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21 July 2025

SUBMISSION ON THE OVERSEAS INVESTMENT (NATIONAL INTEREST TEST AND OTHER MATTERS) AMENDMENT BILL

1. I am an Emeritus Professor of Law at Waipapa Taumata Rau/ The University of Auckland. In 2022 I retired after 43 years, during which time I specialised in teaching and researching domestic law and policy, international economic regulation, and Te Tiriti o Waitangi. This included analysis of New Zealand's foreign investment regime and its relationship to international trade and investment agreements.

2. I have written a number of books analysing contemporary policy making in Aotearoa New Zealand, including foreign investment under neoliberalism. Of particular relevance to this Bill are *Rolling Back the State. The privatisation of power in Aotearoa New* Zealand (Bridget Williams Books 1993); *The New Zealand Experiment. A World Model for Structural Adjustment?* (Auckland University Press 1996); *The FIRE Economy? New Zealand's Reckoning* (Bridget Williams Books 2015). I have had two Marsden Fund grants to conduct extensive research on domestic and international policy and law in Aotearoa New Zealand.

3. Internationally, I have been actively involved as an analyst, commentator, educator, advisor to governments, participant in inter-governmental reform proceedings, and as a reviewer for UNCTAD on foreign investment regimes, including under trade and investment treaties.

4. I agree that the Overseas Investment Act 2005 is extremely complex as a result of repeated piecemeal amendments. It requires first-principles reform through a careful, open, evidence-based, consultative process to achieve a balanced, workable and Tiriti-compliant regime that also reviews New Zealand's international trade and investment treaty commitments.

5. This Bill does the opposite of that. It seeks to implement another undemocratic coalition commitment between the ACT and National parties which pre-empts effective scrutiny and shows an arrogant disregard for evidence-based, consultative and transparent decision making.

6. The Bill's structure of piecemeal amendments to the existing Act is so convoluted that it is almost impossible to assess accurately the nature of its proposals and then relate them to New Zealand's international trade and investment commitments, even for someone with legal expertise on the subject. That is especially the case in relation to forestry and water.

7. This submission addresses the following matters:

   (i) The regulatory process;

   (ii) The risks of executive power;

   (iii) The misrepresentation of barriers to foreign investment;

   (iv) Exclusion of forestry land from sensitive land;

   (v) Abdication of Tiriti o Waitangi responsibilities;

   (vi) Locking in more liberalisation through trade agreements;

   (vii) Weakening control of foreign investment in water.

8. For the reasons set out below, I oppose this Bill. I urge the Select Committee to reject the Bill and to recommend a first-principles review of the international investment regime to provide a clear, coherent, balanced, Tiriti-compliant new Act and set of regulations.

(i) Yet another flawed regulatory process

9. The main support documents, notably the Regulatory Impact Statement (RIS), do not refer specifically to content of the Bill. Nor do they provide a convincing rationale for the new regime it proposes. We are presented, yet again, with a *fait accompli* based on a pre-commitment in a coalition agreement made for political reasons, and ideological assertions made by the Act Party's Associate Minister David Seymour.

10. The quality assessment panel somewhat euphemistically described the RIS as meeting the quality criteria "*with two notable limitations*". First, the scope and depth of the analysis, and consideration of options, were (once again) circumscribed by the Coalition Agreement. That precluded a robust assessment of alternatives, and the only options considered were those that could be implemented in this term of government.

11. As a result, they admitted that the approach adopted in the Bill was not the best means to achieve even the coalition's stated objectives: "*Considering a wider set of first order changes would likely identify options that would be more effective at addressing the defined problem*." (page 3)

12. Moreover, time constraints imposed by the government meant that "*users and key stakeholders have not been consulted. … A high-quality process would involve consultation with affected parties and implementing agencies, to ensure that any changes are informed by stakeholder input, are deliverable and that the expected benefits will materialise*."(page2) The assessment had to rely instead on comments made in relation to previous reviews of the investment regime.

13. A fuller first-principles review was deemed "infeasible" because it could not be completed in the time required, and would have been broader than necessary to meet the Coalition commitment. (page 12)

14. Non-regulatory options to attract foreign investment were also ruled out because the Minister want to review the Act.(page12)

15. These limitations alone should ring alarm bells. But the single-minded focus on liberalisation by the Coalition commitment and the Associate Minister ignores other fundamental considerations.

16. In the RIS, Treasury officials noted concerns previously expressed by the public that foreign investment rules should "manage a wide range of risks" and "that there is inherent non-economic value in retaining domestic ownership of certain assets" (page 2). They listed a range of community concerns, including profits going offshore, loss of jobs and foreign control of iconic businesses.

17. The proposed fast-tracking of approvals, and narrowed criteria for assessment under the Bill's regime, would mean that environmental and other risks would have to be managed through other regulations. Those would be subject to the narrow libertarian principles, including on regulatory takings, in the Regulatory Standards Bill if passed.

18. There is not a single reference in the RIS to compliance with te Tiriti o Waitangi or mana whenua engagement.

(ii) The risks of giving more executive power to Act

19. The Bill continues to vest extensive power in the hands of the Minister, but under a more liberalised regime. While the Minister of Finance is the principal minister under the Act, the Act Party leader David Seymour currently *holds portfolio responsibility for the Overseas Investment Act as* Associate Minister of Finance.

20. *Under the Bill:*

    (a) *the Registrar and* Minister must have regard to the purposes of the Act, which have been amended to refer to the streamlining of foreign investment applications.

    (b) There are repeated references to the "national interest". The national interest *test* is spelt out, and "*transactions* of national interest" are defined in Section 20A in terms of acquisitions land, property or fishing quota by a non-New Zealand government and investments in strategically important businesses. However, decisions regarding both would ultimately rest with the Minister.

(c) Ministers can also exempt any transaction, person or asset from the requirements for consent or definition as an overseas person, including retrospectively.

(d) Further, the Minister is empowered to write the Ministerial Directive Letter that sets the government's general policy approach and weighting of criteria and factors, and its preferred approach to undertaking a national interest assessment, conditions, levels of monitoring, etc.

21. Under the current libertarian Minister, the cumulative effect is likely to be a hands-off approach and potentially free-for-all for foreign investors without effective conditions.

22. That risk would be reinforced if the Regulatory Standards Bill is passed.The Ministerial Directive Letter is explicitly treated as secondary legislation, and would therefore come within the libertarian principles and ministerially-controlled review mechanisms proposed in the Regulatory Standards Bill. The "regulatory takings" principle carries an expectation of compensation for "impairment" of investors' property, which could occur through the imposition of stronger conditions or restrictive criteria on the expansion of existing investments.

23. My submission on the Regulatory Standards Bill also explained how the "regulatory takings" principle could provide the basis for investor claims through investor-state dispute settlement under New Zealand's trade and investment treaties, and the potential chilling effect of this on moves to restore a more balanced regime or to meet Tiriti o Waitangi obligations in the future.

(iii) Misrepresentation of screening as a barrier to investment

24. I will address this only briefly and refer the committee to the submission from Dr Bill Rosenberg.

25. As the RIS acknowledges, reliance on the OECD FDI Regulatory Restrictiveness Index raises significant methodological issues. In particular, rankings only look at the screening regime and do not look at its actual application (page 6), which in New Zealand is notoriously liberal.

26. The Index does not consider other factors that are crucial to foreign investors' decisions, such as our small domestic market size and remote location.

27. It is significant that other peer OECD countries are currently tightening their investment rules, notably in response to the climate crisis.

(iv) Unexplained exclusion of forestry land from "sensitive land"

28. Two categories of investment remain subject to greater scrutiny as "transactions of national interest": sensitive land (residential or farm land) and fisheries quotas.

29. The most substantive change to the current regime (clauses 9 to 11) removes "forestry activities" (in respect of "any trees that are used to provide wood") from the definition of "sensitive land" and revokes the special screening that requires a national interest assessment, including the benefit and investor tests.

30. The Bill also removes a list of special conditions on forestry investments, including requirements to re-establish tree crops once harvested, and maintenance and protection of historical heritage, biodiversity, and public access if regulations so require. The Ministerial Letter can set down requirements and conditions for applications relating to transactions over land used for forestry activities, but it is not required to do so and the Minister retains overall discretion.

31. Where farm land is not already used for forestry, a special test, including its productive capacity for farming, may apply. It would be possible, but not mandatory, to require replanting after harvest.

32. There is no discussion in the policy documents of the rationale for, and implications of, removing special considerations for forestry investments and bringing forestry land and activities under the 15 day rule.

33. I view this as a complete abdication of responsibility on the part of the government to respond to the well-documented failure of poorly-regulated forestry companies to comply with their existing conditions, for example relating to slash. Fast tracking more forestry investment, with minimal conditions, means further sacrificing already climate-ravaged communities, who are predominantly Māori.

34. It is not enough to say these activities could be regulated more rigorously through domestic regulation. Such moves could open New Zealand to a potential investor-state dispute by a forestry investor from say China, Japan, Singapore or Canada if the investor had been approved without conditions, such as removing slash, and those requirements were subsequently imposed through legislation or regulation.

35. The investor could then claim a legitimate expectation that the original terms of the investment continued for its entire term, thereby constituting a breach of "fair and equitable treatment". Investor-state disputes (ISDS) commonly claim hundreds of millions of dollars as compensation for lost future profits, compound interest, costs and even punitive damages.

The legal and fiscal risks are well-recognised as having a chilling effect on government decisions. While successive governents since 2017 have rejected the inclusion of ISDS in new agreements, it continues to apply in a number, including with major investors.

(v) Further abdication of Tiriti o Waitangi responsibilities

36. There is no recognition of Crown obligations, and Māori responsibilities and rights, under Te Tiriti o Waitangi in the 2005 Act and Regulations or the current Bill.

37. In addition to the fast tracking of forestry investments, discussed further below, the most complex and least visible aspect of this Bill relates to categories of land that are predominantly of concern to Māori and te Tiriti o Waitangi.

38. The categories of "sensitive land" in Schedule 1 remain unchanged and these include marine and coastal area, lake beds, land on an island, land held for conservation purposes, historical places and wahi tapu listed in the New Zealnd Heritage List or under a heritage order pursuant to the Heritage New Zealand Pouhere Taonga Act. But these are not residential or farm land, and would be subject to the "fast track" regime proposed by the Bill and the liberalised criteria that apply to investment applications under the general test.

39. Yet, as the RIS reveals, there has been no engagement with Māori over the Bill. Consulting with Te Arawhiti and Te Puni Kokiri is the Crown talking to the Crown, not the Crown engaging with its Tiriti partner.

(vi) Locking in more liberalisation through trade agreements

40. Chapters on investment and trade in services in contemporary international trade and investment agreements contain rules relating to the parties' foreign investment regime. Yet public documentation relating to this Bill make no reference to the inter-relationship between the Bill and agreements to which New Zealand is a party.

41. This issue may have been addressed in paragraph 65 of the RIS, which is redacted, but that is short and it is unclear what, if any, of the following issues were discussed. Nor do we know what advice was given to the Cabinet.

National treatment

42. The most relevant rule, "national treatment", requires foreign and domestic investors to be treated alike in like circumstances. That prevents special rules being applied to foreign investors and investments, such as a special screening mechanism and conditions, unless the state has explicitly reserved the right to adopt non-compliant measures.

43. Those reservations, set out in an annex, are expected to lock in the existing level of vetting and not permit a future tightening of restrictions on foreign investors/ments.

44. The agreements often include a ratchet that automatically locks in any future liberalisation, so there is no going back.

45. There is a second annex in which the state party can reserve more flexibility and policy space to adopt more restrictive measures in the future. That is negotiated when the agreement is first made.

46. In addition, the most-favoured-nation rule requires that the other party's investors and investments receive as good treatment as those of other countries. That is not discussed here.

The example of CPTPP

47. I will explain the implications and issues arising from this Bill for national treatment, using as an example the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the successor to the Trans-Pacific Partnership Agreement (TPPA) after the US quit. However, other agreements that use standstill and ratchet, and policy space, annexes raise similar concerns.

48. Article 9.12 of CPTPP sets out the rules relating to non-conforming measures. Annex 1 lists the party's existing non-compliant measures that it wants to retain. These are subject to a standstill that prevents the adoption of less compliant measures, sometimes referred to as "the principle of no backwardness".

49. A ratchet applies, which means that amendments that further liberalise those measures are automatically locked in, creating a new ceiling beyond which new measures cannot go.

50. New Zealand's standstill and ratchet commitment in Annex I specifies the investment activities involving CPTPP parties that require prior approval under the Overseas Investment Act 2005 and its regulations, and the Fisheries Act 1996. I have added emphasis and omitted the footnotes:

> Consistent with New Zealand's overseas investment ***regime as set out in the relevant provisions of the Overseas Investment Act 2005, the Fisheries Act 1996 and the Overseas Investment Regulations 2005, the following investment activities require prior approval*** from the New Zealand Government:
>
> (a) acquisition or control by non-government sources of 25 per cent or more of any class of shares or voting power in a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ$200 million;

(b) commencement of business operations or acquisition of an existing business by non-government sources, including business assets, in New Zealand, where the total expenditures to be incurred in setting up or acquiring that business or those assets exceed NZ$200 million;

(c) acquisition or control by government sources of 25 per cent or more of any class of shares or voting powers in a New Zealand entity where either the consideration for the transfer or the value of the assets exceeds NZ$100 million;

(d) commencement of business operations or acquisition of an existing business by government sources, including business assets, in New Zealand, where the total expenditures to be incurred in setting up or acquiring that business or those assets exceed NZ$100 million;

(e) **acquisition or control, regardless of dollar value, of certain categories of land that are regarded as sensitive or require specific approval according to New Zealand's overseas investment legislation**; and

(f) any transaction, regardless of dollar value, that would result in an overseas investment in fishing quota.

Overseas investors **must comply with the criteria set out in the overseas investment regime and any conditions specified by the regulator and the relevant Minister** or Ministers.

This entry should be read in conjunction with Annex II – New Zealand – 7 and 8.

51. Article 9.12.2 provides for a second annex, often called "policy space" reservations, that allows the adoption of new measures in the sectors, sub-sectors or activities that are listed. The degree of policy space this provides depends on the exact wording.

52. In the CPTPP the relevant Annex II entry reads:

New Zealand reserves the right to adopt or maintain ***any measure that sets out the approval criteria to be applied to the categories of overseas investment that require approval*** *under New Zealand's overseas investment regime.*

For transparency purposes ***those categories****,* ***as set out in Annex I*** *– New Zealand – 12 and 13, are …[repeats the above]*

53. So the policy space is reserved for the **criteria**, not for the **categories**. In other words, the categories cannot be altered, but the approval criteria can be.

54. The **criteria** for vetting of investments above the dollar threshold specified in Annex I can be liberalised or tightened. Likewise, the **criteria** for vetting of "certain categories of land that are regarded as sensitive or require specific approval according to New Zealand's overseas investment legislation" can be tightened in the future.

55. The **categories** of land listed in Annex I of CPTPP are those set out in the overseas investment legislation. Under Annex I, changes to those categories would be subject to the ratchet. Annex II only protects policy space for **the criteria** for the categories referred to in Annex I.

56. How does this relate to the liberalisation in this Bill? Under Section 6 of the 2005 Act:

> **category**, in relation to an overseas investment, means any of the following categories:
> **(a)** an overseas investment in sensitive land:
> **(b)** an overseas investment in significant business assets:
> **(c)** an overseas investment in fishing quota.

Under section 14(1) the Minister or Regulator can only have regard to the **criteria** for consent that "apply to the relevant **category** of overseas investments."

57. The question for me is whether (a) the removal of forestry from being subject to a special test as sensitive land under Section 16A (1AA) and (4); (b) applying instead the general test (as per Clause 9), and (c) the relocation of the definition of "forestry activities" from Section 16A(1AA) to Section 6(1) Interpretation, means the "category" of sensitive land has been altered (in a permitted liberalised way).

58. There is a strong argument that forestry land and activities have been removed from the scope of "sensitive land". On that interpretation, Annex I of CPTPP would prevent restoration of forestry land and activities into the category of sensitive land. The criteria that apply to forestry, as a general category, could not be tightened.

59. A counterargument is that the **categories** of land considered "sensitive" are listed in Schedule 1 to the 2005 Act. These categories have not been amended and the Act's schedule still refers generically to "non-urban land" over 5 hectares as "sensitive land", which would include land used for forestry activities. The approval criteria that relate to the different uses off that land has been changed, as permitted by CPTPP Annex II. This interpretation would allow forestry land to be reunited with other categories of land in the future, with the stronger criteria that apply to them.

60. References to **classes** of investment transactions further complicate interpretation. On a plain meaning, a "class" could mean a "sub-category" of sensitive land; for example, that forestry land and activities are a class of sensitive land, but subject to criteria that are different from residential and farm land.

61. However, the use of the term "class" is itself inconsistent in the Bill.

62. Clause 16 is described in the Explanatory Note as creating two new **categories** within the **class** of Transactions of National Interest in Section 20A. The two new categories created are: (i) "transactions that the regulator determines may be contrary to the national interest" and (ii) "a new regulation-making power enabling regulations to **specify new classes** of screened transactions that must undergo a national interest assessment".

63. If correct, this would expand the Annex I categories. The first "class" could be argued to come within the security exception of the CPTPP, which is very broad and self-judging, unlike other trade agreements where similar issues may arise. The second "class" would have to be limited to "sensitive land" or fisheries quotas. Both seem contrary to the intention of Annex I to apply a standstill to the limited list of **categories**, while allowing new **criteria** to apply to those limited categories.

64. However, whereas the Explanatory Note refers to "categories" within a "class" of transactions, it is Clause 16 of the Bill itself which actually amends Section 20A. Clause 16 adds these two "transactions" to a list under Section 20A(1). But Section 20A(1) does not describe them as "categories" or "classes". Instead, it says: "*The following **kinds** of overseas investment transactions are transactions of national interest …*".

65. Later, Clause 26 which amends Section 61(1) on Regulations refers to "prescribing **additional classes** of transactions that are transactions of national interest". So does Clause 31 that amends Section 127, which also applies to Regulations, with no reference to "categories".

66. My view is that the amendments in the Bill clearly intend to remove forestry land and activities from the **categories** that are subject to special screening procedures so they become general forms of foreign investment. It is more likely than not that the removal of forestry land from land that requires special approval would become locked in under Annex I.

67. However, this is far from clear, and inconsistent drafting compounds the problems of interpretation. I presume that MFAT and Treasury officials, and the drafting office, must have considered this question, but I – and significantly, other countries and their investors that are covered by relevant agreements – can have no idea what advice they gave, whether it was followed and whether we agree with it. The select committee needs to have that explained.

(vii) Losing control of foreign investment in water

68. The Bill would also have very significant impacts on foreign investment in the extraction of water for bottling or other bulk extraction for human consumption.

69. Water extraction rights are investments in their own right. Foreign investment in water assets is subject to the standard investment regime, unless it is integral to investment in land where it may come indirectly under the test for sensitive land.

70. Clause 12 of the Bill removes extraction of water for bottling or other bulk extraction for human consumption from special vetting, including consideration of sustainability. That requirement had been introduced specifically to provide flexibility to impose levies on water extraction as a means to bypass restrictions in New Zealand's free trade agreements.

71. Removal of that consideration from the Overseas Investment Act would mean the significantly weakened fast-track regime applies to water investments, including in water extraction.

72. Looking again at the example of the CPTPP, investments relating to water are not specified in the entries relating to the foreign investment regime in either Annex I or Annex II in the way that land and fisheries quotas are. They are therefore subject to the more general foreign investment screening regime.

73. The ratchet in the CPTPP means that vetting of future investments in water would still be governed by the value threshold, the fast-track process and the more limited right to impose conditions that are provided for under the Act. This weaker investment regime would be locked in under Annex I, unless Annex II provides the space to tighten restrictions in the future.

74. There is a policy space protection for water in the CPTPP Annex II, but it is limited. Significantly, it explicitly does not apply to wholesale trade and retail of bottled mineral, aerated and natural water.

> *New Zealand reserves the right to adopt or maintain any measure with respect to water, including the allocation, collection, treatment and distribution of drinking water. This reservation* ***does not apply to the wholesale trade and retail of bottled mineral, aerated and natural water****.*

75. The limited nature of this protection, which also exists in some previous agreements, has previously been controversial when investors sought to use water permits for agriculture to extract water for bottled water exports.

76. Plans to impose a royalty on exports of bottled water, provided in the 2017 Labour-New Zealand First coalition agreement, were shelved due to issues with free trade agreement commitments. (see https://newsroom.co.nz/2020/07/12/bottled-water-royalty-plans-on-ice/)

77. Then Trade minister David Parker reportedly "*said the Government had approached the issue 'somewhat more indirectly' through changes to the Overseas Investment Act, allowing water bottling to be taken into account as a relevant factor for the acquisition of sensitive land by overseas buyers*."

78. However, those criteria only applied to future water bottling operations, and only for land that was already designated as sensitive.

79. While the legal risk of breaching these trade rules only applies to countries with which New Zealand has agreements that contain those obligations, it would be impractical to differentiate

between investors based on nationality, especially given the ability of investors to incorporate in countries that have access to such rights.

80. We can infer that concern about these constraints on regulating foreign investment in water lay behind the Annex II entry in the later FTA with the European Union. This Annex omits the phrase excluding "wholesale trade and retail of bottled mineral, aerated and natural water". The remaining wording is broad enough to extend the policy space protection to that investment as well:

> New Zealand reserves the right to adopt or maintain any measure with respect to water, including the allocation, collection, treatment and distribution of drinking.

81. This Bill removes David Parker's amendment to the Overseas Investment Act, and hence reinstates the policy constraints on restricting foreign investments in relation to water extraction.

82. There are particular issues here for Māori. As noted earlier, there is no explicit protection for te Tiriti o Waitangi or mana whenua in the 2005 Act and Regulations or the current Bill. The Treaty of Waitangi Exception in the TPPA/CPTPP would not provide effective protection for the introduction of Tiriti-compliant considerations in the future.

83. It is deeply concerning that there has been no explanation of the implications of this change relating to water, especially in light of New Zealand's commitments in its free trade agreements. Is New Zealand First aware of this and if so, has their policy on this changed?

Conclusion

84. For the reasons set out above, I oppose this Bill.

85. I urge the select committee to call in the officials from the Ministry of Foreign Affairs and Trade and the Treasury to explain the implications of the Bill for the future policy space to regulate foreign investment in Aotearoa New Zealand.

86. In rejecting the Bill, the Select Committee needs to recommend a first-principles review of the international investment regime to provide a clear, coherent, balanced, Tiriti-compliant new Act and set of regulations that includes a review of New Zealand's commitments in international trade and investment treaties.

87. I wish to speak to this bill and urge the committee to allocate a realistic time to allow engagement with the technical matters raised in this submission.