

Hon Grant Robertson
Minister of Finance
Via email: Grant.Robertson@parliament.govt.nz

13 May 2021

Dear Hon Minister Robertson,

RE: NZSF decision to divest from Israeli banks

1. Thank you for your letter of 11 May 2021. We assume that you sent that letter before having an opportunity to consider the information contained in our letter of 05 May, as you do not refer to it.
2. In this letter we set out material information, some of which is repeated from our 05 May letter, that suggests the Guardians' decision to divest from Israeli banks has caused reputational damage to New Zealand and that the decision did not follow best practice standards.
3. As the Guardians is operationally independent, we appreciate your sensitivity, but that does not make it unaccountable. On the contrary, it is precisely because it is independent that it is accountable to you.
 - a. This is why under Section 69 of the New Zealand Superannuation and Retirement Income Act 2001¹ (The Act) the Guardians' must report to you any information you require. This information would include any information they did not take into account in reaching their decision and any reputational issues they are now aware of.
 - b. The Guardians' accountability to you is also why, under Section 71 of The Act, you review whether or not the Guardians has complied with its investment policies, standards, and procedures in all material respects.

The contents of this letter is germane to both of those statutory responsibilities.

The decision has caused damage to New Zealand's reputation

4. For reasons given below, the Guardians' decision has aligned New Zealand with the politics of the Boycott, Divestment, and Sanctions (BDS) campaign. Thus, reputational damage is assured.
 - a. The BDS campaign is led by the Palestinian Campaign for Academic and Cultural Boycott of Israel, a Ramallah based Palestinian organisation founded in 2004.² It is an arm of the BNC, the Palestinian National Committee. The BNC is comprised of member organisations, foremost amongst them is the Palestinian National Islamic Forces, a group consisting of Hamas and Palestinian Islamic Jihad, both currently engaged in war crimes.³
 - b. The German Bundestag has passed a resolution describing the BDS campaign as antisemitic and compared it to the Nazi boycott of Jews.⁴ Other governments of democratic countries have similarly condemned BDS.⁵

If aligning, or being perceived to be aligning, the New Zealand Government's own funds with BDS is not reputational damage to a democratic and forward-thinking country, we don't know what is.

¹ <https://bit.ly/3hfh3xo>

² https://jcpa.org/pdf/PACBI_unmasked_web.pdf

³ *ibid*

⁴ <https://www.dw.com/en/german-parliament-condemns-anti-semitic-bds-movement/a-48779516>

⁵ <https://www.jewishvirtuallibrary.org/countries-opposed-to-bds>

5. New Zealand is the only country with a sovereign fund to exclude Israeli banks. While leading on issues of human rights may increase the reputation of a country, when it is clearly discriminatory and does not follow best practice (as in this case), it is damaging.
 - a. On a sliding scale this issue moves New Zealand closer to, and not further away from, reputational damage with the democratic 'global community' whose reputation most New Zealanders increasingly care about.
 - i. This is especially true at a time when strategic relationships with democracies such as the USA, Germany, the United Kingdom and Australia are more, rather than less, important to New Zealand's strategic and trading future.
6. The US research institute, Foundation for Defense of Democracies, has pointed out that the divestment decision "could cause reputational and financial problems for New Zealand and for companies managing its sovereign wealth fund."⁶
7. UK Lawyers for Israel have suggested that the decision breaches legal requirements.⁷
 - a. The Patrons of UK Lawyers for Israel include two former members of the UK's Supreme Court (Lord Millett and Lord Dyson; the latter was also President of the English Court of Appeal); a former member of the Scottish Court of Appeal (Inner House of the Court of Session – Lady Cosgrove); a former First Minister of Northern Ireland (Lord Trimble); a former leader of the UK Conservative Party (Lord Howard); a former Minister of Trade and Industry (Lord Young).
8. The Guardians have self-referred themselves to the United States Office of Antiboycott Compliance of their decision.⁸
 - a. This has the potential for New Zealand to be listed alongside countries like Iran, Libya, Syria, and Yemen.
 - b. It is highly likely that at least some of the investment managers are very uncomfortable at having been placed in this position, as they are now implicated in the decision and the regulator's sights trained on them.
 - i. It is vitally important for the continued management of the Fund that it maintains good working relationships with key investment managers. We are concerned that this is being jeopardised via the decision.

The decision did not follow best practice

The process of the decision was flawed

9. The Guardians did not give the Israeli banks an opportunity to engage before the divestment and exclusion was applied.⁹
 - a. This is in contrast to the engagement the Guardians have with companies invested in that are located in the Western Sahara.¹⁰
10. The Guardians sought no advice from the Ministry of Foreign Affairs on the decision, despite the impact on New Zealand's international relations being entirely foreseeable.¹¹
 - a. This is in contrast to the situation with companies invested in that are located in the Western Sahara.¹²

⁶ <https://www.fdd.org/analysis/2021/04/22/new-zealand-fund-divests-from-israeli-banks/>

⁷ <https://bit.ly/3vSYIzA>

⁸ NZSF Document Number 3205465

⁹ <https://bit.ly/NZ-SF>

¹⁰ Mohamed v Guardians of NZ Superannuation CIV-2020-404-000361

[2021] NZHC 512 <https://nzsuperfund.nz/assets/Uploads/Mohamed-v-Guardians-of-NZ-Superannuation.pdf>

¹¹ <https://bit.ly/NZ-SF>

¹² Mohamed v Guardians of NZ Superannuation CIV-2020-404-000361

[2021] NZHC 512 <https://nzsuperfund.nz/assets/Uploads/Mohamed-v-Guardians-of-NZ-Superannuation.pdf>

11. The Guardians wrote to New Zealand anti-Israel activist, John Minto, who promotes the BDS campaign, to inform him about the exclusion decision before they wrote to your office as Minister of Finance.¹³
12. The Guardians have singled out Israel and the “occupation”, while continuing to invest in companies and banks in other jurisdictions where there are “occupations” and objectively worse human rights issues.¹⁴
 - a. We have identified 39 companies that NZSF invests in that are arguably involved in supporting ‘occupations’ around the world based on their logic.¹⁵ This includes companies involved in maintaining the occupation of Western Sahara, Northern Cyprus, and Crimea.
 - b. We have identified a further 48 companies that use forced labour that NZSF invests in.¹⁶
13. CEO, Matt Whineray, raised questions about the MSCI flag for the banks being “only yellow” (i.e. “does not constitute a major breach of global norms”¹⁷) in an email on 19 January 2021¹⁸ to which there was no recorded response from anyone.

The data relied on for the decision is biased and significantly flawed

14. The Guardians claim to lean heavily on the UN Global Compact for decision-making, yet one of the companies excluded, Bank Leumi, is an active signatory of the Global Compact and has been since 2008.¹⁹
15. The justification document and an internal NZSF email from Anne-Maree O’Connor²⁰ reference a 2020 report on the Norwegian Government Pension Fund (NGPF) ethical framework. However:
 - a. That report explicitly states “The recommendations have been limited to main contractors responsible for the construction of Israeli settlements in occupied territory.”²¹
 - b. The Norwegian Council on Ethics has drawn a clear distinction when companies are directly involved in the construction of settlements - as NZSF did in 2012 - and stated that the exclusion threshold must be high.²²
 - c. The Norwegian sovereign fund, NGPF, still invests in Israeli banks.²³Yet Ms O’Connor peculiarly and incorrectly referred to the Norwegian example as evidence supporting the Guardians’ exclusion decision.
16. The justification document is misleading and incorrect in its reference to two Dutch Pension Funds (ABP and PGGM).²⁴
 - a. While ABP does not have Israeli banks on their list of assets and the BDS campaign claimed a victory in 2020,²⁵ the Israeli banks are not listed as exclusions from the fund,²⁶ and there is no indication that divestment was made on the grounds of ‘ethical’ considerations.

¹³ *ibid*

¹⁴ <https://freedomhouse.org/countries/freedom-world/scores>

¹⁵ <https://bit.ly/NZ-SF>

¹⁶ *ibid*

¹⁷ <https://bit.ly/3beoZv5>

¹⁸ NZSF Document Number 3185242

¹⁹ <https://www.unglobalcompact.org/what-is-gc/participants/1157>

²⁰ NZSF Document Number 3185242

²¹ <https://bit.ly/3bfzGqS>

²² *ibid*

²³ <https://www.nbim.no/no/beholdningene/#/2020/investments/equities>

²⁴ <https://bit.ly/NZ-SF>

²⁵ <https://bdsmovement.net/news/biggest-dutch-pension-fund-abp-divests-from-israeli-banks>

²⁶ <https://www.abp.nl/images/companies-excluded.pdf>

- b. PGGM overturned their decision in 2019²⁷ and reportedly immediately regretted the 2014 exclusion.²⁸
 - i. At that time, there was swift condemnation from the Dutch Foreign Ministry,²⁹ that said the decision was a “sanctimonious move intended to pander to a certain nefarious trend in public opinion”; and
 - ii. The fund was blacklisted by the state of Illinois as Israel boycotters.³⁰
17. The justification document made no reference to the Oslo Accords, which were mutually agreed to by the PLO and Israel, and guaranteed by the UN and the international community. The provisions in the accords specifically govern relations between Israel and the PA, and as the *lex specialis*, trump more general obligations delineated in other legal documents.³¹
- a. Under the treaty, Israel is granted full security and civil control in Area C of the West Bank (the location of the settlements). The borders of Israel and the future Palestinian state, the status of Jerusalem, refugees, and settlements are to be “negotiated in the permanent status negotiations” not adjudicated by pension funds in other countries.
 - b. Accusing companies of being complicit in violations based on their adherence to mutually agreed upon and internationally brokered agreements – such as the Oslo Accords – fundamentally undermines the foundations of the international legal order.
18. The Guardians made a conscious decision in 2012 not to exclude Israeli banks because they drew “a distinction between a company being directly and materially involved in an activity, versus being a supplier of materials or services in the normal course of business.”
- a. The justification document overrules this distinction partly on the basis of a 2019 announcement by Prime Minister Netanyahu that “if his government were re-elected it would annex parts of the OPT”.
 - i. However, that is hopelessly out of date: as part of the Abrahamic Accords, which has seen some Arab countries announce an end to their boycotts of Israel³² and the UAE announce a \$10b fund for investment into Israel,³³ the proposed annexation has been suspended.³⁴ There has also been another election.
- Thus, the Guardians are seeking to punish companies for something that did not happen and that is not on the agenda.

The expertise of the author(s) of the Justification Document is non-existent, and the sources relied on are flawed

19. Given the serious flaws in the justification document³⁵, we cannot believe that the author(s) had any expertise relevant to the Arab-Israeli conflict.
- a. We note that the NZSF has refused to release the name of the person(s) responsible for the document. If they were *bona fide* experts able to defend their position, this should not be necessary.
20. The justification document cited only anti-Israel NGOs and provided no balance in opinion with which to properly consider the data.³⁶

²⁷ <https://www.timesofisrael.com/dutch-pensions-group-removes-israeli-banks-from-blacklist/>

²⁸ <https://bit.ly/3bfAbak>

²⁹ <https://bit.ly/3xVHyOe>

³⁰ <https://foreignpolicy.com/2020/06/10/israel-annexation-boycott-europe-palestinians-netanyahu/>

³¹ <https://bit.ly/3xYtyU1>

³² <https://www.israelnationalnews.com/News/News.aspx/299744>

³³ <https://en.globes.co.il/en/article-uae-launches-10b-israel-investment-fund-1001363820>

³⁴ <https://bit.ly/3y6qmWs>

³⁵ <https://bit.ly/NZ-SF>

³⁶ <https://bit.ly/NZ-SF>

- a. One of the NGOs cited in the justification document is a leader in the BDS campaign against Israel and has links to terror organisations.³⁷
21. The justification document references a United Nations OHCHR blacklist of Israeli companies³⁸ and CEO, Matt Whineray, referenced this blacklist in an email of 19 January 2021.³⁹
 - a. By relying on the database, which was politically motivated and by its terms not a legal analysis (of what is in fact a legal issue), the Guardians are - and by implication, the New Zealand government is - aligning with the politics of BDS and foregoing proper legal analysis to a legal question.⁴⁰
 22. The justification document relied heavily on Security Council Resolution 2334
 - a. The justification document claimed that UNSC 2334 “is considered binding on Israel”.⁴¹ However, the resolution was not adopted in exercise of the Security Council’s ‘Chapter VII’ powers. Therefore, all of its operative provisions are legally non-binding.⁴²
 - b. Furthermore, UNSC 2334 has been recognised as deeply flawed⁴³ to the extent that, in 2018, the leader of the New Zealand National party admitted they “got it wrong” in supporting the resolution.⁴⁴
 23. The justification document relied on non-binding United Nations General Assembly resolutions.
 - a. The United Nations passes a grossly disproportionate number of resolutions against Israel, showing institutional bias against the Jewish nation.⁴⁵
 - i. For example, since 2015 there have been 112 resolutions against Israel and only six other countries have been singled out in a total of 42 resolutions.
 - b. Furthermore, resolutions about other countries contain diplomatic comments of praise such as “Welcomes the positive developments in Myanmar...”, “Acknowledging the participation of North Korea...”, and “Commends the Government of the Sudan...”. In contrast, the resolutions against Israel are suffused with political hyperbole and contain few, if any, comments of praise.

The qualifications and competence of Ms O’Conner, as Chair of the Ethical Investment Committee, to identify and select competent, bona fide authors that could pass the minimum thresholds of a best practice are lacking

24. Chair of the Ethical and Socially Responsible Committee is Anne-Maree O’Connor, has no relevant formal qualifications in politics, law, history, international relations, or finance.
 - a. It is an abrogation of responsibility on behalf of the Guardians to leave an important, geopolitically-complex and sensitive decision to someone with no relevant formal qualifications who only consulted someone with no expertise in this area.

Next steps

25. As the Minister of Finance, you are empowered to enforce accountability here. The acts of the Guardians are so serious that the situation demands urgent ministerial action in line with the statutory responsibilities

³⁷ https://www.ngo-monitor.org/ngos/who_profits/

³⁸ <https://bit.ly/3oeQSsh>

³⁹ NZSF Document Number 3185242

⁴⁰ <https://www.jns.org/opinion/new-details-on-the-un-bds-blacklist/>

⁴¹ <https://bit.ly/NZ-SF>

⁴² <https://bit.ly/33OKiiN>

⁴³ <https://israelinstitute.nz/2017/11/two-dozen-legal-experts-condemn-uns-c-resolution-2334/>

⁴⁴ <https://israelinstitute.nz/2018/07/new-zealand-got-it-wrong-over-2334-simon-bridges/>

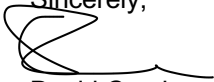
⁴⁵ <https://unwatch.org/database/>

26. We have communicated the information contained in this letter to the Guardians. They have committed to reconsider whether there is “new information”, as indeed this is. They are obliged to reverse their decision where there is reputational damage.
 - a. The Guardians have stated that they are open to reviewing the decision in light of new information.
 - b. It is highly likely your office can accelerate these decisions in the best interests of the country.

27. As with the investments you have sought advice on with respect to Myanmar⁴⁶ and China⁴⁷, for example, we request that you use your legislated powers to properly query the decision of the Guardians to divest from Israeli banks.

28. We understand that this letter is subject to OIA requests and we do not require consultation for its release, with or without personal details redacted.

Sincerely,



David Cumin
Co-director
The Israel Institute of New Zealand

⁴⁶ <https://bit.ly/3bh5aTK>

⁴⁷ <https://bit.ly/3y28pID>