprising letters from me of 17 June and 25 August 2018, and correspondence from NZ Super Fund dated 28 June and 20 September 2018. That correspondence from NZ Super Fund, and also letters written by NZ Super Fund to Neil Scott dated 26 July and 7 September 2018, stated NZ Super Fund's (and the Guardians') current investment stance in relation to investment in Israeli Banks, and the nature of those investments. This letter assumes that NZ Super Fund's stance and investment position remains the same. If there has been any change in stance or in the nature of those investments, please advise.

In February this year the United Nations Human Rights Council released a list of 112 companies which it had identified as being complicit in the building and maintenance of illegal Israeli settlements on occupied Palestinian land. We are requesting NZ Super Fund withdraw its investments from these companies as we believe it is morally and ethically untenable to maintain them in addition to them being outside the provisions of the Super Fund's Responsible Investment Framework.

Our reasons for this request are in a legal opinion we obtained from a leading member of the New Zealand legal fraternity, Dr Rodney Harrison QC, which we sent to the Minister of Finance last year. In case you have not seen this a copy is attached with this email.

Alongside the reasons given in Dr Harrison's opinion we wish to emphasise the following:

1. The United Nations Security Council has stated that these Israeli settlements are a "flagrant violation under international law" and has called on all countries "not to provide Israel with any assistance to be used specifically in connections with settlements in the occupied territories" and "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".
   This last quotation is from UNSC Res. 2334 which was co-sponsored at the UN Security Council by the New Zealand government. Irrespective of that however, these "decisions" by the Security Council are binding on all members.

2. New Zealand is a signatory to the *Fourth Geneva Convention of 1949* and has also enacted legislation to make the Geneva Conventions part of domestic New Zealand law through the *Geneva Conventions Act of 1958.* Under the Fourth Geneva Convention is the requirement that

   "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

It is the abuse of this provision of the fourth Geneva Convention by Israel which is in focus here. Assisting Israel in this "flagrant violation under international law" are the 112 companies identified by the UN Human Rights Council, in some of which the NZ Super Fund has significant investments.

3. New Zealand is also a signatory to the 1998 Rome Statute of the International Criminal Court and has enacted legislation to make the Rome Statute part of New Zealand domestic law through the *International Crimes and International Criminal Court Act 2000.* As part of this Act it states that war crimes include the "grave breaches" under the *Fourth Geneva Convention* (which, as stated above, includes settlements) **and** it also includes the listed war crimes of the Rome Statute, which includes:

   > "The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies…"

   This makes clear that under New Zealand domestic law Israel is committing a war crime by building illegal settlements on Palestinian land and it follows that the NZ Super Fund is complicit in these war crimes by investing in companies which facilitate the building and subsequent growth of these illegal settlements.

4. In 2018 the UN High Commissioner for Human Rights stated that:

   > *"…considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law."*

   In a similar vein in 2019, Amnesty International published a comprehensive study of the human rights and legal implications of companies doing business with the Israeli settlements. It concluded:

   > *"A company cannot meet its responsibility to respect human rights and the standards of international humanitarian law while doing business with the settlements. This is because the settlements have been established and developed in breach of the international law rules governing what states can and cannot do in a situation of military occupation. As such, they constitute war crimes and give rise to systematic, widespread and serious human rights violations."*

In our view it is untenable for the NZ Super Fund to make investment decisions outside international legal and human rights frameworks and continue to invest in land theft and human rights violations in Palestine.

Within the last week yet another Palestinian child, 14-year-old Ali Abu Alia, was shot dead by the Israeli Defence Force during a protest against an illegal Israeli settlement in the occupied West Bank.

It is clear to us the NZ Super Fund is acting well outside its own "Responsible Investment Framework" as well as turning a blind eye to our international commitments and New Zealand's own domestic legislation.

We therefore request the NZ Super Fund withdraw its investments from the 112 companies named by the UN Human Rights Council as assisting in breaches of international law and human rights.

As these issues have been under scrutiny for a considerable time by the NZ Super Fund we look forward to hearing from you without undue delay.

Na,

John Minto
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RODNEY HARRISON B.A., LL.B. (Hons), Ph.D.
QUEEN'S COUNSEL

24 September 2019

John Minto
By Email

Dear Mr Minto

New Zealand Superannuation Fund Investments in Israeli Banks

1 Introduction

1 You have asked me to provide an opinion concerning the legality under both New Zealand law and international law, of investing in Israeli banks on the part of the New Zealand Superannuation Fund ("NZ SuperFund"). The Israeli banks are said to be funding illegal settlements by Israel, or Israelis, on occupied Palestinian land ("illegal Israeli settlements").

2 I have been referred to correspondence between you and NZ SuperFund comprising letters from you of 17 June and 25 August 2018, and correspondence from NZ SuperFund dated 28 June and 20 September 2018.

3 I have also had access to supporting research papers or reports of repute concerning the illegal Israeli settlements, in particular the 7 February 2013 Report to the United Nations Human Rights Council of the Independent International Fact-finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People throughout the Occupied Palestinian Territory, including East Jerusalem[1]; the Banktrack Human Rights Briefing Paper of 8 December 2017, "How Banks Contribute to Human Rights Violations"[2]; and the Human Rights Watch Report of May 2018, "Bankrolling Abuse: Israeli Banks in West Bank Settlements".[3]

4 I understand that you may wish to use this opinion in further correspondence with NZ SuperFund, or in correspondence with the Minister of Finance as the Minister responsible for NZ SuperFund. It therefore proceeds by first examining relevant New Zealand domestic laws and policies, in particular in terms of the New Zealand

[1] www.banktrack.org/download/un_human_rights_council/un_human_rights_council_human_rights_situation_in_Palestine_and_other_occupied_Arab_territories.pdf
[2] www.banktrack.org/download/how_banks_contribute_to_human_rights_violations.
[3] www.banktrack.org/download/human_rights_watch_bankrolling_abuse.

Superannuation and Retirement Income Act 2001 ("the Act"). Having done so, it considers the position from an international law perspective.

2 Domestic New Zealand law and policy governing ethical investment by NZ SuperFund

Analysis of the Act

5 Part 2 of the Act establishes and governs the investment and other activities of NZ SuperFund. Section 48 of the Act establishes the Guardians of New Zealand Superannuation, and constitutes them a Crown entity for the purposes of s 7 of the Crown Entities Act 2004. Under s 48(3), the latter Act applies to the Guardians except to the extent that the Act provides otherwise.

6 Section 58 is the crucial provision of the Act governing investment by the Governors of "the Fund", which (under s 40) is "the property of the Crown". Section 58(2) provides that (emphasis added):

> *The Guardians **must invest** the Fund on a prudent, commercial basis and, **in doing so, must manage and administer** the Fund in a manner **consistent with**–*
>
> *(a) best-practice portfolio management; and*
>
> *(b) maximising return without undue risk to the Fund as a whole; and*
>
> *(c) **avoiding prejudice to New Zealand's reputation as a responsible member of the world community**.*

7 Section 60(1) imposes a duty on the Guardians to "establish, **and adhere to**, investment policies, standards, and procedures for the Fund that are **consistent with their duty** to invest the Fund on a prudent commercial basis in accordance with section 58". Under s 60(2), the Guardians must review such policies, standards, and procedures "at least annually".

8 Section 61 prescribes the mandatory content of any such policy statement, which must "cover", in particular:

> *(d) ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community; ...*

9 Section 64 of the Act empowers the giving by the responsible Minister of "Ministerial directions". Relevantly, s 64(1) and (2) provide:

> *(1) The Minister may, after consultation with the Guardians, give directions to the Guardians regarding the Government's expectations as to the Fund's performance, including the Government's expectations as to risk and return.*
>
> *(2) Despite anything to the contrary in the Crown Entities Act 2004, the Minister –*
>
> *(a) must not give a direction that is inconsistent with the Guardians' duty to invest the Fund on a prudent, commercial basis, in accordance with section 58; and*
>
> *(b) must not give a direction to the Guardians in respect of the Fund except in accordance with this section.*

10 For present purposes, two interpretation issues arise in relation to these provisions of the Act.

11 The first interpretation issue concerns the meaning and effect of the s 58(2)(c) express duty imposed on NZ SuperFund to invest "in a manner consistent with… avoiding prejudice to New Zealand's reputation as a responsible member of the world community", and the related obligation to have and comply with investment policies which address in particular (under s 61(d)) "ethical investment, including policies… for avoiding prejudice to New Zealand's reputation as a responsible member of the world community".

12 In my view, these provisions go further than simply imposing on NZ SuperFund a duty not to engage in investments which can be demonstrably categorised as unethical. The obligation under s 58(2)(c) requires in addition a risk-avoidance approach, one which is "consistent with… **avoiding prejudice to New Zealand's reputation**". That is to say, it requires assessment of particular proposed (and existing) investments and investment strategies not merely in terms of NZ SuperFund's own view of what constitutes an ethical investment; but also by reference to (responsible) world community views on the ethicality of the particular investment or investments in question. The risk of or potential for reputational damage **to New Zealand's reputation** - not to NZ SuperFund as the actual investor - is what must be "avoided".

13 Moreover, the three discrete performance standards laid on the Guardians by s 58(2)(a) – (c) impose independent duties,[4] each of which must be observed when making investments. Any tension in practice between the three duties must be resolved by only making investments which satisfy all three duties. That is to say,

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[4] This interpretation is supported by the second "must" in s 58(2) and the use of "and" to link the sub-clauses. Contrast also the wording of s 4(1) of the State-Owned Enterprises Act 1986, and (for comparable language) that of s 171(3A)(c)(v) of the Accident Compensation Act 2001.

this is not a "balancing exercise" allowing for relative fulfilment (and thus non-fulfilment) of any of the three duties.

14 The second interpretation issue concerns the extent of the Minister's power to give directions to the Guardians under s 64(1). The power is limited to the giving of directions "regarding the Government's expectations as to the Fund's performance, including the Government's expectations as to risk and return". The question which arises is whether the power to direct as to the Fund's "performance" empowers a direction to refrain (or to divest) from investing in particular investments or classes of investment, so as to secure compliance with the s 58(2) duties, in particular the s 58(2)(c) duty.

15 In my opinion, the s 64(1) power to direct is wide enough to empower the Minister to give directions aimed at securing performance by the Guardians of any of the duties imposed by s 58(2). The expression "the Fund's performance, including the Government's expectations as to risk and returns" must be seen as including the Guardians' "performance" of each and every aspect of the duties imposed by s 58(2). That is effectively confirmed by the express limitation in relation to the converse of s 64(1), stated in s 64(2)(a) (para 9 above). Equally, compliance by the Guardians with the s 60(1) duty (para 7 above) must be seen as an aspect of "the Fund's performance", capable of being addressed by Ministerial direction under s 64(1).

NZ SuperFund's Ethical Policies

16 NZ SuperFund's current investment policy, in purported compliance with ss 60 and 61 of the Act, is its "Responsible Investment Framework"[5] ("the RI Framework"). This opinion is not the place for a detailed analysis of the RI Framework. In short, I consider it seriously arguable that in a number of respects the RI Framework is inadequate as a statement of investment policy in relation to the s 58(2)(c) duty imposed on the Guardians, and equally (in terms of ss 60(1) and 61(d)) fails adequately to "cover… ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community".

17 In that regard the RI Framework immediately gets off on the wrong footing when summarising the Guardians' "responsibilities under our Act" (p 3). Having paraphrased s 58(2), the Framework then tellingly observes (emphasis added):

> *None of these three legs has precedence over the other so each* ***must be taken into account*** *when considering investment issues.*

18 As developed in paras 11 – 13 above, this seriously understates the Guardians' statutory obligations. Each of the "three legs" must be satisfied (complied with)

[5] Latest edition June 2019.

when investing; there is no balancing exercise involved, as the Framework implies. And each of the "three legs" imposes an independent statutory duty; not merely identifies considerations to be "taken into account when considering investment issues".

19 Furthermore, despite the RI Framework's assertion that it is "consistent with our mandate and incorporates both 61(d) and (i) under our Act", in the more detailed policy provisions which follow there is not one single point at which consideration of avoiding prejudice to New Zealand's international reputation is invited, whether when making, managing or divesting ethically contentious investments. The best that the Framework can do is a vague reference (under "Standards and Benchmarks") at p 5, to "United Nations Global Compact (all principles) and other good practice standards". That, by itself, falls far short of being sufficiently informative.

20 The RI Framework instead contains a far greater, largely blinkered, focus on "ESG" (Environmental, Social and Governance) investment. While achieving ESG investment is no doubt a good thing (and arguably enhances New Zealand's international reputation), it is by no means the same as avoiding unethical investment and thus prejudice to New Zealand's international reputation.

21 NZ SuperFund's letter to you of 28 June 2018, defending its investment "holdings in a number of Israeli banks", demonstrates that the above inadequacies of the IR Framework are reflected in practice. In that letter, NZ SuperFund advises:

> *These [Israeli bank] investments are held passively in [the Fund's] global equity portfolio, which is managed externally and includes shares in more than 6,500 companies around the world. Like many institutional investors, a sizeable proportion of the Fund tracks global equity indices in order to gain cost effective, diversified exposure to share markets around the world. Investments in these companies move in and out of the Fund primarily in line with their market capitalisation rather than through active stock picking.*
>
> *In 2012 the Guardians excluded from the Fund a small number of Israeli companies because of their involvement in the construction of Israeli settlements on the Separation Barrier in the Occupied Palestinian Territories. The decision followed findings by the United Nations that the West Bank Separation Barrier and settlement activities were illegal under international law. We also factored in votes by New Zealand for UN Security Council resolutions demanding the cessation and dismantling of the Separation Barrier, and the cessation (sic) of Israeli settlement activities in the Occupied Palestinian Territories.*
>
> *In deciding whether a company is in breach of the Fund's responsible investment standards and how material that breach is, we take account of the proximity and importance of the company's actions, and our ability to engage with the company to change its business or practices. We draw a*

> *distinction between being directly and materially involved in an activity, versus being a supplier of materials or services in the normal course of business.*

22 Two points emerge from this. First, NZ SuperFund appears to regard the fact that its investments in Israeli banks are "held passively in its global equity portfolio" as an adequate response to any principled objection to those particular investments. To the contrary, the kind of passive, market capitalisation-driven investment approach described is an abrogation of the Guardians' responsibility.

23 Secondly, these (passive) investment "decisions" focus solely on "deciding whether a company is in breach of the Fund's responsible investment standards **and how material that breach is**" (emphasis added) - **not** the Guardians' express statutory (and policy-based) duties of avoiding prejudice to New Zealand's international reputation. The two are significantly different, as argued in paras 11 - 13 above.

24 Thus whether assessed in terms of the RI Framework or in terms of NZ SuperFund's attempts at justification of its position, there is nothing which suggests that NZ SuperFund/the Guardians are even attempting to comply, let alone actually in compliance, with the s 58(2)(c) duty to invest the Fund so as to avoid prejudice to New Zealand's reputation as a responsible member of the world community.

3 International Standards Governing Ethical Investment

25 International standards governing ethical investment and equally the considered emphasis and views of the international community regarding particular investments or categories of investment are of considerable importance and weight, not only in their own right, but because they will be highly relevant to compliance by the Guardians with their statutory duty to invest "in a manner consistent with… avoiding prejudice to New Zealand's reputation as a responsible member of the world community".

26 Before turning to international standards directly governing ethical investment it is appropriate to recall that Israel's illegal settlements in the occupied Palestinian territories give rise to legal consequences and responsibilities under international law for States other than Israel itself. This is clear from the International Court of Justice's Advisory Opinion of 9 July 2004 relating to "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[6] The Advisory Opinion states (at [159]) *inter alia*:

> *Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not*

[6] Available at www.ici/wp-content/uploads/2012/03/wall paper ICJ The Hague.pdf

> *to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.*

27 New Zealand is, of course, a High Contracting Party to the Fourth Geneva Convention, to which the Court refers.

28 The leading statement on ethical investment at the international level is the "Guiding Principles on Business and Human Rights", endorsed by the UN Human Rights Council on 16 June 2011[7] ("the Guiding Principles"). The Guiding Principles impose requirements on business enterprises as well as Governments. In particular they require business enterprises not only to refrain from directly by their own activities causing or contributing to breaches of human rights under international law, but also to refrain from business activities which indirectly cause or contribute to, or support, such breaches. Provision of financing by banks which enables or facilitates systematic human rights violations must be seen as a paradigm example of the latter, indirect effect.

29 The NZ SuperFund RI Framework surprisingly contains no reference to the Guiding Principles, but as already noted (para 19 above) it does make passing reference to the "United Nations Global Compact (all principles)". This would appear to be a reference to the "Ten Principles" of the "UN Global Compact" on "corporate sustainability".[8] The first two principles address Human Rights:

> *Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and*
>
> *Principle 2: make sure that they are not complicit in human rights abuses.*

30 Both these principles are electronically linked to commentary, which in turn supports the ultimate conclusions of this opinion. In relation to Principle 2, the commentary includes the statement that "Complicity means being implicated in a human rights abuse that another company, government, individual or other group is causing".

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[7] Available at www.ohchr.org/Documents/Publications/GuildingPrinciplesBusinessHR_EN.pdf.

[8] Available at www.unglobalcompct.org/what_is_gc/mission/principles.

31 Having regard to the available information, in particular the three reports referred to in para 3 above, there can in my view be no doubt that those Israeli banks which are involved in the funding of illegal Israeli settlements, in particular by advancing funds to enable construction of homes and amenities in defiance of relevant United Nations resolutions and international law, are directly and/or materially contributing to ongoing human rights violations, occurring on a massive scale.

32 It may be suggested that investing in any such Israeli bank is one step removed from the bank's more direct activities. But plainly, so far as NZ SuperFund's responsibilities are concerned, that provides no justification or excuse. The Act's effective prohibition on unethical investment represents a value judgment already taken, having the force of law, that, despite their relative indirectness or remoteness, such investments effectively support human rights violations, and are to be avoided.

33 In any event, on any view of the matter, the holding of investments in Israeli banks involved in the funding of illegal Israeli settlements is in breach of the Guiding Principles, United Nations resolutions, and international law. It constitutes both indirect facilitation of and support for breaches of human rights (para 28 above) and "complicity" and thus being implicated in the ongoing human rights abuse (paras 30 - 31 above). The admitted investments in Israeli banks which are funding or likely to be involved in funding illegal Israeli settlements ought therefore to have been assessed by NZ SuperFund (and in particular, the Guardians) as in breach of both the Act and the RI Framework (despite its manifest inadequacies).

34 NZ SuperFund's response to your concerns in the passage reproduced in para 21 above underlines its erroneous and blinkered investment assessment approach. First off, NZ SuperFund appears, erroneously if not jesuitically, to argue that making or holding an otherwise offensive investment "passively" is somehow a defence. The response goes on to concede that "involvement in the construction of Israeli settlements… in the Occupied Palestinian Territories" must be seen as "illegal under international law"; but (by implication) treats the Israeli banks as either not, or not sufficiently, involved in the offending activities. Instead, NZ SuperFund seeks to "draw a distinction between being directly and materially involved in an activity, versus being a supplier of materials or services in the normal course of business".

35 The distinction which NZ SuperFund attempts to draw is both fallacious and unworkable, as stated. More importantly and in any event, it ignores both the Guiding Principles and related commentary (discussed above), taking an approach which is both impermissible and unprincipled, in that context. Finally, as already noted (para 23 above), NZ SuperFund's defence of its position completely fails to address, let alone comply with, the s 58(2)(c) duty to avoid prejudice to New Zealand's reputation as a responsible member of the world community.

4 Conclusions

36 The Act imposes on the Guardians of NZ SuperFund a duty to make and manage investments of the Fund in a manner consistent with each of the three discrete duties prescribed in s 58(2). Importantly, the Fund does not belong to the Guardians or NZ SuperFund; it is "the property of the Crown" (s 40).

37 The discrete duty imposed by s 58(2)(c) is to make and administer investments in a manner consistent with "avoiding prejudice to New Zealand's reputation as a responsible member of the world community". The importance of this duty is further emphasised by s 60(1), which imposes a duty on the Guardians not only to establish but also to "adhere to" investment policies, standards and procedures that are consistent with the s 58(2) duties. The prescribed content of the investment policies which the Guardians must establish and adhere to includes (under s 61(d)) "ethical investment, including policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community".[9]

38 The test or criterion imposed by means of these specific duties does not involve a balancing exercise, enabling it to be traded off against the other s 58(2) duties; nor is it to be approached as no more than a "relevant consideration". Moreover, the applicable test or criterion is not satisfied simply by an assessment on the part of the Guardians of the ethicality (in their eyes) of the particular investment. The ultimate issue is whether the investment in question places at risk (or potentially prejudices) New Zealand's international reputation. Thus the responsible "world view" of the category of investment in question must ultimately be treated as critical.[10]

39 The Minister of Finance as the responsible Minister is empowered by s 64(1) (after consultation with the Guardians) to give them directions aimed at securing performance of any of the duties imposed by s 58(2)(a) – (c), including a direction to refrain (or to divest) from investing in particular investments or classes of investment so as to secure compliance with the s 58(2)(c) duty.[11]

40 NZ SuperFund's Responsible Investment Framework is incomplete and inadequate and arguably invalid for non-compliance with ss 60(1) and 61(d), by reason of its inadequate treatment of the duty to ensure "ethical investment" and/or failure to stipulate "policies, standards, or procedures for avoiding prejudice to New Zealand's reputation as a responsible member of the world community".[12] Implicit in this conclusion is the potential for a successful judicial review challenge to the Framework as it stands.

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[9] Paras 6 – 8 above.
[10] Paras 11 – 13 above.
[11] Paras 14 – 15 above.
[12] Paras 16 – 20 above.

41 NZ SuperFund's admitted investments in Israeli banks, some or all of which are involved in the funding of illegal Israeli settlements (in particular, by advancing funds to enable construction of homes and amenities) offend against both the Act and the RI Framework (despite its manifest inadequacies). They also contravene international standards governing ethical investment, as stated in the Guiding Principles in particular, supported by a body of reputable international opinion.[13]

42 NZ SuperFund's justifications for investing in the Israeli banks do not stand scrutiny. To the extent that NZ SuperFund appears to be attempting to justify these investments by claiming that they are "held passively", that cannot excuse the making, far less the retention of investments which the law (or policy) prohibits. Indeed, adopting a "passive investment" approach may well be of itself a dereliction of duty. Nor in any event do the attempted justifications of the investments on the merits withstand scrutiny.[14] There are therefore in my view good grounds for challenging the making and/or persistence in retention of these investments by way of judicial review, should your currently-proposed initiatives with the Minister of Finance prove unsuccessful.

Yours faithfully

Dr Rodney Harrison QC

[13] Paras 31 – 33 above.

[14] Paras 34 – 35 above.

From: johnminto@orcon.net.nz <johnminto@orcon.net.nz>
Sent: Tuesday, 23 February 2021 5:53 PM
To: Enquiries <E2@nzsuperfund.co.nz>
Subject: RE: Letter for the Chief Executive Matt Whineray

Thanks [redacted] – we look forward to hearing from you.

Nā,

John Minto
21 York Street
Waltham
Christchurch 8023
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0220850161
johnminto@orcon.net.nz

"Charity provides crumbs from the table; justice provides a place at the table"
Bill Moyers

From: Enquiries <E2@nzsuperfund.co.nz>
Sent: Tuesday, 23 February 2021 5:23 p.m.
To: johnminto@orcon.net.nz
Subject: RE: Letter for the Chief Executive Matt Whineray

Kia ora Mr Minto

We apologise for the delay in responding to your letter. We would like to assure you that we have been working on this and expect to be in a position to provide you with a substantive response within the next two weeks.

Best regards,

[redacted]

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NZSUPERFUND
Te Kaitiaki Tahua Penihana
Kaumātua o Aotearoa

From: johnminto@orcon.net.nz <johnminto@orcon.net.nz>
Sent: Tuesday, 23 February 2021 2:18 PM
To: Enquiries <E2@nzsuperfund.co.nz>
Subject: FW: Letter for the Chief Executive Matt Whineray

Kia ora,

I have received no response to this letter, despite it being two months since it was sent, and would appreciate a response without further delay.

Nā,

John Minto
21 York Street
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0220850161
johnminto@orcon.net.nz

"Charity provides crumbs from the table; justice provides a place at the table"
Bill Moyers

From: johnminto@orcon.net.nz <johnminto@orcon.net.nz>
Sent: Friday, 11 December 2020 4:37 p.m.
To: 'enquiries@nzsuperfund.co.nz' <enquiries@nzsuperfund.co.nz>
Subject: Letter for the Chief Executive Matt Whineray

Kia ora,

Please pass on the attached letter and accompanying legal opinion to the Chief Executive.

Nā,

John Minto
21 York Street
Waltham
Christchurch 8023
03 5500132
0220850161
johnminto@orcon.net.nz

"Charity provides crumbs from the table; justice provides a place at the table"
Bill Moyers

From: Catherine Etheredge
To: johnminto@orcon.net.nz
Cc: [redacted]
Bcc:
Subject: Guardians of NZS - Israeli Investments
Date: Monday, 1 March 2021 9:27:25 AM
Attachments: image001.jpg
image002.png
image003.png
NZSF Letter re. Israeli Investments - John Minto Response, 25 February 2021.pdf
R-GNZS-IC-Paper-Exclusion-of-Israeli-Banks-January-2021.pdf

Dear Mr Minto,

Please find attached a response from our CEO to your letter of 11 December. I also attach a copy of the Investment Committee paper that is referenced in our response and which has been proactively disclosed on our website.

Kind regards
Catherine

Catherine Etheredge
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NZSuperFund_Logo_RGB

C1 - Public

NZSUPERFUND
Te Kaitiaki Tahua Penihana Kaumātua o Aotearoa

26 February 2021

John Minto
Palestine Solidarity Network Aotearoa

Email: johnminto@orcon.net.nz

Kia ora Mr Minto,

I acknowledge your letter dated 11 December 2020 and thank you for taking the time to write to me with your concerns. I also acknowledge our previous correspondence as referenced, along with correspondence between the Guardians of New Zealand Superannuation (Guardians) and other individuals who have written to us in relation to the NZ Super Fund's investment in companies with activities connected with the Occupied Palestinian Territories (OPT).

The Guardians has a long-standing commitment to responsible investment. In 2019 our responsible investing practice was independently assessed by Willis Towers Watson in the course of their independent review of the Guardians and Fund. Willis Towers Watson rated the Guardians' responsible investment approach as excellent, and noted our approach to exclusions (where reputation issues are concerned) as aligning with best practice standards. The Guardians' approach to responsible investment has been recognised internationally, including being named by the UNPRI in 2019 as one of 47 asset owners on the UNPRI Leaders' Group as demonstrating "a breadth of responsible investment excellence".

The Guardians has researched the situation in the OPT and continued to monitor developments for some time. As you know, in 2012 several companies were excluded from the NZ Super Fund whose activities were considered to be in breach of the UN Global Compact Principles on human rights due to their direct and material involvement in construction of settlements or the separation barrier in the OPT. We continue to analyse relevant information as it comes to hand, and to apply our Statement of Investment Policies Standards and Procedures (SIPSP) and Responsible Investment Framework (RIF) in the light of that information. This work is ongoing.

The list of companies involved in certain specified activities related to the Israeli settlements in the OPT published by the United Nations Human Rights Council (UNHRC) in 2019 is one of a number of sources of information considered by us when assessing whether companies in our portfolio are breaching standards under our RIF. The list provides a database of companies believed by the UNHRC to be involved in certain specified activities but does not provide detail about the extent of a company's involvement or express a view as to the legality or otherwise of the activities of the companies on the list.

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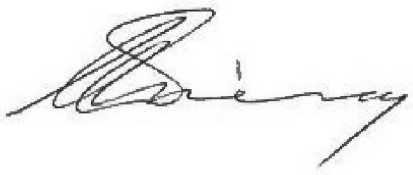
We have long utilised other sources of information on this issue which provide more detail on the nature and degree of involvement, which is important under our RIF in determining if we conduct further research, engage, hold or exclude companies with some link to an issue flagged as a concern.

In January this year, the Chief Investment Officer approved a recommendation by the Guardians' Investment Committee to exclude securities issued by First International Bank of Israel, Israel Discount Bank, Bank Hapoalim, Bank Leumi and Bank Mizrahi-Tefahot from the portfolio. The decision to exclude was made applying considerations set down in the SIPSP and the RIF. The exclusions were implemented in February 2021. For further information about this decision please refer to our website where we have proactively disclosed the relevant Investment Committee paper.

We will continue to monitor the situation as it relates to Israel and the Occupied Palestinian Territories and apply the principles set down in our SIPSP and RIF to our investment portfolio.

Ngā mihi



Matt Whineray
Chief Executive Officer

ITEM IC ISRAELI BANKS AND CONSTRUCTION OF SETTLEMENTS IN THE OCCUPIED PALETINIAN TERRITORIES

Presented by: [redacted]

Date: ***14 January 2021***

1 Purpose

1.1 To **approve** following recommendation:

1.2 *"Exclude securities issued by First International Bank of Israel; Israel Discount Bank; Bank Hapoalim; Bank Leumi; Bank Mizrahi-Tefahot from the portfolio based on the Guardians' RI Policy, Standards and Procedures."*

1.3 The reasons for this recommendation are set out in the accompanying template. In brief, the primary considerations under our Statement of Investment Policies Standards and Procedures (**SIPSP**) and Responsible Investment Framework (**RIF**) leading to this recommendation are as follows:

- The United Nations General Assembly has consistently reaffirmed the illegality of Israeli settlements in the Occupied Palestinian Territories (**OPT**) and called for an immediate halt to all settlement activities (most recently in December 2020). In resolution 2334 (co-sponsored by New Zealand), the UN Security Council reaffirmed that the establishment by Israel of settlements in the OPT had no legal validity and constituted a flagrant violation under international law.
- International concern about settlement activity in the OPT has been heightened following the announcement in September 2019 by the Israeli Prime Minister that if his government were re-elected it would annex parts of the OPT[1] and by the escalation since in approvals of construction plans for housing units in the OPT[2].
- A number of reports by the UN Human Rights Council have concluded that the construction of Israeli settlements in the OPT cause or contribute to breaches of Palestinian human rights including the right to self-determination, non-discrimination, freedom of movement, and rights to education, water, housing, and an adequate standard of living[3]. Palestinian people are not permitted to purchase settlement housing and are generally barred from entering the settlements. The planned intensification of settlement activity will exacerbate the infringement of these human rights.

[1] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, "Situation of human rights in the Palestinian territories occupied since 1967" 21 October 2019, para 63 (Report of the Special Rapporteur 2019). https://undocs.org/A/74/507.
[2] Highlighted in the June and December 2020 reports from the UN Secretary General on the implementation of Security Council resolution 2334, https://www.un.org/unispal/wp-content/uploads/2020/06/S.2020.555.pdf, https://www.un.org/unispal/wp-content/uploads/2020/12/S20201234_161220.pdf

[3] See the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, 7 February 2013, UN Doc A/HRC/22/63,

- Under our RI Framework we use the UN Global Compact principles as a benchmark for expected standards of corporate behaviour. Principle 1 asks that companies support international human rights and Principle 2 provides that businesses should avoid being complicit in human rights abuses. There is credible evidence that the relevant companies, (*First International Bank of Israel; Israel Discount Bank; Bank Hapoalim; Bank Leumi; Bank Mizrahi-Tefahot, hereafter called* "the **Israeli Banks"**), provide finance for the construction of Israeli settlements in the OPT. We have accordingly considered if, due to the nature of that finance, the Israeli Banks are breaching these standards due to the human rights abuses caused by the construction of those settlements.
- It is reasonable to assume both that the provision of bank funding is critical to enabling the construction of settlements in the OPT to proceed on the scale contemplated by recent construction plan approvals and that funding from international banks is not readily available, given their notable absence[4], making the Israeli banks essential to the construction process.
- Various reports have describe the nature of these banks involvement, not as passive lenders, but as active and direct partners in the development projects. A key reason given is that Israeli law limits the ability of developers to collect advance payments from buyers unless those developers obtain financial guarantees, in a framework known as "accompanying agreements". It is through these agreements that the banks are reported to become involved in every stage of the project, including involvement in determining the price rate and sale schedule of the apartments[5].
- Given these matters, we have concluded the Israeli Banks are materially contributing (and are highly likely to continue to contribute) to the construction of settlement in the OPT, and due to the human rights impacts associated with construction of the settlements are materially in breach of Principle 1 and Principle 2 of the UN Global Compact.

1.4 Engagement would be resource intensive and is unlikely to be effective given the Israeli Banks have continued their involvement in the face of international criticism over a long period and have reported that they believe their activity is legal.

1.5 Exclusion would be financially immaterial for the Fund.

2 SIPSP and IC delegations

2.1 Under the Guardians' delegation framework, the CIO can authorise the Fund to exclude/divest individual issuers on the recommendation of the Investment Committee.

2.2 We use a template to assist the IC in making its recommendations and this follows below. This template guides the IC through the considerations in the SIPSP and RIF and provides additional background to understand the basis for determining where there may be a breach of relevant standards and the materiality of the issue.

2.3 Our governing legislation says that we must invest the Fund on a prudent, commercial basis and in doing so, must manage and administer the Fund in a manner consistent with best-practice portfolio management, maximising return without undue risk to the Fund as

[4] To be clear, if non-Israeli banks were similarly involved, we would apply the RIF to them in the same way we are to the Israeli banks covered in this paper.

[5] Financing the Land Grab – the direct involvement of Israeli Banks in the Settlement Enterprise" – report by Who Profits research centre (NGO) Feb 2017

a whole, and avoiding prejudice to New Zealand's reputation as a responsible member of the world community.

2.4 Our RIF provides further details on how we will give effect to responsible investment (which as stated in the RIF encompasses ethical investment).

2.5 We utlilise a range of activities and procedures as we consider appropriate. This includes monitoring the portfolio to identify companies that may breach the standards of good corporate practice contained in our SIPSP (i.e. our RI Standards). These standards include the UN Global Compact Principles.

2.6 Following this analysis we may undertake a range of steps as further outlined in the RIF, which may include monitoring, engaging with the issuer in various ways such as through correspondence, meetings or voting. In certain circumstances we may also exclude issuers.

2.7 The SIPSP and RIF provides guidance as to the way in which we approach exclusion decisions.[6]

2.8 The RIF states that in some limited cases we will exclude securities issued by companies from the portfolio. This may occur where companies are involved in certain activities or breaches of standards.

2.9 We exercise judgement in making these decisions and, as relevant, take account of:

- New Zealand or other national law,
- International law, including conventions to which New Zealand is a signatory,
- Requirements of our mandate,
- Significant policy positions of the New Zealand Government,
- Impact of exclusion on expected Fund returns,
- Actions of our peers,
- Severity of breach/action,
- Likelihood of success of alternative course of action (engagement),
- Expert or other advice where relevant,
- Other relevant factors on a case-by-case basis.

2.10 The relevance of these factors in a given case, and the weight to be given to them, will vary depending on the context in which the issue has arisen. Ultimately these are matters for the Guardians to determine based on its understanding of the position, and its consideration of its mandate.

2.11 A key factor in assessing whether a company may be breaching our RI standards and the severity of the breach, is the proximity and importance of the company's actions to that illegal or unethical activity. We draw a distinction between being directly and materially involved in an activity versus being a supplier of materials or services in the normal course of business. In doing so, we consider whether the product or service is integral to the activity; specifically designed for the activity (as opposed to a product/service for more general application which happens to be used for the relevant activity); and whether there are alternatives or off-the-shelf substitutes to the use of this product or service.

2.12 The focus on materiality is important. It focuses attention on where there may be greater reputational risk, and helps to manage the Fund prudently with regards to impact on investment returns and consistent with best practice and with our mandate.

2.13 Given the nature and complexity of certain issues, it is not always possible for us to establish definitively whether a company has breached any particular RI standard. For example, this may ultimately depend on information that is not available to us. Where

[6] See Page 17 of the RI Framework

that is the case, we assess whether there is an unacceptable risk of such breach occurring based on credible information available to us at the relevant time.

3 The issue of companies and settlements in the OPT

3.1 As outlined in the template, the United Nations regards the wider activity of Israeli settlements within the OPT as illegal under international law. This position has been held for some time.

3.2 However, it is important to note that the United Nations' position relates to the broader activity. It does not specifically determine the legal status of activities by particular companies which provide services/activities that contribute in some manner to the settlement activities within OPT.

3.3 In such cases, as noted in section 2, we assess the proximity and importance of the companies' actions to the broader activity that is considered illegal.

3.4 In December, 2012 the Investment Committee recommended the exclusion of certain construction companies where there was credible evidence as to material involvement in the development and construction of the settlements in the OPT.[7] Without this activity the settlements would not exist. In excluding these companies, we distinguished between direct involvement as lead developers or lead contractors and indirect involvement by suppliers of materials and other subsidiary services. At the time, we did not exclude the banks/financiers of the construction activities as their involvement was considered to be a service and less direct than the construction firms themselves.

3.5 Since implementing the exclusions, we have continued to monitor relevant developments in the region, including:

- More recently, there have been increased reports on the nature and importance of the role certain banks play in the settlements.
- A significant increase in the construction of settlements and the number of approvals of plans for settlements to be developed.
- The significant concern around Israel's annexation plans as summarised further in the template.
- The Office of the United Nations High Commissioner for Human Rights (**OHCHR**) has, pursuant to Human Rights Council resolution 31/36[8], published a database of 112 companies for which it considers there are reasonable grounds to believe the companies are involved in certain specified activities related to the Israeli settlements in the OPT (including supply of equipment, materials, utilities, and other services during and after construction). This list includes a number of Israeli Banks but has not identified any non-Israeli banks as being involved.
- More detailed coverage of companies and the nature of their involvement in the settlements is provided by the Who Profits non-governmental organisation. It's report on the extent and nature of the Israeli Banks involvement[9] is well researched and draws on credible annotated evidence, including the companies own disclosures and council records.

3.6 From our research, we have identified the Israeli Banks as raising concerns from a RI perspective.

[7] In 2012 the IC excluded Africa Israel and its subsidiary Danya Cebus, and Shikun & Binui for property development and construction of settlements Superdoc: 812553.

[8] The Office of the United Nations High Commissioner for Human Rights (OHCHR) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25542

[9] Financing the Land Grab – the direct involvement of Israeli Banks in the Settlement Enterprise" – report by Who Profits research centre (NGO) Feb 2017 and Bankrolling Abuse – Israeli Banks in West Bank Settlements – Human Rights Watch 2018 (NGO report)

3.7 As set out in the template, there is credible evidence that the banks provide project finance in respect of the construction of Israeli settlements in the OPT and that this is an integral aspect of settlement construction. These companies are the focus of this paper and our recommendations.

3.8 More generally, the OHCHR database lists a range of other companies. We note that the database does not make a determination on the legal status of any of the listed activities or companies. It does not provide guidance on how the list should be used or on the materiality of the different types of involvement. We would therefore need to do further analysis to determine if these other companies should be added to our focus list for engagement or exclusion based on the guidance in our RIF. Subject to further information and analysis being undertaken, the extent of their involvement may be very different from that of the banks which form the subject of this paper. The OHCHR list will be published annually.

4 Communication of decision

4.1 We will write to the five companies informing them of our decision prior to including them on the public exclusion list.

4.2 This will give the companies an opportunity to respond, including on whether they have made recent decisions to withdraw from financing the development and construction of settlements. If the latter arises, which we believe unlikely, we will revert to the Investment Committee to discuss rescinding the exclusion decision.

[redacted]

RI Guidance for Exclusion Decisions

Companies	**First International Bank of Israel; Israel Discount Bank; Bank Hapoalim; Bank Leumi; Bank Mizrahi-Tefahot ("Israeli Banks")**
Date	**14th January 2020**
Domicile/Sector	**Israel/Banking**
Description of issue	

Context: Occupied Palestinian Territories (OPT) and Israeli settlements

There is credible evidence that the Israeli Banks identified are providing project finance which enables the development and construction of Israeli settlements in the OPT at the scale contemplated by recent construction plan approvals. The background to OPT and the Israeli settlements is well-known, and the Israeli-controlled settlements in the OPT are regularly condemned by the UN. These matters, and key sources of supporting information, are summarised further below:

History of the Settlements

Following the ending of an Israeli imposed moratorium on settlement expansion in late 2009-2010, construction revived during 2011 and as continued over the decade. [10]

By 2017, an industry article quoted in the Who Profits report stated that about 55% of the land marketed by the Israel Land Authority for development was over the Green Line.[11]

In 1983, there were 99,000 Israeli settlers in the West Bank and East Jerusalem, whereas by 2019 there were 650,000 settlers, an increase of more than 550 per cent.[12] Furthermore, the planned construction of settlements has escalated recently. In October 2020 the Israeli government announced that it had approved the construction of nearly 5,000 more settlement homes in the OPT, which brought the number of settlement home approvals for 2020 to more than 12,150[13].

[10] EU Trade with Israeli Settlements Briefing Paper Aug 2012 and Peace Now report "Torpedoing the Two State Solution: Summary of 2011 in the Settlements". Jan 2012
[11] "Financing the Land Grab – the direct involvement of Israeli Banks in the Settlement Enterprise" – report by Who Profits research center (NGO) February 2017
[12] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, "Situation of human rights in the Palestinian territories occupied since 1967" 21 October 2019, para 62 (Report of the Special Rapporteur 2019). https://undocs.org/A/74/507.
[13] See reference 2

Israel and annexation

In September 2019 Prime Minister Netanyahu announced that if his government were re-elected it would annex parts of the OPT.[14] In June 2020 an agreement between the coalition partners of the Israeli Government to annex significant parts of the Occupied Palestinian West Bank after 1 July 2020, was condemned by a group of 47 independent experts appointed by the UN Human Rights Council.[15] The Israeli Government put its annexation plans on hold in August 2020 as part of an agreement to establish full diplomatic relations with the United Arab Emirates. Israel's coalition government broke apart in late December 2020 and new elections are expected in March 2021. It is not clear what impact the Israeli elections will have on any annexation plans, nor the impact of the new US administration on Israel and its settlement activity.

If Israel does not go ahead with its *de jure* annexation plans, the settlements in the OPT are, in any case, considered by most international authorities, including the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, an independent expert appointed by the UN Human Rights Council, to be *de facto* annexation, and contrary to international law.[16]

Regulatory Environment – Legal status of settlements and their construction

International Law

The position at international law has been well articulated by the United Nations Security Council[17] and in subsequent and numerous UN Resolutions on the subject.

Multiple UN Security Council Resolutions dating back decades have stated that the construction of Israeli Settlements in the OPT are illegal. UN Security Council Resolution 465 adopted unanimously on March 1 1980 established that Israel's policy and practices of building settlements on occupied territory, including East Jerusalem, have no legal validity and constitute a flagrant violation of the IV Geneva Convention provisions to protect civilians during war and occupation. Article 49 of the IV Geneva Convention states "The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." An advisory opinion by the International Court of Justice (ICJ) in 2004[18] also concluded that the Israeli settlement in the OPT breached international law.

Repeated Security Council and UN General Assembly Resolutions have further criticized the settlement activity as a serious obstacle to the peace process.

[14] Report of the Special Rapporteur 2019, para 63. See also https://undocs.org/A/HRC/40/73
[15] "Israeli annexation of parts of the Palestinian West Bank would break international law – UN experts call on the international community to ensure accountability", June 2020, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960&LangID=E
[16] Report of the Special Rapporteur 2019, para 62-63.
[17] UN Security Council resolution 465 (1980) http://unispal.un.org/UNISPAL.NSF/0/5AA254A1C8F8B1CB852560E50075D7D5
[18] ICJ Legal Consequences of the Construction of a Wall in the OPT, July 4th 2004 (also consider the legality of the settlements).

In December 2016, the UN Security Council adopted a historic resolution (Resolution 2334)[19] on Israeli settlements, which is considered binding on Israel. "The United Nations Security Council has reaffirmed that the establishment by Israel of settlements in the occupied Palestinian territory, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace".

The resolution was put forward by New Zealand and three other elected members – Malaysia, Senegal and Venezuela, - and was the first action taken by the Security Council on the Middle East Peace Process in almost eight years.

On 20 December 2017, a resolution building on UN Security Council Resolution, was adopted by the UN General Assembly that called for "Permanent sovereignty of the Palestinian people in the OPT, including East Jerusalem, and of the Arab population in the Occupied Syrian Golan over their natural resources".

Israel contests the settlements are illegal under the Geneva conventions and maintains that it has valid rights to the territory until negotiations over the final agreement are reached. The State of Palestine states the settlements are an illegal annexation.

The International commission of Jurists issued a statement on November 2019 that refers to Israel's current annexation proposals and states "such annexation is prohibited by international law, including Article 2(4) of the UN Charter, which forbids the use of force against the territorial integrity of a State and, consequently, the transmission of sovereign title over territories resulting from such use of force."[20]

New Zealand's Position[21]

New Zealand is a signatory to the Geneva Convention and to the Universal Declaration of Human Rights which the ICJ considers to be international laws which are being breached by the development and construction of the settlements in the OPT.

New Zealand supports a lasting two-state settlement in accordance with the UN Security Council resolutions and with subsequent agreements between Israel and Palestine. New Zealand has supported General Assembly Resolutions that have called the settlements illegal and counter-productive to a two-state settlement.[22]

New Zealand worked throughout its two-year term on the Security Council to advance a resolution on the Middle East Peace Process, one of the most long-standing and unresolved issues on the Council's agenda.

[19] https://unsco.unmissions.org/sites/default/files/security_council_briefing_-_21_december_2020_2334.pdf
[20] https://www.icj.org/israel-palestine-measures-toward-annexation-of-the-occupied-palestinian-territory-must-be-reversed-icj-analysis/
[21] https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/un-security-council-the-situation-in-the-middle-east-including-the-palestinian-question/
[22] http://www.mfat.govt.nz/Foreign-Relations/Middle-East/New-Zealand-Voting.php

In December 2016, New Zealand co-sponsored and supported UN Security Council Resolution 2334. Foreign Minister Murray McCully welcomed the adoption of Resolution 2334, saying "New Zealand voted for and co-sponsored the resolution because it was consistent with long-held New Zealand policy positions on the Palestinian question".

Speaking after the vote, New Zealand's Permanent Representative Gerard van Bohemen told the Security Council "every settlement creates false hope for the settlers that the land will one day be part of a greater Israel. Every settlement takes land away from Palestinians needing homes or farmland or roads. Today's resolution provides important signals to the parties and to the international community about the way forward."

NZ Government statement on Israel's current annexation plans

In June 2020, the New Zealand Government released the following press statement: "New Zealand is a long-standing supporter of Israel's right to live in peace and security. However, successive New Zealand governments have also been clear that Israeli settlements are in violation of international law and have negative implications for the peace process."

"The New Zealand Government's view is that annexation would gravely undermine the two-state solution, breach international law, and pose significant risks to regional security. We call on Israel to reconsider these plans."[23]

Peer fund actions

We regard wide-spread exclusion of companies by peer funds (that have exclusion policies) as a signal that those holdings are a concern amongst our global investor community.

Exclusion of companies due to their involvement in the construction of Israeli settlements in the OPT is still *rare* amongst large institutional investment funds. Notable exclusions have been made by NGPF, PGGM and ABP on the issue, and by a small handful of other pension funds or fund managers.

The Norwegian Council of Ethics (Council) Report (2009) on business involvement in the construction of settlements in the OPT focused on those development and construction firms who were directly involved. The Council's analysis concluded that the companies were contributing to the construction of the settlements in a material and direct manner and were very likely to continue to be involved in such activities into the future. It determined that this constituted a direct contribution to projects that breached humanitarian law and the Norwegian Government Pension Fund subsequently excluded the companies from the portfolio on the Council's recommendation. The Council of Ethics has issued no further company exclusions related to this issue.

In 2014, the Dutch Pension Fund PGGM excluded Israeli Banks involved in the settlements whilst the other Dutch Fund ABP determined that it was not appropriate to exclude the banks. [redacted]

[23] https://www.beehive.govt.nz/release/new-zealand-expresses-concerns-over-proposed-israeli-annexation-plans#:~:text=%E2%80%9CNew%20Zealand%20is%20a%20long,live%20in%20peace%20and%20security.&text=%E2%80%9CThe%20New%20Zealand%20Government's%20view,significant%20risks%20to%20regional%20security.

Following the Israeli annexation announcements, in June 2020 ABP excluded 2 Israeli banks, Bank Leumi and Bank Hapoalim for failure to produce a detailed and comprehensive human rights policy. More action by peer funds may follow.

NZ Super Fund considerations

Institutional investors may face reputational risks from both holding, or from excluding, companies involved in some way on the politically divisive issue of Israel and Palestine. Response to our own decision to exclude in the past has been mixed. [redacted]

The overall issues are complex and involve matters of judgment. However, we have a robust decision-making process for exclusion decisions, and ensure that position is clearly communicated.

Relevant RI standards (under the RIF)	
UN Global Compact Principle 1: support international human rights UN Global Compact Principle 2: avoid complicity in human rights abuses	
Materiality of involvement	
Context under international law and the actions of States	
International sanctions or International Law. National Law International censure	The United Nations regards the broader issue of Israel establishing settlements in the OPT as breaching international law (including the IV Geneva Convention) by moving its own civilian population into occupied territory. The ICJ has indicated that it is inconsistent with The Universal Declaration of Human Rights and UN Resolutions. A Report to the UN Human Rights Council in 2013 by an independent international fact-finding mission established to investigate the implications of the Israeli settlements on the human rights of the Palestinian people considered the human rights implications of the settlements in the OPT and highlighted infringement of the right to self-determination, non-

	discrimination, freedom of movement, the rights to education, water, housing and an adequate standard of living. Whilst Israel disputes the illegality of the activity, the UN, State of Palestine, and NZ view the settlement activity as a significant breach of international law. The recent deterioration in the peace process due to Israeli annexation intent has significantly increased international censure and heightens the human rights and reputational risks surrounding corporate involvement in the settlements. Some further developments saw the Dutch Parliament passing a resolution on the 1st of July 2020 which calls for the government to consider sanctions against Israel if it goes ahead with the annexation plan for settlements in OPT.[24] Belgium's Chamber of Representatives voted for a similar resolution, should Israel proceed with annexation plans. Companies are not responsible for the actions of States. However, these actions can be important to the context within which they operate and seek to apply their own corporate standards.

UN Global Compact	Evidence and Severity of breach of RI standards by company
Breach of RI standards (severity)	The United Nations and ICJ's positions focus on the broader issue of settlements, and do not establish whether the Israel Banks' activities contravene international law. MSCI has raised a lower level controversy flag (yellow) noting concerns over the Israeli Banks involvement in the construction of settlements in the OPT. MSCI reports the companies' have responded by stating that they

[24] https://www.middleeastmonitor.com/20200701-dutch-parliament-votes-to-impose-sanctions-on-israel-if-it-annexes-west-bank/

	have legal rights conferred by the Israeli State. MSCI does not conduct further in-depth analysis on the issue of the settlements. Following our own research, drawing on UN and other credible reports, we consider the materiality (proximity and importance) between the Israeli Banks' activities and settlement construction below, whether this leads to a breach of our RI standards and if so the severity of this breach.
UN Global Compact Principle 1 UN Global Compact Principle 2	**Breaches of standards by banks in the construction of settlements in the OPT** **Summary:** *Given the special circumstances pertaining to the OPT, the clear positions by the United Nations and New Zealand Government on the unlawful nature of the settlements, and the nature of their involvement in the settlements, there is an unacceptable risk in our view, based on the information available to us, that the banks are in breach of the UN Global Compact Principle 1. to support international human rights and Principle 2. to avoid complicity in breaches of human rights, and that this breach is severe, long-term and ongoing.* A number of reports have concluded that the construction of Israeli settlements in the OPT cause or contribute to breaches of Palestinian human rights including the right to self-determination, non-discrimination, freedom of movement, and rights to education, water, housing, and an adequate standard of living. The planned intensification of settlement activity will exacerbate the infringement of these human rights. Under our RI Framework we use the UN Global Compact principles as a benchmark for expected standards of corporate behaviour (our RI standards for companies). Principle 1 asks companies to support international human rights and Principle 2 provides that businesses should avoid being complicit in human rights abuses. There is credible evidence that the Israeli Banks provide finance for the construction of Israeli settlements in the OPT. We have accordingly considered whether, by providing that finance, the Israeli Banks have materially breached these UN Global Compact Principles.

	Guardians has previously excluded property development and construction firms Africa-Israel Investment, Danya Cebus, and Shikun & Binui. There was credible evidence that these companies have an integral role in settlement planning, development and construction. In our original research into the issues of the OPT settlements, we considered the banks to be service providers to the developers and less materially involved on the basis that they were one step removed from the construction process. We have continued to monitor developments since that time, and now understand their role to be materially more integral to the settlement activities based on more recent reports. In particular, we understand the banks to be providing project finance to the developers (i.e. funding directly linked to the particular development projects) and actively partnering with the development and construction firms. The Israeli Banks' activities appear to be of a material scale and important to the settlement activities for the following reasons: • It is likely to be difficult for settlement construction to take place on the scale contemplated by recent construction approvals without significant bank finance. • There do not appear to be any non-Israeli bank companies funding the settlements, therefore Israeli Banks (including the listed banks we covering in this paper) are the key source of ongoing finance for the settlements. • According to reports we have seen, the Israeli Banks sign Accompaniment Agreements (regulated by Israeli Sale Law) which involves the bank across key stages of the construction and sale process. The Israeli Banks provide finance for the development and construction company to purchase the land and build the project and financial guarantees on housing projects for buyers. They hold the property as collateral until the units are sold. The banks will inspect each stage of the project including profitability

	and are usually involved in determining the price rate and sale schedule of apartments. It is not necessarily atypical of banks to be closely involved with developers they are financing. Generally we would engage with a bank to improve integration of ESG risks in their lending processes when faced with such activity by customers. • However, the ongoing absence of any significant action by the Israeli Banks to address the issues in the face of UN condemnation, including UN Security Council Resolutions, is a rare situation. The Israeli Banks' involvement has continued in full knowledge of UN censure regarding the settlements over a long period of time. • The Israeli Bank's breach of UN Global Compact standards is, in our view, severe, long-term and ongoing due to the integral nature of involvement and the significant impact on human rights from the settlements.
	Specific details of the Israeli Banks' involvement The primary source of information on the banking sector and involvement in the OPT is the NGO "Who Profits" reports.[25] The researchers have identified the banks involvement by settlement and project. The sources of information are well referenced and we consider them to be reliable. The UN OHCHR has identified that it considers there are reasonable grounds to believe, based on a reliable body of information consistent with other material, these banks as involved in financing the settlements in the database prepared pursuant to Human Rights Council resolution 31/36. The following table lists each bank and the main settlements where they are each financing projects, (primarily housing developments): First International Bank of Israel: — Beitar Illit; Gilo (East Jerusalem)

[25] http://www.globes.co.il/serveen/globes/docview.asp?did=1000596221&fid=1124

	Israel Discount Bank:	Gilo (East Jerusalem); Neve Ya'akov
	Bank Hapoalim	Beitar Illit; Efrat; Ma'ale Adumim; Har Homa; Pisgat Ze'ev
	Bank Leumi	Alfei Menashe; Givat Ze'ev; Ma'ale Adumim; Har Homa; Neve Ya'akov; Pisgat Ze'ev
	Bank Mizrahi-Tefahot	Southeast Ariel; Beitar Illit; Ma'ale Adumim; Har Homa; Neve Ya'akov; Pisgat Ze'ev; Ramat Shlomo
Severity of the breach of standards	**Severe, long term, ongoing**	
Key sources		

Council on Ethics (Norway) Recommendations to the Ministry of Finance November 16th 2009 (Africa Israel Investments Ltd, & subsid. Danya Cebus)
Council on Ethics (Norway) Recommendations to the Ministry of Finance 21 December 2011 (Shikun & Binui Ltd.)
UN Security Council resolution 465 (1980) http://unispal.un.org/UNISPAL.NSF/0/5AA254A1C8F8B1CB852560E50075D7D5
ICJ Legal Consequences of the Construction of a Wall in the OPT, July 4th 2004 (also consider the legality of the settlements).
UN General Assembly GA/11191 66th GA Plenary 81st Meeting Annex IV, VI and VII
NZ MFAT - http://www.mfat.govt.nz/Foreign-Relations/Middle-East/New-Zealand-Voting.php
EU Trade with Israeli Settlements Briefing Paper Aug 2012 and Peace Now report "Torpedoing the Two State Solution: Summary of 2011 in the Settlements". Jan 2012
https://www.icj.org/israel-palestine-measures-toward-annexation-of-the-occupied-palestinian-territory-must-be-reversed-icj-analysis/
"Financing the Land Grab – the direct involvement of Israeli Banks in the Settlement Enterprise" – report by Who Profits research centre (NGO) Feb 2017
"Bankrolling Abuse – Israeli Banks in West Bank Settlements" – Human Rights Watch 2018 (NGO report)
Database of business enterprises involved in certain specified activities related to the Israeli settlements pursuant to Human Rights Council resolution 31/36 on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan. – Report compiled by OHCHR – to be updated annually (12 February 2020). https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25542
Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, "Situation of human rights in the Palestinian territories occupied since 1967" 21 October 2019, para 63 (Report of the Special Rapporteur 2019). https://undocs.org/A/74/507.
Highlighted in the June and December 2020 reports from the UN Secretary General on the implementation of Security Council resolution 2334, https://www.un.org/unispal/wp-content/uploads/2020/06/S.2020.555.pdf, https://www.un.org/unispal/wp-content/uploads/2020/12/S20201234_161220.pdf

Assessment of sources of evidence	Reputable evidence based on reliable sources

Likely effectiveness of engagement and use of resources	
Context	The Israeli Banks have business revenue coming from a wide range of business lines, primarily in Israel (not the OPT). The Israeli State disputes that the projects are illegal. However, reliance by the companies on local Israeli law is not sufficient in this case to avoid a breach of RI standards. The Israeli Banks are not responsive to the concerns of the international community regarding the impact of the construction of settlements , including on the peace process. Two banks have recently been excluded by ABP for not responding sufficiently on human rights policy and practice. The ability to collaborate is limited as four of the five banks are small-cap which reduces the likelihood peers would hold the companies and/or prioritise them for engagement. We expect if the companies take a view that their activities are legal (and this is a view reflected by the Israeli State) any engagement efforts we undertake will not be successful, which is consistent with the absence of material substantive action from the Israeli Banks to date.
Issue conflicts with viability of company?	
Lack of ability to control situation?	
Legal compliance is not sufficient?	
Responsiveness	
Structural issue (history of problems)?	
History or culture of non-engagement (e.g. only responds to extreme actions)?	
Limited ability to collaborate with peers?	
Has reached limits of what company can do?	
Language or cultural barriers?	
Can work with other investors	
Engagement is an efficient use of resources?	[redacted] so engagement collaboration would need to be led by us. As a small minority shareholder and with limited likelihood of success, we do not believe engagement on this issue with these investee companies is a good use of our resources.
Assessment	**Engagement unlikely to be effective or an efficient use of resource**

Impact on Fund Performance	
Is this a NZ or Australian company? Does the Fund have large holdings in the company/ies? Will exclusion harm Fund performance?	The companies are not part of the New Zealand or Australian universe for our local portfolios. The companies are not important to the portfolio in terms of total exposure, AUM or size of holdings. Exclusion of the Israeli Banks will not harm Fund performance.
Assessment	**Engagement is resource intensive and unlikely to be effective; Exclusion does not have a significant impact.**

Concluding comments	
Summary of key considerations supporting exclusion recommendation. The materiality of the issue for the Israeli Banks centers on the illegal status of the settlements, and credible evidence that the Israeli Banks play a material and critical role in enabling such settlement activities. We can expect growing censure of business involvement in the settlements due to the escalating numbers of approvals and tensions from annexation plans announced by the Israeli Government. Whilst these formal annexation plans are now on hold, these moves have escalated international censure of the settlement activity. The key elements are: 1. UN and International censure, NZ position 2. Recent escalation of tensions increasing reputational risks 3. Central and direct involvement of the banks 4. Lack of responsiveness to engagement by peers 5. Other priorities on which to expend engagement resources 6. Limited investment impact from exclusion **Conclusion:** *We consider that there is an unacceptable risk that the banks are materially contributing to a breach of human rights standards and that engagement is unlikely to be effective, is resource intensive given the size of holding and exclusion would be financially immaterial for the Fund.*	

Recommendation	Exclude

From: Catherine Etheredge
To: [redacted]
Subject: Guardians of NZS - Israeli bank exclusion decision
Date: Monday, 1 March 2021 9:33:25 AM
Attachments: image001.jpg
image002.png
image003.png
R-GNZS-IC-Paper-Exclusion-of-Israeli-Banks-January-2021.pdf

Dear [redacted] I hope you are well.

We note that you have written to us in the past in relation to the NZ Super Fund's investments in companies with activities connected with the Occupied Palestinian Territories.

In January this year, the Guardians' Chief Investment Officer approved a recommendation by the Guardians' Investment Committee to exclude securities issued by First International Bank of Israel, Israel Discount Bank, Bank Hapoalim, Bank Leumi and Bank Mizrahi-Tefahot from the Fund's portfolio. The exclusions were implemented in February 2021. For your information, please find attached a copy of a recent Investment Committee paper about this decision. This paper has been proactively disclosed on our website.

Kind regards
Catherine

Catherine Etheredge
Head of Communications
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Mobile: +64 27 4777 501
Email: cetheredge@nzsuperfund.co.nz

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NZSuperFund_Logo_RGB

From: [redacted]
To: Catherine Etheredge
Subject: Re: Guardians of NZS - Israeli bank exclusion decision
Date: Monday, 1 March 2021 12:13:28 PM
Attachments: image001.jpg
image002.png
image003.png

Hi Catherine,

Thank you for you email. I hope you are well too.

These are interesting developments. Thank you for letting me know.

Kind regards,
[redacted]

On Mon, 1 Mar 2021 at 09:34, Catherine Etheredge <CEtheredge@nzsuperfund.co.nz> wrote:

> Dear [redacted] I hope you are well.
>
> We note that you have written to us in the past in relation to the NZ Super Fund's investments in companies with activities connected with the Occupied Palestinian Territories.
>
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>
> Kind regards
> Catherine
>
> **Catherine Etheredge**
> **Head of Communications**
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>

From: Catherine Etheredge
To: [redacted]
Subject: Guardians of NZS - Israeli bank exclusion decision
Date: Monday, 1 March 2021 9:35:35 AM
Attachments: image001.jpg
image002.png
image003.png
R-GNZS-IC-Paper-Exclusion-of-Israeli-Banks-January-2021.pdf

Dear [redacted] I hope you are well.

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Kind regards
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From: [redacted]
To: Catherine Etheredge
Subject: Re: Guardians of NZS - Israeli bank exclusion decision
Date: Monday, 1 March 2021 10:18:55 AM
Attachments: image001.jpg
image002.png
image003.png

Dear Catherine,

Thank you so much for sharing this news with me. How very thoughtful of you.

Kind regards,
[redacted]

fyi There is a growing movement lead by Palestinian and Israeli human rights activists for outside pressure to force Israel to become a one State secular, inclusive, equal human rights society. It may sound too optimistic but it in fact, it would be in the best interests of all.

On Mon, Mar 1, 2021 at 9:36 AM Catherine Etheredge <CEtheredge@nzsuperfund.co.nz> wrote:

> Dear [redacted] I hope you are well.
>
> We note that you have written to us in the past in relation to the NZ Super Fund's investments in companies with activities connected with the Occupied Palestinian Territories.
>
> In January this year, the Guardians' Chief Investment Officer approved a recommendation by the Guardians' Investment Committee to exclude securities issued by First International Bank of Israel, Israel Discount Bank, Bank Hapoalim, Bank Leumi and Bank Mizrahi-Tefahot from the Fund's portfolio. The exclusions were implemented in February 2021. For your information, please find attached a copy of a recent Investment Committee paper about this decision. This paper has been proactively disclosed on our website.
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> Kind regards
> Catherine
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