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Joint Committee on Foreign Affairs and Defence
Consideration of the Illegal Israeli Settlements Divestment Bill
2023

January 2024

MEMBERSHIP

The following Deputies and Senators are members of the Joint Committee on Foreign Affairs and Defence of the 33rd Dáil Éireann and the 26th Seanad Éireann










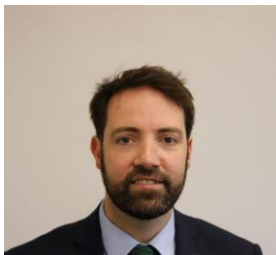



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Table of Contents

Consideration of the Illegal Israeli Settlements Divestment Bill

MEMBERSHIP	2
Introduction	2
Background	2
Proposed use of UN Database	2
Establishment of Future Ireland Fund and Infrastructure, Climate and Nature Fund	3
Views of the Joint Committee on Foreign Affairs and Defence	4
Further progression of the Illegal Israeli Settlement Divestment Bill	6
Conclusion.....	7
Annex 1:UN Database	8
Annex 2:Standing Orders 177 and 178:.....	9

Introduction

The Illegal Israeli Settlements Divestment Bill 2023, a Private Members Bill introduced by John Brady TD, reached Second Stage in the Dáil on 16 May 2023. Minister for Finance Michael McGrath TD wrote to the Cathaoirleach of the Joint Committee on Foreign Affairs and Defence on 1 June seeking the Committee's views on the most appropriate and legally sound mechanism to progress the intention behind the Bill. The Joint Committee was briefed by officials from the Department of Finance and from the Ireland Strategic Investment Fund (ISIF) on 24 October.

The Bill was considered against the backdrop of extreme violence in Israel and in the occupied Palestinian territories. While the scope of this report is confined to the specific issues raised in the Illegal Israeli Settlements Divestment Bill, the Joint Committee takes this opportunity to express its horror at the catastrophic humanitarian disaster currently unfolding with over 24,000 dead, thousands missing, 1.9 million people displaced, and massive destruction of housing and vital infrastructure, including education facilities. The Joint Committee urges the Government to make every diplomatic effort to promote the aim of securing an immediate humanitarian ceasefire, the immediate and unconditional release of hostages, and to insist on full, safe, and unhindered humanitarian access to Gaza and support the UN in their efforts to increase the flow of humanitarian goods into Gaza.

Background

The Illegal Israeli Settlements Divestment Bill 2023 seeks to amend the National Treasury Management Agency (Amendment) Act 2014 which established ISIF. It proposes that the NTMA/ISIF would not invest directly or indirectly in a list of companies doing business in the illegal Israeli settlements in the occupied Palestinian territory (oPt) named in a UN Database produced by the UN's Human Rights Council on 12 February 2020 and would divest from such investment where it became known to ISIF. The Minister for Finance has expressed understanding for the motivation and intentions behind the Bill but has a number of concerns including the appropriateness of the proposed use of the UN database.

Proposed use of UN Database

On 24 March 2016, at its 31st session, the Human Rights Council adopted Resolution 31/36 entitled "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan".

This resolution requests that the United Nations High Commissioner for Human Rights produce a database of all business enterprises engaged in certain Israeli settlement activity in the occupied Palestinian territory. On 12 February 2020, the OHCHR published a report containing a database listing 112 business entities. The database was updated in June 2023. However, this update was exceptional in nature as the database has not been allocated funds to ensure regular monitoring of companies on the list. A UN Human Rights Council Resolution calling for additional funding for the database was adopted in July.

The Department of Finance has identified a number of concerns regarding the use of this UN database in the Bill. The Bill could require disinvestment from a company even where it was not now invested in the occupied Palestinian territories. In turn, it would potentially allow the NTMA to invest in companies active in the occupied Palestinian territories while in full compliance with this Bill. The Department has expressed concern at whether it is legally sound to indirectly name specific private companies in primary legislation. It also expressed concern that the Bill would cross-reference a UN document, stating that it is not clear whether it is possible in domestic law to impose specific investment restrictions based on a cross-reference to a document produced by an international body such as the UN.

Establishment of Future Ireland Fund and Infrastructure, Climate and Nature Fund

In Budget 2024, the Minister for Finance announced the intention to establish a Future Ireland Fund and an Infrastructure, Climate and Nature Fund. Primary legislation to establish these funds will address Environmental Social and Governance issues (ESG). The Department of Finance views this as an opportunity to consider how to deal with the issue of investment by companies active in the oPt. At the meeting of 24 October, a member of the Committee countered that there is no reason why the Illegal Israeli Settlements Divestment Bill could not progress in tandem with legislation establishing the funds.

As part of the preparation of this legislation, the NTMA has analysed sovereign wealth funds and their approach to ESG, including on the issue of human rights violations in the oPt. ISIF's international peers in sovereign investment generally do not operate under detailed statutory responsible investment rules. Where a legislative approach is taken, this is usually at a high level with details determined in the implementation. The Department of Finance expressed the view that including a range of specific social or environmental concerns in primary law may be ineffective unless they can be made operational. A focus on high level

social and environmental principles in primary law along with an appropriate investment policy and supporting policies may achieve a better outcome. The policies and principles underpinning investment can be subject to change and evolution over time; adapting to such changes is more difficult where detailed rules are set out in primary legislation.

Views of the Joint Committee on Foreign Affairs and Defence

The Committee had an in-depth discussion with officials from the Department of Finance and ISIF. The discussion explored the intention behind the legislation, international examples of best practice, and ISIF's approach to other forms of responsible investment. The Committee heard that where issues such as those addressed by the Bill arise for ISIF's investment decisions, it is usually in the context of passive investments in ISIF's global portfolio which are outsourced to a partner, currently EOS at Federated Hermes. A decision is taken to expose investments to a certain basket of risks such as by tracking an index. Those passive portfolios contain large numbers of securities. ISIF allocates capital to a broad index and as a result have ended up exposed to the companies in question. ISIF's approach to responsible investment in this context is to work with their partners in EOS at Federated Hermes. These partners aggregate the influence of multiple investors and all their assets and seek to influence the companies they invest in. Given the scale of Hermes/EOS their influence is far in excess of what ISIF can bring to bear acting individually.

The Department of Finance officials highlighted that international best practice on responsible investment tends to use an approach based on policies or internal governance rather than a legislative approach. Where a legislative approach is taken, legislation is kept at a high level with details developed through internal policies.

Some members endorsed the approach taken in the Bill, underlining that a legislative approach is needed to ensure that the divestment from companies listed on the UN database. In response to the concern that the UN database is incomplete, one Member queried whether there is any suggestion that there are companies on the database at present that are not operating in the illegal settlements. On the Department of Finance view that incorporating the UN Database into primary legislation would make Ireland an international outlier, one Member countered that this would rather make Ireland an international leader. He said that while the UN database is incomplete, this is due to international efforts to starve it of resources. A UN Human Right Council Resolution calling

for more resources for the database was adopted in July. The Member asserted that the database is a live piece of work which, while not all encompassing, is a starting point.

Members raised the role of the UN Guiding Principles on Business and Human Rights, querying both how these are used in ISIF's decision-making and how they would interact with the proposals in the Bill. ISIF replied that human rights are factored into ISIF's investment decisions. In response to a question on eight companies engaged in the illegal Israeli settlements, ISIF explained that its partner organization have engaged with the companies in question, including by meeting the management teams to highlight concerns. The official acknowledged that none of the companies in question has ceased their operations in the illegal settlements as a result of these engagements.

One Member expressed the view that ISIF's process is flawed and stated that only a legislative approach can effectively stop investment in the illegal settlements. The Member asserted that reliance on ESG frameworks and responsible investment strategies have been found to be ineffective and called on the Department to give guarantees that mechanisms proposed will exclude the companies listed in the UN Database. In response, the Department official advised that no ESG process is perfect and that the funds must be future-proofed. It would be preferable to set out high-level principles in legislation with further detail developed in implementation.

Several members expressed concerns at the proposed use of the UN Database in the Illegal Israeli Settlements Divestment Bill. Concerns raised included the incomplete nature of the database given that it has not been adequately resourced. Members queried whether the approach proposed in the Bill is legally robust, particularly with regard to EU law. A member expressed concern at potential liability of the State if it makes investment decision based on a database that is incomplete or out of date resulting in a company unfairly missing out on a commercial opportunity. One Member expressed concern that the legislation specifically targets one country and suggested a wider human rights-based approach might be more appropriate.

Members expressed concerns at consistency of the Government's approach to the UN database across Departments. One Member highlighted that IDA Ireland's consultant, based in Israel, will not target companies listed on the UN database and queried why one state body is willing to rely on the database while the Department of Finance is not. Another

Member suggested that more robust knowledge sharing, and inter-agency cooperation is needed.

One Member expressed the view that that the proposed approach in the Bill would unduly restrict ISIF in its investment decisions, particularly in the use of third parties as partners. He considered legislation to be a “crude” tool in this context and advocated a policy-based approach.

The Committee queried what legal advice had been received by the Department of Finance. The Department officials advised that they cannot share either advice from the Attorney General or internal departmental legal advice. The Committee concluded that legal advice on the proposal is required.

Further progression of the Illegal Israeli Settlements Divestment Bill

The Illegal Israeli Settlements Divestment Bill 2023 will be deemed to be read a second time on 17 February 2024. There is a requirement for ‘Detailed Scrutiny’ of Private Members’ Bills as set out in Standing Orders 177 and 178. This ‘Detailed Scrutiny’ is undertaken by the relevant Committee (in this Bill’s case the Committee on Finance, Public Expenditure and Reform, and Taoiseach) and takes place after Second Stage, and prior to formal Committee Stage.

‘Detailed Scrutiny’ is a stage in the legislative process for Private Members’ Bills (PMBs) which endeavours to ensure that PMBs are subjected to a similar level of scrutiny as Government Bills.

This detailed scrutiny shall be conducted from a policy, legal and financial perspective, and in accordance with the guidelines set out in the Memorandum of Understanding agreed between the Dáil and the Government. Legal advice should be obtained as part of the pre-Committee Stage scrutiny of Private Members’ Bills.

Following the ‘Detailed Scrutiny’ of the PMB a report is laid before the Houses. This report to the Dáil reflects the opinion of the Committee and is a political opinion on the PMB and the policy underlying it. The report may refer to policy gaps, the legislative and policy

context, possible issues with the Bill which would require amendments, and possible unintended legal or policy consequences which should be addressed. The relevant Committee must also make a recommendation on whether or not the Bill may proceed to Committee stage.

For the avoidance of doubt this report from the Joint Committee on Foreign Affairs and Defence is not a report on the Illegal Israeli Settlements Divestment Bill 2023 under Dáil Éireann Standing Order 178.

Conclusion

The members of the Joint Committee on Foreign Affairs and Defence expressed a range of views on the merits of putting the UN database on a legislative footing. There was no consensus as to the most appropriate way to advance the intention behind the Bill. There was however support for a stronger approach to ESG in the State's investment through ISIF and in the new Future Ireland Fund and Infrastructure, Climate and Nature Fund. Should any such requirements be set out in legislation however, it is essential that these have robust basis. As the issues to be resolved relate to specifics of financial investment decisions and their legal implications rather than to foreign policy, the Joint Committee on Foreign Affairs and Defence considers that the Committee on Finance, Public Expenditure and Reform, and Taoiseach may be better placed to advise on these issues. It is recommended that further legal analysis of this proposal be carried out. As required by Standing Orders and as set out above, this would be undertaken by the relevant Committee prior to Committee Stage of the Bill.

Annex 1:UN Database

The UN Database compiled pursuant to Human Rights Resolution 31/36 lists companies engaged in the following activities in the oPt:

- The supply of equipment and materials facilitating the construction and the expansion of settlements and the wall, and associated infrastructures
- The supply of surveillance and identification equipment for settlements, the wall and checkpoints directly linked with settlements
- The supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops
- The supply of security services, equipment and materials to enterprises operating in settlements
- The provision of services and utilities supporting the maintenance and existence of settlements, including transport
- Banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses
- The use of natural resources, in particular water and land, for business purposes
- Pollution, and the dumping of waste in or its transfer to Palestinian villages
- Captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints
- Use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements

For further information, see <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session31/database-hrc3136>.

Annex 2: Standing Orders 177 and 178:

Where a private member's Bill has passed its second reading.

177. The Clerk of the Dáil shall cause a notification that a private member's Bill has been read a second time to be sent to—

- (a) the Clerk to the relevant Select Committee appointed pursuant to Standing Order 95 (in these Standing Orders referred to as the 'relevant Committee'),
- (b) the member in charge of the Bill, and
- (c) the member of the Government within whose policy remit the Bill falls

Scrutiny by Committees of private members' Bills which have passed their second reading.

178. (1) Where—

- (a) the notification that a private member's Bill has been read a second time has been circulated to the relevant Committee by the Clerk to the Committee; and
- (b) the member in charge of the Bill has sent a written request to the relevant Committee to undertake detailed scrutiny of the Bill (referred to in these Standing Orders as 'scrutiny'),

the Bill shall be subject to scrutiny by the relevant Committee: Provided that the Business Committee may waive, in accordance with Standing Order 30, the requirement for scrutiny, following a request from the member in charge of the Bill, or the relevant Committee. Such a request for a waiver may only be made where the Bill has been read a second time, shall be in accordance with guidelines adopted by the Committee on Standing Orders and Dáil Reform, and shall be subject to notice having been given to the Business Committee not later than 11 a.m. on the fourth day preceding its weekly meeting: Provided that, by permission of the Ceann Comhairle, a request for a waiver may be made on shorter notice. The member in charge of the Bill may request a scrutiny waiver even having asked the relevant Committee to undertake scrutiny. The relevant Committee may only ask for a waiver following the scrutiny request.

(2) Scrutiny, or detailed scrutiny under Standing Order 161, shall be conducted from a policy, legal and financial perspective, and in accordance with the guidelines set out in the Memorandum of Understanding agreed between the Dáil and the Government, and laid before Dáil Éireann.

(3) Where the relevant Committee has completed scrutiny of a private member's Bill, it shall—

(a) lay a report thereon before the Dáil, and

(b) following the laying of the report, send a Message to the Dáil—

(i) confirming that scrutiny has been completed and reported on, and

(ii) containing a recommendation on whether or not the Bill may proceed to Committee Stage.

Such a Message shall be in writing, signed by the Clerk to the Committee, and shall be addressed to the Clerk of the Dáil. The Ceann Comhairle shall, at the first convenient opportunity, communicate such Message to the Dáil.

(4) Nothing in these Standing Orders shall preclude a Joint Committee from undertaking scrutiny, and reporting thereon, save that only the relevant Committee may decide on the recommendation as to whether or not the Bill may proceed to Committee Stage.

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