Submission to Finance and Expenditure Select Committee on the Overseas Investment (National Interest Test and Other Matters) Amendment Bill

Geoff Bertram

1. My full name is Ivo Geoffrey Bertram. I hold a doctorate in Economics from the University of Oxford. I taught in the School of Economics and Finance at Victoria University for more than three decades before retiring in 2009. I was then a Senior Associate at the University's Institute for Governance and Policy Studies until 2023. I am currently Visiting Scholar in the School of History, Philosophy, Political Science and International Relations.

Predetermined "benefit tests" lead to bad decisions

2. In a previous submission to this committee in 2020, on the Overseas Investment Amendment Bill No 3, I set out an extensive and detailed critique of the so-called "benefit to New Zealand test", showing it to be inadequate, both in its previous form and in its then-proposed amended form, because the detailed provisions in section 17 of the Overseas Investment Act 2005 (OIA) prevent Ministers from taking account of costs as well as benefits, and (with the sole exception of water bottling) do not permit the benefit test to have a negative outcome (section 17(2)(b)(i)) however great the detrimental effects may be.

3. The central issue was, and remains, that proper testing of the national interest, or the benefit to New Zealand of an investment, should be based upon a full evaluation of all relevant issues and areas of concern, including costs as well as benefits. Statutory wording that artificially restricts the scope of project evaluation by barring decision-makers from taking account of negative aspects of a project is a recipe for regulatory failure, opening the way for rent-seeking opportunism by overseas actors, and skewing the spectrum of likely overseas-funded investment projects towards less attractive and more potentially damaging ones, from the perspective of New Zealand's national interest. My 2020 submission is attached as Appendix 1 for easy reference.

4. I said then, and I repeat now, that "properly assessing net benefit – the only concept of "benefit" that makes economic sense - automatically involves assessing detriments, including detriments that are genuine whether or not they have been explicitly listed in the menu of "factors" provided in [section 17 of] the Act" (emphasis added). The thrust of the Bill now before this committee is to move decisions on overseas investment even further away from proper assessment of net benefit, and towards automatic approval for any and all such investment, without regard to the many detriments often associated with such investment.

5. As the High Court said in *Oceana Gold v Coromandel Watchdog* (2020) NZHC 2345 at paragraph 57, "the provisions [in section 17 of the Overseas Investment Act 2005]

enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no 'catch-all' provision enabling Ministers to consider 'any other matters' the Ministers consider to be relevant. The legislature has left no such discretion to the relevant Ministers... the Act's 'benefit to New Zealand' test is heavily circumscribed. It constrains decision-makers to a greater extent than similar tests in other statutory contexts."

6. As an example of "other statutory contexts" the Court pointed out that section 63(3)(b) of the Commerce Act 1986 provides for assessment of "benefit to the public" in the case of mergers and acquisitions, and in that case "benefit" means the **net benefits, after considering all the pros and cons**. Matters to be considered are not limited to the dollars and cents at stake for the parties; they include also intangible things like the freedom and diversity of the press and the climate of competition (see *Commerce Commission v NZME Limited, Fairfax Media Limited, and Stuff Limited*, [2018] NZCA 389 at [2-4], [81] and [98]).

7. The Bill's proposed repeal in clause 12(2) of the existing provisions in section 17(3) of the Act, which enable the Minister to prevent overseas operators from engaging in industrial-scale water bottling on sites that are sensitive both environmentally and for Maori, is especially ill-judged. Large-scale water bottling was the subject of extensive debate and controversy during the 2010s, culminating in a major dispute over a proposal

8. The specific case that brought the issue to public attention was the May 2018 approval of an application by Creswell NZ Ltd, a subsidiary of Nongfu Spring (China's largest freshwater bottler), to buy up and expand the Otakiri Spring and associated bottling plant near Whakatane. The acquisition attracted strong public opposition both because it potentially threatened the sustainability of the aquifer and because the bottling operation involved massive quantities of plastic - quite apart from the facts that (i) the massive profits from the operation would flow to the Chinese owners with no requirement for them to pay royalties on the water taken, and (ii) Treaty of Waitangi issues around Maori rights over water remain unresolved.

9. When the Nongfu Springs application landed on the desk of Green MP Eugenie Sage (the then-Minister of Land Information) it came with clear advice from officials that the law did not allow her to consider environmental costs or Treaty of Waitangi issues: "the Overseas Investment Act (OIA) does not allow Ministers to take Treaty and environmental matters into account". As Greens Co-Leader Marama Davidson said, "The Minister was constrained by a flawed Act which says we are unable to take environmental and Treaty decisions into account. This decision does not sit with Green kaupapa and longstanding Green Party positions". Section 17(3) of the OIA was subsequently enacted to avoid a repeat of this situation.

10. I was therefore astounded to read in the Treasury's disclosure statement that "the benefit test's water bottling factor will be repealed as it is rarely applicable". The issue of industrial-scale water bottling may have become a rarity since section 17(3) of the Overseas Investment Act 2005 was inserted, but it was certainly not so before that, and is unlikely to remain so once the regulatory gate is reopened.

11. In summary, labels like "national interest test", "benefit to New Zealand test", and "investor test" may serve the immediate political purpose of giving the legislation a misleading image of rigour, but are fundamentally misleading as to what exactly is tested. Empty tests conducted by authorities whose hands are tied in advance are a sure recipe for rent-seeking opportunism to prevail over genuinely constructive and productive overseas-funded projects.

Macro-economic issues and historical amnesia

12. Treasury's disclosure statement on the Bill opens with the statement "overseas investment can help to finance the gap between New Zealand's national savings and investment needs, enhance productivity, and support higher-paying jobs." But it is a matter of basic accounting that an increase in capital inflow from overseas will (other things equal) increase the current account deficit on the balance of payments – which is the standard measure of the gap between national savings and investment. Far from financing the existing gap between national savings and investment, increased overseas investment in the first instance widens that gap. Whether in later periods the gap narrows as a result of the capital inflow depends heavily on the nature of the spending that is financed by the inflow.

13. Where overseas capital funds new productive activity that would otherwise not have developed, and where the income generated by that activity is retained within the local economy rather than flowing back out of the economy, there can be a case for the inflow. But not all overseas investment meets those criteria, and in recent New Zealand history there are many examples of overseas investments that failed to do so.

14. Treasury's use of the word "can", rather than "will", in the passage quoted above, invites addition of the words "but may not". Without rigorous evaluation and scrutiny by well-informed and properly resourced authorities, operating under a sensible statutory mandate, particular overseas investments can equally worsen the performance of the New Zealand economy, worsen the gap between savings and investment, reduce productivity, and eliminate local employment in favour of labour supplied on a casual basis from offshore. Weakening the already pathetic limits on foreign investment simply shifts the balance of probability from good to bad overseas investment.

15. As noted by Treasury in its regulatory impact statement, the New Zealand public have well-grounded concerns that overseas investment can be predatory rather than

constructive. Extensive documentation of bad conduct by transnational companies has been carried out over many years by the Campaign Against Foreign Control of Aotearoa (CAFCA for short). In particular I would direct the committee's attention to the archive[1] of CAFCA's annual Roger Award for "worst transnational operating in Aotearoa/New Zealand", which provides detailed commentary on nineteen Roger Awards issued between 1997 and 2015.

16. The Roger Award winners were:

- IAG / State Insurance (2015)
- ANZ (2014)
- Rio Tinto Alcan NZ Limited (2013)
- Taejin Fisheries (2012)
- New Zealand Aluminium Smelters Ltd/Rio Tinto Alcan NZ Ltd (2011)
- Warner Brothers (2010)
- ANZ Bank (2009)
- BAT (British American Tobacco NZ) (2008)
- Telecom (2007)
- Progressive Enterprises (2006)
- Bank of New Zealand and Westpac (2005)
- Telecom (2004)
- Juken Nissho (2003)
- Tranz Rail (2002)
- Carter Holt Harvey (2001)
- Tranz Rail (2000)
- TransAlta (1999)
- Monsanto (1998)
- Tranz Rail (1997)

17. The clear lesson from the historical record is that the New Zealand Government should be rigorously selective, not uncritically welcoming, to overseas investment. The open-door approach in this Bill is an invitation to unscrupulous and predatory overseas capital, with no guarantee that it will make much difference to the willingness of principled and constructive overseas investors to commit to worthwhile projects here.

Support for other submissions and comments

18. I take this opportunity to record my agreement with, and support for, the submissions of Professor Jane Kelsey and Dr Bill Rosenberg.

19. I agree also with the comments by Treasury in paragraphs 67 and 68 of CAB-25-SUB-0013 that "considering a wider set of first order changes would likely identify options that would be more effective at addressing the defined problem" and that this is not an

[1] At https://www.cafca.org.nz/views-analyses-and-research/roger-award/2016/04/cafca-campaign-against-foreign-control-of-aotearoa-43/ .

example of high-quality lawmaking – "users and key stakeholders have not been consulted in the development of these proposals… a high-quality process would involve consultation with affected parties and implementing agencies, to ensure that any changes are informed".

20. The passage of this Bill is clearly intended to be as rushed, and as oblivious to alternatives and evidence, as the decisions to be made under it promise to be.

Conclusion

21. The claim in the supporting Cabinet Paper CAB-25-SUB-0013 that the proposed Bill is "focusing on managing a broad range of risks to New Zealand's national interest" is misleading. The actual thrust of the Bill is to focus attention selectively on a narrow range of benefits, with minimal attention to risks and detriments, and with a strong element of predetermination and bias in favour of indiscriminate promotion of overseas investment. I submit that the Committee should reject this Bill.

22. I shall be happy to appear in support of this submission.

Appendix I

Submission to the Finance and Expenditure Select Committee on the Overseas Investment Amendment Bill No 3

Geoff Bertram
26 October 2020

1. Introduction

1.1 My full name is Ivo Geoffrey Bertram. I hold a doctorate in Economics from the University of Oxford. I taught in the School of Economics and Finance at Victoria University for more than three decades before retiring in 2009. I am currently a Senior Associate at the University's Institute for Governance and Policy Studies.

1.2 This submission is focused on the changes to the so-called "benefit to New Zealand test" laid out in clauses 8 and 9 of the Bill, which are proposed to replace the existing sections 16A and 17 of the Overseas Investment Act 2005.

1.3 My central argument is that the "benefit to New Zealand test" in the existing legislation is in fact a sham, not a genuine test at all, and that the proposed amendments to the Bill that are before the Committee fail to change that. The Act should be amended to enable Ministers of the Crown to (i) carry out proper cost-benefit assessment of each proposed new overseas acquisition of sensitive land, and (ii) be able to decline consent without being stymied by blatantly prejudicial detailed wording in the statute.

1.4 It is my submission that the Committee should delete the proposed new sections 17(b)(2)(ii) and 17(2)(b)(iv) entirely, and substitute new wording making it clear that the function of Ministers in assessing applications to purchase sensitive land is to properly take account of all relevant factors, without the extreme limitations imposed by the obscure and convoluted wording in the Act - both as it stands, and as it will remain if the proposed Bill is passed.

2. The High Court's September 2020 decision in the *Oceana Gold* case

2.1 In September 2020 the High Court released its decision in the case *Coromandel Watchdog v Minister of Finance and Associate Minister of Finance and Oceana Gold*, [2020] NZHC 2345[2]. The issue before the Court was a simple one: does the Overseas Investment Act 2005 permit Ministers to exercise their judgment on the basis of a full

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[2] Online at https://forms.justice.govt.nz/search/Documents/pdf/jdo/dc/alfresco/service/api/node/content/workspace/SpacesStore/8d5c21da-8e19-488f-b80b-e6d1d741fdcb/8d5c21da-8e19-488f-b80b-e6d1d741fdcb.pdf .

cost-benefit assessment of applications to buy up sensitive land, or are Ministers (i) barred from taking into account any matters not explicitly listed in s.17 of the Act, and (ii) barred from taking into account all relevant detrimental effects of a proposed purchase? The Court has ruled that Ministers are so barred on both counts.

2.2 The facts of the case were straightforward. Oceana Gold (NZ) Ltd wished to buy a dairy farm near Waihi in order to convert it into a tailings dump for their mining operations at Waihi. The application was strongly opposed by local groups opposed to expansion of the mining industry. Strong arguments both in favour of the project and against it meant that the Government's decision on the application was controversial. Section 24(1)(a) of the Overseas Investment Act 2005 requires two Ministers of the Crown, including the Minister for Land Information, to sign off on any consent. In this case, for the first time since the Act was passed, two Ministers reached opposite positions, meaning that the application was declined[3].

2.3 Rather than taking a case for judicial review to test whether ministerial discretion had been properly exercised, the company submitted a second application later in 2019, which was successful[4] because the Minister for Land Information who had ruled against the earlier application was removed from the case under section 7 of the Constitution Act 1986, and replaced by another Minister who was prepared to sign the consent. Consequently, the task of seeking judicial review to settle the meaning and proper interpretation of the "benefit to New Zealand test" set out in sections 16A and 17 of the Overseas Investment Act 2005 fell on the shoulders not of the well-resourced transnational company, but on those of the impoverished voluntary organisation Coromandel Watchdog, against which the Court subsequently awarded costs – an outcome typical of the general climate of intimidation that surrounds cases of this nature when transnational capital confronts local community opposition.

2.4 The Court judgment has confirmed that the precise wording of the Act means that when Ministers are considering a proposed purchase of sensitive land under section 24, anything not explicitly listed as a positive benefit in the highly prescriptive section 17 must be ignored. Officials had therefore been correct in September 2019 when they advised the Ministers given the task of approving the Waihi consent application, "you are limited to considering the benefits of the transaction by reference to the 21 benefit factors set out in the Act and Regulations. You cannot consider matters outside

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3 https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2019-05/201710162-201810122 ; and "Reasons for decision by Ministers on application by Oceana Gold (New Zealand) Limited in respect of approximately 178 hectare of land in Waihi", https://www.linz.govt.nz/sites/default/files/media/doc/reasons_for_decision_by_ministers_on_application_by_oceana_gold_new_zealand_ltd_-_redacted.pdf , both accessed 25 October 2020.

4 https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2019-10/201900432; http://canterbury.cyberplace.co.nz/community/CAFCA/cafca19/fi-2019-10.html accessed 25 October 2020.

of those factors. The Act allows you to consider the *benefit* of transactions, but in most cases does not allow you to consider the *detriment* of transactions"[5].

2.5 The following are the High Court's words[6]:

> The provisions enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no 'catch-all' provision enabling Ministers to consider 'any other matters' the Minister consider to be relevant. The legislature has left no such discretion to the relevant Ministers…… the Act's 'benefit to New Zealand' test is heavily circumscribed. It constrains decision-makers to a greater extent than similar tests in other statutory contexts.

2.6 The press release announcing approval of Oceana Gold's application was explicit in stating the limitations under which the consenting Ministers had made their decision[7]:

> The Ministers noted that they are required to assess only the benefits described in the Overseas Investment Act when making their decision" [emphasis added].

3. That was not cost-benefit analysis

3.1 From my perspective as an economist, any assessment of "benefit to New Zealand", as those words are commonly understood in the well-established literature on project evaluation as well as in other New Zealand policy contexts with which I am familiar, requires a focus on net benefit, with any identifiable detriments offset against identifiable benefits. To do otherwise must inescapably result in an unbalanced outcome, leading to decisions with the potential to cause substantial reductions in the national welfare of New Zealand, as economists understand that expression.

3.2 A "benefit test" from which consideration of detriments is excluded is no test at all. I am not aware of any other situation in the economic literature or in public policy where benefits alone are considered determinative in the absence of any consideration of offsetting costs. All economic models of rational decision-making of which I am aware take for granted that costs must be weighed against benefits. All the standard authorities on project evaluation describe that process as "cost-benefit analysis" with explicit consideration of both sides of the equation.

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5 Land Information New Zealand, *MEMORANDUM BRF 20-091 Applications for consent under the Overseas Investment Act from Oceana Gold (New Zealand Limited)*, BRF20-091, 3 September 2019, p.4 paragraph 27 (released under the Official Information Act).

6 [2020] NZHC 2345 at paragraph 57.

7 "Ministers approve application to extend Waihi mine", press release dated 8 October 2019, https://www.beehive.govt.nz/release/ministers-approve-application-expand-waihi-mine accessed 26 October 2020.

3.3 To take just one example, competition policy, section 67(3)(a) of the Commerce Act 1986 provides that in considering merger applications the Commerce Commission may approve a merger or acquisition only if it is "satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted".

3.4 No precise definition of the word "benefit" is provided in that Act, nor are the words "cost" or "detriment" anywhere mentioned. But in considering and deciding on merger applications the Commerce Commission has consistently treated "benefit to the public" as involving a careful balancing of detriments against benefits. Precisely which factors should be included as detriments and benefits has been much debated over the years and has recently been the subject of an important Appeal Court judgment, which I summarise below. But to my knowledge, at no time since the Commerce Act 1986 was passed into law has any party to proceedings under that Act questioned the proposition that detriments must be considered alongside benefits in application of the public benefit test specified in the Commerce Act.

3.5 The Appeal Court judgment to which I have referred above arose from a 2017 decision of the Commerce Commission which declined a merger application from two media companies, Fairfax and NZME, on the basis that the detriments outweighed the benefits. The Commission made clear that ([2017] NZCC 8 paragraph 1062) "in assessing public benefits, a "net" approach is taken whereby any costs or 'disbenefits' incurred in realising the benefits are deducted."[8] The Commission's decision was resoundingly upheld on appeal in both the High Court[9] and the Court of Appeal[10].

3.6 One of the key questions before the Appeal Court was ([2018] NZCA 389 paragraph 4(a)) "Was the High Court correct, as a matter of law, to find that the Commission has jurisdiction to take into account non-economic, unquantified detriments (in the form of plurality concerns) when applying the legal test for authorisation under s.67(3) of the Act?". The Appeal Court's answer was "yes" ([2018] NZCA 389 paragraphs 81 and 138(b)).

3.7 A second question before the Appeal Court was ([2018] NZCA 389 paragraph 4(c)) "Did the High Court err in law and fact in its approach to balancing unquantifiable

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8 Commerce Commission decision *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8, 2 May 2017 , https://comcom.govt.nz/__data/assets/pdf_file/0032/77639/2017-NZCC-8-NZME-Limited-and-Fairfax-NZ-Limited-Authorisation-determination-2-May-2017.pdf , Section 6 "Public benefits and detriments".

9 [2017] NZHC 3186, https://comcom.govt.nz/__data/assets/pdf_file/0029/78266/Commerce-Commission-v-NZME-Limited-and-Fairfax-NZ-Limited-High-Court-Judgment-18-December-2017.PDF

10 [2018] NZCA 389 https://comcom.govt.nz/__data/assets/pdf_file/0030/98904/Commerce-Commission-v-NZME-Limited,-Fairfax-Media-Limited-and-Stuff-Limited-Court-of-Appeal-Judgment-26-September-2018.PDF.

detriments against the net quantifiable benefits of the transaction?". The Appeal Court's clear answer was "no" ([2018] NZCA 389 paragraphs 137 and 138(c)).

3.8 In its extensive review of the authorities on interpretation of "public benefit" ([2018] NZCA 389 paragraphs 55-75 and 85-87) the Appeal Court made clear both that detriments are relevant in evaluating "public benefit" and that "non-economic" detriments are to be included in the balancing exercise and may be determinative.

3.9 I cannot see any economically intelligible basis on which "benefit to New Zealand" in the Overseas Investment Act 2005 should be given a meaning that differs from "benefit to the public" in s.67(3)(a) of the Commerce Act 1986. That is, however, the position resulting from the extremely narrow pro-foreign-investment wording of the former Act. In my submission this is incompatible with any claim that New Zealand's vetting procedures are adequate to weed out predatory and destructive cases of foreign investment. The effect is to tar all foreign investment with the same brush, giving greatly increased credibility to arguments against foreign investment in general.

3.10 The Committee's task now ought to be to clean up this mess and make it crystal clear that any assessment of a proposed foreign investment must jump through the same analytical hoops as are required for public investments and merger applications. The obscure and convoluted proposed new wording of section 17(2)(b) in the Overseas Investment Amendment Bill (No 3) only makes matters worse, and must inevitably lead to further judicial review at some stage. In that proposed new section,

- Sub-sections (i) and (ii) codify the "counterfactual test"[11] in an extremely limited form which prevents (undefined) "non-directly-comparable aspects" from being netted off from the "factors" narrowly set out in section 17(1).

- Sub-section (iv) requires the Ministers to set aside any particular factor which turns out negative once "directly-comparable aspects" have been netted out for that particular factor

- Sub-section (iii) thereby loses all serious meaning, given that it allows Ministers to consider only positive, not negative, net benefits when adding-up factor scores

- The entire scheme of the proposed section is to block any <u>overall</u> consideration of the issues that most attract public scepticism regarding the alleged benefits of foreign investment.

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[11] Established in *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 and codifed

3.11 Properly assessing net benefit – the only concept of "benefit" that makes economic sense - automatically involves assessing detriments including detriments that are genuine, whether or not they have been explicitly listed in the menu of "factors" provided in the Act.

4. Conclusion

4.1 Speaking in the Committee stage of debate on the Overseas Investment Act 2005, Green Part co-leader Rod Donald described the legislation as "a con job"[12]. Experience with the Act in practice has confirmed that judgment. This Committee now has the chance to give the law some credibility. The proposed amendments do not achieve this goal.

4.2 I shall be happy to speak to this submission if the Committee wishes.

[12] *Hansard*, Vol.626, 14 June 2005, p.21553.