

Overseas Investment Through Legal, Policy and Comparative Law Lenses: An Examination of New Zealand’s Approach to Protecting Sensitive Land and the Interests of Future Generations Including Comparisons with Canada and Kuwait

Dr. Myra E. J. B. Williamson¹

Senior Lecturer of Law and Convenor of the BA in
Law at Te Piringa Faculty of Law,
University of Waikato, New Zealand

Abstract

*“The Government’s economic strategy aims to build a productive, sustainable and inclusive economy. Overseas investment contributes to this when it brings with it new jobs and increases productivity, which is the biggest determinant of people’s living standard in the longer term”.*²

Overseas investment often attracts controversy: there are conflicting opinions on the need for it and way in which it can best be managed. New Zealand has actively encouraged overseas investment since at least 1973 when the Overseas Investment Commission (OIC) was established by the Overseas Investment Act 1973. In the past 47 years, the law pertaining to the management of overseas investment in New Zealand has undergone significant changes, reflecting the changing policies of successive governments.

The current entity is the Overseas Investment Office (OIO), which is a regulatory unit within Land Information New Zealand (a government department). The OIO is responsible for administering New Zealand’s overseas investment

¹ BA, LLB Hons (First Class), University of Otago; LLM Hons (First Class), PhD, University of Waikato; Post-Graduate Certificate in Tertiary Teaching and Learning (Waikato), Barrister and Solicitor of the High Court of New Zealand. Any correspondence with the author is most welcome and may be directed to either drmyrwilliamson@gmail.com or myra.williamson@waikato.ac.nz. This article was completed and submitted for peer review on 5 December 2020. The post-peer review version, incorporating amendments after that process, was submitted for publication on 6 February 2021. The author wishes to thank the anonymous peer-reviewers for their comments, suggestions and recommended changes. Much of the socio-economic and demographic data on New Zealand, located mainly in Section 2 of the paper, is due to the requirements of one of the peer-reviewers. As always, any errors or omissions remain the author’s sole responsibility.

² The Treasury, “Overseas investment in New Zealand” in *Consultation Document: Reform of the Overseas Investment Act 2005 – Facilitating productive investment that supports New Zealanders’ wellbeing* (April 2019) <<https://treasury.govt.nz/sites/default/files/2019-04/overseas-investment-reform-consultation.pdf>> accessed 20 January 2020. This document sought public consultation on further changes to the legislation.

laws.³ The OIO is engaged with “realising the benefits of overseas investment, while protecting New Zealand’s sensitive land and assets”,⁴ which is a difficult balancing act. The Act states that it is a privilege for overseas persons to own or control sensitive New Zealand assets.⁵

New Zealand is a great place to “do business” – currently it’s ranked the best in the world.⁶ It’s also a great place in which to invest and New Zealand encourages overseas investment so long as there is a “benefit to New Zealand”. That means, any overseas person wishing to buy sensitive land or business assets must demonstrate that their investment will, or is likely to, benefit New Zealand (or any part of it, or a group of New Zealanders).⁷ If the land is over five hectares, then the benefits must be substantial and identifiable. Decision-makers take into account 21 economic, environmental and cultural factors when deciding if the overseas investor passes that test. This test is “unique among global investment screening regimes. Its closest comparator is Canada’s ‘net benefit’ test, but that focuses on economic factors”.⁸

This paper will proceed on the assumption that-in accordance with the principles and purposes of comparative law-every legal system has something to learn from every other system; knowing how other legal systems have tackled an issue can inform national lawmaking since virtually all legal systems face the same problems.⁹ For international scholars with an interest in overseas investment law, the paper will provide an overview of New

3 Namely, the OIO oversees the Overseas Investment Act 2005 (the Act, as amended in 2018), the Overseas Investment Regulations and sections 56 to 57J of the Fisheries Act 1996.

4 Land Information New Zealand (LINZ) “Overseas investment” (25 June 2019) <linz.govt.nz/overseas-investment> accessed 20 January 2020. This statement describes the purpose of the Overseas Investment Office (OIO) as stated on the Office’s homepage.

5 Overseas Investment Act 2005, s3.

6 The World Bank, 2020. *Doing Business 2020 – Comparing Business Regulation in 190 Economies* (Washington, DC: World Bank) DOI: 10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC by 3.0 IGO <<http://documents.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf>> accessed 20 January 2020. In the 2020 report, New Zealand has the number one ranking for ease of doing business, followed by Singapore, Hong Kong, Denmark, South Korea, the US, Georgia, the UK, Norway and Sweden. The only Arab state in the top 20 is the UAE ranked 16th. To provide some geographical context, Bahrain is ranked 43rd, Morocco is 53rd, Oman is 68th, Jordan is 75th, Qatar is 77th, Saudi Arabia is 62nd, Tunisia 68th, Kuwait is 83rd, Egypt is 114th, the West Bank and Gaza is 117th, Iran is 127th, Lebanon is 143rd, Algeria is 157th, Iraq is 172nd, Syria is 176th, Libya is 186th and Yemen is 187th.

7 Overseas Investment Act 2005 s12 (for an overseas investment in sensitive land) and s 13 (for an overseas investment in significant business assets).

8 The Treasury, “Overseas Investment in New Zealand”, supra n 1 at p61.

9 Ralf Michaels “Comparative Law” in Basedow, Hopt, Zimmermann (eds.) *Oxford Handbook of European Private Law* (Oxford University press, forthcoming) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty_scholarship> accessed 20 January 2020.

Zealand's unique approach. The paper will discuss what is meant by "benefit to New Zealand", a crucial test that any potential "overseas person" must satisfy.¹⁰ The paper will also discuss the recent changes to the meaning of "sensitive land" which now includes all residential land, significant business assets and fishing quota. In a nutshell, overseas persons (or associates of overseas persons) now need prior consent from the OIO before they can purchase sensitive land or business assets.

The paper will explain key legislative provisions and some recent court decisions¹¹ one of which resulted in an order for an overseas person to divest itself of its entire interest in two properties for failure to obtain consent before purchasing, in addition to a substantial civil penalty.¹² Interestingly, getting prior legal advice provides no protection from the OIO's powers.

The overall purpose of this paper is to explain how one jurisdiction (New Zealand) is managing overseas investment and how it seeks to achieve a balance between the benefits and risks.

Keywords: Overseas investment; Overseas Investment Office; Foreign investment; Overseas person; Sensitive land; New Zealand investment law; comparative law.

10 The factors for assessing the benefit of overseas investments in sensitive land are set out in section 17 of the Act and the factors for assessing the benefit of overseas investments in business assets in section 18 of the Act.

11 *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* (2016] NZHC 558 (a company which was a 100%-owned subsidiary of an Australian company purchased land to plant forests; *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382 (the defendants were Chinese nationals and thus 'overseas persons' under s 7(1) of the Act, who purchased a residential property in Auckland for \$NZ5,128 million without seeking prior consent from the OIO).

12 *Chief Executive of Land Information New Zealand v BCH Investments Ltd* [2019] NZHC 1630 (BCH was ordered to pay a civil penalty of \$NZ 300,000-the maximum penalty under the Act-plus costs, and divest its entire interest in two properties within 2 years; the properties were "sensitive" because they adjoined a scenic reserve).

Section 1. Introduction

Should overseas persons-also known as ‘foreigners’ or ‘expatriates’-be able to purchase residential land and homes in your country? If permitted, what conditions should be imposed on this type of investment? What should your government’s policy be, how should that policy be formulated, and how can that policy be translated into effective legislation? As part of that broader picture, one may also ask how can the public influence that policy discussion and should future generations’ interests be considered in setting policy on overseas investment in land? Those questions are at the heart of this paper; the potential answers to them-while by no means settled-have provoked heated debate in New Zealand over the years. This paper examines the policy and legislative responses to the issues arising from overseas investment in land, primarily in New Zealand but with a comparative law angle, particularly utilizing comparisons with Canada and Kuwait.

Terminology issues: Overseas investment v foreign direct investment

A brief statement on the general investment terms used in this paper might be helpful at the outset. The term “foreign direct investment” (FDI) in this paper refers to “an investment in the form of a controlling ownership of a business in one country by an entity based in another country”.¹³ The key characteristic of FDI is that “it involves ownership and confers effective management control”.¹⁴ It is clear that FDI may take many forms such as greenfield investments, joint ventures and acquisitions whilst it does not include other forms of international expansion such as licensing, exporting and non-equity alliances.¹⁵ It is observed here that FDI is a subset of-or, one particular type of-overseas investment.¹⁶

This paper is concerned with legislating for the control of “overseas investment” in the broadest sense of the term. Although “overseas investment” is not defined in the New Zealand legislation, its meaning is understood from a reading of the Act as a whole: overseas investment occurs when an overseas person (discussed below) invests in fishing quota¹⁷, sensitive land¹⁸

13 The NZ Government’s Consultation Document on Reform of the OIO, *infra* n 58 at 114, “Glossary”.

14 Sea-Jin Chiang and Philip M Rosenzweig (2001) 22 Strategic Management Journal 747-776 at 748 <<https://onlinelibrary.wiley.com/doi/epdf/10.1002/smj.168>> accessed 23 January 2020.

15 *Ibid.*

16 This point is also made by the NZ Government’s Treasury in the NZ Government’s Consultation Document on Reform of the OIO, *infra* n 58 at 5, para 22: “Firms at least directly funded by foreign direct investment (a type of overseas investment) are among the largest employers in New Zealand.”

17 As defined in s57D of the Fisheries Act 1996.

18 As defined in s12 of the OIO Act 2005.

or significant business assets¹⁹. Up until 2018, foreigners could buy residential houses in New Zealand without any significant legislative impediments. In 2018 a fundamental change to the law-the so-called ‘foreign-buyers’ ban’- was initiated and passed into law by the Labour-NZ First coalition government that had won the 2017 general election.²⁰ By that time, New Zealand’s housing market had experienced a period of strong and consistent growth. In fact, runaway market prices had placed the possibility of buying a house beyond the grasp of many normal New Zealanders and that had a direct impact on, *inter alia*, our overseas investment laws.

All governments have to grapple at some point with the question of whether foreigners/overseas persons/expatriates (however that group is defined) should be able to purchase residential land in one’s country and if so, how that investment is best regulated. This issue is a mere subset of a much larger area of policy concern which relates to the overall regulation of foreign investment across all aspects of the economy. This paper carves out a specific area for investigation within what is potentially a massive area of inquiry. It examines New Zealand’s current law and policy as it relates to the ability of foreigners to invest in New Zealand land and business assets, but especially in residential land. The paper seeks to identify learnings both for New Zealand and for other countries that might be looking abroad for examples on what is effective when it comes to regulating overseas investment. Some recommendations emerge from New Zealand’s experience that other jurisdictions might find useful.

Regulating foreign investment is a ‘hot topic’ in many parts of the world, including in the states of the Gulf Co-operation Council (GCC). For instance, as of 1 December 2020, foreigners-for the first time-will be allowed to own one hundred percent shares in United Arab Emirate (UAE) companies due to an amendment to the 2015 Commercial Companies’ Law. Foreign-owned companies will no longer have to use a local person to hold majority ownership.

19 As defined in s13 of the OIO Act 2005. Generally speaking, “significant business assets” means that the overseas person acquires an interest in a company with assets that are valued at \$NZ100 million or more.

20 This is a not a paper which seeks to explain the electoral features of New Zealand’s constitutional framework, but it may be helpful for an overseas readership to note that in New Zealand the government is formed entirely from Parliament. Thus, all members of the government must first have been elected into Parliament as Members of Parliament (MPs) at a general election, which are held once every three years. This is a mark of the traditional Westminster style of government. In addition, New Zealand has adopted a ‘Mixed-Member-Proportional’ (MMP) method of voting which means that the parties who attract the greatest share of the vote usually have to form a coalition together in order to form a new government. For the first time under MMP, since its introduction in 1996, that was not the case in 2020, because the Labour Party (led by Jacinda Ardern) won an outright majority at the general election and did not need to enter into a coalition with another party.

Up until now in the UAE, and in the other GCC states, foreigners can usually only own forty-nine percent of a company and they must find a local individual or company to own the majority fifty-one percent shareholding. That type of law is inherently unattractive to foreign investors.

The dramatic change to the law of the UAE was apparently made to increase foreign investment and make it more attractive to foreign investors as compared with other potential investment targets in the region. Indeed, the Prime Minister of the United Arab Emirates and Ruler of Dubai, Sheikh Mohammad bin Rasheed Al Maktoum has been reported as saying of this law change that ‘the UAE now enjoys a fertile legislative environment for the establishment of businesses in order to enhance the UAE’s competitiveness’.²¹

It is likely that the UAE’s neighbours, including Kuwait, may consider changing their laws which are often restrictive and unattractive to foreign investment, especially the long-held requirements of having companies majority-owned by locals. Failure by its competitors to adopt a similar law to the UAE may render them less attractive, comparatively speaking, as a viable destination for long-term investment.

Thus, competition for foreign investment is a global business and the legislative framework put in place by any government reflects national policy goals and future ambitions, and foreign investment law will obviously have a tangible effect on what types of investment a country can attract.

With regards to the structure of this paper, this section sets out the objectives, methodology and overall approach of the paper. Section two briefly describes the context to overseas investment in New Zealand. It provides a brief primer on the issue of the ‘foreign buyers ban’ for the non-New Zealand reader. Section three explores some key features of New Zealand’s current legislative framework. Section four moves into the policy space by raising the question of how governments can achieve ‘intergenerational justice’ by focusing on sustainable investment. There it is argued that the current New Zealand legislation may achieve intergenerational justice by preventing overseas investors from buying up sensitive land on an unlimited basis, but more action is needed to achieve that goal. Section five offers a brief set of recommendations for other governments to consider when framing (or reframing) their policy position and their laws on overseas investment.

21 Khitam Al Amir, ‘UAE allows 100% ownership of businesses for foreign nationals from December 1, 2020’ (Gulf News, online, 23 November 2020) available at: <<https://gulfnews.com/business/uae-allows-100-ownership-of-businesses-for-foreign-nationals-from-december-1-2020-1.1606134333609#:~:text=Dubai%3A%20The%20UAE%20has%20scrapped,effect%20from%20December%201%2C%202020>> last accessed 25 November 2020.

Objective

This paper focuses on the issue of foreigners buying land in New Zealand as a stepping off point to understand the close connection between law and policy in relation to overseas investment. Although it is somewhat trite to observe that there is always a close connection between law and policy, regardless of the area of law, in the area of overseas investment the connection is very clear and undeniable, indeed it is much more noticeable than in other areas of law. Exploring the law-policy nexus is part of the underlying objective of this paper.

Another objective of this paper is to consider overseas investment from a comparative perspective because all countries have to grapple with the issue and, as all comparative lawyers know, one can learn much about one's own legal system by comparing it to other legal systems. In particular, Canada and Kuwait are used as points for comparison with New Zealand, which is the main focus of this research.

Foreign investment can take many forms. This paper seeks to explore and explain New Zealand's current policy and legislative response to foreign investment especially when investment takes the form of land ownership. It seeks to explain the fundamental changes that took place in 2018. It aims to explain the pitfalls and the possibilities for regulating foreign ownership of land, and present a possible model for others to consider, critique and adopt to the extent applicable in their own jurisdictions.

Finally, it seeks to argue that New Zealand's Overseas Investment Act 2005 implicitly-but not explicitly-recognizes the need for 'intergenerational justice' and sustainable investment by putting in place stringent protections of New Zealand's 'sensitive land', to preserve it for current and future generations. However, both New Zealand and other countries need to actively adopt the criteria of environmental, social, and governance (ESG) investment to better position themselves for long-term challenges such as climate change, economic inequality and housing unaffordability.

The scope of this paper cannot encompass an examination of the changes brought about by COVID-19, that is beyond the scope of the paper. However, some references to the changes that have occurred are made in passing. A thorough examination of how COVID-19 affected overseas investment in New Zealand is an important area for future research.

Methodology

This paper essentially adopts doctrinal research methodology in so far as it seeks to identify *what the law is* in relation to overseas investment by examining legislation and decisions.²² Doctrinal methodology is what lawyers most commonly do, even if they do not identify it as such. The paper will explain key legislative provisions and selected decisions of the courts and the regulator in this area, in order to explain what the law is and how it is being applied. It is also, thus, adopting empirical research methodology, with the decisions of the courts and the decisions of the Overseas Investment Office (OIO, the regulator) as the key sources.

However, that is not to imply that the methodology is one dimensional. This author adopts the view expressed by De Geest and others that law is by nature a hermeneutic discipline (using text analysis) as well as an axiomatic discipline (using logical analysis) and a historical discipline: ‘Indeed, legal doctrine cannot be reduced to one single type of discipline, but is a combination of several of them’.²³ This paper encompasses all of these elements and tries not to be ‘one-dimensional’.²⁴

The paper also has a socio-legal thread to its methodology because it explores the law and policy nexus by explaining how the legislation was passed and later amended to meet the new Labour-NZ First coalition government’s policy goals. Some context may be helpful here: the author of this paper teaches in the area of law and policy and as such the case study of overseas investment law in New Zealand is a way to explore that broader law-policy nexus.

This paper does not adopt a comparative law approach *throughout*, but some comparisons are used (for instance, between the ‘benefit to New Zealand’ test and the Canadian ‘net benefit’ test). As alluded to above, the underlying purpose is not only to explain New Zealand law in this area for its own sake, but to act in the spirit of comparative legal scholarship, which assumes that

22 “Doctrine has been defined as ‘a synthesis of rules, principles, norms, interpretive guidelines, and values’ which ‘explains, makes coherent or justifies a segment of the law as part of a larger system of law.’ In this method, the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesis to establish an arguably correct and complete statement of the law on the matter in hand”: Terry Hutchinson, “Doctrinal research” in Dawn Watkins and Mandy Burton *Research Methods in Law* 2nd ed. (Routledge, London: 2017) at 13 [*nb*: footnotes in the original text are not replicated here].

23 Mark van Hoecke “Legal Doctrine: Which method(s) for what kind of discipline?” in Mark van Hoecke (ed) *Methodologies of Legal Research – What Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) at 4-6, citing and translating De Geest.

24 *Ibid.*

every legal system is essentially dealing with the same sorts of legal issues, and much can be learnt by observing what other jurisdictions are doing.

This will allow scholars in other jurisdictions to consider whether the New Zealand approach is useful in helping them address the challenges they are facing. The comparative approach is also employed to some extent in relation to Kuwait, as per the analysis at pages 16-19 below.

This paper also has a theoretical thread to it as it seeks to place the New Zealand legislation within a theoretical context when it examines how our legislation, arguably, recognizes the concept of ‘intergenerational justice’ without using that term in the legislation. In short, this paper seeks to examine both the current and future directions of New Zealand’s policy and legislative response to overseas investment. An explicit recognition of international justice would be preferable both in New Zealand and overseas, thus, the paper adopts a law reform methodology especially in sections four and five.

Section 2. Context and background

A few demographic and socio-economic facts are provided here followed by a transition into an overview of our government. New Zealand is a country of approximately five million people (including citizens, permanent residents and those normally resident), which is located in the South Pacific Ocean.²⁵ The New Zealand society is a multi-ethnic one. Approximately 70 percent of the population self-identifies as ethnically European.²⁶

The indigenous Maori population, whose ancestors settled in New Zealand before Europeans arrived, is currently approximately 16.5 percent of the total population.²⁷ Other significant groups in New Zealand society self-identify as ethnically Pacific Peoples (approximately 8 percent), Asian (approximately 15 percent), Middle Eastern/Latin American/African (approximately 1.5 percent in total across all three groups). New Zealand is the most common birth-place for those usually resident, with 72.6 percent of the resident population being born here, followed by England as a place of birth (4.5 percent), China (2.5

25 Stats New Zealand, ‘Population’, which shows that the current total population is 5,101,400 as at 20 September 2021, available at: <<https://www.stats.govt.nz/topics/population>> last accessed on 4 February 2020; next update is due on 18 February 2021.

26 Stats New Zealand, ‘European ethnic group’ available at: <https://www.stats.govt.nz/tools/2018-census-ethnic-group-summaries/european> last accessed on 4 February 2020.

27 Stats New Zealand, ‘Maori Ethnic Group’, which shows that on census night 2018, there were 775,836 people who identified as ethnically Maori out of a total resident population that night of 4,699,755, available at: <https://www.stats.govt.nz/tools/2018-census-ethnic-group-summaries/maori> last accessed on 4 February 2020.

percent) and India (2.5 percent).²⁸

In terms of education, one in four New Zealanders participated in full or part-time education at the time of the 2018 census; of the total population, 18.2 percent reported having no qualifications and the proportion of the population with a bachelor's degree (or level 7 qualification) is 14.6 percent of the total population.²⁹ In terms of housing, which is at the heart of this paper, 27.8 percent of the population owned or partly owned their own homes (or their homes were owned by a family trust) whilst 31.9 percent lived in rented dwellings and 3.4 percent lived in a dwelling rent-free.³⁰

Life in New Zealand is generally very good. According to the Organization for Economic Cooperation and Development (OECD) measures, New Zealand performs well on many measurements of well-being when compared to other countries in the OECD's Better Life Index. For example, 77 percent of people of working age have a paid job which is above the OECD average of 68 percent.³¹ Life expectancy in New Zealand is 83 years for women and 80 years for men, giving an average life expectancy of 82 years, which is above the OECD average of 80 years.³²

An extremely high 88 percent of New Zealanders rate their personal health as "good" or "very good" which compares well with, say South Koreans (where only 40 percent rate their health as "good" or very good") and the OECD average is just 69 per cent when asked the question, "how is your health?".³³ Air quality is generally excellent, with the presence of tiny air pollutants (atmospheric PM2.5 or concentrations of fine particulate matter) being measured at 4.9 micrograms per cubic metre, which is lower than the OECD average of 13.9 micrograms per cubic metre, and is actually the best air quality in the world.³⁴

By way of comparison, and acknowledging that this paper will be published in a Kuwaiti law journal, it may be interesting to note that the World Health Organization's records show that air quality in the Middle East and North

28 Stats New Zealand, '2018 Census totals by topic' available at: <<https://www.stats.govt.nz/information-releases/2018-census-totals-by-topic-national-highlights-updated>> last accessed on 4 February 2021.

29 Ibid.

30 Ibid.

31 OECD 'Better Life Index – New Zealand' available at: <<http://www.oecdbetterlifeindex.org/countries/new-zealand/>> last accessed on 4 February 2021.

32 Ibid.

33 OECD, 'Better Life Index – Health' available at: <<http://www.oecdbetterlifeindex.org/topics/health/>> last accessed on 6 February 2021.

34 Ibid.

African region is among the worst in the world.³⁵

Coming back to the Better Life Index, it is apparent that overall, New Zealanders are more satisfied with their lives than the OECD average: when asked to rate their satisfaction with life on a scale of one to ten, the average grade that New Zealanders gave for personal satisfaction was 7.3, which is much higher than the OECD average of 6.5.³⁶

Politically, New Zealanders are very active in democratic processes: ‘there is a strong sense of community and high levels of civic participation in New Zealand’ with very high turnout (around 88 percent) at the last general election.³⁷ However, housing is one area where New Zealand does not perform well when compared with OECD comparisons. In fact, the OECD data shows that in terms of housing costs as a ratio to total household costs, New Zealanders have to pay more than anywhere else in the OECD to keep a roof over their heads.³⁸

In plain terms, housing is very unaffordable in New Zealand and more unaffordable than in any other OECD country. Foreigners investing in New Zealand property was identified as one driver of increasing housing unaffordability. To that end, in 2018, the (then) new Labour-NZ First coalition government passed a law which virtually ended the ability of foreigners to buy homes in New Zealand and it severely limited foreigners’ ability to buy any land here without obtaining prior permission. It became referred to colloquially as the ‘foreign buyers’ ban’. To understand the policy reasons that lay behind the promise to implement a foreign buyers’ ban some context may be helpful. Public discussion of the issue of whether foreigners should be able to purchase New Zealand land reached a peak around 2017-2018. Labour campaigned in

35 World Health Organization, ‘The Global Health Observatory – Concentrations of Fine Particulate Matter (PM2.5)’ available at: <[https://www.who.int/data/gho/data/indicators/indicator-details/GHO/concentrations-of-fine-particulate-matter-\(pm2-5\)](https://www.who.int/data/gho/data/indicators/indicator-details/GHO/concentrations-of-fine-particulate-matter-(pm2-5))> last accessed on 6 February 2021. For instance, in the WHO’s dataset of PM2.5 concentration, New Zealand ranks as the country with the lowest concentration of air pollutants (and therefore the cleanest air) in the world, followed by Brunei, Sweden, Iceland, Finland, Canada, Estonia, Australia, Norway and the United States. At the other end of the scale, the ten countries with the *worst* air quality are Qatar (with the worst air quality in the world), followed closely by Nepal, Saudi Arabia, Egypt, Niger, Bahrain, Cameroon, India, Iraq, Bangladesh and Kuwait. It is noticeable that out of the ten countries with the worst air quality, four of the six GCC states are present. Obviously air quality affects other health outcomes such as life expectancy.

36 OECD ‘Better Life Index – New Zealand’ available at: <<http://www.oecdbetterlifeindex.org/countries/new-zealand/>> last accessed on 4 February 2021.

37 Ibid.

38 OECD, ‘Better Life Index – Housing’ available at: <<http://www.oecdbetterlifeindex.org/topics/housing/>> last accessed on 6 February 2021.

the lead-up to the 2017 general election on a promise to stop foreigners from buying residential houses in New Zealand. Post-election, the newly-elected Labour-New Zealand First coalition government, led by Labour Party Prime Minister Jacinda Ardern, proposed the imposition of strict limits on what was (at that time) the virtually unrestricted ability of foreigners to buy houses in NZ.

The new law passed by Arden's government prevents anyone except New Zealand residents (and residents of Australia and Singapore) from buying land in New Zealand. It was a quite a significant law change and it was part of the Labour-led government's response to rampant house price inflation. It has to be said that this law change did not solve the problem of housing affordability in New Zealand: at the time of writing, in the post-COVID-19 economic recovery, house prices are skyrocketing and it is predicted that by mid-2021 they will be increasing at the same rate as they were in 2016, at around 15 percent.³⁹ A few words on that problem are worth noting at this juncture.

Housing affordability had been dropping rapidly in New Zealand for decades before house prices started spiraling upwards. For instance, in 1975 the average family would have spent approximately 39.2 percent of their weekly income on housing mortgage repayments.⁴⁰ That increased to 67 percent of average weekly income in 1987. By 2007-2009, affordability had dropped even further, so that the average family had to spend 60-80 percent of weekly income on mortgage repayments.⁴¹

Throughout the late 2000s and right up until early 2020 house prices continued to increase in relation to income, and rampant house price inflation became (and remains) a major social and economic issue in New Zealand. One of the reasons for the housing affordability problem, at least in the eyes of the public, was the previously unrestricted ability of foreigners to buy as much land in New Zealand as they wished.⁴²

39 'House price surge just getting started' (NZ Herald, 17 November 2020) available at: <<https://www.nzherald.co.nz/business/house-price-surge-just-getting-started-westpac/OMNAAKV6WO33T7P4SURMKSR63U/>> last accessed 27 November 2020

40 Bernard Hickey, "Opinion: Why the golden oldies are wrong: housing is less affordable now than in 1987 and 1975 (Corrected)" (Interest.co.nz, 17 August 2009) <<https://www.interest.co.nz/news/44330/opinion-why-golden-oldies-are-wrong-housing-less-affordable-now-1987-and-1975-corrected>> accessed 5 October 2020.

41 Ibid.

42 There are many factors that affect housing affordability such as interest rates, rules on deposits for mortgages, low rises in wages and salaries relative to higher rises in inflation, policies on capital gains tax, immigration and migration policies, and availability of land and housing for development including anti-development attitudes and tight building regulations, to name just a few. Thus, the ability of foreigners to buy property is certainly not the only factor that drove up housing prices and caused a housing crisis. For a discussion on the multiple factors that created housing unaffordability in

One of the reasons why foreigners were able to buy land in New Zealand was that under the previous National government (2008-2017) there were no significant legislative barriers to overseas investment in land. The general feeling amongst the public was that overseas investment in New Zealand land and shares had increased significantly and was getting out of control, thus driving up prices as international investors bought and sold repeatedly at a profit. The National Party was in government for a decade, and it supported policies of increasing foreign investment in New Zealand and increasing immigration - it had few, if any, qualms about overseas investors purchasing New Zealand land.

The tide began to turn when the property market became increasingly inaccessible to ordinary New Zealanders and the problem was raised repeatedly in the media. In addition, whilst ordinary New Zealanders reported their difficulties at purchasing their first home, several stories emerged of Silicon Valley millionaires buying ‘bolt holes’ in New Zealand and spending large amounts of money on palatial villas in attractive, often remote, New Zealand locations, as well as in our most popular tourist locations such as Queenstown.⁴³ The thinking, by said millionaire/billionaire investors, was (and remains until now) that if the world experienced a global disaster, such as a nuclear or biological war-or a global pandemic-then New Zealand was the ultimate survival destination.⁴⁴

That prediction almost came to pass in April-May 2020, when New Zealand showed an uncanny ability to lockdown the country and bring the COVID-19 coronavirus under control in a rapid manner. During the early months of the coronavirus pandemic, whilst New Zealand was being lauded in the international media for its effective response, a ‘hunt for the bunkers’ was underway in New Zealand. Rumours swirled in the media about whether these bunkers actually existed; they even gave rise to a tongue-in-cheek documentary, ‘Hunt for the Bunker People’.⁴⁵ Humour aside, the reality is that wealthy foreigners have

New Zealand see Michael Basset and Luke Malpass ‘Priced Out: How New Zealand Lost its Housing Affordability’ (The New Zealand Initiative, 2013) available for download from: <<https://nzinitiative.org.nz/reports-and-media/reports/priced-out/>> accessed 5 October 2020.

43 Olivia Carville “Paranoid Silicon Valley magnates pour millions into NZ doomsday bunkers” New Zealand Herald (online ed, Auckland, 6 September 2018) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12120090> accessed 20 January 2020.

44 Ibid. For a sarcastic take on the doomsday scenario, see Steve Braunias “Spending doomsday with Kim Dotcom” NZ Herald (online ed, Auckland, 27 July 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12091592> accessed 21 January 2020.

45 Anna Murray, “Inside the Hunt for the Bunker People documentary” New Zealand Herald (online ed, Auckland, 24 April 2020) <https://www.nzherald.co.nz/entertainment/news/article.cfm?c_

indeed been purchasing property in New Zealand, for years (not just due to the COVID-19 pandemic) and some investors-such as Silicon Valley venture capitalist, billionaire, and PayPal co-founder, Peter Thiel-have been granted New Zealand citizenship on the back of their investments in this country.⁴⁶

Aside from the American investors, Chinese millionaires invested \$NZ1.5 billion in the New Zealand housing market in 2017.⁴⁷ There were several local reports (and some conflicting data) regarding the unusually high levels of overseas buyers in the NZ housing market.⁴⁸ There was a lot of concern in New Zealand about our over-heated housing market, with allegations that the continuous rise in New Zealand house prices was due-at least in part-to the fact that anyone in the world could buy a house here. The public discussion of a possible law change lead to some interesting perspectives as people reacted to what was going to (and eventually did) amount to a ban on foreigners buying New Zealand homes.

The causes of housing price inflation pre-2017 were many. Probably the main reason why property became so unaffordable was a simple demand and supply issue. Far fewer houses were being built and there simply were not enough houses for the number of people who needed somewhere to live. Bassett and Malpass have noted that ‘the number of newly completed homes in 2011 was only 46% of the number built 35 years earlier, yet the number of households needing a roof over them had risen significantly in the interim.’⁴⁹ This research indicates that far from being a problem with foreigners, the housing affordability problem was really just a matter of demand outstripping supply.

id=1501119&objectid=12224426>. Note that the title of the so-called documentary is a play on words, referring to the New Zealand film ‘Hunt for the Wilderpeople’ directed by Taika Waititi.

46 Matt Nippert, “Revealed: How Peter Thiel got New Zealand citizenship” New Zealand Herald (online ed, Auckland, 1 February 2020) <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11790034>.

47 Catherine Harris, “Chinese pour \$1.5 billion into NZ housing market last year” Stuff.co.nz (online, New Zealand, 7 September 2018) <<https://www.stuff.co.nz/business/property/106836362/chinese-pour-15-billion-into-nz-housing-market-last-year> > accessed 21 January 2020 (“Mainland Chinese purchased 1.5 billion of residential real estate in New Zealand last year [i.e. in 2017], according to a real estate website for Chinese investors”).

48 For example, see Jason Walls “ASB data shows the actual number of homes sold to foreign buyers in the year to March 2018 is likely between 11% and 21% nationally, not the 3% reported by StatsNZ” Interest.co.nz (online, 26 June 2018) <<https://www.interest.co.nz/news/94482/asb-data-shows-actual-number-homes-sold-foreign-buyers-year-march-2018-likely-upwards-11>> accessed 22 January 2020; see also CNBC “New Zealand bans most foreigners from buying homes” CNBC (online, 18 August 2018) <<https://www.cnb.com/2018/08/16/new-zealand-bans-most-foreigners-from-buying-homes.html>> 20 January 2020.

49 Bassett and Malpass, above n 31, pp18-19.

However, the more visible aspect of the problem—the ‘cause’ that was much easier to spot than an inherent, long-term mismatch between supply and demand—was the visible presence of foreign investors and offshore property speculators in the New Zealand housing market. Specifically, Chinese investors were said to be increasingly visible at property auctions and many real estate agents appeared to be promoting New Zealand properties in China and Singapore because New Zealand was said to be ‘an investor’s dream’.⁵⁰ The New Zealand media reported many instances of locals being outbid by foreign (Chinese) offshore property investors.⁵¹ These stories captured the imagination of hopeful purchasers and clamping down on foreign investment firmed up as one area where policy and law needed urgent reform.

Where overseas investment is concerned, it must be acknowledged that reactions are often heated and there are conflicting interests. Xenophobia (the dislike, lack of tolerance or fear of foreigners) has to be considered as a factor as well. It is common sense that Chinese foreigners are more physically noticeable at a property auction, whereas American, English and other European property investors might be less distinguishable as non-citizens or non-residents. Moreover, the typical person attending an Auckland property auction would, quite frankly, not be able to tell the difference between a New Zealand resident of Chinese origin and a non-resident or overseas Chinese investor.

The fact is that modern New Zealand is a multicultural, multi-ethnic country. According to the last census, twenty-three percent of Aucklanders were of Asian origin. Thus, no one could have known the residency status of potential purchasers unless the latter disclosed that information themselves, which is most unlikely in a property auction setting.⁵² Nevertheless, real estate agents were sufficiently concerned with the presence of foreign buyers in the local housing market that in 2015, one remarked to a local newspaper that: ‘Kiwis are getting really upset. They can’t compete with Asians who have the money,

50 Patrice Dougan, ‘Asian advert’s Auckland property boast: ‘An investor’s dream’” (NZ Herald online, 22 April 2015) available at: < https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11436779> accessed 5 October 2020.

51 For example, see Anne Gibson, ‘We’ve Got Chinese Buyers’ NZ Herald (online ed, 11 July 2015) available at: <https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11478724> accessed 5 October 2020 (reporting that several Auckland property-owners were approached by Chinese offshore investors).

52 Diana Clement, ‘Property Report: Migration helps fuel price boom’ (NZ Herald, 8 June 2015) available at: <<http://www.newzealandmortgages.com.au/wp-content/uploads-4/jul15/propertyreportmigrationhelpsfuelpriceboomnzherald8june15maryobrieninterview.pdf>> accessed 5 October 2020.

and they pay more...It's as plain as the nose on your face, what's happening in the auction rooms each week.'⁵³

Although there was plenty of speculation that foreigners were buying up New Zealand residential property, obtaining reliable data at that time on who was purchasing New Zealand property didn't definitively answer the question. For instance, a BNZ-REINZ survey in 2015 suggested that eight percent of total house sales were made to foreign buyers.⁵⁴

However, conflicting data collected by Phil Twyford, the Labour Party's (then) housing spokesperson (when Labour was in opposition), showed that the eight percent figure was far too low. Twyford claimed that the presence of Asian buyers was more likely to account for around forty percent of house purchases in the Auckland region, although that data was difficult to verify since it relied on electoral data matching with Asian surnames and it was not a completely reliable indicator of purchasers' residency status.⁵⁵

Nevertheless, calls were made (through the media, especially) for the government to do something to cool the New Zealand housing market and to improve housing affordability. In relation to the idea of placing a ban on foreigners buying New Zealand homes, there were some stakeholders-including property investors, realtors, lawyers and law societies-who expressed their clear opposition to the proposed policy of banning foreigners from buying New Zealand residential property.

International organisations, such as the International Monetary Fund, also weighed in, claiming that to ban foreigners from buying property would not help to drive down housing prices, so it was pointless to implement such a law change.⁵⁶ On the other hand, there were a lot of ordinary New Zealanders who could no longer afford to buy a house and they wanted the government to take some immediate action to limit who could buy residential property. The Labour Party, which was in opposition until 2017, campaigned at the 2017 general election on a promise of, *inter alia*, passing legislation to reign in foreign buyers. In the interests of making housing more affordable

53 Gibson, above n 40.

54 Ibid.

55 Ibid. See also Stuff, 'Housing data "strongly suggests" Chinese foreign investment – Twyford' (Stuff online, 13 July 2015) available at: <<https://www.stuff.co.nz/business/70170890/housing-data-strongly-suggests-chinese-foreign-investment--twyford>> accessed 5 October 2020.

56 Rob Stock "IMF not keen on proposed foreign buyer ban for houses" Stuff.co.nz (online, 6 July 2018) <<https://www.stuff.co.nz/business/money/105284813/imf-not-keen-on-proposed-foreign-buyer-ban-for-houses>> accessed 22 January 2020.

for New Zealanders-and in the interests of fulfilling an election promise-the law was then changed in 2018 when Labour won the right to govern. The new government, led by Prime Minister Jacinda Ardern, moved quickly to establish a foreign buyers-ban on residential homes.

The law change in 2018 – banning (most) foreign buyers

As of 22 October 2018, all residential land is now classified as ‘sensitive land’. Therefore, only New Zealand citizens, New Zealand permanent residents and certain Australian and Singaporean permanent residents are eligible to purchase a home in New Zealand.⁵⁷ Anyone else who wants to purchase land must seek permission from the Overseas Investment Office. The legislation is discussed in detail in section three below.

Before moving on it is worth observing here that New Zealand permits both New Zealand citizens *and permanent residents* to buy residential land, and there are no limits on how much land individuals in either group can purchase. In a general sense, a permanent resident of New Zealand has virtually all the same rights as a New Zealand citizen: permanent residents can purchase property, study, work, access loans (both bank and student), and vote in both local and government elections for their preferred political representatives.

In other words, there is very little difference between the rights of a permanent resident and a citizen of New Zealand. This is quite unlike the policy and law in other countries where only citizens might be permitted to own property, or where permanent residency is available only if a certain amount of money is invested in residential property, to say nothing of the fact that permanent residents cannot vote in many countries, nor access government-funded schools or loans. New Zealand has adopted a long-term view of encouraging permanent residents to settle in New Zealand and become an integral part of its society, thus, they have always had the ability to purchase residential property, of any value, to help them settle here and contribute to New Zealand society.

Furthermore, there are no limits upon such land acquisitions, thus, many property investors own multiple investment properties. To deny permanent

⁵⁷ These changes to the Overseas Investment Act 2005 were implemented via the Overseas Investment Amendment Act 2018 and came into effect on 22 October 2018. They are now part of the Overseas Investment Act 2005 (the OIA 2005 or ‘the Act’). There are no restrictions on New Zealand citizens buying homes but New Zealand permanent residents must satisfy some additional criteria, namely, that they must have been residing in NZ for at least the immediately preceding 12 months, or they have been in NZ for 183 days or more in total in the immediately preceding 12 months or they must be a “tax resident” of NZ: see the definition of “ordinarily resident in NZ” in the OIA, s6 and s6(2).

residents the ability to purchase residential land would never be tolerated in an egalitarian and human rights-oriented society such as New Zealand. However, it might be argued that at some point in the future New Zealand may have to consider the concept of limiting the number of investment properties that can be purchased by citizens and permanent residents alike.

That controversial notion is well beyond the scope of the current paper, and it delves into the jurisprudence underpinning conceptions of property. Suffice to say here that although owning property is one of the most basic and fundamental human rights, even John Locke only granted the right to ownership of property so long as there was ‘enough, and as good as, left in common for others’, as per the so-called Lockean proviso.⁵⁸

Exploring that argument will have to be left to another paper because it is well beyond the scope of the current one, but there is certainly a basis upon which to argue that a domestic right to own property (by citizens and permanent residents on an equal footing) must have limits placed upon it, especially when there is not ‘enough and as good as left in common for others’ which appears to be the case in New Zealand at the moment. The number of people renting a property in which to live is rising at twice the rate of the number of owner-occupiers.⁵⁹

There is an increasing problem in New Zealand insofar as people with adequate finance or equity are purchasing multiple investment properties, which makes it harder for those who just want to buy their first home. It is difficult to know the exact numbers but it appears that there are approximately 131,000 landlords in New Zealand and about eighty percent of them own one investment/rental property. Therefore, about twenty percent of investors own multiple rental properties: data suggests that 23,000 investors own two-to-five properties and 3,643 investors own six or more properties.⁶⁰ It is somewhat

58 John Locke, *The Second Treatise of Government* (1690) sec 27.

59 Statistics New Zealand states that in the year to June 2019, the number of households renting their homes rose by 15,400 (2.6%) whereas the number of households occupied by their owners increased by only 7,900 (0.7%): see Greg Ninness, ‘Statistics NZ estimates the number of households renting their homes increased by 15,400 in the year to June’, Interest.co.nz, accessed 21 November 2020 at: <<https://www.interest.co.nz/property/100565/statistics-nz-estimates-number-households-renting-their-homes-increased-15400-year>>.

60 It is hard to know exactly how many permanent residents and citizens own multiple properties because this data only seems to be available in response to individual Official Information Act requests. The ‘Property Academy Podcast’ made such a request and found that there are about 131,000 landlords and about 80% of them own one invest property: see post by Ed McKnight, ‘Podcast: How many properties do NZ Investors Really Own? Ep 235’, 5 May 2020, available at: <<https://www.opespartners.co.nz/blog/how-many-properties-do-nz-investors-really-own-ep-235>> accessed 21 November 2020.

staggering that there are apparently about 800 individuals who own more than fifty properties each, and there are 293 individuals (private or corporate) in New Zealand who own 201 or more properties.⁶¹

This seemingly excessive accumulation of investment property may well be contributing to the considerable problems experienced by first-home buyers in getting into their first family home. Placing a limit on the number of properties one person (that is, a private individual) can own at any one time is a proposal that this author believes is worth exploring even though it would be difficult to achieve, since many investors purchase properties in the name of a company or a trust. This aspect of regulating property investment will be the subject of a separate research paper and it is set aside for the time being because it is beyond the scope of this paper.

Returning to the issue of the extent to which foreigners can buy houses in New Zealand, it is clear that this is just one small part of the overall picture of ‘overseas investment’, yet it is often one that is prone to provoking heated public debate. Overseas investment is controversial and it provokes strong feelings, it involves notions of ‘sovereignty’ and protecting state assets (and even state security) and it raises many questions such as whether foreigners should be able to own assets and whether we have data on how many foreigners own New Zealand land. If we are going to continue to allow foreigners to buy land because of the investment benefits in doing so, how can that process be managed and controlled? New Zealand has been working on answering these questions yet many countries are likely to face the same dilemmas as New Zealand has faced, thus, our attempts to regulate this area might of interest to other jurisdictions facing similar questions.

Section 3: Overseas investment in NZ - Purpose, Scope and History

The New Zealand government has expressed a clear policy position regarding overseas investment. The New Zealand Government acknowledges that “[t]o grow our economy and lift productivity we need investment – both by New Zealand investors and by overseas investors”.⁶² That position would be one that is adopted by most, if not all, governments. It is a general, rather bland and probably ubiquitous, policy position.

61 Ed McKnight, *ibid*.

62 The Treasury, “Overseas investment in New Zealand ” in *Consultation Document: Reform of the Overseas Investment Act 2005 – Facilitating productive investment that supports New Zealanders’ wellbeing* (April 2019) <<https://treasury.govt.nz/sites/default/files/2019-04/overseas-investment-reform-consultation.pdf>>.

at 1 [hereinafter “Reform of the OIO”]. This document sought public consultation on further changes to the OIO legislation, to be implemented in 2020 via legislative reform.

What makes a country an attractive destination for overseas investment?

New Zealand is an attractive destination for foreign investment for many reasons. First and foremost, it ranks extremely well on many business performance indicators: New Zealand is currently ranked as the best place in the world for doing business (literally, according to the World Bank's *Doing Business 2020* report).⁶³ It is also reported to be the least corrupt country in the world.⁶⁴

In addition, it is extremely easy to purchase a residential property in New Zealand: sale and purchase can be completed in a very short space of time and a sale and purchase transaction can be initiated and seen through to completion without either party needing to physically be present in the country. The cost of the transaction is quite low (typically lawyers charge between \$400 and \$800 New Zealand dollars for a simple conveyance) and registration of the sale and purchase is fast, easy and inexpensive.

New Zealand has other attractions, too: it is seen as a peaceful country, with a very low risk of conflict, thus making it a safe haven for foreign investors. New Zealand has good trade relations with virtually all other countries. The New Zealand passport is currently ranked as one of the most powerful in the world (in terms of how freely New Zealanders can travel).⁶⁵ Notably, there is a proven correlation between a passport's power and the country's trade freedom. Researchers have found that countries that rank well for trade freedom, foreign investment freedom and human rights usually have powerful passports, too,⁶⁶ which seems to be borne out in the case of New Zealand.

63 The World Bank, 2020. *Doing Business 2020 – Comparing Business Regulation in 190 Economies* (Washington, DC: World Bank) DOI: 10.1596/978-1-4648-1440-2. License: Creative Commons Attribution CC by 3.0 IGO <<http://documents.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf>> accessed 20 January 2020. In the 2020 report, New Zealand has the number one ranking for ease of doing business, followed by Singapore, Hong Kong, Denmark, South Korea, the US, Georgia, the UK, Norway and Sweden. The only Arab state in the top 20 is the UAE ranked 16th. To provide geographical context, Bahrain is ranked 43rd, Morocco is 53rd, Oman is 68th, Jordan is 75th, Qatar is 77th, Tunisia 68th, Kuwait is 83rd, Egypt is 114th, the West Bank and Gaza 117th, Iran is 127th, Lebanon is 143rd, Algeria is 157th, Iraq is 172nd, Syria is 176th, Libya is 186th and Yemen is 187th.

64 Transparency International, Corruption Perceptions Index 2019, <<https://www.transparency.org/cpi2019>> accessed 23 January 2020.

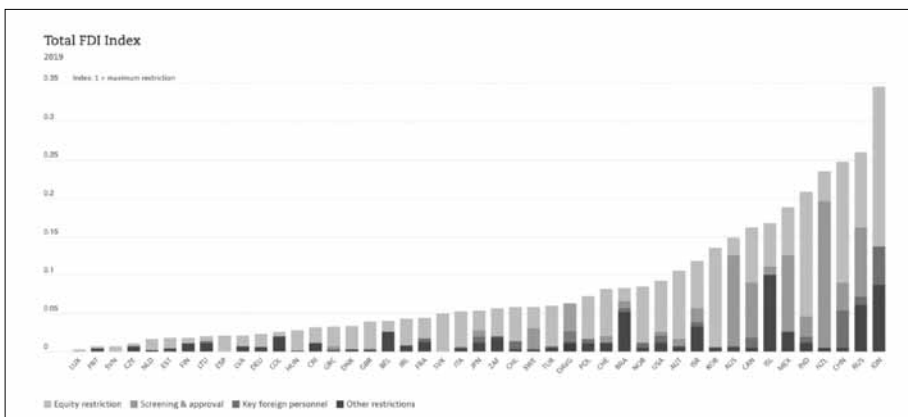
65 Henley and Partners, 'Henley Passport Index 2020' <https://www.henleyglobal.com/storage/app/media/HENLEY_PASSPORT_INDEX_2020_Q3_INFOGRAPHIC_GLOBAL_RANKING.pdf> accessed 27 October 2020; New Zealand is ranked joint 8th for passport power with visa accessibility to 183 countries.

66 Henley and Partners, 'Henley Passport Index – Global Mobility Report 2020' <https://www.henleypassportindex.com/assets/2020/Q1/2020%20HPI%20and%20Global%20Mobility%20Report_200107.pdf> accessed 27 October 2020 esp. at 24-27.

However, on the flip-side, New Zealand also has a “prolonged current account deficit and low per-capita investment in productive businesses”.⁶⁷ When measured against other countries in the OECD, New Zealand does not rank well for *market openness*. New Zealand has one of the most restrictive screening regimes for overseas investors in the OECD. In the OECD’s 2019 “Foreign Direct Investment Regulatory Restrictiveness Index” (FDI RRI), New Zealand is in 41st place.⁶⁸ The only OECD countries with worse rankings than New Zealand for market openness are China, Russia and Indonesia.

That reality does not bode well for New Zealand’s ability to attract investment.⁶⁹ This is almost entirely due to New Zealand’s strict screening and approval procedures, which are currently being reviewed.⁷⁰ Figure 1 below shows New Zealand’s position compared to other OECD nations. The OECD average is indicated by the abbreviation ‘OAVG’ and New Zealand’s position is four places from the right, indicated by the abbreviation ‘NZL’.

Figure 1 – OECD’s Foreign Direct Investment (FDI) Index 2019⁷¹



This kind of data is very useful from a policy and law perspective. It would be interesting if the Gulf Cooperation Council (GCC) states were members

⁶⁷ The Reform of the OIO, above n 58, at 2.

⁶⁸ OECD, “Foreign Direct Investment Restrictiveness Index” (2019), <<https://goingdigital.oecd.org/en/indicator/74/>> last accessed 30 November 2020.

⁶⁹ Ibid.

⁷⁰ Ibid. Each of the OECD nations ranking in the FRI RRI are ranked on four items: equity restriction, screening and approval, key foreign personnel and other restrictions. New Zealand ranks worst on the screening and approval item and has no barriers for the ‘key foreign personnel’ item.

⁷¹ OECD, Foreign Direct Investment Restrictiveness Index (2019) <<https://goingdigital.oecd.org/en/indicator/74/>> last accessed 30 November 2020.

of the OECD (none of them are, although theoretically they could join). If GCC states' data could be included in the Regulatory Restrictiveness Index rankings it could be very helpful to them, as this type of comparative economic analysis helps states to understand how their economic policies and investment restrictions measure up against comparable economies. New Zealand's current focus on investment regulation reform is driven, at least in part, by its concern regarding our poor rankings in this index, especially New Zealand's performance compared to the average for "small advanced economies".⁷² Comparative economic analysis can drive changes in policy, which in turn can drive changes and improvements in the law.

Greenfield investments

Another problem for New Zealand concerns 'greenfield investments'. Research shows that New Zealand not only has overall lower levels of overseas investment than other small advanced economies, but "New Zealand has... struggled to attract the most valuable forms of investment, such as greenfield investment" (emphasis added).⁷³ Greenfield investment may be defined as "a type of investment where capital is used to create a new physical facility in a location where there are currently no facilities."⁷⁴ In other words, greenfield investment 'means creating an entirely new project or company from nothing – such as an oil field, a mine or a new factory'.⁷⁵ Host states, including New Zealand, often have a preference for greenfield investment over mergers and acquisitions (M&A) because the former represents an entirely new source of capital, rather than a mere reorganization of capital as in the latter.

There is no doubt that overseas investment offers a solution to many problems: it can help to "build our productivity to support the economy and employment".⁷⁶ Overseas investment also "enables new firms to be established and existing firms to expand and become more productive".⁷⁷ In addition, overseas investment is associated with wage and salary growth. Research by Fabling and Sanderson shows that New Zealand firms that are acquired by

72 The term 'small advanced economies' is used by the New Zealand Government and by the OECD. It includes New Zealand, Singapore, Finland, Denmark, Switzerland and Ireland. Each of these states has populations of between four and eight million, therefore, New Zealand sees value in comparing its overseas investment levels with countries that share some features in common such as population-size and economy-size: see Reform of the OIO, above n 58, at 9 fn 8.

73 Reform of the OIO, *ibid* at 9.

74 Reform of the OIO, *ibid* at 115, "Appendix C: Glossary".

75 David Collins, *An Introduction to International Investment Law* (Cambridge University Press, 2017) 5.

76 Reform of the OIO above n 58 at 1.

77 Reform of the OIO, above n 58 at 5.

overseas owners tend to increase employment and wages more quickly than domestic firms.⁷⁸ Furthermore, the owners and directors of New Zealand firms have anecdotally reported that foreign investment improved their access to capital, and it also provided access to the new owner's stock of technology, networks and management experience.⁷⁹

The connection between FDI and Research and Development

Overseas investment thus offers many positive outcomes for an economy, but overseas investment-and FDI in particular-offers advantages in one particular area that is deemed essential for economic growth: research and development (R&D). Economic growth is widely accepted to be an important driver of well-being since economic growth leads to improved jobs and income levels. Research and development are seen to be integral to economic growth.

The line of inquiry being pursued here is that there is a clear and direct connection between levels of overseas investment and levels of R&D, and in turn there is a clear connection between legislative frameworks and overseas investment: the law can encourage or stifle overseas investment. Investment in R&D is one area where the Kuwait Government has recognized it has a weakness and it has taken steps to remedy it.

Comparative insights: Kuwait and New Zealand

This paper is written (primarily) for a Kuwaiti/Gulf audience by a New Zealand academic. Comparing Kuwait and New Zealand's key economic performance indicators, as identified by the World Economic Forum, offers some surprisingly interesting insights. Using data published in the World Economic Forum's Global Competitiveness Report 2019, it is observed that Kuwait and New Zealand have a lot in common.⁸⁰ Both have very similar population sizes and quite similar GDP figures. Kuwait and New Zealand are both "high income group" countries.

78 Reform of the OIO, above n 58 at 5 citing Richard Fabling and Lynda Sanderson "Foreign acquisition and the performance of New Zealand firms" (New Zealand Economic Papers 48:1, 2014) 1-20, DOI: <<https://www.tandfonline.com/doi/full/10.1080/00779954.2013.773600>> accessed 22 January 2020.

79 Fabling and Sanderson, *ibid* at 1. However, the study did note that "foreign acquisition targets tended to be firms that were already larger, more productive and more likely to be exporting than their competitors", at 14.

80 World Economic Forum, *The Global Competitiveness Report 2019*, <http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf> accessed 23 January 2020. This paper does not make any comment on some of the individual scores for indicators and citation of the scores should not be taken as implicit acceptance of their veracity; there are certainly some comparative scores which do not seem 'quite right' but critically analysing them is beyond the scope of the current paper.

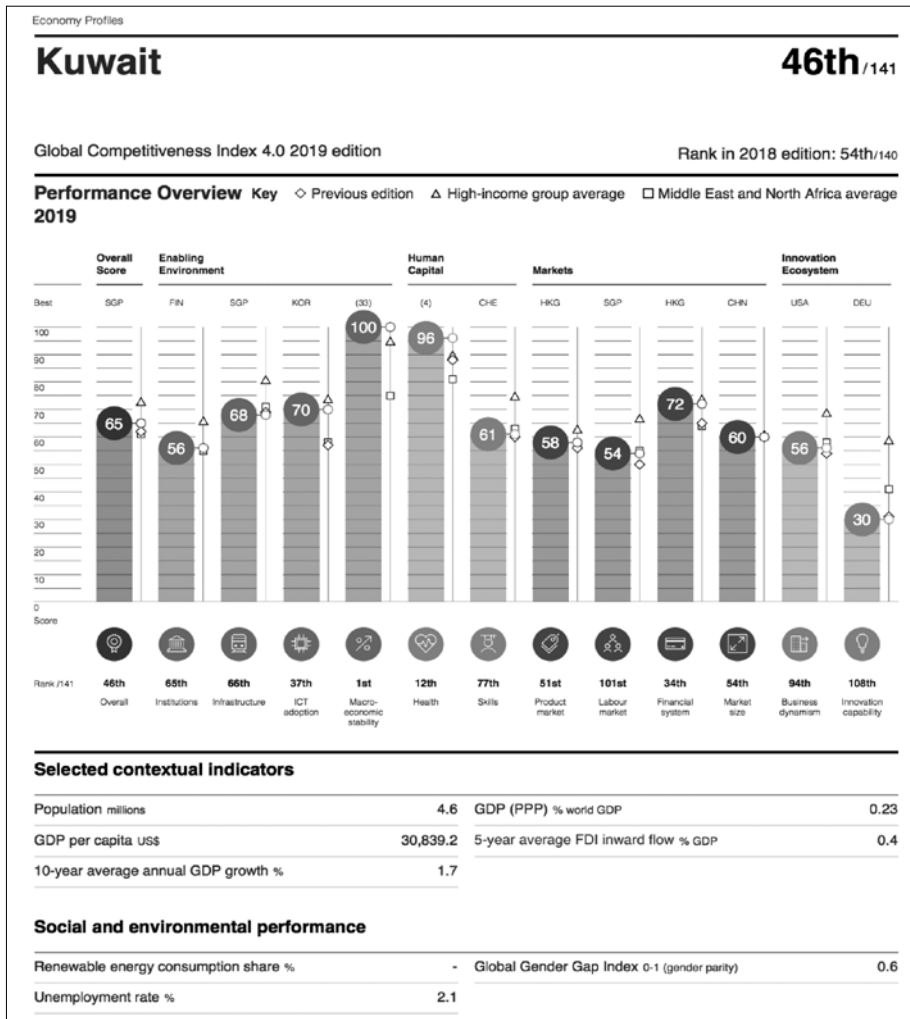
Both Kuwait and New Zealand score 100 percent for “macro-economic stability” and both score highly for “human capital”.⁸¹ Kuwait’s population is 4.6 million and New Zealand’s population is 4.9 million. Kuwait’s GDP as a percentage of the world GDP is 0.23 percent and New Zealand’s is 0.15 percent. Kuwait’s GDP per capita (in \$US) is \$30,839.20 and New Zealand’s is \$41,266.8. Overall, Kuwait ranks at 46th overall and New Zealand at 19th in the Global Competitiveness Report which is interesting in itself because on many other international indices, Kuwait and New Zealand are usually much further apart. One of the areas where Kuwait and New Zealand diverge is in the space called “innovative ecosystem”: Kuwait scores 56 out of 100 for business dynamism whereas New Zealand scores 76. Moreover, Kuwait scores 30 out of 100 for innovation capability whereas New Zealand scores 61 out of 100.

Those key indicators are expressed graphically in the screenshots below from the Global Competitiveness Report 2019: Figure 2 contains the figures for Kuwait and Figure 3 contains the figures for New Zealand.⁸²

81 The Global Competitiveness Report, see Kuwait at p326 *cf* New Zealand at p422. On the “human capital” indicator, Kuwait scores 96% for health and 61% for skills whereas New Zealand scores 91% for health and 82% for skills.

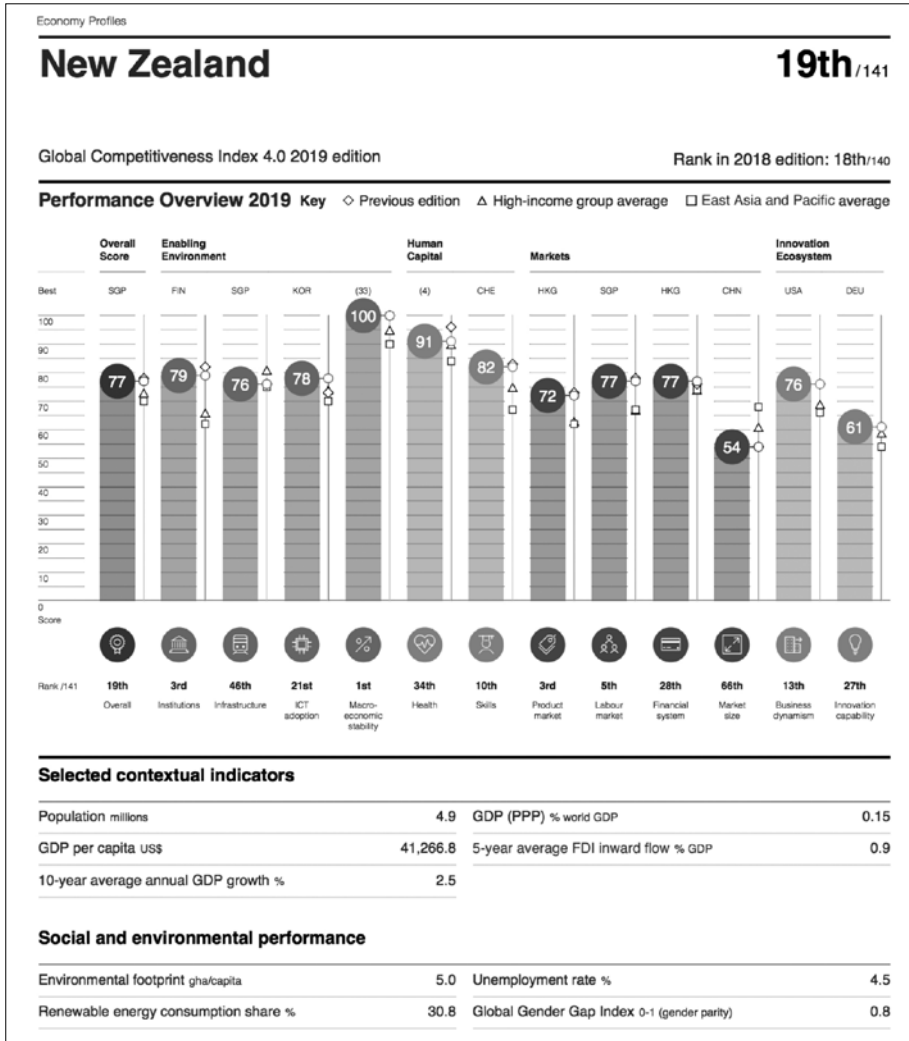
82 World Economic Forum, *The Global Competitiveness Report 2019*, p359 and 422 for Kuwait and New Zealand respectively.

Figure 2: Kuwait’s global competitiveness score – a summary from the Global Competitiveness Report 2019



Those performance scores for the last two indicators on Figures 2 and 3 contribute towards very different overall rankings: Kuwait is 94th for business dynamism (a category which the USA leads) and 104th for innovation capability (a category which Germany leads) whereas New Zealand ranks 13th and 27th respectively. It is argued here that since the data shows that many of the other indicators are quite similar between Kuwait and New Zealand, those “innovative ecosystem” scores, to significant degree, define the overall difference between the global competitiveness of Kuwait and New Zealand.

Figure 3: New Zealand’s global competitiveness score – a summary from the Global Competitiveness Report 2019



Both New Zealand and Kuwait are aware of the underinvestment in R&D. As for the latter, it is noted that the Director-General of the Kuwait Direct Investment Promotion Authority (KDIPA), Meshaal Jaber Al-Ahmad Al Sabah has recently stated that for Kuwait, “the FDI focus is on high-quality investments” and since Kuwait is not desperate for capital, the emphasis is

on adding value and “assisting the transition to a knowledge economy”.⁸³ Conversely, the New Zealand Government has noted that New Zealand does not do as well with investment in R&D as it does in other areas such as human capital: “New Zealand does less well in building knowledge capital through R&D”.⁸⁴

The benefits and the risks of overseas investment

The Overseas Investment Office (OIO) states that “New Zealand welcomes overseas investment that benefits New Zealand”.⁸⁵ That admittedly general statement reflects the New Zealand Government’s economic strategy (as set out in the 2019 consultation document for reform of the Act) which is to:⁸⁶

[B]uild a productive, sustainable and inclusive economy. Overseas investment contributes to this aim when it brings with it new jobs and increases productivity, which is the biggest determinant of people’s living standards in the longer term.

The New Zealand Government has identified at least four distinct benefits of overseas investment. Although these are identified as applying in the New Zealand context, they would also probably apply to other small economies, such as Kuwait:

1. Technology and process innovations: domestic firms benefit from the adoption of up-to-date technologies and processes to support workers to undertake high-value work.⁸⁷ In addition, “domestic firms may be encouraged to innovate as competition increases, which is particularly important in a small market like New Zealand”,⁸⁸
2. Skill increases: “foreign direct investment can result in the transfer of new expertise and skills into the country being invested in”,⁸⁹
3. More diverse international connections and access to global distribution

83 Courtney Fingar, “Kuwait economy needs foreign investment to diversify” (Financial Times online ed., 11 September 2018) < <https://www.ft.com/content/960fc4c8-67fd-11e8-ae1-39f3459514fd>> accessed 23 January 2020.

84 New Zealand Government <https://www.oecd.org/economy/surveys/new-zealand-2019-OECD-economic-survey-overview.pdf>

85 Land Information New Zealand, “About the Overseas Investment Office” (no date) <<https://www.lin.govt.nz/overseas-investment/about-overseas-investment-office>> accessed 22 January 2020.

86 New Zealand Government, ‘Consultation Document: Reform of the Overseas Investment Act 2005’ (The Treasury, 2019) at 5.

87 The NZ Government’s Consultation Document on Reform of the OIO, above n 58 at 5.

88 Ibid at 5.

89 Ibid at 6.

networks,⁹⁰ and

4. Participation in global value chains.⁹¹

However, balanced against those benefits are the various risks of overseas investment, such as:⁹²

1. The risk that economic activity in New Zealand might be lowered if, for instance, a firm was moved offshore or if overseas investors invested in unproductive assets or assets in unsustainable sectors;
2. The risk that overseas investors could underinvest in New Zealand assets during periods of global economic stress and instead prioritise their own domestic operations;
3. The risk that profits could go offshore instead of being retained and invested/spent in New Zealand;
4. The risk that the foreign investment could increase the prices of and reduce New Zealanders' ability to buy assets; and
5. The risk that high levels of foreign ownership of sensitive New Zealand assets (e.g. land) could conflict with some people's views that certain assets "should be owned or controlled by New Zealanders" because of their "productive, environmental, historic or cultural value";⁹³
6. The risk that overseas businesses could pay less tax than equivalent New Zealand businesses; and
7. The risk that foreign ownership of certain critical assets (e.g. infrastructure or strategically important industries) "could pose risks to New Zealand's national security or public order."⁹⁴

The challenge in this space is to walk the line between encouraging overseas investment-to acquire its many benefits-whilest minimizing the considerable risks that come with it. Thus, the question becomes: how is New Zealand

90 Ibid at 6: "In the absence of a large domestic market, international connections enable New Zealand firms to access distribution networks and markets that would otherwise be unavailable, widening their reach. Such connections can also reduce the risks associated with increased global protectionism." Such a benefit would obviously apply to other countries with small domestic markets, such as Kuwait.

91 The NZ Government's Consultation Document on Reform of the OIO, above n 58 at 6. This report notes that "much of the growth in trade since 2000 has been driven by the rise of global value chains, where different manufacturing processes are happening in different countries."

92 These risks are identified by the New Zealand Government in the NZ Government's Consultation Document on Reform of the OIO, above n 58 at 6-7.

93 The NZ Government's Consultation Document on Reform of the OIO, above n 58 at 6-7.

94 Ibid, at 7.

trying to achieve that balance? A brief discussion follows below explaining New Zealand's legislative response to managing overseas investment.

Section 4. The New Zealand legislation: the Overseas Investment Act 2005

New Zealand's current approach to regulating overseas investment is set forth in the Overseas Investment Act 2005, as amended in 2018 and 2020 (the Act).⁹⁵ In section 3 of the Act, its purpose is set out succinctly as follows:⁹⁶

3. Purpose

The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by –

- (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
- (b) imposing conditions on those overseas investments.

The Act thus starts from the principle that owning New Zealand land and business assets is 'a privilege'. It may be noted that the Act replaced the old statutory regime, the Overseas Investment Act 1973 and the accompanying Overseas Investment Regulations 1995 so it was not an entirely new concept *per se* for the New Zealand government to legislate in the area of foreign investment. In terms of history, New Zealand has used legislation to regulate foreign investment since at least 1973. However, a lot of changes have been implemented since then. The 2005 Act has been amended on several occasions, most recently in 2018 and-following a public consultation in 2019-further amendments were passed in 2020 and further changes are likely to be made in the 53rd New Zealand Parliament that has just begun its new post-election session as of 25 November 2020.⁹⁷

There are many important aspects to the Act and only a few are selected here for discussion. These concepts are selected because they help to explain the essence of the Act and because they are likely to be of most interest to an

95 Note that in New Zealand, a statute retains its original name (in this instance, it is the Overseas Investment Act 2005) even though it may be amended multiple times in the intervening years. Each bill that is debated and passed to amend the original Act will have its own specific name and year, but that will not change the original statute's name and year. The government's official legislation website, www.legislation.govt.nz, will indicate when a section has been amended by such legislation.

96 Overseas Investment Act 2005, s3 (bold emphasis in the original).

97 Note that the current Parliament is the 53rd New Zealand Parliament and it began sitting on 25 November 2020, following the general election that was held on 17 October 2020. It consists of 120 Members of Parliament, a mixture of 'list MPs' and 'electorate MPs'. The government of New Zealand is drawn entirely from the Parliament. The government, the Sixth Labour Government, is led by Prime Minister Jacinda Ardern.

overseas reader: (i) the concept of an ‘overseas person’; (ii) the meaning of ‘sensitive land’; and (iii) the ‘benefit to New Zealand’ test.

(i) The definition of an ‘overseas person’

A ‘person’ has always been broadly defined in New Zealand’s overseas investment legislation. In the original 1973 Act, a ‘person’ was defined to include ‘any individual person, a corporation sole, a corporation aggregate, and any association or combination of individual persons or corporate or unincorporate bodies.’⁹⁸ In the 2005 Act, the definition of a ‘person’ has been deleted and replaced with a much more specific definition of an ‘overseas person’. The concept of the ‘overseas person’ is extremely important to understanding the scope and ambit of the Act.

The purpose of the Act, as stated in s 3, refers to ‘overseas persons’ and they are defined separately in section 7 as individuals who are neither New Zealand citizens nor ordinarily resident in New Zealand (see s7(2)(a)), body corporates that are incorporated outside of New Zealand or that are more than twenty-five percent subsidiaries of a body corporate incorporated outside New Zealand (s 7(2)(b)), or a body corporate that has an overseas person holding more than 25 percent of its shares (s 7(2)(c)). An ‘overseas person’ also includes a partnership⁹⁹ or trust¹⁰⁰ when more than twenty-five percent of its governing board are overseas persons, or a unit trust when an overseas person is the manager, trustee or both.¹⁰¹

A couple of observations are offered here in relation to the definition of an ‘overseas person’ in section 7. First, it is evident that an ‘overseas person’ encompasses both natural individuals and corporate entities. Second, the definition excludes New Zealand citizens and permanent residents alike, so they are not ‘overseas persons’ and they are not subject to any of the limitations set forth in the Act. This is something for other jurisdictions to ponder when they are enacting similar legislation or reviewing existing laws: how to define an ‘overseas person’ in the legislation is integral to determining the scope of the Act.

(ii) The meaning of ‘sensitive land’

Consent from the Overseas Investment Office will be required for any transaction that falls within any of the following three situations: if it will result

98 Overseas Investment Act 1973 s 2 ‘person’.

99 Overseas Investment Act 2015, s 7(2)(d).

100 Overseas Investment Act 2015, s 7(2)(e).

101 Overseas Investment Act 2015, s 7(2)(f).

in an overseas investment in sensitive land,¹⁰² or if it will result in an overseas investment in significant business assets,¹⁰³ or if it will result in an overseas investment in fishing quota.¹⁰⁴ The main focus of this paper is the first of those situations, an investment in ‘sensitive land’. That term is further explained Schedule 1 of the Act. Schedule 1 is in fact called ‘Sensitive land’ and this is the area of the Act which is devoted to delineating the policy on what is, and is not, sensitive land. According to Part 1 of Schedule 1, ‘sensitive land’ includes any land that is residential land, any non-urban land (i.e. rural land) if it is over five hectares, any land on islands around New Zealand, as well as the foreshore and seabed, the bed of a lake, land held for conservation purposes, land held for public reserves and public parks, land subject to heritage orders, historic places, Maori reservations and so on.¹⁰⁵ In short, the Act now states that all residential land is sensitive land, therefore, no overseas person can purchase residential land without prior consent from the regulator (the OIO).

(iii) Benefit to New Zealand test

The third term that is highlighted in this paper is the ‘benefit to New Zealand test’ set forth in s 16A of the Act. This section was also inserted in the 2018 overseas investment law changes passed by the Fifth Labour Government. The ‘benefit to New Zealand test’ states that an overseas investment will only be permitted if all of the following circumstances are met: (a) if the transaction will benefit New Zealand as determined by the Minister under s 17; (b) if the land is non-urban land over five hectares and the benefit will be *both* substantial and identifiable; and (c) if the relevant land includes residential land, the Minister must be satisfied that the conditions that the Minister will impose on the consent are likely to be met. A separate test (not discussed here) applies if the land relates to forestry (see s 16A(2) and (4)).

There are few countries in the world that have consolidated foreign investment legislation comparable to New Zealand’s OIA, and even fewer that have a national benefit test in their legislation. One important comparison to be noted is between New Zealand and Canada. Like New Zealand, Canada has a consolidated piece of national legislation and, like New Zealand, Canada has a test which it calls a ‘net benefit’ test. The Investment Canada Act has a similar purpose to New Zealand’s Overseas Investment Act. The Investment Canada

102 Overseas Investment Act 2015, s 10(1)(a).

103 Overseas Investment Act 2015, s 10(1)(b).

104 Overseas Investment Act 2015, s 10(2).

105 Overseas Investment Act 2015, Schedule 1.

Act was enacted with the purpose of providing:¹⁰⁶

[F]or the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security.

The Investment Canada Act provides a ‘net benefit’ test in section 16(1):¹⁰⁷

A non-Canadian shall not implement an investment reviewable under this Part unless the investment has been reviewed under this Part and the Minister is satisfied or is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

There are exceptions to the above net benefit test, which are beyond the scope of the current paper. Four very brief observations are offered here with regards to Canada’s net benefit test.

First, the net benefit test is controversial in Canada ‘because failure to fulfil this requirement means that investment cannot proceed, potentially resulting in a significant loss of business opportunity to the investor and to the Canadian economy.’¹⁰⁸ Thus, this test is all-important to green-lighting any large-scale foreign investment in Canada, whether it be an acquisition-based investment or a greenfield investment.

Secondly, the Investment Canada Act sets forth in s 20 the factors to be considered in determining whether any particular investment passes the net benefit test. Those factors include: the effect that the investment will have on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, and on the utilization of parts, components and services produced in Canada and on exports from Canada;¹⁰⁹ the degree and significance of participation by Canadians in the business;¹¹⁰ the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;¹¹¹ the

106 Investment Canada Act 1985, RSC 1985, ca 28 (1st Supp), s 2 available at: <<https://laws-lois.justice.gc.ca/eng/acts/I-21.8/page-1.html#h-278302>> accessed 21 November 2020.

107 Ibid, s 16(1) available at: < <https://laws-lois.justice.gc.ca/eng/acts/I-21.8/page-5.html#docCont>> accessed 21 November 2020.

108 David Collins, above n 71 at 71.

109 Investment Canada Act, s 20(a).

110 Ibid, s 20(b).

111 Ibid, s 20(c).

effect of the investment on competition within any industry in Canada;¹¹² the compatibility of the investment with national industrial, economic and cultural policies;¹¹³ and the contribution of the investment to Canada's ability to compete in world markets.¹¹⁴ These factors seem to be comprehensive in nature and other jurisdictions may want to consider this list and perhaps enact a similar 'net benefit' test in their own legislation.

Thirdly, the Investment Canada Act does not establish a hierarchy among the above factors, so there is no one element that is more important than the others. Other jurisdictions, using the Canadian law as a model, may wish to consider whether they want to copy that formula, and not attribute any weighting in the Act to the individual factors or whether some factors are more important, and carry more weight, than others. That decision would depend on individual governments' policy objectives.

Fourthly, the Investment Canada Act sets a higher standard for foreign direct investment than most other jurisdictions. Whilst many countries allow for foreign investments to be prevented on the basis of national security and have a test in their legislation that provides for such, Canada (like New Zealand) goes further than national security, seeking to more carefully examine how the investment will benefit the country in a much wider sense than just avoiding any risks to national security. That seems, to this author, a sensible position to adopt.

Finally, the Investment Canada Act only applies to investments over a certain threshold value, currently set at just over one billion Canadian dollars. The threshold for review was previously (until the end of 2017) set at \$800 Canadian dollars but the threshold was increased and it is adjusted annually based on growth in nominal gross domestic product.¹¹⁵

The threshold for 2020 is 1.075 billion Canadian dollars in enterprise value.¹¹⁶ It is submitted that the review threshold is very high and, as compared with, say, New Zealand, where the threshold for business assets is \$100 million, setting the threshold so high would mean that only a very small proportion of potential transactions are screened by the regulator. Other countries may wish to consider setting a lower threshold than Canada's, perhaps closer to New Zealand's level,

112 Ibid, s 20(d).

113 Ibid, s 20(e).

114 Ibid, s 20(f).

115 Government of Canada, 'Thresholds for Review' available at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html last accessed 21 November 2020.

116 Ibid.

at least initially, to catch more investments and give their regulator the chance to review them to determine their potential benefit to the country.

It is worth observing here that some countries, such as the United States, are far more lax when it comes to screening foreign investments: the US does not restrict foreign investment in land unless the land is located at US ports or close to military installations or sensitive government facilities. Japan does not restrict foreign persons from acquiring land. Australia is more similar to New Zealand – it requires all residential land and vacant commercial land to be screened before a transaction can be completed.

Countries like Kuwait and others, who are either creating or amending their laws on foreign investment, may wish to consider the various solutions that the abovementioned jurisdictions have arrived at. Whether they wish to emulate the US, and its low threshold for screening, or Canada with its relatively high monetary threshold and list of factors to consider, or New Zealand and Australia with relatively low thresholds for business assets and total screening for residential land, it is clear from the above analysis that there are various options available to governments and policy-makers: the trick is determining which model of regulation fits best with the society's long-term interests and the government's individual goals. This observation dovetails with those in section five below. The following section argues that sustainable investment and intergenerational justice ought to be at the heart of any new laws or policies on overseas investment.

Section 5. Intergenerational justice & sustainable investment

Before drawing this paper to a close, this section addresses the future direction of policy in overseas investment. It builds on what currently exists in terms of legal regulation, discussed above, and looks ahead to 'what should be'. It is argued here that there is an urgent need to consider intergenerational justice and sustainable development and apply those concepts to the regulation of overseas investment.

This section begins by arguing that there is a 'presentist bias' in policy making. That is followed by an analysis of sustainable investment and how these concepts apply to the regulation of foreign investment in New Zealand, and elsewhere.

The 'presentist bias' in policy-making and 'elections have consequences'

One of the problems with regulating overseas investment is that governments must take a long-term view of what sort of investment they ought to encourage

and they must decide upon the long-term policy goals that they want to achieve for their people. However, many societal issues that need to be tackled today and tomorrow may involve short-term pain to achieve long-term gain – and politicians are reluctant to inflict short-term pain on their societies. This leads to what Jonathan Boston, a New Zealand Professor of Public Policy, calls a ‘presentist bias’ in policy-making.¹¹⁷

To put it simply, policy-makers and governments often exhibit a bias for what makes them popular to the people in the *present*, to the detriment of what is good for their country in the *future*. They have a habit of preferring policies that front-load the benefits and back-load the costs, because they want to remain popular, in order to be re-elected at the next election, which is usually three or four years away, and in order to do that, they seek to find (and keep) favour with their constituents.

Consequently, hard decisions which might be best for the long-term benefit of their society, are usually put off for another day (and for another government to tackle and risk unpopularity). Boston explains that ‘democratically-elected governments often face powerful political pressures to prioritise short-term goals and interests over those of a longer-term nature’.¹¹⁸

A lot of issues facing New Zealand today - and indeed facing all countries - are what might be described as slow-moving or ‘creeping problems’. A few examples will help to elucidate the issue. In the social domain, examples of ‘creeping problems’ include the issues caused by an aging population, increasing income and wealth inequality, declining rates of home ownership, greater social and cultural diversity and declining societal trust; in the health domain ‘creeping problems’ include the causes and costs of increasing rates of obesity and lifestyle problems like heart disease and diabetes; and in the environmental sphere, ‘creeping problems’ are manifest in terms of man-made climate change, the struggle to move to a low and, eventually, a zero-emissions economy, decreasing biodiversity, the growing vulnerability of assets and infrastructure in coastal zones as water levels rise, the decreasing supply of freshwater, the need to clean up polluted waterways and damaged landscapes, and the slow accumulation of toxic chemicals and micro-plastics in the environment and (ultimately) in the food chain.¹¹⁹

117 Jonathan Boston, ‘Protecting Long-term Interests in a Short-Term World: An Agenda for Better Governmental Stewardship’ (2017) 15 *New Zealand Journal of Public and International Law* 93 at 94.

118 Boston, *ibid* at 102.

119 These examples of ‘creeping problems’ that policy-makers must struggle with are taken from Boston, *ibid*, at 102-103.

These are slow-moving, complex, but hugely significant problems that governments which are elected for, say, three-year or four-year terms (in New Zealand governments are elected for three years unless the Prime Minister calls an early election) do not usually feel compelled to tackle effectively because they will involve some real sacrifices in the short term to achieve any long-term positive change.

In addition, where governments are working in a low-trust environment, such as where there is a tradition of corruption and a record of governments wasting public funds, the public are less willing to make short-term sacrifices for future generations to benefit. There is evidence that low-trust environments are particularly bad for protecting future interests because:¹²⁰

[I]f citizens distrust their politicians they will be more reluctant to support policies that involve non-simultaneous exchanges. By contrast, if trust is high, they will more readily accept the logic of intertemporal bargains and are less likely to penalize governments that implement such strategies.

When the abovementioned facts are considered through the lens of foreign investment, they raise questions such as: What sort of foreign investment should a country encourage (and conversely, what types of investment should it preclude) over the long term? What are the long-term policy goals that foreign investment should try to achieve? Answering these questions is where the concepts of ‘intergenerational justice’, sustainable finance and sustainable investment come into the picture. Applying these concepts-which are becoming increasingly visible and viable-to foreign investment can help policy-makers, politicians, business leaders and members of the government think about, and make, decisions that better protect the long-term interests of current and future citizens.

Elections are when the people of a society get to vote out politicians who have been ineffective at creating policy and laws that are beneficial, and replacing them with politicians who they hope can do better. The writing of this article is timely: 2020 has been a year rich with elections. New Zealand had its general election on 17 October 2020, the US had its Presidential election on 3 November 2020 and Kuwait is due to hold its National Assembly elections on 5 December 2020. Elections are not just an opportunity to change the politicians and law-makers: they are a chance to take stock of what policies are needed to move the country forward and to consider the legacy one wants to leave

¹²⁰ Boston, *ibid*, at 100.

for future generations. Elections are, therefore, very much connected with the concept of ‘presentist bias’, discussed above, and ‘sustainable investment’, discussed below.

Sustainable investment for environmental, social and economic prosperity

There is a new way of thinking of ‘prosperity’ that talks in much wider terms than mere economic prosperity: this way of thinking has taken hold in New Zealand. Across government, there is an increasing desire to measure ‘success’ not only in economic terms but equally in terms of environmental and social success.

The thinking is that economic prosperity is actually worth very little if social issues such as wealth disparity and child poverty are not dealt with, and if the environment in which we live has to be degraded in the process. This trend which favours taking economic, environmental and social factors into account when seeking ‘prosperity’ has been evident for a while but it is increasingly taking concrete form. A couple of examples demonstrate how this way of thinking is being turned into substantive change.

First, the Climate Change Response (Zero Carbon) Amendment Act 2019 was passed into law in New Zealand in 2019 – it sets new domestic greenhouse gas emissions targets so that New Zealand must aim to get to zero net carbon emissions by 2050.

It also establishes a new Climate Change Commission to provide expert advice and monitoring that will help to keep successive governments on track to meeting long-term goals, and it provides an overall framework that will help New Zealand to meet its obligations under the Paris Agreement.¹²¹

A second example is the ‘Wellbeing Budget’ and the ‘Living Standards Framework’: each year, the New Zealand Minister of Finance delivers a ‘budget’ to Parliament which is a statutory obligation under the Public Finance Act 1989 and, to put it simply, he/she sets out the plan for government revenue and expenditure for the next fiscal year. However, since its introduction in 2019, this document is no longer called ‘The Budget’, instead, it is called ‘The Wellbeing Budget’ because the planned spending takes into account the need to address much wider social issues such as child poverty and not just the need to balance the government’s financial books.

¹²¹ Ministry for the Environment, ‘Climate Change Response (Zero Carbon) Amendment Act 2019 (reviewed 25 November 2019), available at: <https://www.mfe.govt.nz/climate-change/zero-carbon-amendment-act>> last accessed 23 November 2020.

The Treasury uses its ‘Living Standards Framework’ to create a budget that measures ‘success’ not just in monetary terms. The Minister of Finance has stated that it wants to embed a wellbeing approach across the whole public sector. To do that, he wants the whole public sector to ‘move to broader measures of progress and impact; consideration of long-term and *inter-generational outcomes*; and a whole-of-government approach’¹²² (my emphasis).

Sustainable investment: the future policy setting for all investment

In light of the above, it is asserted here that the future policy direction in New Zealand and elsewhere is for something called ‘sustainable investment’. With regards to New Zealand’s position on sustainable investment, the Minister of Finance, Grant Robertson, has recently stated that:¹²³

Sustainable finance is a critical part of the transition to a more sustainable and low emissions economy. For New Zealand, it is about building on our success to date, and encouraging the development of a more fulsome approach to sustainable investing by both the public and private sectors.

Sustainable finance and investment have just received a boost in New Zealand with the release of the ‘Roadmap for Action’ by New Zealand’s new Sustainable Finance Forum.¹²⁴ The Sustainable Finance Forum (SFF) was established in New Zealand in 2019 to:¹²⁵

[D]evelop a financial system which is sustainable, and to do this by 2030. Our vision is a financial system that is more resilient, inclusive, robust, and agile through the incorporation of environmental, social and economic considerations in financial decisions.

One of its key tasks is ‘to develop a financial system that ‘serves the needs and long-term inter-generational prosperity of society whilst protecting the environment in which we live’ (emphasis added).¹²⁶

122 The New Zealand Government, Treasury ‘Embedding wellbeing in the public sector’ (updated 12 December 2019) available at: <<https://www.treasury.govt.nz/information-and-services/nz-economy/higher-living-standards/embedding-wellbeing-public-sector>> last accessed 23 November 2020.

123 Finance Minister Grant Robertson, ‘Time to find win-win investments’ (New Zealand Herald, 3 November 2020) p3.

124 New Zealand’s Sustainable Finance Forum, link to the full report and the executive summary is available at: <<https://www.theaotearoacircle.nz/sustainablefinance>> last accessed 23 November 2020.

125 Sustainable Finance Forum, Executive Summary, available at: <https://static1.squarespace.com/static/5bb6cb19c2ff61422a0d7b17/t/5f9f7ade2366312117bd9214/1604287244536/Final+Executive+Summary.pdf>> last accessed 23 November 2020.

126 Ibid.

The Roadmap for Action produced by the SFF has received support from the highest levels of the New Zealand government. For instance, the New Zealand Prime Minister, Jacinda Arden—who, as leader of the Labour Party, was recently re-elected to head the government—has commented that she wholeheartedly supports the ‘Roadmap for Action’. Arden supports the report because it shows how New Zealand’s financial system can change from one focused on short-term financial wealth creation ‘to one which supports long-term social, environmental and economic prosperity’.¹²⁷

The abovementioned documents and developments show one clear trend: New Zealand is very much focused on sustainable investment and finance, that is, investment which does not just create financial wealth but which produces real benefits for the environment and for society. This new way of thinking about investment is sometimes referred to as ‘ESG’ investment (environmental, social and governance criteria) because it takes a much broader view of what investment should achieve.

When we apply that policy theme to overseas investment we can assume see that governments will need to think more carefully about how they can create policy and law that provides for sustainable investment. In relation to business assets and land, New Zealand is well on the way to achieving that: it is trying to protect current and future generations from being locked out of owning their own home (and all the benefits that come with private home ownership) by preventing overseas persons from buying any residential land under five hectares, and by forcing them to apply for pre-purchase consent if the target residential land is over five hectares *and* they can show that they have a commitment to reside in New Zealand or they will increase the housing available to New Zealanders or their investment will be of benefit to New Zealand.¹²⁸

Future law reform

Although it is clear that the terms ‘sustainable investment’ and ‘inter-generational justice’ are not to be found anywhere in the Overseas Investment Act 2005, the argument put forward here is that to some extent, those goals will still be met because of the stringent ‘benefit to New Zealand’ test in s 16A and the criteria that must be considered by the Minister when applying that test, pursuant to s 17. Nevertheless, it is submitted that the OIA could be

127 Jacinda Arden, ‘PM welcomes Roadmap for Action’ in *The New Zealand Herald*, 3 November 2020, at B2.

128 The ‘benefit to New Zealand test’ provided for in the Overseas Investment Act 2005 s16A-16C.

strengthened in a couple of ways. First, it could be amended to explicitly refer to the need for sustainable investment.

That could be achieved by including an extra sub-section in the ‘purpose section’ of the Act, in section 3. For instance, a new sub-section 3(3) could be added to the ‘purpose’ section of the Act to make it absolutely clear that one of the purposes of the Act is to promote sustainable investment that promotes social, environmental and economic prosperity current and future New Zealanders.¹²⁹ Such an amendment would update the Act and bring it into line with the current Government’s support for sustainable finance and sustainable investment (discussed above). Secondly, the Act could explicitly state the need for the Minister to consider, under s 17(2), the need to achieve both sustainable investment and inter-generational justice.

The current list of factors for the Minister to consider when assessing whether a transaction passes the ‘benefit to NZ test’, is already quite good. As discussed above, it requires the Minister to consider whether the overseas investment will create new job opportunities or retain existing jobs that might otherwise be lost,¹³⁰ whether it will lead to the introduction of new technology or business skills into New Zealand,¹³¹ whether the investment will increase export receipts,¹³² whether it will add greater market competition, greater efficiency or greater productivity,¹³³ whether it will introduce additional investment for development purposes,¹³⁴ or whether it will increase processing in New Zealand of New Zealand’s primary products.¹³⁵

Those are all good and worthy factors for the Minister to consider as part of the ‘benefit to New Zealand test’. What is noticeable about that list is that the factors listed there are heavily influenced by economic prosperity and they do not mention the need for social, environmental and health prosperity. Thus, it is suggested that perhaps another item could be added to that list in s

129 Overseas Investment Act 2005, s 3, available at: <<http://www.legislation.govt.nz/act/public/2005/0082/latest/DLM356887.html>> accessed 23 November 2020. Currently there are two subsections in section 3; the suggestion here is to add a third subsection, perhaps worded as follows: ‘s 3(3) The overall purpose of this Act is to encourage sustainable overseas investment which takes into account the need to promote health, economic, environmental and social wellbeing, and which is for the benefit of current and future New Zealanders’. This would make the ESG criteria explicit in the legislation.

130 Overseas Investment Act 2005, s 17(2)(a)(i), available at: <http://www.legislation.govt.nz/act/public/2005/0082/latest/DLM358028.html?search=sw_096be8ed81a1c0be_justice_25_se&p=1> last accessed 23 November 2020.

131 Ibid, s 17(2)(a)(ii).

132 Ibid, s 17(2)(a)(iii).

133 Ibid, s 17(2)(a)(iv).

134 Ibid, s 17(2)(a)(v).

135 Ibid, s 17(2)(a)(vi).

17(2)(a), namely, the Minister should take into account whether the proposed investment will ‘be a sustainable investment that will enhance New Zealand’s economic, social, and environmental wellbeing and be in the interests of both current and future New Zealanders’.

By adding this sort of wording to the list of factors that the Minister must consider when assessing a foreign investment, this would ensure that sustainable investment is placed ‘front and centre’ of both law and policy on overseas investment in New Zealand.

Section 6. Conclusion and recommendations

This section draws together some of the recommendations that arise from the foregoing research and analysis. The paper has limited its scope to a relatively small area of foreign investment law, focusing on the relationship between law and policy, and particularly on the way in which New Zealand (and a few other jurisdictions) have provided answers to the myriad questions that arise around how to encourage-but also regulate-foreign investment. In this section a concise set of recommendations is put forward for other jurisdictions to consider when they come to addressing these issues in their own jurisdictions.

First, it is recommended that each country ought to immediately initiate and foster an open public debate on what sort of investment they want their society to encourage, and sort of legacy they want to leave for future generations. This needs to be a wide-ranging public discussion and the debate ought to include a consideration of a number of key matters including for what purpose they want to encourage foreign investment, and how they wish to define a ‘foreign investor’ or an ‘overseas person’.

For instance, in New Zealand (as was observed above) permanent residents and New Zealand citizens are not considered as overseas persons and therefore both groups have an unlimited ability to purchase residential land. It is submitted that every society has to pause and consider how they wish to define a ‘foreign investor’ or an ‘overseas person’ before they can decide what investment opportunities they will provide to them. The public discussion ought to also encompass what types of investment their society needs and whether there are key sectors that require more or less urgent foreign investment. Locking permanent residents out of residential land investment may not have long-term positive outcomes for the coherence and strength of society. Therefore, it is recommended that both citizens and permanent residents of countries ought to be on an equal footing when it comes to the potential to invest in residential land. Without ties to the land, there is no way to put down roots, and without

putting down roots, no one is really and truly invested in the society in which they live.

Second, sustainable investment policies are the way of the present and—more importantly—the future. It is submitted that every government and society needs to consider what future they wish to secure for their grandchildren, and their grandchildren. Investments that empower industries which worsen climate change, investments that are based on increasing or sustaining current emissions from fossil fuels, and investments that do not help a country move towards sustainable development ought to be immediately discouraged both in policy and law: it is now widely accepted, by bodies including the Inter-Governmental Panel on Climate Change—that they are not in any country’s-nor the planet’s-long-term best interests.

On the other hand, investments that promote economic growth, technological innovation, and that help address climate change and/or help the country to diversify, ought to be encouraged by policy and law. Sustainable investment is a concept growing in power and importance, and it is recommended that it be given prominence in every country’s policies and laws on foreign investment. The time for investing in fossil fuels is over – sustainable investment is all about a sustainable future for the planet.

Allowing foreigners to purchase one’s residential land pales in comparison with the risks associated with continuing foreign investment in fossil fuel industries. Since the burning of fossil fuels is the cause of man-made climate change, it follows that foreign investment which increases the production of fossil fuels is most surely irresponsible and it ignores the rights of future generations to be able to live a safe, healthy and fulfilling life on the land that their parents and grandparents were able to live upon. Legislation on foreign investment can encourage foreign investors to invest in sustainable energy projects and achieve a low-to-zero emissions future.

Third, once a public debate and discussion has taken place, policy-makers will be better able to frame a policy for sustainable foreign investment which will form the basis for future legislation. A policy statement on foreign investment is the starting point for sound legislation. When considering overseas models, it is submitted that the legislation on foreign investment passed by the parliaments of Canada and New Zealand, discussed above, are different but useful examples to draw upon.

Both countries are rather unusual in that they have a consolidated piece of national legislation that governs foreign investment, each have clearly stated

purposes. Within the consolidated legislation, each has a ‘benefit’ test. In New Zealand it is called the ‘benefit to New Zealand’ test and in Canada it is called the ‘net benefit’ test. All countries should consider creating legislation dedicated to the regulation of foreign investment and it is submitted that each country ought to consider a statutory test along the lines of either Canada or New Zealand.

Fourth, it is submitted that every country ought to create a specialised and independent regulator to oversee all applications for foreign investments. In New Zealand the ‘regulator’ of overseas investment is officially the chief executive of Land Information New Zealand, as that delegation was made by the Minister of Finance.¹³⁶ Certain powers belonging to the chief executive are delegated to the Overseas Investment Office.

Thus, the Overseas Investment Office is the regulatory unit within Land Information New Zealand which has the statutory ability to review applications and screen them and, if it grants permission for a transaction, to then impose conditions on investments. It also has the power to subsequently monitor implementation of the investment and its conditions, and to bring prosecutions if those conditions are not met.

Fifth, it is submitted that each country ought to consider learning from New Zealand’s mistake when it comes to allowing foreign investors to purchase residential land. As noted above, up until 2018, foreigners could buy residential land in New Zealand and there were really no limits on how much land they could purchase. That was changed in 2018 and although it has not solved the housing affordability problem in New Zealand, it has probably helped.

Other governments could learn from this mistake by preventing foreigners from purchasing residential land under a certain size (in New Zealand it is five hectares). Of course, different countries have different needs, and they may wish to encourage foreign investors to buy residential land, but this is risky because once residential land has been sold to overseas owners, one has to wait until they wish to sell and that may contribute to an over-heated housing market and housing unaffordability, as it did in New Zealand.

Sixth, and finally, this paper advocated for every government to embrace and then embed the principles of sustainable investment in both policy and law. The way of the future is to move away from fossil fuels towards sustainable energy. Overseas investment laws can help with that difficult transition if

¹³⁶ See Overseas Investment Act 2005, s 30; see also s 6 for definition of ‘Minister’ and see ss 31-35 for ministerial delegation and directives under the OIA.

the principles of a ‘net benefit’ test are included in the legislation, and if the concepts of sustainable investment are incorporated into both law and policy.

It is suggested that this paper may give food for thought to other academics, policy-makers and members of legislatures and executives: when one looks abroad one can see that we are all facing similar challenges and we are all living on the same planet. The decisions made on foreign investment in one country may have long-term repercussions, not only for the current population of that country but for future generations of that country, and for the global community. The COVID-19 pandemic of 2020 has shown how interconnected we all are, and how decisions in one country can have effects on all countries.

This paper has argued that law and policy have the power to make positive, sustainable change. Overseas investment law can be, and should be, an effective driver of that change. As the United Nations Secretary-General recently said, ‘democracy... can ensure participation in decision-making and advance much-needed legislation. And it can ensure intergenerational justice.’¹³⁷

137 UN Secretary-General Antonio Guterres, ‘Alongside Pandemic, World Faces “Triple Planetary Emergency” Secretary-General Tells World Forum for Democracy, Citing Climate Change, Nature, Pollution Crises’, Press Release UNDoc SG/SM/20422, 16 November 2020, available at: <<https://www.un.org/press/en/2020/sgsm20422.doc.htm>> last accessed 3 December 2020.

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